Tweed Shire Council
Public Inquiry

Second Report

August 2005

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Table of Contents

Introduction

Introduction

The Context of the Public Inquiry into Tweed Shire Council

Background

On 10 November 2004 the Minister for Local Government, the Hon Tony Kelly MLC convened a Public Inquiry into Tweed Shire Council, pursuant to section 740 of the Local Government Act.

Section 740 of the Act empowers the Governor or the Minister to appoint a person as Commissioner, to hold a Public Inquiry and to report to the Governor or the Minister, relevantly, with respect to:

Any matter relating to the carrying out of the provisions of the Act or any other act conferring or imposing functions on a council, and

Any act or omission of a member of a council, any employee of a council or any person elected or appointed by any office or position under the Act or any other act imposing functions on a council, being an act or omission relating to the carrying out of the provisions of the act concerned, or to the office or position held by the member, employee or person under the act concerned, or to the functions of that office or position.

The Act incorporates certain powers, which are given to commissioners, under the Royal Commissions Act 1923.

Amongst those powers is the power, pursuant to section 12A, to communicate information and to furnish material to a law enforcement agency.

Terms of Reference

The Inquiry has been conducted within the confines of the terms of reference announced by the Minister.

The Terms of Reference provided for the conduct of a wide-ranging inquiry into the affairs of the council, involving the conduct of the Councillors as the Elected Body, and also of the council staff and council's operations, as comprising the Corporate Body.

The Terms of Reference are set out below:

"To inquire, report and provide recommendations to the Minister for Local Government on the efficiency and effectiveness of the governance of Tweed Shire Council.

The Inquiry will have particular regard to:

1. *Whether the elected representatives have adequately, appropriately and reasonably carried out their responsibilities in the best interests of all ratepayers and residents, in an environment free from conflicts of interest.*

2. *The appropriateness of the procedures and processes adopted by Council in relation to its environmental planning responsibilities, including the processing of applications for development, particularly those of a significant nature.*

3. *The appropriateness of the relationship between elected representatives and proponents of development in the council area.*

4. *Whether the elected representatives are in a position to adequately direct and control the affairs of council in accordance with the Local Government Act 1993, so that council may fulfil the Charter, provisions and intent of the Local Government Act 1993 and otherwise fulfil its statutory functions.*

5. *Any other matter that warrants mention, particularly where it may impact on the effective administration of the area and/or the working relationships between the council, councillors and its administration.*

The Commissioner may make other recommendations as he sees fit, including whether all civic offices in relation to the Council should be declared vacant."

In light of the directions embodied in the Terms of Reference, the Inquiry has directed itself to matters, which it regards as falling within the Terms of Reference, involving both the Elected Body and the Corporate Body.

The Concerns underlying the Inquiry

In announcing the Inquiry, the Minister for Local Government, the Honourable Tony Kelly MLC ascribed the reasons for convening the Inquiry as:

Recent press reports and correspondence to the Minister from the local community has highlighted concerns about the manner in which a number of planning decisions have been conducted.

Council's Charter

Section 8 of the Act sets out council's charter. This charter contains a set of principles intended to guide councils in the manner in which they carry out their functions.

While the principles contained in the charter are not exclusive, councils are required to act in a manner that is not inconsistent with the principles contained in its charter.

Relevantly, the Charter provides that a council is:

- To provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively
- To exercise community leadership
- To properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development
- To have regard to the long term and cumulative effects of its decisions
- To bear in mind that it is the custodian and trustee of public assets and to effectively account for and manage the assets for which it is responsible
- To facilitate the involvement of councillors, members of the public, users of facilities and services and council staff in development, improvement and co-ordination of local government
- To keep the local community and the State government (and through it, the wider community) informed about its activities
- To ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected

The Role of the Councillors

The Act provides, in section 223, that the role of the councillors, as the governing body, is to direct and control the affairs of the council in accordance with the Act.

Section 232 further elaborates on their role, emphasising and differentiating between a councillor's role as a member of the governing body of the council and his or her role as an elected person.

Councillors, as members of the governing body:

- Direct and control the affairs of the council in accordance with the Act
- Participate in the optimum allocation of the council's resources for the benefit of the area
- Play a key role in the creation and review of council's policies and objectives and criteria relating to the exercise of council's regulatory functions
- Review the performance of the council and its delivery of services, and the management plans and revenue policies of the council.

and, as an elected person:

- Represent the interests of the residents and ratepayers
- Provide leadership and guidance to the community
- Facilitate communication between the community and the council.

The Concerns

In announcing the Inquiry, the Minister had highlighted community concerns over planning matters.

Ancillary to these were concerns over the relationships between certain councillors and developers, which was partially emphasised by substantial donations provided by certain developers to assist the election campaigns of such councillors.

These concerns are partially reflected in terms 1, 2 and 3 of the reference.

Council's Planning Role

Councils exercise powers, under the EP&A Act, as the primary body determining what use can be made of land within their local area.

This planning function is exercised in conjunction with the State Government, primarily through consultative processes with departments such as DIPNR.

Despite contrary suggestions made to the Inquiry, councils are the primary determinants of development applications within their local area.

While, in certain instances the State exercises a determinative power, such as under SEPP 71, such determinations find their basis in and are dependent upon the underlying planning regime adopted by the council.

In the exercise of their role, determining development applications, councils are required to give effect to the objects of the EP&A Act:

(a) to encourage:
- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economical welfare of the community and a better environment,
- (ii) the promotion and co-ordination of the orderly and economic use and development of land,
- (iii) the provision of land for public purposes,
- (iv) the provision and co-ordination of community services and facilities, and
- (v) the protection of the environment, including protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
- (vi) ecologically sustainable development, and
- (vii) the provision and maintenance of affordable housing, and

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

The Scope of the Inquiry

When opening the Public Hearings, the Inquiry emphasised:

> *"…In conducting this Inquiry I've been called upon to form an opinion regarding governance issues affecting Tweed Shire Council.*
>
> *It is my view that the Terms of Reference extend both to the role of councillors, forming the elected body, but also to the conduct of the corporate body principally represented by the staff.*
>
> *The context concerns a broader domain: the governance of Tweed Shire Council, with some emphasis on conflicts of interest, environmental planning responsibilities, the relationships of elected representatives and proponents of development, and finally, it is focused on the Charter of the Local Government Act. These issues are specifically related to the first four terms of Reference. It is important to note item 5 of the terms of reference in this context. I will repeat item 5 for those who might not have heard it the first time. Item 5 says:*
>
> *Any other matter that warrants mention, particularly where it may impact on the affected administration of the area and/or working relationships between the Council, councillors and its administration.*
>
> *It will therefore be my duty to make determinations on what other matters might be relevant to the effective administration of the area, and/or the working relationships between the council, councillors and the administration…"*

The Inquiry has explored a number of themes in order to fulfil its role. On 16 February 2005, the themes that the Inquiry intended to pursue were advised as:

(a) Election issues. These involve the conduct of councillors and developers, including the receipt of donations, in particular those connected with the 1999 and 2004 ordinary elections.

(b) Conflicts of interest issues. Arising from the first point the associations of persons and the compliance by councillors with the Council's adopted code of conduct. Second, councillors' declarations of their pecuniary interest in the preceding five years.

(c) Development processes and statutory functions. In particular, the Council's understanding of planning instruments, section 94 contributions, and section

96 variations. And the handling of certain significant development applications in the areas that include Kingscliff, Casuarina, and Cabarita.

(d) Transparency and communication with the community. The use of closed sessions of meetings of the Councils, especially in consideration of large development applications will be examined. Also, Council's complaints management systems, and the Council and the Council laws interactions with the public.

(e) Compliance with Council's charter. That is defined in section 8 of the Local Government Act. In particular, having regard to the long term and the cumulative effects of Council's decisions in its area.

The first report placed emphasis on electoral issues, in so doing it made reference to the relationship between certain councillors to developers and to the perception that certain councillors had, prior to the 2004 council elections, provided outcomes that may be perceived as favourable to certain developers.

In this report the Inquiry explores the remaining themes that were indicated on 16 February 2005.

This report explores these themes in the following chapters:

- Economic and Social Change in the Tweed area and the 2004 Elections
- Planning and Development Processes
- Governance and the Community
- Natural Justice and the Inquiry

The Bulford Inquiry

In May 2001, Robert Bulford was authorized to conduct an investigation into the local planning practices of the council. In his later reports, Mr Bulford was to be highly critical of the role of certain members of the elected body, and of their relationship with certain developers operating in the Tweed.

This Inquiry does not follow from Mr Bulford's investigation and is entirely separate from it. However, concerns raised by Mr Bulford remain and were emphasised in the manner that the council exercised its planning and determinative functions under the EP&A Act and in the conduct of the 2004 election.

It is important to emphasise that this Inquiry does not draw from Mr Bulford's investigation nor rely on it when coming to its conclusions and findings.

Some Important Developments and Proposals

A significant number of submissions raised concerns over council's dealings with particular developments or council's proposal to sell some land at Cabarita Beach. The

Inquiry inspected a number of council's files to obtain a fuller understanding of these proposals.

These files included:

- SALT, Outrigger and Peppers
- Nor Nor East,
- Latitude 28',
- Casuarina Beach,
- An aged care facility at Bilambil Heights,
- the Dolphin Hotel,
- the re-development of the Cabarita Beach Hotel,
- the Wardrop Valley industrial estate,
- the Penny Ridge Resort development, and
- the Resort Corporation's proposals to develop council owned land at Cabarita Beach.

While some of these proposals feature in this report, the SALT, Outrigger & Peppers proposal, the Nor Nor East proposal and Resort Corporations proposals for the council owned land at Cabarita Beach are referred to on numerous occasions to underlie concerns over governance and planning issues.

In those circumstances a short cameo of each development is set out below, to provide an insight into the nature of these proposals.

The SALT Developments

The SALT Development was hailed by the "Tweed Directions" councillors as proof of their ability to kick-start the economy of the Tweed.

On one hand, it was a major development that would provide substantial employment and economic benefits to the council and ratepayers of the Tweed.

On the other hand, many of the aspects of the development were of questionable merit.

Ultimately the economic aspects drove the day, to the detriment of other values.

Such was the obvious concern of the then Director Development Services, that a late addendum was added to the report recommending that the council adopt the following Policy Statement:

"The filling of the site for the SALT development has been endorsed by Council given the resultant financial benefits to the overall funding package that enables viability of tourism development and the consequent economic and employment benefits to the Shire.

This endorsement is based on merit assessment and factors that are pertinent to this development application and should not be interpreted by any other landowners and/or developers as setting any form of precedent for other development proposals on the Tweed Coast".

The SALT site contains an area of 73.86ha, lying south of Kingscliff between the coastal reserve and Cudgen Creek, on the rear of the coastal dune formation.

The site had been sand mined with the dunes flattened and denuded by this process.

The loss of the native vegetation was relied upon to promote a view that the intrinsic natural values of the site had been lost and could not be recovered.

This view was supported by the majority councillors who demonstrated a similar disregard to denudation on Lot 490 that adjoins to the north and on coastal and other lands that were either being or were earmarked for development.

The majority of the SALT site had been zoned 2 (f) Tourism under council's LEP and was the subject of a specific constraint that, while acknowledging that residential development was permissible, required that the number of tourist rooms exceed the number of dwellings.

While there had been a number of previous applications to develop the site this requirement had previously served to thwart them.

At the time of its approval, the SALT proposal comprised of 2 tourist resorts, the "Outrigger" with 213 units and another (then unnamed) of 280 units; and 612 dwellings made up of medium density and detached dwellings.

Tied to the development was a proposal to import approximately 750,000m^3 of sand fill. This would be used to raise the levels on the site by about 2m overall and up to 5m in parts.

The proponent, the Ray Group, maintained that the development would generate an investment of $218.5m, with an annual investment of $45.45m.

As has been highlighted earlier in this part the council was swayed by the economic opportunity represented by its consent. Underlying this was the steadfast promotion by the Ray Group, that without filling the site, without raising the levels of the resort rooms and without views over the ocean the resort, ultimately the project was not feasible.

Such was the support that the project enjoyed, at least from the then majority councillors that the proponent could say that it had already secured the council's agreement to amend the LEP to secure council's ability to entertain the application.

During the period of council's assessment significant concerns were raised by a number of government departments and other bodies, not the least of which were the Coastal Council and the DEC. While the proponent was able to succour the concerns of some departments, others, particularly those of the Coastal Council, remained.

Ultimately, the council, as the consent authority ignored these continuing concerns in granting consent.

A large number of modifications have been sought subsequent to the approval. Some of these applications have been relatively minor, while others have been highly significant. These applications, other than the most recent seeking a 37% increase in density, have received council's blessing with little, if any, real consideration.

At the time that the Inquiry was announced, the council was dealing with an application to modify the consent to permit an increase of 37% in the density of the development.

The application did not ultimately proceed, almost certainly as a result of the announcement of this Inquiry.

While the application was withdrawn, the council found itself in a position where the master plan intended to guide the development, was likely to have no binding effect. If this were so then the developer could potentially do what it liked.

There is little doubt that with a compliant council, the developer would seize this advantage.

Nor Nor East

Marine Parade Kingscliff runs adjacent to the beachfront reserve along the beach and contains at its southern end, a commercial retail and restaurant strip. Within this area are a number of smaller accommodation complexes.

In 2002 Resort Corporation had put forward a proposal for a mixed retail, commercial and residential development.

In the wake of substantial local opposition, the council had indicated that it regarded this as an over-development of the site.

In 2003 Resort Corporation lodged an "amended" application for a mixed development, substituting tourist accommodation for the earlier residential component.

Despite substantial local concern and questions on whether the development breached height restrictions, the majority councillors exercised their powers and despite the staff recommendations gave further height concessions.

Subsequently, the application was to come back before the council when the developer sought modifications to the consent.

The development raises concerns over council's processes, the legitimacy of the amended application (in the light of SEPP 71), the concessions granted to the applicant and the relationships between the principals of the applicant company and the majority councillors.

Cabarita Beach

In its submission to the Inquiry, the council implied that it had held a long-term goal of selling at least one of the lots owned by it at Cabarita Beach. No doubt that this would suggest legitimacy in its dealings with this and 4 other lots making up its car park at Cabarita Beach.

The council had been the subject of considerable opposition and concern over its proposal to sell the land. In so doing it had effectively forced the surf club to join in a proposal by Resort Corporation to develop this and the surf club's land.

The proposal, if accepted, would almost consume the beach, effectively linking this development to another being undertaken by Resort Corporation.

Coincidently, with the advent of this proposal, council's planning processes for the area had been put on hold. The development that was being proposed was directly opposite to what the local residents and council's strategic planners saw as their vision for the area.

There are substantial governance issues associated with this proposal, not the least of which were council's consultation processes, procedural issues within council, the roles played by the Mayor and the majority councillors, and the relationship between councillors and the developer.

Conducting the Inquiry

The Inquiry has undertaken a number of processes aimed to ensure that it fulfilled its role, both in respect to the Terms of Reference and to ensure that it was, as suggested by its nomenclature a "public" inquiry.

It is important to emphasise that the Inquiry has been required to deal with an opposition intended to undermine the Inquiry and its ability to undertake its tasks. This campaign was conducted by certain councillors, certain elements within the council, certain of its advisors, and members of the public associated with the campaign to elect some councillors.

To some extent this arose from a failure on the part of the elected body, the governing body and particularly its legal advisors to understand the nature of an inquiry convened under section 740, or to gain a wider understanding of the concept of "governance" in the context of local government, or the provisions of the Act and the standard of conducted expected of both the elected and governing bodies.

(i) Public Notices

Following the announcement of the Inquiry, notices calling upon the public to provide written submissions to the Inquiry, were published in local newspapers circulating within the council area.

This call for written Submissions was subsequently re-iterated when notices were published advising the dates of the Public Hearings.

(ii) Direct Approaches to the Council for Information

Including:

- Council's Planning instruments
- Councils codes and policies
- Council's management and future planning documents.

(iii) Letters Addressed to:

- The Mayor and each of the Councillors
- The General Manager, Dr Griffin
- Members of council's Executive Staff
- Former members of council's Executive Staff
- Members of Parliament and former Councillors

advising them of the Inquiry, its terms of reference and inviting them to make a submission.

The Inquiry also wrote to:

- The NSW Ombudsman
- The Independent Commission Against Corruption
- The Department of Local Government
- Department of Infrastructure, Planning and Natural Resources
- The Department of Lands
- Department of Environment and Conservation
- Department of Primary Industries

seeking information from them.

(iv) The Inquiry's website

Immediately following the appointment of the Commissioner, the Inquiry established its own website.

The website contained a précis setting out the Terms of Reference and an Information Paper providing information about the Inquiry and setting out the intended processes which the Inquiry proposed to undertake.

Subsequently, details regarding the Public Hearings and the list of speakers for each of the daily hearings was added.

(v) The Written Submissions

An Information Package, to assist the preparation of submissions, was prepared by the Inquiry.

A copy of the Information Package, in a downloadable format, was made available on the Inquiry's website. Additionally, arrangements were made with the council for copies of the Information Package to be available at the Council Chambers and at council's library. The council made copies of the Information Package available for this purpose.

The Approach taken by the Inquiry

The Terms of Reference called upon the Inquiry to obtain an overview of matters pertaining to the governance of the council, and to form an opinion on the governance matters raised in the Terms of Reference.

In so doing, the Inquiry was directed to inquire into certain matters associated with the conduct of the Elected Body, and in the wider context, the council as a whole.

In the opening address of the Public Hearings the Inquiry's approach was clearly defined, and the relevant parts of the transcript are set out below:

> *"...In light of the issues raised by the terms of reference I have agreed to allow a number of people to make submissions and appear before the Inquiry to talk about specific issues.*
>
> *I emphasise, however, that this Inquiry is not called upon to reassess an individual's case in relation, for example, to a development application or any other matter that pertains to the individual rather than the specific Terms of Reference. I do not – and stress this – I do not have the power to overturn or change any approval granted by the Council. Accordingly, I will consider submissions and evidence solely from the point of view of the Terms of Reference. I am, however, keen to receive a broad range of submissions, provided that they are relevant to the Terms of Reference.*
>
> *I do not wish to exclude people from having their submissions published where they appear to fall within the Terms of Reference, or to refuse to allow them to appear. If I were to do so there would be justifiable concern that the inquiry may be less than open. At this point I should correct some of the information that I saw in the local press this morning. First, I do not intend to have any closed sessions at the public hearings. I believe that the hearings are public; they have to be transparent and that whatever evidence is presented has to be available to anyone who is interested in the carriage on the Inquiry.*

So there will be no – I repeat – no closed sessions of this Inquiry. Second, I noticed in the local press this morning that we may be tapping phones. I can give you total assurance that there will be no phone tapping. It is also suggested that there will be covert operations by the Inquiry. I give you water-tight guarantee that there will be no covert operations either under way or likely to happen in the future. I repeat: this is a Public Inquiry and its operations must be transparent and the information must be there for the public to share. As I've said before, all evidence will be given on oath or affirmation…"

In conducting the Inquiry, and particularly throughout the Public Hearings, the Inquiry has sought to obtain an understanding of the council's processes.

In order to do so, the Inquiry has reviewed various documents, including:

- Council files relating to a number of development applications
- Council planning instruments and policies
- Council codes and policies
- Reports to and minutes of council meetings
- Electoral returns and funding declarations.

The Inquiry has conducted its review to obtain sufficient information based upon which it can be satisfied that a conclusion can be safely drawn.

Publication of Submissions

The Inquiry emphasized its role as a Public Inquiry.

It sought, as far as possible, to obtain the public's views of the matters raised in the Terms of Reference.

This was emphasised in a number of ways: in the information sheet, the notices calling for submissions and advising the dates of the Public Hearings, at the commencement of, and during the Public Hearings conducted by the Inquiry.

In order to undertake the Inquiry required by the Terms of Reference, it was appropriate to seek involvement of the public, particularly when considering whether the council exercised appropriate openness and transparency in its decision-making.

Copies of submissions were made available for public viewing at the council's chambers and its libraries.

Censorship of Submissions

The Inquiry relied on advice regarding the general application of defamation law to matters contained in submissions. The advice indicated that matters would generally not be considered defamatory, if contained in Submissions falling within the Terms of Reference of the Inquiry.

The nature of this advice was incorporated into the Information Package.

Discretion was exercised as to whether to make a Submission publicly available.

In light of the advice that had been provided to the Inquiry, notwithstanding the Inquiry's view that Submissions should be publicly available, it was felt appropriate in certain instances to refrain from providing copies of certain Submissions.

A policy was adopted to consider whether a Submission should be censored or not be published, and each Submission was reviewed according to this policy.

While the Inquiry had considered whether partial exclusion of information such as identifying details was appropriate. It was felt inappropriate to exercise this discretion, rather it was considered preferable not to make available some of the submissions.

The View

In order to acquaint itself with the properties directly or likely to be involved in its consideration, on 9 December 2004 the Inquiry attended the council area to conduct a review. The Inquiry viewed major developments within the area, lesser developments and the local area generally. The sites viewed included:

- SALT
- Seaside City
- Kings Forest
- Casuarina Beach
- The Resort Corporation Pty Ltd proposal at Cabarita Beach, and
- Various proposals at Kingscliff, Terranora, Pottsville, Hastings Point and Tweed Heads.

Public Hearings

The Inquiry made arrangements to conduct Public Hearings in 31 sessions.

The Public Hearings were held at the Court House, Tweed Heads.

The Public Hearings commenced on 16 December 2004 and concluded on 18 March 2005.

In all, 134 different speakers attended and spoke, some on more than one occasion. Speakers included:

- The Mayor and Councillors
- Council's current and former General Manager
- Past and present senior members of council's staff
- Mr Bulford

- Professor Bruce Thom, visiting Professor to DIPNR
- Representatives from the Department of Environment and Conservation, DIPNR and Primary Industries
- Various developers operating in the council area and their advisors and consultants.

The Public Hearings were conducted on an informal basis. The procedures that were adopted, sought to ensure that the Inquiry proceeded in a simple and expeditious manner, whilst at the same time, recognising the rights of the people involved.

The approach taken by the Inquiry at the Public Hearings was to put questions to the speakers on the themes being pursued by it. This approach was underlain by the premise that the Inquiry had reviewed the Submissions made by the various speakers before they were called, and was aware of the issues that they had raised.

In adopting this approach, the Inquiry sought to obtain clarification or further detail of matters, which it thought appropriate, whether the particular matters had been specifically raised in the Submission, or not.

It was felt that this approach would enable the Inquiry to make more efficient use of the limited time available to it at the Public Hearings.

Through the adoption of this course, the Inquiry heard from a greater number of speakers than it could otherwise have heard from, if each speaker were simply allowed to read from, and expand on their written Submission.

Most importantly, it allowed the Inquiry to direct itself to, and focus on, the issues it regarded as important to its Inquiry.

This approach differed from the approaches, which had been taken by previous Inquiries convened under section 740 of the Act.

Right of Reply

The Terms of Reference call upon the Commissioner to inquire, report and provide recommendations to the Minister on aspects involving the governance of the council. At all times it was open to the Inquiry to make a recommendation that the Governor declare all civic offices to be vacant.

Such a recommendation, if made, and if acted upon, could result in the appointment of an Administrator or a fresh council election.

Whilst the Inquiry would only be making comments, findings or recommendations, these might be taken up by the Minister or by the Governor and given effect to.

Given this, the Inquiry regarded itself as having a duty to act fairly in accordance with the principles of administrative law. The Inquiry sought to conduct its proceedings in a

manner, which afforded natural justice to the Councillors, council's staff and to members of the public.

Time was set-aside at the conclusion of the Public Hearings for council, Councillors and members of the public to reply to matters, which had been raised during the Public Hearings. Ultimately, no requests for an oral reply were received.

Council, Councillors and members of the public were afforded an additional opportunity to make further written submissions in reply within two weeks from the conclusion of the Public Hearings.

During the Public Hearings a number of speakers provided additional material, which have been treated as submissions.

Additionally, the Inquiry received a large number of written submissions in reply.

In all the Inquiry has received over 574 submissions.

Natural Justice

The powers available to the Inquiry included the power to recommend the dismissal of the Elected Body. In light of this power it was imperative that procedures were adopted to ensure that the principles of natural justice be observed.

Whilst not wishing to detail the entirety of the approaches taken to ensure this outcome, it is appropriate to highlight some of the major aspects embodied in the manner in which the Inquiry was conducted.

Included in the procedures adopted were:

- The majority of Submissions which were received by the Inquiry were made available for public viewing at the council's chambers and Libraries.
- Details which were thought to be inappropriate, were deleted from other Submissions.

This approach provided opportunity to others to comment on or correct statements made in the Submissions.

Other procedures included:

- Providing copies of documents to councillors, witnesses and to the council and seeking comment or clarification
- Conducting the hearings in public
- Allowing members of the public, with leave of the Commissioner, to put questions to speakers.

A right of reply, both orally at the conclusion of the Hearings, and subsequently in writing.

Post Hearing Procedures

The Inquiry has adopted a view that where issues required further clarification following the conclusion of the Public Hearings it should seek appropriate evidence.

The Inquiry has sought further evidence from the council and from various witnesses.

The Earlier Report

The death of Councillor Bell prompted speculation regarding the future of the council, particularly whether significant expense should be incurred in a by-election pending the outcome of the Inquiry.

It is considered appropriate, in those circumstances to bring forward the first report to determine the future of the council and to avoid further speculation.

Accordingly, when providing that report, it was acknowledged that it would precede a more lengthy report that would deal with all issues associated with the Terms of Reference, including those more briefly touched on in the first report.

This report now completes that process.

The Compunctive Powers of the Inquiry

The Royal Commissions Act gives powers to the Inquiry:

- to require evidence to be given on oath or by virtue of an affirmation,
- issue summonses requiring the attendance of witnesses and for the production of documents,
- inspect documents produced to it,
- to communicate information to law enforcement agencies, such as the ICAC, the Director of Public Prosecutions, the Attorney General and others, and
- to deal with instances of contempt.

In order to fulfil its role the Inquiry exercised many of these powers, issuing a number of summonses, calling witnesses to give evidence on oath, inspecting various documents produced variously by the council, state bodies and departments, individuals and corporations.

As was indicated in the first report, the Inquiry has written to the ICAC expressing concerns that certain matters associated with the 2004 elections may constitute corrupt conduct and within the investigative role of that commission. That reference is still open, and the Inquiry has forwarded further evidence to ICAC.

The Royal Commissions Act also provides for a number of offences, including:

- a failure to attend or to produce documents,
- the refusal to be sworn and to give evidence,
- giving false evidence,
- subornation, and
- destruction of documents.

The inquiry is concerned that certain evidence that it received was tainted as a result of certain actions taken by a group of individuals associated with "Tweed Directions". Further, the Inquiry is concerned that there has been a failure to produce documents that were required by the summonses issued by the Inquiry. Again these actions are associated with individuals and corporations associated with "Tweed Directions". Added to this are concerns that an individual gave false evidence whilst on oath. Again, this individual is associated with "Tweed Directions".

In addition to these matters are concerns that council's legal representative failed to act appropriately in his dealings with the Inquiry.

These matters are dealt with in this report.

Errata and Corrigenda

At page 292 the First Report incorrectly attributed a donation of $10,000 to Chiltern Hunt (Australia) Pty Ltd. It did so in the context of that company's development application at Terranora Road Terranora.

The subdivision application had attracted the interest of the Inquiry as, for no apparent reason, the then majority councillors had ignored the recommendations of council's staff and provided a number of concessions to the applicant. The reasons for granting these concessions were not explained, as was pointed out in the first report.

While the earlier report incorrectly attributed a donation from the applicant, the concerns that were highlighted are entirely relevant to the issues that were being illustrated.

The first Report stated:

> *The platform of the Balance Team in the 1999-2004 council aimed directly at developers, and in the period after their election their actions in council clearly promoted the perceived interests of developers and their proposals. The prima facie evidence suggests that in many instances they were to promote these activities with scant or total disregard to the requirements of the EP&A Act, the Act and to the principles of good governance, such as those enshrined in codes of conduct, recognition of conflicts of interest and the like (these issues are pursued in depth in the Inquiry's second report). Their actions would provide clear signals to existing and prospective developers.*
>
> *In the period following the 1999 election, and in the short period between the 2004 and the announcement of this Inquiry, there is prima facie evidence that the council's decisions were marked by nepotism and favoritism.*

The first report was in error referring to Chiltern Hunt (Australia) Pty Ltd as having made a donation to Tweed Directions and this is hereby acknowledged.

While the report may have incorrectly attributed a donation to Chiltern Hunt (Australia) Pty Ltd the underlying concerns, that the Balance Team candidates, many of whom were to later become Tweed Directions candidates, had acted with nepotism and favouritism. Their dealings with the Chiltern Hunt subdivision application is indicative of this behaviour.

Acknowledgements

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Thanks are also offered to the Council, both elected representatives and staff. Their cooperation and provision of material was very helpful.

There was also a number of other people who provided valuable input and support, and their assistance is also recognised.

Dictionary

So far as possible the following definitions contained in the Act, and other Acts and sources which have been referred to, have been followed

The **Act**	The Local Government Act 1993
The **EP&A Act**	The Environmental Planning and Assessment Act 1979
The **EP&A Regulations**	The Environmental Planning and Assessment Regulations 2000
The **Council**	Tweed Shire Council (sometimes referred to as **TSC**)
The **Elected Body**	The Councillors
The **Corporate Body**	The General Manager and staff of the council, or where appropriate the functions carried out by the council.
The **Mayor**	Councillor Polglase
The **General Manager**	Council's current General Manager, Dr Griffin
Balance Team	(also known as "Balanced Team") a grouping of candidates who stood for the 1999 elections supported by Domfor and TCSB
Mr **Blundell**	a businessman and property developer operating in the Tweed Shire and one of the principals of Tweed Directions
Coastal Policy	a policy adopted in 1997 that intended to protect the coastline and beaches for the enjoyment of future generations and to ensure that coastal development is balanced, well planned and environmentally sensitive
DCP	a development control plan
DEC	the Department of Environment & Conservation (formerly the National Parks & Wildlife Service)
DIPNR	the Department of Infrastructure Planning & Natural Resources (formerly PlanningNSW)

DLWC	the Department of Land & Water Conservation
Domfor	Domfor Pty Ltd, a company headed by Mr Bedser, which was a substantial donor to the Balance Team campaign
EIS	an environmental impact statement
L&E Court	the Land & Environment Court
LEP	a local environment plan and in the context of the council, the Tweed Local Environment Plan 2000
Mr **Paul Brinsmead**	a partner of Hickey Lawyers, a director of Resort Corporation, and the son of Councillor Robert Brinsmead
Mr **Madrers**	a director of Resort Corporation and the son in law of Councillor Robert Brinsmead
Nor Nor East	a mixed commercial, retail and tourist development being undertaken by Resort corporation at Kingscliff
Resort Corporation	Resort Corporation Pty Ltd, a developer operating in the Tweed Shire. Its directors being Paul Brinsmead and Peter Madrers
SALT	A large development at South Kingscliff being undertaken by the Ray Group comprising residential and tourist facilities
Section 94 Plan	a plan adopted under s. 94 of the EP&A Act levying infrastructure contributions on developments
SEE	Statement of Environmental Effects an assessment of the environmental effects of a proposed development, accompanying a development application
SEPP	a State Environmental Planning Policy
SEPP 1	State Environmental Planning Policy No 1 – Development Standards that allows some discretion in the application of planning controls

SEPP 71	State Environmental Planning Policy No. 71 – Coastal Protection that affected certain types of development within 1km of the coastline
Mr **Staerk**	a public relations manager and one of the principals of Tweed Directions
TCSB	Tweed Concerned Small Business Group, a group formed to secure donations and to campaign for the "Balance Team" candidates in the 1999 election
TCV	Tweed Community Vision, an association formed as part of the campaign strategy adopted by Tweed Directions
Tweed Directions	an association formed to secure donations and to campaign for the election of certain candidates in the 2004 elections
The **Tweed Directions Candidates**	Candidates supported by donations provided by Tweed Directions
The **Tweed Directions Councillors**	The Mayor and Councillors Beck, Bell Brinsmead, Lawrie & Murray

Economic and Social Change in the Tweed Area and the 2004 Elections

Economic and Social Change in the Tweed Area and the 2004 Elections

2.1 *Tweed Shire and the Region*

2.1.1 The Economy and the Elections

In the First Report of the Inquiry the council elections of 1999 and 2004 were analysed in terms of the themes developed by rival candidates. Principally through the efforts of Mr Bedser a fund was organised to support pro-business candidates in the 1999 election. These candidates won seven of the eleven positions on the council. The pro-development councillors "put out the welcome mat" to developers who made significant investments, particularly in tourism ventures. At the 2004 election a fund was created by a group called Tweed Directions to support pro-business and pro-development candidates. In contrast to the 1999 fund the primary funding sources were developers and others with property industry interests (98.4% of the total fund). Again in contrast to 1999 the majority of the donations came from bodies primarily located outside of the Tweed. A further difference in 2004 was the size of the pool of funds created, being many multiples greater than the 1999 pool[1]. Tweed Directions effectively ran its own team at the 2004 election, choosing the number of "independent" groups that would represent its interests, selecting the group leaders who would receive funds, and organising and mentoring the campaigns of the "independent" groups. Tweed Directions also ran a parallel campaign promoting the values it espoused and attacking candidates who were not part of the Tweed Directions team. The Tweed Directions' team won six of the 11 places on council, the sixth place being gained by a tiny margin.

The Tweed Directions' campaign extolled the economic benefits that investment and development had brought to the Tweed since 1999, and sought to frighten voters by referring to the dangers of going back to "the bad old days". Tweed Directions characterised the candidates who were not part of their team as "left-wing rabble-rousers" and "extreme greens". Its justification for assembling the largest-ever pool of funds to fight an election in non-metropolitan New South Wales was that it had brought prosperity to the Tweed.

The focus of this section is whether or not such claims were justified, and to assess whether the unique structure of the Tweed Directions campaign allowed for a free and fair election in Tweed Shire in 2004.

[1] Owing to apparent irregularities in the Tweed Directions return to the NSW Electoral Funding Authority the precise size of the pool is not clear: it was between $343,000 (rounded) and $633,000. The irregularities have been referred to the Independent Commission Against Corruption for investigation.

2.1.2 Comparative Population and Social Changes

Tweed Shire Council's population grew by 7431 people between 1999 and 2003 compared to Ballina's addition of 2308 and Byron's 1877 people. In relative terms, however, the growth rates of the three North Coast councils with a coastal zone and a rural hinterland, were quite similar: 6.59% for Byron, 6.49% for Ballina and 6.69% for Tweed Shire (Tables 2.1.2.1 and 2.1.2.2).

Table 2.1.2.1

Estimated Residential Populations, Fringe LGA's of Tweed Shire, 1999 - 2003

	Tweed	Byron	Ballina	Lismore	Kyogle	Gold Coast
1999	70764	28506	36931	43209	9894	394675
2000	73025	29127	37497	43086	9828	409111
2001	74577	29689	38159	43064	9817	423719
2002	76158	29990	38852	43030	9770	439374
2003	78195	30383	39239	43015	9666	455986

Source: Australian Bureau of Statistics – National Regional Profiles.

Table 2.1.2.2

Estimated Residential Population Change, Fringe LGA's of Tweed Shire, 1999 - 2003

	Tweed	Byron	Ballina	Lismore	Kyogle	Gold Coast
1999-2000	2261	621	566	-123	-66	14436
2000-2001	1552	562	662	-22	-11	14608
2001-2002	1581	301	693	-34	-47	15655
2002-2003	2037	393	387	-15	-104	16612

Source: Source: Australian Bureau of Statistics – National Regional Profiles.

Income statistics published by the Australian Bureau of Statistics are only available for census years, and are presented as weekly individual and weekly household income in income groups, each group representing a range of $100 except the top two groupings where the range is from $1000-1499 and over $1500.

Table 2.1.2.3 shows that median weekly individual income for individuals in Tweed was the same ($200-$299) in 2001 and 1996. The weekly individual income for Byron was the same as Tweed Shire's in both census years. In 2001 Ballina's rose to the State average. The median weekly individual income across New South Wales in 1996 was also $200-$290, but by 2001 this had risen to $300-$399.

Table 2.1.2.3

Median Age and Incomes – Tweed, Byron and Ballina Shires, 1996 and 2001.

	Tweed		Byron		Ballina	
	1996	**2001**	**1996**	**2001**	**1996**	**2001**
Median Age	40 years	46 years	36 years	39 years	39 years	41 years
Median Weekly Individual Income	$200 - $299	$200 - $299	$200 - $299	$200 - $299	$200 - $299	$300 - $399
Median Weekly Household Income	$300 - $499	$500 - $599	$300 - $499	$500 - $599	$300 - $499	$500 - $599

Source: Australian Bureau of Statistics, 1996 & 2001 Census Data.

In 1996 13.7% of the Tweed Shire income earners were earning less than $120 per week, 2.6% less than the New South Wales figure of 16.3% for the lowest income group.

By 2001 the Tweed Shire proportion of people in the lowest income group had fallen to 11.4%. The New South Wales proportion was 14.1%, 2.7% higher than Tweed's.

Clearly the proportion of low-income people in Tweed Shire was lower than the State figure in 1996 and 2001.

The proportion of earners in the $1000 plus groups in 1996 was 1.9% in Tweed Shire rising to 4.7% in 2001. The State proportion of people in the highest income brackets was 6.4% in 1996 rising to 13.4% in 2001.

There was a slight improvement in the proportion of people in Tweed Shire in the lowest income groups between 1996 and 2001, and in both years the proportion in Tweed Shire was better than for the State as a whole. At the same time the median weekly income of people in Tweed Shire did not grow in line with shifts at the State level, and the proportion of high-income earners in Tweed Shire stayed at very low levels.

These data indicate that Tweed Shire was one of the poorer areas of New South Wales though certainly not amongst the poorest. The age profile of the Tweed population probably explains much of this. The area has a very large number of aged persons whose incomes would be expected to be lower than those places where a higher proportion of the population is in the working age groups. The age structure of Tweed Shire is discussed below.

Table 2.1.2.4

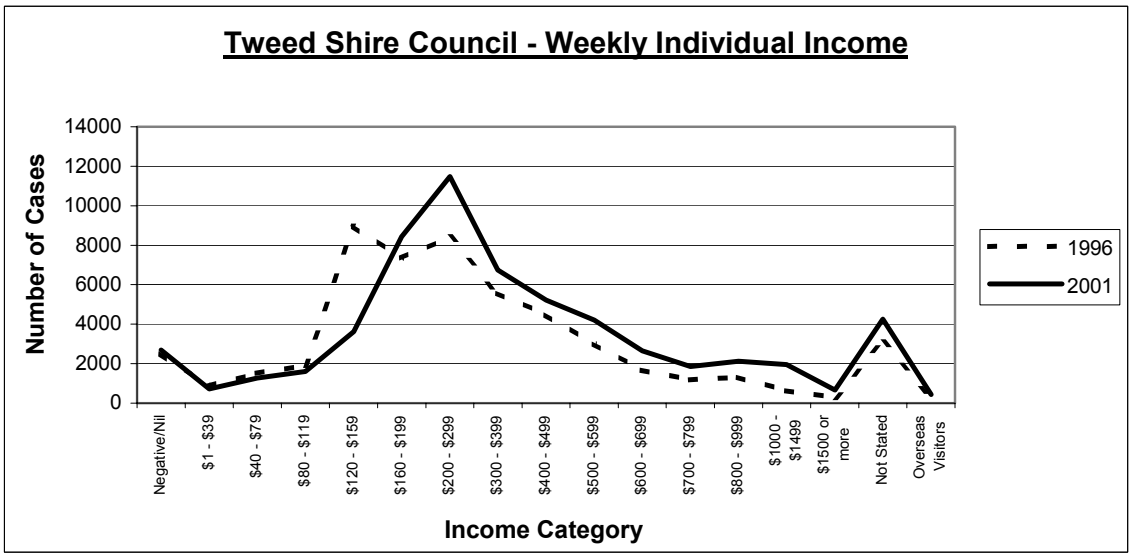
Weekly Individual Incomes Tweed Shire Council 1996 and 2001

	1996	**2001**
Negative/Nil	2508	2697
$1 - $39	871	725
$40 - $79	1509	1270
$80 - $119	1905	1606
$120 - $159	8966	3632
$160 - $199	7339	8441
$200 - $299	8412	11482
$300 - $399	5560	6742
$400 - $499	4472	5222
$500 - $599	2999	4208
$600 - $699	1670	2655
$700 - $799	1190	1863
$800 - $999	1314	2134
$1000 - $1499	626	1958
$1500 or more	304	662
Not Stated	3091	4249
Overseas Visitors	309	448
TOTAL	53045	59994

Source: Australian Bureau of Statistics, 1996 & 2001 Census Data.
Tweed (A) Parts a & b.

Figure 2.1.2.1

Weekly Individual Incomes Tweed Shire Council 1996 and 2001



Source: Adapted from Australian Bureau of Statistics, 1996 & 2001 Census Data. Tweed (A) Parts a & b.

In terms of weekly household income the median group figure for Tweed Shire Council moved from $300-$499 in 1996 to $500-$599 in 2001. Exactly the same movement was experienced in Byron and Ballina (Table 2.1.2.3).

Table 2.1.2.5

Age Distributions Tweed, Byron and Ballina Councils 1996 and 2001

	Tweed	Tweed	Byron	Byron	Ballina	Ballina
Age Group	**1996**	**2001**	**1996**	**2001**	**1996**	**2001**
Under 15	17.75	17.2	22.5	20.8	21.0	20.0
15-24	9.1	8.9	11.4	11.1	11.6	11.2
65 +	26.3	27.45	13.7	12.5	19.2	19.3

Source: Australian Bureau of Statistics, 1996 & 2001 Census Data.

In the Tweed, Byron and Ballina areas the number of children fell between 1999 and 2001, with the fall in the proportion of the population aged under 15 years in Tweed (2.4%) being the largest. The proportion of youths and young adults in the population also fell in the inter-census period in each of the three Local Government areas. It is notable that the proportion of people in the 15 to 24 years of age groups is lowest in the Tweed. In contrast, Tweed has had the largest proportion of aged persons in its population (of the three councils), and that proportion has grown over time.

Tweed Shire's population is significantly older than most places in New South Wales. In 1996 the median age of the New South Wales population was 34 years. Tweed Shire's median age was 40. In 2001 the median age of the State's population was 35, whilst Tweed Shire's median age had risen to 43.

In both 1996 and 2001 there were more people aged 15 years and over not in the workforce in Tweed Shire than there were employed people: 9953 more in 1996 and 9254 more in 2001. A remarkable proportion of Tweed Shire's population was defined by the census as being "Not in the Workforce"; that is, they were not numbered as being either employed or unemployed. This is largely brought about by the age structure of the population with 51.4% of those not in the workforce in 1996 being aged 65 years and over. In 2001 the proportion was 49.9%. When those aged between 55 and 64 years and not in work are added to the over 65's, the proportions grew to 69.3% in 1996 and to 68.1% in 2001. The data suggests that a large number of people aged 55 to 64 had taken early retirement with two thirds of the people in that age group in 1996 being classified as not in work, and 62.8% of the same group similarly classified in 2001.

The unemployment rates of the Tweed Shire workforce were quite high in both 1996 and 2001. The New South Wales figure for unemployment in 1996 was 8.8% whereas that for Tweed was 15.6%. In the age bracket 15 to 19 years the unemployment level stretched to 24.3%, and was even higher (25.4%) in the 20 to 24 age group.

In 2001 the State's unemployment rate was 7.2%, whilst Tweed Shire's was 12.6% suggesting that Tweed's rate had slightly improved relatively. Unemployment amongst young people, however, remained a significant problem, with the level sitting to 20.4% for the 15 to 19 age group and 22.3% for the 20 to 24 year age group.

Since most of the detailed information concerning the demographic and social/economic structure of Tweed Shire is confined to census years it is not possible to identify any changes that might have taken place between 2002 and the present. The official figures do not allow the Inquiry to form any opinion on whether the pro-development policies of councils since 1999 have effected a significant improvement in the economic and social base of Tweed Shire. What is apparent, however, is that the age structure of Tweed Shire, where persons above 65 represent a disproportionate part of the age pyramid (compared to other councils) is a fundamental and defining feature. Moreover, it is apparent that the population of over 65s is growing at a faster rate than in most other places.

Besides the ageing of the population Tweed Shire has faced a number of problems resulting from the decline of the Shire's traditional industries (**T. 3/03/05 p. 790-791, p. 796-800**). Industries such as dairying, sugar and bananas have suffered. There has been some growth in new agricultural sectors but the decline of the old industries has affected the land use and settlement pattern of the area, and presented challenges for economic growth into the future.

PROF DALY: *You mentioned pressure on agricultural land and other land in the shires, from earlier evidence that we got at the hearings there are suggestions that some of the key agricultural industries are under some stress. Industries, for example, like dairying, banana growing, sugar. Would you like to comment on what the pressures are on those industries?*

MR BROOKS: *Yes.*

PROF DALY: *Particularly in terms of the land base of them.*

MR BROOKS: *Yes. It's quite a contentious issue in the Tweed Shire, the lack of viability in our rural industries. For a long time now we have had agricultural protection zonings placed on our sugar cane land, which is basically the flood plain of the river. It is the best soil we've got in the district. It's flood-prone. There doesn't really seem to be a problem with anyone with it being declared as agricultural protection. We've had the same sort of thing put on the Cudgen land. Parts of the Cudgen area, of course, are good. There are parts of the Cudgen area east of Old Bogangar Road which have been a very contentious issue and, if I may, I could elaborate there because that's one of the reasons for dissatisfaction in the rural community and previous councils.*

The dairy industry is in decline. We went from something like 1200 dairy farms in the Tweed and we're down to, I think, less than a dozen now. And that was mostly brought about by the State Government's failure to allow us access to the Sydney market. That was the major reason for the demise of the industry. Those that hung in there now, of course, do have access to the Sydney market. The Federal Government hasn't helped the dairy industry in their deregulation because it was probably our only stable rural industry whereby people who were dairy farming knew that if they produced X litres of milk they knew exactly what their income would be. But under the situation now a lot of them are barely making their cost of production, so the dairy industry is in decline.

The banana industry has to now rely upon a cyclone in North Queensland wiping out the Tully area for them to make a significant income from plantations here. They have got the added problem here that plantations have to be on steep hillsides to get above frost level, so it's a heck of a lot harder job than in North Queensland where they can grow it on flat land like this. The traditional industries in the Tweed, yes, are in decline. There was a $90,000 study commissioned by the Tweed Economic Development Corporation with Federal money which was done by a panel of independent consultants. It has identified the problems, but unfortunately it's another expensive document that appears to have been shelved with - - -

PROF DALY: *When was that done?*

MR BROOKS: *I think, from memory, it came out about the end of 1983. It was in the last two or three years that it was completed. So as far as agriculture goes I see that the future of agriculture in this area is in new small area niche cropping, intensive farming if there's going to be a future, but the major problem we have is that the planning rules that are in place are not keeping pace with the modern trends in agriculture. If somebody came in tomorrow and said, "I want to buy 10 acres of land because I want to grow hydroponic strawberries" or whatever, that kind of industry, nobody can sell them that area of land. We're only allowed to sell a minimum of 100 acres, 40 hectares, and that's a bone of contention with a lot of the farming community. There is just no flexibility in the planning rules to allow for modern trends in agriculture.*

T. 3/3/05 p.790-791

PROF DALY: *Okay. Another question. I just want to get the figures right here. You were talking about the dairy industry - - -*

MR BROOKS: *Yes.*

PROF DALY: *- - - and you quoted the number of dairy farmers at one point in time and then more recently. Could you just give me those figures again?*

MR BROOKS: *It's gone from somewhere around 1200 dairy farms in, like, up to the '40s and early '50s - that's when the decline started – to down to, I think it is less than a dozen at the moment, somewhere around 12 left.*

PROF DALY: *The dozen that's left, does that represent an amalgamation of some of those other farms? Are they bigger - - -*

MR BROOKS: *No, mostly it's still farms that were in existence in those days. Some of them have managed to extend the size of their properties by taking advantage of a planning process that was in place a few years ago, called concessional allotments.*

PROF DALY: *Yes.*

MR BROOKS: *And they were able to buy a neighbouring farm and pay for it by selling off some concessional allotments. If they hadn't have been able to do that they wouldn't be in dairy because they have to be able to run, you know, 200 cows now to even make a living.*

PROF DALY: *The dairy industry problem in northern New South Wales has affected a number of regions, the Clarence, Richmond and so forth. Is Tweed worse off than them, those other regions that have been affected?*

MR BROOKS: *I mean, this is only an opinion on - - -*

PROF DALY: *Just your - - -*

MR BROOKS: *Yes. I don't think so, no. I think it's a problem common to the whole area, yes.*

PROF DALY: *Following the federal changes to the dairy industry, did the Tweed industry - the farmers who were still in the business - did they get compensation through that system?*

MR BROOKS: *I think there was small amounts of compensation paid. Maybe not compensation, but I think there was money offered to assist in some way. But one of the major bones of contention was that a lot of these farmers had spent tens of thousands of dollars over the year of acquiring quotas which allowed them to sell a particular number of litres a milk. And those quotas, because it was a very stable industry, cost a lot of money. And with this deregulation, those quotas were just wiped, they just disappeared, and there was no compensation to the farmers for any loss of quota like that. So some of them lost tens of thousands of dollars.*

PROF DALY: *You mentioned a $90,000 study but I think you said that it was done by the Economic Development - - -*

MR BROOKS: *The Tweed Economic Development Corporation.*

T. 3/3/05 p.796-797

MR BROAD: *Can I just take up two things with you. You spoke about a decline in traditional industries. What are those traditional industries that you refer to?*

MR BROOKS: *The traditional industries that we had in the Tweed were dairy, beef cattle - - -*

MR BROAD: *So agricultural industries?*

MR BROOKS: *Oh, agricultural industries, yes.*

MR BROAD: *Yes. But what about the industries that draw support from them, such as, say - - -*

MR BROOKS: *Machinery manufacturing industries and - - -*

MR BROAD: *Well, have you got machinery manufacturing industries?*

MR BROOKS: *We did have. We used to have a major manufacturer of slashing equipment. It's gone. We had another major machinery company, not so much for our local industries but they were involved in building a lot of equipment for the cotton industry. They've gone. Well, they're the two major ones that I can think of that come to mind at the moment.*

MR BROAD: *What about the support? On the drive down to Murwillumbah there seems to be a cane processing facility; is that operational?*

MR BROOKS: *Yes, it operates for roughly six months of the year.*

MR BROAD: *So it's seasonal, depending on - - -*

MR BROOKS: *Yes. The season's finished at the moment. But that's in the process of setting up a green electricity development, whereby they're going to generate power, a considerable amount of power, at the sugar mill right through the whole year, using - instead of burning the sugarcane, cutting it green, using the leaf material. And at this stage it appears to be if they run out of that, using camphor laurel to supply the boilers to generate electricity on a year-round basis. And that's actually, I think, in the process of going through all the DAs at the moment and, you know, it will be another 18 months, two years, before it's actually up and operating. That's an attempt by the sugar industry to hedge against variations in sugar prices to give them some extra income.*

MR BROAD: *Now, you've spoken about the manufacturers of the slashers and the cotton equipment going out of the Tweed; have other industries come in?*

MR BROOKS: *We now have quite a large boat-building industry that's set up in the Tweed, because I've been told that the Tweed climate is actually the best climate in Australia for the curing of fibreglass. So we have - I can't tell you the exact number but it's a significant number, like, four, five or six, or something like that, of new boat-building industries. And I think there are a few other fibreglass industries that have set up in the industrial estate. We have, you know, things like ice-cream cone manufacturing, which is expanding and expanding, supplying virtually the whole east coast of Australia. You know, all sorts of industries like that. Yes, we have had replacements, yes.*

T. 3/3/05 p.798-800

Agricultural industries that once had defined the economic landscape of Tweed Shire have shrunk and changed. In 2001 agriculture and associated industries employed just 5.5% of the Shire's workforce. In 1991 they had employed 8.2%. Despite this relative loss, those industries had lost only 171 workers, or just 0.7% of the 2001 total workforce (Table 2.1.2.6).

The major growth industry in the decade to 2001 was the health and community services sector, which added 90.2% more workers. Given the age and income structures of the Shire, this is not surprising.

The next two highest growth sectors were construction (43.5 % increase) and property and business services (45.6% increase). Retailing grew by 33.4% reflecting the level of population increase and the modest increase in the income base of the area. The tourist industry, as reflected in the accommodation, café and restaurant sector, grew quite slowly adding only 10.9% more workers as against an overall increase of 24.9% in the total workforce over the decade.

Table 2.1.2.6

Tweed Shire Council Employment by Selected Industries

Industry	1991	2001
Agriculture/Fishing	1,475	1,304
Construction	1,522	2,185
Wholesale Trade	826	897
Retail Trade	2,942	4,417
Accommodation/Café/Restaurant	1,868	2,096
Property/Business Services	1,133	2,083
Health/Community Services	1,424	2,708
Culture/Recreation Services	377	626
Personal/Other Services	551	860
Total Number of People	17,942	23,880

Source: Shift Share Analysis of Industry Sectors for Regional Local Government Areas of New South Wales: University of Queensland 2005

The former Mayor saw the council as playing a significant role in advancing the economy of Tweed Shire (**T. 16/02/05 p. 31-32**) through the provision of services and

infrastructure. In line with the philosophy of the Tweed Directions group the anticipated growth would rely on property development and tourism to a large extent.

MR BROAD: *... Mayor Polglase, could I ask you to give an indication of what your vision is for the Tweed Shire Council?*

MAYOR POLGLASE: *Yes. The Tweed Shire Council is a Council that has probably been for many years been at the lower end of the - of the development area, in area of growth and expectation from within the community, and because of lifestyle and the area we live in many people wish to move to live in this environment. The Council has a responsibility to be able to look forward to how to provide adequate services, as regard infrastructure and community lifestyle, which has the expectations.*

Tweed Shire, in the last number of years, has put together what we call a management plan, which is the Bible of the Council for that year. In that plan it demonstrates how the Council will look after and fund growth expectations, how we can contribute - get funds contributed from the development industry to make that growth happen, how we can respond to community expectations, and one of those main strengths of the Council is that we do have a very strong community system which has representation from a large and broad number of community people who have input into the Council's direction, and that then is put into our management plan, which gives Council a direction which we believe the community should go.

So Council then looks forward to the next four or five years of how we are going to deliver those outcomes, and the vision is that because of the ageing population is a challenge to this Council to deliver those outcomes. There is a youth expectation, but the biggest expectations that we have in our Council is how to accommodate, to provide opportunities in the job growth area.

This has been achieved, in my opinion, by Council supporting the tourist aspect of our area, because that seems to be an area where a lot of people like to come to the Tweed and enjoy our climate, and enjoy our area. So Council has been very active in promoting and working towards providing opportunities in those particular areas, which has now come to fruition after probably four or five years of dedicated work. We are now achieving those results.

And the vision is that Council in the future has to address those issues, which is the retiring population, who come here to retire, and also has to address the opportunities that we can provide for our young people in the area of job growth. That is a challenge, and I believe that this Council and the previous Council, and other Councils before, have shouldered that responsibility and moved forward with that. And with that comes expectations from communities, which are not always going to be delivered, from other groups who don't agree with some of those ..... but Council has always had a very strong direction and a very strong focus, and I believe that it has been a benefit to everybody who has lived in the Tweed.

T. 16/2/05 p.31-32

Former Councillor Boyd (**T. 17/02/05 p. 160-163**) presented a different view of both Tweed Shire's past and its potential for the future.

MS ANNIS-BROWN: *Councillor Boyd, I would just like to start off with the period that you were mayor. Could you just advise us of the dates during which time you were mayor of the Council?*

CR BOYD: *I became the president of the shire in 1979. This is before the Local Government Act in 1993. I was president for two years and then I was out for two years and then I came back in and I subsequently served 16 terms until 1999.*

MS ANNIS-BROWN: *All right. There is quite a lot of data around that talks about the way Tweed was during the time that you were mayor, and it basically says that it wasn't doing so well, and I would just like to talk a little bit about that, and I'm particularly interested in what policies you had during the time that you were mayor and what was your vision and what did you hope to achieve?*

CR BOYD: *Well, I - philosophically, I had a different point of view to some of the previous speakers, maybe it's because I've lived in the Tweed all my life and I have always regarded it as being one of the greatest places on Earth. I have a great love of the valley, simply because it is as beautiful as it is. It has provided a wonderful way of life - quality of life for a number of generations of people and I was certainly - strongly of the view, and still am, that the Tweed doesn't really have to go out with a "for sale" sign and encourage people to come there, because it is the sort of place that, obviously, people are naturally attracted to. It has so many attributes that it really is a place that people would want to come to and to do and establish themselves either as retirees or in business or whatever.*

So I never did see the necessity to put out the so-called welcome mat, because in my humble opinion, the Tweed was going to develop anyway, as it did, during my term of office. It has been described here today as the "bad old days", however, I think the records show that it wasn't stagnating, as has been described, in fact, on an average, I think we were proving about $100,000,000 worth of development every year for the last 10 years of my term. So I guess my vision was that we should, as a Council, be endeavouring to place great value and emphasis on the quality of life that we enjoy and, perhaps, pass that on to other generations and, also, to try and encourage those sort of industries and development that was, in fact, sustainable.

MS ANNIS-BROWN: *So, what sort of policies did you implement or attempt to implement to achieve that?*

CR BOYD: *Well, like all mayors, you inevitably have to deal with people who want to do something in the shire, to develop it or whatever and I've got to say that perhaps I have a record of not being so encouraging to everybody who walks through my door but to indicate to them that if they wanted to develop at all, what I was endeavouring to do through the Council in that period was to get the best quality that we could encourage them to do. Obviously, Council always has to deal with development applications. It's*

not a matter for Council really to decide who puts in a development application or the nature of it. We have to deal, as a matter of law, with what comes into our offices.

Now, if I could just say this, perhaps clarify the point a little. Reference has been made that most of what was happening during my term of office was just house-building. I don't deny that. However, what can any councillor do to not deal with the development applications that come in. If it is for the development of residential lots, then you have to deal with that. You can't say, "No, we don't want it" especially in those areas where it's already been zoned for that purpose.

PROF DALY: *Could I ask you if you recall - don't want to go - you've been with the Council over a very large number of years but if I could go back say, to the second half of the 1990s, do you recall what the unemployment rate in Tweed was in those years?*

CR BOYD: *I don't, Mr Commissioner. I don't carry those sort of figures in my mind but I do know that the employment was in fact low. I'm sorry, there was a high unemployment as there was, I think, in most of our surrounding areas including the Gold Coast too, I might say. It was a period of high unemployment not just in the Tweed. I think that's been over-emphasised that the Tweed was suffering more than others. I think only records will show whether that's correct or not. There's been a lot of play made over a period of time about a lot of things which, when you analyse them, are not as accurate as they have been portrayed.*

PROF DALY: *Do you know what the unemployment rate is currently?*

CR BOYD: *No, it's not a figure I carry in my mind but I know it is much lower than it was then as it is in the whole of Australia, I believe.*

PROF DALY: *Are you familiar with the Australian Bureau of Statistics index which they call the CEFA index which, essentially is an attempt to measure well-being of a local government area or a region? Are you familiar with that index?*

CR BOYD: *No, I can't say that I am at the moment. I haven't had occasion to really look at.*

PROF DALY: *Would it surprise you to know that around the middle of the 1990s the CEFA index for Tweed suggested that there were probably a range of problems of employment, income, those sorts of things. Would that surprise you?*

CR BOYD: *Not at all.*

PROF DALY: *And, would it surprise you that that CEFA index now suggests that some of those problems are not so pronounced? That the CEFA index has improved in terms of Tweed?*

CR BOYD: *No, I wouldn't be surprised, Mr Commissioner, because as I said just a moment ago that I think the whole of Australia is in a much better position nationally so*

far as unemployment is concerned and a much higher percentage of people employed now than there was in the 1990s.

PROF DALY: *So, you would say that back in the second half of the 1990s because you don't want to go too far back, whatever the unemployment figures or the CEFA index might have suggested, it was more a product of national - the national economy and that current figures are a result of changes in the national economy. Are you arguing that?*

CR BOYD: *Yes, I am, Mr Commissioner. We live beside the Gold Coast and periodically we see figures of what's happening there and at the time, as I recall, the unemployment rates were equally as high in the Gold Coast as they were in the Tweed as they were in Byron and other areas around us. I believe that unemployment is very much related to the national economy and it is beyond the scope of local government in many cases to cure problems of unemployment on its own. Unemployment relates to policies which are outside of our scope to change whether it be in the Federal scene or the State scene so whilst there are some things which local government can do to try and fix that problem, in many cases it's out of our scope to do so.*

PROF DALY: *Thank you.*

MS ANNIS-BROWN: *You just mentioned there are some things that local government can do to fix that problem. What sort of things do you have in - would you be thinking of when you - - -*

CR BOYD: *Well, I go back to when I first got into Council in '64, we had some industries at that time - the timber industry was still quite a large industry at that time - and the biggest timber mill was really in a position where it couldn't expand. The problem that we had at that time that there was insufficient land zoned for industrial purposes. That was of particular interest to me and I took the trouble and the effort to try and convince Council that it should acquire land for that purpose and it did so and in the case of Murwillumbah, this is just an isolated case - I don't wish to belabour it but it's one which is an example of how, I think, Council can play some part in providing land on which industry can establish itself and create employment so quite apart from house-building which we all understand it an employer of people whilst it's being built whether it's Peppers or whether it's Salt or a house or whatever.*

Once it's built that employment in terms of those industries ceases but I think longer-term employment is created in the secondary industries in our case because I'm a farmer as well as a councillor and I am fully aware that our farming industries are declining rather - not surprisingly in the Tweed. It's generally a national situation but I had 20 years in tourism as well involved as a tourist officer and I worked for the Department of Tourism in New South Wales for 14 years so I understand the potential for employment in the tourist industry. ...

T. 17/2/05 p.160-163

2.2 *The Coastal Property Boom*

2.2.1 The Position of Tweed

The property boom of the first half decade of the twenty first century was one of the biggest and most broadly based (in terms of geographic coverage) in Australia's history. The area stretching from Ballina in the south to the Sunshine Coast in the north witnessed substantial development and soaring property prices.

The development of Tweed Shire was seen to lag behind that of other parts of the coastal stretch of northern New South Wales and south eastern Queensland. The councillors elected as part of the Balance Team in 1999 were anxious that Tweed Shire should participate in the development surge that was taking place along other parts of the coast. A great deal of land had been zoned for development many years before, so there was a ready supply of land if the Council chose to allow its development. Since tourism had been a prominent stimulus to development along the coastal areas of south-east Queensland and the North Coast of New South Wales, it was logical to expect that Tweed Shire with its beaches and distinctive natural environment would become part of the expansion of tourism. The Balance Team's win in the 1999 election enabled a tourism-led development phase to begin (**T. 18/02/05 p. 243-245**).

PROF DALY: ... *The themes which I was mentioning really refer to what's happened in Tweed in the last four or five years in terms of its growth and the factors which have stimulated that growth. The suggestions have been made that the growth in the area - economic growth and population growth and so on - have been primarily stimulated by two things; one is an increase in the level of development, that is, property development throughout the area, and, secondly, growth of tourism. Would you agree with that synopsis of - - -*

CR BRINSMEAD: *The second part, Mr Commissioner, was tourism?*

PROF DALY: *Yes, the first part was property development in general and then tourism as a particular aspect of all that.*

CR BRINSMEAD: *Generally, yes. I would only qualify it by saying that the rate of pure residential development hasn't risen, it may have even declined somewhat since the years of the '90s. But if you look at the statistics the developments that have progressed since 1999 have contained a larger quantity of business and business related developments and tourism development and so on.*

PROF DALY: *The role of the Council in relation to that, how would you describe the Council's role?*

CR BRINSMEAD: *Since 1999, the Council role in that has been very considerable. The Council in 1999, that was called the balance team, ran on a platform of getting the Tweed moving. There were some big development projects down on the Tweed coast that had been stalled for over 25 years. That's a long time. Its platform was to open the door*

of the Tweed to business and some economic growth and to work to achieve a change of culture in the Council that was more investment friendly. Not that it advocated - we ever advocated - an anything goes free for all policy because the fact is that the Council, after 1999, didn't re-zone and didn't have to re-zone any land.

It was all re-zoned for development. It had been sitting there for year after year. It was mainly due to open the door and to proceed with those things that had been held up for many years, and, particularly, if you related to tourism - and I've been a tourist entrepreneur in - related to - my farming activities - what the Tweed lacked in the tourist industry - it's been up till now the tourism industry has been very small and ineffectual in many respects because it was a tourism industry that had to rely to the greatest extent on day-trippers from the Gold Coast.

Now, it's well known to those who do the number crunching in tourism that day-tripping - the day-tripping industry - cannot support a solid tourism industry. What was needed on the Tweed was the creation of a tourism/accommodation infrastructure. Now, we'd talked about that for years and really believe - because I've been involved in the tourism business going back a number of years - what is happening with South Kingscliff now on the former sand mining site probably should have happened 20 years ago, but what was needed was the creation of this first time - to create the Tweed as a destination, a solid tourism/accommodation infrastructure. If I may just make one statement. It said, someone has sort of coined it by saying where the tourists roost gets the economic boost.

PROF DALY: *So you'd link a lot of what has been described as strong growth and prosperity primarily to this growth of tourist infrastructure. Am I reading you right?*

CR BRINSMEAD: *Yes. It's not just in tourism. Other things are happening too, but tourism is sort of at the, you know, the coal face where it is. I don't discount what Councillor Boyd said, the considerable influence of the economic climate of the nation, the influence of the Federal Government, you can't rule that out but at the end of the day development takes place - development has to take place at a local government level. You have to get the runs on the board and you have to create jobs - any jobs that are created will have to be created at local government level.*

Might I just add that I think we're only beginning to see the benefits now. The real benefits are starting to come on stream and we will see more of the work that's been done in the last few years.

PROF DALY: *Can I just go back to something you said earlier in your comments? And that is that there was no need to re-zone land, the land was actually zoned - - -*

CR BRINSMEAD: *That's right.*

PROF DALY: *- - - into which this new development went. How sustainable is that into the future? Is there still a lot of land zoned that - - -*

CR BRINSMEAD: *Yes, there is by and large, Mr Commissioner. Well, this is a credit to the former Council in re-zoning land for the future except for - there may be a few*

exceptions, but, basically, the land has already been re-zoned. What we need for our growth has already been factored in and re-zoned and it's there to keep us going for the next 20 years at least. We need to re-zone. There's no pressure to re-zone a lot of land for population growth.

T. 18/2/5 p.243-245

It would appear that a large number of developers operating along the NSW North Coast and in south east Queensland made very substantial profits in recent years. According to *Business Review Weekly*[2], Feb. 3-9 2005: "in just four years, more than 20 property developers, financiers and investors, riding a wave of strong demand and surging prices, have amassed huge private fortunes, some in the hundreds of millions of dollars".

In the same article one of the leading developers stated that he "had never seen the economy awash with so much money as there is now". One of the most prominent developers on the Gold Coast and in Tweed Shire observed that "you would have had to be silly not to make money".

Naturally the developers wanted the bonanza to continue, but there have been signs that places like the Gold Coast might not offer the same opportunities in the future as they had done in the past. In the growth years 2001-2005 the population of southeast Queensland from the New South Wales border to Noosa had grown at a rate of 85,000 people per year. Some estimates suggested that a further one million people might seek to locate in the region over the next 25 years. A plan for south-eats Queensland launched by the Planning Minister in November 2005 determined that 80% of the 22,420 square kilometres of the region would be protected from urban development. The plan aimed to push new arrivals away from the coastal areas. North of Brisbane one council had placed a population growth cap on its area. In Byron the first Greens Mayor was elected at the 2004 election and adopted a more measured policy towards further development in the area. As well, the Gold Coast was beginning to consider the limitations on growth that its water resources imposed.

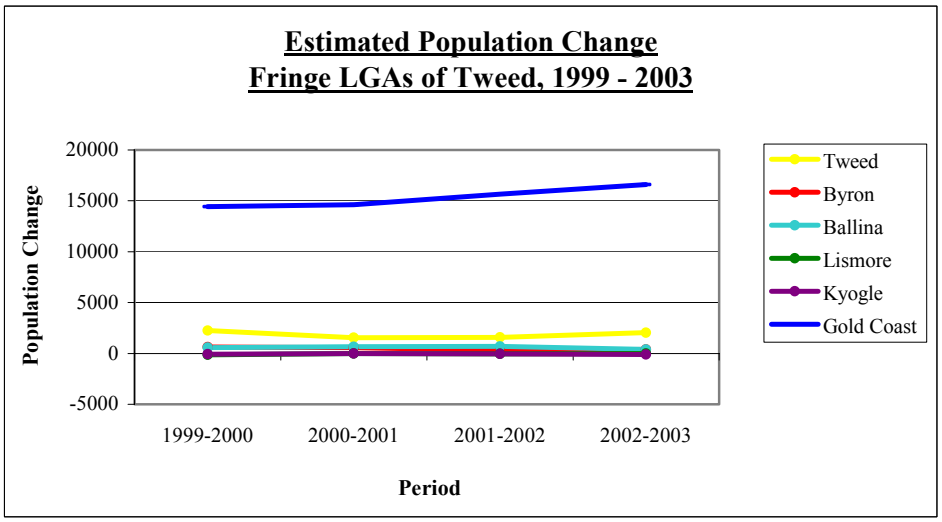
In this context of doubt about the future opportunities along the North Coast-South-east Queensland coast Tweed Shire appeared to purr with opportunities. A substantial amount of land was long zoned for development, the natural environment was one of the most diverse and attractive, and the council that was in place from 1999-2004 had shown itself to be keen to promote new development in the Tweed. In such circumstances it is not surprising that developers and others in the property industry would be willing to fund the Tweed Directions program with the intention of keeping the control of the council in pro-development hands.

Tweed's growth during the boom years of 2001-2004 was relatively modest (Figure 2.2.1.1) but its potential growth appeared to be substantial. The Tweed Directions' group was determined that the potential for growth would be realised.

[2] John Stensholt and James Thomson "The Sun Kings" p. 32- 39.

Table 2.2.2.1

Estimated Population change Fringe LGA's of Tweed 1999 – 2003.



2.2.2 Tweed Shire Housing Market

In contrast to the Gold Coast the residential structure of Tweed Shire has been principally made up of separate houses. In 1996 this made up 70.2% of the total housing stock, a figure that grew to 71.6% by 2001. Other North Coast councils had a similar pattern: 82.4% of residences in Byron in 2001 were separate houses, as was 75.2% of the Ballina stock. The number of separate houses grew by 13.4% in Tweed Shire between 1996 and 2004, compared to 9.7% and 8.7% growth in Byron and Ballina (Table 2.2.2.1).

Townhouses were the second largest dwelling type in Tweed Shire in 2001 with 12.7% of the stock, down from 12.9% in 1996. In Byron townhouses constituted 6.6% of the residential stock in 2001, and in Ballina 12.9%.

It is clear that the housing profile of Tweed Shire has been made up of single or double storied dwellings, as is the case with other North Coast areas. Many of the disputes over property issues in Tweed Shire in the past three years have been associated with the development of higher residential buildings. Units in 2001 represented 8.9% of the housing stock in Tweed Shire. In Byron units made up 4.9% of the stock, and in Ballina in 2001 7.2%. The proportion of 3 storey units in Tweed Shire in 2001 was 2.3% of the stock, down from 2.7% in 1996. In Byron 3 storey units made up 1% of the residential stock, and in Ballina just 0.6%. Units above 3 storeys were rare in Tweed Shire in 2001 (1.1% of the stock), and even rarer in Byron (0.1%) and Ballina (0.3%).

One thing that does set Tweed Shire apart from the other North Coast councils is the number of caravan parks (36), a number of which provide permanent accommodation. In 2001 these made up 5.7% of Tweed Shire's residential stock. In the same year caravans in Byron made up 3.5% of the stock, and in Ballina 0.3%.

Table 2.2.2.1

Tweed/Byron/Ballina Shires – Dwelling Structure (Number of Persons).

	Tweed			Byron			Ballina		
	1996	2001	Difference	1996	2001	Difference	1996	2001	Difference
Separate House	45459	51551	6092	21219	23272	2053	24992	27159	2167
Semi-detached, Row or Terrace House, Townhouse etc with:									
One Storey	5558	6569	1011	745	895	150	2413	2885	472
Two or more Storeys	2756	2584	-172	494	959	465	1400	1730	330
Flat, Unit or Apartment									
In a One or Two Storey Block	3024	3956	932	1326	1095	-231	2304	2287	-17
In a Three Storey Block	1745	1623	-122	165	267	102	281	202	-79
In a Four or More Storey Block	466	793	327	34	29	-5	23	98	75
Attached to a House	246	201	-45	114	128	14	132	170	38
Other Dwelling									
Caravan, Cabin, Houseboat	4169	4104	-65	1063	994	-69	1417	1252	-165
Improvised Home, Tent, Sleepers Out	164	80	-84	115	69	-46	88	46	-42
House or Flat attached to a Shop, Office, etc	345	335	-10	188	262	74	178	158	-20
Not Stated	787	228	-559	586	258	-328	512	124	-388
TOTAL	64719	72024	7305	26049	28228	2179	33740	36111	2371

Source: Adapted from Australian Bureau of Statistics.

The median price of houses in the North Coast areas fluctuated in the 1990s. In the Tweed area prices dropped from 1995 to 1997 before beginning a steady increase through to 2001 (Table 2.2.2.2 and Figure 2.2.2.1). The median house price in 2001 was $180,000, up from $118,000 in 1993.

The rate of increase of unit prices slowed from 1997, enlarging the gap between house and unit prices. In 2001 the median unit price was $140,000, whereas it had been $118,000 in 1993.

Land price levels did not increase very much until 1999. In 1993 the median price for a residential lot was $65,000. By 1997 it had reached $74,000 where it remained in 1998. By 2001 it had reached $93,000.

Table 2.2.2.2

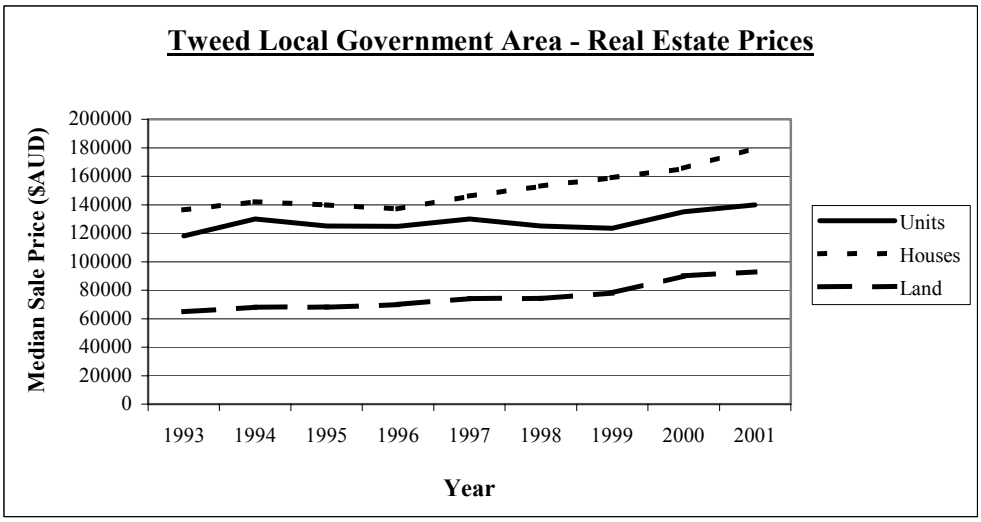
Tweed Local Government Area – Real Estate Prices (Median Prices).

	1993	1994	1995	1996	1997	1998	1999	2000	2001
Units	118000	130000	124950	124900	130000	125000	123500	135000	140000
Houses	136500	142000	140000	137000	146000	153000	159000	165500	180000
Land	65000	68000	68000	70000	74000	74000	78000	90000	93000

Source: Real Estate Institute of New South Wales – Real Estate Yearbooks.

Figure 2.2.2.1

Tweed Local Government Area – Real Estate Prices (Median Prices).



Source: Real Estate Institute of New South Wales – Real Estate Yearbooks.

Throughout much of the 1990s Byron Bay and Ballina outstripped the Tweed area in terms of house and unit prices. From 1993 to 2001 house prices in Byron Bay increased by 84.1% (Table 2.2.2.3 and Figure 2.2.2.2). Unit prices in Byron Bay grew by 64.5% (Table 2.2.2.4 and Figure 2.2.2.3).

Table 2.2.2.3

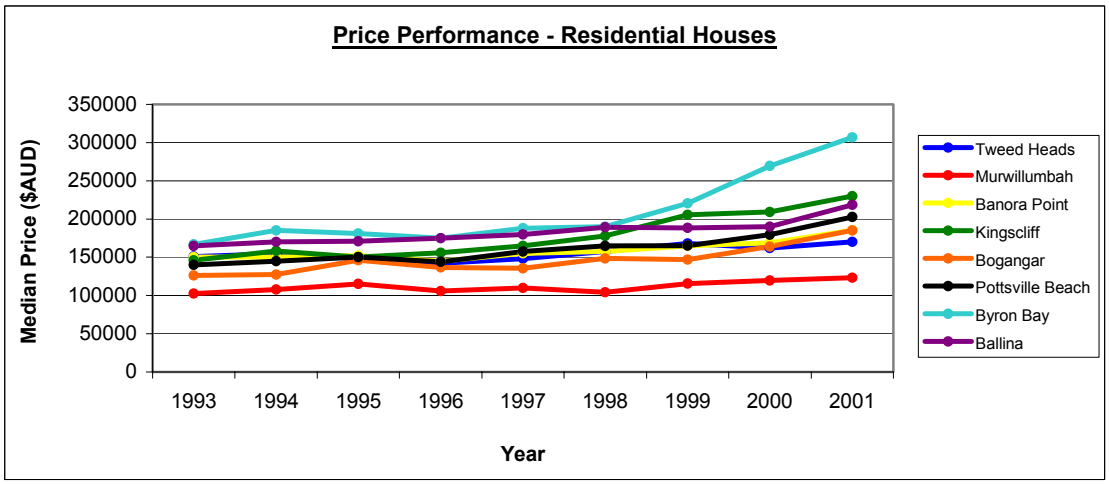
Tweed Region – Price Performance (Median Price) for Houses

Post Code	Suburb	1993	1994	1995	1996	1997	1998	1999	2000	2001
2485	Tweed Heads	151000	154500	148900	142000	148000	157500	168000	161900	170000
2484	Murwillumbah	102500	108000	115000	106000	110000	104000	115500	119500	123500
2486	Banora Point	150000	150000	152250	145000	155000	157500	165000	168995	185000
2487	Kingscliff	146000	158500	150000	156000	165000	178000	205500	209000	230000
2488	Bogangar	126250	127500	146000	136750	135500	148500	147000	164000	185250
2489	Pottsville Beach	140000	145000	150000	144000	157450	165000	165250	179500	202500
2481	Byron Bay	166750	185000	181000	175000	188000	190000	220500	269500	307000
2478	Ballina	165000	170000	171000	175000	180000	189250	188500	190000	218500
	Tweed LGA	**136500**	**142000**	**140000**	**137000**	**146000**	**153000**	**159000**	**165500**	**180000**

Source: Real Estate Institute of New South Wales – Real Estate Yearbooks.

Figure 2.2.2.2

Tweed Region – Price Performance (Median Price) for Houses



Source: Real Estate Institute of New South Wales – Real Estate Yearbooks.

Table 2.2.2.4

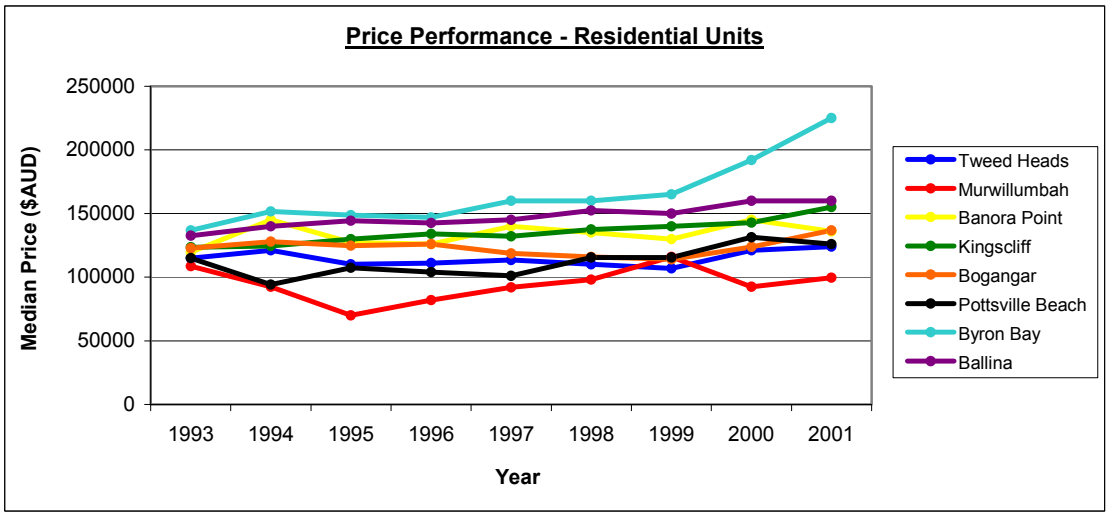
Tweed Region – Price Performance (Median Price) for Residential Units.

Post Code	Suburb	1993	1994	1995	1996	1997	1998	1999	2000	2001
2485	Tweed Heads	115000	121000	110000	111000	113500	110000	107000	121000	124000
2484	Murwillumbah	108500	92500	70000	82000	92000	98000	116000	92500	99500
2486	Banora Point	119600	145000	127250	125900	139900	135000	130000	145000	136000
2487	Kingscliff	123500	124500	130000	134000	132000	137500	140000	142750	155000
2488	Bogangar	122750	128000	124750	126000	118625	116000	114000	123750	136750
2489	Pottsville Beach	115000	94250	107500	104000	101000	115500	115500	131250	126000
2481	Byron Bay	136750	151668	148750	147000	160000	160000	165000	192000	225000
2478	Ballina	132500	140000	144250	142500	145000	152500	150000	160000	160000
	Tweed LGA	**118000**	**130000**	**124950**	**124900**	**130000**	**125000**	**123500**	**135000**	**140000**

Source: Real Estate Institute of New South Wales – Real Estate Yearbooks.

Figure 2.2.2.3

Tweed Region – Price Performance (Median Price) for Residential Units.



Source: Real Estate Institute of New South Wales – Real Estate Yearbooks.

House prices in Kingscliff (57.5% increase 1993 to 2001), Bogangar (46.7% increase), and Pottsville Beach (44.6% increase) represented the parts of Tweed where housing prices began to accelerate in the 1990s. They were each on the coast, so the market began to focus on the Tweed coast progressively through the 1990s. Unit prices in Tweed were much slower to move upwards. Kingscliff with a 25.5% increase from 1993 to 2001 had the biggest increase.

For most of the 1990s residential land prices between the Tweed and Byron Bay and Ballina were not greatly different, and there was not much differentiation in prices between different parts of the Tweed. Then from 1999 residential property values exploded in Kingscliff, outstripping price increases in both Byron Bay and Ballina. The price of residential land in Kingscliff grew by 185.5% from 1993 to 2001, whilst the price of land in Ballina grew by 62.2% in the same period, and that of Byron Bay by 116.2%. From 1999 on Kingscliff land prices grew at a rate ten times faster than in Byron Bay or Ballina (Table 2.2.2.5 and figure 2.2.2.4). Suddenly, with the new council in place in 1999, the Tweed coast attracted strong interest in the property market.

Table 2.2.2.5

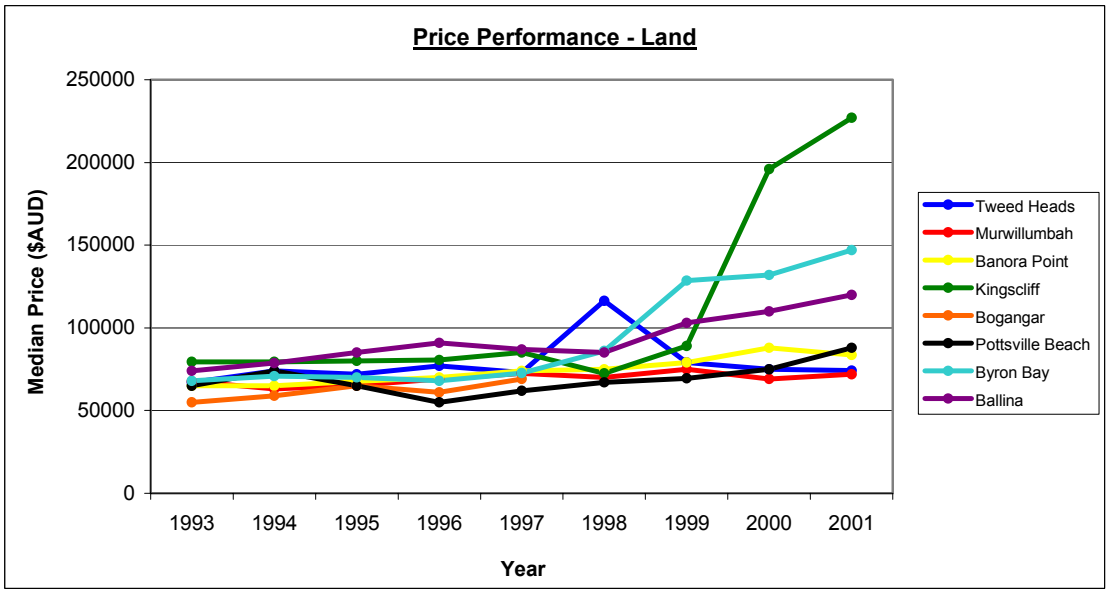
Tweed Region – Price Performance (Median Price) for Land.

Post Code	Suburb	1993	1994	1995	1996	1997	1998	1999	2000	2001
2485	Tweed Heads	67000	74000	72000	77000	73000	116250	79000	75000	74250
2484	Murwillumbah	67500	63000	65250	69000	72500	70000	75000	69000	72000
2486	Banora Point	65000	65000	67500	70000	74000	75000	79000	88000	83500
2487	Kingscliff	79500	79500	80000	80500	85000	72500	89000	196000	227000
2488	Bogangar	55000	59000	65000	61000	69000				
2489	Pottsville Beach	65000	74000	65000	55000	62000	67000	69500	75000	88000
2481	Byron Bay	68000	70750	69975	68000	72750	86000	128500	132000	147000
2478	Ballina	74000	78750	85000	91000	87000	85000	103000	110000	120000
	Tweed LGA	**65000**	**68000**	**68000**	**70000**	**74000**	**74000**	**78000**	**90000**	**93000**

Source: Real Estate Institute of New South Wales – Real Estate Yearbooks.

Figure 2.2.2.4

Tweed Region – Price Performance (Median Price) for Land.



Source: Real Estate Institute of New South Wales – Real Estate Yearbooks.

In terms of buildings (both residential and non-residential) in Tweed Shire the value of construction dropped in 1999 and 2000 (Table 2.2.2.6 and Figure 2.2.2.5). From 2001 residential building values rose on a steep curve.

Table 2.2.2.6

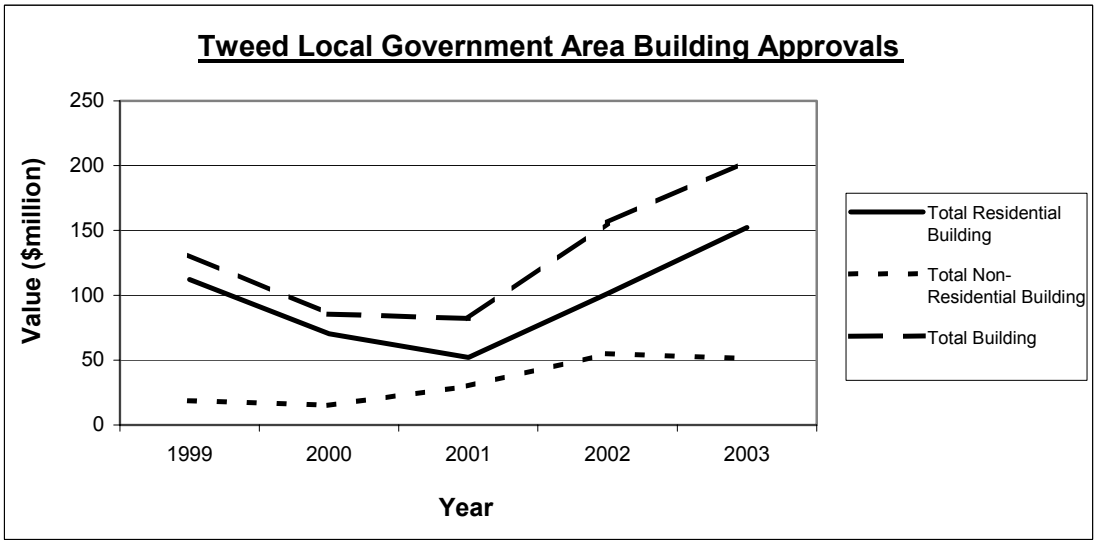
Tweed Shire – Building Approvals.

	1999	2000	2001	2002	2003
Total Residential Building ($m)	112.1	70.4	52.1	101.3	152.3
Total Non-Residential Building ($m)	18.8	15.2	29.9	54.9	51.2
Total Building($m)	130.9	85.6	82.1	156.1	203.6

Source: Australian Bureau of Statistics, National Regional Profile, Tweed (A) Local Government Area.

Figure 2.2.2.5

Tweed Shire - Total Value of Building.



Source: Adapted from Australian Bureau of Statistics, National Regional Profile, Tweed (A) Local Government Area.

Development applications rolled in, in 1999 ahead of the jump in property value increases in 2001. In 1999 and 2000 a total of $12.683 million of development applications to the council for projects above $1 million (Table 2.2.2.7, Figures 2.2.2.6 and 2.2.2.7). From 1999 to November 2004 a total of $931.710 million of development applications with an individual project value greater $1 million were made to Tweed Shire Council. The average per year of all such development applications was $33.543 million, and the average per project was $4.930 million. The peak year in terms of the average per project was 2001 with $7.702 million per project. The yearly average for all project development applications was $155.285 million. The peak year for applications was 2002 when the total value reached $275.531 million.

Table 2.2.2.7

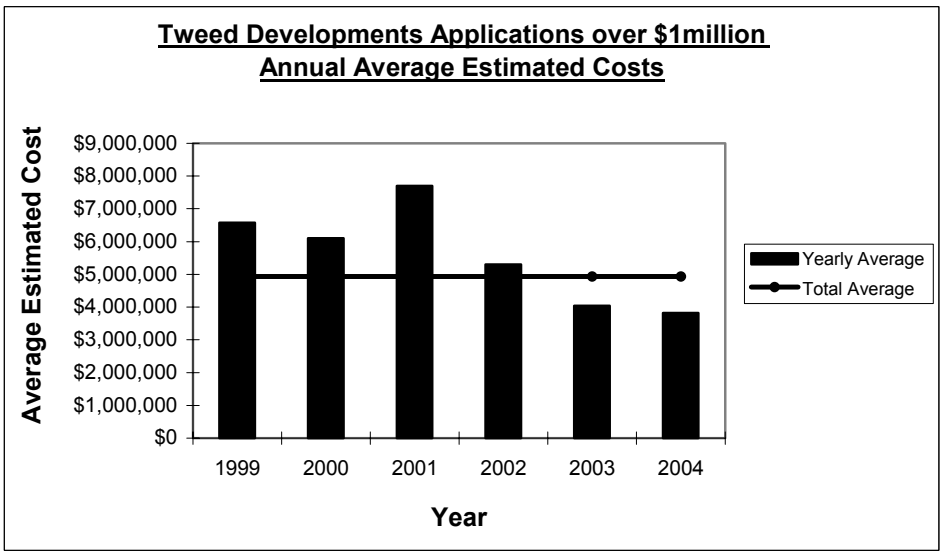
Development Applications over $1,000,000 – Total & Average Annual Estimated Costs.

	1999	2000	2001	2002	2003	2004	TOTAL
Yearly Average	$6,581,111.11	$6,101,470.59	$7,702,333.33	$5,298,673.08	$4,036,393.76	$3,823,260.87	$33,543,242.74
Yearly Total	$59,230,000	$103,725,000	$115,535,000	$275,531,000	$201,819,688	$175,870,000	$931,710,688.00

Source: Adapted from Tweed Shire Council data.

Figure 2.2.2.6

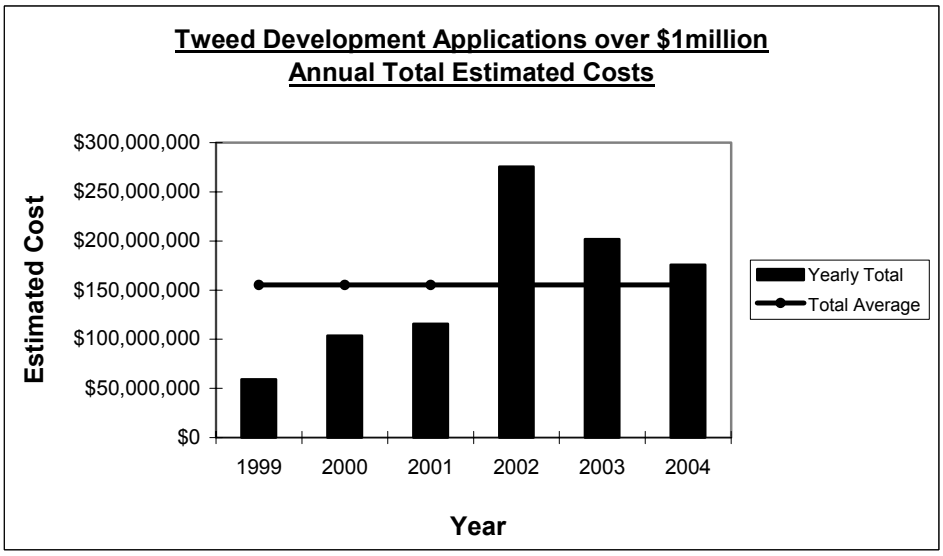
Development Applications over $1,000,000 – Average Annual Estimated Costs.



Source: Adapted from Tweed Shire Council data.

Figure 2.2.2.7

Development Applications over $1,000,000 – Total Annual Estimated Costs.



Source: Adapted from Tweed Shire Council data.

The approval times for so many large projects was remarkably fast. 39% of these projects were approved within 40 days, and a further 23% were approved between 40 and 90 days. Only 38% of the approvals for major projects took longer (Table 2.2.2.8 and Figure 2.2.2.8).

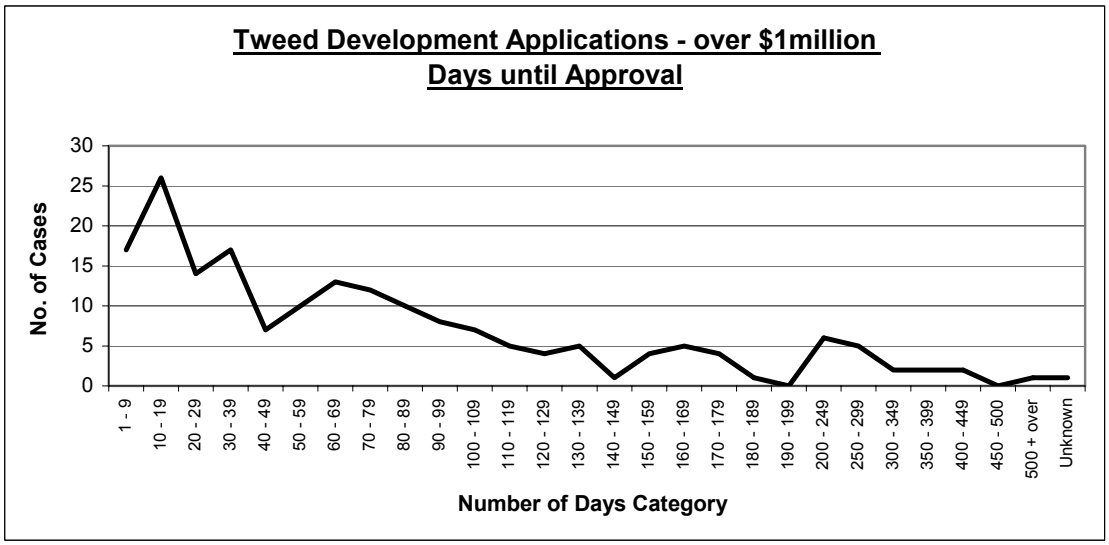
Table 2.2.2.8

Tweed Development Applications over $1,000,000 – Days until Approval.

Period of Days	Number of Cases
1 - 9	17
10 - 19	26
20 - 29	14
30 - 39	17
40 - 49	7
50 - 59	10
60 - 69	13
70 - 79	12
80 - 89	10
90 - 99	8
100 - 109	7
110 - 119	5
120 - 129	4
130 - 139	5
140 - 149	1
150 - 159	4
160 - 169	5
170 - 179	4
180 - 189	1
190 - 199	0
200 - 249	6
250 - 299	5
300 - 349	2
350 - 399	2
400 - 449	2
450 - 500	0
500 + over	1
Unknown	1
TOTAL	189

Figure 2.2.2.8

Tweed Development Applications over $1,000,000 – Days until Approval.



Source: Adapted from Tweed Shire Council data.

The surge of development activity created a great deal of reaction from the community, especially on the Tweed coast. The community reaction (Section 4) lay behind the turbulent election campaign in 2004, and stimulated the creation of the Tweed Directions group.

The reaction appears to have developed around two factors. First, many people in the coastal villages felt that the level and type of development threatened their life styles and` the amenity of their built environments and the concern for its impact on the natural environment.

The second effect has been the impact of increasing property values on housing affordability in the Tweed. Dr. Stephen Kelly of the Southern Cross University's Centre for Enterprise Development and Research has conducted a research project assessing Housing Affordability in the Tweed Shire. The Inquiry acquired a draft of the report dated 31 January 2005.

Dr. Kelly identified housing affordability as a significant and increasing problem in the Tweed Shire. People on low incomes were finding it harder to enter the housing market in the Tweed. There appeared to be a significant displacement of low income earners as a result of a proportional and numerical growth in investors in the housing market. He identified the problem of an ageing population as related to the emergent problems of affordability.

2.3 *Tourism and the Tweed*

2.3.1 Tourism and the Economy

It is not surprising that both of the pro-business councils in the Tweed (1999-2004, 2004-2005) viewed tourism as a significant industry for promoting economic growth in the region. The fact that tourism dominated the successful economy of the Gold Coast provided powerful evidence to many decision-makers. There was a recognition that the Tweed region would not replicate the high-rise development pattern of the Gold Coast. The Tweed would aim to develop a tourism industry on a scale that was commensurate with its natural environment and the desire of many in the community that Tweed should not follow the Gold Coast pattern. The evidence before the Inquiry suggests that councillors who were dubbed pro-development, and councillors who were sometimes referred to as "pro-community", were equally aware of the potential of the tourism industry. The arguments arose over the where and when and how new tourist developments would be put in place.

Various local politicians placed their faith in tourism as a prime generator of economic growth, despite the fact that through the mid-1990s tourism had a patchy record in the Tweed.

In that period Tweed Shire outnumbered each of the other New South Wales North Coast councils in terms of visitor numbers and the number of nights spent in the region (Table 2.3.1.1 and Figures 2.3.1.1, 2.3.1.2, 2.3.1.3), although the numbers varies significantly year by year. In 1994-95 the number of visitors to the Tweed and the number of visitor nights spent there fell in 1995-96 and in 1996-97. Byron attracted more visitors than Tweed relative to the resident populations of the two Shires. In Byron expenditure by tourists grew through each of the mid-1990s years in Byron but fluctuated up and down in the Tweed.

Table 2.3.1.1

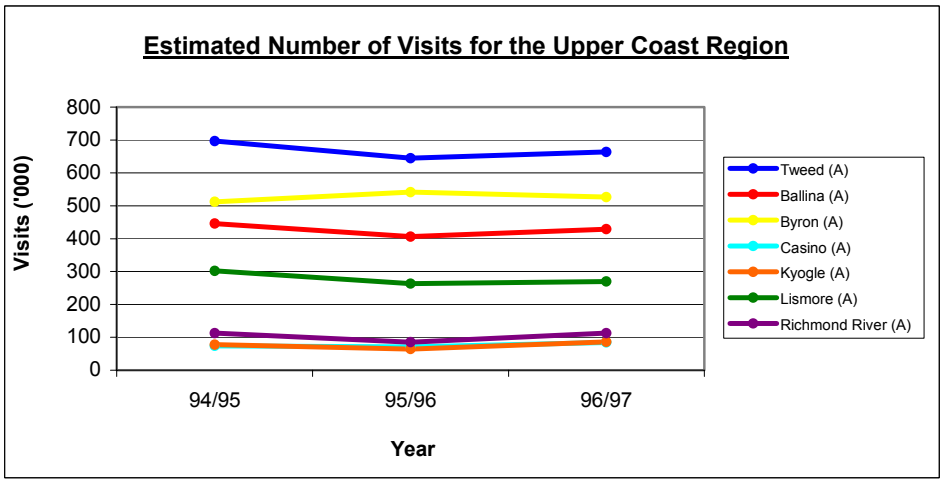
North Coast Regions – Visitor Trends 1994 - 1997.

	Visits ('000)			Nights ('000)			Expenditure ($million)		
Region	**94/95**	**95/96**	**96/97**	**94/95**	**95/96**	**96/97**	**94/95**	**95/96**	**96/97**
Tweed (A)	697	645	664	2492	2193	2481	157	143	165
Ballina (A)	446	406	429	1429	1239	1386	92	83	95
Byron (A)	512	542	526	1811	1842	1902	112	117	124
Casino (A)	74	71	84	277	240	323	18	16	22
Kyogle (A)	78	64	86	329	290	357	22	19	24
Lismore (A)	302	263	270	1136	912	1089	75	63	76
Richmond River (A)	113	85	113	467	378	462	29	25	30
TOTAL	2222	2077	2174	7940	7094	8001	505	466	537

Source: Tourism New South Wales.

Figure 2.3.1.1

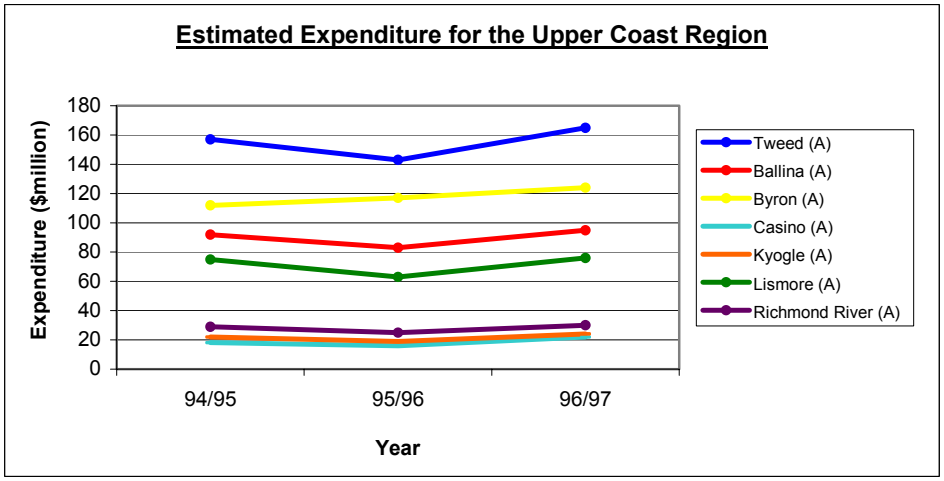
Estimated Number of Visits for the Upper Coast Region, 1994 - 1997.



Source: Adapted from Tourism New South Wales.

Figure 2.3.1.2

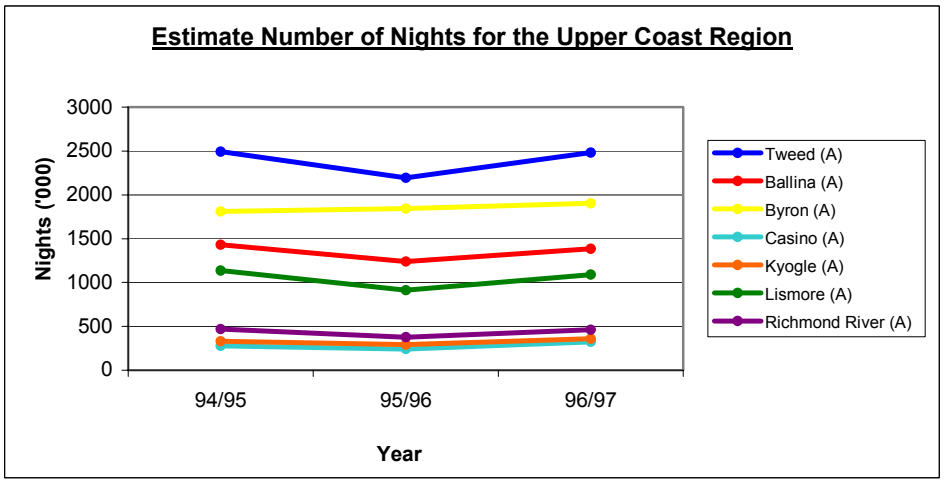
Estimated Expenditure for the Upper Coast Region, 1994 - 1997.



Source: Adapted from Tourism New South Wales.

Figure 2.3.1.3

Estimated Number of Nights for the Upper Coast Region, 1994 - 1997.



Source: Adapted from Tourism New South Wales.

The Gold Coast's record in promoting tourism no doubt influenced those who promoted Tweed's potential for building an effective tourist industry itself. In the mid-1990s it has been estimated[3] that tourism contributed over $1.2 billion to the Gold Coast's gross regional product. $608 million of that came from interstate visitors and $447 million from international visitors, the two groups making up 88.9% of tourism's contribution. The largest single sector within the tourism industry was accommodation, cafes and restaurants with a $202 million contribution to gross regional product. Other main contributors were retail trade ($193 million), property services ($164 million), and recreation and entertainment services ($130 million). It was estimated that 25,057 jobs were linked, directly and indirectly, to tourism activity.

The report that supplied these data was commissioned by the Gold Coast City Council in 2002. The data used were for 1996-97 because data from the 2001 census were not available at the time of writing the report.

The Mayor of Gold Coast City Council in 2002 (Gary Baildon) in releasing the Gold Coast Economic Development Strategy stated that he expected that tourism would remain the principal industry of the Gold Coast for many years to come. He also observed that "Gold Coast tourism faces significant challenges and opportunities[4]". Despite its success based on tourism, the Gold Coast had begun to worry about the sustainability of the industry.

In their 2002 report West and Bayne indicated that "the current relatively narrow economic base (*of the Gold Coast*), of which tourism is a vital part, will need to be

[3] G. West and B. Bayne *The Economic Impacts of Tourism on the Gold Coast* (Brisbane: Cooperative Research Centre for Sustainable Tourism, p.xii)
[4] Gold Coast Economic Development Strategy, 2002, p.7.

expanded in order to meet the needs, dreams and aspirations of a rapidly growing population and the increasing visitor markets".

In a decade tourism move from being a relatively insignificant part of Australia's international economy to becoming one of the major sources of earnings. The Gold Coast played a role in this. In 2002 the Gold Coast was receiving more than 4 million visitors a year (Tweed was received 429,000 in the same year). West and Bayne (p.2) noted: "There is, however, some concern that during much of the 1980s and 1990s the Gold Coast's domestic tourism visits grew at less than half the average annual growth rate for Australia".

In 2004 the Australian Government issued a White Paper entitled *A Medium to Long Term Strategy for Tourism.* The White Paper observed that: "Tourism is growing in importance as an economic driver both globally and in Australia. It is of particular importance to regional development. The Australian tourism industry has enjoyed steady high growth rates over the 1990s. Several shocks since 2001 have put this growth at risk" (p. ix).

The White Paper (p. xvi) stated that tourism contributed 4.5% to Australia's gross domestic product in 2001-2002, generated over $17 billion in export earnings, and was directly responsible for employing around 550,000 people, and indirectly another 397,000.

The evidence of the importance of tourism at the Australian level and at the Gold Coast level shows that it is an industry with a capacity to generate substantial income and jobs. At both levels, however, there were warning signs that the growth of the industry was facing several challenges in the early years of the century. This was when tourism was being extolled as one of the chief hopes for the future Tweed economy.

The available information on the recent history of tourism in the Tweed (Table 2.3.1.2, Figures 2.3.1.4, 2.3.1.5, 2.3.1.6) shows that the industry has had a fluctuating history between 1998 and 2002, with the average annual change in visitor numbers averaging only 1%, and standing only marginally higher in 2002 than they were in 1998. Day trips, which had been a staple of the tourism industry in the Tweed, fell from 877,000 in 1998 to 580,000 in 2002.

Table 2.3.1.2

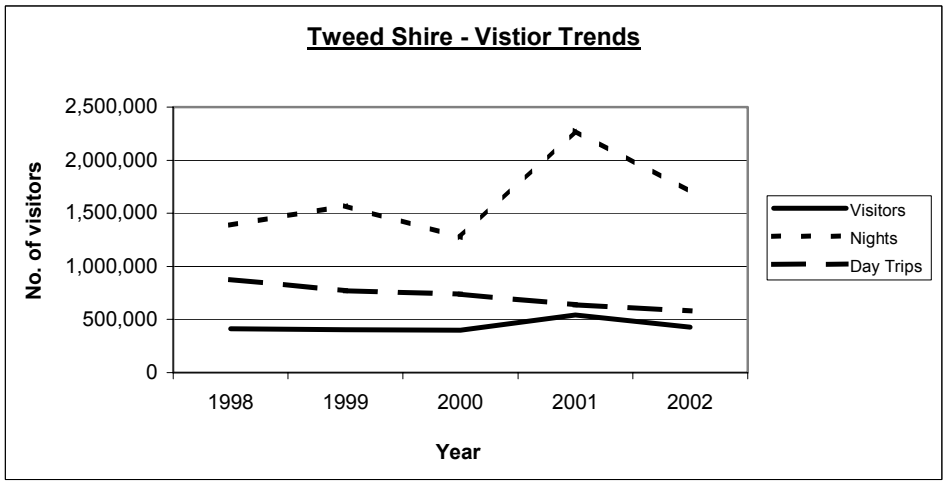
Tweed Shire – Visitor Trends, 1998 – 2002.

	1998	1999	2000	2001	2002	Av. Annual Change
Visitors	414,000	403,000	399,000	542,000	429,000	1%
Nights	1,390,000	1,570,000	1,272,000	2,284,000	1,700,000	5%
Day Trips	877,000	770,000	739,000	638,000	580,000	-10%
Average Stay	3.36	3.9	3.19	4.21	3.96	4%

Source: Adapted from TACTIC & Tourism New South Wales.

Figure 2.3.1.4

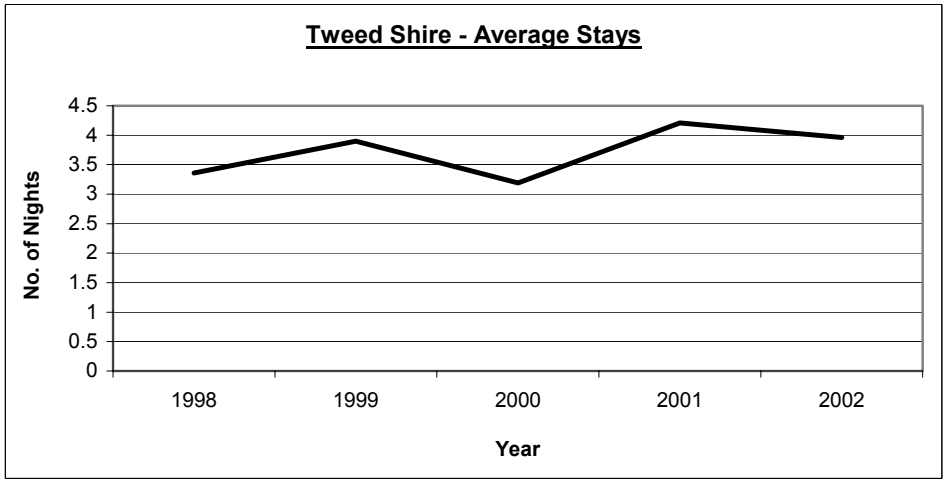
Tweed Shire – Visitor Trends, 1998 – 2002.



Source: Adapted from TACTIC & Tourism New South Wales.

Figure 2.3.1.5

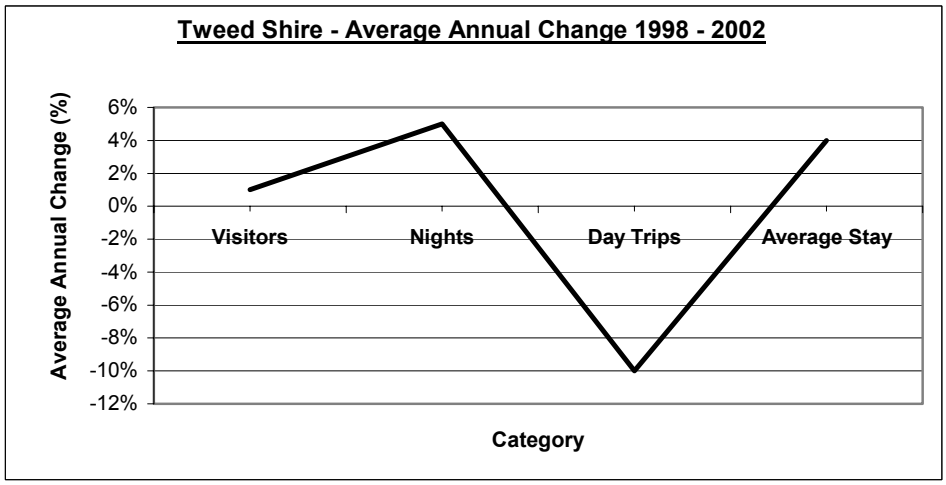
Tweed Shire – Average Stays, 1998 – 2002.



Source: Adapted from TACTIC & Tourism New South Wales.

Figure 2.3.1.6

Tweed Shire – Average Annual Change, 1998 – 2002.



Source: Adapted from TACTIC & Tourism New South Wales.

A paper by Terry Watson, the chief of the Tweed and Coolangatta Tourism Inc (TACTIC), called *Creating the Future* (April 2004), directed attention to the challenges facing the Tweed's tourism future. The paper states that: "History has shown in many destinations that fixing problems caused by tourism growth after they have arisen is expensive, time consuming and `creates wide divisions within the community. Whilst the Tweed has not reached this point, there are clear early warning signs within parts of the Shire and significant decisions to be made. Byron Shire to our immediate south provides a clear indication of how such problems manifest themselves, within a relatively short time frame, if tourism is left to manage itself" (p.3).

Tweed Shire Council was the main funder of TACTIC, and the message of the paper is clear (later repeated at the Public Hearings). The message that it sent was that it was up to the council to take the responsibility, and the funding, of a strategy that would propel the Tweed's tourism industry into the future.

MR WATSON: *It works in - in terms of - I've quite often described the relationship we have with Council as kind of equivalent to them throwing money over the fence and saying, "Go and do something with tourism." And in terms of governance, it's very, very strong, reporting kind of mechanisms. We report to - we provide regular reports to Council on our activities. We acquit all of the funds that they give us, so we give them our annual budgets, all of those kind of things, and then we present quarterly to the executive management team and we present quarterly-ish to Council itself. So, yes, that's kind of how, I guess, the relationship works. In terms of how we actually sit down together and have a strategic approach to tourism in the Tweed, we don't.*

T. 18/3/05 p. 1695

One side of the tourism debate, Watson points out (p.3), is "characterised by dangerous and simplistic mantra that tourism creates jobs and is therefore a good thing". The

problem with tourism without a strategy, according to Watson is that day-by-day decisions are made that combine to produce a long-term tourism result, usually without public awareness or scrutiny.

The various aspects of the development scene in the Tweed between 1999 and 2005 (discussed in Section 3), and the reactions and interactions between the Council and the community (Section 4) suggest that the Council accepted the importance and the inevitability of tourism but without an overall strategy, and without an effective means of communicating and engaging the whole community.

Watson (p. 4) argued that "the Tweed is in an enviable, yet somewhat confusing stage of its tourism history. The Shire's tourism future is dynamic, but not focussed and has not yet been written. It is however increasingly facing a situation where it will be written for it…Over the next two years the Tweed will be transformed as a destination with an expected doubling of accommodation in beds in the Shire. Similar transformations in other destinations have resulted in substantial economic turmoil over many months". The community reactions to some large scale developments in the Shire (Sections 3 and 4) indicate that the turmoil had already begun as Watson was writing his paper. The Council faced a serious governance problem: the management of growth, which it believed was vital for the Shire's future, and the negative reactions to that growth by some sections of the community. The evidence shows that the Council failed in this regard. A very particular example of this failure occurred with the Beach development at Cabarita where the pro-development councillors and the General Manager adopted a bellicose and intransigent attitude to public disquiet about aspects of the development and the potential sale of council land to the developer (Section 4).

The stock of tourist accommodation in the Shire at the end of 2003 (Watson, p.6) was 1,205 tourism rooms and between 200 to 300 rooms in cabins at caravan parks. 70% of the visitors stayed in the caravan parks leaving 30%, or 130,000 visitors per annum, in the purpose-built tourist accommodation. Many of the tourism operators were financially marginal, Watson claimed (p. 6). By the end of 2005 Watson estimated (p.7) that there would be an additional 1,226 tourism rooms available, and that would require a doubling of the number of visitors if all the rooms were to be occupied. This raised a serious risk of intra-Tweed competition arising from high levels of new accommodation, particularly along the coast, which could lead to cannibalisation of existing businesses by new product (Watson p. 11). This is one aspect of the economic turmoil that Watson warned about in his paper.

The relevance of all of this to the Council, and to the Inquiry, is twofold.

First, the Council is the major backer of TACTIC, the group that is responsible for promoting the tourist industry in the Shire. TACTIC's revenue in 2004 was $525,000, 50.48% of which was supplied by the Council (Watson p. 31). Previously the Council had supplied around 70% of the funds. Although the Council's financial role diminished as external income sources grew (retail products, travel commissions etc) it was still the major single force shaping the structure of the tourist industry in the Shire. The Council had taken on a major responsibility for the promotion of the tourist industry. This

presented a substantial governance challenge in a community divided over issues of development and the growth of tourism.

Second, the Council had adopted a strategy whereby the product that would provide the basis for growth of tourism was dependent on receiving the Council's approval and backing. The Council, with its advocacy of tourism, was still bound to make decisions that took account of the views of the whole community. Its level of advocacy of development and tourism was such that it needed to convince the community that it was making decisions free of bias. The increased scale of the new tourist developments meant that the Council began to deal with development proposals that were much larger than those with whom they had previously encountered, and with major proponents of development coming from outside of the Tweed, armed with both resources and experience much greater than encountered by the Council in the past. All of this draws attention to each of the first three Terms of Reference of the Inquiry: whether the elected representatives have adequately, appropriately and reasonably carried out their responsibilities in the best interests of all ratepayers and residents, in an environment free from conflicts of interest; the appropriateness of the procedures and processes adopted by the Council in relation to its environmental planning responsibilities, including the processing of development applications, particularly those of a significant nature; and the appropriateness of the relationships between the elected representatives and proponents of development.

2.3.2 Sustainable Tourism

The Council adopted an aggressive policy of promoting tourism, and the developments associated with tourism. The Inquiry has not sought to make a judgement on whether the Council's policies were, or were not, appropriate for promoting the economic and social well-being of the Shire. It does have a duty, however, to consider whether the elected representatives have adequately, appropriately and reasonably carried out their responsibilities in the best interests of all ratepayers and residents. Given the central role of tourism in the Council's plans, the Inquiry considered two aspects of the potential impacts of tourism on the "best interests of all ratepayers and residents".

The first is the impact of tourism and new residential developments (many of which were partly focussed on tourism, see Section 3) on the affordability of housing, and the viability of existing tourism businesses. Both of these aspects have been noted earlier in this Section.

A number of tourist units recently built in the Tweed have been subsequently sold as residential units (Section 3). Because of the character and quality of these buildings they but some upward pressure on prices. More significant have been the developments that combine large tourism complexes (such as Outrigger and Peppers) with new high quality, but also high priced, residential houses. This inevitably puts upward pressure on prices. There are 36 caravan parks in the Tweed which provide cheap accommodation for a number of retired people. A number of these parks are located on beach or river fronts and occupy highly valued land. Inevitably in the future there will be pressure on these sites to be redeveloped for tourism or residential purposes. This will also put further

upward pressure on property prices. The combination of all these factors presents a real challenge of housing affordability into the future.

The second aspect is the impact of tourism on the employment base of the Shire. This aspect has been loudly promoted by proponents of tourism who argue that the industry provides a best chance opportunity to overcome the Shire's employment problems. . It has been used as a rationale for allowing and promoting developments that have been opposed by large sectors of the community because they have been seen to destroy key aspects of the amenity and natural environment of some places.

The evidence is clear that tourism is a major industry, and that it has been a significant force in promoting economic growth in regional areas. The Gold Coast has been a powerful example of this. Yet tourism is well known to provide limited opportunities for many of the workers within the industry. The major issued raised in relation to this are casualisation of the workforce, limited career opportunities, and low wages. As shown in 2.3.1 by the work of West and Bayne the Accommodation, Cafes and Restaurant sector of the tourist industry in the Gold Coast has been both biggest and fastest growing sector of the industry. West and Bayne (p. 2) also pointed out the downside of this. They singled out the low wage rates for employees in the Accommodation, Cafes and Restaurant sectors as being of particular concern. The 2001 census showed that this sector in the Tweed was both relatively small and slow growing. If the tourism sector in the Tweed were to grow at the rate expected by its proponents then the Accommodation, Cafes and Restaurants sector would be anticipated to grow strongly, and become a major element of the employment base of the Tweed. In this context it was appropriate for the Inquiry to explore whether the issues of casual and part-time work, career opportunities, and low wages had been considered by those shaping the strategy of elevating tourism to a central position in the future growth of the Tweed.

At the Public Hearings Ms. Annis-Brown and Mr Broad raised some of these issues. (**T. 17/02/05 p. 152-153; T. 2/03/05 p. 746-748; T. 4/03/05 p. 923-925; T. 4/03/05 p. 956-958; T. 9/03/05 p. 1055-1056**).

MS ANNIS-BROWN: *And, I'd just like to talk about how that actually would assist that goal, if you like, of assisting young people getting jobs and developing the shire.*

CR BECK: *Well, firstly, when are all these tourist resorts are being built? We have actually run out of builders and plumbers and roof fixers and all of this, in the area so the employment has been boosted in an incredible manner. So, that's given employment and when these big developers started their developments, they made a pledge that they would take on apprentices which was really good because it meant that we are training young people so that - for the future.*

So, that also, once the developments have been completed, it takes a very big amount of service people to service them, not only with the lawns, the - there's just - all of the things that go with everyday living and tourism - people like to be waited on so there's a lot of people needed for employment so that has really boosted our employment figures. You've only got to look at them to see what's happened in the last few years.

MS ANNIS-BROWN: *I guess the other thing too is that with tourism development generally it creates a lot of short-term and casual jobs so I'm just wondering whether that's actually sustainable in the long term, those jobs that have been created?*

CR BECK: *No, I don't think it's just short-term jobs because you'll have the same people employed all the time. I just saw in the Gold Coast Bulletin this morning a young man who's been 15 years at the one place - it's a tourism resort - and he's been there for 15 years so - he does the garden so that's not casual at all.*

MS ANNIS-BROWN: *So, you wouldn't agree that tourism is generally a seasonal sort of thing and there may not be long-term career options in that sort of industry?*

CR BECK: *I think there are long-term career options especially in big developments like Salt where they have convention centres and this type of thing.*

MR BROAD: *You spoke about waitresses or waiters, is there a problem that really that sort of work is only for a few hours a day, that there's only limited hours that you work. You might work over the lunch time rush, you might work in the evening associated with the dinner rush and it's not a full-time employment in the sense that one - - -*

CR BECK: *It may suit people. A lot of people like that type of part-time work so they can fit in with their families so I don't knock any type of employment at all. Any employment to me is good employment.*

MR BROAD: *I'm not asking you that. What I'm saying is, it is a relatively limited form of employment and relatively low paid.*

CR BECK: *Well, they probably could be relatively low paid but, let's face it, there's a lot of people who - we aren't all brain surgeons and - - -*

T. 17/2/05 p. 152-153

MS ANNIS-BROWN: *During the inquiry we've been hearing a substantial amount of evidence given with respect to tourist development and the fact that, you know, the councillors have said, "We need it to keep the economy going and get it going", in fact. Just interesting, it appears that the statement that you've made and given your local knowledge with businesses - - -*

MR PENHALIGON: *It's different.*

MS ANNIS-BROWN: *- - - appears to contradict that.*

MR PENHALIGON: *It does.*

MS ANNIS-BROWN: *So - - -*

MR PENHALIGON: *I would suggest the tourist trade is purely cream on the cake, icing on the cake. And if you don't have the day to day people trading there who are all locals with some sort of spending power, you just cannot survive. Impossible.*

MS ANNIS-BROWN: *In your view, is that belief being put forward to council in an effort to ensure that there are more - or there is more security with respect to spending habits and jobs being created?*

MR PENHALIGON: *I really don't know if that issue's been put to council, because I wonder what council could do about it.*

MS ANNIS-BROWN: *Does your association, for example, put that argument forward?*

MR PENHALIGON: *Our association could have an input there, yes. They could make those matters more - council more aware of those matters. You see, it's a matter of developing long term people who are going to live here and work here, not these floaties in for a weekend from Brisbane or up from Sydney for a week. And most of those people fly in, eat out for a few days, and go home. They are not the people who constantly spend in your shop every day.*

So we need to develop long term permanent people here, like the family unit, with good housing and permanent jobs. And not just visit the Tweed - even though we live here, like my family. We've lived here for 24 years, but they spend 90 per cent of their time up the Coast for work and education. It's up and down, up and down, every day. Because it's not here to sustain them and that's the problem with Tweed. It has to develop these things to sustain people. And that's why I supported a forward looking council because we desperately need that permanent sustained ongoing environment here. For business and for education and for jobs.

MS ANNIS-BROWN: *Do you believe the council is achieving that, given the amount of tourist development that is occurring in the shire?*

MR PENHALIGON: *Well, I don't believe that the tourist is the answer. It's nice, but I don't believe it's the answer. It's - as I said before, it's the cream on the cake. We need the permanent positions.*

T. 2/3/05 p.746-748

MS ANNIS-BROWN: *All right, thank you. Mr Wylie, if I could just talk to you, and this matter, sort of, moves on from that. You make a statement, and just bear with me while I find it, this is on page 6 of your submission. You talk about job creation and developments, and you state:*

In particular that all developments these days include local job creation as a major reason for local community support. The Tweed Shire Council also uses job creation as a major reason for supporting development applications.

Could you perhaps just elaborate on that comment.

MR WYLIE: *Well, you know, that's what we heard at a lot of the public meetings that we've attended, is that this development is good for the area because it does create jobs, and I'd asked a couple of times, well, to people like, say - David Boyd was one in*

particular. "Do we ever keep a record of how many jobs that are claimed to be created, and how many jobs are actually created for something that seemed to be such an important part of under-pinning so many DAs," yet from what I could establish it was never measured, and that always, to me, seemed to be just a little out of whack.

I had a business background. If you were going to create 300 jobs, or sell $300 million, at the end of the year, somebody wanted to know how did you go, and we'd always hear that as a community, this job or this project will create blah, blah, but yet there never seemed to be any measure of it, and from a business background, I always - just made me feel a bit uncomfortable.

MS ANNIS-BROWN: *We heard earlier this morning from a developer's perspective, if you like, that clearly they're always having to take into account market forces in determining the supply and demand issues, whether those buildings are in fact going to be tenanted or visited by people, so I suppose in the same respect there should be some measure, I suppose, as to whether people are going to want to come to these developments and thereby creating those jobs, and it's just interesting that you say there appears to be no measure of that from council's perspective.*

MR WYLIE: *At least from what I was able to assess. There may well be, but I was never able to figure it out, and I think that, you know, we were at the Salt meeting that was referred to previously, and a lot of these numbers do get bandied about, and I heard one - somebody there say, "But let's look at the quality of the jobs", and, you know, "do you want - all our kids have picked up beer glasses and scrubbed pots and pans and worked in restaurants", and whilst it is a job, it's not a job in terms of creating careers for many. It's a good sort of a drifter's part-time job when you're at uni, etcetera.*

MS ANNIS-BROWN: *And I was going to come to that. I would appear that many tourist job generally don't have those longer term career options. And in fact even though there's a certain amount of construction employment arising, once the building has been developed, what happens after that, I suppose?*

MR WYLIE: *Yes, exactly. I mean, our kids have done it, and we see where it fits, and we wouldn't want to deny anybody else's kids. But let's not kid ourselves that we're creating, you know, fantastic career paths for young people. You know, there would be some through hotel management, etcetera. And we're certainly aware of the construction job creation, because where we live, you know, the traffic noise is just - I mean, we moved here because we thought it was a lovely quiet little village. But frankly, since Salt has been approved - you know, we live one block from the - one house from McPhail Avenue, and I can tell you, every morning now from 5.30 through until about 8-ish, it's just a darn speedway.*

We get traffic and guys on motorbikes. And I know they're out earning a quid, but they're flying down there. And then of an afternoon it's the same thing when they're heading out. There was no provision made for them to get, you know, into Salt in a better way other than head south and come in through Casuarina and then come back through all the roundabouts. And if I was working there, I wouldn't do that either. I don't blame them.

I just say that, you know, there was never a better access way as part of whatever this master plan was, that we could see to get people in there. And goodness knows what is going to happen when all these hotel rooms are occupied and all these houses are up there. You know, it will be worse than where it was in Sydney where we lived.

MS ANNIS-BROWN: *Okay. All right, thank you very much.*

T. 4/3/05 p. 923-925

MS ANNIS-BROWN: *Mr Waters, you just spoke about tourism being the way to go, basically, in the future, and rural business on the decline. You also state that:*

Tourism provides huge growth and great opportunities for employment.

We've had statements made to us that tourism is, in fact, mostly made up of short term and casual positions, no long term career opportunities. I mean, what would you say to something like that?

MR WATERS: *No. It may have been in the past. With the current developments, like Salt and Casuarina, particularly, Outrigger and the Peppers Resort, there's literally hundreds and hundreds of full-time jobs there. There's certainly career opportunities with the organisations that are involved there. No, I don't think that any rational person would say that it's only casual. I mean, certainly part time and casual is a big part of, you know, the tourism employment. That's right across a lot of industries these days, though. I think part-time work growth has increase in Australia dramatically.*

MS ANNIS-BROWN: *Are you aware of any statistics that have been produced with respect to these hundreds of full-time jobs that you have mentioned? Where are you getting your information from?*

MR [sic. WATERS]: *From the operators of those businesses, particularly Outrigger, for instance, I have heard their employment figures - but also the predictions from the developers of the Peppers Five Star Resort. And there's no doubt that that again will have, again, literally hundreds of full time employees. And, again, that's only two specifically. There is obviously more.*

MR BROAD: *Is there any in the same sort of size that are envisaged to Peppers and Outrigger?*

MR [sic. WATERS]: *Not quite that size. There will be employment opportunities at the smaller resort-style developments such as the old Cabarita Beach pub site there. There's a development going in there that's quite significant. There's no doubt that there will be substantial economic benefits from a development like that. I think in Tweed Heads as well with the Twin Towns Resorts and Twin Towns Towers there; they definitely provide substantial full-time employment and career opportunities for those that are prepared to put in the hard yards, I would imagine.*

MS ANNIS-BROWN: *Just to finish off, you mentioned that youth unemployment has been quite high as a percentage. Would you agree that the reduction in unemployment generally is a result of national movements rather than local development or things like that?*

MR [sic. WATERS]: *We probably haven't enjoyed the reduction in national trends as much as other parts of the country such as the capital cities. We are starting to now. I don't know the current figures but I am fairly confident that there is a bit better opportunity, particularly with these developments starting to be completed. Again, I will mention Outrigger. It's only half-open, I believe, but when it's fully open and when Peppers is open at the end of the year, that's when we will see more opportunities for the youth.*

But I am fairly sure that there's a reduction in youth unemployment. But, again, it has taken a while to happen and we're just starting to see the fruits of some of the work that has been done and I think the national trends have been trending lower now for quite some years. I mean, I often hear our federal politicians talking of, you know, the figures and I think our unemployment figure is down to around 5 per cent now and that's the lowest in some 30 years. There's no way that our local unemployment is down to 5 per cent. I think it's probably around 9 per cent.

MS ANNIS-BROWN: *But it was never as low as national figures to start with?*

MR [sic. WATERS]: *Nowhere near it. In fact it was probably one of the worst in the country.*

MS ANNIS-BROWN: *So, relatively speaking, you have moved down with national trends, have you not?*

MR [sic. WATERS]: *Relatively, I guess, but it's only of late that we have, you know, started to see some better improvements. It wasn't just the national trend.*

MS ANNIS-BROWN: *All right. Thank you.*

T. 4/3/05 p. 956-958

MS ANNIS-BROWN: *If we could just go to another issue that was raised in that matter, and that was the issue of jobs that were to be created by the development. We've heard, during the inquiry, quite a lot of evidence, and several speakers have mentioned it, with respect to their concern that, clearly, you know, they hope this job is creating jobs, and that is certainly an issue on Council's mind, from what we can gather. In particular, I'll take you to an article where the developer quoted - was quote as saying that:*

More than 80 construction jobs and around 150 ongoing jobs, mostly in retailing, are expected to be created by the proposed 20 million Enterprise shopping complex at South Tweed.

If I could just now take you to the actual development proposal that was submitted on behalf of the developer - and it specifically talks about jobs in this way:

It is anticipated that up to 20 full-time ...(reads)... the light industry users of the building.

Now, this application was submitted in December 2003. With that information provided, I suspect that's the information upon which Council ultimately based its decision, and here we have the developer in February 2004 quoting, now, not 20 full-time jobs, but 150 ongoing jobs. There seems to be a slight discrepancy there between the figures.

MS WRIGHT: *It does seem to be. I think Mr Blundell had a lot on his mind during that period of the election, so he might have got that information incorrect. But what concerned me was, the mayor at the time who, even through the process of the election period, where all the councillors were vacated - they were dismissed, if you like - the mayor stayed on in his caretaker capacity. He was the only person who had the ability to be able to call that development up for consideration and scrutiny by councillors. He chose not to do it.*

It slipped through the radar, I guess, and that surprised me, given that the mayor is so pro-jobs, that the DA is saying one thing, the developer is saying another. The DA is representing an industrial development. The mayor, himself, and the developer, in the media, are referring to it as retail, making comparisons to a very large retail complex on the Gold Coast, referring to retail jobs, and really, misrepresenting what was being presented to Council. Council staff could only assess the information that was presented in front of them. So Council officers have done the best they could through that process. So, yes, it's quite odd that that has managed to slip through the radar.

T. 9/3/05 p.1055-1056

Mr Robert Brinsmead, a councillor on both the 1999-2004 and the 2004-2005 councils, wrote to the Inquiry (letter dated 6/02/05)[5] attacking the line of the Inquiry's questioning concerning the tourism industry. He claimed to be appalled by this.

[5] This Submission in Reply was emailed to the Inquiry on 6 March 2005. Since Mr Brinsmead is objecting to evidence given on 17 February 2005, it is assumed that the date written on the letter was a clerical error and should be 6 March 2005.

The Office of the Commissioner,
Public Inquiry Tweed Shire Council
Locked Bag A5045, South Sydney NSW 2135.

6/2/2005

Dear Professor Daly:

Re Demeaning the Tourism Industry on Account of Low-Paid Jobs

On several occasions during the Inquiry, questions have been put to various speakers that indicate a biased and demeaning view about the kind of employment generated by the tourism industry in general and Salt in particular. The lead questions put by Mr. Broad and Ms Brown would surely send a shudder through the spine of any Tourism Minister or CEO of any tourism authority throughout Australia. Many of the comments put to the Inquiry (including the remarks coming from the Bench) fly in the face of the enormous educational effort undertaken by our tourism authorities and bodies throughout Australia.

I refer, by way of example, to the 2004 White Paper on tourism put out by the Federal Government, to the ABS data on tourism, and perhaps above all to the Cooperative Research Centre in Sustainable Tourism. The CRC has been called "the world's leading scientific institution managing and delivering research to support the sustainability of travel and tourism." This non-profit organization is sponsored by the Federal Government, the State governments and by the leading Universities throughout Australia. The dedicated scholars behind the CRC would be appalled by the comments made at this Inquiry, including the biased questions coming from the Commission itself.

I should not have to remind Mr. Broad and Ms Brown that Tourism is now up there rivaling Mining and Agriculture as Australia's leading export earner – and at a time when the current import/export deficit needs its main export performers to shine. Tourism employs 6% of the Australian workforce, it contributes $73 billion in expenditure per annum, and it contributes more than 11% of the nation's export earnings.

To speak of the tourism industry or tourism employment, as this Inquiry has repeatedly done, in terms of a focus on low paid jobs (making beds and washing pots!) is failing to appreciate how this service industry sustains just as many sophisticated industries and

jobs as agriculture or mining. To be specific, the CRC based at Griffith University, which has one of the best research teams in Australia, did an independent study and report on Salt. The study projected that the Salt tourism development (just 72 hectares – the size one Tweed farm) would contribute $80M p.a. to the Tweed's economy. Compare that to about $50M for the combined agricultural input of the Tweed. Salt will also employ about as many people as the combined agricultural industry of the Tweed. Surely it has to be apparent that this $80 million annual economic output must take in a lot more than making beds, washing pots and Ms. Brown's focus on seasonal or part time jobs! Yes, I am appalled, Mr. Commissioner.

The tourism jurisdictions throughout Australia now spend an enormous effort to educate the whole community about the importance of tourism to the economy. The Northern Territory has the slogan, "Tourism is everybody's business." Maybe that is the reason its tourism bodies are among the best performers in Australia. A recent Australia-wide conference in Sydney was told how the NSW tourism bodies are the worst performers in Australia and need a massive educational shake-up. Perhaps this educational shake-up needs to start with this Commission of Inquiry! I refer you to the Griffith University-based CRC studies being done by Dr. Guy West on the Economic Impacts of Tourism on the Gold Coast. Studies such as these should put an end to comments which demean tourism on account of low-paid jobs. Such comments/questions misapprehend the dynamics of the tourism industry from beginning to end.

Yours sincerely,

Robert D. Brinsmead
Tweed Shire Councillor

Submission in Reply 008

Mr Brinsmead created and operated Tropical Fruit World, a major tourist attraction in the Shire. His son and son-in-law are major developers of tourist product in the Tweed. Mr Brinsmead has been a vocal and consistent promoter of the tourism policies adopted by the Council. He is a friend of Mr Ray, a major tourism developer in the Tweed including the SALT development. Mr Brinsmead's ire was directed at the Inquiry's seeking evidence on issues such as casualisation of the workforce, career paths, and wage levels. Mr Brinsmead might be seen to be defending his own interests and those of his family and friends in attacking the Inquiry. The reasons for the Inquiry's line of questioning are set out above. There is no doubt that it was appropriate and related to the Terms of Reference of the Inquiry.

MR RAY: *Well, I have known Cr Brinsmead for a long time and I consider him to be a friend. I have respect of what he tries to do for this place. I don't necessarily always agree with the way he goes about it but I certainly have empathy for his determination for certain outcomes. It was with Cr Brinsmead that I first discussed the idea of a smart economic community and I suppose if Cr Brinsmead has at any time championed our position both corporate and personal in this place, it comes from the fact that we are fellow travellers in that regard. He also has the same view about tourism being important in the short term as an industry which can provide some early solutions to the economic and social problems.*

T. 24/2/05 p. 515

2.4 *Electoral Issues*

2.4.1 Political Donations in the 2004 Local Government Elections

In the 1999 and 2004 elections for Tweed Shire Council a number of candidates espoused a pro-business and pro-development platform. These candidates when they formed a majority in the Council in both 1999 and 2004, soon put in place policy directions aimed at encouraging investment and development in the Shire.

It is clear from the evidence before the Inquiry that the majority groups in both councils (1999 and 2004) genuinely believed that their policies were necessary to promote economic development in the Shire. In both elections, however, the pro-development candidates received substantial funding from bodies that would gain substantially from the adoption of such policies. In the 1999 election the Balance Team group of candidates were supported by a fund created by a Mr Bedser, and supported by some 300 local business people (see the First Report for details). In the 2004 election an incorporated group called Tweed Directions established a fund to support pro-development candidates.

There were some significant differences between the funding pools established for the two elections.

First, the donors to the 2004 fund almost entirely came from bodies or individuals in the property industry. The largest donors were bodies located outside the Shire. The donors could anticipate handsome commercial benefits if a pro-development council were elected.

Second, the size of the funding pool grew enormously, indicating that the donors regarded their investments in the candidates as some kind of insurance policy for their existing or future investments in the Shire.

Third, a sophisticated organisational structure was put in place, and by a number of people with expertise in election campaigning who were recruited from outside of the Shire. The narrow victory gained by the Tweed Directions team in the 2004 election was seen as justifying the large expenditure made by Tweed Directions.

There was a fourth, and most important, difference between the organisational structures of the funding pools in 1999 and 2004. This was Tweed Directions' overseeing of all the important aspects of the candidates' campaigns, and the establishment of a parallel campaign by Tweed Directions that cost more in total than the amount of money they donated to the individual campaigns of the candidates. In reality, Tweed Directions became a de facto political Party. It decided on how many groups would represent the party in the elections and who would head these groups. It was also responsible for having the candidates from each of its groups falsely represent themselves to the community as genuine independents. Tweed Directions candidates wilfully misled the electorate and perverted the democratic process. It was this amalgam of facts that led to the recommendation in the First Report that all civic offices be declared vacant.

The actions of Tweed Directions raise a number of serious issues for Local Government elections.

Tweed Directions demonstrated that any group that wished for a council that would give priority to issues important to the group, and that would frame policies and make decisions that supported the `aspirations of the group, could engineer that outcome. The secret was to create a war chest so large that it would enable the group to swamp any opposition in terms of media exposure, and large enough to entice pliant candidates to stand for the group's causes. Alongside money, Tweed Directions' showed the benefits of sophisticated campaigning techniques developed in Federal and State elections. To win an election in this manner required the services of non-local professionals. The "package" containing all of these things could only work when the machinery of the campaign governed and directed all who were paid to stand on behalf of the group. It was in this sense that Tweed Directions acted as a de facto political party. Its basic platform was never really enunciated, largely because its focus was so narrow. It wanted a council that would attend to the broad needs and philosophies of proponents of development. The *local*, so proudly proclaimed by the Local Government sector, became secondary in the sense that the bulk of the funds contributed to Tweed Directions were sourced outside the Shire. These external donors paid their money to obtain a regime that would, in a general sense, protect and enhance their considerable investments and their more considerable profits to be made in the Tweed.

Developers and other groups with interests in property contribute to both State and Federal elections. The difference with Local Government elections is that the elected representatives are responsible for the plans that make various types of development possible, they are personally responsible for the operation of the development application system, and they have the authority to approve or deny consent to development projects. Developments always carry some level of commercial risk. The most critical, most fundamental, commercial risk revolves around whether the project will be allowed to proceed. Councillors have it in their power to make that decision. They also have it in their power to set the conditions of approval, and the cost structure of a project may be significantly affected by these conditions. Councillors have it in their power to assist developers in their quest for profits in the most fundamental way.

The scale and importance of the Tweed Directions' experiment in directly linking developers' interests to Local Government elections needs to be assessed in relation to the funding arrangements for other councils in the 2004 election. A sample of 14 councils was chosen, and their electoral declarations to the NSW Election Funding Authority were analysed. The councils were selected to provide something of a cross-section of New South Wales councils, according to size and location. The councils analysed were: Ashfield, Auburn, Blacktown, Burwood, Eurobodalla, Gosford, Great Lakes, Lake Macquarie, Nambucca, Penrith, Port Stephens, Shoalhaven, Wingecarribee and Wollondilly.

A similar exercise was reported in the First Report. The four councils that were compared with Tweed in that report were Ballina, Byron, Coffs Harbour, and Hastings, councils with a number of similarities to Tweed. The results, described in the First Report, showed that the scale and character of the Tweed election funding base was demonstrably

different to those councils. The extended analysis of the 14 councils considered here attempts to place Tweed in a more general council context.

Table 2.4.1.1 provides some background to the levels of contributions made to the various councils by detailing the number of voters in the 2004 election. Tweed with 45,629 voters sits about the middle of the 14 sample councils in terms of number of voters. Some of the councils have voter numbers much larger than Tweed: Gosford had more than twice the number of voters, and Blacktown more than three times as many. None had levels of contributions as large as those in Tweed.

Table 2.4.1.1

Number of Voters – Sample Councils 2004.

Council	Grand total
Ashfield Council	
East Ward	4459
North Ward	5074
North/East Ward	5452
South Ward	5265
Auburn Council	
First Ward	12999
Second Ward	15012
Blacktown Council	
First Ward	28996
Second Ward	28242
Third Ward	25569
Fourth Ward	27507
Fifth Ward	24802
Burwood Council	15713
Eurobodalla Council	21322
Gosford Council	90656
Great Lakes Council	21117
Lake Macquarie Council	
East Ward	40080
North Ward	36926
West Ward	38268
Nambucca Council	N/A
Penrith Council	
East Ward	32315
North Ward	30976
South Ward	32241
Port Stephens Council	
Central Ward	12109
East Ward	11744
West Ward	11701
Shoalhaven Council	
First Ward	17586
Second Ward	17412
Third Ward	18457

Tweed Council	45629
Wingecarribee Council	25114
Wollondilly Council	
A Ward	N/A
B Ward	7295
C Ward	N/A

Source: New South Wales State Electoral Office.

The average total of the contributions made to the 14 councils in 2004 was $62,209.96. This was close to the total of contributions made to candidates for the Tweed Shire Council election in 1999, but this was to expand greatly in 2004. In the Tweed Shire Council election in 2004 the size of the contributions was at least five and a half times larger than in 1999.

Of the14 councils surveyed Blacktown, Eurobodalla and Wingcarribee were marginally above the group average with Gosford, Lake Macquarie and Shoalhaven having contributions totals much larger than the average of the 14 councils. Lake Macquarie had contributions totalling $191,763.08, the highest total of the 14 councils, but the total of the Tweed contributions was 1.8 times larger than Lake Macquarie's. The voter numbers in Lake Macquarie were two and a half times larger than the number of voters in Tweed Shire (Table 2.4.1.2 and Figure 2.4.1.1)

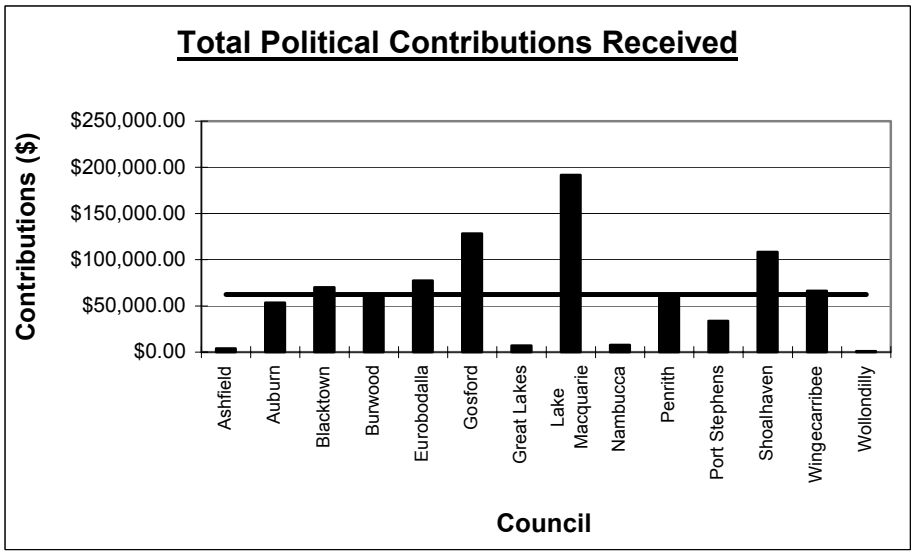
Table 2.4.1.2
Contributions Received – 2004 Elections.

Council	Contribution Received
Ashfield	$4,005.00
Auburn	$53,551.95
Blacktown	$70,150.00
Burwood	$59,311.00
Eurobodalla	$77,628.32
Gosford	$128,433.50
Great Lakes	$7,039.00
Lake Macquarie	$191,763.08
Nambucca	$7,607.70
Penrith	$61,763.75
Port Stephens	$33,780.47
Shoalhaven	$108,486.00
Wingecarribee	$66,364.65
Wollondilly	$1,055.00
TOTAL	$870,939.42
Average/Council	$62,209.96

Source: New South Wales Election Funding Authority.

Figure 2.4.1.1

Contributions Received – 2004 Elections.



Source: Adapted from New South Wales Election Funding Authority.

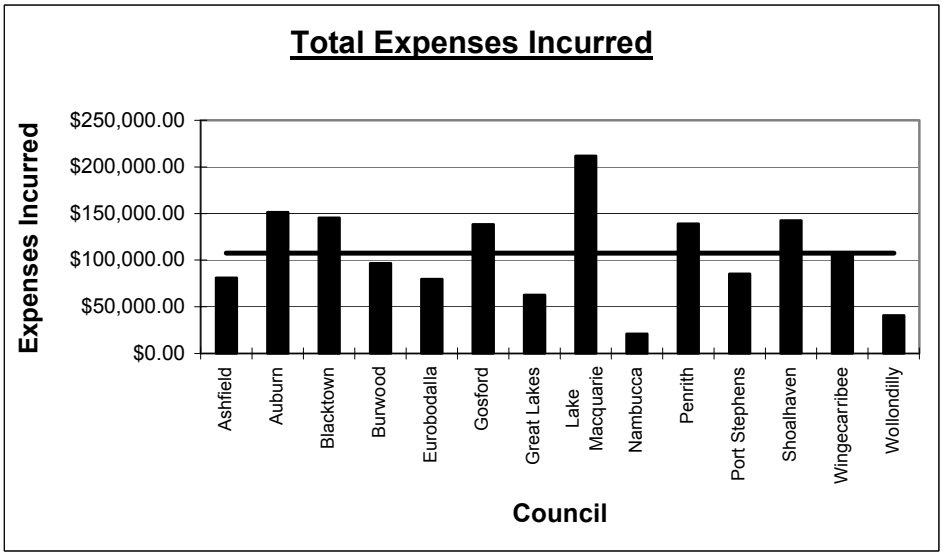
The average expenditure of the 14 councils was 1.7 times larger than the total of contributions made to candidates (Table 2.4.1.3 and Figure 2.4.1.2). Eleven of the 14 councils had expenditure levels greatly higher than the levels of contributions. Expenditure in Ashfield was 20 times greater than contributions and in Wollondilly expenditure was 40 times greater. In just three of the 14 councils contributions made up the substantial base of expenditure by candidates. In Eurobodalla contributions were 97.5% of expenditure, in Lake Macquarie 90.6%, and in Shoalhaven 76.8%. These figures suggest that in the majority of councils candidates are funded by their own money or by fund raising exercises (dinners, raffles and the like). What occurred in the Tweed Shire election, and in Eurobodalla, Lake Macquarie and Shoalhaven, was exceptional.

Table 2.4.1.3
Total Expenses Incurred – 2004 Elections.

Council	Expenses Incurred
Ashfield	$80,992.12
Auburn	$151,505.70
Blacktown	$145,677.96
Burwood	$96,922.77
Eurobodalla	$79,909.78
Gosford	$138,613.23
Great Lakes	$62,778.42
Lake Macquarie	$211,788.90
Nambucca	$20,989.06
Penrith	$139,315.71
Port Stephens	$85,303.01
Shoalhaven	$142,422.70
Wingecarribee	$106,604.90
Wollondilly	$40,736.42
TOTAL	$1,503,560.68
Average/Council	$107,397.19

Source: New South Wales Election Funding Authority.

Figure 2.4.1.2
Total Expenses Incurred – 2004 Elections.



Source: Adapted from New South Election Funding Authority.

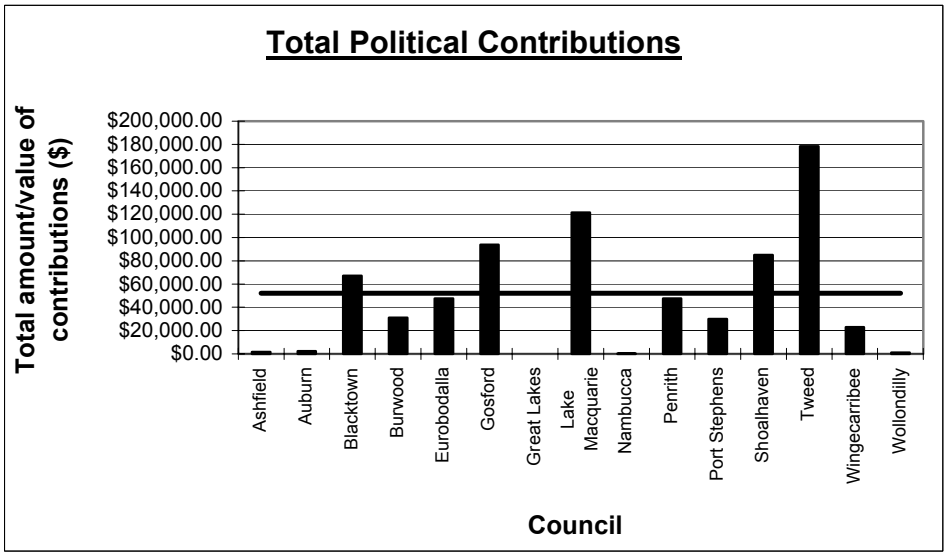
Third Party declarations have to be made when donors make contributions of $1000 to groups or $1500 to registered political parties. Table 2.4.1.4 and Figure 2.4.1.3 show that these large donations made up the major part of total contributions to candidates in Blacktown, Burwood, Eurobodalla, Gosford, Lake Macquarie, Penrith, Port Stephens, Shoalhaven, and Tweed.

Table 2.4.1.4
Total Amount or Value of Contributions – 2004 Elections.

Council	Total amount or value of contribution
Ashfield	$1,500.00
Auburn	$2,500.00
Blacktown	$67,000.00
Burwood	$30,982.00
Eurobodalla	$47,500.00
Gosford	$93,855.80
Great Lakes	$0.00
Lake Macquarie	$121,392.58
Nambucca	$300.00
Penrith	$47,600.31
Port Stephens	$30,075.77
Shoalhaven	$85,100.00
Tweed	$178,377.00
Wingecarribee	$22,939.45
Wollondilly	$1,000.00
TOTAL	$730,122.91
Average/Council	**$52,151.63**

Source: New South Wales Election Funding Authority.

Figure 2.4.1.3
Total Amount or Value of Contributions – 2004 Elections.



Source: Adapted from New South Wales Election Funding Authority.

Table 2.4.1.5 and Figure 2.4.1.4 distribute the source of contributions to candidates into three groups: donations made by individuals, those made by unincorporated organisations (including registered political parties), and corporations. Corporations donated 65% of

the total and unincorporated organisations 22%. Individual donors contributed only 13%. Donations by corporations were substantial in Eurobodalla (83% of total contributions), Gosford (66% of the total), Lake Macquarie (54% of the total) and Shoalhaven (93% of the total). In the Tweed election 98% of the total contributions came from corporations (overwhelmingly Tweed Directions). Figure 2.4.1.4 starkly shows just how exceptional the influence of Tweed Directions on the Tweed election actually was.

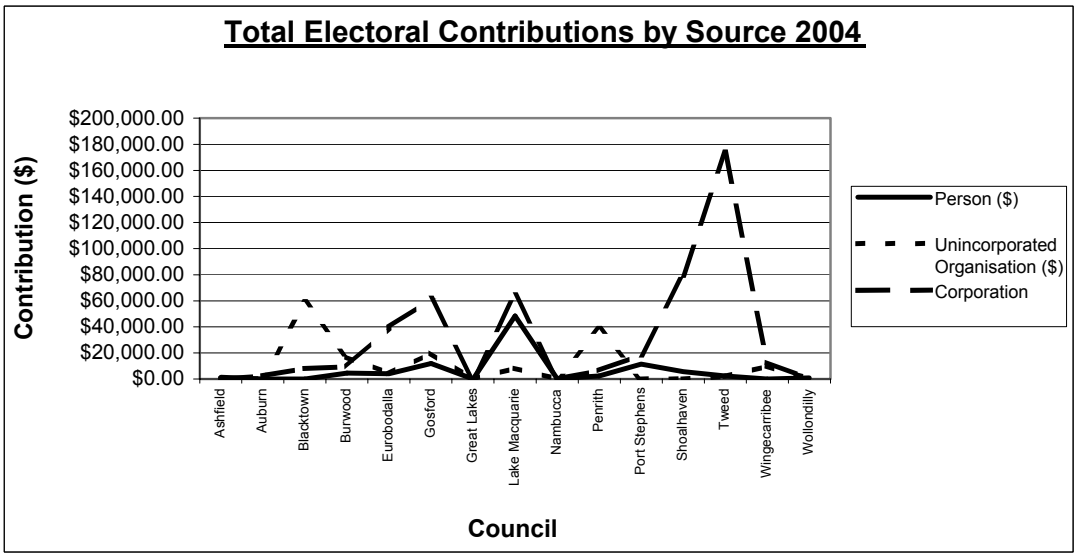
Table 2.4.1.5

Total Electoral Contributions by Source – 2004 Elections.

	Amount or value of contribution by class of contributor		
Council	**Person ($)**	**Unincorporated Organisation ($)**	**Corporation**
Ashfield	$1,500.00	$0.00	$0.00
Auburn	$0.00	$0.00	$2,500.00
Blacktown	$0.00	$59,000.00	$8,000.00
Burwood	$4,500.00	$16,982.00	$9,500.00
Eurobodalla	$4,000.00	$4,000.00	$39,500.00
Gosford	$12,000.00	$20,000.00	$61,855.80
Great Lakes	0	0	0
Lake Macquarie	$48,370.00	$8,449.24	$64,573.34
Nambucca	$300.00	0	0
Penrith	$2,496.66	$38,645.55	$6,458.10
Port Stephens	$11,370.00	$0.00	$18,705.77
Shoalhaven	$5,700.00	$0.00	$79,400.00
Tweed	$2,477.00	$2,000.00	$173,900.00
Wingecarribee	$0.00	$9,939.45	$13,000.00
Wollondilly	$1,000.00	$0.00	$0.00
TOTAL	**$93,713.66**	**$159,016.24**	**$477,393.01**
Average/Council	**$6,693.83**	**$11,358.30**	**$34,099.50**

Source: New South Wales Election Funding Authority.

Figure 2.4.1.4
Total Electoral Contributions by Source – 2004 Elections.



Source: Adapted from New South Wales Election Funding Authority.

The extent of the Tweed Directions impact on the 2004 elections is shown by the comparisons tabled in Tables 2.4.1.6 and 2.4.1.7 and in Figures 2.4.1.5 and 2.4.1.6. Across the 14 councils there is clearly some kind of parity between the size of the donations and the size of the voter population. In Tweed there is none. The scale of the contributions is hugely disproportionate to the voter population compared to the other councils. In fact on a per voter basis the contributions in the Tweed election were four times greater than the average for the 14 councils. This bespeaks the sense of desperation on the part of Tweed Directions to achieve a victory. It suggests that the contributors must have decided that their donations were critical to protecting their business interests in the Shire. The contrast between the Tweed elections and those of the other councils is demonstrated in Addendum 2.4.1.1 in which the contributions and other sources of candidates' funds are broken down into finer geographical detail.

Table 2.4.1.6

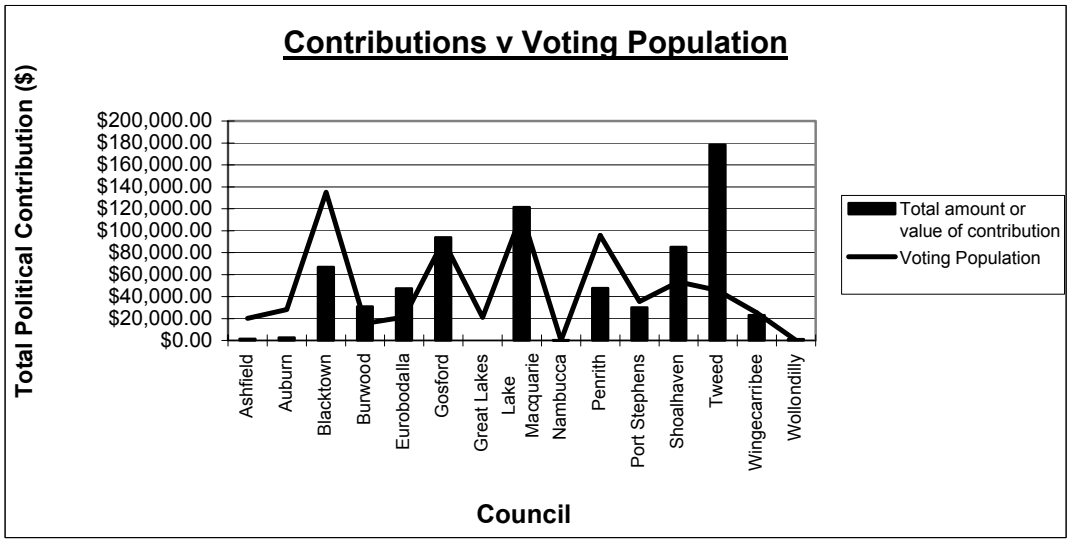
Contributions Received against Voting Population – 2004 Elections.

Council	Total amount or value of contribution	Voting Population
Ashfield	$1,500.00	20250
Auburn	$2,500.00	28011
Blacktown	$67,000.00	135116
Burwood	$30,982.00	15713
Eurobodalla	$47,500.00	21322
Gosford	$93,855.80	90656
Great Lakes	$0.00	21117
Lake Macquarie	$121,392.58	115274
Nambucca	$300.00	n.a
Penrith	$47,600.31	95532
Port Stephens	$30,075.77	35554
Shoalhaven	$85,100.00	53455
Tweed	$178,377.00	45629
Wingecarribee	$22,939.45	25114
Wollondilly	$1,000.00	n.a
TOTAL	**$730,122.91**	**702743**
Average/Council	**$52,151.63**	**46850**

Source: New South Wales Election Funding Authority.

Figure 2.4.1.5

Contributions Received against Voting Population – 2004 Elections.



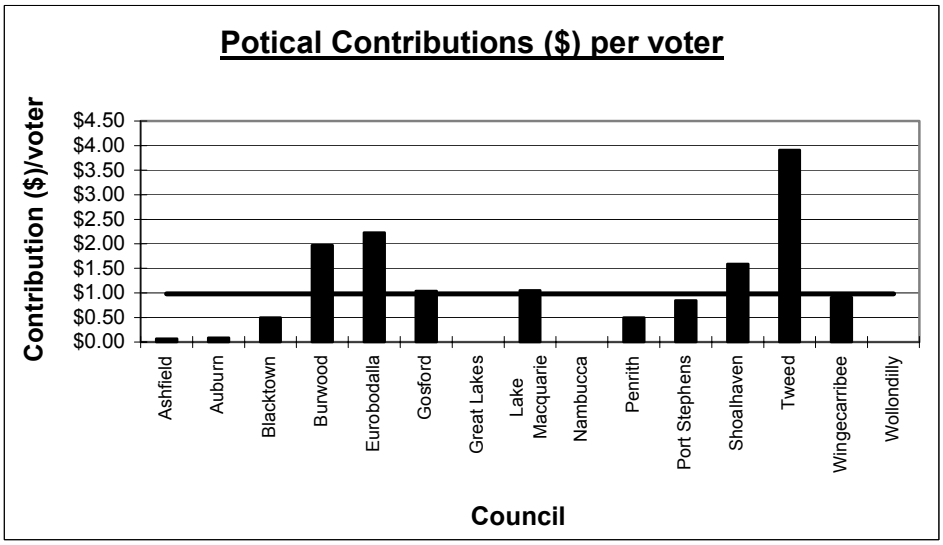
Source: Adapted from New South Wales Election Funding Authority.

Table 2.4.1.7
Contributions per Voter – 2004 Elections.

Council	$/person
Ashfield	$0.07
Auburn	$0.09
Blacktown	$0.50
Burwood	$1.97
Eurobodalla	$2.23
Gosford	$1.04
Great Lakes	$0.00
Lake Macquarie	$1.05
Nambucca	N/A
Penrith	$0.50
Port Stephens	$0.85
Shoalhaven	$1.59
Tweed	$3.91
Wingecarribee	$0.91
Wollondilly	N/A
TOTAL	**$14.71**
Average/Council	**$0.98**

Source: New South Wales Election Funding Authority.

Figure 2.4.1.6
Contributions per Voter – 2004 Elections.



Source: Adapted from New South Wales Election Funding Authority.

Table 2.4.1.8 records the major donors to candidates across the 14 councils. It is clear that where large donations (those in excess of $10,000) have been made the corporations involved have been connected to the property industry. These include companies such as Stevens Group in Eurobodalla, PW Saddington, Twin Rivers Development P/L and

Hunterland P/L in Lake Macquarie and Lucas Property Development, Elderslie Property Development and Beechwood Homes South Coast in Shoalhaven.

Table 2.4.1.8

Third Party Contributions

Council	Party	Ward	Group	3rd Party Name	Address	Amount	Date Rec'd	Part B of 3rd Party Decl.
Auburn		1st	G	Wincrow P/L	Liverpool	$2,500.00	27.5.04	No gifts/don. rec'd by 3rd party
Blacktown		1/2/3/4/5	C/C/A/C/D	Building Workers Club Ltd	Plumpton	$5,500.00	1.6.04	No gifts/don. rec'd by 3rd party
		1/2/3/4/5	C/C/A/C/D	ALP Blacktown City Committee	Schofields	$59,000.00	23.7.04	No gifts/don. rec'd by 3rd party
Burwood	Independent		D	BMC Prestige Builders P/L	Five Dock	$4,500.00	19.7.04	No gifts/don. rec'd by 3rd party
	Independent		D	Mars Australian Developments	Sydney	$2,000.00	19.8.04	No gifts/don. rec'd by 3rd party
			F	General Construction & Maintenance P/L	Rosehill	$2,000.00	13.7.04	Photocopied
	Labor		G	John Fisk	Rozelle	$3,000.00	14.10.04	Photocopied
Eurobodalla	Eurobodalla First		A & H	Bay Investment Group	Batemans Bay	$5,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Eurobodalla First		A & H	Batemans Bay Motors P/L	Batemans Bay	$2,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Eurobodalla First		A & H	GAAF Partnership	Batemans Bay	$2,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Eurobodalla First		A & H	Marsim Management P/L	Edgecliff	$5,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Eurobodalla First		A & H	Marsim Management P/L	Edgecliff	$2,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Eurobodalla First		A & H	Cameron's Timber & Hardware	Batemans Bay	$2,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Eurobodalla First		A & H	Stevens Group	Erina	$15,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Eurobodalla First		A & H	Draytene P/L	Long Beach	$2,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Eurobodalla First		A & H	Sid Pashalidis	Batemans Bay	$2,000.00	2.7.04	No gifts/don. rec'd by 3rd party
	Euro-Vision		C, D & E	Advocate Support Group P/L	Moruya	$6,000.00	28.6.04	No gifts/don. rec'd by 3rd party
	Euro-Vision		C, D & E	WK & DP Dance	Moruya	$2,000.00	22.7.04	No gifts/don. rec'd by 3rd party
	Euro-Vision		C, D & E	Stevens Group	Erina	$2,500.00	23.6.04	No gifts/don. rec'd by 3rd party
Gosford	Liberal		C	WR & CM Dobler	Terrigal	$5,000.00	3.11.04	No gifts/don. rec'd by 3rd party
	Liberal		C	Parit P/L	Peats Ridge	$2,500.00	N/A	No Declaration found
	Liberal		C	Living Choice Australia	Kincumber	$5,000.00	9.11.04	No gifts/don. rec'd by 3rd party
	Independent		D	Knash Holdings	Parramatta	$3,000.00	25.8.04	No gifts/don. rec'd by 3rd party
	Independent		D	Porthaze P/L	Erina	$2,000.00	23.7.04	No gifts/don. rec'd by 3rd party
	Central Coast First		E	Gerard O'Farrell	Picketts Valley	$2,200.00	30.8.04	No gifts/don. rec'd by 3rd party
	Central Coast First		E	Maddocks	Sydney	$200.00	26.8.04	No gifts/don. rec'd by 3rd party
	Central Coast First		E	Lianta P/L	Lindfield	$2,500.00	1.9.04	?
	Gosford Comm. Ind.		G	Kincumber Hotel	Kincumber	$5,000.00	26.7.04	No gifts/don. rec'd by 3rd party
	Gosford Comm. Ind.		G	MacMasters Beach & District Prog. Assoc.	MacMasters Beach	$4,000.00	26.7.04	No gifts/don. rec'd by 3rd party
	Gosford Comm. Ind.		G	Aust Bali Ltd	Avoca Beach	$6,028.00	26.7.04	No gifts/don. rec'd by 3rd party
	Independent		I	Harry Boyle	Woy Woy	$5,000.00	29.6.04	No gifts/don. rec'd by 3rd party
	Independent		I	SV & JA Roberts	Erina	$2,000.00	23.7.04	No gifts/don. rec'd by 3rd party
	Independent		I	Gaywood Timbers & Building Supplies	Ourimbah	$2,000.00	23.7.04	No gifts/don. rec'd by 3rd party
	Independent		I	Knash Holdings P/L	Parramatta	$3,000.00	25.8.04	No gifts/don. rec'd by 3rd party
	Independent		I	Woodport Inn	Erina	$2,051.00	N/A	No Declaration found
Lake Macquarie	The Greens	East	A	Newcastle Greens	Newcastle	$2,274.00	26.7.04	Photocopied
		East	C	Lake Real Estate P/L	Belmont	$2,077.24	28.6.04	No gifts/don. rec'd by 3rd party
		East	C	Lake Real Estate P/L	Belmont	$6,248.00	28.6.04	No gifts/don. rec'd by 3rd party
		East	C	Lake Real Estate P/L	Belmont	$2,698.00	28.6.04	No gifts/don. rec'd by 3rd party
		East	C	Lake Real Estate P/L	Belmont	$1,329.40	28.6.04	No gifts/don. rec'd by 3rd party
		East	C	Ford Communications	Newcastle	$5,720.70	22.7.04	No Declaration found
	The Greens	West	B	Newcastle Greens	Newcastle	$2,274.00	28.7.04	Photocopied
	Labor	E/N/W	B/D/C	Bruce Gibson	Morrisset	$3,300.00	17.6.04	No gifts/don. rec'd by 3rd party
	Labor	E/N/W	B/D/C	Nick Vranos, Moweno P/L	Summer Hill	$2,400.00	N/A	No Declaration found
		E/N/W	E/B/E	Fred Andriessen	Cardiff	$5,000.00	21.7.0?	No gifts/don. rec'd by 3rd party
		E/N/W	E/B/E	Ian MacDonald	Sanctuary Cove	$2,000.00	21.7.0?	No gifts/don. rec'd by 3rd party
		E/N/W	E/B/E	Duncan Hardie	Sydney	$5,000.00	21.7.0?	No gifts/don. rec'd by 3rd party
		E/N/W	E/B/E	Rosecorp	Woolloomooloo	$2,000.00	21.7.0?	No gifts/don. rec'd by 3rd party
		E/N/W	E/B/E	Roche Group P/L	Double Bay	$2,500.00	21.7.0?	No gifts/don. rec'd by 3rd party
		E/N/W	E/B/E	Hammersmith Management P/L	Double Bay	$5,000.00	21.7.0?	No gifts/don. rec'd by 3rd party
	Hunter Citizens	E/N/W	D/C/A	PW Saddington	Merewether	$31,920.00	30.8.04	No gifts/don. rec'd by 3rd party
	Hunter Citizens	E/N/W	D/C/A	Buttaba Hills P/L	Morpeth	$15,000.00	7.7.04	No gifts/don. rec'd by 3rd party
	Hunter Citizens	E/N/W	D/C/A	Twin Rivers Developments P/L	Raymond Terrace	$10,000.00	26.8.04	No gifts/don. rec'd by 3rd party
	Hunter Citizens	E/N/W	D/C/A	Hunterland P/L	Morpeth	$10,000.00	7.7.04	No gifts/don. rec'd by 3rd party
	Hunter Citizens	E/N/W	D/C/A	Candidate	?	$6,150.00	N/A	?
	Hunter Citizens	E/N/W	D/C/A	Belkin Constructions P/L	Edgeworth	$2,000.00	9.9.04	No gifts/don. rec'd by 3rd party
Penrith	Liberal	East	C	Greater Sydney Forum	Mt Druitt Village	$13,200.00	N/A	No Declaration found
	The Greens	East	D	Nepean Greens C/- Allan Quinn - Convenor	Cambridge Park	$3,251.46	10.8.04	Photocopied
	Labor	East	E	ALP - St Marys Branch	Claremont Meadows	$14,983.63	6.12.04	Photocopied

		North	B	King & Lewis P/L	Blaxland	$6,458.10	26.7.0?	Photocopied
	The Greens	North	D	Nepean Greens C/- Allan Quinn - Convenor	Cambridge Park	$4,058.46	23.7.04	Photocopied
	The Greens	South	C	Nepean Greens C/- Allan Quinn - Convenor	Cambridge Park	$3,152.00	27.7.0?	Photocopied
Port Stephens		East	C	Project Plan	Anna Bay	$2,500.00	19.7.04	No gifts/don. rec'd by 3rd party
		East	C	Sylvia Robinson	Anna Bay	$5,000.00	16.7.04	No gifts/don. rec'd by 3rd party
		East	E	Ruwaldi P/L	Soldiers Point	$3,904.00	27.8.04	Photocopied
		East	D	Liberal Party - Karuah Branch	Raymond Terrace	$6,001.47	N/A	No Declaration
		West	C	Liberal Party - Karuah Branch	Raymond Terrace	$4,800.00	29.11.04	No gifts/don. rec'd by 3rd party
Shoalhaven	Independent	1st	B	Greg Todd, In-Ja-Ghoondji Trust	Tomerong	$5,700.00	N/A	No gifts/don. rec'd by 3rd party
		1st/2nd/3rd	E/A/B	Shoalhaven Comm. Action Inc. (John Tate)	Nowra	$12,759.00	17.5.04	No gifts/don. rec'd by 3rd party
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Lucas Property Development	East Sydney	$12,000.00	11.5.04	?
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Elderslie Property Development	Sydney	$10,000.00	22.7.04	No gifts/don. rec'd by 3rd party
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Beechwood Homes South Coast	Nowra	$10,000.00	28.7.04	No gifts/don. rec'd by 3rd party
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Nowra Park P/L	Castle Hill	$2,000.00	N/A	?
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Dolphin Point Development	Dolphin Point	$5,000.00	27.7.04	?
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Manildra Group of Companies	Auburn	$2,000.00	26.7.04	No gifts/don. rec'd by 3rd party
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Tipalea Partners P/L	Sydney	$10,000.00	22.7.04	No gifts/don. rec'd by 3rd party
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	WD P/L	Auburn	$20,000.00	28.7.04	No gifts/don. rec'd by 3rd party
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Stevens Group	Erina	$2,000.00	5.8.04	No gifts/don. rec'd by 3rd party
	Shoalhaven Ind. Gp	1st/2nd/3rd	F/C/C	Stockland	Sydney	$5,000.00	23.7.04	No gifts/don. rec'd by 3rd party
Wingecarribee	Labor		B	ALP - Southern Highlands Branch	Bowral	$5,939.45	11.8.4	Nil
			D	Feli Pastoral Co P/L	Exeter	$2,000.00	28.7.04	No Part B
			D	W Mcl Carpenter & Associates	Mittagong	$1,250.00	28.7.04	No Part B
			D	Bowral Land Sales	Mittagong	$1,250.00	28.7.04	No Part B
			D	Iloma & Chamae P/L	Bowral	$2,500.00	28.7.04	No Part B
			D	Lyntton Kettle Constructions	Bowral	$2,000.00	28.7.04	No Part B
			D	Copeland Developments P/L	Bowral	$2,000.00	28.7.04	No Part B
			D	Mittagong Chamber of Commerce	Mittagong	$4,000.00	28.7.04	No Part B
			D	Genner Constructions P/L	Braemar	$2,000.00	28.7.04	No Part B
			D	Angelo Magiotto	Preston	$1,600.00	N/A	No Part B
			D	Geoff Harvey	Berrima	$1,600.00	N/A	No Part B

Source: Adapted from New South Wales Election Funding Authority.

Some sense of the way the large donations related to groups of candidates is given in Table 2.4.1.9. It shows that, with the exception of Shoalhaven, the contributions of corporations to groups of candidates across the 14 councils were relatively modest. This was not the case with Tweed is misleading. Groups supported by Tweed Directions received substantial sums. The listing of independents for Tweed is misleading. As shown in the First Report the corporate donations to these "independents" were almost entirely made by Tweed Directions. These independents were very dependent on Tweed Directions who funded their campaigns and masterminded the overall campaign of the Tweed Directions team. The evidence before the Inquiry, though limited, does not suggest that in other places, where reasonably large corporate donations were made (Gosford, Lake Macquarie, Shoalhaven, Eurobodalla), there was the same degree of organisation and control over the candidates as in Tweed. The evidence, however, does suggest that property interests in a number of councils were active in the 2004 elections in a number of councils.

Table 2.4.1.9

Contributions of More than the Prescribed Amount – 2004 Elections.

Council	Name	Ward	Groups	Amount or value of contribution by class of contributor		
				Person ($)	Unincorporated Organisation ($)	Corporation ($)
Ashfield		South	A	$1,500.00	Nil	Nil
Auburn		First	G	Nil	Nil	$2,500.00
Blacktown		1st/2nd/3rd/4th/5th Wards	C,C,A,C&D	Nil	$59,000.00	$8,000.00
Burwood	Independent		D	Nil	Nil	$9,500.00
			F	$1,500.00	$2,000.00	Nil
	Labor		G	$3,000.00	$14,982.00	Nil
Eurobodalla	Eurobodalla First		A & H	$2,000.00	$4,000.00	$31,000.00
	Euro-Vision		C, D & E	$2,000.00	Nil	$8,500.00
Gosford	Liberal		C	$5,000.00	Nil	$7,500.00
	Independent		D	Nil	Nil	$6,250.00
	Central Coast First		E	Nil	Nil	$22,176.00
	Labor		F	Nil	$20,000.00	$1,500.00
	Gosford Community Independents		G	Nil	Nil	$15,028.00
	Independent		I	$7,000.00	Nil	$9,401.80
Lake Macquarie		East	A	Nil	$2,274.62	Nil
		East	C	Nil	Nil	$18,073.34
		West	B	Nil	$2,274.62	Nil
		East/North/West Wards	B/D/C	$3,300.00	$3,900.00	Nil
		East/North/West Wards	D/C/A	$38,070.00	Nil	$37,000.00
		East/North/West Wards	E/B/E	$7,000.00	Nil	$9,500.00
Nambucca			Court	$300.00	Nil	Nil
Penrith	Liberal	East	C	Nil	$13,200.00	Nil
	The Greens	East	D	$2,163.33	$3,251.46	Nil
	Labor	East	E	Nil	$14,983.63	Nil
		North	B	Nil	Nil	$6,458.10
	The Greens	North	D	Nil	$4,058.46	Nil
	The Greens	South	C	$333.33	$3,152.00	Nil
Port Stephens		East	A	$1,370.00	Nil	Nil
		East	C	$5,000.00	Nil	$2,500.00
		East	D	Nil	Nil	$6,001.47
		East	E	Nil	Nil	$3,904.30
		West	C	Nil	Nil	$6,300.00
		West	U: Jordan	$5,000.00	Nil	Nil
Shoalhaven	Independent	First	B	$5,700.00	Nil	Nil
	Independent	First	D	Nil	Nil	$1,400.00
		1st/2nd/3rd Wards	F/C/C	Nil	Nil	$78,000.00
Tweed	Max Boyd Group		A	$2,477.00	Nil	Nil
	Independent		D	Nil	Nil	$16,500.00
	Independent		F	Nil	Nil	$24,400.00
	Independent		H	Nil	Nil	$17,200.00
	Independent		I	Nil	Nil	$23,700.00
	Independent		K	Nil	Nil	$13,400.00
	Independent		L	Nil	Nil	$17,650.00
	Independent		M	Nil	Nil	$22,050.00
	Labor		O	Nil	$2,000.00	Nil
	Independent		P	Nil	Nil	$23,000.00
	Independent		Q	Nil	Nil	$16,000.00
Wingecarribee	Labor		B	Nil	$5,939.45	Nil
			D	Nil	$4,000.00	$13,000.00
Wollondilly		B	U: Hardacre	$500.00	Nil	Nil
		C	A	$500.00	Nil	Nil

Source: Adapted from New South Wales Election Funding Authority.

2.4.2 Electoral Finance Law

The structure, organisation, and funding system introduced by Tweed Directions promises to change the way in which power is won in Local Government elections. Any

entity with sufficient resources that wishes to gain control of a council, for whatever reason, could follow the Tweed Directions template. All that is needed is a small band of professional campaigners, and a sufficient number of related entities that share a need to have people of their own persuasion in control of a council. Added to this the system requires a number of people who would be willing to stand as candidates under conditions defined by the organising body. The Tweed Directions' model threatens to change the nature of Local Government elections. In this part some of the rules and regulations governing election funding are reviewed to place the Tweed Directions' model in perspective.

At all levels of government in Australia there is a legal obligation on candidates to reveal sources of funds over a prescribed amount. This is done, in the case of New South Wales Local Government elections, by submitting a return to the Election Funding Authority. The declarations are made after the election, and then processed by the Authority. With 152 councils in the State, and with the number of candidates in a single council election possibly running to over a hundred, the information is not required and subsequently does not become available for public scrutiny until many months after an election. If, as was the case with the Tweed election, the public are unaware of the scale and nature of donations to the candidates they will be voting in ignorance.

Donations are generally seen as gifts of sums of money to the candidates. It is possible, however, that donations or gifts can take other forms, such as payments in kind and the discharging of debts. The New South Wales system requires details of the number and monetary details of contributions. Thresholds are defined above which the source of the donations have to be revealed. In the New South Wales system donations of $200 to a candidate, $1000 to a group, or $1500 to a political party have to be identified. The system is designed to prevent candidates being funded through anonymous donations.

The rationale for requiring donations to be declared[6] is primarily based on the public's right to know what groups or individuals are supporting candidates. The principle is fine, but the system prevents the public from exercising its rights in any practical way. For the public to make decisions on who they might vote for, on the basis of knowing where the financial assistance to the candidates is coming from, they must have the information before they vote. Instead they get it several months after they have cast their votes. In an election where candidates deliberately mislead or hide their financial links (as was the case with the Tweed Shire election in 2004) the democratic principles that underlie the public's right to know are flaunted and mocked by the system.

A second rationale for requiring candidates to make declaration is that disclosure might prevent or reduce the effect of donations on influencing political decision-making. In the case of the 2004 Tweed Shire elections candidates acted in a manner designed to avoid revealing their source of funds. The Tweed Directions' candidates did not acknowledge in any way their obligations to Tweed Directions in terms of their funding bases. Later, they used the specious logic that because they did not know the identity of individual donors to Tweed Directions there was no need to make any reference to the group that funded almost all the costs of their campaign. At Federal or State elections it is possible

[6] See Rachel Callinan *Election Finance Law: Public Funding, Donations and Expenditure* NSW Parliament Briefing Paper 15/2001 provides the background to the issues discussed here.

to argue that at least some donors contribute to parties or candidates for purely altruistic reasons. At Local Government elections altruism as the motive for supporting candidates is less easy to substantiate because Local Government politicians have powers over such a very limited range of policy areas.

Generally most of the decisions made by councillors will not lead to individuals or bodies gaining monetary rewards. There is one significant exception to this generalisation. Councillors have strong powers over the planning and development of property. Since property is the source of wealth of many people in Australia councillors have it in their power to enrich firms or individuals by their decisions, and the level of enrichment can be very substantial. There is every reason why developers and others in the property industry might want to influence the decision-making of councillors. That influence need not extend to a one-on-one relationship between an individual developer and individual councillors (although there are plenty of examples of where such relationships have occurred). More subtly, and less dangerously, proponents of development might desire to have a majority of councillors in a council compliant with their general desire to invest and develop in the council area. The level and type of developments in any area are often controversial subjects, and often influence the way people vote at the council elections. Although pro- and anti-development themes were well canvassed in the 2004 Tweed Shire elections a large proportion of the population did not know the kinds of links that certain candidates had with the property industry. The fact that a commanding pool of funds was garnered from development interests, and was allocated to designated candidates, was not public knowledge casts doubts over the probity of the electoral process.

Disclosure laws are meant to preserve the integrity of the electoral process. They are meant to prevent any possible corruption of the process through donations. This concept extends beyond the actuality of corruption to the imputation or perception of corrupting mechanisms. The example of the 2004 Tweed Shire elections illustrates just how ineffective the current disclosure system is in providing the transparency that allows voters to make informed decisions, and maintains public confidence in the system. As Cass and Burrows[7] point out "the question of the influence of campaign contributions upon political outcomes is really unanswerable. However, what is not irrelevant is the *perception* that the possibility that money can influence politics is enough to cause a different sort of problem for democracy, and that is the problem of a general disillusionment with the political process".

The Tweed Directions model achieved technical compliance with the electoral laws, but was specifically designed to evade the spirit of the laws.

It is doubtful that a practical system could be devised that would restrict or prevent certain bodies from influencing an election outcome so that they may achieve a material benefit by restricting the size and source of donations, or by outlawing certain donations altogether. There are many ways in which the real source of a donation can be hidden. A simple means is for a fourth party to provide the funds to a third party that has no apparent connections with the donor and who acts as a proxy for his or her interests. It is

[7] Deborah Z Cass and Sonia Burrows *Commonwealth Regulation of Campaign Finance-Public Funding, Disclosure and Expenditure Limits,* Sydney Law Review Vol. 22, p.451

an open question as to whether restrictions are a viable way to go when dealing with processes that sit at the very roots of a democratic system. A former Prime Minister, Paul Keating, has argued that property developers should be banned from giving political donations to municipal candidates and political parties[8]. The feasibility and practicality of such a ban has been broadly questioned. The solution most hopefully lies with greater transparency and timeliness in the disclosure system.

Another approach that has been floated is the placing of limits on the election expenditure of candidates. The huge pool of money available to the Tweed Directions' candidates in the 2004 Tweed Shire election undoubtedly gave them a strong advantage. Expenditure limits would create a level of financial equality for candidates. It would also put a break on the escalating costs of elections, and strengthen the ability of less well resourced groups or individuals to contest elections. Equality stands besides transparency and accountability as the key principles of regulating elections. Containing electoral expenditure would reduce the reliance on donations, and hence the potential for corruption. In New Zealand candidates can only spend a stipulated amount on their personal campaigns.

The Supreme Court of Canada in 1997 argued the case of equity and fairness in electoral processes as being a principal base of democracy (Cass and Burrows p.459). Their view implied that spending limits are a necessity.

[8] Callinan, p. 17.

In some models of representative democracy unlimited campaign expenditure might be seen as an integral part of the communication between the representatives and the represented in order for the latter to directly choose the former. However it has also been argued that some models of representative democracy countenance restrictions on expenditure for the very reason that electoral choice cannot be made in the face of unlimited campaign expenditure because it has the potential to compromise the integrity of the political process.[58] The Supreme Court of Canada has, in principle, recognised the validity of State referendum expenditure limits as a means of ensuring electoral fairness because it was a key component of political equality under representative democracy.[59] Quoting extensively from the Lortie Commission, established to investigate Canadian electoral systems, it said:

> If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate. … To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard. Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties.[60]

58 A species of this argument was accepted by Brennan J in ACT TV when he upheld a prohibition on election advertising as a form of reasonable regulation: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 159–161.

59 *Libman v Quebec,* 1997 DLR LEXIS 1511: 151 D.L.R. 4th 385. Note however that the particular legislative limits under consideration here were struck down as disproportionate to their stated objective.

60 Id at ¶47.

It is worth noting that the implementation of Third Party disclosure in New South Wales followed on criticism of the disclosure scheme, by the Independent Commission Against Corruption. The ICAC Inquiry dealt with dubious land deals and political donations in Tweed Shire. It is ironic that a new, sophisticated system for gaining advantages at the council level should have been pioneered in Tweed Shire a decade and a half after the ICAC Inquiry.

In 1979 the Wran Government constituted the NSW Parliament Joint Select Committee Upon Public Funding of Election Campaigns to work out how to introduce public funding for elections. This led to the Election Funding Act 1981, and the establishment of the Election Funding Authority. Public funds under the new Act were to supplement private funds rather than replace them. The Act did not impose upper limits on election spending

because it was considered too difficult to implement them; candidates could resort to front organisations to spend sums on advertising and promoting a candidate in excess of the limits imposed. In the Tweed Shire election of 2004 Tweed Directions spent more on its parallel campaign than the collective campaign expenses of the nine groups that they had created and funded.

There have been suggestions made by members of the Greens Party that public funding should be introduced at the Local Government level as a means of countering the impacts of groups like Tweed Directions. There are practical reasons for not following this idea, the major one being the scale of Local Government (152 councils and many hundreds of candidates). The State system of public funding allocates funding according to a Party's state-wide vote in the Legislative Council (through the Central Fund) and an apportionment (through the Constituency Fund) divided equally among contested Legislative Assembly constituencies. At the heart of the State system are allocations to parties based on the number of votes they attract. In Local Government elections registered Parties do contest elections but only in certain councils and only in certain elections. The majority of elections are not contests between registered Parties. Rather, the majority of groups standing in council elections represent various local interest groups. In Tweed Shire the ALP ran an accredited team for the first time, and the evidence suggests that the Liberal Party has never run such a team in the Tweed Shire elections.

There is sense in the proposition that electoral spending should bear a relationship to the significance of the election. Federal elections are clearly of major importance because the Federal Government has to manage Australia's relationships with the rest of the world, its economy, and a range of structures and services that define the social and environmental features of the nation. The State elections are of significant importance because the State Parliaments govern matters of education, health, transport, policing and a range of other areas. Local Government in comparison has a very limited range of responsibilities, and the term *Local* implies that the issues considered at an election are primarily of concern to the communities of each council. These issues generally are not of such moment that they warrant the sums of money attached to the Tweed Shire election of 2004, and now beginning to appear in other councils.

Large levels of electoral funding in Local Government elections are almost entirely related to support of candidates by proponents of property development. As noted above councils play a central and critical role in determining the feasibility and commercial success of developments. Instances of proven corruption in Local Government have almost entirely been associated with property development. Most of these instances have involved issues related to zoning or rezoning decisions and decisions made in the development consent process. These instances usually involve one-on-one relationships between a developer and one or more councillors (or staff). The Tweed Shire elections of 2004 introduced another element. The logic of the Tweed Directions' scheme involved collecting a sufficiently large pool of money to support candidates who could be relied on to adopt a pro-development policy regime. Many developers and others associated with the property industry donated to the cause. Their donations did not imply that councillors necessarily would be involved with individual developers or individual projects. In fact Tweed Directions attempted to keep the knowledge of who donated what to the pool

hidden from the candidates[9]. What lay behind the Tweed Directions' system was an implicit guarantee that the goals of developers would be supported in general, if not in the particular. Effectively, the implicit guarantee might be interpreted by proponents of development as an insurance policy. The donor who made the largest donation to Tweed Directions ($80,000) also holds the largest areas of land that will be developed in Tweed Shire over coming years. Compared to the hundreds of millions of dollars at stake, an investment at the effective rate of $20,000 a year over the life of a council can be considered a small and sensible insurance policy.

There is a more radical solution controlling the problem of disproportionate electoral expenditure at the Local Government level, based on large contributions by entities that expect to gain materially from them, is to remove or substantially reduce the capacity of councillors to benefit their donors by taking away or curtailing the authority of councillors to give consent to major development projects.

[9] This was a specious and cynical ruse because the source of the donations would be revealed publicly after the Election Funding Authority had processed the declarations. As well, the Tweed business community is relatively small and organisers of Tweed Directions, donors, and candidates would inevitably interact with each other, and many were friends and in regular social contact with each other. Since the Tweed Directions' candidates received almost all their funds from the pool it beggars belief that they were totally incurious about who the donors were. Further, the size of the pool was so large and the number of developers active in Tweed Shire was so small that a person of the most limited intellect or the most unsuspecting mind would have known what was going on.

Section 2 Addendum 2.4.1.1

The Council of the Municipality of Ashfield

Ward	Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
East Ward	A	Nil	Nil	Nil		Nil	$200	No	Nil	$5,008.55
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$4,544.00
	C	Nil	$635.00	Nil		$635.00	$1,000	No	$635.00	$705.00
	D	Nil	Nil	Nil		Nil	$200	No	Nil	$3,488.08
	U: Allison	Nil	Nil	Nil		Nil	$200	No	Nil	$388.90
North Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$880.00
	B	Nil	$75.00	Nil		$75.00	$200	No	Nil	$4,500.00
	C	Nil	Nil	Nil		Nil	$1,000	No	Nil	$242.00
	D									
	E	Nil	Nil	Nil		Nil	$1,000	No	Nil	$17,766.21
North/East Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$1,295.00
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$2,065.00
	C	Nil	Nil	Nil		Nil	$1,000	No	Nil	$5,461.14
	D	Nil	$635.00	Nil		$635.00	$1,000	No	$635.00	$715.00
	E	Nil	Nil	Nil		Nil	$1,000	No	Nil	$8,700.38
	F	Nil	Nil	Nil		Nil	$200	No	Nil	$2,846.82
South Ward	A	$1,500.00	$500.00	Nil		$2,000.00	$1,000	No	$2,000.00	$14,408.32
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$1,956.72
	C	Nil	$220.00	Nil		$220.00	$1,000	No	incomplete	incomplete
	D	Nil	Nil	Nil		Nil	$200	No	incomplete	incomplete
	E	Nil	$735.00	Nil		$735.00	$1,000	No	$735.00	$701.00
	F	Nil	Nil	Nil		Nil	$1,000	No	Nil	$5,320.00
	U: Mahmoud									
	TOTAL	$1,500	$2,165	$0		$3,665			$4,005.00	$80,992.12

Auburn Council

Ward	Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
First Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$8,944.00
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$2,013.94
	D	Nil	Nil	Nil		Nil	$1,000	No	Nil	$6,734.04
	F	Nil	Nil	Nil		Nil	$1,000	No	Nil	$8,026.00
	G	$2,500.00	$4,050.00	Nil		$6,550.00	$1,000	Yes	$6,550.00	$14,294.82
	H	Nil	Nil	Nil		Nil	$1,000	No	Nil	$8,071.00
	I	Nil	Nil	Nil		Nil				
	U: O'Brien	Nil	Nil	Nil		Nil				
	U: Velupillai	Nil	Nil	Nil		Nil	$200	No	Nil	$1,000.00
	U: MacDonald	Nil	$210.00	Nil		$210.00	$200	No	$210.00	Nil
Second Ward	B	Nil	$3,555.00	Nil		$3,555.00	$1,000	No	$3,555.00	$4,305.00
	C	Nil	Nil	Nil		Nil	$1,000	No	Nil	$3,120.08
	D	Nil	Nil	Nil		Nil	$1,000	No	Nil	$8,071.00
	E	Nil	$669.00	Nil		$669.00	$1,000	No	$669.00	$150.00
	G	Nil	Nil	Nil		Nil	$1,000	No	Nil	$1,663.05
First/Second Ward	C/ F	Nil	$1,407.00	Nil	$529.00	$1,936.00	$1,500	No	$1,936.00	$4,575.00
	J/A	Nil	$6,440.00	$17,691.95		$24,131.95	$1,000	No	$24,131.95	$21,187.60
	E/H	Nil	$16,500.00	Nil		$16,500.00	$200	No	$16,500.00	$59,350.17
	TOTAL	$2,500	$32,831	$17,692	$529	$53,552			$53,551.95	$151,505.70

Blacktown City Council

Ward	Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
First Ward	A	Nil	$1,000.00	Nil		$1,000.00	$1,000	No	$1,000.00	$5,896.50
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$1,907.11
Second Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$5,440.85
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$6,288.00
	D	Nil	Nil	Nil		Nil	$1,000	No	Nil	$6,188.39
	E	Nil	$2,000.00	Nil		$2,000.00	$1,000	No	$2,000.00	$8,918.00
Third Ward	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$7,633.00
	C	Nil	Nil	Nil		Nil	$1,000	No	Nil	$5,562.18
	U: Wilson	Nil	Nil	Nil		Nil	$200	No	Nil	$1,800.00
Fourth Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$4,989.26
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$7,340.90
Fifth Ward	A									
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$3,620.00
	C	Nil	Nil	Nil		Nil	$1,000	No	Nil	$3,363.55
	E	Nil	Nil	Nil		Nil	$200	No	Nil	$8,080.52
	F	Nil	Nil	Nil		Nil	$1,000	No	Nil	$6,567.00
1st/2nd/3rd/4th/5th	C/C/A/C/D	$67,000.00	$150.00	Nil		$67,150.00	$1,000	Yes	$67,150.00	$62,082.70
	TOTAL	$67,000	$3,150	Nil		$70,150			$70,150.00	$145,677.96

Burwood Council

Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
A	Nil	$6,315.00	$541.00	$1,535.00	$8,391.00	$1,500	No	$8,391.00	$7,539.00
B	Nil	Nil	$14,168.00		$14,168.00	$200	No	$14,168.00	$17,244.01
C	Nil	Nil	Nil		Nil	$200	No	$490.00	$1,871.00
D	$9,500.00	$1,000.00	$1,030.00		$11,530.00	$1,000	Yes	$11,530.00	$11,601.00
E	Nil	Nil	Nil		Nil	$1,000	No	Nil	$4,138.00
F	$3,500.00	Nil	Nil		$3,500.00	$1,000	Yes	$3,500.00	$8,969.57
G	$17,982.00	$3,250.00	Nil		$21,232.00	$1,000	Yes	$21,232.00	$45,560.19
TOTAL	$30,982.00	$10,565.00	$15,739.00	$1,535.00	$58,821.00			$59,311.00	$96,922.77

Eurobodalla Shire Council

Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
A/H	$37,000.00	$11,935.00	-$1,141.00	Nil	$47,794.00	$1,500	Yes	$47,794.00	$44,659.00
B	Nil	$2,150.00	Nil	Nil	$2,150.00	$1,500	No	$2,150.00	$1,897.90
C/D/E	$10,500.00	$10,098.00	Nil	Nil	$20,598.00	$1,500	Yes	$20,598.00	$19,288.57
F/G	Nil	Nil	Nil	Nil	Nil	$1,500	No	Nil	$6,782.00
I	Nil	$210.00	$2,215.00		$2,425.05	$200	No	$2,425.00	$2,686.00
J	Nil	$3,746.32	Nil	Nil	$3,746.32	$1,500	No	$3,746.32	$3,504.31
U: Summers	Nil	$915.00	Nil		$915.00	$200	No	$915.00	$1,092.00
TOTAL	$47,500.00	$29,054.32	$1,074.00	Nil	$77,628.37			$77,628.32	$79,909.78

Gosford City Council

Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
A	Nil	$2,000.00	Nil		$2,000.00	$1,000	No	$2,000.00	$4,792.00
B	Nil	$494.00	Nil		$494.00	$1,000	No	$494.00	$2,786.35
C	$12,500.00	$4,500.00	Nil		$17,000.00	$1,000	Yes	$17,000.00	$16,408.31
D	$6,250.00	$5,330.00	Nil		$11,580.00	$1,000	Yes	$11,580.00	$12,101.34
E	$22,176.00	$16,000.00	Nil	$1,575.00	$39,751.00	$1,500	Yes	$39,751.00	$40,873.00
F	$21,500.00	$8,100.00	Nil		$29,600.00	$1,000	No	$29,600.00	$30,627.00
G	$15,028.00	$8,450.00	$1,732.00	$925.00	$26,135.00	$1,500	Yes	$26,135.00	$27,143.00
H	Nil	Nil	Nil		Nil	$1,000	No	Nil	$934.00
I	$16,401.80	$4,910.00	$686.60		$21,311.80	$1,000	Yes	incomplete	incomplete
J	Nil	$1,873.50	Nil		$1,873.50	$1,000	No	$1,873.50	$2,948.23
TOTAL	$93,856	$51,657.50	$2,418.60	$2,500.00	$149,745.30			$128,433.50	$138,613.23

Great Lakes Council

Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
A	Nil	$1,337.00	$955.00		$2,292.00		No	$2,292.00	$9,646.00
B	Nil	$850.00	Nil		$850.00		No	$850.00	$1,693.65
C	Nil	Nil	Nil		Nil		No	Nil	$21,545.51
D	Nil	Nil	Nil		Nil	$1,000	No		
E	Nil	$900.00	Nil		$900.00		No	$900.00	$5,125.61
F	Nil	Nil	$2,547.00		$2,547.00		No	$2,547.00	$9,333.60
G	Nil	Nil	Nil		Nil		No	Nil	$1,369.87
U: Baldwin	Nil	Nil	Nil		Nil		No	Nil	Nil
U: Patterson	Nil	$450.00	Nil		$450.00		No	$450.00	$2,656.00
U: McCaskie	Nil	Nil	Nil		Nil		No	Nil	$7,009.00
U: Hennelly	Nil	Nil	Nil		Nil		No	Nil	$940.00
U: Laughton	Nil	Nil	Nil		Nil		No	Nil	$50.00
U: Presland	Nil	Nil	Nil		Nil		No	Nil	$2,844.87
U: Richardon	Nil	Nil	Nil		Nil		No	Nil	$50.00
U: McCarthy	Nil	Nil	Nil		Nil		No	Nil	Nil
U: Hutchinson	Nil	Nil	Nil		Nil		No	Nil	$514.31
TOTAL	$0	$3,537.00	$3,502.00		$7,039.00			$7,039.00	$62,778.42

Lake Macquarie City Council

Ward	Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
East Ward	A	$2,274.62	Nil	Nil		$2,274.62	$1,000	Yes	$2,274.00	$2,274.00
	C	$18,073.34	$1,032.90	Nil		$19,106.24	$1,000	Yes	$19,106.24	$14,799.76
	U: Lee	Nil	$650.00	Nil		$650.00	$200	No	$650.00	Nil
North Ward	A	$2,274.62	Nil	Nil		$2,274.62	$1,000	Yes	$2,274.00	$2,274.00
	U: Mihell	Nil	Nil	Nil		Nil	$1,000	No	Nil	$763.00
	U: Smith	Nil	$650.00	Nil		$650.00	$200	No	$650.00	Nil
West Ward	B	$2,274.62	Nil	Nil		$2,274.62	$1,000	Yes	$2,274.00	$2,274.00
	D	Nil	Nil	Nil		Nil	$1,000	No	Nil	$4,163.90
	U: Steele	Nil	$950.40	$205.00		$1,155.40	$1,000	No	$1,155.40	$533.30
	U: Roffey	Nil	$650.00	Nil		$650.00	$200	No	$650.00	Nil
East/North/West Wards	B/D/C	$7,200.00	$9,342.50	$9,059.60		$25,602.10	$1,000	Yes	$25,602.00	$21,951.00
	D/C/A	$75,070.00	$19,679.00	$10,678.00	$1,500.00	$106,927.00	$1,500	Yes	$106,927.00	$93,553.00
	E/B/E	$16,500.00	$8,679.88	$5,020.56		$30,200.44	$1,000	Yes	$30,200.44	$69,202.94
	TOTAL	$123,667.20	$41,634.68	$24,963.16	$1,500.00	$191,765.04			$191,763.08	$211,788.90

Nambucca Shire Council

Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
Hoban	Nil	$50.00	Nil		$50.00	$200	No	$50.00	$1,613.00
Dunne	Nil	$510.00	$748.70		$1,258.70	$200	No	$1,258.70	$1,772.60
Ainsworth	Nil	Nil	Nil		Nil	$200	No	Nil	$1,098.00
Nash	Nil	Nil	Nil		Nil	$200	No	Nil	$1,362.20
Pinch	Nil	Nil	Nil		Nil	$200	No	Nil	$130.00
Willey	Nil	Nil	Nil		Nil	$200	No	Nil	Nil
Carpararo	Nil	Nil	Nil		Nil	$200	No	Nil	Nil
Moran	Nil	Nil	Nil		Nil	$200	No	Nil	$538.00
Harding	Nil	Nil	Nil		Nil	$200	No	Nil	$666.50
Duffus	Nil	Nil	Nil		Nil	$200	No	Nil	$1,180.00
Flack	Nil	$1,830.00	$3,879.00		$5,709.00	$200	No	$5,709.00	$6,453.00
Tartleton	Nil	Nil	Nil		Nil	$200	No	Nil	$2,213.80
South	Nil	$200.00	Nil		$200.00	$200	No	$200.00	$1,248.00
Kaplan	Nil	Nil	Nil		Nil	$200	No	Nil	$496.90
Cecil	Nil	Nil	Nil		Nil	$200	No	Nil	$462.00
Court	$300.00	$65.00	Nil		$365.00	$200	No	$365.00	$857.66
Ballangarry	Nil	$25.00	Nil		$25.00	$200	No	$25.00	$107.00
Waller	Nil	Nil	Nil		Nil	$200	No	Nil	$790.40
TOTAL	$300	$2,680	$4,628		$7,608			$7,607.70	$20,989.06

Penrith City Council

Ward	Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	TOTAL	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
East Ward	A	Nil	$870.43	Nil		$870.43	$1,000	No	$870.43	$7,068.41
	B	Nil	Nil	Nil		Nil	$200	No	Nil	$1,660.00
	C	$13,200.00	Nil	Nil		$13,200.00	$1,000	Yes	$13,200.00	$19,801.61
	D	$5,414.80	Nil	Nil		$5,414.80	$200	Yes	$5,414.80	$5,414.81
	E	$14,983.63	$3,400.00	$1,031.00		$19,414.63	$1,000	Yes	$19,414.63	$14,891.51
	U: Walsh	Nil	Nil	Nil		Nil	$200	No	Nil	Nil
	U: Moore	Nil	Nil	Nil		Nil	$200	No	Nil	$120.10
North Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$2,862.20
	B	$6,458.10	Nil	Nil		$6,458.10	$200	Yes	$6,458.10	$4,640.00
	C	Nil	$3,400.00	$1,031.00		$4,431.00	$1,000	No	$4,431.00	$12,591.35
	D	$4,058.46	Nil	Nil		$4,058.46	$200	Yes	$4,058.46	$6,461.46
	E	Nil	Nil	Nil		Nil	$200	No	Nil	$11,140.00
	U: Dukes	Nil	Nil	Nil		Nil	$200	No	Nil	$450.00
South Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$6,744.24
	B	Nil	$3,400.00	$1,031.00		$4,431.00	$1,000	No	$4,431.00	$12,427.20
	C	$3,485.33	Nil	Nil		$3,485.33	$200	Yes	$3,485.33	$9,962.25
	D	Nil	Nil	Nil		Nil	$1,000	No	Nil	$14,083.00
	E	Nil	Nil	Nil		Nil	$1,000	No	Nil	$7,853.00
	U: McIver	Nil	Nil	Nil		Nil	$200	No	Nil	$195.03
	U: Hutchison									
	U: Cranfield	Nil	Nil	Nil		Nil	$200	No	Nil	Nil
	U: Bratusa	Nil	Nil	Nil		Nil	$200	No	Nil	$949.54
	TOTAL	$34,400.32	$11,070.43	$3,093.00		$61,763.75			$61,763.75	$139,315.71

Port Stephens Council

Ward	Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
Central Ward	A	Nil	Nil	Nil		Nil	$200	No	Nil	$4,528.00
	B	Nil	$610.00	Nil		$610.00	$200	No	$610.00	$1,979.40
	C	Nil	Nil	Nil		Nil	$1,000	No	Nil	$4,845.00
	D	Nil	Nil	Nil		Nil	$1,000	No	Nil	$5,234.00
	E	Nil	Nil	Nil		Nil	$1,000	No	Nil	$8,874.35
	F	Nil	Nil	Nil		Nil	$1,000	No	Nil	$1,306.16
	G	Nil	Nil	Nil		Nil	$1,000	No	Nil	$3,360.00
	U: Milton	Nil	Nil	Nil		Nil	$200	No	Nil	$325.00
	U: MacKenzie	Nil	Nil	Nil		Nil	$200	No	Nil	$1,226.50
	U: Summergreene	Nil	Nil	Nil		Nil	$200	No	Nil	$300.00
East Ward	A	$1,370.00	Nil	Nil		$1,370.00	$200	No	$1,370.00	$3,877.50
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$4,007.00
	C	$7,500.00	$1,500.00	Nil		$9,000.00	$1,000	Yes	$9,000.00	$10,484.00
	D	$6,001.47	$250.00	$70.00		$6,321.47	$1,000	Yes	$6,321.47	$6,321.47
	E	$3,904.30	Nil	Nil		$3,904.30	$1,000	Yes	$3,904.00	$300.00
	F	Nil	Nil	Nil		Nil	$1,000	No	Nil	$1,234.68
	G	Nil	Nil	Nil		Nil	$200	No	Nil	$3,686.00
West Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$3,308.00
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$1,140.00
	C	$6,300.00	$1,275.00	Nil		$7,575.00	$1,000	Yes	$7,575.00	$8,655.81
	D	Nil	Nil	Nil		Nil	$1,000	No		
	U: Williams	Nil	Nil	Nil		Nil	$200	No	Nil	$440.00
	U: Jordan	$5,000.00	Nil	Nil		$5,000.00	$200	No	$5,000.00	$9,870.14
	TOTAL	$30,075.77	$3,635.00	$70.00		$33,780.77			$33,780.47	$85,303.01

Shoalhaven City Council

Ward	Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
First Ward	A	Nil	$500.00	Nil		$500.00	$1,000	No	$500.00	$1,316.33
	B	$5,700.00	Nil	Nil		$5,700.00	200	Yes	$5,700.00	$5,380.00
	D	$1,400.00	$2,945.00	Nil		$4,345.00	$1,000	No	$4,345.00	$10,583.00
	E	Nil	Nil	Nil		Nil	$1,000	Yes	Nil	$4,252.00
Second Ward	A	Nil	Nil	Nil		Nil	$1,000	Yes	Nil	$4,252.00
	D	Nil	$3,150.00	Nil		$3,150.00	$1,000	No	$3,150.00	$4,806.60
Third Ward	B	Nil	Nil	Nil		Nil	$1,000	Yes	Nil	$4,252.00
	D	Nil	Nil	Nil		Nil	$200	No	Nil	$2,272.00
	E	Nil	Nil	Nil		Nil	$200	No	Nil	$5,636.77
1st/2nd/3rd	C/B/A	Nil	$1,150.00	$2,624.35		$3,774.35	$1,000	No	$3,774.00	$4,562.00
	F/C/C	$78,000.00	$13,017.60	Nil	Nil	$91,017.60	$1,500	Yes	$91,017.00	$95,130.00
	TOTAL	$85,100.00	$20,762.60	$2,624.35		$108,486.95			$108,486.00	$142,442.70

Wingecarribee Shire Council

Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
A	Nil	$855.60	$1,022.10		$1,877.70	$1,000	No	$1,877.70	$1,375.65
B	$5,939.45	Nil	Nil		$5,939.45	$1,000	Yes	$5,939.45	$11,237.12
C	Nil	$1,600.00	$4,289.00		$5,889.00	$1,000	No	$5,889.00	$8,582.14
D	$17,000.00	$23,765.00	$7,688.00		$48,453.00	$1,000	Yes	$48,453.00	$48,437.29
E	Nil	Nil	Nil		Nil				
F	Nil	Nil	$4,205.50		$4,205.50	$1,000	No	$4,205.50	$23,794.05
G	Nil	Nil	Nil		Nil	$1,000	No	Nil	$5,792.00
U: Gair	Nil	Nil	Nil		Nil	$200	No	Nil	$5,751.10
U: O'Neill	Nil	Nil	Nil		Nil	$200	No	Nil	$685.55
U: Holzl	Nil	Nil	Nil		Nil	$200	No	Nil	$950.00
TOTAL	$22,939.45	$26,220.60	$17,204.60		$66,364.65			$66,364.65	$106,604.90

Wollondilly Shire Council

Ward	Group	> Prescribed Amount	= or < Prescribed Amount	Fundraising	Annual Subscriptions	Total	Prescribed Amount	Third Parties	Contributions Received	Expenses Incurred
A Ward	A	Nil	Nil	Nil		Nil	$1,000	No	Nil	$3,079.70
	U: Glynn	Nil	Nil	Nil		Nil	$200	No	Nil	$969.41
	U: Hannan	Nil	Nil	Nil		Nil	$200	No	Nil	$1,473.64
	U: Kinsela	Nil	Nil	Nil		Nil	$200	No	Nil	Nil
	U: Reay	Nil	Nil	Nil		Nil	$200	No	Nil	$584.50
	U: Smith	Nil	Nil	Nil		Nil	$200	No	Nil	$265.01
	U: Costa	Nil	Nil	Nil		Nil	$200	No	Nil	$1,006.30
	U: Deery	Nil	Nil	Nil		Nil	$200	No	Nil	$933.90
B Ward	A	Nil	Nil	Nil		Nil	$200	No	Nil	$3,711.00
	B	Nil	Nil	Nil		Nil	$1,000	No	Nil	$794.52
	C	Nil	Nil	Nil		Nil	$1,000	No	Nil	$7,511.50
	D	Nil	$50	Nil		$50.00	$1,000	No	$50.00	$3,891.00
	U: Hardacre	$500.00	Nil	-$380.00		$380.00	$200	No	$380.00	$4,696.00
C Ward	A	$500.00	$125.00	Nil		$625.00	$200	No	$625.00	$1,959.70
	B	Nil	Nil	Nil		Nil	$200	No	Nil	$3,175.82
	C	Nil	Nil	Nil		Nil	$200	No	Nil	$3,189.62
	U: Condran	Nil	Nil	Nil		Nil	$200	No	Nil	$1,062.00
	U: Colless	Nil	Nil	Nil		Nil	$200	No		
	U: Braeckmans	Nil	Nil	Nil		Nil	$200	No	Nil	$708.80
	U: Khan	Nil	Nil	Nil		Nil	$200	No	Nil	$1,724.00
	TOTAL	$1,000.00	$175.00	-$380.00		$1,055.00			$1,055.00	$40,736.42

Planning and Development Processes

Planning and Development Processes

"Local Government has not had more than thirty years' experience with town planning legislation, and the Government considers that it is now opportune for it to be more independently responsible for local planning decisions. …

These changes create a new era for local government in local planning and the Government looks to local government to exercise its new autonomy for the benefit of local communities."

14 November 1979
Second reading of the Environmental Planning and Assessment Bill

"Consistency of decision making must be a fundamental objective of those who make administrative decisions."

3 August 2004
Mr Justice McClellan
Land and Environment Court

3.1 *Terms of Reference*

The Terms of Reference instructed the Inquiry to inquire, report and provide recommendations as to the efficiency and effectiveness of the governance of Tweed Shire Council in respect of five matters. The second of the five matters required an appraisal of the appropriateness of the procedures and processes adopted by council in relation to its environmental planning responsibilities, including the processing of applications for development, particularly those of a significant nature.

This Section addresses these issues.

3.2 *The Role of the Department of Infrastructure, Planning and Natural Resources*

3.2.1 The Policy Framework

In November 2002 Planning New South Wales introduced State Environment Planning Policy 71 (SEPP 71). Its intention was to manage developments along the coast in order to protect various attributes of the New South Wales Coast.

2 Aims of Policy

(1) This Policy aims:

(a) to protect and manage the natural, cultural, recreational and economic attributes of the New South Wales coast, and
(b) to protect and improve existing public access to and along coastal foreshores to the extent that this is compatible with the natural attributes of the coastal foreshore, and
(c) to ensure that new opportunities for public access to and along coastal foreshores are identified and realised to the extent that this is compatible with the natural attributes of the coastal foreshore, and
(d) to protect and preserve Aboriginal cultural heritage, and Aboriginal places, values, customs, beliefs and traditional knowledge, and
(e) to ensure that the visual amenity of the coast is protected, and
(f) to protect and preserve beach environments and beach amenity, and
(g) to protect and preserve native coastal vegetation, and
(h) to protect and preserve the marine environment of New South Wales, and
(i) to protect and preserve rock platforms, and
(j) to manage the coastal zone in accordance with the principles of ecologically sustainable development (within the meaning of section 6 (2) of the *Protection of the Environment Administration Act 1991*), and
(k) to ensure that the type, bulk, scale and size of development is appropriate for the location and protects and improves the natural scenic quality of the surrounding area, and
(l) to encourage a strategic approach to coastal management.

(2) This Policy:

(a) identifies State significant development in the coastal zone, and
(b) requires certain development applications to carry out development in sensitive coastal locations to be referred to the Director-General for comment, and
(c) identifies master plan requirements for certain development in the coastal zone.

(3) This Policy aims to further the implementation of the Government's coastal policy.

SEPP 71 had implications for councils' local environmental plans, and for the processing of development applications.

7 Application of clause 8 matters

The matters for consideration set out in clause 8:

(a) should be taken into account by a council, when it prepares a draft local environmental plan that applies to land to which this Policy applies, and
(b) are to be taken into account by a consent authority when it determines a development application to carry out development on land to which this Policy applies.

SEPP 71 listed a range of matters that had to be taken into account when planning for, or evaluating development applications for, coastal sites. These included such issues as public access to beaches, relationship of developments to surrounding areas, impacts on amenity, protection of scenic qualities, conservation of animals and wildlife corridors, and the impact of coastal processes on developments amongst other matters.

8 Matters for consideration

The matters for consideration are the following:

(a) the aims of this Policy set out in clause 2,
(b) existing public access to and along the coastal foreshore for pedestrians or persons with a disability should be retained and, where possible, public access to and along the coastal foreshore for pedestrians or persons with a disability should be improved,
(c) opportunities to provide new public access to and along the coastal foreshore for pedestrians or persons with a disability,
(d) the suitability of development given its type, location and design and its relationship with the surrounding area,
(e) any detrimental impact that development may have on the amenity of the coastal foreshore, including any significant overshadowing of the coastal foreshore and any significant loss of views from a public place to the coastal foreshore,
(f) the scenic qualities of the New South Wales coast, and means to protect and improve these qualities,
(g) measures to conserve animals (within the meaning of the *Threatened Species Conservation Act 1995*) and plants (within the meaning of that Act), and their habitats,
(h) measures to conserve fish (within the meaning of Part 7A of the *Fisheries Management Act 1994*) and marine vegetation (within the meaning of that Part), and their habitats
(i) existing wildlife corridors and the impact of development on these corridors,
(j) the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards,
(k) measures to reduce the potential for conflict between land-based and water-based coastal activities,
(l) measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals,

(m) likely impacts of development on the water quality of coastal waterbodies,
(n) the conservation and preservation of items of heritage, archaeological or historic significance,
(o) only in cases in which a council prepares a draft local environmental plan that applies to land to which this Policy applies, the means to encourage compact towns and cities,
(p) only in cases in which a development application in relation to proposed development is determined:
(i) the cumulative impacts of the proposed development on the environment, and

(ii) measures to ensure that water and energy usage by the proposed development is efficient.

Note. Clause 92 of the *Environmental Planning and Assessment Regulation 2000* requires the *Government Coastal Policy* (as defined in that clause) to be taken into consideration by a consent authority when determining development applications in the local government areas identified in that clause or on land to which the *Government Coastal Policy* applies.

Schedule 1 Coastal lakes

(Clause 3 (1), definition of "coastal lake")

Avoca Lake
Back Lake/Lagoon
Baragoot Lake
Bellambi Lagoon
Bingie (Kellys) Lake
Bondi Lagoon
Bournda Lagoon
Broadwater
Brush (Swan) Lagoon
Bullengella Lake
Bunga Lagoon
Burrill Lake
Candlagan Creek and Lagoon
Cobaki-Terranora
Cockrone Lake
Coila Lake
Congo Creek and Lagoon
Corindi (Pipeclay) Lake
Corunna Lake
Cudgen Lake
Curalo Lagoon
Curl Curl Lagoon
Cuttagee Lake
Dalhousie Creek and Lagoon
Dee Why Lagoon
Deep Creek and Lagoon
Durras Lake
Goolawah Lagoon
Hearns Lake
Kianga Lake
Killalea Lagoon
Kioloa Lagoon
Lake Ainsworth
Lake Arragan
Lake Brou
Lake Brunderee
Lake Cakora
Lake Cathie
Lake Conjola (includes Berringer)
Lake Hiawatha
Lake Illawarra
Lake Innes
Lake Macquarie
Lake Minnie Water
Lake Mummuga (Dalmeny)
Lake Tarourga
Lake Wollumboola
Little Lake (Narooma)
Little Lake (near Wallaga)
Long Swamp
Manly Lagoon
Merimbula Lake
Meringo Creek and Lagoon
Meroo Lake
Middle (Tanja) Lagoon
Mullimburra Lagoon
Murrah Lagoon
Myall Lakes
Nangudga Lake
Nargal Lake
Narrabeen Lagoon
Narrawallee Inlet
Nelson Lagoon
Oyster Creek and Lagoon
Pambula Inlet/Lake
Queens Lake
Saltwater Lagoon
Saltwater Lake
Smiths Lake
St Georges Basin
Swan Lake
Tabourie Lake
Termeil Lake
Terrigal Lagoon
The Broadwater (Clarence River)
Tilba Tilba Lake
Tuggerah Lake (includes Lakes Bu and Munmorah)
Tuross Lake
Wagonga Inlet
Wallaga Lake
Wallagoot Lake
Wallis Lake
Wamberal Lagoon
Wapengo Lagoon
Watsons Taylor Lake
Werri Lagoon
Willinga Lake
Wonboyn Lake
Woolgoolga Lake
Wooloweyah Lagoon

Schedule 2 Significant coastal development—specified development

(Clauses 9 (1) (a) and 10 (1))

Development for any of the following purposes if all or any part of the development is on land to which this Policy applies:

mining, extractive industry, industry, landfill, recreational establishments, marinas, tourist facilities (except bed and breakfast establishments, and farm stays).

Structures greater than 13m in height, where the height is the greatest height measured from any point on the building to the natural ground level (being the ground level of the site as if the land comprising the site were undeveloped) immediately below that point.

Development comprising:

(a) subdivision of land within a residential zone into more than 25 lots, or

(b) subdivision of land within a rural residential zone into more than 5 lots, or

(c) subdivision of land within any zone into any number of lots if the future development of any lot created by the subdivision will require effluent to be disposed of by means of a non-reticulated system.

In this Schedule:

extractive industry means the obtaining of extractive materials by methods including

excavating, dredging, tunnelling or quarrying, or the storing, stockpiling or processing of extractive materials by methods including washing, crushing, sawing or separating.

extractive material means sand, gravel, clay, turf, soil, rock, stone or similar substances.

industry means the following types of industry but only if they comprise designated development in accordance with Schedule 3 to the *Environmental Planning and Assessment Regulation 2000*—agricultural produce industries, bitumen pre-mix industries, breweries and distilleries, cement works, ceramic and glass industries, chemical industries and works, chemical storage facilities, composting facilities or works, contaminated soil treatment works, crushing, grinding or separating works, drum or container reconditioning works, electricity generating stations, livestock intensive industries, livestock processing industries, mineral processing or metallurgical works, paper, pulp or pulp products industries, petroleum works, wood or timber milling or processing works, and wood preservation works, but does not include mining or extractive industries.

landfill means a waste management facility that disposes of waste by landfill.

marinas means marinas which are designated development in accordance with Schedule 3 to the *Environmental Planning and Assessment Regulation 2000*.

mining includes the mining, processing or handling of minerals, being minerals within the meaning of the *Mining Act 1992*.

recreational establishments means health farms, religious retreat houses, rest homes and youth camps, but excludes internal refits of, or minor alterations or minor additions to, existing recreation establishments.

tourist facilities means any of the following which provide accommodation for tourists: hotels, motels, backpackers' accommodation, hostels, tourist resorts, holiday cabins, holiday units, serviced apartments, eco-tourism resorts, caravan parks and camping grounds, but excludes internal refits of, or minor alterations or minor additions to, existing tourist facilities.

*** Schedule 2 Later repealed**

Part 3 Significant coastal development

9 Application of Part

(1) This Part applies to:

(a) development specified in Schedule 2, and

(b) development (other than development specified in Schedule 2) comprising the erection of a building that is 2 or more storeys in height, the number of storeys being determined in accordance with clause 6 of *State Environmental Planning Policy No 6—Number of Storeys in a Building*, on, or partly on, land within a sensitive coastal location, and

(c) development (other than development specified in Schedule 2) within 100m below mean high water mark of the sea, a bay or an estuary, and

(d) development (other than development specified in Schedule 2) on land

described in Schedule 3,

subject to subclause (2).

(2) This Part does not apply to:

(a) development in relation to which, under another environmental planning instrument, development consent cannot be granted without the concurrence of the Minister or the Director-General, or

(b) development in relation to which, under another environmental planning instrument, the Minister or the Director-General is the consent authority.

(3) Despite subclause (2), this Part does apply to development in relation to which, under:

(a) *State Environmental Planning Policy No 1—Development Standards*, or

(b) *State Environmental Planning Policy No 14—Coastal Wetlands*, or

(c) *State Environmental Planning Policy No 26—Littoral Rainforests*,

development consent cannot be granted without the concurrence of the Director-General, whether or not the concurrence may be lawfully assumed.

10 State significant development

(1) Pursuant to section 76A (7) of the Act, development specified in Schedule 2 is declared to be State significant development.

(2) Pursuant to section 76A (9) of the Act, the Minister is the consent authority for State significant development.

*** Schedule 10 Later repealed**

Schedules 1 and 2 and Part 3 section 9 indicate the kinds of development, and the characteristics of development that fell under SEPP 71.

11 Determination by councils of applications for significant coastal development

(1) This clause applies to development that is included in clause 9 (1) (b), (c) or (d).

(2) A council must send a copy of a development application for consent to carry out development to which this clause applies to the Director-General within 2 days after the application is received by the council.

(3) A council must not determine a development application for consent to carry out development to which this clause applies:

(a) within 28 days after a copy of the application is received by the Director-General pursuant to subclause (2), or
(b) if the Minister gives the council a direction under section 88A of the Act in respect of the development application.

(4) During the 28-day period referred to in subclause (3) (a), the Director-General may specify matters, in addition to the matters set out in clause 8, that the council must take into consideration in determining the development application.

(5) In addition to the matters set out in clause 8, a council must take into consideration any matters specified under subclause (4) in respect of a development application when it determines the application.

SEPP 71 related to the coastal zone, including coastal lakes and estuaries, northward from Port Stephens, and southward from Shellharbour. The coastal zone is generally one kilometre landward of the western boundary of the coastal waters of the State.

The Tweed not only had territory in the coastal zone that was affected by SEPP 71, it was chosen by Planning New South Wales as the pilot program in the Comprehensive Coastal Assessment, a program designed to collect information on coastal values and to develop decision-making tools and methods. Tweed Shire Council was a partner in the pilot. SEPP 71 was the centrepiece of the State Government's $11.7 million scheme to protect the New South Wales coast from over-development. It was released by the then Minister for Planning, Dr, Refshauge, on 28 October 2002, and became effective in November of that year. Effectively, it meant that all developments that fitted the various thresholds defined in the SEPP (see above) were to be processed by Planning New South Wales.

Following the elections in 2003 the structure of the planning system at the State Government level was changed with the formation of the Department of Infrastructure, Planning and Natural Development. The new Department had responsibility for SEPP 71.

SEPP 71 might be regarded as the end-point of a process of policy development that stretched back to 1979 (when the Coastal Council was established), and more directly to a set of policy initiatives of the Carr Government that began the process of developing coastal protection from 1997. Alongside the pressures arising from development demands, the policy direction was guided by the perceived failures of some councils to manage the challenges of rapid growth along the NSW coast, and the conservation of its natural environment and preserve public amenity. Professor Thom, the previous chair of the Coastal Council and visiting Professor at DIPNR, discussed the record of councils in these matters (**T. 10/3/05 p. 1230**).

PROF DALY: *And with that 1997 policy did that obligate councils to do certain things?*

PROF THOM: *There was a 117 direction issued by the Minister, and who happened to be Minister Knowles at the time, a Section 117 direction, which indicated that councils must take into consideration the Coastal Policy. That was also brought in as part of the EP and A Act as a requirement. In doing so then councils, by taking into consideration the matters associated with the Coastal Policy, were obliged to do so to take into consideration. And with the amendments to the Coastal Protection Act take on board those principles of the Coastal Policy, namely, the principles of ecological sustainable*

development which linked across, of course, to similar objects that occur in the EP and A Act.

There was a recognition that councils would be cognisant of the implications of that policy in consideration of whatever; environmental protection, economic development, provision of social services, amenities, whatever fell within the confines of the coastal zone. And the important thing about the Coastal Policy was that it was restricted to a geographically defined zone - a one kilometre zone - that was marked on one to 25,000 maps. Those maps had been signed by the Minister as the maps that concur with the provisions in the Coastal Protection Act.

PROF DALY: *By and large did councils take into any consideration the policy?*

PROF THOM: *A very mixed bag in relationship to the way in which councils used or took into consideration the Coastal Policy. That often related to the different types of interest that councils had along the coast. It was such that as a result of further consideration of councils' activities through 1999 and into 2000, particularly instigated as a result of a review of beach management which coastal council undertook and I chaired that review, the government in 2001 released its Coastal Protection package. ...*

T. 10/3/05 p. 1230

When DIPNR took over the planning responsibilities of the State, in the year following the introduction of SEPP 71, a new approach to planning was adopted that was aimed at reducing the complexity of the system. Included in the approach were goals of improving development assessment and the development of regional strategies. Both of these goals had very direct implications for councils, and the North Coast was singled out as being especially important in terms of reform. Professor Thom explained the current position (**T. 10/3/05 p. 1237-1239**).

PROF THOM: *... Plan Reform, is the terminology we currently use. And in doing so, the Government accepted that we had many antiquated Local Environmental Plans, many zones which had conditions within it which made it very, very difficult to get consistency and outcome from one council to another, various definitions that existed under the zoning tables, for example, we had something like 16 different definitions across the State for extractive industry.*

We had something like five and a half thousand Local Planning instruments for the State and we have something like 3100 different zones across the State. All this added up to, as I said, a bogging down, a complicated system. So the planning reform process - and if it hasn't already been tabled, I can table this document - - -

PROF DALY: *I would appreciate that.*

PROF THOM: *- - - which does summarise a lot of what I can now say - does reflect the present position with one exception, which I will come to if I could. So in the context of planning reform there are four key themes that the government is pursuing. First is the regional strategies. The second is the simplified plan-making. The third is to improve*

development assessment and the fourth is a more flexible use of developer financial contributions, essentially through a revision of section 94 of the EP and A Act.

PROF DALY: *Okay. Let's focus on the first of those.*

PROF THOM: *The strategic assessment planning: one of the things that I encountered as chair of the Coastal Council, when I was asked to comment on a number of things and actually participate as the Minister's intervener in a number of landed environment court cases, was the inconsistency between what were old regional environmental plans and the plethora of matters associated with Local Environmental Plans. It was quite clear that regional environmental plans either had to be totally revised or chucked out.*

Government has taken the decision that we should have very, very few regional environmental plans. They will remain as provision in the Act but there will be very few of them. The key statutory planning instrument is the Local Environmental Plan. But the Local Environment Plan - and there will be one Local Environment Plan per council area - and the key thrust, however, of the reform is to have those Local Environmental Plans guided by regional strategies.

The regional strategies will be a mechanism that councils will have to give effect to in their revision of LEPs. And in areas of high growth, high population growth, councils are on notice to have their LEPs revised in the next three to five years. Support will be given to councils to do that under the planning reform funding mechanism and that is ongoing at the present time. The regional strategies will be designed to give a framework that will do two things: inform the content of these revised LEPs but also provide an investment structure for government, an investment plan for government, for supporting the regions through infrastructure.

At the moment there is no co-ordinated mechanism to bring together infrastructure investment across the various sectors of government. They just happen to occur as a result of individual departmental bids which end up going through the budgetary process. Minister Knowles, as Minister for Infrastructure, is Chair of the Infrastructure Planning Committee of Cabinet and is in a position to help co-ordinate the bids for infrastructure but to do it in the context of what we see is necessary in a strategic plan.

And in that strategic context the strategies will do a number of things: they will identify settlement areas, where settlement is appropriate; and identify conservation areas; identify employment lands that can be zoned accordingly. They will provide for the areas of high conservation value which the State should be acquiring - and there's an investment process that will be linked to acquisition. The one that I'm particularly involved in is the Coastal Lands Protection Scheme. The Government has announced an increase in funding for that so there's already an important announcement to underpin that particular move. There will be support for particular types of infrastructure that will flow through that. So these regional strategies are now being developed in a number of areas along the coast. A high priority area is the Far North Coast which is the six councils of the Far Northern region.

PROF DALY: *Where is that at?*

PROF THOM: *In fact, we have just had a meeting with mayors and general managers this morning - of those six councils, informing them that we have a status report, which has just been completed, as to where we're up to. We're currently - and this comes back to an earlier question that you made about the Comprehensive Coastal Assessment - the data and information that we have from the Tweed Pilot for the Comprehensive Coastal Assessment yielded a number of scenarios associated with growth, population growth and the possible location of population in terms of the region, such as the Tweed Shire, over the next 30 years, recognising that the Far North Coast is projected to grow over the next 30 years at about 80,000, according to the latest statistics that we have released through the Department. But there's a strong view within the Department that that's an under-estimate. 40,000 of that, by the way, is estimated for Tweed Shire.*

T. 10/3/05 p. 1237-1239

Planning NSW had developed a regional structure across New South Wales, which looked after their regional planning responsibilities, and the operational links between the State and Local Governments in the planning area. The base of the North Coast Planning NSW region was at Grafton, which still provides the base for the regional DIPNR office. Mr Imrie, a former deputy director of the Planning NSW office at Grafton appeared at the Hearings. He provided some background on the challenges that were faced (**T. 18/3/05 p. 1705-1707**). These included the volume of material that had to be managed, the complexity of the planning system, and the resources available.

MS ANNIS-BROWN: *You mentioned state significant applications. You don't seem to have been around when SEPP71 was introduced?*

MR IMRIE: *Fortunately, yes.*

MR BROAD: *Can I interrupt? Why is that?*

MR IMRIE: *I think one of the features of the New South Wales planning system is its immense complexity and virtually for any development application, it changes from local government area to local government area. You have a whole series of controls that are held in the local council - local environmental plan - with its definitions. You often have model provisions, which are standard model provisions, and then, on top of that, you actually have development control provisions in the regional plan and as time went on, there was more and more development provisions contained in state policies, which sometimes don't sit easily with local things. So it's really just the complexity of it.*

MS ANNIS-BROWN: *Just to go on from there, you mentioned you had a team of staff working on these matters; development applications and the like. I'm just wondering what your resources were like. I mean, did you have enough staff to do the work at the time? How many, roughly, applications were you dealing with? Things like that.*

MR IMRIE: *I mean, I guess the true answer is: there's probably never enough staff to deal with all of the things that come across a busy, government organisation desk. But we got back and I guess - look, I'm sorry, I can't recall actual numbers. It would be some*

hundreds of individual matters per month that would comes across my desk, from very minor things to some quite complicated things.

MS ANNIS-BROWN: *In terms of your staff, what sort of professional skills did they hold? You would have had environmental people, planners; what sort of skill set did they have?*

MR IMRIE: *Yes, certainly, we did. We had one or two people with good environmental skills, who were able to do - particularly, as we had responsibility for state policies dealing with coastal wetlands and littoral rainforest, and in that case, it is necessary to have people with botanical skills, to enable them to identify exactly where the boundaries are. So we had a number of people who - or one person, particularly, who was quite qualified to do that, but others who had an interest and had picked up those sort of skills.*

Some individuals - most people are qualified, I guess, with a planning degree or a geography degree or something, in the first instance, but they tend to add on things that are of particular interest to them. One of the things that was my responsibility was an amendment to the items of historic significance in the region, and that was actually handled by a person who had quite a lot of individual expertise, but he was certainly not qualified in that.

MS ANNIS-BROWN: *So just to go back, you mentioned you would have received - and this is off the top of your head - hundreds of applications per month, ranging from minor to major.*

MR IMRIE: *Yes.*

MS ANNIS-BROWN: *How many staff did you have in your teams? Did you have many teams, one team? I mean, how many staff were dealing with those hundreds of applications per month?*

MR IMRIE: *Generally speaking, a team has got about four or five people in it, and at any given time - I usually had a team that dealt with the northern part of the region, when I was dealing with this area, and if there were particular projects on, there would be a team with the right number of people to do that project in it.*

MS ANNIS-BROWN: *Okay. So you just allocated them as necessary, depending on - - -*

MR IMRIE: *So really it was, if you needed to take people off line to do whatever you were going to do, you would estimate what the time might be and you would take those people and put them in a team to deal with that particular work.*

MR BROAD: *Can I just ask you a couple more, perhaps, general questions? What sort of load were you dealing with? You were dealing with a number of Council areas. How many files, roughly, per annum, would you have to deal with? I mean - sorry, I'll restrict it. Where it came to the Department's involvement in development applications which*

were before Council, which the Department was then involved with, how many were you dealing with, roughly, per annum?

MR IMRIE: *What, at any one time?*

MR BROAD: *Oh, at any one time or per annum.*

MR IMRIE: *Okay. Look, I'm sorry, I do not have the numbers and my memory is slipping away a little bit with it.*

MR BROAD: *Are we talking about hundreds over a year or - - -*

MR IMRIE: *Yes, I would have thought it's in that sort of numbers, yes. I mean, we had concurrence roles, so there were a number of things where that would be triggered, and some of those were more complicated than others. So it could be a concurrence role in Council's local environmental plan - - -*

T. 18/3/05 p. 1705-1707

Mr Imrie was asked about the relationship between his office and Tweed Shire Council. He stated that it was never an easy relationship because of the complexity of the issues in the Tweed.

MR BROAD: *So far as Tweed Shire Council was concerned, what was your relationship with the Council? Were you on a good relationship with staff within the Council?*

MR IMRIE: *I have to say it varied over the years. Certainly, with the past director, Director Broyd, yes, we had good relations with him and, I think, Mr Jardine, who was the forward planner, and with Gary Smith, who was the statutory planner.*

MR BROAD: *The quality - - -*

MR IMRIE: *It was never an easy relationship, because things in Tweeds tended to be quite complicated and there were lots of pressures for them.*

MR BROAD: *Why do you say things were complicated? Because of discrete planning instruments and policies?*

MR IMRIE: *I guess that's part of it. I mean, that's my earlier comment. I mean, the system is quite complicated and, I guess, a lot of things in Tweed had a complicated history, so if you - to understand whether you actually had an approval or what your approval could actually achieve, you actually had to have an understanding of that history and then you would have to research what the extent of your approval or non-approval rights were. So that often took some time. So it certainly wasn't - a thing from Tweed Coast would not be a simple straight-forward matter and tended to be dealt with, as a consequence, by one of the more experienced planners in my team, yes.*

T. 18/3/05 p. 1708

3.2.2 The Impact of SEPP 71

Mr Papps, who was formerly an executive director of Planning New South Wales, with responsibility for rural and regional planning in the State, appeared at the Public Hearings. He discussed the background work on evaluating social, environmental and economic values along the coast to enable Planning NSW to better resolve conflicts between economic development and environmental values. He explained some of the processes before the introduction of SEPP 71 (**T. 10/3/05 p. 1248-1249**).

MR PAPPS: *That's right, and the - I mean, the other very obvious one that you've already heard about was getting a better understanding of the values along the coast. And so the coastal audit and gathering information about social, environmental and economic values up and down the coast, because planning decisions, at least from my perspective, were nearly always about a trade-off between a range of values, some of them conflicting. The classic one, for example, might be dealing with an argument from some that such and such a development should occur because of the very significant social and economic benefits it might have for a community, as opposed to the potential impacts it might have, say, on environmental values. So you had to make trade-off decisions. The better the data you had to begin with, the better the trade-off decision. So that was a big initiative.*

MR BROAD: *The introduction of SEPP 71 provided significant alteration in the way that councils - or the way that major developments were then to be handled.*

MR PAPPS: *That's right.*

MR BROAD: *It effectively transferred responsibility for major developments or tourist developments away from council and to the Department.*

MR PAPPS: *It certainly had that effect. It had more than that, and part of the thinking behind that particular provision - that particular set of provisions - was because of the real and potential conflict, at times, between the interests of local government, elected perhaps on a different platform, responding to different community pressures, and the interests of the state government. There was a need to have a better hierarchy of decision making and to have more certainty about when the state government ought to be involved in local planning decisions. Up until that time, very generically speaking - and I'm not a lawyer - the state government did have a capacity to participate in local government decisions through two main ways.*

The first was that it was required to approve local environmental plans or amendments to local environmental plans, so it could apply some strategic thinking at that level, and the second was that providing certain criteria were met, the minister had the capacity to do what we called "call in" a development application. So up until the time that a development application was adjudicated on by the local government, the minister had the discretion, if he chose, to call it in, and he would, in effect, become the consent authority. Now, that had been applied up and down the Coast in various ways, and there was, I think, a high degree of dissatisfaction, both from local government and from the

Department and, in turn, the minister, about what seemed to be often arbitrary decision about what was called in.

T. 10/3/05 p. 1248-1249

The introduction of SEPP 71 led to a large number of coastal development projects, formerly handled by councils, being processed by DIPNR in Sydney. It was a most significant shift in responsibilities.

Data supplied by DIPNR show the number of applications handled under SEPP 71 from its inception (November 2002) through to April 2005. There were 332 applications forwarded to DIPNR from the councils affected by the new system. Tweed Shire topped the number of applications with 37, 11% of the total (Table 3.2.2.1 and Figure 3.2.2.1).

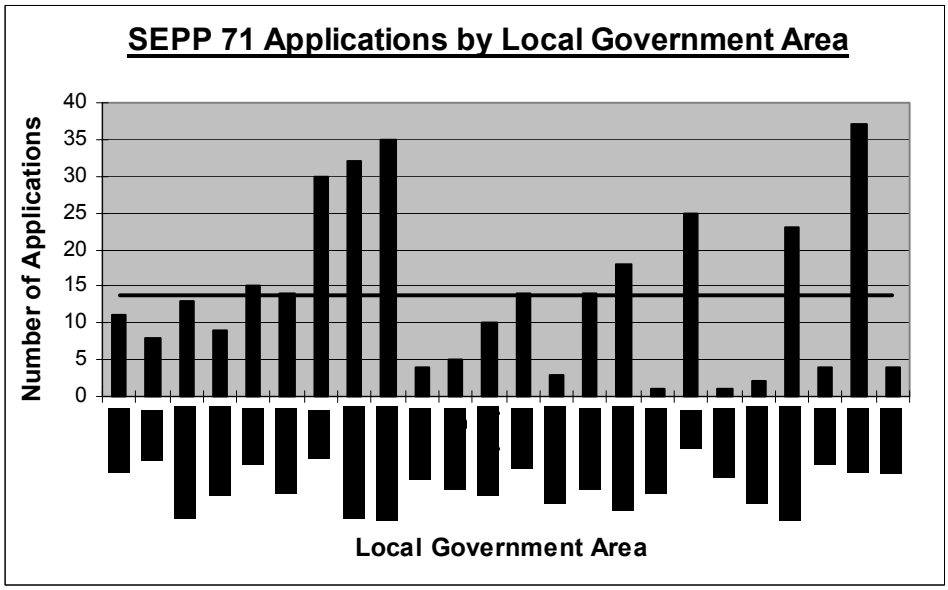
Table 3.2.2.1
SEPP 71 Applications by LGA

	TOTAL	Approved	Withdrawn	Returned	Rejected	Current	
Ballina	**11**	6	1	0	0	4	
Bega	**8**	4	3	0	0	1	
Bega Valley	**13**	2	1	1	0	9	
Bellingen	**9**	5	2	0	1	1	
Byron	**15**	3	5	0	1	6	
Clarence Valley	**14**	1	1	2	1	8	1 = Off exhibition submissions being summarised
Coffs Harbour	**30**	9	4	0	0	17	
Eurobodella	**32**	14	3	0	0	14	1 = Forwarded to council for determination
Great Lakes	**35**	17	1	1	0	15	1 = Not proceeding
Greater Taree	**4**	0	1	0	0	3	
Hastings	**5**	3	1	0	0	1	
Kempsey	**10**	4	1	0	0	5	
Kiama	**14**	3	5	0	0	6	
Macksville	**3**	1	2	0	0	0	
Maclean	**14**	11	1	0	0	2	
Nambucca	**18**	13	0	0	0	5	
Narooma	**1**	0	1	0	0	0	
Port Stephens	**25**	11	1	0	1	11	1 = DIA matter
Pristine Waters	**1**	0	0	0	1	0	
Richmond Valley	**2**	0	0	0	0	2	
Shoalhaven	**23**	8	2	1	1	11	
Taree	**4**	2	0	0	0	2	
Tweed	**37**	12	2	0	2	21	
Wyong	**4**	2	0	0	0	2	
TOTAL	**332**	131	38	5	8	146	
Average	**13.83**	5.46	1.58	0.21	0.33	6.08	

Source: Department of Infrastructure, Planning and Natural Resources, May 2005.

Figure 3.2.2.1

SEPP 71 Applications by LGA



Source: Adapted from Department of Infrastructure, Planning and Natural Resources, May 2005.

Tweed Shire had the largest number of applications in 2003, and the second largest in 2004 and 2005 (Table 3.2.2.2 and Figure 3.2.2.2). Tweed Shire has had the third largest number of applications approved (Figure 3.2.2.3), but has the largest number of applications awaiting decisions (Figure 3.2.2.4). These statistics show that Tweed Shire's coastal developments are amongst the highest in number in New South Wales, but also amongst the most complex as indicated by the large number of applications that remain unresolved in the decision-making system.

Table 3.2.2.2

SEPP 71 Applications by LGA by Year.

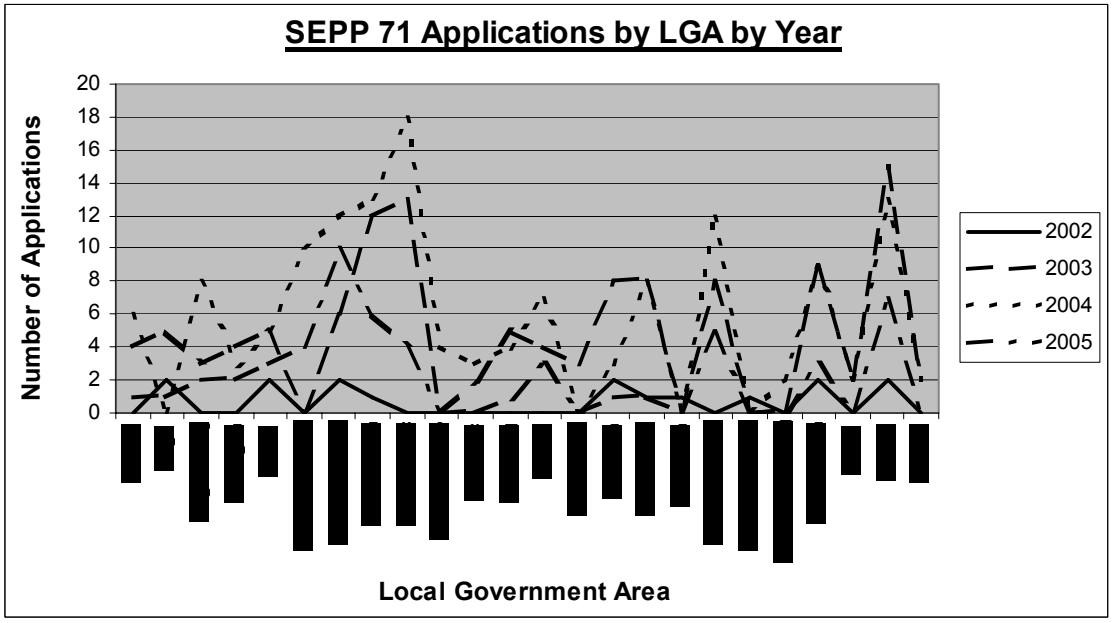
	2002	2003	2004	2005	TOTAL
Ballina	0	4	6	1	**11**
Bega	2	5	0	1	**8**
Bega Valley	0	3	8	2	**13**
Bellingen	0	4	3	2	**9**
Byron	2	5	5	3	**15**
Clarence Valley	0	0	10	4	**14**
Coffs Harbour	2	6	12	10	**30**
Eurobodella	1	12	13	6	**32**
Great Lakes	0	13	18	4	**35**
Greater Taree	0	0	4	0	**4**
Hastings	0	2	3	0	**5**
Kempsey	0	5	4	1	**10**
Kiama	0	4	7	3	**14**
Macksville	0	3	0	0	**3**

Maclean	2	8	3	1	**14**
Nambucca	1	8	8	1	**18**
Narooma	1	0	0	0	**1**
Port Stephens	0	8	12	5	**25**
Pristine Waters	1	0	0	0	**1**
Richmond Valley	0	0	2	0	**2**
Shoalhaven	2	9	9	3	**23**
Taree	0	2	2	0	**4**
Tweed	2	15	13	7	**37**
Wyong	0	2	2	0	**4**
TOTAL	16	118	144	54	**332**

Source: Department of Infrastructure, Planning and Natural Resources, May 2005.

Figure 3.2.2.2

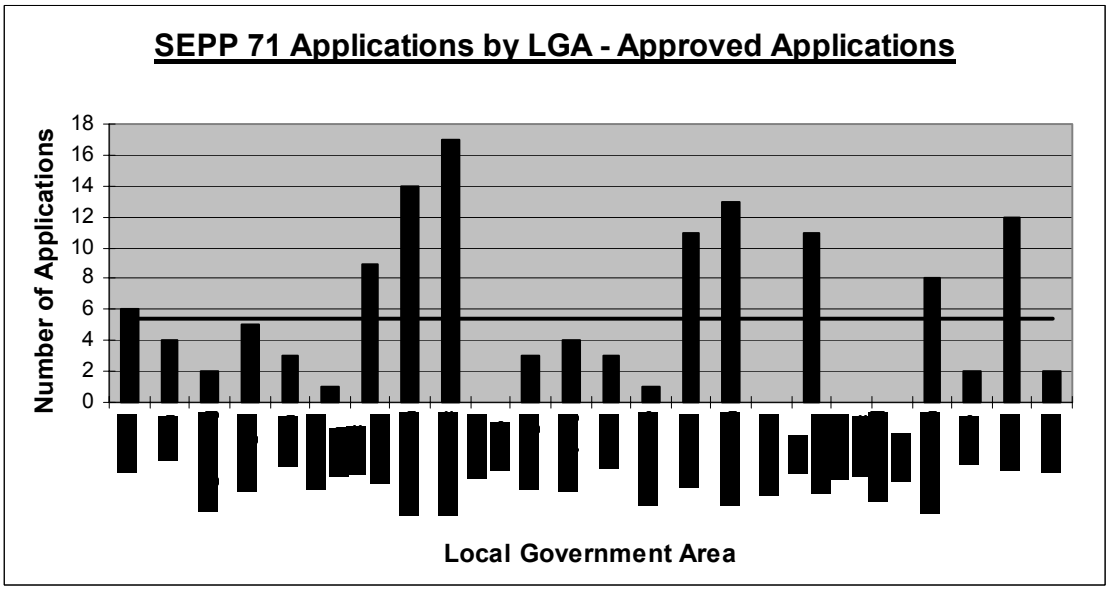
SEPP 71 Applications by LGA by Year.



Source: Adapted from Department of Infrastructure, Planning and Natural Resources, May 2005.

Figure 3.2.2.3

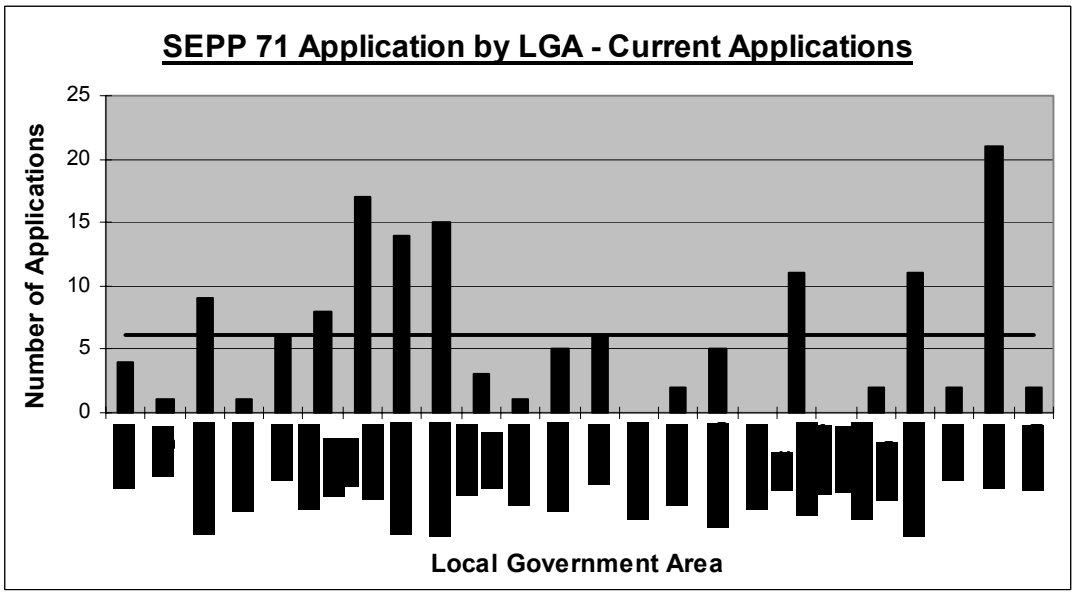
SEPP 71 Applications by LGA – Approved Applications.



Source: Adapted from Department of Infrastructure, Planning and Natural Resources, May 2005.

Figure 3.2.2.4

SEPP 71 Applications by LGA – Current Applications.



Source: Adapted from Department of Infrastructure, Planning and Natural Resources, May 2005.

3.2.3 The Challenges SEPP 71 Had to Meet

The number of applications to Planning NSW, and then to DIPNR, that fell under the SEPP 71 system surprised the planning authorities (**T. 10/3/05 p. 1250**).

MR BROAD: *When it came to SEPP 71 being promulgated, what sort of expectation did the government have as to the number of applications it might be dealing with on that policy?*

MR PAPPS: *There was a great deal of discussion at the time about that. The state government had a very clearly expressed policy, that it didn't want to become involved in local government planning decisions that it didn't need to. In other words, where it wasn't adding value or it wasn't representing a legitimate state government interest, it didn't want to be involved in the local government decision making, and, in fact, I think a number of ministers were concerned about the number of call ins – the elevation - the growing number of call ins were seen as a symptom of a failure in the planning system. In other words, if we got our strategic planning done better, there would be better local environmental plans with better statutory arrangements and reflections of state government policy that would lead to better local government decision making, would lead to less call-ins.*

So there was a great deal of anxiety about this and at the time that we were formulating SEPP 71, we had the tension between trying to come up with a legal definition that would capture the significant or potentially significant developments, where we as a state would have a legitimate interest, and ensuring where the ones where we didn't have a legitimate interest went through that filter and returned back to local government. I think it's fair to say, certainly from my perspective - I can't speak on behalf of the then minister or the government - that we didn't accurately estimate the work load that SEPP 71 introduced within to the Department - - -

MR BROAD: *Did you underestimate it?*

MR PAPPS: *We underestimated it .*

MR BROAD: *Significantly?*

MR PAPPS: *In my view, significantly. We were struggling, and why that was important, apart from anything else, is because it had a direct resource implication.*

MR BROAD: *I was about to leap to that. You spoke about the Department dealing with state significant developments. What sort of logistical requirements did that put on the Department to deal with those? Were they large in number? Did they require a very detailed consideration or were they - were you receiving an application, which was fairly well thought out at a high level of quality, that you could read through and say, "Yes, we can go through this part. It is a well thought out, well put together process."*

MR PAPPS: *Based on my experience, they varied widely. We would deal with some where there had been a great deal of work already done and where there wasn't much*

else required except us exploring the issues, canvassing broadly and bringing, if you like, the broader experience and the broader perspective of state government to that planning issue. There were others where there were clearly information - significant information gaps right from the beginning, and where, for example, we thought there might not have been adequate consultation with the community or with interest groups or where perhaps we thought there hadn't been adequate attention paid to the view of the Coastal Council. So it used to vary quite widely, and - - -

MR BROAD: *Is it - - -*

MR PAPPS: *Sorry.*

MR BROAD: *I'm not trying to cut you short.*

MR PAPPS: *No.*

MR BROAD: *I'm trying to get my head across this process. Within the Department that you dealt with, what sort of manpower was required by SEPP71 by comparison to the manpower that was required prior to its implementation?*

MR PAPPS: *I think there are two parts to my answer. The first is that, prior to its implementation, it was an ad hoc diversion of existing resources. So, for example, if we had called in a major coastal DA, let's say on the south coast, it would mean me diverting one, two or possibly three planning officers from my planning team to work almost full-time on that for however long it took, and that meant they weren't doing the work that they were otherwise asked to do.*

With SEPP71, the State Government acknowledged that it would have a far greater role, and it gave us additional resources and we set up a specific unit within head office to deal with it. In practice, my planning teams - my then planning teams in the region still had to contribute some resources, some time, some effort, because they understood the places the best, and so they were being called on to advise the head office unit.

MR BROAD: *So they would feed down to a central office in Sydney?*

MR PAPPS: *That's right. I think as a generalisation, Mr Broad, I'd say that the SEPP71 with the dedicated resources, even though I thought they weren't sufficient, relieved by regional planning teams of a great deal of the burden, but not all of it.*

MR BROAD: *Within councils they bring to bear a multi-skilled group of people. They bring those with environmental skills, those with planning skills, those with engineering skills - - -*

MR PAPPS: *That's right.*

MR BROAD: *- - - and they tend to work as groups together.*

MR PAPPS: *That's right.*

MR BROAD: *Within the Department, did you have a similar model that you had these multi-skill?*

MR PAPPS: *In part. We had a range of skills within the Department that went beyond just straight statutory planning.*

MR BROAD: *That's why I asked, because you spoke of planning teams.*

MR PAPPS: *Yes. And my planning teams were mostly made up of planners, and they had that particular disciplinary skill. Elsewhere in the Department, we did have other skills, for example, urban designers. We had some people who had been trained and skilled in coastal protection. But, otherwise, we relied on advice from other parts of government so, for example, in a specific development, if there were coastal engineering matters, teams would call on those skills from mostly the Department of Land and Water Conservation. We would often call on Professor Thom for his particular skills and his particular expertise, just as a source of advice. We would be duty bound to make the decisions under the legislation, but we would utilise whatever skills and advice we could get across government agencies and across the coast for councils.*

T. 10/3/05 p. 1250-1253

The large number of applications sorely tested the resource base of Planning NSW and then DIPNR. The evidence suggests that the resource base was inadequate for the tasks set by SEPP 71.

MR BROAD: *We've heard that there's a general shortage of skilled planners in meeting with the demands of SEPP71. Did you struggle with the ability to put staff on who could deal with the applications?*

MR PAPPS: *We did, and it was a generic struggle across all aspects of planning. There was a staff shortage - there was shortage of skilled planners. It was particularly difficult to employ people to work in that statutory planning aspect, dealing with DAs, because it was stressful work. You got a lot of pressure on you, both in terms of time, in terms of the complexity of the matters you were dealing with, and because you dealt - in those situations you dealt with government agencies, you dealt with the community, you dealt with the local council, the elected councillors, you dealt with the council officials and you dealt with the developers.*

…

MR BROAD: *Did you have significant numbers of staff who had the actual experience to day-to-day dealing with development applications?*

MR PAPPS: *In our planning teams, we had staff who would have met that definition.*

MR BROAD: *Did you have significant numbers of those sort of staff?*

MR PAPPS: *I would have argued at the time, and did argue at the time, we never had enough staff to deal adequately with the statutory planning matters.*

T. 10/3/05 p. 1254-1255

Applications flowed to Sydney from 24 councils that prior to SEPP 71 would have handled them themselves. The collective planning base of these councils in terms of professional planning staff is not known to the Inquiry, but it must number between 100 and 200 people. Information from DIPNR indicates that the total number of professionals in the State Significance group in May 2005 was 30, of which just 6 were dedicated to SEPP 71 applications. Although SEPP 71 applications only related to coastal and coastal lake sections of the councils, whereas the planning staff of the 24 councils dealt with their entire areas, the disparity in the resource bases of DIPNR and the councils is very great. It is also a fact that the coastal areas are under greatest growth pressure from development and have large populations in contrast to the hinterland areas. The planning resources of the councils would have a direct relationship to this. It led Planning NSW and DIPNR to rely on these resources (**T. 10/3/05 P. 1253-1254**).

MR BROAD: *In reviewing some of the files of councils, there appears to have been substantial liaison between the Department and councils.*

MR PAPPS: *That's right.*

MR BROAD: *To what extent did you draw on councils for their skills?*

MR PAPPS: *It depended on the council but, as a generalisation, we attempted to make as much utilisation of the skills of the officers of council as we could. Many of the councils up and down the New South Wales coast have got very skilled planners, engineers and the like, and they also understand the places very well. It's their place, so they've got a very detailed geographic, social understanding of the place. So wherever we could, we would utilise those skills.*

MR BROAD: *When it came to physical numbers, in the first two years after SEPP71 was introduced, what sort of numbers did you deal with?*

MR PAPPS: *I can't recall. I really can't. I - Professor Thom would probably be able to answer that off the top of his head. Certainly current DIPNR staff should be able to give you those figures.*

MR BROAD: *As a - your best guess.*

MR PAPPS: *Because we were filtering through a large number of DAs and because councils - many councils were saying, "Well, I'm unsure whether this ought to be dealt with by the State Government," we were getting as a first flush, as a first cut of DAs being referred to us in the coastal zone, in some areas I think hundreds - hundreds within a month and, again, from my perspective as the person responsible for that, I felt that we had under-estimated the number we would be seeing at some stage in the process, and we were struggling with the additional, even with additional resources.*

MR BROAD: *Did you end up hitting the wall with them and simply found them too much?*

MR PAPPS: *There was a process of reviewing the SEPP itself to see whether we could refine the definitions to make sure that the filters were as good as they could be so the things that didn't need to come in didn't. We were training council staff, running workshops and the like with council staff, to get them better at making the judgment about whether it should come in, and we were making better use of a centralised unit which was already doing large DAs in urban settings. So the coastal - the skills and resources that were brought in to manage SEPP71 was married into that group and as able to draw on both their administrative skills and some of their other experiences. So, in that way, we began, I think, to manage it better. But by the time I left I think - you know, I certainly don't think that issue had been resolved to everyone's satisfaction.*

T. 10/3/05 p. 1253-1254

The resource problems did not just lie with the Sydney base of Planning NSW and DIPNR. The regional offices also faced resource challenges. The matter was raised with Mr Papps (**T. 10/3/05 p. 1256-1257**).

PROF DALY: *... You said that when SEPP71 came in you did get some extra resources to handle it.*

MR PAPPS: *That's right.*

PROF DALY: *That, in turn, took some pressure off the regional offices.*

MR PAPPS: *Correct.*

PROF DALY: *But they still had to assist because there were geographically placed to do that.*

MR PAPPS: *That's right.*

PROF DALY: *The use of the regional offices, how did that actually work? Did you - presumably the development application would come to your office in Sydney.*

MR PAPPS: *It would come into Sydney via - often via the regional office.*

PROF DALY: *Via the regional office.*

MR PAPPS: *Sometimes directly.*

PROF DALY: *Okay.*

MR PAPPS: *And there would be a - - -*

PROF DALY: *Why would there be a difference? Why would it sometimes go to the regional office and then up with you, or not go directly to you?*

MR PAPPS: *I couldn't tell you. I wasn't across all of the details. Much of the administration of it was handled by the regional planning coordinators or managers in*

each region and the person who was running the central unit within head office. I think that reflected simply different councils' approach. Some councils were very conservative in their assessment of whether they thought the DA met the criteria and, therefore, had to be referred, and some weren't, and some sent it directly into the unit and some sent it via the regional office. But there was an administrative system set up as quickly as possible to cope with that, to have all the basis things that you would need, such as a register and liaison officers between the head office group and the regional groups. So they, you know, set up an administrative process to try and deal with all that to make sure that there was certainty and consistency.

PROF DALY: *You said that the establishment of SEPP71 put a lot of pressure, in terms of staff, and you said you probably under-estimated – not you personally, but the system under-estimated quite how heavy that pressure might be.*

MR PAPPS: *Yes.*

PROF DALY: *How well staffed were the regional offices?*

MR PAPPS: *In my view, our regional planning offices were never adequately staffed to meet the tasks placed on them. Having said that, it would also be fair to say that if you asked any senior bureaucrat in any government agency, or almost any government agency, were they adequately staffed to meet those sorts of responsibilities you'd probably get the same answer. But I would say, quite genuinely, it was a big task, particularly in the coastal areas, and we struggled with the numbers that we had.*

T. 10/3/05 p. 1256-1257

The role of the regional offices was taken up with Mr Stephen Murray, the Manager of Planning and Strategy for the North Coast Region of DIPNR during the Public Hearings (**T. 16/3/05 p. 1413**). Mr Murray indicated that the Grafton office handled certain referrals related to SEPP 71 applications and that since its inception the office, which is related to 12 or 13 councils, had dealt with 924 such referrals.

MR MURRAY: *Stephen Douglas Murray, 27 Burns Crescent, Corindi Beach, New South Wales. I'm a town planner with the Department of Planning, Infrastructure Planning and Natural Resources, and my title is Manager Planning and Strategy for the North Coast Region.*

PROF DALY: *Thank you. You are based in Grafton?*

MR MURRAY: *That's correct.*

PROF DALY: *What region do you cover from Grafton?*

MR MURRAY: *Our region covers from Hastings Council through to the Tweed Council, and we basically go to the base of the Great Divide or the top of the Great Divide, depending on the local government areas, and two or three westernmost local government areas would be Kyogle, Lismore City Council, and parts of the Richmond Valley.*

PROF DALY: *So how many councils altogether?*

MR MURRAY: *12 or 13.*

PROF DALY: *12 or 13, okay. How long have you been in that position in Grafton?*

MR MURRAY: *In terms of my current position, since just before Christmas because of the restructure of the Department, but previously with the Department of Planning, known as Planning New South Wales, 2 years 8 months.*
…

MR MURRAY: *I probably need to explain the roles that the Department plays in terms of SEPP71 just to clarify.*

PROF DALY: *Yes.*

MR MURRAY: *There are two roles that we have in the Department. One is where the Minister takes on the role of the Consent Authority, and those assessments are done by what we call our Urban Assessments Branch, which are based in Head Office in Sydney. So those applications which are considered state-significant under SEPP71 are dealt with all centrally in Sydney.*

The role of the region, in particular in SEPP71, is to look at the referrals that are required under that SEPP that aren't - I think they're specified in clause 9; I can pull out the relevant clause, anyway. Those referrals come through to the regional office, and we've had approximately 924 referrals since the introduction of SEPP71.

The other role that the region does play is we often given comments to our Urban Assessments Teams in terms of the development applications that are required to be assessed under the SEPP, and sometimes we have a role in terms that there's a concurrence role required either under the local environmental plan applying to that local government area or our regional environmental plan.

The other role that we do have under SEPP71 relates to the issue of master plans, and in the instance where a master plan is required because it's required because it's near a sensitive coastal location, and is less than 25 lots, the regional office assesses those, and all the major master plans where they are 25 lots or more or have the capability of being 25 lots by virtue of land owned in adjoining ownership that could be subdivided, are handled by our Urban Assessments Team.

PROF DALY: *Okay. We had appearing before us last week Mr David Papps, who previously was Director of Planning New South Wales and had very close contact with SEPP71 and those issues. We also had Professor Thom, who was former Chairman of the Coastal Council, etcetera. One of the issues that was raised with Mr Papps was the issue of resources. You have now given us some figures, which are a lot. How many people do you have to manage what you do?*

MR MURRAY: *Well, we've got to look historically and at present, and I have a team now of 27 staff, but of that I have predominantly three or four people who would look at the issues that are raised under SEPP71 along with their other duties that they have within the region. It was a similar number prior to the two departments, which was Planning New South Wales and the Department of Land and Water Conservation, amalgamating. I had a smaller team: there was about a total of 15 of us for the region; and we probably looked at two people mainly then would do the referrals.*

However, one important thing to note is that there was a subsequent amendment to SEPP71 that did lower the amount of referrals. When it originally came out, basically everything that required development consent in the location specified was being sent to the Department. The Minister - the Department recommended the Minister make subsequent amendments in response to concerns raised by local government across New South Wales that the referrals should then be limited to basically buildings over two storeys.

PROF DALY: *Right. Okay.*

MR MURRAY: *So since that amendment came through, there has obviously been a decline in the amount of referrals. But these are the referrals that are required under the SEPP. These aren't the matters that fall under the schedule of state-significant.*

PROF DALY: *Okay. Thank you for that. Ms Annis-Brown.*

MS ANNIS-BROWN: *Mr Murray, if I could just touch on – you mentioned very briefly the role of DIPNR. If I could just explore that a little bit further with you, and what I'd like to do is specifically talk about the distinctions between the role that DIPNR has - the concurrence role - and the role it has with respect to state-significant development and calling up developments where the Minister then is ultimately the consent authority. So perhaps if you could just start off from a broad role of DIPNR and then go down and perhaps we could look at those issues separately.*

MR MURRAY: *Okay. I mean, obviously, from a very broad role of DIPNR, our new charter is to manage natural resource management, planning, social and economic issues regarding land use across New South Wales. When we come down to things that fall more particularly in my area, a lot of it is administrating the role of the government through the Environmental Planning and Assessment Act, and that has - if you like, to keep it simple, it's split into two roles. One is it's plan making, which is Part 3 of the Act, and the other significant role that we deal within the region is a role in development approval, which is the Part 4 section of the Act.*

So coming back to the more detailed parts of your question, which was the concurrence role, the Department has a role, or the Director General does through the Act which is basically delegated in a lot of instances down to my level, and in some cases down to my managers below my level. We have a role to give concurrence in accordance with local environmental plans where those plans require the concurrence of the Director General of the Department.

T. 16/3/05 p. 1411-1414

The lack of resources within DIPNR, at both the Sydney and Grafton offices, has meant that the councils still play a substantial role in relation to SEPP 71 applications.

MR MURRAY: *... However, the Department over the years has delegated some of those responsibilities back to council, particularly where they have done a local environmental plan that's been through a strategic planning process – you know, through the normal public exhibition process - and specifies the height that council can assume our concurrence, because the Director General has previously passed that on to the councils - can assume our concurrence role in those instances.*

In some cases we do have a concurrence role under what we call State Environmental Planning Policy No. 1, which is development standards. It's where applications seek to vary a numerical development standard. In a lot of instances, those, apart from creating minimum lot sizes in rural areas and allowing dwelling entitlements in rural areas that vary more than 10 per cent, they stay with the Department. However, matters to do with floor space ratio, generally heights, setbacks in those matters can be dealt with with the councils.

In some instances across the whole North Coast, and I know from my previous experience in local government, we would often not use our assumed concurrence role as councils and they ask the Department to take on that role. So that's generally the concurrence role. The main thing to note with that is when we do issue concurrence, we are limited to the matters raised in the clause relating to that concurrence. We can't actually look at issues outside that. It actually says the things we must look at and have regard for. So does that give a general - - -

MS ANNIS-BROWN: *Yes. I just wanted to confirm with you the issues which you specified to which concurrence is limited.*

MR MURRAY: *Yes.*

MS ANNIS-BROWN: *That is specified in each individual LEP?*

MR MURRAY: *Local Environment Plan. And generally they are very similar issues, because we have a look at the - when the LEP has been drafted it comes normally through us and obviously through the Parliamentary Council, and we ask them to keep them as consistent as possible.*

MS ANNIS-BROWN: *Yes, because I was going to say who determines that, otherwise each council would ostensibly be able to limit it to the issues which they feel may be necessary, I suppose.*

MR MURRAY: *We do set some criteria within our regional environmental plan that relates to plan preparation to do with coastal foreshore areas. So we kind of have set the scene, but without directing the specific clause. We've directed the areas that we want them to look at.*

MS ANNIS-BROWN: *Just going back to the assumed concurrence, perhaps you could just elaborate a little bit more on that. You mentioned that it's again limited - or what that means is that the council may assume the DGs concurrence based on a list of matters that has already been prepared. Is that what you suggested?*

MR MURRAY: *Well, what we have done, and I can leave a copy, if you like, with the Commissioner - - -*

MS ANNIS-BROWN: *That would be good.*

MR MURRAY: *- - - is brought a copy - an instrument - or its our circular that actually spells out how council may assume that concurrence. And what it does is it says what you can't assume, and everything else falls within that. And then there's another instrument to do with our Regional Environmental Plan to do with heights of buildings that says that where you've prepared a plan and we've basically agreed with those heights as part of that plan, because it's greater than 14 metres, you can assume our concurrence as a council.*

MS ANNIS-BROWN: *So that application would not even go to the Department.*

MR MURRAY: *No. But some councils do choose to send those applications to us for comment.*

MS ANNIS-BROWN: *Right.*

MR MURRAY: *But it's a decision of the individual council; it's not necessarily a policy thing. Or in other instances, if we get a number of representations, whether it be through local members or community groups, quite often we will actually ask councils to forward us applications to have a look at.*

MS ANNIS-BROWN: *Just with respect to SEPP1, I understand that that is usually delegated to a Departmental or council officer. Is that correct?*

MR MURRAY: *That's correct.*

MS ANNIS-BROWN: *Okay. So how would that work? I mean, what proportion, I suppose, is delegated, and how do those delegations work? Again, is it a list of delegations? Who determines that list?*

MR MURRAY: *It's by exception once again so that you will find in the document I'll leave here called Circular B1. It actually spells that out: how it's in the department it's delegated through our delegations within the department. All councils have different delegations on whether the council officers, or the councillors as the elected body, may use that assumed concurrence and that from my experience varies in a number of different councils.*

MS ANNIS-BROWN: *So that would appear in the general officers delegations - - -*

MR MURRAY: *Delegations of a council whether or not they could assume - if they have got an assumed concurrence - they could use it or whether it has to be the full elected body.*

MS ANNIS-BROWN: *All right. Thank you.*

MR BROAD: *In respect of Tweed Shire Council, is the delegation to the councillors or to staff of the council?*

MR MURRAY: *I'll have to read it. Just to - - -*

MR BROAD: *You can just have a glance and tell me that.*

MR MURRAY: *It's the consent authority so in that case it's to the council - - -*

MR BROAD: *It's the council.*

MR MURRAY: *- - - and then the council - my understanding under the Local Government Act has the right then to delegate certain functions that are consistent with the provisions of the Local Government Act to the officers of council.*

T. 16/3/05 p. 1415-1418

The role of councils in providing resources and information in relation to SEPP 71 applications began at the start of the SEPP 71 system.

MR BROAD: *Yes. The other question I have in respect of SEPP71 is in your view, given limited operation really of SEPP71, has it effectively taken council decision-making powers away from them on larger developments?*

MR PAPPS: *It's hard for me to answer that because I would have to restrict my answer to the time I left the department, which is effectively two and a half, nearly three years ago.*

MR BROAD: *Probably the better question is this; is the operation of SEPP71 so large in respect of a coastal council that the effective decision making of councillors on larger developments has now gone?*

MR PAPPS: *I'd agree with that statement. I think that was one of the aims of the SEPP for those significant important major coastal developments.*

MR BROAD: *Developments within that zone.*

MR PAPPS: *Within that zone they would come to State Government. Long-term the policy was more about getting the regional strategies in place of sufficient quality that there would need to be less and less intervention by the State providing Local Government reflected the regional strategy.*

MR BROAD: *But it's confined to each particular zone and doesn't affect decision-making outside that particular zone?*

MR PAPPS: *That's true.*

T. 10/3/05 p. 1264

3.2.4 Issues Arising from SEPP 71

There are a number of issues that relate to the fact that development approvals in the coastal zone that are affected by SEPP 71 are decided upon in Sydney, and not in the local region. One of these is how objections to aspects of the developments are handled. The Inquiry examined the detailed assessment of all SEPP 71 applications approved for Tweed Shire. It would appear that objections are generally noted but, in most cases, they did not prevent an approval being granted. Councils are often consulted in relation to objections, and other matters in the assessment process. If a council has a majority of pro-development councillors, as with Tweed, it is not surprising to find that the council will argue that the objections should not prevent the approval of the project. DIPNR, generally, appears not to explore the objections in a way that an independent body might do.

MS ANNIS-BROWN: *Mr Murray, if I could just talk to you about the issue of public notification and objections received with respect to development applications. I'm just interested to know how involved DIPNR gets in I guess going through those objections and/or submissions, and what involvement it actually has in considering those when it actually gives consent or otherwise to approvals - to development applications, rather.*

MR MURRAY: *I mean, obviously I could speak with certainty in terms of the issues we deal with within the region, because quite often where there's a matter where we have to give a concurrence, there's been advertised - and council will - we normally request, or most cases councils will forward their submissions to us. We actually assess those submissions. We assess them to see whether they actually related to our concurrence role. And if they do, and they have merit, sometimes we'll actually go back to the council - through the council to the applicant, and actually ask to discuss that matter and seek solutions. And at other times we'll actually impose conditions, which we can on our concurrences, to actually what we think will address with those issues.*

While my understanding is the same approach is used with our urban assessments branch, but once again, you know, as I'm not a member of that urban assessments branch. But that is standard practice of how you do it in town planning. So I, you know, I can only say that that's what I would expect.

MS ANNIS-BROWN: *To go back to the Cabarita Beach proposal, and that was from what you've stated, undertaken by the urban assessments team. I'd just like your opinion if you can, they have referred to a number of submissions having been received, and they related to over-development, excessive height, visual impact, loss of public tavern, overshadowing, loss of privacy, contravention of local planning laws. I mean, there's a whole raft of issues there that were referred to in terms of the objections received. It then goes on to say:*

Tweed Shire Council is generally supportive of the proposal.

I'm just wondering, in your view is that a valid statement? I guess in terms of is that a valid consideration, having spoken about the great number of submissions and the number of issues they relate to, whether that's a valid consideration in terms of the department's consideration of the proposal?

MR MURRAY: *Not knowing and not having viewed the Council report on the matter - because I'm not sure whether Council did - but my understanding is of what happens with SEPP71 is that most councils actually prepare a report on the matter and send their views through to the department. Now, that report is normally comprehensive, and also includes suggested conditions of consent, so while this is only a summary document or an assessment report trying to summarise it - and I know it refers to a number of tagged documents, which I haven't seen because we're not involved in this - for me to make a judgment on whether that's valid or not without actually seeing the information that supported that, it's hard to know, but my understanding is, on a number of these, that the Urban Assessment's branch do work with the applicant to actually amend designs, amend layouts, etcetera, design features to address the concern. So, once again, it's part of the overall assessment.*

MS ANNIS-BROWN: *Okay. Well, let's take it away from the specific and talk about the general. You mentioned that where you exercise a concurrence role you take those objections into account. You read them, you may well go back to the applicant and discuss those issues so if something like that was to be considered, again, do you think that's a valid consideration?*

MR MURRAY: *Sorry, I'm confused by the question.*

MS ANNIS-BROWN: *Okay, sorry. I'll rephrase that. Several objections have come in.*

MR MURRAY: *Yes.*

MS ANNIS-BROWN: *You've looked at them. You believe there's reason to go back to the applicant with them or discuss the issues with Council and yet you've received a report from Council saying it generally supports the proposal. What weight would you give to Council's general support of the proposal even though you've received several submissions with respect to several issues?*

MR MURRAY: *Okay. Without trying to be obtuse, it would depend on the detail and the issues Council has considered in its submission to us - would depend on the weight that we gave it so if Council has heard the public objections and actually raised those in their reports and we believe, for instance, it has addressed them to a satisfactory manner, we make give weight to the Council report.*

Alternatively, the Council report may not have, in our opinion, fully considered those objections and, therefore, we may say, "Well, we give that less weight" so it's subject to actually the information provided for you to actually make that thing and that's one of the

complexities of the planning system is that when you make those merit assessments it's subject to the argument and the different arguments that are placed and how you assess that against the criteria that 79(c) says and the objects of the Act and you actually have to look at that information and make a merit-based assessment on that and so the answer, as I say is, the weight that you would give to the recommendation that Council has made from my point of view would be subject to the depth and the detail in which they have actually looked at and addressed the issues and made their assessment.

MS ANNIS-BROWN: *Yes.*

MR MURRAY: *So, if we got a report that came through, well, you know, for this and we think it's fine, here's our conditions yet we hear the community saying the design's inappropriate or this is inappropriate, you'd tend to give it less weight but if it was very detailed and justify their position you may balance the issues raised by both so - - -*

T. 16/3/05 p. 1430-1433

By moving the development approval process for coastal development away from the councils, DIPNR has removed the decision-making a phase further from the communities. The DIPNR assessment reports on coastal developments in the Tweed suggest that in some cases the community raised a number of objections, but their voice was not heard. The objections were often dismissed on technical grounds: for example, the assessor would decide that the extent or timing of beach shading associated with a particular development was within the intent of the regulations, or that a rise in the height of a building was reasonable on topographic grounds. In some cases objections might not be taken into account because the assessor had noted that the council itself did not support the objections. This latter summation smacks of Catch 22 situations: where the council is very pro-development, and the project is contentious, it is inevitable that the council will dismiss the objections. Mr Papps recognised the need for a more "coalface" type of approach with SEPP 71 assessments, as against a technical approach (**T. 10/3/05 p. 1255**). Mr Papps suggested that the "coalface" approach had not occurred because the process was in a learning phase.

MR BROAD*: It's must [sic. be] more coalface that [sic. than] promulgating planning instruments.*

MR PAPPS: *That's right, and I don't want to imply that I'm being critical of SEPP71. I think SEPP71 is a good policy and I think it's a worthwhile policy. It's more the implementation of it at the coalface never quite works out the way you imagined it in the first instance, particularly given some of the difficulties in constructing a legal instrument that's got definitions, and you're trying to set up a filtering system built around legal definitions. You always have problems getting that right. It nearly always involves refinement. So I think it's a very good policy. I've strongly believed in it, and I expected, whether I was there or not, it would get better with time, both in terms of its administration as we became more skilled at that, and in terms of the way people were trained up to deal with it, particularly at council level.*

T. 10/3/05 p. 1255

The problem with shifting the assessment program for SEPP 71 to Sydney is the capacity of Sydney-based officers to understand the detail of local areas. This was partly to be rectified by DIPNR's Comprehensive Coastal Assessment program; the detailed information base would allow assessors to make informed decisions. As well, DIPNR has given a high priority to creating regional plans into which the councils' local environmental plans would blend; this would mean that the details of local plans would provide a base for the assessors in harmony with the broad goals of the State agency. The Comprehensive Coastal Assessment was not completed when the SEPP 71 system was introduced, and the regional plans have not been constructed along the coastal councils as yet. The intermediate position might have been the use of regional offices to obtain the detailed material needed to assist the Sydney-based assessors of local development applications. Mr Murray stated that nearly a thousand references had been made to the Grafton office since SEPP 71 was implemented, so some part of the local details was handled by that office. The difficulty for the regional offices, however, is that they are under-resourced, and their territories are quite large. Moreover, the North Coast region provided a third of the SEPP 71 applications. As Mr Papps observed (**T. 10/3/05 p. 1257**) "they did as much as they could" in the regional offices.

PROF DALY: *Did either people from the Sydney office or people from regional offices get into the field? Did they do site inspections? Did they - was there much of that, was that - - -*

MR PAPPS: *No. There - - -*

PROF DALY: *- - - was difficult because of the numbers of DAs, and distances, and so forth?*

MR PAPPS: *They did as much as they could. It was a general policy that we certainly had within our group that you couldn't make decisions about significant planning matters without having a reasonably good understanding of the place. So the people from head office would go and spent time in those cases with the regional teams. It would vary. I mean, if it was a big, complex planning matter they'd spent more time. ...*

T. 10/3/05 p. 1257

Complicating the SEPP 71 assessment processes further, it was necessary for Planning NSW or DIPNR to obtain inputs from a number of other State Agencies into aspects of the various development applications. This had a number of effects. First, it slowed the assessment processing down (**T. 10/3/05 p. 1258**). Second, it created some tensions where the professional advice of one Agency was either not followed by the assessment officer, or contradicted the evidence that officer might have obtained from the council or from the developer. Third, there has been a certain amount of restructuring of the government Agencies over the past few years, and some legislative changes; these have made the process of harmonising the views of many Agencies into one assessment even more difficult.

PROF DALY: *Okay. Going back to another point which was raised earlier, the connection of Planning New South Wales with other government agencies, now I would imagine that this would vary a great deal up and down the coast, but I imagine that, for*

example, what is now the Department of Environment and Conservation but previously was unitised into EPA and National Parks and Wildlife and so forth, I imagine that such a department like that would be fairly frequently called upon to - and in some instances it might be for advice, perhaps the Threatened Species Act and its application - - -

MR PAPPS: *Absolutely.*

PROF DALY: *- - - and another instance is, it might be very direct, if there was toxic land, I would imagine that the EPA would have an interest in that.*

MR PAPPS: *Yes. That's true.*

PROF DALY: *We've heard evidence that in one of the developments which we will talk about in a minute, Salt, that the developer dealt with eight different State agencies in the process of that development. The cumulative effect of having a lot of players, as well as the central player which was Planning New South Wales, did that mean that SEPP71 introduced a drag on the speed at which development applications could be processed?*

MR PAPPS: *It would have, under certain circumstances. There would have been a number of development applications, I imagine, that took longer under the system operating with SEPP71 than otherwise. It did add some advantages. I mean, there were - as part of our general reforms that Professor Thom mentioned, plan first initially, and then some of the other reforms that we were undertaking as a Department, we were asking our regional teams to become much more involved with their colleagues in other agencies so, in other words, to establish and then maintain much more cooperative relationships and to try and put as much effort as they could into making the idea of whole of government decision-making work better in practice.*

Many of those agencies, as you've quite rightly said, had a direct role, that is, they often had to make a decision themselves about issuing authorities and permits and the like. In other cases, they had indirect roles where we sought their advice to inform our decisions but, certainly, the message that went out to our regional planning teams under the reforms that we introduced was, "Do all you can to make whole of government a reality. Try and make this process as seamless and as integrated as it can be," acknowledging that it will never be truly seamless nor truly integrated.

PROF DALY: *Would that be difficult in the sense that the headquarters of regional offices of different agencies might vary - the regions over which those groups presided might not coincide perfectly, and the levels of responsibility of people in those different places might vary a lot? Was there a difficulty with that?*

MR PAPPS: *That was a difficulty and, clearly, this is all my personal opinion about how the system worked, as a senior bureaucrat.*

PROF DALY: *Sure.*

MR PAPPS: *But that was a difficulty. There were a range of other difficulties. In many cases the decisions that were being made, both by ourselves and other agencies, were*

actually made by more senior bureaucrats in Sydney and so while there might often be quite good co operation and integration at a regional level it wasn't always then reflected in the same way within Sydney and that was certainly another issue. And, of course, different agencies were working to different legislative context and different objectives and so, again, you were always involved in this attempt to marry the different demands in the decision-making process.

PROF DALY: *There was also a fair amount of legislative change around the late 1990s into the early 2000 period.*

MR PAPPS: *That's right.*

PROF DALY: *That would have complicated that process as well - - -*

MR PAPPS: *That's - - -*

PROF DALY: *- - - with new Acts, new Regulations.*

MR PAPPS: *That's true. And at the same time with the appointment of Sue Holliday as Director-General of the then Department of Urban Affairs and Planning and subsequently Planning, New South Wales, she was driving a reform agenda with the support of the Government to make planning much more relevant and active in the regional areas and to try and get a whole of Government planning happening so that there was less - there was less agency by agency decision-making and less agency by agency strategic planning. So that was another - that was another layer of complexity and reform going on, if you like, at the same time.*

T. 10/3/05 p. 1258-1260

Another issue related to the role of the regional office in terms of development approvals is concurrence, where the office is delegated by the council to make decisions on a matter (**T. 18/3/05 p. 1707-1708**).

MR IMRIE: *Yes, I would have thought it's in that sort of numbers, yes. I mean, we had concurrence roles, so there were a number of things where that would be triggered, and some of those were more complicated than others. So it could be a concurrence role in Council's local environmental plan - - -*

MR BROAD: *How were they dealt with, concurrence matters? Were you basically reliant on Council to provide the information to you?*

MR IMRIE: *We would actually have the development applications, so whatever the developer had put together, and we had Councils view on it as well. And, essentially, I had delegation to make those decisions, yes. I would make those decisions on the basis that if it was a very complicated matter and we were probably going to say, "No", I would do that in consultation with either my regional director of an assistant director in Sydney, so - but run of the mill stuff, I mean, I would make the decision. I think, from memory, we have a time on that. We have 40 days to decide our concurrence, so they were a fairly high priority.*

MR BROAD: *So far as Tweed Shire Council was concerned, what was your relationship with the Council? Were you on a good relationship with staff within the Council?*

MR IMRIE: *I have to say it varied over the years. Certainly, with the past director, Director Broyd, yes, we had good relations with him and, I think, Mr Jardine, who was the forward planner, and with Gary Smith, who was the statutory planner.*

MR BROAD: *The quality - - -*

MR IMRIE: *It was never an easy relationship, because things in Tweeds tended to be quite complicated and there were lots of pressures for them.*

MR BROAD: *Why do you say things were complicated? Because of discrete planning instruments and policies?*

MR IMRIE: *I guess that's part of it. I mean, that's my earlier comment. I mean, the system is quite complicated and, I guess, a lot of things in Tweed had a complicated history, so if you - to understand whether you actually had an approval or what your approval could actually achieve, you actually had to have an understanding of that history and then you would have to research what the extent of your approval or non-approval rights were. So that often took some time. So it certainly wasn't - a thing from Tweed Coast would not be a simple straight-forward matter and tended to be dealt with, as a consequence, by one of the more experienced planners in my team, yes.*

MR BROAD: *The other thing you just alluded to was pressure. Can you indicate in some more detail in respect of that?*

MR IMRIE: *Well, look, the biggest pressure on us with concurrence things was dealing with stuff in the 40 days. That was the issue. We had a short space of time to decide whether we wanted additional information, and that needed to be done. And, say, in a complicated matter, that meant you had to spend some time on the matter, up front, to decide whether you wanted that - you know, whether you wanted that additional information, because if you didn't, then the 40 day time was running and you had to get that decided.*

MR BROAD: *Was that aggravated by a shortage of information that was being provided to you?*

MR IMRIE: *I guess that's - from time to time, but certainly, that wasn't special to Tweed Shire.*

T. 18/3/05 p. 1707-1709

One of the factors that the person assessing a SEPP 71 application has to consider is the number of jobs that will be created, as the development is being built, and after the development is completed. The evidence from the assessment reports for Tweed considered by the Inquiry does not indicate how the assessor appraises the data. In the

case of the major SEPP 71 projects approved by DIPNR in the Tweed a total of 1298 jobs were to be created. The data are supplied by the developer making the application. Mr Imrie (**T. 16/3/05 p. 1430**) indicated that the Department would seek evidence to support the developer's claims, but there are no details on how this might be done.

PROF DALY: *Okay. In the cover sheet that comes with the reports that go through your department, there are a number of things listed on the front page, and presumably they're very important. Now, one of those things that is listed is the number of jobs that a development will generate. Where does that - those data come from?*

MR MURRAY: *Normally that data comes from the applicant, but is quite often tested by - - -*

PROF DALY: *How is it tested?*

MR MURRAY: *Well, the department will seek evidence. I can't give specifics, but I know from talking to them in the past on some of them where we've queried in a region, they actually go back to the applicant and will ask for justification to actually show that that estimate of jobs is real.*

PROF DALY: *I've reviewed all of the major developments in recent years, and the reports associated with them. I've not come across once any testing of those figures.*

MR MURRAY: *Well, I mean, I can't speak for these. But I know in some of the matters I've dealt with across the north coast, we've asked for that, and proponents have actually provided reports. Now, these reports don't actually reflect - my understanding is there's a whole file that's an assessment of it, and this is a - if you like, an assessment report that is put through the organisation and then to the Minister - - -*

T. 16/3/05 p. 1430

The assessor also has to consider socio-economic impact statements concerning a particular development application. In the case of the Resort Corp development at Cabarita Beach the assessor's report considered the fact that the developers had demolished the only hotel in town, and that they were going to substitute a tavern on another site to provide for the village's needs. Years later, no tavern has been built, and the village has been without this facility (**T. 16/3/05 p. 1428-1429**). There are other examples of how the socio-economic impact review has apparently not captured the real concerns of the community, instead accepting the developer's assurances (Addendum 3.2.4.1).

PROF DALY: *The Tweed LEP 2000 clause 17, and also Development Control Plan number 45, both requires socio-economic impact statements to be made in relation to certain applications that include hotels and tourist accommodation of more than 50 beds. In terms of the development of a new complex at Cabarita, where there was a hotel that is now being replaced by tourist and commercial development, the issue of the tavern that was there in the old building, made up part of the socio-economic impact statement.*

In the report on that, it said:

During the course of pre-DA analysis of the subject site, Resort Corp acquired the tavern licenses, and subsequently conducted extensive research into the viability of retaining the tavern within the proposed development. Ultimately, it was decided to remove the tavern component because of the negative impact of a hotel in the development incorporating accommodation and other commercial tenancies catering to the family market.

As liquor licence regulations prohibit the licence from being relocated further than one kilometre from the original location, it is critical Resort Corp relocate the tavern within the Cabarita township, otherwise the licences will be lost. Resort Corp indicated that they intended to relocate the hotel/tavern to a temporary location within six months until such time as it can be permanently relocated to permanent location within town, possibly within a new Cabarita Beach Surf Club, which is intended to be built on the block opposite, on the opposite side of Pandanus Parade.

Do you know what the current status of that is?

MR MURRAY: *No, I don't.*

T. 16/3/05 p. 1428-1429

Another problem related to approvals granted through DIPNR arises is the issue of compliance with the conditions of the approval. It would seem that DIPNR does not have the mechanisms to properly enforce compliance, and that this is often left to the councils (**T. 16/3/05 p. 1436**).

MS ANNIS-BROWN: *Mr Murray, if I could just talk to you about compliance with consent conditions and specifically I'm referring to the case where the Minister has called in the development, for example, or even it may relate to concurrence, to it's concurrence role, how does the Department then ensure and - or whose role is it to ensure that conditions of consent are complied with?*

MR MURRAY: *It's technically the responsibility of the consent authority so that is the Department. However, in most cases, we have a very good working relationship with the local governments that we deal with and they take on a compliance role for us. However, in some instances, particularly on concurrences, I will send my officers out to do that and we will use the resources of our head office which have people who have expertise in compliance and also our legal branch.*

With the restructure and the amalgamation of the departments, we actually have a new compliance unit which has traditionally dealt with compliance to deal with the natural resource management thing but we're working up a process where they can actually become involved with the compliance issues to do with town planning but, traditionally, most councils for requests to them have actually dealt with the issues for us but the Department has a responsibility.

T. 16/3/05 p. 1436-1437

The evidence suggests that the SEPP 71 system, meant to provide protection to coastal communities from over-development, has somewhat imperfectly fulfilled its role.

3.3 *The Extent of Concerns over Tweed Shire Council's Planning and Assessment Roles*

The submissions received by the Inquiry suggested that there was a great deal of concern within the Tweed community about what were perceived as deficiencies in the planning and assessment processes of the council. It was not possible for the Inquiry to investigate all the allegations of problems in these areas. A number of specific cases are dealt with in the following parts of Section 3. Here the purpose is to prelude those parts by providing a sample of the issues raised in the submissions alleging that council's processes were wrong or inadequate in cases that have not been analysed in any depth by the Inquiry.

3.4 *A Resilient Planning System*

3.4.1 Introduction

Councils are given responsibility, as the primary authorities, to determine what use and development of land may be undertaken in their council area.

This determinative power stems from the functions exercised by councils under the EP&A Act.

The EP&A Act seeks to encourage:

> (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
>
> (ii) the promotion and co-ordination of the orderly and economic use and development of land,
>
> (iii) the protection, provision and co-ordination of communication and utility services,
>
> (iv) the provision of land for public purposes,
>
> (v) the provision and co-ordination of community services and facilities, and
>
> (vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
>
> (vii) ecologically sustainable development, and
>
> (viii) the provision and maintenance of affordable housing, and …

While the EP&A Act seeks to promote the attainment of these objects by sharing the responsibility for environmental planning between the different levels of government, the primary and indeed the major role lies with councils.

While, through the adoption of SEPP 71 and other processes, the determinative role of councils may have been reduced, the primary planning and determinative roles remain with councils.

The majority of councillors and senior staff promoted a view that major developments in the shire were being determined by the State Government.

Mayor Polglase put this proposition in the following terms.

> MAYOR POLGLASE: *... but you will probably be aware that in New South Wales there is a condition in planning which we call SEPP71. Now, in Tweed Shire Council,*

that covers all our eastern seaboard where our major growth has been determined, and nearly all our major developments have been determined by the State Government. Tweed Shire has acted in a concurrence capacity. They've asked our opinion. We have given a concurrence. We support it. But the major - major developments have all been supported by State Government in - under - under the conditions of SEPP71. ...

T. 16/2/05 p. 65

Mr Hodges, council's Director of Planning and Environment, gave the following evidence.

MR BROAD: *You spoke about SEPP 71; with regards to a policy, to what extent is Council's decision making now being taken over by the state?*

MR HODGES: *Well, virtually, all the areas that are covered by the SEPP 71 maps, which is basically a kilometre from the shoreline and up the foreshores, any major development or significant subdivision is - has to be approved by the State Government and not Council.*

T. 18/2/05 p. 325-326

This view was taken up in a number of submissions, principally by those critical of the Inquiry.

The Kingscliff and Tweed Coast Business Association (**submission 35**) suggested:

The oft repeated statements that this (new) Council is a pro development / develop at all costs Council is absolutely incorrect.

- In terms of the Tweed Coast (the most sensitive of the development areas) neither this new Council nor the one immediately prior has re-zoned any significant parcels of land for development. Any developments that have proceeded were upon land that was zoned, in some cases, up to 20 years ago.
- Every major development that has taken place since 1999 has done so with the over riding support & approval of the NSW State Government. The State Government is the consent authority for the entire coastal strip.
- Of the (37) kms of Tweed coastline, about (24) kms of these have been set aside as a 'no go' for development. In fact, the area of land between Tweed Heads in the North, Wooyung to the south and the land bounded by the coast and the Pacific Hwy Motorway – 87% of the land is also 'no go' for development! These vast areas that have been set aside for Nature Reserves and National Parks and dwarf the areas set aside for pre determined (ie. not by this Council) development. The claims of pro-development / over development are myths perpetrated by those with political agendas – nothing more / nothing less!

This proposition simply ignores the role of council as the primary planning body for its local area.

The proposition, so far as it related to council's determinative role, is also largely factually incorrect.

3.4.2 The Planning Role of Councils

The EP&A Act anticipates that planning instruments and policies operate at four discreet levels:

- State, through SEPP's, model provisions etc.
- Regional, through regional plans
- Entire local government areas, through LEP's etc.
- Within local government areas, through DCP's etc.

While the state exercises its powers regarding state and regional instruments, the primary and over-arching planning regime is effected at the local government level.

In effect, the primary role of local government is to provide an effective planning regime within its local government area to provide the foundation for its subsequent decisions. In that context, the determinative role exercised by councils follows from and gives effect to its planning function.

Similarly, to the extent that the state exercises a determinative role, it must consider local instruments and policies, including LEP's and DCP's. – *see section 79 EP&A Act.*

Importantly, the determinative role does not change whether exercised by a local council or by a state body.

It is fundamental that the planning process provides the foundation for the subsequent decision-making.

In most instances LEP's provide the legal foundation for decision-making processes.

While state policies or regional plans may facilitate or provide guidelines for some developments, the great majority of developments are considered in light of the provisions of LEP's and commonly in light of policies enunciated in DCP's.

The EP&A Act recognises that LEP's and DCP's will principally find their source in local councils. The EP&A Act anticipates that the councils principally (in the case of LEP's) or solely (in the case of DCP's) draft the terms of these plans. – (**sections 54-72**).

Similarly, the EP&A Act anticipates that amendments will also flow from councils.

While DIPNR has a role in the preparation and amendment of LEP's it would be wrong to suggest that this role is so great as to dictate the content and wording of LEP's.

3.4.3 The Determinative Role of Councils

Consent Authorities are required to consider and to determine development applications brought under the EP&A Act.

In the great majority of cases councils exercise the functions of the consent authority.

A development application may be determined by refusal of by granting consent, either conditionally or unconditionally (**section 80**).

The EP&A Act recognises that there must be a legal validity underlying the determinations and facilitates applications to restrain breaches of the EP&A Act (**section 123**).

Many LEP's, including those of some councils near the Tweed, expressly prohibit a council granting consent to an application that is contrary to the objectives of the plan (see for example Richmond River, Ballina, Byron and Lismore LEP's).

The Tweed LEP does not contain similar general prohibitions; however, the Tweed LEP does contain some express prohibitions, such as that prohibiting consent authority being given to buildings breaching its height restrictions (**clause 16**).

Prohibitions, such as those outlined above give clarity to the determinative role of councils, reinforcing the underlying need for the application to be founded on a legal basis.

The failure of the Tweed LEP to enshrine more suitable prohibitions will be referred to later in this part.

In light of the foregoing it will be seen that the determination of development applications is effectively a two-part process. Council must first determine whether it has the legal capacity to consider the particular application.

Having done so, the council must consider whether, on the merits of the application, it should grant consent to the application.

The EP&A Act when first enacted prescribed the matters that were to be considered when determining a development application. In its present form, the EP&A Act is less prescriptive, requiring that a consent authority take into consideration "such of the following matters are of relevance to the development" (**section 79C**):

> (a) the provisions of:
>
> (i) any environmental planning instrument, and
>
> (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and
>
> (iii) any development control plan, and
>
> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),
>
> that apply to the land to which the development application relates,
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

It will be seen that the EP&A Act places relevance on "environmental planning instruments", which include LEP's (**section 4**), and exhibited draft LEP's and DCP's.

As has been indicated earlier, these documents essentially stem from councils' planning processes.

It is worthwhile emphasising that a LEP is the primary planning tool affecting development in a council area. It is the coalface at which the determinations are principally made.

Refining and guiding decisions are DCP's, which form the enunciated policy of the council.

Court decisions are built around the terms of LEP's. Such is their importance that they form the foundation and basis of perhaps almost all development applications.

Collaterally, DCP's have not, until more recently, been considered to provide a strong foundation for decision-making, but rather, a flexible tool to draw from or to provide a basis of differentiation when determining applications.

In the case of the Tweed, they appear to have had an equivocal status.

Recent decisions of the L & E Court emphasise the role of DCP's and the manner that they should be applied.

The following passages from the Stockland Development case indicate the L & E Court's views regarding their role and their adoption together with their importance in providing consistency in council's decision making:

· A development control plan is a detailed planning document which reflects a council's expectation for parts of its area, which may be a large area or confined to an individual site. The provisions of a development control plan must be consistent with the provisions of any relevant local environmental plan. However, a development control plan may operate to confine the intensity of development otherwise permitted by a local environmental plan.

· A development control plan adopted after consultation with interested persons, including the affected community, will be given significantly more weight than one adopted with little or no community consultation.

· A development control plan which has been consistently applied by a council will be given significantly greater weight than one which has only been selectively applied.

· A development control plan which can be demonstrated, either inherently or perhaps by the passing of time, to bring about an inappropriate planning solution, especially an outcome which conflicts with other policy outcomes adopted at a State, regional or local level, will be given less weight than a development control plan which provides a sensible planning outcome consistent with other policies.

· Consistency of decision-making must be a fundamental objective of those who make administrative decisions. That objective is assisted by the adoption of development control plans and the making of decisions in individual cases which are consistent with them. If this is done, those with an interest in the site under consideration or who may be affected by any development of it have an opportunity to make decisions in relation to their own property which is informed by an appreciation of the likely future development of nearby property.

Again, fundamental to this entire process is the provision by council, as the primary (if not the sole) drafting body, of a clear and workable local planing regime through its LEP and DCP's.

In other words, a resilient planning scheme.

3.4.4 Measuring the Resilience of the Council's Planning Regime

The Inquiry's Terms of Reference call on it to consider *"the appropriateness of the procedures and processes adopted by Council in relation to its environmental planning responsibilities, including the processing of applications for development, particularly those of a significant nature*".

In order to assist its understanding of this and other issues, the Inquiry initially called for public submissions and undertook the task of reviewing a number of council's files.

Information gleaned through this process suggested that there were a number of weaknesses in council's planning processes that were in turn reflecting on, putting pressure on and potentially undermining council's determinative processes. Further, that the weaknesses of these planning processes were not confined in their operation to council's role, but that their weaknesses went beyond the council's role and affected decision-making at the state level.

Having come to this preliminary view, the Inquiry focussed its attention through evidence at the Public Hearings and further review of council's files to determine whether the council had adopted a resilient planning system.

Evidence supporting a view that the planning regime was not resilient was likely to come from:

- Development applications
- Applications to modify development consents
- Concerns expressed by:
    - Staff

    - Bodies providing input into council's decision-making
    - Bodies reliant upon council's planning regime in their decision-making
    - The community
    - Applicants seeking consents
- Conditions of consents
- Enforcement

Mr Hodges, council's Director of Planning and Environment was asked:

> MR BROAD: ... *If Council has in place its local environment plan, it has a raft of development control plans and other subsidiary plans and policies such as '94 contribution plans and the like. Today - sorry, yesterday - we heard the Council has just passed their variation in respect of this definition of floor level or ground level. What is the resilience of Council's policies, codes and the like?*

T. 18/2/05 p. 323

Regrettably, his response did not provide an answer to the question.

Mr McGavin, a town planner employed by the council, who had prior experience working for other councils, spoke favourably of the resilience of council's planning instruments, saying:

> MR McGAVIN: *I think so. The LEP and the DCPs, in general, are similar to the other councils that I've worked in on the coast. I've worked in three other councils. There are similar aspects to those DCPs and the LEP. I think there's always an opportunity to review and update and make things contemporary and things like that. But obviously, you know, it takes resources to do that. But generally, yes.*

T. 3/3/05 p. 849

Having considered the evidence available to it, the Inquiry does not share this view.

The evidence received by the Inquiry suggests that there is overwhelming evidence to support the view that the council has not put in place a resilient planning regime to support its decision-making.

3.4.5 Obtaining Consent

The determination of development consents may involve a complex exercise, seeking ultimately to meld the effects of the development with the natural, social, economic and, potentially, the political attributes and goals of the immediate vicinity and possibly the larger area.

Section 5 of the EP&A Act seeks to encourage development that meets that Act's goals. To achieve this result, the EP&A Act sets out the matters to be considered when determining a development application.

Traditionally the role of the consent authority has been notionally divided into two parts:

(i) Legality: Whether, having regard to the terms of the applicable planning instruments, the development is able to be approved.

(ii) Merit: Whether, having regard to all the matters underlying consideration of the development and its effects, it merits consent, conditionally or otherwise.

It is important to contrast and to separate the role of a consent authority when considering a development application from the goal of a developer.

Mr Ray and Mr P Brinsmead, both developers in the Tweed area made clear that, from their perspective, developments were driven by feasibility.

Mr Brinsmead quite correctly linked feasibility to the ability to obtain financial backing for the project.

MR BROAD: *To what extent do you try and maximise the possibility or the development potential of a site?*

MR P. BRINSMEAD: *Well, as a developer you have to make it work financially. And, fundamentally, the decision as to whether you - if it fits the criteria and the business plan that's the first criteria, the next is once you've got the confidence that that project is likely to receive consent it needs to be feasible. And the feasibility, obviously, is working through how much it costs to deliver and how much you're going to get for it. That's the final arbiter of whether you go ahead.*

MR BROAD: *So that's really the developer's denominator is the feasibility?*

MR P. BRINSMEAD: *It's the developer's denominator and the financier's denominator.*

MR BROAD: *It's the ultimate denominator.*

MR P. BRINSMEAD: *You don't get your developments financed unless it reaches a certain level of profitability.*

T. 23/2/05 p. 437

Mr Ray similarly emphasised that, from a developer's perspective, feasibility serves as a project's lynchpin (**T. 24/2/05 p. 504**).

It is important to emphasise that this perspective, based on economic returns does not parallel the role of a consent authority and may, in many instances, be sharply opposed, particularly as feasibility often implies a need to maximise returns.

Mr Brinsmead, Mr Ray and the Ray Group's development manager, Mr MacRae gave evidence of the processes leading up to the presentation of a project for development consent. While each recognised the importance of the planning regime under which an application would be considered, each acknowledged that the consent was part of the process and that their consideration of the regime aimed at substantial compliance,

accepting that discretions underlay much of this process (**T. 23/2/05 p. 436-437, 24/2/05 p. 504 et. seq., 4/3/05 p. 900 et. seq.**).

While the contrast between a developer's and a consent authority's perspective is not surprising, it is however surprising that an applicant seeking development consent is not obliged to address all matters that may be relevant to the consideration of the application under section 79C of the EP&A Act.

The EP&A Regulation provides that a development application be accompanied by the information specified in Part 1 of Schedule 1, this in turn requires that the following information be provided:

- the name and address of the applicant,
- a description of the development to be carried out,
- the address, and formal particulars of title, of the land on which the development is to be carried out,
- an indication as to whether the land is, or is part of, critical habitat,
- an indication as to whether the development is likely to significantly affect threatened species, populations or ecological communities, or their habitats,
- a list of any authorities from which concurrence must be obtained before the development may lawfully be carried out,
- a list of any approvals of the kind referred to in section 91 (1) of the Act that must be obtained before the development may lawfully be carried out,
- the estimated cost of the development,
- if the applicant is not the owner of the land, a statement signed by the owner of the land to the effect that the owner consents to the making of the application,
- a list of the documents accompanying the application.

Depending on the nature of the application other material must be provided, including:

- a sketch plan of the land,
- a sketch of the development,
- a statement of environmental effects (in the case of development other than designated development), or
- an environmental impact statement (in the case of designated development),
- a species impact statement (in the case of land that is, or is part of, critical habitat or development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats).

More commonly, the application is accompanied by a statement of environmental effect, rather than an environmental impact statement.

Again, Schedule 1 specifies the information to be contained in a statement of environmental effects, providing that it "indicate the following matters":

- the environmental impacts of the development,
- how the environmental impacts of the development have been identified,

- the steps to be taken to protect the environment or to lessen the expected harm to the environment,
- any matters required to be indicated by any guidelines issued by the Director-General for the purposes of this clause.

Essentially, the EP&A Regulation mandates the provision of certain basic information in an application. Depending upon the nature of the application certain other information is also required. However, the quality and complexity of this further information may be variable as the EP&A Regulation steps back from mandating or prescribing the information to be provided in a statement of environmental effects.

Essentially there is a lack, with the wording of the clause and otherwise as, to the understanding of the Inquiry, no guidelines have been issued by the Director-General. Essentially there is no adequate prescription of what a statement of environmental effects must or should address.

Collaterally, as was indicated by Mr Anderson, a consultant town planner operating in the Tweed area and a former member of council's staff, the material accompanying a development application does not necessarily address consideration under section 79C of the EP&A Act:

MR BROAD: *Now, do you, in preparing the statement of environmental effects, undertake an evaluation in terms of that required under Section 79C of the Environmental Planning and Assessment Act, that is, an evaluation of the provisions of planning instruments and policies, the likely impacts of the development, the suitability of the site, public interest, those sort of matters?*

MR ANDERSON: *Not explicitly, no. An applicant's role is to address the matters in Clause 50 of the regulations. It's the consent authority's responsibility to carry out a Section 79C assessment in determining the development application. However, of course, any prudent consultant and/or developer would have due regard to all of those matters that the Council has to consider and address those that are relevant in any statement of environmental effects. But we do not carry out a detailed section 79C assessment, that's a matter for the council.*

T. 23/2/05 p. 345

Having regard to the nature of the other material required by Schedule 1, it is likely that the statement of environmental effects is the only supporting document that addresses the likely impacts of the development, the suitability of the site (other than its physical attributes) for the development and the public interest, as required by section 79C of the EP&A Act.

In those circumstances, both the EP&A Act and the EP&A Regulations are deficient.

In the absence of recognition either by the applicant prior to lodging an application or by the consent authority as part of its review, there is an underlying risk that there will not be proper consideration of the application, as mandated by section 79C of the EP&A Act.

The ability of a council to recognise potential issues is largely determined by the skill of its staff.

Mr Smith, council's Manager Development Assessment, a qualified town planner whose department determines development applications indicated that his staff included town planners and engineers (**T. 24/2/5 p. 523**).

Mr Buckley, who was to give evidence immediately after Mr Smith indicated the skills base of his staff in the following terms:

> MR BUCKLEY: *A lot of them have been both dual qualified at health surveyors and building surveyors. Some are one or the other. They have the relevant qualifications in environmental and building issues. And in the recreation services, there are staff with skills in - qualifications in that area. And also in the community services area, there are those with relevant community service qualifications as well.*

T. 24/2/05 p. 534

Mr Buckley described the role of his department as:

> MR BROAD: *I'm a little bit confused, Mr Buckley, exactly what the environmental health issues that you spoke about were. Are you talking about management of infrastructure such as water supply and sewage services? Or are you talking about management of environmental issues in a larger sphere throughout the council area?*
>
> MR BUCKLEY: *No, it's not the infrastructure issues. It's the environmental impacts, pollution issues, contamination of the land, review of the environmental parts of development applications, it goes on to food premise inspection, septic tank issues. Quite a range of issues. But it's in that area of the - I suppose looking after the environment and the regulatory role that goes with that, as opposed to the hard infrastructure, which is not in my division.*

T. 24/2/05 p. 534-535

Mr Buckley was later to clarify this evidence in the following manner:

> PROF DALY: *Just to follow up a little further on that. Under your environmental management system, is it your responsibility or people working for you to manage fauna?*
>
> MR BUCKLEY: *No, the - we don't have a lot - we don't have a lot of management of fauna, ourselves. The issue of fauna, as it's impacted by developments that are proposed, are certainly analysed as part of the development services process.*
>
> PROF DALY: *Who does that?*
>
> MR BUCKLEY: *That's through the development services unit. We look - my unit looks more at the actual pollution type issues that may exist or may arise from the development and impacts on soil, water, etcetera, not fauna. We don't have the skills in that area.*

T. 24/2/05 p. 539

In other words, the members of Mr Smith's department, who appear to lack the appropriate width of skills, appear to have the primary role.

Ultimately, after hearing evidence from a number of members of council's staff, including Mr Ainsworth, Mr McGavin, Mr Missingham and Mr Musgrave the situation remained unclear, except to say that council's consideration of major development applications appears to rely on the separate and discrete input from a number of staff, each of whom appear to operate in isolation, with each bringing their particular skills to the matter, as is evidenced by the following answers given by Mr Musgrave:

MR BROAD: *Now, there was a sub issue involved in that, and that was whether or not all the fill and the extent of the excavation, leaving aside the remediation concerns, would ultimately lead to the development being accepted as designated development. That was on the basis of being an extractive industry.*

MR MUSGRAVE: *Okay. Well, I probably can't answer that very well. I'm a development engineer. I don't tend to get involved in planning matters, such as that.*

MR BROAD: *In the planning issues*
? Yes.

MR MUSGRAVE: *But I was aware that the planners were talking about it possibly being a designated development.*

MR BROAD*: In the sense that it affected you, directly, there were concerns raised by other government departments in respect of filling, particularly the Department of Sustainable Resources.*

MR MUSGRAVE: *Yes.*

MR BROAD: *And those concerns, as I recall, related to the question of whether the fill was appropriate?*

MR MUSGRAVE: *Yes. That's correct, yes.*

MR BROAD: *Where there concerns over acid sulphate soils?*

MR MUSGRAVE: *Yes, correct.*

MR BROAD: *Concerns over water table issues?*

MR MUSGRAVE: *Yes.*

MR BROAD: *Concerns over de-watering, if I recall, and salt build-up?*

MR MUSGRAVE: *Yes.*

MR BROAD: *And in your involvement at that time, did you go through each of those concerns and look at how they might be dealt with?*

MR MUSGRAVE: *Yes, I was involved in looking at a few of those aspects.*

MR BROAD: *Yes.*

MR MUSGRAVE: *The first aspect was at one stage they proposed to transport the fill by hydraulic means and that would have had an impact on the ground water table and we were most concerned about that potential impact on the ground water table. I was also involved in the concept of them trying to truck the fill material there. That was one of their proposals, to truck the fill material there and I - - -*

MR BROAD: *I think you gave a report in respect of the number of truck movements a day from recollection?*

MR MUSGRAVE: *I did or they did?*

MR BROAD: *I think you did.*

MR MUSGRAVE: *Yes, I think I can recall that I roughly calculated how many truck movements - - -*

MR BROAD: *Yes, 57 or 58 movements a day or so?*

MR MUSGRAVE: *Oh, yes, it was substantial.*

MR BROAD: *Yes.*

MR MUSGRAVE: *It was substantial, yes, for the road out there at the time. I was also involved - I was involved with the acid sulphate, that was an environmental health office who made comments on that.*

MR BROAD: *Radioactivity?*

MR MUSGRAVE: *No, that was, again - - -*

MR BROAD: *That was someone else?*

MR MUSGRAVE: *- - - the environmental health officer who was involved in that. I also made some comment about the use of the material, the actual fill material, in terms of, is that the best use of the material.*

MR BROAD: *Oh, and that was a question whether it was an appropriate use of the resource, that there was only a finite amount of sand available within the Tweed Shire - - -*

MR MUSGRAVE: *Yes.*

MR BROAD: *- - - and whether is should be used to fill that site as against the other sites within Tweed.*

MR MUSGRAVE: *Yes, I raised some issues in relation to that. At the end of the day it probably wasn't my call because I was looking more at the actual engineering aspects relating to the development in terms of public infrastructure and the filling of the site.*

MR BROAD: *Yes, and in respect of those, you went about a process to satisfy yourself that the potential adverse effects had either been dealt with, mitigated or minimised, I assume?*

MR MUSGRAVE: *Correct.*

MR BROAD: *Is that your role?*

MR MUSGRAVE: *Yes, that's part of my role.*

MR BROAD: *Yes, and you, I assume, reported up through the various levels. Did you take part in any of the meetings where the planning group, the specialists, all got together to discuss things?*

MR MUSGRAVE: *Yes, I was present at a number of the meetings, not all of the meetings, but a lot of meetings relating to technical engineering matters. If there was an issue to be discussed, I was present at that meeting along with the planners and environmental health officers and possibly at some stage senior management as well. They were there.*

MR BROAD: *Were the engineering facets of the Salt development - leaving aside the planning issues - potentially matters of some concern?*

MR MUSGRAVE: *Not really, no. The actual engineering component was not a matter of some concern.*

MR BROAD: *Sorry, I'm probably making - I mean, the engineering components fell under your supervision in the sense of the acid sulphate, the de-watering, all of those issues that we've just discussed, were they of some concern?*

MR MUSGRAVE: *Again, acid sulphate wasn't an issue for me to deal with, that was - - -*

MR BROAD: No, I'm sorry - - -

MR MUSGRAVE: *- - - the environmental health officer. The engineering matters was, the filling of the site was. Obviously, I have to make sure that the site is filled in an appropriate manner and to an appropriate standard and conditions of consent were drafted to allow that to happen.*

T. 9/3/05 p. 1110-1113

If issues are not addressed, whether by way of consideration and consequent dismissal or by appropriate review, there remains the opportunity for relevant concerns, particularly on environmental issues not being adequately considered in the decision-making process. This was emphasised by Mr Diacono, the Manager of Conservation Planning of the regional branch of the Department of Environment and Conservation, who said:

MR BROAD: *…Regulation 50 of the Environmental Planning Act Regulations requires that there be a statement of environment effects to accompany a development application. It refers also to schedule 1 as to what its particulars are to be, and schedule 1 basically provides that the statement of environmental effects deal with the environmental impacts of the development; how they have been identified; the steps to be taken to protect the environment to lessen the expected harm; and, any matters required to be addressed by guidelines issued by the Department. If a statement of environmental effects does not recognise potential impacts which would involve potentially your Department, is there any fail-safe system that would direct them to your Department?*

MR DIACONO: *There's no fail-safe. It's really up to the discretion of Council to refer that development to our Department for opinion. Council may consider the statement of environmental effects, and because it doesn't activate the Department - our Department's statutory role, it might never refer the issue to us. So - - -*

MR BROAD: *In other words, it can slip through the cracks?*

MR DIACONO: *IT [sic. It] can slip through, and there are probably numerous examples of that happening. I might also add that a statement of environmental effects can sometimes have, say, a flora and fauna report attached to it which requires a fair degree of scrutiny to see whether it's providing all the information on threatened species or other fauna or flora which may be occurring in that area.*

MR BROAD: *And that relies on expert skill within Council.*

MR DIACONO: *It relies on experts skilled in the - consultant in preparing the report and then experts skilled in Council in understanding that it's correctly done, and maybe in our Department having the knowledge of those species. A classic example is bats. Bats come at different times of the year, so you might go out and so a bat survey in the middle of summer and not see blossom bats. But the important thing is that the blossom bats come down in winter, and that's the important time of year for them. So it's - there are nuances with any of these statements of environmental effects.*

T. 9/3/05 p. 1146-1147

Importantly, the EP&A Act, in its present form does not contain sufficient safeguards to ensure that a consent authority has all the information necessary to determine whether an application requires consideration by an expert with particular or discrete skills.

The council provides a form of development that may be downloaded from its website. The form provides limited notes, either as an initial guide or as commentary on the detail

to be provided in particular parts of the form. The form emphasises that these notes are intended to serve as a guide.

When viewed as a whole, those parts dealing with the statement of Environmental Effects obviously intend to seek a minimal response. While the form refers to the possibility that "some applications will require this (i.e. The Statement of Environmental Effects) to be provided by specialist consultants", it does not indicate the types of applications or the circumstances this may arise.

The form, which can be filled out online, anticipates only short answers, generally between three to six lines, encourages superficiality.

Overall, there must be significant concerns that information provided by applicants will be superficial, not address all relevant issues and that the role of a Statement of Environmental Effects will be seen as little more than an opportunity to promote the application.

As has been indicated earlier in this part, the complexity of development applications and their particular environmental impacts may require input from, and consideration by, appropriately qualified experts.

There is no novelty in this view as experts, whether they be architects, structural, geotechnical, or hydraulic engineers have long been involved in building, subdivisional and other applications coming before councils.

As an example, the SALT subdivisional development application was accompanied by a Statement of Environmental Effects prepared by town planning and development consultants. In turn, the statement attached separate reports dealing with:

- potential threats to or effects on threatened or endangered species, their populations, communities or habitats
- socio economic impacts
- tourism aspects of the development
- management of dunal and wetland areas adjoining the development
- riparian management
- landscape design
- architectural design
- engineering aspects

While this list is varied, it is not complete, as a separate application was lodged for the filling aspect of the development and the engineering, ecological and other aspects of this part of the overall development.

Clearly, the diversity of these reports draws upon a diverse range of skills.

Section 79C requires that a consent authority, in determining a development application, take into consideration certain matters (as relevant) including the planning regime, the

likely impacts of the proposed development, the suitability of the site and the public interest.

Essentially, this calls on the consent authority to initially satisfy itself that it has sufficient information to enable proper consideration, then subsequently to consider the application in light of the prescriptions contained in section 79C.

This determinative role is not akin to the role formerly, or currently, exercised by councils, where by comparison, building consent was sought; as it calls upon councils to weigh and consider discrete concerns; rather than discerning prescriptive or regulatory compliance.

This role casts a significantly higher burden on councils to meet the objects of the EP&A Act. The current regime implies that the material is contained within, or accompanies the development application. The Statement of Environmental Effects will be the primary source for the consent authority,

As has been suggested earlier in this part, the Statement of Environmental Effects may neither consider what material is required to determine the application, nor provide it.

Earlier in this part there was reference to the growth in the width of expertise potentially required to address matters relevant to the consideration of development applications.

Again, as has also been indicated earlier in this part, councils, such as the Tweed, are unlikely to have the full suite of experts at their disposal within council staff.

In those circumstances, the council is at least initially reliant on the external experts who provide the reports supporting the application, to provide assessment of the matters to be considered under section 79C.

This reliance calls into question the role of the consultants retained by the proponent.

Mr Anderson, who is a Consultant Town Planner, gave evidence at the Inquiry. Mr Anderson had provided reports for a number of applications that were reviewed by the Inquiry. Additionally, Mr Anderson has an extensive background in local government, rising to the position of manager of the council's subdivision unit. Mr Anderson gave the following evidence of his qualifications and background:

MR ANDERSON: *I have a degree in environmental planning. I have an associate diploma in town planning. I have some - or have had some 25 years experience in local government, both in engineering and in planning, including the last 10 years up until September 2000 as the manager of the Tweed Shire Council Subdivision Unit. And I've been practising as a consultant since September 2000. We're principally involved in - in our work is principally in the Tweed Shire. Probably about 80 per cent of our work is in the Tweed Shire.*

It involves a range of activities from feasibility investigations, provision of planning advice, preparation of applications, preparations of re-zoning applications, planning

reports, appeal work, and so on. We act for a range of consultants in both the private and public sector, including Tweed Shire Council.

T. 23/2/05 p. 346-347

Subsequently differentiating and formalising the nature of his role:

MR BROAD: *... can I differentiate the role of a town planner as against a person giving environmental advice? Do you as a town planner provide expert advice in environmental issues?*

MR ANDERSON: *Only to a very limited extent. Our area of expertise is really in statutory and strategic planning rather than in environmental sciences per se. It's statutory planning mainly.*

MR BROAD: *So if there was an issue which involved - well, if there were environmental issues the statement of environmental effects would call on some other person's expertise?*

MR ANDERSON: *Correct. We would normally - the planner's role is largely to co-ordinate a range of other specialist experts that may deal with flora and fauna, acid sulphate soils and water quality and so on and the statement of environmental effects would normally incorporate their specialist reports, and, indeed, evaluate those reports.*

T. 23/2/05 p. 342-343

Mr Anderson gave evidence regarding his role as a consultant retained by a proponent and his perspective of the processes associated with the preparation of a Statement of Environmental Effects and, more generally, of the application process.

His evidence, although brief, was wide ranging and to a large extent serves as a sounding board to consider the way applications are presented to council, the reliability of the information and the way the determinative function is exercised.

The evidence raises substantial concerns, not through or arising from the quality or the integrity of Mr Anderson's evidence, but rather because it highlights significant weaknesses in the determination process.

The concerns relate, variously, to the content of the material supporting the application, the role of the consultants providing this material, the relationship between these consultants and the proponent, the iterative process leading to the presentation of the application and the overall relevance of the material to the determinative process.

Earlier in this part, concerns have been raised over the dichotomy between the matters relevant to determination of an application under section79C of the EP&A Act and the material required to accompany an application under Regulation 50 and Schedule 1 of the EP&A Regulation. It is not proposed to re-iterate them in this part, but to review and comment on the role of the consultants and their relationship with proponents.

Mr Anderson gave evidence regarding his role, the role of the other consultants, the processes involved and of the underlying relationships between proponents and consultants. It is beneficial to set out this part of his evidence in its entirety:

MR BROAD: *... if I can now return to the statement of environmental effects. The objects of the Environmental Planning and Assessment Act include encouraging proper management development and conservation of natural and artificial resources including agricultural land, natural areas, forests, etcetera. It also talks about the promotion and co ordination of the orderly and economic use in development of land.*

MR ANDERSON: *Yes.*

MR BROAD: *And the protection provision and co-ordination of community and utility services. The role that you undertake in preparing a statement of environmental effects, what does that generally involve? Are you working from a model?*

MR ANDERSON: *It involves a critical evaluation of a particular development proposal addressing the relevant heads of consideration in Clause 50 of the EP and A regulations. I mean, there is a not a prescribed form for a statement of environmental effects as such, but the regulations do prescribe those matters which it must address.*

MR BROAD: *So assuming that you are retained as a consultant to a developer, a developer wanting to, say, undertake a sub-division. The developer has got land, say, ripe for sub-division and he says, "Look, I want get a yield of 750 lots out of this." And mathematically you can get 500 square metre lots, allow for roads, etcetera. What sort of model, as a town planner, do you apply to that? Do you simply say, "Oh, yes, we can knock out 750, that shouldn't be a problem. We're a bit tight for this but we can talk our way around that?" Is there some sort of physical base that you refer to or are you, basically, fitting with a developer's aspiration?*

MR ANDERSON: *No. Our objective is to ensure that the development proposal complies with all statutory planning requirements which may include, for example, a development control plan over the site. That plan may well prescribe the likely or the target yields which are anticipated from the site, and, of course, the development control plan is a document prepared by the Council. So that would be the first guiding document which you would review to establish yields. You would then seek to do the normal site opportunities and constraints analysis and that would then lead you to a conclusion about what, in fact, the optimum yields were and that would be the basis on which you would provide advice to your clients and hopefully and ultimately the DA.*

MR BROAD: *If you don't have a DCP that envisages yields where do you draw from?*

MR ANDERSON: *You would simply draw from the objectives of the zone in the LEP which is the overriding planning instrument controlling development of the site, any relevant State environmental planning policies such as the North Coast Regional Environmental Plan, which, in fact, prescribes a target density of 15 dwelling per hectare, for example. So in the absence of any site specific plans it would come down to the zone objectives and any other relevant environmental planning instruments.*

MR BROAD: *What about layout? How do you go about laying out a sub-division?*

MR ANDERSON: *I guess it's an iterative process which involves striking a balance between the site's physical opportunities and constraints, statutory planning controls and the commercial realities of being able to produce marketable allotments which, you know, purchasers are prepared to buy.*

MR BROAD: *So as a town planner do you have a speciality in commercial aspects of, say, a sub-division?*

MR ANDERSON: *No. We largely rely on a developer and the developer's marketing advisers who carry out market research and various other things, that sort of detail. We have a broad overview understanding, if you like, of, I guess, the commercial realities of development generally, in other words, what the market requires and so on from time-to-time and that's obviously varies over time, but generally speaking a developer would come to us with an instruction to design allotments with a general minimum area of, say, 800 square metres and a general minimum frontage of, say, 20 square metres and that would be the starting parameter.*

MR BROAD: *To what extent does a town planner's report gainsay the aspirations of a developer?*

MR ANDERSON: *It attempts to strike a balance, if you like, between the commercial realities and the developer's interests, the site's capabilities and the regulatory regime that applies to that site. It has to try and strike a realistic balance.*

MR BROAD: *Commercial realities are dictated to you by the developer or his advisers.*

MR ANDERSON: *Sorry, what was that?*

MR BROAD: *The commercial realities are dictated to you by the developer or his commercial advisers.*

MR ANDERSON: *To some extent, yes.*

MR BROAD: *Now, do you, in preparing the statement of environmental effects, undertake an evaluation in terms of that required under Section 79C of the Environmental Planning and Assessment Act, that is, an evaluation of the provisions of planning instruments and policies, the likely impacts of the development, the suitability of the site, public interest, those sort of matters?*

MR ANDERSON: *Not explicitly, no. An applicant's role is to address the matters in Clause 50 of the regulations. It's the consent authority's responsibility to carry out a Section 79C assessment in determining the development application. However, of course, any prudent consultant and/or developer would have due regard to all of those matters that the Council has to consider and address those that are relevant in any*

statement of environmental effects. But we do not carry out a detailed section 79C assessment, that's a matter for the council.

MR BROAD: *So the council has an entirely independent role?*

MR ANDERSON: *The council's role is to evaluate the application against the relevant heads of consideration in section 79C.*

MR BROAD: *Right. To what extent - having heard this, to what extent is there a basis of science to applications?*

MR ANDERSON: *Sorry, basis of science?*

MR BROAD: *Science. I mean, I'm trying to get my head around whether as a consultant representing a developer, you move from a base. What you've basically said is we have a ..... land which may look towards a yield of 15 lots a hectare. We may have DCPs which are prescriptive.*

MR ANDERSON: *Yes.*

MR BROAD: *What is the strength of that sort of base and other DCPs which, you know, may deal with height, which may deal with other issues. How solid is that base?*

MR ANDERSON: *A development control plan doesn't have the statutory force of an environmental planning instrument, of course. It's a matter that a consent authority must take into account. And my recollection is the new judge of the Land Environment Court has recently held that a contemporary DCP that has been through due process in preparation, ought to be given determining weight unless there are compelling reasons not to do so.*

I think probably historically the court, and indeed many consent authorities, have tended not to give DCPs quite so much weight. So they are a significant planning tool, if you like. But certainly they don't have the weight of a statutory planning instrument.

T. 23/2/05 p. 343-346

His evidence makes clear that much of what is put to a council is driven by the proponent, driven by its perceptions and economic outcomes, that is, the "commercial realities". While Mr Anderson may have shown some reluctance to concede the issue outright, it is clear that the proponent dictates the nature of the development, whether it is 800 square metre lots or twin key accommodation suites. This is not surprising and as the proponent has already undertaken the feasibility studies and financial modelling associated with the development. It goes without saying that the application, if made, follows from these studies.

It is perhaps the secondary stage of this process that give rise to concerns, the suitability of the development.

In this respect, the aspirations of the proponent may be in sharp contrast with the EP&A Act.

The proposal may, for a number of reasons, be unsuitable for the site, or if suitable, be inappropriate through density, non-compliance, or other concerns.

Accordingly, there are two issues that are likely to arise, the overall suitability of a development of the nature proposed and the suitability of the development when assessed in terms of section 79C.

There is little doubt that proponents view their proposals as meeting both these aspects, and therefore justifiable, even if not strictly compliant.

Mr P Brinsmead spoke of the approach taken by Resort Corporation:

> MR P. BRINSMEAD: *We're in the business of - we're in the business of putting together projects that we don't have to go down the hard road in terms of fighting for relaxations and those sorts of things, so we will generally - we will generally - try and design a project that complies with both the LEPs, the DCPs, the SEPPs, the regional plans, etcetera. In every circumstance it may not be possible and it may be that we come up with a project or a product that we think is particularly exciting in terms of the market acceptance of it, in terms of even the community's acceptance of it, and we would then consult with our planners and say, "Look, what is the likelihood that even though this may not strictly comply with the DCP, what is the likelihood that the consent authorities may see that this may have greater merit?"*
>
> *That's unusual because you always, when you go down that path, you always bump into problems in terms of things like objections and those sorts of things. But you certainly think about it, absolutely.*

T. 23/2/05 p. 436-437

It is tacit to the development process that, given the proponent's need to maximise its opportunity, that the Statement of Environmental Effects aligns itself to the proponent's intended outcome. In those circumstances, the proponent's experts become advocates, extolling the virtues of the application, and gainsaying the developer's puff.

In those circumstances, reports become little more than promotional material, containing statements like:

> The landscape design philosophy for SALT is based on:
>
> "*A significant destination community with its landscape character firmly grounded in the surrounding setting, integrated into the natural environment of Cudgen Creek and Bogangar Beach*."
>
> The key components of this philosophy are the seamless integration of SALT into the adjoining natural environment, reflecting original site vegetation and creating a community that embodies the character of the Northern New South Wales coastal region.

…The interpretation of local landscape characteristics will play an important role in establishing SALT as a signature destination residential community and resort development on the Australian east coast. …

…the Kingscliff South Master Plan will provide visitors and residents with lifestyle opportunities that stress community values and environmental harmony.

Regrettably, in some instances they draw on irrelevancies or misstate requirements to engender support for the proposal.

The NSW Government Coastal Policy contains, at Table 3, a strategic action in relation to beaches and waterfront open space, which is referred to in Clause 32B of the North Coast REP. The principle contained in the Coastal Policy is that:

"Beaches and waterfront open spaces will be protected from overshadowing. The standard to be applied will vary according to local circumstances, however, generally the standard to be applied is:

- In cities or large towns, no overshadowing before 3 pm mid winter and 6.30 pm summer daylight saving time;
- Elsewhere, no overshadowing before 4 pm mid winter and 7 pm midsummer daylight saving time."

The policy contains a note relating to this standard which states that:

"*The suggested standard in this principle may be difficult to apply in highly urbanised environments. An LEP or Development Control Plan which is tailored to local conditions and which has the overriding objective of minimising overshadowing may be required in these situations.*"

It is apparent from the note to the policy that it is difficult to achieve the objective of nil overshadowing of waterfront open space or beach areas in urban environments and it is therefore submitted that strict compliance with this development standard is not appropriate in the circumstances of this case.

This role, supporting an application, contrasts with the consultant's role when either acting for an objector or when giving expert evidence during court proceedings.

Mr Anderson indicated his view of the role of a consultant when acting for an objector:

MR BROAD: *... Having looked at a number of the applications being dealt with by Tweed Council, it appears that you have had a role on behalf of applicants in some development applications and for objectors in respect of other applications. Can you indicate to me the nature of your role if it contrasts between acting for an applicant, as against acting for an objector?*

MR ANDERSON: *I think I should make it quite clear to you that we often carry out feasibility investigations and provide preliminary advice to clients who because they don't agree or like the advice they're given, don't use us then to prepare a formal application. They may go somewhere else. Equally, we have people come to us and ask us to prepare objections. Now - - -*

MR BROAD: *That's a quite proper role.*

MR ANDERSON: *Absolutely, absolutely. Who ask us to prepare objections, and again we say we are prepared to assess a particular application and advise them whether or not there is a basis on which they could mount an objection. And quite often we give advice and say, "Look, we don't believe there's any basis to object", and those people there go to another consultant. Or indeed, they don't object at all.*

MR BROAD: *In advising objectors are you stepping into the shoes of council and exercising an equivalent role under section 79C?*

MR ANDERSON: *We would evaluate the DA in terms of its statutory compliance. Is it valid, adequate and conforming? And we would then assess it on its merits against relevant section 79C heads of consideration. That's the basis.*

MR BROAD: *So you move from regulation 50 to then looking at it as though you were in council's shoes?*

MR ANDERSON: *Correct.*

MR BROAD: *And that's an entirely different role.*

MR ANDERSON: *Well, it covers a little bit of both. We assess it in terms of does it address the section - sorry, the regulation or clause 50 regulations matters on the one hand. And then assuming that it does and it's therefore an adequate and valid application, is it satisfactory on merit in terms of relevant section 79C heads of consideration.*

MR BROAD: *Does that become an advocacy role?*

MR ANDERSON: *No.*

MR BROAD: *It's purely a person's view?*

MR ANDERSON: *It's purely us expressing a professional opinion to an objector, which may or may not ultimately be lodged as an objection with the council as to whether or not there are issues on which the council might refuse an application or indeed impose conditions to perhaps mitigate some impacts.*

MR BROAD: *So that role would be probably equivalent to an expert witness's role in say Land Environment Court proceedings?*

MR ANDERSON: *Yes, very similar. Indeed, some of the objections lead to ultimately us providing expert evidence in court proceedings where an objector may appeal against a council's decision.*

T. 23/2/05 p. 348-350

While Mr Anderson did not concede that this role involved advocacy, there is little doubt that the nature of the brief, whether for a proponent or an objector, involves, at least implicitly, an advocacy role.

Perhaps the most important aspect of this evidence is that it emphasises that reports accompanying an application do not address the matters relevant to consideration under section 79C of the EP&A Act. It emphasises the need for amendments to be made to the EP&A Act to address these matters.

Mr Anderson suggested in this evidence that such a report would be provided to an objector rather than the consent authority. In those circumstances it is like that an advocacy tome would not creep into such advice.

Mr Glazebrook described the position of a consultant as:

> MR GLAZEBROOK: *Well, we're paid by the client. We have a professional duty to achieve agreed objectives for the client. In the case of a development application that is an approval that the client can live with. I guess by definition you can't be seen to be, just because of those things, totally independent. However, there is a professional duty by which we're bound and that is to provide the correct professional advice in accordance with the statutes that we have to operate under.*

T. 23/2/05 p. 356

Ultimately, advocacy does not sit comfortably with the proper consideration of an application under section 79C, particularly where the advocacy emphasises the perceived "need" for the development, as was suggested in the SALT development, to support aspects including filling, overshadowing and height variation.

In many instances reports adopt a precipitous tone with statements such as (**SEE "Outrigger" Tourist Hotel**):

> Filling of the site by an average 2 m and the erection of a 3 storey building above **finished** ground level is essential to achieve beach views from hotel rooms. If beach views cannot be provided from the rooms, the resort will not be developed and the entire project will not proceed because of negative economic impacts;
>
> …
>
> It is submitted that upholding of the objection would be consistent with the aims of the Policy in that strict compliance with the 3 storey height limit will preclude the development of a viable and functional resort on the site. …
>
> …
>
> If the objection is not upheld the resort will not be developed and the project will not proceed.
>
> …
>
> It is submitted that upholding the objection would be consistent with the aims of State Environmental Planning Policy No. 1 in that strict compliance with the beach and waterfront shadow restrictions would preclude the development of a viable and functional resort on the site.
>
> …
>
> …
>
> …If the building is not approved as proposed the resort hotel would not be developed and the project would not proceed.
>
> …

Development of the site poses a number of challenges, not least of which is the need to ensure that a viable and sustainable tourist resort is created on what is a significant and unique coastal site. To achieve this objective, it is essential that filling of the site and the erection of a 3 storey resort hotel occurs such that beach and ocean views are available from the resort rooms for guests.

Mr Anderson was to contrast the role of a consultant preparing applications and that of an expert giving evidence to assist the deliberations of a court, differentiating the role in the following terms:

MR BROAD: *...But the concern of the court is that it obtain assistance from an impartial witness.*

MR ANDERSON: *Yes. I mean, obviously the role of an expert witness is more of an officer of the court, rather than advocating their client's point of view. And to a large extent, that's what we attempt to do in providing advice to our clients. And indeed, as a consequence of that, we lose some clients because they don't like the advice they're given.*

MR BROAD: *So in respect of an application, you're not fulfilling that sort of a role. You're not an expert witness, you're filling a statutory role providing information required by regulation 50. And you don't do it with that level of independence potentially that's expected of an expert witness.*

MR ANDERSON: *No, I think there's a - perhaps a fine distinction between our role as a consultant in preparing applications and perhaps providing general advice, and that of an expert witness before the court. And indeed, you know, there may well be cases where a client may choose not to use you as an expert witness because they weren't necessarily totally happy with the application that was prepared in terms of putting the best spin on it from their point of view.*

MR BROAD: *Your role acting for a proponent seeking modification under section 96 of the Environmental Planning and Assessment Act.*

MR ANDERSON: *Yes.*

MR BROAD: *Is that akin to your role in respect of a statement of environmental effects?*

MR ANDERSON: *Yes, essentially the same, yes.*

MR BROAD: *So you're a proponent?*

MR ANDERSON: *Correct.*

T. 23/2/05 p. 350-351

Courts have and continue to rely on experts in particular fields to assist them with their understanding of issues associated with matters coming before them.

They have been concerned that the evidence given by these experts be independent of the party's interest and of a standard that they can rely on. In order that independence can be maintained, courts have adopted a posture that expert witnesses act, as it were, as though retained by the court and not by a party. In those circumstances they are regarded as an "Officer of the Court". This role is intended to nullify any advocacy role that would otherwise arise.

In New South Wales, courts including the Supreme Court, the District Court, the Land and Environment Court as well as the Administrative Decisions Tribunal have adopted codes relating to the role and conduct of experts providing reports and evidence supporting a party's case.

The codes contain the following elements:

- an obligation to provide impartial assistance
- a paramount obligation to the Court or Tribunal
- the expert is not an advocate
- the expert expressly acknowledge that he or she is bound by the Code of Conduct
- the expert indicates his or her qualifications and expertise
- the expert provides the reasons for his or her opinions
- a bibliography is supplied
- any qualification to the report is indicated
- whether his or her opinion is concluded, and if not, whether further research is needed
- whether other matters fall outside the person's field of expertise.

The EP&A Act anticipates that a proponent will, as necessary, provide expert reports and material to assist the consideration of applications. This Act, as presently drafted, does not give effect to this, as Regulation 50 and Schedule 1 do not anticipate material that will facilitate consideration in accordance with the principles contained in section 79C.

The position is further weakened by a failure to ensure the quality of the "expert" reports and material and its usefulness, through its independence and competence.

Councils are given major powers as the consent authority for their local area. They are called upon to exercise their determinative role in respect of major or complex applications. This role has not been negated through SEPP 71, other planning policies or by the EP&A Act, as was suggested by some councillors and senior staff.

Similarly, departments and authorities are also called on to determine major and complex applications.

Such applications must, by their very nature, be supported by expert reports and materials.

It is appropriate, if not imperative, that consent authorities obtain material of the highest quality and independence. The EP&A Act and the Regulations should enshrine and adopt the principles enunciated by Courts and Tribunals as set out earlier in this part.

Before departing from this part, it should be said that the evidence of Mr Anderson and Mr Glazebrook has been used to indicate a position. It is not intended by using their evidence to reflect either adversely on them, nor by association to draw from it and to criticise experts in similar or other fields. Rather, its use is to point up weaknesses in the EP&A Act with a view to recognising the need for change, as Courts and Tribunals have, and to promote an approach similar to that adopted by Courts and Tribunals.

Mr Anderson, whose evidence has been largely referred to in this part, described himself as a consulting town planner, with a degree in environmental planning and an associate diploma in town planning. Mr Glazebrook, another consultant town planner also gave evidence at the Public Hearings. Both gentlemen were members of the Planning Institute of Australia.

To become a member of this institute, prospective members must have appropriate qualifications and experience to meet the institute's standards of competency.

The institute has adopted a code of professional conduct and a code of membership.

The code of membership generally requires that an applicant possess an academic qualification recognised by the institute and at least practical experience of the nature required. The code lists specific qualifications offered by various universities, generally associated with urban, regional or environmental planning members seeking admission to the Urban and Regional Planning Chapter. It similarly sets out the qualification and experience necessary for admission to the Social Planning and Economic Planning Chapters.

The institute has adopted a code of conduct that applies to all its members. The preamble to the code recognises:

> "A planner's responsibility to the community must take precedence over sectional interests."
>
> "…In particular, almost all of the work that planners do involves the public interest as well as the sectional interest of their client or employer. Ultimately, the integrity of planning decisions, and of the planning system as a whole, relies upon the integrity of the planners who serve it, in whatever capacity."

The code deals with aspects including professional standards, dealing with conflicts of interest, professional opinion and competence. Of the various matters contained in the code, the following bear emphasis:

- Members shall strive for the highest standards in all their professional activities.
- Members shall seek to ensure that all persons who may be affected by planning decisions have the opportunity to participate in a meaningful way in the decision-making process.
- Members shall seek to ensure that the processes of planning are conducted as openly as possible and that all relevant information is disclosed to interested persons.

- Members shall use their best endeavours to ensure the development:
- is sustainable;
- provides for the protection of natural and man-made resources;
- is aimed at securing pleasant, efficient and safe working, living and recreation environment; and
- is efficient and economic.
- Members shall not act in circumstances where there is a potential conflict between their own private interest and the interest of their client or public interest.
- Members shall take all reasonable steps to maintain their professional competence while working in the planning profession and in doing so shall have regard to the advice and requirements of the Institute.

Most importantly, the process of having a professional body made up of members with recognised qualifications and professional standards goes a long way to provide integrity and reliability in the reports, provided by its members.

Of course, there are other professions, such as engineers, who likewise provide reports accompanying development applications, which have professional bodies that likewise set professional standards and adopt codes of conduct.

Collaterally, there does not appear to be a professional body with oversight in respect of other environmental matters that appears to have the recognition that the Planning Institute of Australia does.

The Environment Institute of Australia and New Zealand does not appear to have an equivalent role to the Planning Institute. While it has adopted a code of conduct, it does not appear to adopt the same levels of professional qualifications entitling membership, nor, regrettably, does it appear, as suggested by evidence given at the Public Hearings, to be as widely recognised. Mr Diacono, the Manager of the Conservation Planning section of the Department of Environment and Conservation's northeast branch, while aware of the Environmental Institute, was unsure of its membership and role:

PROF DALY: ... *You said that the – in relation to the particular things you're interested in - your Department, I mean, biodiversity-type issues and Aboriginal heritage and so forth, you said that you use consultants, that developers use consultants, that Councils use consultants to prepare reports on some of those issues. Is there any institute that relates to consultants in that particular field which might be similar to, say, the Australian Planning Institute in the planning field?*

MR DIACONO: *Yes. A lot of these consultants are members of the Planning Institute.*

PROF DALY: *No. I'm talking particularly about environmental consultants as opposed to planning consultants.*

MR DIACONO: *I know there is an Environmental Institute of Australia, but I'm not aware of whether the consultants who are preparing these flora and fauna reports are members of that institution but I would assume that they are members of professional*

bodies, because most of them are botanists at heart or flora or fauna people at heart, and so they belong to the relevant professional bodies.

PROF DALY: *But the Australian Planning Institute has a purpose, in a sense - that is to accredit people, and they have a code of ethics so they accredit people. You have to go through certain processes to belong to the Australian Planning Institute, and once you're a member of it, you have to abide by the code of ethics of that institute, and in a sense that gives some sort of guarantee that anyone using their services should have certain expectations about their level of skills and they way in which they go about doing their business.*

What I'm trying to find out is that in the environmental science arena, if that's the correct term, is there any such simple way of knowing that whoever you're dealing with has a background that is broadly accepted and you have some guarantees, in a sense, that there's a code of ethics and so forth? Is there any such - - -

MR DIACONO: *I'm not aware of any body that fulfils that role, and I guess when it comes to choosing between consultants you basically consider their track records.*

T. 9/3/05 p. 1148-1149

Mr Papps, who had formerly held the position of Executive Director of Rural and Regional Planning in the former Department of Urban Affairs and Planning spoke of the variability in the standard of reports accompanying development applications, the lack of an equivalent to the Planning Institute:

PROF DALY: *In terms of the material that would come in to you and you said that a lot of the material came in from councils, for example, that was relevant to the application. A lot of that - some of that material would have been prepared by consultants.*

MR PAPPS: *That's right.*

PROF DALY: *You would come in touch with that. Also, for various reasons, the consultants quite frequently would have been paid for by the developer. The council may have called in the consultant but the ultimate payment of that might have come from the developer who was making the application. In terms of - this is a very broad question. There might not be an answer to it. But in terms of your experience would you say that the material that came in through the consultancies attached to development applications were high standard, an average standard, a poor standard or did it vary enormously?*

MR PAPPS: *It varied enormously. Some of it was of a very high standard, some of it was of a very low standard. In many circumstances we would have to advise both the developer and the other players involved that we couldn't proceed to even begin our statutory role because the information based on which we were acting was inadequate. So we would have to address that in some way by getting the consultants to do more work or finding some other source of information. And, of course, that was one of the - one, not the only, but certainly one of the driving factors behind the comprehensive coastal audit that Professor Thom mentioned; was that we were trying to get some high quality*

reliable data that could serve as a base line for much of this work. It wouldn't deal with every situation, but you would, at least, have some really high quality data as a base line.

PROF DALY: *I would imagine that in terms of consultants you probably met a range of different skills. Planning consultants, that is people who have professional qualifications in the planning field, would have been one, I imagine.*

MR PAPPS: *Yes.*

PROF DALY: *Environmental scientists would be another.*

MR PAPPS: *That's right.*

PROF DALY: *Both of those areas of consultancy have come before us in the evidence that we've been looking at in this inquiry. On the one hand there is an institute, The Australian Planning Institute, which has been going for a long time. It has a fairly strong charter and constitution. It has - contains within that ethical guidelines of how people should act. As far as I can gather there is no similar institutional base to the environmental consultancy industry. Am I right in that?*

MR PAPPS: *That's certainly my understanding and I think that you have identified certainly a significant problem. The consultancies that related more to questions of value, measuring, for example, defining measuring the environmental value of the site, were always more difficult to deal with than, if you like, the straight up and down planning ones where you were, say, interpreting a planning instrument. And that's what the consultant was doing.*

Working out whether habitat was there or significant, for example, was much more difficult. And we grappled with that in the department and we toyed with the idea at various stages of, for example, having accreditation of environmental consultants or environmental science consultants or having a register and both those ideas were rejected as being impractical in the long term. So we never really dealt adequately with that issue.

PROF DALY: *Is one of the problems there that planning as an educational system within the universities and colleges goes back a number of years. I think Professor Winston - - -*

MR PAPPS: *That's right.*

PROF DALY: *- - - was the first to establish planning school at the University of Sydney in 1947. Environmental science, to give it a broad title, doesn't really have that history, number one. Second, it doesn't have a clear-cut product in the sense that - say, at the University of New South Wales you have environmental engineering, a department that has a certain product. In other universities you have degrees that contain the word "environment" but they might be an evolvement of different basic sciences like zoology or other things.*

MR PAPPS: *That's right.*

PROF DALY: *Is that a difficulty in terms of what we were just talking about?*

MR PAPPS: *It is. And I think you've adequately described it. And the layer of difficulty on top of the one that you've already described is that even where you might be able to get agreement between a range of consultants, for example, about what habitat might occur on a coastal site it's then very difficult to get agreement about the value to assign to it in a trade-off decision between environment, social and economic, if that's what you're doing, or to get agreement about the potential impact of a development on those values. So will it be significant, can it be managed, or is it so significant that it can never be managed?*

And getting on top of what you've already described some consensual views amongst the consultants and the experts about that has always been very difficult.

T. 10/3/05 p. 1260-1262

If the objectives and the intent, particularly as contained in Sections 5 and 79 of the EP&A Act are to be met, then there is an urgent need to ensure that all experts providing reports to be considered when determining development applications are provided by persons holding the appropriate professional qualifications and experience and who are bounded by standards of integrity.

These goals can only be achieved by:

- ensuring that consultants providing reports are members of relevant professional bodies exercising a similar role to the Planning Institute of Australia
- the provision of a code of conduct in a form similar to that adopted by Courts and Tribunals, ensuring the independence and integrity of reports, through amendments of the EP&A Act or the EP&A Regulations.

3.4.6 The Role of Policy in Considering Development Applications

The Act provides that a councillor, as a member of the governing body is to play a key role in the creation and review of the council's policies and objectives and criteria relating to the exercise of the council's regulatory functions (**section 232**).

The introduction to Chapter 7 of the Act provides:

What are the regulatory functions of councils?

Introduction. The major regulatory functions of councils are found in this Chapter. It lists the activities that are regulated and it sets out the means of their regulation.

A council, in relation to a range of activities within its area, exercises regulatory functions of 2 main kinds.

First—various activities can only be carried out if the council gives its **approval** (for example, the operation of a caravan park). Some of these approvals may also be granted as part of the

development consent process under Part 4 of the *Environmental Planning and Assessment Act 1979*.

Second—a council can **order** a person to do, or to stop doing, something (for example, a council can order a person to keep fewer animals on specified premises).

Failure to obtain or to comply with an approval and failure to comply with an order are made offences under sections 626, 627 and 628.

A council is not given power to regulate activities by other means. For example, the Chapter does not confer power to require a person to hold a periodic licence.

In exercising its regulatory functions, the council must observe any relevant statutory criteria and any other criteria contained in a local policy it may have adopted after public consultation.

As will be seen from this extract, the Act specifically recognises that the regulatory function may include the exercise of functions under the EP&A Act.

Importantly, the Act recognises a requirement that councils observe any relevant statutory criteria and in local policy adopted after public consultation.

In 1999 the "Balance Team" councillors had sought election on the basis of their fundamental policy to promote economic growth.

Councillor Brinsmead was to describe the policies of the "Balance Team" as:

CR BRINSMEAD: ... *The Council in 1999, that was called the balance team, ran on a platform of getting the Tweed moving. There were some big development projects down on the Tweed coast that had been stalled for over 25 years. That's a long time. Its platform was to open the door of the Tweed to business and some economic growth and to work to achieve a change of culture in the Council that was more investment friendly. Not that it advocated - we ever advocated - an anything goes free for all policy because the fact is that the Council, after 1999, didn't re-zone and didn't have to re-zone any land. ...*

T. 18/2/05 p. 243

Subsequently, while individual candidates may have separately espoused platforms affecting social issues, the candidates supported by Tweed Directions were bound by a common policy platform as being pro-development.

The policies of the "Balance Team" councillors and the subsequent policies of "Tweed Directions" councillors, who each held a majority in their term of council, has implicitly provided the basis for and legitimacy of their decisions as a number of contentious applications.

Councillor Beck was to emphasise this when giving evidence:

CR BECK: ... *Let me make it very clear that when I went into council at the '99 election, and we put out the welcome mat because our shire was so badly developed. We had housing development. We had nothing to supply jobs. Our young ones were having to go away to get jobs. And we put out the welcome mat for investors to come to the area*

so that we could - and it happened and I'm very proud of the fact that we had a $650 million Casuarina Resort and development, and you've only got to drive along there today. You might not like the architecture but it's a beautiful community and all of these other things. We started this and I make no excuses for it. It was because we had the - we put the welcome mat out and the investors came in; and, of course, we talked to them.

T. 17/2/05 p. 147-148

In response to the Inquiry's call, it received a significant number of submissions playing down or seeking to traverse the role of the councillors, as is indicated by (**submission 190**):

Development without Regard for Environmental or Social Consequences

The statements in the Media accusing the Council of an "unrestrained," "develop-at-any-cost" agenda would fill a volume. It seems that some people try to outdo each other in making the most extreme allegations. First one will complain that some Councillors are hell-bent on "concreting the Tweed from one end to the other." (Clearly a nonsense!)

Not to be outdone, another will talk about the Tweed being subjected to "rape, pillage and plunder." It is an extreme kind of talk, yet the very people who do this complain bitterly if anyone suggests they are being extreme. The Parnaby letter in the Appendix is quite typical of these extreme statements. This letter claims that Councillors Polglase, Beck and Brinsmead "regularly... approve developments ...without any consideration of their environmental or social consequences." (See Appendix 5) Wow! How bad must these Councillors be to have no environmental or social conscience at all!

Given that every major development on the Tweed in the last five years has been approved with the consensus of all the relevant state government departments, it is not surprising that the critics prefer to make very generalized accusations so they can't be pinned down to naming a single development that deserves their extreme kind of condemnation.

Does Mr. Parnaby really think that a certain group of Councillors willy nilly approve developments for certain people without constaint? The reality, of course, is that the approval process has to start by conforming to an LEP that has to be approved by the Minister of Planning. After it gets past that hurdle, each separate state government department must assess whether the development proposal conforms to the toughest planning legislation in the world – the NSW EPA, the Coastal Policy of NSW and the Endangered Species Legislation. After all the issues they may raise are addressed, Council's planning department must then assess the development proposal in the light of its own environmental and social polices, its Development Control Plans and any other Council policies relevant to the development proposal. Then there has to be community

consultation, with Council assessing each objection. This all adds up to a very demanding and rigorous process that generally takes years for major developments. There is no evidence that any Councillors have been able to wave some magic pro-development wand to short-cut, much less to by-pass this rigorous process.

It is a matter of record that in almost every case wherein the Councillors have voted to approve developments, they have acted on the recommendation of the Planning department, which in turn had gained the necessary clearances from the various state government departments. The few exceptions have been development proposals that have line-ball calls.

So the very generalized accusation about some Councillors regularly approving developments without consideration of their environmental or social consequences amounts to a slanderous accusation against state government departments, the Minister of Planning and Council's own

Planning department because all these parties have acted a part in the approval processes. For instance, every major development on the Tweed Coast – Casuarina, Salt, Sea Breeze, Koala Beach, the Beach (Cabarita) – has been approved with the full support of the NSW government. No development happens without the consensus of the two levels of government. For Mr. Parnably to single out some Councillors for "regularly approving developments" "without any consideration of their environmental or social consequences" is an absolute nonsense. It is clearly defamatory at well. This sort of irresponsible talk is simply perpetuating a fiction that has absolutely no basis in reality.

Submission 190

Many submissions were to adopt the recurrent themes that the majority of large or contentious developments were not determined by the council, that there were few developments approved contrary to staff recommendations and that beneficial economic changes had been obtained by the previous pro-development council, as a result of their pro-development policies.

All of the foregoing gives rise to a fundamental question whether policy adopted by candidates, which may by ultimately be brought forward as councillors, should be applied to the determination of development applications.

If the answer to this question is "yes", subsidiary questions then arise, regarding the extent to which policy may be applied, the circumstances where it should be applied and whether it should have general or specific application.

The issues were raised with Councillor Boyd, who appeared to accept as a principle, that it was legitimate for policy to play a part in the development determination process:

MR BROAD: *We seem to have been having this debate about the policies. And the debate about policies seems to turn on this idea that council's policies are a number of documents that it reviews after every election which are enshrined. But so far as the voting is concerned, the policies that come into the council are the policies of the candidates that are put to the public as their election ..... [sic. platform] So, in other words, the current council has a majority which says, yes, we are pro-development and*

we want to facilitate development. Now, isn't in those circumstances the exercise of voting against a recommendation simply giving effect to a platform?

CR BOYD: *Yes.*

MR BROAD: *And does that fall outside Section 232 as the councillor's responsibility to play a key role in the creation and review of council's policies? And I don't mean it in the formal written sense. I mean it in the overall direction of the way the council steers itself.*

CR BOYD: *By a majority council can make decisions as it sees fit really. And if they make bad decisions then ultimately they pay a price for it. If they don't observe the rules of local government then eventually they pay a price for that.*

T. 17/2/05 p. 174-175

and that it would provide some flexibility in the process:

MR BROAD: *And councillors may say, "Well, look, we don't place the same emphasis on requiring a road width of x number of metres in an estate"; or "We don't see that there is a necessity to impose this level of contribution under our contributions policy"; or they can say, "Look, really the height of that building is not significantly over what we would normally consider", and that's open to council, isn't it?*

CR BOYD: *That is indeed what has happened.*

MR BROAD: *And that has been the subject of a lot of your concern?*

CR BOYD: *Exactly.*

MR BROAD: *All right. Are you trying to impose an inflexible role on the councillors?*

CR BOYD: *No. I - look, I believe that there has got to be some flexibility but the whole purpose of making policies and guidelines is to ensure that everybody is treated equally. ...*

T. 17/2/05 p. 175-176

To a significant degree the matter has become a touchstone of concerns in the Tweed with significant concerns that the council has consented to applications contrary to the recommendations of its staff or has varied or deleted draft conditions of consent.

The question brings into play the respective roles of the councillors and staff, their relative expertise, the intended operation of the Act and EP&A Act and of the planning hierarchy contained within the EP&A Act.

The starting point lies in the separation of roles between the elected and corporate bodies.

Council staff fall under the control of the General Manager. His functions include:

> …The general manager is generally responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay, of decisions of the council.
>
> The general manager has the following particular functions:
>
> • the day-to-day management of the council …

Conversely, the councillors, as forming the governing, direct and control the affairs of the council in accordance with the Act (**section 223**).

The Act therefore makes clear that, except for staffing matters, the governing body exercises the decision-making power of councils. Only when the councillors delegate decision-making powers, do staff exercise a decision-making role.

Councils develop and adopt policy in many guises, for example, through management plans, strategic plans, social plans and the like. These various plans steer the council's direction and dealings. Generally, through the actions contemplated in the plans, councils obtain, often over a longer term, the ideals sought by their policies.

To a large degree, a LEP is a reflection of council policy setting the longer and shorter-term strategies that aim to achieve functional planning throughout the council area. DCP's and other subsidiary planning documents are also legitimate reflections of council policy, applying to aspects of or physical areas in which development may occur.

Importantly, these planning instruments stem from longer-term consultative processes involving specialists from within or outside council staff. They do not stem from the rhetoric or positioning of candidates seeking electoral mandate.

It is the secondary aspect that involving the candidates of aspirants that this part is directed to.

Earlier in this part reference has been made to the introductory statement to Chapter 7 of the Act. It is useful to emphasise the last paragraph, which reads:

> …In exercising its regulatory functions, the council must observe any relevant statutory criteria and any other criteria contained in a local policy it may have adopted after public consultation.

While this part is explanatory in its nature and does not form the part of the Act, it emphasises:

- the need to observe any statutory criteria; and
- that any policy may only have been adopted after public consultation.

These matters are to be subsequently enshrined in the Act in Part 3 of Chapter 7, which provides for the adoption of local policies concerning approvals and orders.

The Act provides for the adoption of a local approvals policy, after consultation. The Act enables councils to adopt such policies, but does not mandate them (**section 158**).

Importantly, the Act anticipates that a local approvals policy will address:

158 Preparation of draft local policy for approvals

…

(3) Part 1 is to specify the circumstances (if any) in which … a person would be exempt from the necessity to obtain a particular approval of the council.

(4) Part 2 is to specify the criteria (if any) which … the council must take into consideration in determining whether to give or refuse an approval of a particular kind.

(5) Part 3 is to specify other matters relating to approvals.

Part 3 provides that a local approvals policy cannot be inconsistent with, nor more onerous than, the Act or the Regulations.

The Department of Local Government has issued a practice note No. 14 – Local Government Approval Policies. This document provides the Department's perspective that Chapter 7 only operates in the limited context of the Act, certain other Acts, but not the EP&A Act (except under Part 4).

The practice note provides a model policy drawn from that adopted by Newcastle City Council. It is worthwhile setting out the aims of the policy as contained in the model policy:

The Policy aims:

- to promote an integrated framework for dealing with applications for approval;
- to ensure consistency and fairness in the manner in which the council deals with applications for approval;
- to encourage and assist effective participation of local communities in decision-making;
- to make the council's policies and requirements for approvals readily accessible and understandable to the public;
- to assist the council to fully pursue its charter under section 8 of the Act;
- to apply common or consistent requirements and procedures to all types of approval;
- to establish a system of community participation which can effectively resolve disputes and conflicts as they arise; and
- to use straight-forward English and explanatory notes throughout the text of the Policy.

There are no collateral provisions in the Act affecting applications under the EP&A Act, nor are there collateral provisions in the EP&A Act.

The EP&A Act provides the manner in which applications are to be assessed and determined in section 79. Subsection C provides for the matters relevant to the evaluation of applications, with section80 providing for determination, whether by conditional or unconditional consent, or by refusal.

Concerns over the manner in which the councillors had dealt with applications came in the form of:

- approval contrary to staff recommendations;
- granting concessions that in the view of the person or group, were not appropriate;
- an inability to comprehend why the generally majority councillors of the council had adopted the course taken by them;
- a major shift in the stance of reports in a relatively short timeframe.

Examples of these concerns follow.

Mr Paterson (**submission 278**) was bitterly opposed to the Nor Nor East development as it directly affected the amenity of his property.

Mr Paterson wrote:

> Of particular concern to me is the change in direction of the report recommendations occurring between 5 and 19 November 2003, as a consequence of a meeting held on 11 November 2003 between certain Council officers and the applicant's representatives who I believe were Mr Paul Brinsmead and Mr Peter Madrers. I consider that advice should be sought direct from all of those Council officers involved in preparation of these reports to establish the details of the 11 November 2003 meeting issues and to establish the basis for the redirection of the original report recommendations.

Submission 278

Co-incidentally, Mr Paterson is an employee of council, with qualifications in Town Planning, but not working in the section responsible for preparing the reports.

Dr and Mrs Wright, whose property adjoins the Penny Ridge Resort at Carool, detailed the developments and the subsequent changes that have taken place on the resort property, including:

> a/. Forty-seat restaurant becomes one hundred and forty seat restaurant and conference centre, (Sunday Mail 08/08/04 – Item 4).
>
> b/. Private Golf Course for use of resident guests become Public Golf Course with Pro Shop and Buggy Shed.
>
> c/. Units, which were originally designated as tourist accommodation, are presently advertised for sale, ($265,000.00), on public notice boards.

Submission 271

Their submission, as did the subsequent evidence of Dr Wright, detailed their attempts to ascertain how the various developments could have been approved, concluding:

After much frustration we eventually advised Council that it was a total waste of our time and effort to object as Council appeared to be unable or unwilling to curtail this person's activities,(see Daily News article – Item 5).

Submission 271

Councillor Dale, while not referring to the current council, also spoke of situations where consents had been granted, that were, in his opinion, incomprehensible,

CR DALE: *I don't think many major decisions have come before us in the life of this council, where we've seen the same sort of treatment - well, where we've seen the same methods used. I think the previous council, a number of glaring examples where planning staff recommendations were trampled and left in the dust, and council went in a completely different direction. And I've looked at a lot of them, and looked at them carefully. And I haven't been able to understand why that would have been done. In many case, the - as I've said before, it was to the detriment of the community or social worth. And it seemed to do nothing but deliver an extra profit level to developers and investors and speculators.*

T. 18/2/05 p. 277

While Councillor Dale could not fathom the reasons for the decision, Mr and Mrs Catchpole, who, through their submission and their evidence at the Public Hearings, have no doubt continued to devote a significant amount of their time to planning and environmental issues, indicated their view that substantial concessions were being provided to developers, as follows:

From our own observations, we believe that the majority of Tweed Shire ratepayers favour development carried out in a sensitive way, where the community's views are taken into consideration. Not in the way the majority of councillors seem to currently follow, where planning rules and professional advice from experienced council staff are bent or ignored to suit the needs of developers (who are only doing it for their own short term financial gain). There seems to be a situation where the paid council staff do their best to try and look after the ratepayers interests, and certain councillors do their best to look after developers interest. For example, when the development application was lodged for the recent Salt development, senior council staff advised that the development should be smaller and no sand pumping should occur to increase the height of the land, bringing the height of the buildings erected on it effectively up to four stories (there is a three story height limit in the Tweed Shire). This advice was overruled by the mayor and his controlling group of councillors to suit the developer's requirements and the development went ahead. In another case, a Resort Corp unit development in Kingscliff exceeded the height limit of three stories, but was again allowed by the same councillors to go ahead as per the developer's requirements.

Submission 67

Numerous submissions were to detail instances where approvals had been granted contrary to the recommendations of staff.

Mr Broyd, council's former Director of Development Services, wrote:

1.5 I express two generalised opinions based upon my experiences at Tweed and particularly relating to the period 1999 to 2003. On a very high proportion of occasions in dealing with planning and environmental matters, the majority "Tweed Balance Team" of Councillors demonstrated a predisposition to advocate and pressure on behalf of certain development proponents in ways that were dismissive of legalities, policies, or professional advice and consideration of wider public interest issues. Secondly, that high level predisposition and bias in my view in serving the interests of certain development proponents was to the detriment of the environmental and community values of the Tweed. The conduct was not befitting of the quality of planning and political decision making necessary for a Shire that has one of Australia's highest growth rates, and the second highest biological biodiversity on the Australian eastern seaboard. It could be argued that the majority "Tweed Balance Team" Councillors had a mandate for such behaviour from the election results of 1999 – and I acknowledge that. I do believe however that there would be a "significant distance" between the electoral basis for that mandate and the actual conduct of the Councillors and the consequent developmental and environmental outcomes during that period of office.

Submission 362

Mr Broyd was to detail what he regarded as "political decisions" made contrary to staff recommendations, which will be referred to in more detail later in this part.

Such was the frequency of council's decisions contrary to staff recommendations that Mr Broyd ensured that steps were implemented to deal with them:

3.6 The frequent incidence of political decisions contrary to professional recommendations led to discussions about the appropriate procedures relating to ultimate decisions on these matters. I consistently insisted that when a development application had been recommended for refusal, that if the Council sought to approve that development, then the resolution at that meeting should be one of "deferring the development application for the Director of Development Services to provide a further report to the next meeting of Council including appropriate conditions in the event that Council decided to approve this application". This was frequently misunderstood or questioned by Councillors within the "Tweed Balance Team". The report back from myself would always contain consistent recommendations with the previous report with such draft conditions contained within a section of the report subtitled "Options".

Submission 362

There was an overriding sense indicated in a significant number of submissions that the policy direction of the "Balance Team" councillors and/or "Tweed Directions" councillors had tipped an inappropriate balance in favour of developers.

Mrs B Deschamps detailed her concerns, concluding:

> I do not wish to appear at the Inquiry, a calculator would get better results than any words I could possibly speak.

Submission 258

In some circumstances, Mayor Polglase saw the role of the councillors as reflecting the views of the community in relying on policy, when determining development applications. Mayor Polglase supported council's decision not to adopt staff recommendations, as follows:

MAYOR POLGLASE: *Look, I have nothing more but admiration for Tweed Shire Council staff.*

MR BROAD: *And you, as Councillors, do you have regard to the value of their advice as experts in their field?*

MAYOR POLGLASE: *I have - yes, I - I - in my personal opinion, I value their advice. I listen to what they - what they say and the way they put forward their reports to Council. They have a role to report to Council as per the policies of Council. The elected members of Council have a role to assist that report as per the policy of Council and the community expectations.*

MR BROAD: *Yes. Mayor Polglase, in what circumstances is it appropriate for the Councillors to disregard recommendations made by staff?*

MAYOR POLGLASE: *Well, there are issues where there may be strong community expectations where they believe that there is an issue that's not been addressed correctly. They believe the community should see a different outcome or a different result. Then the elected members then have a responsibility to - to balance the report of Council and the policies of Council against the community expectations. That is a very difficult role for elected members to do but that's a role which we're elected to do, and I believe Tweed Shire does it very well.*

MR BROAD: *If Council staff in their expertise report and say "This particular aspect of this particular application does not meet the requirements of a" - I will probably go higher than a policy - that it does not meet the requirements of, say, coastal policy, which of course has got very strong application in the Tweed, in what circumstances should Council consider not to follow that?*

MAYOR POLGLASE: *Well, in answer to that question I would think that we should be more specific on a particular case. To give a generalisation over that is - is very difficult because there are various issues that – that come with various applications to - to give*

consideration to. There are - that's where I believe that Council does have issues with - with what the community expectations are and - and how do we reflect that as a Council, and sometimes we will be at disagreement with the report to Council because there's a strong community attitude that they don't want that or don't support it, and that's our role as elected members to - to do that and make that judgment because that's what we're elected to do.

MR BROAD: *So it is a case by case judgment?*

MAYOR POLGLASE: *It's a case by case judgment.*

MR BROAD: *Yes. And it has just got to be dealt with on each - on its individual merits on the day.*

MAYOR POLGLASE: *Its individual merits, the community expectations, and the outcome that everybody's looking for.*

T. 16/2/05 p. 84-85

Mayor Polglase was to reinforce this view when giving evidence later during the Public Hearings:

MR BROAD: *In respect of the evidence that this Inquiry has received and in respect of its review of certain files, there are some issues that appear to arise. If I can take you through those and get your comment. There seems to be a preponderance of development consents having been granted contrary to staff recommendations. Would you agree with that as being an issue?*

MAYOR POLGLASE: *No, I would not agree and if I am allowed to elaborate - - -*

MR BROAD: *Please do.*

MAYOR POLGLASE: *As I said earlier on in this inquiry from day one - is our Council staff have a responsibility as per the policies of Council to put forward various recommendations. Council has the role, as the community representative, to look at how those issues work within the community. We then may consider - there may be a large community opinion that we should not be doing this or not be doing that. We have a role then as a Council to reflect that community view and the recommendations we make as a Council, which may be in conflict to the recommendation the officer put forward. But they will put those recommendations forward as per the policy of Council which we, as a Council, at the time are responsible for and there may be an issue where we should reconsider our policy and the way it has been put together.*

T. 17/3/05 p. 1591-1592

Collaterally, Councillor Boyd, who served on council for forty years accepted that policy had a legitimate role in determination of development applications.

Councillor Boyd was to recognise the need for Policy to have been developed and adopted by the council beforehand.

MR BROAD: *Yes. There are others who have a different view on governance issues within council quite clearly.*

CR BOYD: *Yes, I'm aware of that.*

MR BROAD: *Is your view simply an extreme view?*

CR BOYD: *Well, I think 50 per cent of the people have indicated at the last election that they at least go some way towards agreeing with my views. It's a matter of some interest I think to this hearing that I have managed to top the poll on seven occasions within the last two despite very strong campaigns against me. I ran second on both occasions so what the views that I have I think must be shared by quite a number of other people.*

MR BROAD: *There is a contrary argument that says, well, those who were also elected obtained very substantial votes whether individually or as combined as groups and that's a very strong view to the contrary.*

CR BOYD: *Precisely.*

MR BROAD: *Yes. And so there seems to be a sharp divide.*

CR BOYD: *Very sharp.*

MR BROAD: *Is it only limited to questions of environmental issues?*

CR BOYD: *No. I think that it relates to development issues. If you look at what I've indicated there in some of my submissions, I believe that where you have situations where staff are recommending approval for a particular application, and on the day of the meeting that we're dealing with that issue, councillors get up and change or vary the conditions of approval that have proven or show by the evidence that I've presented to you that that has resulted in a substantial gain to the developer or the applicant. And I just - I see that as very difficult to explain.*

MR BROAD: *Do you suggest that councillors as the elected body should adopt the recommendations of staff as a matter of principle?*

CR BOYD: *By and large most recommendations from our staff are in fact agreed to but it - I know that it is those occasions whatever when those - those conditions of approval are varied for reasons that are difficult to understand or to explain: that's when I show concern and I've indicated that on at least of two of the submissions I've made.*

MR BROAD: *Isn't that simply though an exercise of the policy powers of the majority of councillors?*

CR BOYD: *The policy powers of the majority of councillors? I don't believe you will find any policy which indicates that in those situations that the council - I understand that*

from the Department of Local Government have indicated to me, as everybody has read probably, that that's the right of a councillor to not necessarily slavishly follow the recommendation of the staff and that's true.

MR BROAD: *We seem to have been having this debate about the policies. And the debate about policies seems to turn on this idea that council's policies are a number of documents that it reviews after every election which are enshrined. But so far as the voting is concerned, the policies that come into the council are the policies of the candidates that are put to the public as their election ..... So, in other words, the current council has a majority which says, yes, we are pro-development and we want to facilitate development. Now, isn't in those circumstances the exercise of voting against a recommendation simply giving effect to a platform?*

CR BOYD: *Yes.*

MR BROAD: *And does that fall outside Section 232 as the councillor's responsibility to play a key role in the creation and review of council's policies? And I don't mean it in the formal written sense. I mean it in the overall direction of the way the council steers itself.*

CR BOYD: *By a majority council can make decisions as it sees fit really. And if they make bad decisions then ultimately they pay a price for it. If they don't observe the rules of local government then eventually they pay a price for that.*

MR BROAD: *The recommendations of the staff are the corporate body's view of how councillors should deal with it - deal with an application.*

CR BOYD: *Yes.*

MR BROAD: *That may be a very complex view. It may, for instance, recommend a great number of conditions which attach to an approval. There may be some very, very complex consideration of a wide ranging variety of issues. But at the end they're a combination of individuals' views, are they not?*

CR BOYD: *Expert views, yes.*

MR BROAD: *Yes. And there is some level of expertise?*

CR BOYD: *Absolutely. That's why you employ the people.*

MR BROAD: *And councillors may say, "Well, look, we don't place the same emphasis on requiring a road width of x number of metres in an estate"; or "We don't see that there is a necessity to impose this level of contribution under our contributions policy"; or they can say, "Look, really the height of that building is not significantly over what we would normally consider", and that's open to council, isn't it?*

CR BOYD: *That is indeed what has happened.*

MR BROAD: *And that has been the subject of a lot of your concern?*

CR BOYD: *Exactly.*

MR BROAD: *All right. Are you trying to impose an inflexible role on the councillors?*

CR BOYD: *No. I - look, I believe that there has got to be some flexibility but the whole purpose of making policies and guidelines is to ensure that everybody is treated equally. I've got to say that the few issues that come before council - and I think the Mayor made this point yesterday - the few issues that come to council largely are those issues where the applicant is really asking for something for which they're not entitled.*

We don't hear about all the people who do the right thing, abide by the guidelines and the policies. They're approved by the development assessment panel, and you don't even hear about them because they have done what had to be done under the guidelines. It's the ones who don't want to accept the rules who then come before council for special consideration.

And I take the view, and always have done, that the person in that situation has a great advantage over the interests of the broad community because they have got advocates standing in the council advocating for them on the day; whereas the average person who might be right next door to that development doesn't attend the meeting. He has not or she has no way of having his or her voice heard.

They might be completely at variance with what the council is proposing to do. But because a person has had the opportunity to lobby councillors before the meeting and pursue a point of view - I mean only before the meeting on Wednesday this week, I was rung by an applicant wanting to get me to commit myself to voting a certain way before the meeting. I said, "I'm sorry but I don't do that".

T. 17/2/05 p. 173-176

Collaterally, council staff recognised the independence of the councillors as decision makers and their role in determining development applications.

Dr Griffin supported the qualifications of his staff and offered a view that strong weight should be placed on their recommendations:

DR GRIFFIN: *I think the recommendations that are put forward from staff are well considered and, except for perhaps some of the social morays that may wish to be applied for council, I'm of the view that council should seriously consider adopting the recommendations of staff.*

T. 16/2/05 p. 106

In his submission to the Inquiry, Mr Broyd wrote:

3.2 During the period of September 1999 until my departure, there was a highly frequent incidence of political decisions made contrary to professional recommendations. I recognise that:

a) There is a clear entitlement of Councillors to make decisions by majority vote contrary to professional recommendations given the roles that are legally defined in the Local Government Act, Charter and other guidelines; and

b) The provisions of the then current Local Environmental Plan and Development Control Plans were inconsistent with the political positioning and stances on individual matters taken by majority Councillors – which is also a reality of Local Government and the lead times in preparing and finalising Local Environmental Plan and associated Development Control Plans.

3.3 Notwithstanding the above, in my opinion, there was a high proportion of these decisions made that were reflecting the particular interests of the development proponents and "getting things to happen" with lack of regard and consideration to the wider planning report evaluation and the legal obligations of Councillors as the planning consent authority under the Local Government Act, 1993 and the Environmental Planning and Assessment Act as amended 1979.

3.4 I can provide a number of examples to reflect the above opinion but they include:

a) Decision making on Casuarina Beach in terms of public road access and "legibility" of road layout in the development;

b) The proposal for the Health Resort on the southern most subdivided lot of Casuarina Beach in terms of environmental protection and public open space provision adjacent to the coastal foreshore;

c) The decision to delete all recommended conditions relating to the development of Nor Nor East Marine Parade, Kingscliff for serviced apartments. This essentially enabled the development to operate as residential apartments and longer term stays. This is a critical factor in that there were concessions in development standards relating to the DA for serviced apartments that were not available for a development application for residential units at the same site; and

d) Major concessions on public open space and other developer contributions to public benefit eg kerb and guttering, in relation to the development approval for the Terranora Lodge rural residential subdivision.

3.5 A number of committees were established with participant composition that would give a favourable approach to the development proponents of an area and to the political positions of the majority "Tweed Balance Team" on the Council during 1999 to 2003. One prime example is the establishment of the LEP Advisory Committee that focussed upon the provisions of the Rural 1(a) zone and for rural subdivision. This Committee had a high proportion of landowners, Councillors and consultants who were the key supporters of more flexible standards for rural subdivision and development. This frequently led to high level differences between the professional advice being given by myself and Manager Strategic Planning Douglas Jardine, and the positions taken by the majority of the participants in these LEP Advisory Committee meetings. The protocol was - partly through my strong insistence – that there was a report from myself to subsequent Council meetings reflecting the professional position with the LEP Advisory Committee minutes attached for consideration in relation to these reports. Behaviours by participants at meetings towards professional staff were occasionally very inappropriate.

3.6 The frequent incidence of political decisions contrary to professional recommendations led to discussions about the appropriate procedures relating to ultimate decisions on these matters. I consistently insisted that when a development application had been recommended for refusal, that if the Council sought to approve that development, then the resolution at that meeting should be one of "deferring the development application for the Director of Development Services to provide a further report to the next meeting of Council including appropriate conditions in the event that Council decided to approve this application". This was frequently misunderstood or questioned by Councillors within the "Tweed Balance Team". The report back from myself would always contain consistent recommendations with the previous report with such draft conditions contained within a section of the report subtitled "Options".

3.7 Of some significance are meetings held between development proponents of major projects: Kings Forest and Seaside City and Casuarina Beach - where there was consistent attendance by the then Mayor Councillor Lynne Beck and Deputy Mayor Councillor Bob Brinsmead with associated strong support and advocacy in the main for the development proponents positions. There would be many interchanges in such meetings of development proponents apparently "feeding" those Councillors information/positions/questions that were then communicated to myself or other professional staff present and apparent that Councillors and proponents had prior discussion about tactics. An example of this was the meeting of January 2001 involving Mr Tim Barr Project Manager of Narui, the then owners of Kings Forest. A highly inadequate development application had been submitted and the meeting was called to advise of the wide range of information inadequacies and the intent for the development application to be refused in the near future. Councillors Beck and Brinsmead were also present at this meeting and were "very interventionist" in the conduct of the discussions.

Submission 362

Section 79C of the EP&A Act requires that a consent authority should, generally, take into account the planning regime that apply to the land to which the development relates, the suitability of the site for the development, the public interest and the likely impacts (including social and economic impacts) of the development.

Within the planning regime adopted by the council are DCP's and other subsidiary non-binding planning documents that do not have the legal status of environmental planning instruments, and which operate as "policy".

These planning documents are not the expressions of "policy" that are being referred to in this part and, accordingly, their role in providing discretion and conversely, continuity when determining development applications should not be equated to "policy" stemming from the platforms of candidates, or a philosophical view expounded by some or all councillors.

It is difficult to see how a general platform "of getting the Tweed moving" as suggested by Councillor Brinsmead, or to "put out the welcome mat for investors to come to the area" as suggested by Councillor Beck could supplant, or provide a legitimate basis for ignoring, staff reports and recommendations.

If these expressions of policy have any application to the consideration of development applications, then they might only bear on consideration of the social and economic impacts of the development or, perhaps, the public interest.

Councillor Brinsmead was quick to place great emphasis on his expertise as a tourist entrepreneur to support his policy views:

PROF DALY: *... The themes which I was mentioning really refer to what's happened in Tweed in the last four or five years in terms of its growth and the factors which have stimulated that growth. The suggestions have been made that the growth in the area - economic growth and population growth and so on - have been primarily stimulated by two things; one is an increase in the level of development, that is, property development throughout the area, and, secondly, growth of tourism. Would you agree with that synopsis of - - -*

CR BRINSMEAD: *The second part, Mr Commissioner, was tourism?*

PROF DALY: *Yes, the first part was property development in general and then tourism as a particular aspect of all that.*

CR BRINSMEAD: *Generally, yes. I would only qualify it by saying that the rate of pure residential development hasn't risen, it may have even declined somewhat since the years of the '90s. But if you look at the statistics the developments that have progressed since 1999 have contained a larger quantity of business and business related developments and tourism development and so on.*

PROF DALY: *The role of the Council in relation to that, how would you describe the Council's role?*

CR BRINSMEAD: *Since 1999, the Council role in that has been very considerable. The Council in 1999, that was called the balance team, ran on a platform of getting the Tweed moving. There were some big development projects down on the Tweed coast that had been stalled for over 25 years. That's a long time. Its platform was to open the door of the Tweed to business and some economic growth and to work to achieve a change of culture in the Council that was more investment friendly. Not that it advocated - we ever advocated - an anything goes free for all policy because the fact is that the Council, after 1999, didn't re-zone and didn't have to re-zone any land.*

It was all re-zoned for development. It had been sitting there for year after year. It was mainly due to open the door and to proceed with those things that had been held up for many years, and, particularly, if you related to tourism - and I've been a tourist entrepreneur in - related to - my farming activities - what the Tweed lacked in the tourist industry - it's been up till now the tourism industry has been very small and ineffectual in many respects because it was a tourism industry that had to rely to the greatest extent on day-trippers from the Gold Coast.

Now, it's well known to those who do the number crunching in tourism that day-tripping - the day-tripping industry - cannot support a solid tourism industry. What was needed on the Tweed was the creation of a tourism/accommodation infrastructure. Now, we'd talked about that for years and really believe - because I've been involved in the tourism business going back a number of years - what is happening with South Kingscliff now on the former sand mining site probably should have happened 20 years ago, but what was needed was the creation of this first time - to create the Tweed as a destination, a solid tourism/accommodation infrastructure. If I may just make one statement. It said, someone has sort of coined it by saying where the tourists roost gets the economic boost.

PROF DALY: *So you'd link a lot of what has been described as strong growth and prosperity primarily to this growth of tourist infrastructure. Am I reading you right?*

CR BRINSMEAD: *Yes. It's not just in tourism. Other things are happening too, but tourism is sort of at the, you know, the coal face where it is. I don't discount what Councillor Boyd said, the considerable influence of the economic climate of the nation, the influence of the Federal Government, you can't rule that out but at the end of the day development takes place - development has to take place at a local government level. You have to get the runs on the board and you have to create jobs - any jobs that are created will have to be created at local government level.*

Might I just add that I think we're only beginning to see the benefits now. The real benefits are starting to come on stream and we will see more of the work that's been done in the last few years.

T. 18/2/05 p. 243-244

While the councillors variously described their occupations as: company director, farmer, solicitor, shopkeeper, botanist, horticulturalist or other, this experience does not equate to or displace the expertise of council staff, as was emphasised by the evidence given by the Council's General Manager, Dr Griffin.

MR BROAD: *When I was asking some questions of the Mayor I referred to the diverse qualifications of the staff. You've got town planners, you've got engineers, you've got staff who have got particular qualifications and particular experience. That's correct isn't it?*

DR GRIFFIN: *That's correct, yes.*

MR BROAD: *And their qualifications and experience I assume would weigh heavily on their selection as staff?*

DR GRIFFIN: *Sorry, I missed a word there.*

MR BROAD: *Their qualifications and experience would weigh heavily on their selection?*

DR GRIFFIN: *Yes.*

MR BROAD: *The staff have, amongst other things, a reporting role. They prepare reports, they consider applications and they prepare reports for the councillors.*

DR GRIFFIN: *Correct.*

MR BROAD: *Would you please answer because we are keeping a transcript and there is a need for a physical response rather than a nod or a quiet response. Is it your view that the Local Government Act puts the staff in a separate position from the councillors?*

DR GRIFFIN: *Yes, the Act makes it quite clear that the staff have a different role to fulfil than councillors.*

MR BROAD: *In your view, is that an independent role?*

DR GRIFFIN: *Mostly it is independent because they're employed on the basis of their disciplined training and their skills and that's what we're wanting to put to the elected members in reports. It's that - that is the basis why they're employed and that is the basis of the operation of Local Government to have expertise to put forward to councillors who may not come from backgrounds of that relevant expertise for the decision making process.*

MR BROAD: *Within the elected body are there councillors with expertise in engineering to your knowledge?*

DR GRIFFIN: *Not formally, no.*

MR BROAD: *Are there councillors with expertise, and I'll do it formally, in town planning?*

DR GRIFFIN: *I don't believe that there is any formal qualifications of town planning within the council members.*

MR BROAD: *So, given that and the intricacies of considerations that council must have, does that place a need on your staff to be able to report effectively to councillors?*

DR GRIFFIN: *Yes, I think that's incumbent upon any organisation that's reporting to in our way councillors or in fact any organisation of staff reporting to a Board to give information, and a Board may well be versed more with professional qualifications than is a council and that is the type of arrangement that I was - I experienced when I worked for the Northern Territory Electricity Commission reporting to the Chairman and Board of Directors. It was the same philosophy. You needed expert advice going for those people, even though they had expertise in a number of the fields and was especially selected by the government to take those roles. I think in Local Government it's the same, perhaps with more importance, to ensure that best information gets to the elected members who may not have that range of experience that exists in others.*

T. 16/2/05 p. 103-105

Council's current Manager, Development Assessment, Mr G Smith, emphasised the independence of staff reports from policy adopted by councillors.

MS ANNIS-BROWN: *Great, thank you. Just to move on now to another topic and that is the role of staff in reporting to council and we have been dealing with this issue quite substantially during the inquiry. I guess I would like your perspective on that and I guess how independent staff are and feel they are with respect to providing reports to council on development applications.*

MR SMITH: *Well, from my point of view, the reports that we prepare are professional reports based on the planning documents and our professional opinion. That's how we prepare them. The individual – I allocate the development applications to staff to deal with on the basis of experience and giving a variety of work and so on. They do the assessment. They have discussions with myself with a director as to where we might be heading with an application. The report is completed. If it's one that goes to the development assessment panel, I review that and sign that into that meeting. The council report, I review that as well. It goes to our director and he reviews it and puts it on the council agenda. The preparation of those reports in my view is always professional and based on the legislation and our requirements under 79C of the Act.*

MS ANNIS-BROWN: *We have had some issues raised where those policies, planning policies may not have been complied with or have been changed once they get to council with respect to height issues and other sorts of matters. I am just wondering whether there has been any pressure placed on staff with respect to those matters before the report is actually prepared, to your knowledge. I mean, you manage a team of staff and you have been at council for quite some time.*

MR SMITH: *Yes.*

MS ANNIS-BROWN: *Have you, in your experience, seen that?*

MR SMITH: *No, I haven't, not in my experience, in the time that I've been with Tweed Shire Council and I haven't seen any evidence of that with individual staff.*

T. 24/2/05 p. 519

Mr Smith provided his view of the reliance that should be placed on the staff reports, suggesting that they should be given "very serious consideration" (**T. 24/2/05 p. 523**).

Mr Smith was questioned about the expertise within his department, their role in considering the matters mandated by section 79C and the role of councillor adopted policy in such consideration. His response merits consideration:

MR BROAD: *Mr Smith, can I carry on from an issue that was discussed with you earlier. You're the head of a department within council which has a number of specialist qualified staff with a very, very discrete skill, don't you?*

MR SMITH: *I have town planners and engineers in my particular unit.*

MR BROAD: *Yes.*

MR SMITH: *Yes, and support staff.*

MR BROAD: *Given that, what weight do you believe councillors should place on reports from your department?*

MR SMITH: *The reports that we prepare are an amalgamation of input from a number of divisions within the council, not just those specialist areas, just to clarify that, yes.*

MR BROAD: *But leaving other divisions aside, not the totality of the report - - -*

MR SMITH: *Oh, you know, the councillors - - -*

MR BROAD: *- - - but those stemming from your branch.*

MR SMITH: *Yes.*

MR BROAD: *What weight do you think should be placed on those?*

MR SMITH: *Well, as I indicated earlier, I think they should give them very serious consideration. And there are, you know - they need to consider all of the matters that we've made in that - or what we've covered in that report - in making their decision on the application. I'm not saying that they have to follow blindly our recommendations.*

MR BROAD: *But they're very discrete skills that you bring to bear and very relevant skills on development applications, aren't they?*

MR SMITH: *Yes.*

MR BROAD: *And you consider a number of factors in your report, and those, most importantly, are the considerations under section 79C of the Environmental Planning and Assessment Act.*

MR SMITH: *Yes.*

MR BROAD: *Do you believe that that should therefore lead to a view that very high weight should be given to those reports?*

MR SMITH: *I believe so. But there's the public interest issues and there's a lot of merit considerations where it's a - - -*

MR BROAD: *But merit considerations - - -*

MR SMITH: *- - - matter of opinion, yes.*

MR BROAD: *Merit considerations are entirely within your bailiwick?*

MR SMITH: *Yes, under 79C, yes.*

MR BROAD: *And public interest considerations are, again, within your bailiwick?*

MR SMITH: *Yes.*

MR BROAD: *Now, in preparing your reports, are there concessions made to policies adopted by councillors?*

MR SMITH: *If there is a policy relevant to the assessment of the application, yes.*

MR BROAD: *I don't mean in the nature of a DCP, I mean an overriding policy of councillors, say, to be pro-development.*

MR SMITH: *No, that's not a - that, in my view, wouldn't be a policy we'd refer to in the assessment of the application.*

MR BROAD: *Yes. But whether it's - I'm not talking about something in the way of a written policy, I'm talking about in a way that the report is presented. Does it acknowledge that councillors indicated a preference for this sort of development or - - -*

MR SMITH: *No. Not in my experience, no.*

T. 24/2/05 p. 523-525

Mr R Paterson, who fulfils a parallel role to Mr Smith, but whose tasks lay in dealing with building rather than development, expressed similar views regarding the role of staff. While Mr Paterson suggested the policy arising from the candidature of councillors should not translate into the manner that staff reviewed and reported on development applications, he was willing to concede that there was recent evidence suggesting this had occurred at higher levels within the staff structure.

PROF DALY: *You clearly would be familiar with the general process of preparing reports and so forth that go to Council for approval. Without getting into any particular detail on it, the individual DAs, do you think the process works effectively? The transition of professional advice to the Council and its application.*

MR PATERSON: *The process is the same one that's been carried out for 20 or 30 years that I'm aware of. It's an escalation process that involves usually the assessing officer, who is responsible for the application being dealt with, preparing a report. That is discussed with myself. It is then passed to the director. The directors collectively look at all of the reports prior to going into the business paper and then the business paper is presented to the Council for determination.*

PROF DALY: *Is there any pressure at any time exerted on the officers in terms of their advice in preparing those reports?*

MR PATERSON: *For the most part the reports are prepared by staff in accordance with what they feel are interpretations of the legislation. For the most part there is not any real influence by the officers along the way. There might be some corrections, there might be some extensions of interpretations but for the most part the officers support the reports which are prepared by the more junior staff then they're passed to the directors. There are always going to be times when there will be some differences of opinion.*

They are usually resolved during the process of report preparation and as it escalates and before it goes to the Council. So that when the Council gets the report it is usually the consensus or the agreed consensus of the officers involved.

PROF DALY: *You are, of course, familiar with the idea of separation of powers within the Local Government Act. Is the primary work of the professional staff in any way influenced by the, perhaps, public feelings of the councillors about certain issues?*

MR PATERSON: *Many of the applications are contentious. We have a community that's pretty well a 50/50 split between pro-development and law conservative, so many of the issues are going to, from time-to-time, be not agreed by the whole community. In regard to your question about whether we're influenced; with each of those applications there's a process where they are advised or notified to the community to persons that might have an interest in it, neighbours and the like, community groups, and when the report is being prepared the Council officers have regard to the submissions that are returned. So there is a potential influence there, yes.*

PROF DALY: *Right. The elected representatives are responsible for determining the policies of the Council. The staff, effectively, put policies into action and so forth. If there is a policy shift at the higher level, at the elected representative level, does that immediately translate into the way in which the professional officers might do their tasks?*

MR PATERSON: *I don't quite understand?*

PROF DALY: *I could put it more simply, perhaps. From the evidence that has come before us the Council prior to 1999 had a rather different view of development and its importance to the councils that have succeeded.*

MR PATERSON: *I'd agree with that, yes.*

PROF DALY: *So what I'm saying is - and that is elections were fought around those issues - so what I'm saying is does that then translate into how professional officers do their tasks, that shift?*

MR PATERSON: *It shouldn't. The professional officers should look at each application on their merit and they should comment and report on the basis of council's adopted policy and the requirements. And for the most part, as far as I'm aware, the reports by the officers have not greatly changed. They normally identify the issues of concern and they make recommendations and include recommended conditions if an approval is going to be granted.*

PROF DALY: *You might agree that within the process merit considerations are fairly important - - -*

MR PATERSON: *Extremely important, yes.*

PROF DALY: *Yes. So in assessing merit would a shift in general policy at the elected representative level then reflect itself in what is considered meritable?*

MR PATERSON: *There's always going to be argument over the merits of a case and it's a matter of what you place emphasis on the merit, I guess, but what council officers try to*

do is impartially assess it and determine it on the basis of adopted policy and the requirements of the Act.

PROF DALY: *There has been a change in the directorship of the area in which you've lived.*

MR PATERSON: *Correct.*

PROF DALY: *Has there been any change with that in the way in which the professional officers operate?*

MR PATERSON: *The professional officers preparing their reports still act in the same manner. They still prepare their reports in the [sic. same] manner. Is that the question?*

PROF DALY: *Yes.*

MR PATERSON: *Yes, they still act in the same manner in preparing their reports. And they still report the cases as they see them to their superiors.*

PROF DALY: *To what extent does the director shape the way in which the development application process delivers?*

MR PATERSON: *The director has the ultimate say on the final report that goes to council. So if the report is prepared and he disagrees with it he is at liberty to alter that or make a different recommendation or add conditions to it or take conditions away.*

PROF DALY: *Does that happen often?*

MR PATERSON: *That has happened in the more recent past, yes.*

PROF DALY: *Does it happen in relation to particular types of development?*

MR PATERSON: *Development applications for - yes, for proposals under consideration.*

T. 4/3/05 p. 944-947

Conversely, Mr G Smith had maintained that this had not occurred. This dichotomy in views might be explained by the position that Mr Paterson found himself in. Mr Paterson had provided a personal submission to the Inquiry raising concerns over the Nor Nor East approval processes. Perhaps because he had and would continue to be adversely affected by this approval, he was more forthright in his views.

Mr Broyd, who has since left council was much more forthright and strident. His evidence recognised the pressures that had been placed on him and was clearly motivated by a wider view of an overriding need to separate proper planning and consideration from shorter-term "political" goals.

Mr Broyd acknowledged the existence of political goals and platforms and their role in decision-making, both in his submission and his evidence at the Public Hearings. He wrote:

> 4.1 In my opinion there was a clear link between the strength of advocacy and pressure sought to be imposed – particularly by the Mayor and Deputy Mayor during the period of September 1991 to September 2001 – for major development proponents who were also the most prominent contributors to the "Tweed Balance Team" election funding. These major development proponents and contributors to election funding were also the developers of the major projects proposed in the Tweed during that period – Casuarina Beach and Kings Beach in particular. The very strong and interventionist behaviour of the "Tweed Balance Team" Councillors and particularly the Mayor and Deputy Mayor of the time – Councillor Lynne Beck and Councillor Bob Brinsmead respectively, certainly reflected the political platform of their election campaign of "getting development to happen in the Tweed".

Submission 362

In his evidence, Mr Broyd spoke of the advocacy provided by the then "Balance Team" councillors, contrasting it against that of their opponents:

> MR BROYD: *Clearly, in the normal process of political decision-making at the local level there is information received from certain sources by certain councillors, relative to the platforms that they come from, on certain issues. But I think that the way in which the other councillors conducted that was much more of a way of consulting staff - a much higher extent about the rights and wrongs of that and the more accepting of advice. It was presented at the council meetings in a way that was more respectful of professional position than asking questions and debating the professional recommendation and other councillors' positions. And it was not - if it was more information, it was more willingly shared, if you like, with the professionals and the other councillors than the Balance Team and the way that the Balance Team operated on those issues.*

T. 2/3/05 p. 667

Mr Broyd was to make clear that the policy brought forward by councillors was, in the case of Tweed Shire Council, to be manifested in pressure placed on staff, attempts to undermine them, disregard for their reports, and relevantly, the principles enshrined in the EP&A Act and of legalities. Mr Broyd was to emphasise his concerns in his submission:

5.2 Certainly there were a range of instances during my tenure as Director when decisions were made that did not reflect and were dismissive of the wider principles of ecologically sustainable development, the public interest and xplicit accountability of Councillors' decisions to the community. There are a number of instances of decision making against professional advice and Council solicitors and were potentially illegally made. Example is the questionable legality that underpinned the decision to delete all recommended conditions for the Nor Nor East development application in Kingscliff that substantiated the use management of the development as serviced apartments as distinct from residential units -- if the development application had been for residential units as distinct from serviced apartments, different standards would have applied in Council's Local Environmental Plan and relevant Development Control Plan.

Submission 362

Mr Broyd is a corporate member and fellow of the Planning Institute of Australia, having previously been the President of its New South Wales Division.

Mr Broyd's submission to the Inquiry incorporated recommendations that he perceived would affect the determinative role of all councils in New South Wales. Mr Broyd was to clarify his intent when giving evidence to the Inquiry:

MR BROAD: *Can I go to some other issues? At point 7.2 you suggest recommendations that might be made by the Inquiry that there be a code of conduct and protocol formulated which distinctively expresses the responsibilities of councils, councillors and professional staff under the Environmental Planning and Assessment Act in planning matters. Are you seeking to separate the role of councils when dealing with development applications from their general role in dealing with, as it were, day to day business or core business or otherwise?*

MR BROYD: *No. I'm not one who considers that councillors should not be part of decision making on development applications or rezonings. I think that's a local democratic process that should still occur. What I'm really targeting here is - and I think it's apparent through many councils in New South Wales - is a lack of understanding by councillors, or certainly a lack of regard by councillors, to the professional ethics and legal responsibilities under which planners operate; under the EP and A Act particularly.*

What I'm really searching for here is a code of conduct that says "These are the responsibilities you'll be - direct for planning; these are the responsibilities of councillors; these are the way in which interaction should occur between the two arms of the organisation," and have that code of conduct implemented and reaffirmed by the general manager of a council and indeed by the Department of Local Government as necessary.

MR BROAD: *So you're really looking at expanding - - -*

MR BROYD: *Expanding the current code of conduct to that effect.*
MR BROAD: *- - - the existing code of conduct.*

MR BROYD: *Yes.*

MR BROAD: *Do you say it's insufficient in its present form?*

MR BROYD: *Yes, and I think most codes of conduct in most councils would be the same. I'm well aware they are not - they don't go that far.*

MR BROAD: *You also talk in paragraph 7.4 that there be a code or regulation that requires, effectively, a statement of reasons for each planning decision, whether that be by councillors who do not accept recommendations of staff or otherwise. Why do you say that? Why should a councillor, or why should councillors as a body exercising their decision-making role under the Environmental Planning and Assessment Act, be called upon to give reasons for not accepting a staff report?*

MR BROYD: *I'm coming from a number of bases here. One, the whole environment within which planning operates in Local Government is one of big dollars to be won and lost, a lot of emotional reaction from the community, a lot of inherent conflict, and I think that, particularly given the increasing perceptions about corruption and about conflict of interest and the way in which decisions are made in Local Government on planning matters, that there is an onus upon councillors to be explicit about the reasons when they do not accept professional recommendation, and particularly when that professional recommendation is coming from a policy established within a council, because the council is varying a policy to make a decision negating that professional recommendation.*

And I think the community has a right to know the political reasons why that variation is taking place to make such a decision, and I think in many ways it's in the interest of councillors to be explicit about those reasons as well, because it then says, "Well, I as a councillor responsible to you as the community, is making this decision because." Now, I'm not being naive about the politics of Local Government or the politics of planning, but I think that is a step that should be taken because there is so much - from a planning professional point of view, there is so much perception of corruption and wrongdoing that comes to bear on my profession as well, that I think the planning profession would like to see that greater public explicit documentation of those kind of decisions as well.

MR BROAD: *Aren't you placing the planning staff at the top of the tree and saying to councillors, "You are secondary in this function. If you want to change our recommendation, then you, despite what the Local Government says that you are the determining body, you should be placed second to us"?*

MR BROYD: *Well, that's certainly not the intent, and I again totally respect the respective roles of professionals in Local Government and councillors in Local Government. But in the same way in which a public report professionally has to be explicit about the reasons why a recommendation is being made, why should not the councillors have a responsibility to be explicit about those reasons also?*

MR BROAD: *But that would serve the public interest. And what you're saying is public perception is such that they should explain themselves.*

MR BROYD: *Not in all cases; in a number of cases, yes.*

MR BROAD: *Would that have any effect on any subsequent proceedings in the Land Environment Court?*

MR BROYD: *That is a key issue involved with such a process. However, it is already clearly established that when a professional recommendation is made, for example, to approve a development and council resolves to refuse it, then the councillors are responsible for publicly stating the grounds for refusal, not the director of planning or the head of planning. So there's already a practice in place there.*

I think the reasons why a contrary decision is made is one level which the Land Environment Court takes into account. And there are risks there, I acknowledge, in terms of what I'm putting forward, for court actions, but it's really the evidence and the rationale for those reasons underpinning that that, given in the court, that are the key to the Land Environment Court process.

MR BROAD: *The Land Environment - - -*

MR BROYD: *Can I just say - - -*

MR BROAD: *Sorry.*

MR BROYD: *- - - I acknowledge that would need to be carefully considered, but my current thinking, I don't see that as a reason to negate what I'm putting forward.*

T. 2/3/05 p. 680-683

The Planning Institute of Australia is a professional body representing planning consultants. Its Code of Conduct emphasises that members should strive for the highest standards in their professional activities, and relevantly, that its members use their best endeavours and "practice their profession with the highest ethical and professional standards and earn the confidence and respect of the community which they serve".

Mr Broyd put forward the following recommendations:

7.1 That legal requirements are established and implemented as an obligation of a Mayor of a Council for declarations to be made by all Councillors regarding sources of election funding support.

7.2 That the Department of Local Government - in consultation with a Steering Committee comprised of a Department of Infrastructure Planning and Natural Resources, the Planning Institute of Australia. NSW Division, the Independent Commission Against Corruption and the NSW Ombudsman's Office - formulate a Code of Conduct and a protocol that distinctively expresses the responsibility of Councils, Councillors and professional staff under the Environmental Planning and Assessment Act 1979 (as amended) and the NSW Local Government Act 1993 on planning matters and that the code/protocol include statements regarding the professional ethics and obligations of planners in local government.

7.3 That the Inquiry express very strong support for the high priority given to the preparation of a regional strategy for the North Coast and for the concurrent and consequent preparation of a new Tweed Shire Strategic Plan: "Tweed Futures" and a reviewed Tweed Local Environmental Plan 2000.

7.4 That the Department of Local Government in consultation with the Department of Infrastructure Planning and Natural Resources and the Planning Institute of Australia NSW Division prepare relevant content of a Code or Regulation that:

a) in the event of the majority of Councillors resolving to seek to approve a development application against professional recommendation - that the Council be obligated to resolve in terms of words to the effect of: "requesting the

Director of Planning to bring back a report to the next meeting of Council identifying appropriate conditions of consent in the event that the Council determines to approve the development application". It needs to be formally recognised that the Director of Planning will make a consistent recommendation with the original report - unless there is of course any new information/renegotiations in the interim that cause a change in that recommendation;

b) that Council be required within the resolution to formally state the reasons why the professional recommendation has not been accepted and the decision taken to approve against the professional recommendation to refuse;

c) that in the event of Council refusing a development application contrary to professional recommendation to approve, then the majority Councillors are themselves required to formulate the reasons for refusal. (consistent with Land and Environment Court expected practice) ;

d) in the event of decision making to approve a development that has clear variations from the Council's Local Environmental Plan and/or Development Control Plan(s) then reasons for those variations being accepted need to be embodied:

i) in a proponents submission as an integral part of the development application for reiteration in the report to Council and be as articulated within the professional report to Council

7.5 That in the event of the Director of Planning identifying what he/she considers to be significant variations of a foreshadowed determination to approve a development application from the Councils Local Environmental Plan and Development Control Plan(s) then he/she must identify those in the Council report and recommend whether such a policy change is of sufficient significance to warrant the preparation of a draft amendment to the Local Environmental Plan and Development Control Plan(s) for exhibition and reconsideration by Council prior to determination of the development application. Should Council not determine to defer the development application to have such a draft amendment prepared and exhibited and reconsidered by the Council prior to

DA determination against professional recommendation then specific reasons must be included in the resolution of Council to approve the development application without such draft amendment and exhibition.

7.6 The Tweed Shire Council be required to provide a statement as to fulfilment of the recommendations in the Department of Local Government Investigation Report 2001/2002 regarding development and environment decision making based upon ecological sustainable development and the adequate resourcing of the strategic planning work program.

7.7 The Inquiry expresses strong support for the Minister for Department of Infrastructure Planning and Natural Resources, the Hon. Craig Knowles, for those components of the planning reform agenda that require the accountability of Councillors to the Local Strategic Plan and give the local Strategic Plan greater status by its incorporation into an 'Integrated Plan Template" as distinct from the LEP template that was placed on public exhibition by DIPNR in late 2004.

Submission 362

There is substantial community concern within the Tweed over the manner in which the Tweed Directions candidates sought their electoral funding. Collaterally, this concern draws from (though not solely) concerns over the manner in which those amongst them exercised their functions when forming part of the "Balance Team" of councillors in the former council. In addition the concerns are both renewed and reinforced by the actions of the Tweed Directions councillors in their exercise of their functions.

Quite clearly, these councillors had demonstrated a view that their platforms would serve as council's policy excusing and legitimising their decisions, particularly in the light of local community concern and concerns held in the wider community.

There is no doubt that policy of this nature has no role in the proper determinations of development applications, particularly in the unrestrained manner that it has been applied.

Quite clearly, the current councillors lacked the professional skills to blithely disregard the recommendations of staff, particularly on matters involving discrete and specialised consideration, such as the dune management plan for Kings Beach (**council minutes 19/1/00**).

There is little doubt that this situation exists across the great majority of, if not all, councils in New South Wales.

Collaterally, there is no doubt that it is legitimate for candidates to adopt platforms, seen as providing necessary or desirable improvements to their local areas when seeking

election. In those circumstances, it is equally legitimate for those platforms to be incorporated in council policies to shape the direction of council activities and pursuits.

As has been alluded to earlier in this part, councils adopt policies in a number of formats, whether by management plans, social plan and the like. Within these plans may be the social goals espoused by councillors.

Most relevantly, such platforms, when adopted as policy, will be formally enshrined in public documents, in an open and transparent manner.

If, a councillor's decision-making was premised on a pro-development policy, it was appropriate that this policy be formally adopted in the nature of a DCP, akin to a local approvals policy.

In those circumstances, appropriate definition, utility, relevance and application can be enshrined in a document.

Mr Broyd sought to go further in his submission, suggesting that councillors be required to give reasons for decisions that were contrary to the recommendations of staff.

There is merit in this argument particularly as staff reports, as in the case of Tweed Shire Council, and generally throughout councils in New South Wales contain fulsome consideration of the application in terms of section 79. Such reports provide the reasons for ultimately making the recommendations.

An alternative approach is to remove councillors from the process of determining development applications, leaving their determination to professionally qualified staff, either within or outside the council.

The concerns raised in this part support the view, at least in the case of Tweed Shire Council, that this is the appropriate course.

So significant were the concerns of this Inquiry regarding issues notified in public submissions or arising from review of council's files and other records, that a recommendation was made for the appointment of an Environmental Planning Administrator under section118 of the EP&A Act, to determine applications pending the Inquiry's report.

Material provided by the Department of Local Government suggests that, while councillors come from a wide range of backgrounds and possess varied skills, few, if any, have formal qualifications in town planning or spheres relevant to the specialist review and consideration of development applications.

Collaterally, it must be acknowledged that consideration of applications potentially involves weighing a number of semantic issues for which there is not black or white answer. Accordingly, determination of development applications does not fall into the sphere of science alone.

There is widespread concern over the manner in which councils determine development applications. Such concern cannot be solely directed towards councillors, as staff under delegated authority determines the great majority of development applications. The council submission indicated that the councillors had dealt with only 5.3% of applications in the period from 1996 to 2004, but these were almost entirely made up of major or contentious projects.

Mr Broyd's view that councillors give reasons for their decisions not to adopt recommendations has merit. It would engender openness and transparency in decision-making. It would also support a view that decision makers should give reasons for their decisions, a proposition that has been the subject of legal argument over a number of years.

The alternative view proposes to either remove determination of applications from councils entirely or to provide for their determination by suitable qualified staff within council.

These issues will be revisited later in this part.

3.4.7 Conditions of Consent

For any council's planning regime to operate effectively, it is necessary that its intent be given effect to and be reinforced.

This can be done through the rejection of development applications that do not meet the spirit and the intent of the regime and by ensuring that the spirit and intent are given effect to in its consents.

The planning regime adopted by a council is, initially, its strategic planning denoting its vision of the future make-up and use of its area.

It is, essentially, a long-term goal, given effect to by the decisions of the council, primarily through its determination of the development applications it receives.

The determinative powers can be exercised either by refusing such applications or by granting consent, either conditionally or unconditionally.

The conditions attaching to a consent may serve as a powerful tool to ensure the integrity of the planning regime.

The EP&A Act permits a consent authority to impose a condition of consent, if:

> (a) it relates to any matter referred to in section 79C (1) of relevance to the development the subject of the consent, or
> (b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or

(c) it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or
(d) it limits the period during which development may be carried out in accordance with the consent so granted, or
(e) it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or
(f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C (1) applicable to the development the subject of the consent, or
(g) it modifies details of the development the subject of the development application, or
(h) it is authorised to be imposed under section 80 (3) or (5), subsections (5)-(9) of this section or section 94 or 94F.

Through submissions made to the Inquiry, evidence at the Public Hearings and review of council files, the Inquiry has become aware of substantial concerns affecting the condition of consent imposed, deleted or varied by the council and, to a lesser extent, by DIPNR.

The public's concerns have come from opposing camps, those who viewed that the conditions imposed or not imposed resulted in an inadequate determination, and those who suggested that the conditions imposed were too onerous, incorrect or inappropriate.

As indicated earlier in this part, the concerns have not only involved council but also DIPNR.

DIPNR became the consent authority for Resort Corporation's application at Cabarita Beach, involving the construction of a mixed development incorporating tourist accommodation.

Council's LEP provides that tourist accommodation is permissible, with consent, in the relevant zoning.

The LEP defines tourist accommodation as:

Tourist accommodation
A building principally used for the accommodation of tourists but does not include a building elsewhere specifically defined in this Schedule.

On 2 October 2004, Mr McGavin, a planner with the council, sent the following email to DIPNR:

Dave,

How did you go with the issue re tourist accommodation and permanent accommodation?

Lindsay

The response and a subsequent email from DIPNR point up the nature of issues that potentially affect the conditions that may attach to a consent:

> They are sticking to their LEP argument that a tourist development can contain both permanent and tourist accommodation, so we will likely condition that the building contain approx. 60-70% tourist accommodation – how we police that requirement is anyone's guess??! AT this stage the applicants are refusing to actually nominate which units will be permanent & which will be tourist – presumably because they have pretty much sold them all already off the plans!

> Morning Lindsay,
>
> I spoke to the developers of The Beach at Cabarita this morning and told them that if we end up approving their DA, we will approve it entirely as a tourist development, with no permanent residential. This is consistent with their DA form, which proposed **57 tourist accommodation units** (& no permanent residential). I trust this gives you some surety when formulating your draft conditions.
>
> Cheers Dave.

DIPNR was to insert a condition in its consent providing:

> 5. The apartments are to be used only for the purpose of tourist accommodation, as specified on the development application form. In this regard, a covenant restricting use is to be placed on the title of each tourist accommodation lot restricting the stay of users within each unit to 40 continuous days.

The applicant responded, providing an advice from Noel Hemmings, QC of Allens Arthur Robinson, pointing out that, under the zoning, the upper floors of the development could be used for residential or tourist accommodation, the definition of tourist accommodation only required that the building be "principally" used for accommodating tourists and suggesting that the covenant required by the consent was both unreasonable and ultra-vires.

Collaterally, the entire tourist component of the building, i.e. the residential and tourist component, had obtained the concessions associated with a "tourist" development.

Resort Corporation took a similar stance with its Nor Nor East development at Kingscliff, providing another opinion from Mr Hemmings.

Leaving aside any benefits that might have been obtained to the developer in the intensity of the development arising from the relaxation of the standards applicable to a residential development or from the sale of the management rights to the building, and leaving aside any detriment that may have been suffered through the need to provide additional facilities for tourists, both of which are outside the capacity of this Inquiry to measure, there were substantial other savings, documented by the council as follows:

S94 & S64 CONTRIBUTIONS	TOURIST ACCOMMODATION	MULTI-DWELLING HOUSING
S64 Contribution – Water	$5,168	$18,608
S64 Contribution – Sewer	$4,231	$15,235
S94 Contribution – No.4 Tweed Road Plan	$11,158	$11,158
S94 Contribution – No.5 Local Open Space Structured	Not Applicable	$3,037
S94 Contribution – No. 5 Local Open Space Casual	$1,321	$654
S94 Contribution – No. 11 Library Facility	Not Applicable	$2,912
S94 Contribution – No. 13 Eviron Cemetery	Not Applicable	$570
S94 Contribution – No. 15 Community Facilities	$2,952	$2,952
S94 Contribution – No. 16 Emergency Facilities	$905	$905
S94 Contribution – No. 18 Council Administration	$1,311.83	$1,500.44
S94 Contribution – No. 22 Cycleway	$1278	$630
S94 Contribution – No. 26 Regional Open Space Structured	Not Applicable	$4,975
S94 Contribution – No. 26 Regional Open Space Casual	$1,752	$931
TOTAL	$30,076.83	$64,067.44
DIFFERENCE	$33,990.61	

On 4 June 2003, council granted consent, by majority, for an application to subdivide land. The application was made on behalf of the owner of the property, Chiltern Hunt (Australia) Pty Ltd.

While Mr Hunt is adamant that the consent conditions imposed by the majority councillors reflect those usually applied by the council, there was considerable dismay on the part of the minority councillors over the conditions that were subsequently to be imposed by the majority councillors though the exercise of their voting power.

Mr Hunt is at pains to defend his company's position, suggesting:

> The Company at no time requested any special treatment nor did it expect any. It did however expect to be treated fairly, courteously and in a timely manner. This did not happen. The history of delay, the exhibition of wrong documents, and unauthorised amendments of Minister's Maps and Draft LEP 2000, and the attempts to include conditions either previously deleted by consultation or not imposed upon other compatible development in the Shire led the company to the conclusion that it was being unfairly being singled out with onerous conditions not imposed upon other developments. In addition it became apparent that the conditions were inappropriate, against Council's policy and unsustainable. The authors of articles and other material alleging concessions in respect of this development either deliberately misrepresented the facts or wilfully published misleading information without bothering to check the documents which are a matter of public record.

When viewed against the advice provided to Mr Broyd and the councillors following the approval.

INTER-DIVISIONAL MEMO

This document is

TO : Cr Boyd
cc. Mayor
Councillors
General Manager
Directors

FROM : David Broyd – Director Development Services

SUBJECT : Subdivision of Lot 12 DP 1005206 being a 56 Lot Rural Residential Subdivision at Terranora Road Terranora

FILE : DA02/1159

DATE : 2 July 2003

[L23SP03]

David,

I refer to your Questions without Notice and provide below cost estimates of those items of public infrastructure excluded by the Council Resolution for Item 9 of the Council meeting of 4 June 2003.

Condition 6(iii) –	Removal of the requirement to dedicate proposed Lot 17 as Public Reserve and replace with lot 58.
Comment	It was recommended to utilise lot 58 as a permanent stormwater water quality pond and transfer Title to Council for classification as operational land. Therefore no credit can be claimed for the value of lot 58
Financial benefit	Lot 17 would have a conservative estimated market value of $250,000
Condition 6(iv)	The requirement to embellish, 1000m^2 of passive open space with playground equipment, seating and the like, of proposed lot 17 was retained, however, lot 17 was replaced with lot 58.
Comment	The embellishment of lot 17 would have provided the community with 4000m^2 of usable passive open space, of which 1000m^2 would have been embellished. Lot 58 has a total area of 4800m^2 the majority of which is taken up by the existing dam that is to be retained as a stormwater quality pond. It is difficult to determine how the intent of the condition can be achieved when there is not 1000m^2 available to embellish. It is a pertinent point to note, that land cannot be classified as both operational and community and may render the condition ultra vires.
Financial Benefit	The relative costs associated with the embellishment of lot 17 compared to lot 58 is negligible. However, considering that the area of lot 58 available

1

for embellishment is marginal and fragmented, and understanding that the developer intended to embellish lot 58 as part of the overall sales marketing strategy (entrance statement), there may be a degree of cost benefit to the developer.
(Cost of embellishment of 1000m^2 for Lot 17 would be approx $35,000)

Condition 9(i)	Reduction in pavement width from 11m to 7.5m
Comment	The reduction in width originated from the interpretation of a letter provided by Surfside Bus lines dated 20 March 2002 that stated *"In this regard we believe the planned road widths as per the plan are satisfactory."* A fax dated 13 June 2003 from Surfside (copy attached) provides further advice seeking road widths to be adequate for potential bus services.
Financial Benefit	3.5m pavement x 1500m x \$50/m^2 equates to a saving of \$262,000
Condition 9(iii)	Removal of requirement to construct kerb and gutter along the full frontage of the site.
Comment	Standard practice and requirement for a subdivision in a 1(c) Rural Living Zone.
Financial Benefit	1500m x \$35/m equate to a saving of \$52,000
Condition 9(v)	Reduction in length of 2m wide footpath/cycleway
Comment	The original intention of the footpath was to link the proposed bus stop in Terranora Road with proposed public reserve lot 17. The removal of the reference to lot 17 does not alter the effective outcome. In other words, the length of footpath required remains the same except for the provision of two pram ramps
Financial Benefit	2 pram ramps x \$500each equates to a cost benefit of \$1,000

SUMMARY

Condition No	Item Description	Cost Benefit
6(iii)	Open space dedication	\$250,000
6(iv)	Open space embellishment	\$17,000 (say 50%)
9(i)	Road Width	\$262,000
9(iii)	Kerb and Gutter	\$52,000
9(iv)	Footpath	\$1,000
	TOTAL	\$582,000

David Broyd
Director Development Services

2

Mr Hunt provides a series of assertions in his submissions regarding the various amendments made by the majority councillors. They lack credibility when viewed against the response provided to Mr Broyd and the councillors.

In what appears to be a common ploy of developers, Mr Hunt suggested:

> …If the Council had not removed the conditions The Company would have gone to the Land and Environment Court seeking removal of the conditions. Legal advice provided to The Company was to the effect that the Land and Environment Court would promptly remove the conditions. …

The Inquiry's review of council's files suggests a common thread of where court challenges are threatened in order to obtain the removal of conditions intended to be imposed. Often such conditions, principally those seeking to mandate or to provide measures to that, will underlie enforcement proceedings, are challenged, and earlier in this part reference was made to the provision of advice to Resort Corporation.

It would be wrong to suggest that such threats or that such challenges are either posturing or that there is no validity in the assertions underlying them.

They point up a real need for the council and for consent authorities to be able to provide conditions of consent that give effect to and secure the outcomes sought in the consent.

They also point up the need for the conditions to be drafted in a way that is defensible, should any challenge be made.

In the latter part of 2004, the Ray Group brought an application to modify the existing consent for SALT. The original consent contained a condition, providing:

> **FUTURE DEVELOPMENT**
>
> 1. Pursuant to Section 80(4) of the Environmental Planning and Assessment Act 1979, further development of Lots 169, 171, 172 and 220 for the purpose of tourist resorts with associated and related uses and facilities shall be generally in accordance with the Concept Master Plan prepared by McKerrell Lynch Architects dated August 2002. Further development of lots shall not be carried out except by means of further development consent or consents.
>
> 2. Pursuant to Section 80(4) of the Environmental Planning and Assessment Act 1979 further development of Lots 177, 191, 238, 245, 256, 310, 311, 312, 340, 345, 349, 373, 423, 465 & 466 for the purpose of multi-dwelling housing with associated and related uses and facilities shall be generally in accordance with Concept Master Plan prepared by McKerrell Lynch Architects dated August 2002. Further development of these lots shall not be carried out except by means of further development consent or consents.

Council had previously considered a similar application and had obtained advice from its solicitors. Mr Smith was to raise his concerns in a letter dated 1 July 2004:

> It is with the greatest of respect that we disagree with the significance, or lack of significance accorded to the Master Plan in respect of the Development Approval itself by the applicants consultant, Mr Anderson.

The Notice of Determination of Approval quite clearly indicates that the Determination itself is based on the development occurring in accordance with the plans and details submitted. It is not possible upon the one hand to take the benefit of a Development Consent and, in particular, a Master Plan prepared by the applicant and submitted to the Council as part of the approval process, and then later say it has no real planning consequences.

That could only be true if the Council took no cognisance of the requirements of the Master Plan in the overall development concept of the land including its consideration of such things as open space, roads, spatial layouts, s.94 contributions etc.

We, in particular, do not believe that Council's own officers who assessed the original application or Council in particular approving the Development Consent could say that none of these matters were taken into account when assessing the Development Application itself, (as proposed by the Master Plan). The Master Plan may still require that there be further development consents in relation to specific areas of development, but that does not mean that the lot layout and uses attributed to those lots was not significant when the Council considered the original application itself. In fact, the opposite would almost certainly be true. The terms and conditions of the Development Consent are clear and unambiguous on this point.

It is this attempt to somehow diminish the importance of the Master Plan in the original approval by the Council and to relegate it to a nothing more than "concept status" that in our view attempts to distort the true effect of the Development Approval in the first place. This distortion is important to assist the applicant's advisers in arriving at the conclusion that because of the lack of planning status of the Master Plan any amendments to it are therefore insignificant and should not be taken into account as being significant when considering the overall development.

We do not agree with these assertions either in logic or in law. We also do not believe these assertions are supported by the case law referred to later in this advice.

The significance, and in turn, the validity of the conditions of consent were of prime importance, as the developer had sought a 37% increase in the density of the development (**Cardno MBK submission 18/10/04**).

In late December 2004, perhaps not co-incidentally following the announcement of the Inquiry, the Ray Group withdrew this part of its application, upon the basis that the revised master plan complied with the LEP. If this stance is correct, it is to totally negate the effect of the master plan and to oust the conditions of consent (**Ray Group letter 21/12/04**).

Mr MacRae, the Ray Group's development manager, provided the following view regarding the density controls affecting SALT and the effect of the Master Plan:

MR BROAD: *More recently you have lodged a further Section 96 application which relates to density of development. Now, I understand that that's been withdrawn.*

MR MacRAE: *That's correct.*

MR BROAD: *It was seeking a very substantial change in density. I think Cardno MBK figures were in the order of 37 per cent. The figures provided by Darryl Anderson and Associates I think run out at 37.5 per cent. Is it usual to have such a significant variation in density from what was anticipated with all the work that you've done before lodging the DA to the time where you are actually on ground doing the work?*

MR MacRAE: *I wouldn't say it's usual but then I wouldn't say that the Salt site itself is a normal development site either. I mean, it has a specific requirement under LEP 2000 that requires one more resort room to be delivered than residential block.*

MR BROAD: *But how does that affect density?*

MR MacRAE: *That is - well, I will explain. That is a particular control on that particular site that we've had to deal with from day one and you've got a piece of land there that was zoned by council back in 1988 to generate a tourism industry which has not been able to happen until we came along because of the expertise we have in delivering resort product.*

Now, we were successful in, and have been successful in, achieving the opening of our first resort and I might add that creating a new tourism driver in a regional area outside of the Gold Coast, which is already known as the tourism hub, is not easy, but until somebody did that that land would sit there and nothing would happen with it, it wouldn't meet the requirements of the Council and State Government's requirements to generate tourism, so we were fortunate through our experience in creating tourist resorts to be able to create the first Outrigger Resort which gave us a certain amount of rooms which gave us a certain amount of land which was the original master plan.

Where if you look at the original master plan there was then to be, I think, four other possible resorts - smaller resorts - dotted around the project. We were then successful in securing another major resort operator, a company called Peppers Resorts, and they were willing to generate another 346 rooms which is their biggest resort in Australia, so we were successful in doing two of the biggest resorts in Australia on that site which then left us land free to - about where the other smaller resorts were going to be – to contemplate a third resort which we are currently doing which then will generate just under a thousand hotel rooms.

That then allows us under the LEP 2000 to generate more density in residential, i.e., that the more resort rooms we can generate then the more residential we can generate. It's all controlled by the resort drivers.

MR BROAD: *Isn't a combination of controls though? Is it simply – are you saying that density is simply a product of how many tourist rooms we can get into this area?*

MR MacRAE: *No, I'm talking about that site.*

MR BROAD: *Yes. Sorry, I mean the site not the area.*

MR MacRAE: *That particular site.*

MR BROAD: *You say that that's the ultimate driver. So that if you can obtain more tourist operators or developers who are willing to put a tourist development in that area you can just run your densities up accordingly because you can always all but match the tourist development with the residential development. The argument is that you've got to be one less room or one less person or whatever it might be. And does that stand alone that the tourist opportunity drives the density?*

MR MacRAE: *Does it stand alone? It's the major factor on that piece of land. The other thing that drives it, of course, is market demand, okay, which has been increasing substantially in the Tweed area over the last three or four years. There's no use attempting to develop more product if it's not going to sell in the marketplace, if it's not required by the market, but the control is definitely the resorts. I mean, you need to understand the whole intent of that piece of land was to create the tourism industry or advise - - -*

MR BROAD: *It's a combination of tourist and residential.*

MR MacRAE: *Correct.*

MR BROAD: *What I'm trying to struggle with is this: whether there is no other constraint applicable. In other words, effectively, you as the owner and as the developer can reflect density simply by the amount of tourism that you can attract to that site.*

MR MacRAE: *No, not at all. That's the starting point.*

MR BROAD: *Where does it finish?*

MR MacRAE: *Where is the finish?*

MR BROAD: *Where does it finish? Where does density finish?*

MR MacRAE: *Plot ratios, site cover, landscape areas, green space, a whole series of calculations that come along after that. State Government's policy on density per hectare. There's a whole set of criteria that then control what that density can be. But primarily on that site if you don't get the resort rooms developed you don't get the density.*

MR BROAD: *So when you put your DA in you put a DA in that reflected your then opportunity, that reflected what you had been able to achieve with tourist accommodation provided?*

MR MacRAE: *What we had achieved in that first resort because we knew that we could bring Outrigger as the major operator to the site. We speculated on - - -*

MR BROAD: *That you could get another one in.*

MR MacRAE: *That we could get the other - some other - operators in there, but at least Outrigger commercially got us started, got our first international resort up, allowed us to then be able to deliver roughly half of the land - the residential land - or apartments that were contemplated in the original master plan. The original master plan did have medium density, it did have villas and so forth in it. And the risk you take as a developer is we've got half the project set in terms of the first resort. We know we can deliver that. We've got the operator. Hopefully we will be able to by that attract another major operator to do another resort to be able to deliver the rest of the project.*

MR BROAD: *Have you come to figures on what the potential might be of that site?*

MR MacRAE: *The master plan that we submitted with the Section 96, which was currently - I subsequently withdrew would be probably – I wouldn't say it's the maximum. One of the things that we've strived to do on that project is ensure that we've controlled the floor space ratios and plot ratios and green space throughout the project. That piece of land could probably generate upwards of, at least, between 1800 and 2000 titles if you maximised your opportunities under the planning controls, but that has not been our desire from day one.*

You know, we had two and a half times the required amount of green space on that project. We've not exceeded much more than point eight plot ratio on any of the resort developments we've done and with a planned medium density, where other projects throughout Tweed and generally have even gone up to one point one plot ratio, if you understand what plot ratio is l But that's a very - much a controlling factor of the density of a building on a piece of land.

So I haven't done the calculations, but I would speculate that you could probably easily do probably 1800 and maybe up to 2000 buildings on that site if you could then generate enough resort rooms to balance it.

MR BROAD: *Yes, to give you the leg up?*

MR MacRAE: *Yes.*

MR BROAD: *When you withdrew that latest Section 96 application, your consultant wrote a letter that, in effect, asked council to - sorry, it may be you or your consultant; I think it was yourself but effectively requested the council not treat the master plan as binding; the original master plan as binding. What position does that then leave council in if it doesn't have some form of binding master plan?*

MR MacRAE: *Well, this became a very interesting and tricky situation because it was through conferencing with council and council's solicitors over this Section 96 application that it actually came to light that a master plan in itself is not binding, it has no statutory approval role. You can't get an approval for a master plan - sorry, unless it is under 71 for the Minister, which isn't relevant to this site. And hence the inclusion of the original master plan and the original development approval, whilst we considered it*

to be binding was, in fact, not necessarily binding and, therefore - and you probably have read stacks of letters, I guess, on advice to the council about that.

And, therefore, in this exercise their advice to council was that the master plan shouldn't be part of this Section 96 approval and that if the Section 96 approval or application was to proceed then we should withdraw that master plan, because it doesn't hold any statutory weight.

MR BROAD: *Does it pay you to have a master plan served to invalidate the approval?*

MR MacRAE: *I'm not a planner; I'm not a lawyer. I can't answer that question.*

MR BROAD: *Does it undermine any certainty - - -*

MR MacRAE: *For us?*

MR BROAD: *For you and for the - - -*

MR MacRAE: *Yes. Yes.*

MR BROAD: *- - - council and for ratepayers?*

MR MacRAE: *Yes. We would have much preferred to have the master plan approved in the Section 96, like it was in the original approval, but council had to stick with their - I'm speculating council would have to stick with their legal advice. And there was a lot of debate over it.*

T. 4/3/05 p. 908-913

If, as suggested by Mr MacRae, the ultimate density is determined by the number of resort rooms they can secure, then the conditions of consent have become meaningless.

Mr MacRae was promoting a view that the density of the site could continue to increase until it obtained a density of fourteen dwellings.

Such a statement sits at odds with the SALT SEE that suggested this density had been obtained in the original application.

The maximum ratio of dwellings to hotel, motel or tourist resort units contained in Schedule 3 of Tweed LEP 2000 provides a control on the density of residential development, as does the need for environmental buffers and east/west open space corridors. Whilst the zoning contemplates a mix of residential and tourist accommodation, the Master Plan nevertheless achieves a density of approximately 14 "dwellings" per ha, which is consistent with the standard of 15 dwellings per ha contained in the North Coast Urban Planning Strategy (Department of Planning, 1995).

While the council may have portrayed that the conditions of consent dictated and ensured the outcomes it sought, at least in the case of SALT they are of little effect. Mr Broyd was to concede this in his evidence:

MR BROAD: *The Salt development proceeded upon the basis that there was a master plan which formed the basis of its approval. In your view, what emphasis should be placed on a master plan?*

MR BROYD: *A master plan, as such, does not have legal status to be adhered to unless it is embodied in a condition of consent in a certain way. But that - a master plan outcome should have embodiment in a development control plan to give it legal weight as an ultimate desired outcome, if you like, given you've got a staged development occurring over a number of years. So whilst the master plan may not have any legal right in its own entity, it really should have some legal basis as that expression of design outcome long-term for the staging of the development to be consistent with.*

MR BROAD: *In considering an overall application for subdivision, do you consider the various aspects, such as density of development?*

MR BROYD: *Yes, you should, yes.*

MR BROAD: *If a master plan is not embodied into consent conditions, how do you then control issues such as density?*

MR BROYD: *If it is not embodied legally in a condition of consent, if it is not embodied in a development consent condition, if it not embodied in a development control plan, then it really comes back down only to the merit assessment of the applications that form the later stages, within which I presume density would be sought to be ..... And that - - -*

MR BROAD: *So, what, '96 applications or something?*

MR BROYD: *Sorry?*

MR BROAD: *Such as '96 applications?*

MR BROYD: *Well, depending upon the original DA and what that provides for and whether it's substantially different and so on, yes. I'm aware that there is this issue running over Salt. The details of that issue I'm not aware of. But it really comes down to the merit of the outcomes you're trying to establish in the end and how that is formalised in the initial approvals and reports to Council and policy expression. But if it's not in a consent condition, not in a DCP, that comes down to the merit of each application in that context.*

MR BROAD: *So what you might be placed with is a situation where there is no plan, there's no base from which to work?*

MR BROYD: *Well, the proponent could assert there is no formal plan to influence those later applications.*

MR BROAD: *In your view, is it important that the conditions of consent give certainty?*

MR BROYD: *Yes.*

MR BROAD: *Now, in other evidence - - -*

MR BROYD: *Sorry, can I qualify that answer. Certainty, as best as can be expressed in 2001, for outcomes that might be, you know, many years in the future, so that's where a policy plan like a DCP to reinforce that kind of longer-term outcome is also very, very important.*

MR BROAD: *In assessing an application such as Salt, would you assess it on the basis that in two years' time there could be an application for 35 per cent increase in density?*

MR BROYD: *No, unless clearly that's apparent at the time you're assessing an application that is not a matter of consideration and not a matter you can bring to bear on the current application. But what should be sought in terms of an application of that scale, of that import, is as much formalised agreement and policy expression at the longer term outcomes as well as the individual DA that is being assessed at the time for infrastructure reasons, for environmental outcome reasons, for the whole financial structure of the total development reasons. But no; in a direct legal sense, that would not be a bearing on a current DA.*

T. 2/3/05 p. 678-679

In the latter part of 2004 the EPA wrote to DIPNR regarding a proposal to waive the master plan for "Casuarina Beach". It serves as an important reminder of the importance of a master plan:

Your reference : SO4/01592
Our reference : GR2378; GRF 9321
Contact : Brett Nudd , 66402521

Department of Infrastructure, Planning and Natural Resources
Att'n. Pradesh Ramiah
GPO Box 3927
Sydney 2001

Northern Regions

Dear Pradesh

REQUEST TO WAIVE MASTER PLAN – CASUARINA BEACH [MP25-7-2004]

I refer to your letter dated the 21 July 2004 regarding the proposal to waive the need to prepare a master plan - Tweed Coast Road Casuarina Beach [MP 25-7-2004]. The Department of Environment and Conservation has considered the request and provides the following response.

We understand that the site encompasses a total area of 70 397m^2 located immediately behind the foredunes of 'Casuarina Beach', with 462 lots / dwellings and associated infrastructure to be developed on the site. It is also appears that if the waiver request is approved that a Development Application for Stage 1 [Lot 31] will be immediately submitted.

The scale of this development clearly falls within the triggers of SEPP 71. From our review of the 'Aims' of SEPP 71 it appears that it is exactly this type of development, which SEPP 71 seeks to capture to protect the coastal environment.

A Masterplan is an appropriate tool to guide the overall development of the site and ensure that the sensitive coastal environment is protected.

A Masterplan provides the necessary framework to 'lock in' the principal elements of the sites development and ensure that the site is developed in an integrated manner. This is particularly important given the proponents proposal to submit multiple DA's for the site, which in the absence of a masterplan for the site may result in fragmented and ad hoc development.

We note that this development was not captured by the locality trigger [ie. within 100m of the mean high water mark] despite its location immediately behind the foredunes. It is apparent that a development this close to the coast clearly falls within the 'Aims' of SEPP 71 and should be captured by both scale and locality triggers.

The request to waive the masterplan is therefore not supported by the Department of Environment and Conservation.

It is also noted that the proponent has invested significant effort in the documents which have been submitted in support of the application. These documents appear to provide a sound basis for the preparation of a masterplan and would limit the resources required in its delivery.

Environment Protection Authority
PO Box 498 Grafton NSW 2460 Australia Telephone 61 2 6640 2500 Facsimile 61 2 6642 7743 ABN 43 692 285 758 www.epa.nsw.gov.au
NSW Government Offices 49 Victoria Street Grafton NSW 2460

If in spite of the reasons above the need for a masterplan is walved it will remain important to ensure that the following issues are addressed through the planning process:-

- An integrated approach to water cycle management for the site, which minimises the proposals demands on the potable water supply, mimics predevelopment flows from the site and minimises waste water discharges.
- Ensures that a detailed assessment of radioactivity on the site is undertaken and appropriate remediation strategies committed too;
- Details of the dune restoration and rehabilitation proposal.
- Details of the beach access points and path configuration. Paths should be designed to minimise street-lighting being visible from the beach for the purpose of minimising disturbance to breeding turtles.

Yours sincerely

GRAEME BUDD
Head Regional Programs Unit – North Coast
Environment Protection and Regulation Division
Department of Environment and Conservation.

The relevance of this type of failure can be measured against SEPP 71, which was adopted, coincidentally, during the period that the SALT development application was being considered by the council.

Part 5 of SEPP 71 relevantly provides:

18 Master plan required before certain consents may be granted

(1) A consent authority must not grant consent for:

(a) subdivision of land within a residential zone, or a rural residential zone, if part or all of the land is in a sensitive coastal location, or

(b) subdivision of land within a residential zone that is not identified as a sensitive coastal location into:

(i) more than 25 lots, or

(ii) 25 lots or less, if the land proposed to be subdivided and any adjoining or neighbouring land in the same ownership could be subdivided into more than 25 lots, or

(c) subdivision of land within a rural residential zone that is not identified as a sensitive coastal location into more than 5 lots,

unless:

(d) the Minister has adopted a master plan for the land, including any adjoining or neighbouring land in the same ownership, as referred to in paragraph (b) (ii), or

(e) the Minister, after consulting the Natural Resources Commission, has, under subclause (2), waived the need for a master plan for the whole or a specified part of the land referred to in paragraph (d).

19 Consent authority to consider master plan

A consent authority must not determine a development application for development on land to which this Policy applies unless the consent authority has taken into consideration the provisions of a master plan adopted under this Part.

20 Preparation of master plans

(2) A draft master plan is to illustrate and demonstrate, where relevant, proposals for the following:

(a) design principles drawn from an analysis of the site and its context,

(b) desired future locality character,

(c) the location of any development, considering the natural features of the site, including coastal processes and coastal hazards,

(d) the scale of any development and its integration with the existing landscape,

(e) phasing of development,

(f) public access to and along the coastal foreshore,

(g) pedestrian, cycle and road access and circulation networks,

(h) subdivision pattern,

(i) infrastructure provision,

(j) building envelopes and built form controls,

(k) heritage conservation,

(l) remediation of the site,

(m) provision of public facilities and services,

(n) provision of open space, its function and landscaping,

(o) conservation of water quality and use,

(p) conservation of animals (within the meaning of the *Threatened Species Conservation Act 1995*) and plants (within the meaning of that Act), and their habitats,

(q) conservation of fish (within the meaning of Part 7A of the *Fisheries Management Act 1994*) and marine vegetation (within the meaning of that Part), and their habitats.

23 Amendment of master plans

(1) A master plan may be amended or replaced by a subsequent master plan.

(2) An amendment to a master plan may be dealt with concurrently with a development application.

Mr Papps, who was formerly Executive Director of Rural and Regional Planning with DIPNR, provided a view that conditions of consent should be built around a master plan:

MR BROAD: *SEPP71 brings a paradigm with it that there must be master planning; that there cannot be a consent unless there's master planning.*

MR PAPPS: *Under certain circumstances, yes.*

MR BROAD: *In sub-divisional matters particularly.*

MR PAPPS: *Yes.*

MR BROAD: *In your view is that type of paradigm something that council should also reflect if they are dealing with large scale sub divisions?*

MR PAPPS: *In generic terms, yes. You have to deal subsequently with questions of the quality of the master planning and all the other issues we've just discussed that Professor Daly has raised. But as a generic answer, yes. And if it's done well and the master plan has been adopted by the relevant branch of Government I think it ought to be the basis for subsequent development decisions, rather than just as a source of advice or consideration.*

MR BROAD: *So it should be the hub of the wheel?*

MR PAPPS: *In my view if it's been done properly, across the board consultation and the like so it represents a high quality product, it ought to be the guide for all the decisions that follow on site.*

MR BROAD: *And conditions of consent should be built around it?*

MR PAPPS: *That's right.*

T. 10/3/05 p. 1263-1264

Fundamental to this view is the assumption that the condition of consent will both give effect to and set in place the master plan. If, as in the case of SALT, the conditions fail to do so, then the underlying basis of the consent may be vitiated.

In attacking those who were concerned at council's processes associated with his company's subdivision, Mr Hunt raised his concerns that there be consistency in the conditions imposed on consents.

The variation in the approach taken to secure the intended short-term occupation of tourist accommodation is discussed elsewhere in this report. It serves to emphasise the need for conditions of consent to be consistent in their requirements.

3.4.8 Review and Repair

Faced with concerns that council's planning regime is not working satisfactorily, Mayor Polglase indicated council's response in the following terms:

> MR BROAD: *If you have something like that that arises, does council then undertake steps which says "Look, we perceive this is a problem. We will take steps to fix that".*
>
> MAYOR POLGLASE: *Well, normally, with Council if we determine something where we, as a Council, have made a determination where it's not in tune with what the policy says or where the conflict is, we try and reassess it in our policy documents which we review of new Council that comes in. We review our policy documents to try and reflect and get a better outcome so that that takes that determination of conflict out because that is where you've probably - the most issues arise is the determination of the wording in - in various planning instruments, and the more we can take that out of the system and make it more black and white, I think the whole local government organisation would be far better off.*

T. 16/2/05 p. 73

Council's processes do not reflect this approach.

Mr Butron, a strategic planner with council, gave the following evidence regarding the processes associated with council's proposed DCP for Cabarita Beach:

> MS ANNIS-BROWN: *Mr Bruton [sic. Butron], I'd just like to talk to you about Cabarita Beach, and, specifically, Pandanus Parade and Cabarita lands generally. The issue has been raised in several submissions and I was just wondering - I understand that you had some involvement on that project; is that correct?*
>
> MR BRUTON [*sic. Butron*]: *Yes, I was the project officer to actually undertake the development control plan for Cabarita as well as to manage the steering committee set up to drive the DCP for Cabarita.*
>
> MS ANNIS-BROWN: *What did that involve exactly, managing a steering committee, and what, in fact, is a steering committee?*
>
> MR BRUTON [*sic. Butron*]: *Basically, it involved establishing the steering committee initially from putting an ad in the Tweed Link to call for people interested in sitting on the steering committee. We ended up getting about 16 people eventually on the steering committee as well as several councillors and myself. The role of the steering committee was basically to guide the preparation of the development control plan, to get community views, it determines what should into the DCP, and just to basically prepare the development control plan.*
>
> MS ANNIS-BROWN: *You mention there were 16 people and seven councillors.*
>
> MR BRUTON [*sic. Butron*]: *Sorry, several councillors, sorry. There were about three councillors.*

MS ANNIS-BROWN: *Several councillors, so three. Okay.*

MR BRUTON [*sic. Butron*]: *Yes.*

MS ANNIS-BROWN: *The people, were they members of the community? I mean, how were they chosen? How did they come to be?*

MR BRUTON [*sic. Butron*]: *Yes, I think we received over close to 30 applications from people who wanted to be on the steering committee and we guided those back down to 16. Most of the people on the committee were residents from Cabarita or represented a resident association or I think it was an environmental association there as well, so, yes, they had some direct interest in Cabarita district.*

MS ANNIS-BROWN: *So that was the main way by which you chose who would be involved. I suppose a determination had to be made as to who was more closely linked to the applications?*

MR BRUTON [*sic. Butron*]: *Yes. And the people that were excluded from the committee were mainly people that resided outside of Cabarita.*

MS ANNIS-BROWN: *All right. So there were a few people that had an interest even though they resided outside?*

MR BRUTON [*sic. Butron*]: *Yes.*

MS ANNIS-BROWN: *Okay. I just also was interested in knowing – you said that the steering committee was set up. I mean, what was the general purpose of the steering committee? What does it do?*

MR BRUTON [*sic. Butron*]: *I guess it's two-fold. To gauge community opinion at the outset of preparing a document as opposed to relying on community opinion during the public submission. That way we are preparing a document that hopefully reflects some of the community views or majority community views and I guess it's a transparency process as well.*

MS ANNIS-BROWN: *Transparency process. Do you believe, in your opinion, that the steering committee achieved those purposes?*

MR BRUTON [*sic. Butron*]: *Yes.*

MS ANNIS-BROWN: *Yes. The next issue I'd just like to ask you is did council take the committee's views on board when it actually came to look at the development application?*

MR BRUTON [*sic. Butron*]: *Yes, we did. The recommendation that actually was put to council at the end of the day was to adopt the majority of the DCP prepared by the*

committee except for two amendments; one relating to Pandanus Parade precinct and the other relating to tourist accommodation.

MS ANNIS-BROWN: *Could you just elaborate on what those amendments involved?*

MR BRUTON [*sic. Butron*]: *Concerning the Pandanus Parade precinct the committee resolved - it wasn't unanimous - but it resolved to keep that as a village green for car parking and for open space purposes. The recommendation that went to council recommended that that could have a higher order use in terms of possibly mixed use development, retail activities as well as residential tourist accommodation above, with still the potential to actually have a village green as such or a village square. The second amendment to the DCP that was recommended related to tourist accommodation.*

Speaking to development control planners downstairs they don't have too many guidelines relating to tourist accommodation and so when applications come in they sometimes rely on DCP6, which is multiple dwelling units, or, basically, they use a merit assessment village application. What I was trying to do is to basically apply multiple dwelling units or some multiple dwelling units design guidelines and apply them to tourist accommodation.

MS ANNIS-BROWN: *Where is the matter up to now?*

MR BRUTON [*sic. Butron*]: *The matter was put on hold by the director pending Council's deliberations with Pandanus Parade Land.*

T. 25/2/05 p. 630-633

Mr McGavin, a town planner with council, was perhaps more optimistic when giving his evidence:

MR McGAVIN: *That's to do with the tourist accommodation definition in the LEP.*

MR BROAD: *Yes.*

MR McGAVIN: *And that's probably the ones that I've put forward and should be looked at. And, to me, you could change a word in that definition and it would probably clear up some of the different interpretations that we're getting from legal people and DIPNR and so forth about how that - what that definition means. So that's - sure, that's one.*

MR BROAD: *Have you put that forward?*

MR McGAVIN: *I have, yes.*

MR BROAD: *And whereabouts does that change lie at present?*

MR McGAVIN: *I've put it forward to my director and he's indicated to me that he wants to discuss it further and flush it out.*

MR BROAD: *When did you put that forward?*

MR McGAVIN: *When did I put it forward? I've spoken to him verbally about it and I put - sent him an email a week, week and a half ago about setting out some of my, you know, my thoughts of how something like that could be done to resolve the issue.*

MR BROAD: *Has this been an issue that's gone back? I mean, these - the email I quoted to you is dated back in February 2004. Have you raised that previously with him?*

MR McGAVIN: *I have. I've had a couple of discussions about just my opinion of what the issue is with the definition. And that's just one opinion, I suppose, but I have raised that.*

MR BROAD: *Your approach to him didn't arise as a result of concerns raised in this inquiry, did it?*

MR McGAVIN: *No, I've had that concern dealing with those types of applications and having to try and work out what does it mean and what the definition means and what do we want. So I've had - it's been on my mind for quite a while.*

MR BROAD: *Are there other matters similarly on your mind that have been on your mind for quite a while?*

MR McGAVIN: *Not particularly, not that I could probably jump out and say off the top of my head. Nothing that I could, sort of, immediately, sort of, produce.*

T. 3/3/05 p. 850-851

Regrettably, while the council has reviewed the suitability of its planning policy documents, it appears to have done little to strengthen their application, as evidenced by:

- the failure in May 2003 to implement recommendations regarding tourist accommodation
- the failure to proceed with the DCP for Cabarita
- the adoption of a definition of ground level, facilitating the potential to thwart the underlying intent to respect and adopt natural ground levels on the datum for determining the building height
- the complete reversal of the height controls in the DCP for Hastings Point

Councillor Lawrie was content to ignore these concerns, posturing about the intricacies of legal interpretations:

MR BROAD: *Do you regard the adoption of decisions - sorry, the decision-making of Council as recognising its policies as contained in development control plans?*

CR LAWRIE: *Yes.*

MR BROAD: *Do you believe that development control plans should be adhered to as a matter of principle?*

CR LAWRIE: *Yes.*

MR BROAD: *And in what circumstances do you regard it as generally appropriate to go away from those?*

CR LAWRIE: *It's not a matter of going away from them; it's a matter of interpreting them. Last night we dealt with a development application in the Razorback precinct and the objectives of the DCP include: facilitate the development of the area; encourage development to take advantage of; ensure the development on; preserve the traditional leafy character of. Now, genuine minds can have differences of opinion on whether or not a particular proposal that's before us either does or does not encourage or retain or ensure or preserve.*

MR BROAD: *Does that point out that there are weaknesses in your planning documents?*

CR LAWRIE: *No. It happens in statutes day-in, day-out around the country in courtrooms.*

MR BROAD: *But that's not something that Council can change. Council can change its DCPs.*

CR LAWRIE: *Yes.*

MR BROAD: *That to you doesn't - the fact that there is a multitude of interpretations to a number of words used in that document doesn't concern you?*

CR LAWRIE: *I don't agree that it caters for a multitude of interpretations.*

MR BROAD: *Well, you have just been suggesting that to me, haven't you?*

CR LAWRIE: *No, that was your word. Sir, it is a choice of whether an application facilitates the development or whether it encourages or retains something. And minds will genuinely differ on that; and so it's a matter of interpretation. And whether something is reasonable or not, that is a legal word, as you would know if you are a lawyer, and it occurs in statutes all the time and it is a word that judges have to interpret all the time.*

MR BROAD: *So we come back to the fundamental issue: as far as you're concerned there is a resilience in the system.*

CR LAWRIE: *Yes, sir. And just recently we came up with a development control plan regarding heights of buildings and the issue is whether you measure from the formed ground level or the natural ground level. And we have had great debate about that in Council as to what was the natural ground level, when it has now been carved out, looking back at drainage diagrams - sewerage drainage diagrams of 40 or 50 years ago to try and ascertain what was the natural ground level.*

MR BROAD: *Does that emanate from the Salt application?*

CR LAWRIE: *No, sir.*

MR BROAD: *And the issue in that of course was, I think it was post sand mining - - -*

CR LAWRIE: *Yes.*

MR BROAD: *- - - the original ground levels, the dunes, were subsequently changed by the sand mining.*

CR LAWRIE: *I assume so.*

MR BROAD: *Well, I think that was the foundation, wasn't it?*

CR LAWRIE: *Yes.*

MR BROAD: *And in that respect there was an application to fill the land on an average of some two metres; in various parts between half a meter and something like 3.5 meters.*

CR LAWRIE: *Yes.*

MR BROAD: *And the developer was saying that he would like the ground level measured from the newly arranged contour, that's the post filling contour.*

CR LAWRIE: *Correct.*

MR BROAD: *And is that the provision now made by Council?*

CR LAWRIE: *Yes, I think it is. And the State Government, not Tweed Shire Council, approved the Peppers Resort within Salt.*

MR BROAD: *Yes. I'm not talking about that, please.*

CR LAWRIE: *I know you're not but it's the same ground level as Salt.*

T. 17/2/05 p. 194-196

Through Mr Broyd and other staff, there were attempts to review and repair, thwarted by majority councillors.

More recently, there appear to have been attempts to review and to enshrine results sought by the majority councillors.

Perhaps it is merely a problem in perspective, given the paradigm of the pro-development councillors.

Proper and orderly planning has been its casualty.

3.5 *The Concerns Raised Regarding the Council's Planning Regime*

3.5.1 Tourist – v – Residential Use

On 9 July 2002 the Pacific Projects Group lodged a development application seeking approval for a "commercial/retail and multi-dwelling housing development comprising eight dwellings" at 32-34 Marine Parade Kingscliff.

The SEE accompanying the application envisaged commercial or retail development on the ground floor with car parking and residences on the first, second and third floors, with a combined floor area of 1864m^2 on a lot of 824m^2.

The proposal was met with concerns raised both by council staff and the local community.

Amongst those members of the local community who raised concerns was Mr R Paterson, coincidently manager of council's Business Services Unit.

Mr Paterson raised serious concerns regarding the application in a submission dated 20 August 2002, not the least of which dealt with boundary set backs and over-development of the site.

In their assessment, council staff had raised concerns over inadequate car parking.

Faced with a refusal, Mr P Brinsmead, one of the principals of the applicant, wrote in his professional capacity:

> You indicated that you have substantial issues regarding this development application and that the community also has some substantial issues. You indicated that you would not be recommending the approval of the development application based on the large number of issues. Fundamentally it is your view that the proposed development application is an over-development of the site.
>
> Based on the issues you have raised and the concerns raised by the local community our client does not propose to proceed any further with a development as proposed. We thank you for the opportunity to have met with you and to obtain appropriate feedback prior to your recommending the refusal of the development application.
>
> Our client proposes within the next 4 week period to lodge an amendment to the development application. This amended development application will be for the development of a commercial residential building of a new design. The new design will attempt to take into account most of the issues of concern raised by you and the community.

The new design is proposed to have a staggered terrace to Marine Parade. Commercial shops will be located at the ground level and 2 levels of residential units will be staggered back to reduce visual impact from the street. The height of the building from Marine Parade will be reduced from that under the original proposal. The building is proposed to have a 2 storey limit from Hungerford Lane. The rear set back off Hungerford Lane will also be increased to accommodate sufficient buffering by landscaping. This will mean the removal of some carparking spaces. The side boundaries of the external terrace decks will allow for the balustrading to be set back from the boundary to assist in maintaining privacy for the adjacent properties. It is proposed that the new building application will be submitted on the basis of a development for tourist accommodation or a mixture of tourist accommodation and multi-level housing. It is anticipated that sufficient carparking will be provided for the residential but payment in lieu of carparking is proposed in relation to the shortfall of carparks for the commercial.

On 28 March 2003 a fresh SEE accompanying the amended application was lodged. The amended application sought approval for a mixed commercial/retail and tourist accommodation development".

The proposal envisaged commercial or retail development on the ground floor, with tourist accommodation and car parking provided on the upper three floors.

Despite Mr Brinsmead's acknowledgement that council considered the application was an overdevelopment of the site, there was no substantial reduction in the gross floor areas of the commercial/retail or accommodation components, as is seen from the following table:

	Initial Application	Amended Application
Ground Floor Commercial / Retail	476.85 m^2	503.86 m^2
1st Floor Accommodation	353.50 m^2	387.80 m^2
2nd Floor Accommodation	537.50 m^2	353.20 m^2
3rd Floor Accommodation	158.00 m^2	240.90 m^2
Total Accommodation	1049.00 m^2	981.90 m^2
Combined Floor Area	1525.85 m^2	1485.76 m^2 (-40.09 m^2)

In the period following, residents, including Mr Paterson, voiced their concerns. Singleton Smith Pty Ltd, representing nearby property owners wrote:

Compliance with relevant Codes & Policies

…it is clearly evident that the proposed units are capable of separate habitation and are no different from a residential dwelling. Accordingly, the proposed tourist

accommodation units should therefore be subject to the same level of assessment that is given to standard multi dwelling housing developments.

The site was zoned 3(b) General Business under the Tweed LEP. Within this zone tourist accommodation, i.e. "a building principally used for the accommodation of tourists", was permissible with consent.

Ultimately, the council gave its consent to the application on 16 June 2003.

The report to council anticipated that appropriate conditions would be imposed to ensure the integrity of the consent. The conditions comprised:

> 97. …the approved units are not to be utilised for permanent residential accommodation.
>
> *PRIOR TO ISSUE OF SUBDIVISION CERTIFICATE*
>
> 98. …The restriction as to user to be established to the effect that no unit shall be rented to the same occupiers for in excess of three (3) months in a single tenancy term.
> 99. The creation of easements for services, rights of carriageway and restrictions as to user may be applicable under Section 88B of the Conveyancing Act including the following:
>
> i. The approved tourist accommodation units are not to be used for permanent residential accommodation. They are to be used for tourist accommodation only. …

The consent, when subsequently granted, did not impose these conditions, which may have provided a measure of clarity.

Such failures serve, individually and collectively, to undermine council's planning regime.

This failure is particularly concerning as the report had highlighted that the original application for commercial/residential development was unacceptable.

While a residential development of almost the same scale and intensity was unacceptable, a tourist development was eminently approvable.

Tourists do not have the same occupational needs as a resident. To compare tourist and residential premises as though their needs weer comparable would be incorrect.

Fundamental to the integrity of the planning regime adopted by a council is the ability to define, with clarity, the use. In other words what differentiates "tourist" use from "residential" use of premises.

There are significant incentives provided by the council in its endeavours to encourage tourism in its local area. As is explored in greater detail elsewhere in this report, the

majority councillors, the general manager and senior staff have promoted tourism as a panacea to the economic, social and employment ills of the council.

The incentives include not applying council's multi-dwelling housing DCP to tourist developments, reduction in the provision of car parking and significant reductions in the contributions levied under section94 of the EP&A Act.

As is referred to earlier in this part, the concessions turned the Nor Nor East application from an overdevelopment to an approvable use.

Collaterally, the contributions otherwise payable were substantially reduced, as is seen in the following memorandum:

FILE COP

INTER-DIVISIONAL MEMO

TO : David Broyd

FROM : Denise OBrien

SUBJECT : Development Application DA02/1136 - mixed commercial/tourist accommodation development including 8 units at Lot 2 Sec 4 DP 9453 & Lot 3 Sec 4 DP 9453, No. 34 Marine Parade Kingscliff

FILE : DA02/1136

DATE : 26 June 2003

11045 - DAMemo.dot

David,

In response to your request for a comparison of the applicable S94 Contributions for tourist accommodation compared to multi dwelling housing for the proposed development please see the table below. However, please also note that S94 Contributions are not the only applicable variations for assessment between tourist accommodation and multi-dwelling housing. Multi-dwelling housing requires additional parking, side boundary setbacks, greater landscaping and general compliance with DCP No. 6

S94 & S64 CONTRIBUTIONS	TOURIST ACCOMMODATION	MULTI-DWELLING HOUSING
S64 Contribution – Water	$5,168	$18,608
S64 Contribution – Sewer	$4,231	$15,235
S94 Contribution – No.4 Tweed Road Plan	$11,158	$11,158
S94 Contribution – No.5 Local Open Space Structured	Not Applicable	$3,037
S94 Contribution – No. 5 Local Open Space Casual	$1,321	$654
S94 Contribution – No. 11 Library Facility	Not Applicable	$2,912
S94 Contribution – No. 13 Eviron Cemetery	Not Applicable	$570
S94 Contribution – No. 15 Community Facilities	$2,952	$2,952
S94 Contribution – No. 16 Emergency Facilities	$905	$905
S94 Contribution – No. 18 Council Administration	$1,311.83	$1,500.44
S94 Contribution – No. 22 Cycleway	$1278	$630
S94 Contribution – No. 26 Regional Open Space Structured	Not Applicable	$4,975
S94 Contribution – No. 26 Regional Open Space Casual	$1,752	$931
TOTAL	**$30,076.83**	**$64,067.44**
DIFFERENCE	**$33,990.61**	

Denise OBrien
Development Assessment Unit

1 []

The Act requires that councillors play a key role in the creation and review of the council's policies and objectives.

Given that the council, albeit perhaps wrongly, perceived the need to encourage tourism in its local area, some financial concessions may be warranted.

Similarly, as was explored in the Public Hearings, a tourist development is likely to demand different recreational and other facilities.

Both Councillor Brinsmead and his son Paul were anxious to promote the benefits of tourism to the local economy. Councillor Brinsmead put his view of the post 1999 successes in the following terms:

CR BRINSMEAD: *... if you related to tourism - and I've been a tourist entrepreneur in - related to - my farming activities - what the Tweed lacked in the tourist industry - it's been up till now the tourism industry has been very small and ineffectual in many respects because it was a tourism industry that had to rely to the greatest extent on day-trippers from the Gold Coast.*

Now, it's well known to those who do the number crunching in tourism that day-tripping - the day-tripping industry - cannot support a solid tourism industry. What was needed on the Tweed was the creation of a tourism/accommodation infrastructure. Now, we'd talked about that for years and really believe - because I've been involved in the tourism business going back a number of years - what is happening with South Kingscliff now on the former sand mining site probably should have happened 20 years ago, but what was needed was the creation of this first time - to create the Tweed as a destination, a solid tourism/accommodation infrastructure. If I may just make one statement. It said, someone has sort of coined it by saying where the tourists roost gets the economic boost.

PROF DALY: *So you'd link a lot of what has been described as strong growth and prosperity primarily to this growth of tourist infrastructure. Am I reading you right?*

CR BRINSMEAD: *Yes. It's not just in tourism. Other things are happening too, but tourism is sort of at the, you know, the coal face where it is. I don't discount what Councillor Boyd said, the considerable influence of the economic climate of the nation, the influence of the Federal Government, you can't rule that out but at the end of the day development takes place - development has to take place at a local government level. You have to get the runs on the board and you have to create jobs - any jobs that are created will have to be created at local government level.*

Might I just add that I think we're only beginning to see the benefits now. The real benefits are starting to come on stream and we will see more of the work that's been done in the last few years.

T. 18/2/05 p. 244

Councillor Brinsmead provided a submission responding to what, he perceived, as an approach taken by the Inquiry to demean the tourism industry.

Mr Paul Brinsmead, who has a direct interest in promoting a perceived need for tourist developments in the Tweed also provided a submission in reply, indicating:

It is my very strong view that Tweed Shire Council is presently dealing with tourist accommodation in a manner which is appropriate and in a similar manner to which tourist accommodation is being dealt with by the NSW State Government. In fact, it might be argued, I believe, that Tweed Shire Council are perhaps a little tougher in this area than the NSW State Government.

His lengthy submission emphasised the opportunities for developers to sell the units to investors and to sell the management rights and that managed apartment complexes were more easily developed by developers.

While Mr Brinsmead suggested that residential developments were less expensive to develop and often easier to sell, they were not generally able to be used for short term accommodation, nor could the management rights be sold.

When exploring the additional costs associated with tourist accommodation, Mr Brinsmead suggested the need to incorporate porte cochere, reception, lobby, office and back of house areas. Implicit to this is the suggestion that such facilities would cut down space that could otherwise be implemented. The table comparing the commercial/retail and residential/tourist components of the Nor Nor East development do not support this.

Mr Brinsmead points out the following matters in respect of the Tweed LEP:

- the definition of "tourist accommodation" refers to a "principal" use of the premises, not the exclusive use of the premises
- there are significant incentives to a proponent developing tourist facilities including:
    - that multi-dwelling set backs do not apply
    - that multi-dwelling density requirements do not apply
    - some of the council's DCP's do not apply
    - some SEPP's do not apply
    - some provisions of the Building Code of Australia do not apply
    - there are significantly lower section94 contributions payable

Mr Brinsmead concludes his assessment of the Tweed LEP and the incentives provided to developers:

I believe it is absolutely essential that the planning regime in the Tweed Shire continues to provide significant incentives to encourage developers to develop tourist accommodation, rather than choosing the easier option of developing multi-dwelling housing.

Mr Brinsmead argues that the practical realities associated with tourism developments mitigate against the imposition of conditions, covenants and the like, suggesting that discussion and debate on whether controls should be imposed is misplaced, arguing:

Generally under the Tweed LEP 2000, the consent authority has the power to make sure that the building must be principally used for short term accommodation. Accordingly, there are some town planning controls.

The Tweed Shire Council has often pointed out, through its Officers, that this control is not much good because it requires the Council to check occupation levels and then make a decision as to whether it will enforce it.

What has failed perhaps to be understood in this respect, is that whatever other controls might be put in place, there will still be a requirement on the consent authority to carry out checks and to enforce it. Even covenants on the title restricting the occupation of the apartment to short term accommodation will still require the same monitoring requirements.

I strongly submit that the manner in which the Tweed LEP is presently structured, does currently provide a correct balance to allow some permanent occupation in a building and thereby allow the retention of some owner benefits. This allows the retention of value in apartment complexes and allows the continued development of tourist infrastructure.

To move to a position of placing more control, such as covenants on the title restricting permanent occupation, absolutely will probably lead to a situation where no more tourist infrastructure accommodation projects are developed on the Tweed.

Of course, underlying all this debate are suggestions that the provision of tourist accommodation will generate employment opportunities, and that the Tweed area does not have a sufficient supply.

These aspects are explored in greater detail elsewhere in this report. However, it is interesting to note that there is no difference between the additional full time positions indicated in the original SEE accompanying the Nor Nor East application, when the residential development was proposed, and that accompanying the latter tourist development.

It appears that Mr Brinsmead's underlying suggestions are not met within at least one development that he is associated with.

While financial incentives may be warranted, and may, legitimately fall within the policy role of councillors, there are significant questions whether the existing density, building planning and other concessions should remain.

Mr Cooper, who had served as a councillor from 1991 to 1999, raised concerns over windfall gains delivered to developers in the form of concessions, pointing out:

… Council has a policy that positively discriminates for tourist development compared to residential development.

For instance car parking is less for tourist development.

Visitor parking is also not required for tourist development.

Allowable site coverage is greater for tourist development.

Section 94 contributions are less for tourist development.

Water and sewer contributions are less for tourist development.

The extra yield generated by the site coverage and parking concessions produces the greatest financial windfall.

If the tourist development is used as normal residential, the following issues will have to be addressed by ratepayers and/or future developers.

The parking shortfall will create shortages in public areas from the overflow. This can only be remedied by increasing the general rate income or increasing contributions from future developers to purchase additional land for parking. Either of these actions will be deferred because of their political unattractiveness resulting in an extended period community conflict.

The shortfall in water, sewerage and S94 contributions will generate a similar financial and political problem.

Mr Cooper enlarged on his concerns, but where appropriate, conceded the legitimacy of some of the concessions, in the following evidence during the Public Hearings:

MR BROAD: *Mr Cooper, you indicate in your submission that council has a policy that positively discriminates with the tourist development compared to residential development and you indicate that the car parking is less for tourist development, visitor car parking is also not required for tourist development. Where do you draw that from? Where do you draw those statements from?*

MR COOPER: *It's council policy as far as I know and I think - I'm not sure that the second part of what you said - I think there's a nexus between car parking and visiting car parking. So if there's less car parking for tourism there will be less visitor car parking provided also.*

MR BROAD: *What I was really trying to get to is this: that I've started going through the access and parking code and there certainly appear to be differentials between tourist developments. For instance, tourist accommodation requires one bicycle parking space per unit, it requires staff parking at .5 of a space per unit and customer car parking at one per unit whereas, say, flats and residential flat building requires public transport, bus stop seating, it requires bicycle parking at two per unit, it requires delivery service vehicle parking of one per 50 units, it requires resident and visitor parking of one per each bedroom plus two for each larger unit.*

Then it says that 25 per cent be accessible for visitors. Are these the sort of things that you say are embodied in DCPs?

MR COOPER: *Yes.*

MR BROAD: *And, again, in respect of contributions for open space what I've been able to ascertain is that the local open space Section 94 plan says that tourist developments are required to contribute to local casual open space only, that tourist developments are not required to contribute to structured open space. These are the sort of concessions.*

MR COOPER: *Yes.*

MR BROAD: *Now, you go on further to say that tourist development application concessions were estimated to allow an extra three units for the Nor Nor East development. Where do you draw that from?*

MR COOPER: *It's really an estimation on our part about just the number of - the amount of space - extra space - they've got to work with.*

MR BROAD: *Who is "our" that you speak of?*

MR COOPER: *Friends talking. Some talking to some staff in council, possibly. That's the sort of conclusion you draw if they don't have to provide as much car parking then that provides more space for - more floor space for units.*

MR BROAD: *You are critical of tourist development and the concessions. You talk of it as being a rort. Is it your view that the developers are using tourist development as a backdoor way of obtaining residential approvals?*

MR COOPER: *It's a backdoor way of getting the best yield. I'm not concerned about the fact that the council did have a distinction because it was quite legitimately based. The problem is that if a developer puts in an application for a tourist development but there are no controls over it remaining a tourism development that's the issue I'm getting at. And, in particular, it's quite a weak control if all someone buying a unit has to work with is a phone call to council to find out if it's a tourism-approved development - a tourist-approved development.*

That's a real problem because it won't show up in searches and they need even to ask the council, they need to know that there is a distinction. So that's the area that is weak. And we saw the previous town planner attempt to plug that in two ways particular to a development, adding an 88B instrument that would have shown up in a search and then subsequently to - I don't know whether it actually recommended but it certainly came out somewhere that he didn't want to continue with the distinction and I would be guessing if I said because he saw the problem of rorting.

MR BROAD: *Is there legitimacy if one is, say, this is a tourist development to also say, "Look, we've got a two unit development, it's likely to be used by a family, they're likely to arrive in one car," therefore, there is a legitimate basis of saying, "No, we don't need extra parking and we may not need the same amount of visitor parking." Is that sort of view legitimate?*

MR COOPER: *You're saying that's a tourist development, someone who is - - -*

MR BROAD: *Yes, in a tourist development as against a residential development, yes.*

MR COOPER: *Yes. I mean, I would expect there would be some tourists who wouldn't have cars at all, come by plane, this is an area that can be reached by plane. Most people wouldn't take two cars away on a holiday, I would think, so it made sense. And also the rest of the allowances for tourist development, less impact on libraries, less impact on structured open space. So there is quite a sound reason for having the distinction. What's needed is to close the loophole and that's been my gripe, is that that loophole where people can call something a tourist development.*

MR BROAD: *So what you're saying is certain concessions - and I was about to come to site coverage - and I could see an argument that simply says, "Well, look, people are only occupying this a short time, they're not wanting to go out the back lawn and, you know, weed the back garden or whatever it might be. They're using this, basically, to go to in an evening or at lunch to then go out and have their recreation elsewhere." And that seems to provide a legitimacy of saying, well, you don't need the same amount of open space.*

MR COOPER: *I'm not denying that. I'm saying that those distinctions in principle are legitimate.*

MR BROAD: *Yes. What you're saying is if you're allowing tourist accommodation you should ensure that that's what its continuing use is.*

MR COOPER: *That's right. There should be a means of enforcing it. Now, I've been on council and it is extremely difficult to launch into a legal, you know, a legal action against someone who's living in a house they've bought or in a unit that they suspected or they bought with the intention of living in it and then find out later that it's not allowed. Politically that is a distasteful exercise and I think in my submission I said that I don't even think legally - I'm not a legal person - but it would be quite legitimate for a judge to say, "You had the means to tell these people what they were getting into. You want me to support you in throwing them out." I don't think any judge would do that.*

MR BROAD: *Is this a recent event or is this something that's only just come up in the last couple of years?*

MR COOPER: *It's only come up in the last couple of years. Now, I must say that I can't be sure that in my time that this didn't go on but it certainly - I've come to recognise it in the last couple of years.*

T. 4/3/05 p. 998-1001

In April 2003 council's then Director of Development Services, Mr Broyd prepared a report to council acknowledging that there had been a substantial increase in interest shown in developing tourist accommodation and facilities in the council area.

The report raised issues, including the effectiveness of current planning legalities and policies, of community concern over the achievement of real economic benefits and of

employment generation sought from tourist development. The report also raised concerns that there were differing development and design criteria between tourist and multi-unit residential development.

Perhaps most importantly, the report recognised that tourism development in regional areas (such as the Tweed) was only viable through strata titled multiple ownership units and emphasised the need to ensure that the economic and employment benefits are derived from actual tourism development.

To achieve this goal, the report recommended that council explore, through a consultation process, appropriate amendments to the council's planning regime to ensure that tourist accommodation capable of being used as residential accommodation meet the same standards as multi-dwelling housing – (**report to meeting 16/4/03**).

The proposals were not carried by a vote of members of the then majority faction of council, comprising councillors Polglase, Beck, Lawrie, Marshall and Youngblutt.

With its refusal to explore amendments to the planning regime, council overlooked an opportunity to explore ways to build a more resilient planning scheme.

The weaknesses highlighted by Mr Cooper, Mr Brinsmead and others, in their submissions to the Inquiry have not only potentially affected the decisions of the council; they have not been addressed by the Council and so continue to affect its processes.

DIPNR has and continues to deal with "tourist" applications referred to it by virtue of SEPP 71, or where its concurrence has been sought.

Documents supplied by DIPNR and evidence given by its representative, Mr Murray suggest that it too was having difficulty assessing a tourist development as opposed to a residential development. In turn it was also having difficulty imposing conditions that would give effect to a tourist use.

Mr Murray gave the following evidence:

MR BROAD: ... *Now, one of the other issues that seems to rear its head is the problem of tourist development. Now, the material that has been provided suggest that the department had dealt with tourism developments. What is the department's view about the resilience of the definition of tourist development or tourist accommodation under the Tweed Shire Council Local Environment Plan?*
…

MR BROAD: ... *There seems to be some issues about being able to define what tourist - not what tourist accommodation is but what tourist usage is; and it seems to stem around being able to define what short term accommodation is. Now, do you see - does the department see difficulty in respect of defining what short term accommodation is?*

MR MURRAY: *It's a general issue talking generally without looking at Tweed's specific definition; but it's a general issue that we've had a number of discussions within*

the department and other issues within the region that we've had to deal with that issue, and a lot of it comes back to the form of structure. The type of management that they're using seems to be the way that we can get used to or get our heads around what they're doing. Sometimes we get proposals which would - we have had a recent proposal not lodged formally but a concept put before the department that was dealt with in Sydney which dealt with single dwellings across a site that were going to be managed for tourism purposes.

And we couldn't see how that was a definite tourism site and raised that issue back with the developer because of the way they had structured their development. And a lot of the other cases - my understanding is that particularly our urban assessments unit who deal with the majority of the development applications that deal with this are looking at the management structures, and how the development is structured, and the facilities, and how the site integrates, to actually look at how it's used for that tourism purpose.

MR BROAD: *Now, when it came to considering the Resort Corp proposal for development at Cabarita Beach, the urban assessments unit dealt with the objectives of the Tweed Local Environment Plan and its definition that:*

Tourist accommodation as being used as a building principally used for the accommodation, but does not include a building elsewhere specifically defined.

It said:

Any approval under the DA will thus be only for tourist accommodation use, applied for on the DA form.
And it goes on to continue:

With no permanent occupancy accommodation permitted under this consent.

Now, the consent conditions anticipated that there would be a covenant restricting their use to be placed on the title of each tourist accommodation lot, restricting the stay of users within each lot to 40 continuous days. Is that the view that the department takes as appropriate, to ensure this short term use of accommodation?

MR MURRAY: *Not being involved in the assessments team, I can't actually speak on that. But we don't actually have a - I'm not aware of a written policy across the department to specify that. But that would - that's been the approach that the urban assessments branch has taken in respect of this application.*

MR BROAD: *Right. Is there continuity in the urban assessment team's approach, to your knowledge?*

MR MURRAY: *Well, to my knowledge, that's the intention. The purpose of having the applications assessed that were State significant under SEPP71, was to actually bring continuity and uniformity to the approach of assessment across the coastline, because of the issues raised through the aims and objectives of the SEPP. That's the purpose.*

MR BROAD: *Now, in another one of the files that were dealt with, there was a suggestion - and that's in respect of Peppers Resort - that:*

The tourist facility approved will not be occupied by any proprietor or occupier for longer than 42 consecutive days or an aggregate of 150 days in any 12 month period.

Now, you've got a difference in approach there. You don't appear to be supporting it by an 88B instrument, or covenant. And you've got a difference in the number of days, both in the short - 40 days against 42 days, but the overall 150 days. Is the department trying to deal with the problem of tourism use of resorts?

MR MURRAY: *I can't speak on behalf of the urban assessments branch, because I'm actually not involved in that branch.*

T. 16/3/05 p. 1423-1425

Despite Mr Murray's understanding that it was the department's intention that there be continuity in the approach taken by the Urban Assessments Team when dealing with such applications. A review of the documents provided by the department suggests otherwise:

DIPNR Role	Property	Developer	Condition Recommendation	Covenant
Consent	**Pandanus Pde Cabarita**	Resort Corp	Only tourist accommodation Stay restricted to 40 days	yes
Consent	**Peppers Resort**	Ray Group	Development be carried out in accordance with definition in Tweed LEP	
Consent	**Nor Nor East – extension 30 Marine Pde**	Resort Corp	Stay restricted to 42 consecutive days or 150 days per 12 months	
Consent	**Ultima**	Zinkohl	nil	

The difficulties in imposing suitable conditions of consent giving effect to the use are highlighted in emails sent by DIPNR to the council.

Lindsay McGavin

From: David Gibson [David.Gibson@dipnr.nsw.gov.au]

Sent: Tuesday, 10 February 2004 12:58 PM

To: LmcGavin@tweed.nsw.gov.au

Subject: RE: The Beach DA – Cabarita

They are sticking to their LEP argument that a tourist development can contain both permanent and tourist accommodation, so we will likely condition that the building contain approx. 60-70% tourist accommodation – how we police that requirement is anyone's guess??! AT this stage the applicants are refusing to actually nominate which units will be permanent & which will be tourist – presumably because they have pretty much sold them all already off the plans!

On a separate issue, we are not actually happy with the "Gold Coast" look of the building and are requiring significant design changes in terms of external materials, design of balustrades, design of fin walls/sun screening etc, and the design on the two main corner treatments. We hope to reach a compromise soon that both parties are prepared to live

with.

Cheers
Dave.

Lindsay McGavin

From: David Gibson [David.Gibson@dipnr.nsw.gov.au]

Sent: Wednesday, 18 February 2004 9:32 AM

To: LmcGavin@tweed.nsw.gov.au

Subject: The Beach development

Morning Linsday,

I spoke to the developers of The Beach at Cabarita this morning and told them that if we end up approving their DA, we will approve it entirely as tourist development, with no permanent residential. This is consistent with their DA form, which proposed **57 tourist accommodation units** (& no permanent residential). I trust this gives you some surety when formulating your draft conditions.

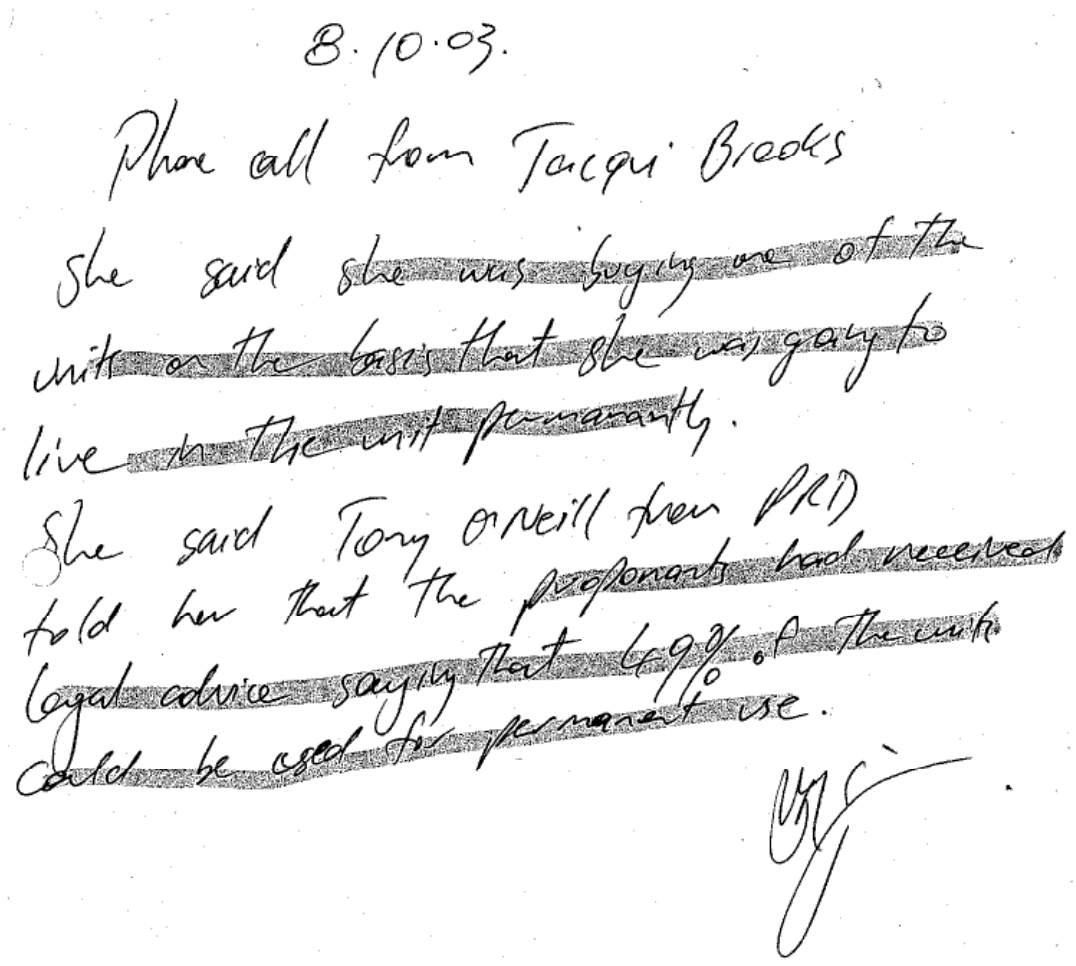
Cheers Dave.

The primary failure of the council to adequately define the nature of "tourist accommodation" uses, coupled with:

- the incentives provided to developers to explore it as an ostensible use
- the unwillingness to provide meaningful and uniform conditions of consent,

severely undermines any capacity that may exist in the council to enforce its (and as applicable, DIPNR's) consents.

There is evidence suggesting that the underlying intent of the use is being abused, as evidenced by the following file note:


8.10.03.

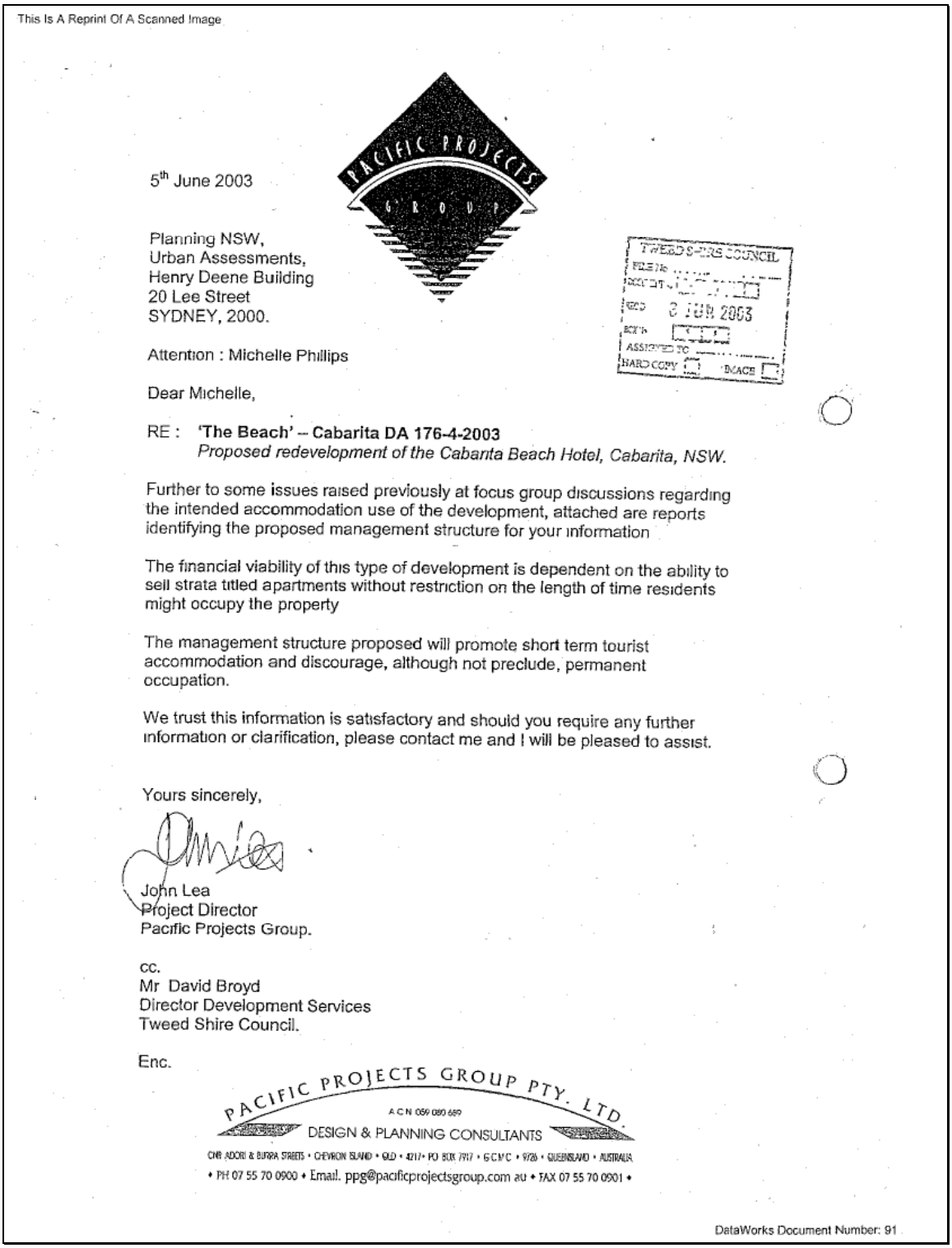
Phone call from Jacqui Brooks

She said she was buying one of the units on the basis that she was going to live in the unit permanently.

She said Tony O'Neill from PRD told her that the proponents had received legal advice saying that 49% of the units could be used for permanent use.

8/10/03
Phone call from Jacqui Brooks
She said she was buying one of the units on the basis that she was going to live in the unit permanently.
She said Tony O'Neill from PRD told her that the proponents had needed legal advice saying that 49% of the units could be used for permanent use.

Developers such as Resort Corporation have been actively seeking a more liberal interpretation of the use, evidenced by submissions, such as those previously referred to, and through letters, such as the following:



This Is A Reprint Of A Scanned Image

PACIFIC PROJECTS GROUP

5th June 2003

Planning NSW,
Urban Assessments,
Henry Deene Building
20 Lee Street
SYDNEY, 2000.

TWEED SHIRE COUNCIL
FILE No
DOC No
REC 3 JUN 2003
BOX No
ASSIGNED TO
HARD COPY IMAGE

Attention : Michelle Phillips

Dear Michelle,

RE : **'The Beach' – Cabarita DA 176-4-2003**
Proposed redevelopment of the Cabarita Beach Hotel, Cabarita, NSW.

Further to some issues raised previously at focus group discussions regarding the intended accommodation use of the development, attached are reports identifying the proposed management structure for your information

The financial viability of this type of development is dependent on the ability to sell strata titled apartments without restriction on the length of time residents might occupy the property

The management structure proposed will promote short term tourist accommodation and discourage, although not preclude, permanent occupation.

We trust this information is satisfactory and should you require any further information or clarification, please contact me and I will be pleased to assist.

Yours sincerely,

John Lea
Project Director
Pacific Projects Group.

cc.
Mr David Broyd
Director Development Services
Tweed Shire Council.

Enc.

PACIFIC PROJECTS GROUP PTY. LTD.
A C N 059 080 689
DESIGN & PLANNING CONSULTANTS
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• PH 07 55 70 0900 • Email. ppg@pacificprojectsgroup.com.au • FAX 07 55 70 0901 •

DataWorks Document Number: 91

Council staff readily acknowledged the difficulties faced by the council, whether in defining the use or enforcing compliance with its consents, with:

- the manager of Council's Development Assessment Unit, Mr Smith,
- Council's General Manager, Dr Griffin, and

- Council's Director of Planning, Mr Hodges, giving the following evidence:

MR BROAD: *Can I put a hypothetical proposition to you? You spoke earlier of the pre-lodgment meetings. Can I put a hypothetical on this basis to you: that if at a meeting you have a proponent who says, well, look, we've got an option to purchase this particular piece of property - I won't try and nominate any place - it's zoned 2E - and that's residential/tourist - we're wanting to build a three-storey complex, we want to have a mixture of residential and tourist accommodation. What's the nature of advice you'd give them so that they can go away and present an application to you?*

MR SMITH: *Well, firstly, that would be something that would be permissible within that zone. And if there was going to be a mix of both types of uses, then the application should be clear on what units or what part of the building's going to be used for tourist accommodation and what part's going to be used for permanent residential accommodation, because in the assessment of the application that has an implication in relation to contributions and car parking, particularly.*

MR BROAD: *What do you then say to them in respect of defining the use? How do you define the use on a plan?*

MR SMITH: *By - there's a nomination of the particular units that are going to be the permanent occupation units and those that will be available for tourist accommodation.*

MR BROAD: *What indication do you give to a person who says, well, what do you mean by "tourist"?*

MR SMITH: *Short-term holiday accommodation, not the permanent residential address or the person who owns the unit, as a guide.*

MR BROAD: *Is short-term residential accommodation 18 months out of two years, is it three months out of two years?*

MR SMITH: *Not necessarily, no. That's been debated and it's been debated at a State Government level as well in DIPNR, as far as trying to put conditions on applications in our shire with not a lot of success either. There's no - we have not got any specific time-frame for what is tourist accommodation, short-term tourist accommodation. It's been discussed and at this stage we have not put a specific time period, whether it be a number of days or months or whatever out of a year.*

MR BROAD: *You, as a head of the council's planning branch, do you have a view whether that is a good position to be in, to not be able to tell a developer, well, this is what tourist accommodation is?*

MR SMITH: *I think the broad description that we've given should be sufficient for the developer to understand that if they're genuine in their proposal that it is a mixed development and the unit will only be available for tourist accommodation, then I think that would be sufficient.*

MR BROAD: *And we've heard that council really doesn't have the resources to make any genuine attempt to enforce any breaches of those sort of uses. How does that affect you, as a planner?*

MR SMITH: *We do have resources to follow up on compliance issues but in relation to those sorts of issues we would not have the resources to regularly visit all the approvals that may have been for tourist accommodation. We would rely on complaints or it being, you know, drawn to our attention that there's a problem with a particular building and then we would investigate it. But we certainly wouldn't have the resources to do a spot check on a regular basis.*

T. 24/2/05 p. 525-526

MR BROAD*: In some of the material that I've read there have been concerns expressed about the ability to enforce conditions of consent, say, for tourist accommodation to ensure that it's not used for permanent accommodation.*

DR GRIFFIN: *Yes, I'd expect that to be a real problem. We've discussed that problem and I don't know that we've come up with an adequate solution at this stage save going around doing regulatory inspections and requiring examination of business books.*

MR BROAD: *Is that a matter that's been confined in this discussion to the council staff?*

DR GRIFFIN: *No, it has been brought forward to councillors. Mr Boyd when he was Director of Development Services had highlighted those particular issues to the councillors.*

MR BROAD: *What about at the State Government level?*

DR GRIFFIN: *I believe our planning staff have had discussions at the State Government departmental level with those particular issues, and as - well, my knowledge at the moment is there's no resolution to a particular approach to take in that regard at the moment.*

T. 16/2/05 p. 107-108

MS ANNIS-BROWN: *I'd just like to clarify that a little Dr Griffin. You mentioned that it's difficult to police, if you like, where tourist development is being used for residential purposes and I'd just like to ask you what role does council take in enforcing conditions of consent, for example, something like that. Certain submissions have raised the fact that the community is concerned that council isn't taking sufficient action to ensure that conditions of consent are being complied with. Can you talk about that a little bit?*

DR GRIFFIN: *Yes, we have staff within our planning directorate allocated to do checks of those particular compliances. I don't know that we're doing much in regard of this, you know, vexing question of the tourism, come full-time residential or major residential activities but certainly with other activities. It's a program that probably doesn't have the highest priority when we have limitations on our staff resources and there is pressure on*

the other end of development approvals, but the management of those areas do their best to get out. If there are particular issues, they're brought to our attention and they're attended to specifically.

T. 16/2/05 p. 109

MR BROAD: *The inquiry has been referred to a whole lot of development applications involving development badged under a tourist zoning.*

MR HODGES: *I have problems with the distinguishment. I think the Council in their wisdom or the planners in their wisdom tried to provide incentives for tourist development and there were concessions given to parking and even in the development standards for tourist development and I think - well, I'm new, but, I mean, with the benefit of hindsight as well I think that's a mistake. I think that, you know, you should be - you should have one sort of, you know, one standard sort of development rules and in certain instances there's probably room for concessions in car parking where you're certain that the resort or whatever is not going to generate car parking demands over normal residential development.*

MR BROAD: *Given the opportunity given your concerns in respect of the definition of problems with tourist development, what would you see as the way to define and control tourist development? In other words, to secure a tourist outcome as against a residential outcome.*

MR HODGES: *I don't think all of those provisions that you put in to say that rooms can't be used for permanent residential are able to be enforced. Similarly, I don't think you can enforce residential housing – ordinary residential houses - from being rented out. And is that a form of tourism? It's an area where I think that you've just got to - I think to a certain extent market forces will determine where tourist go and I think that the standards that we apply to development should be standard and we should have a high quality development. I think the need to encourage tourist development on the Tweed is no longer applicable.*

T. 18/2/05 p. 320-321

The council has sought to obscure its role as the primary planning body for its local area, as evidenced by the approach taken by council's solicitor Mr Tony Smith in his questions to Mr Smith:

MR A. SMITH: *Looking at the regulatory problem, apart from the tourist and residential accommodation problems, council is faced with a whole myriad of problems as a regulatory authority, isn't it? Illegal dwellings, illegal bathrooms. In fact we had a moratorium in the past in this Shire, trying to regulate numerous illegal dwellings. Isn't that right?*

MR SMITH: *That's correct, yes.*

MR A. SMITH: *So the problem being thrown up by the tourist residential question at the moment is just another problem of regulation?*

MR SMITH: *That's correct, yes.*

MR A. SMITH: *And it entirely depends on whether the - really, the State government and the council, and other authorities, get together and find a proper resolution to the problem of notifying purchasers when they purchase properties that this is going to be the restriction requirement.*

MR SMITH: *I think that would be very desirable, yes.*

MR A. SMITH: *And the restrictive covenant would seem to be the most sensible way. You'd agree with that?*

MR SMITH: *Yes, I agree with that, yes.*

MR A. SMITH: *There's also be a lot of discussion about definitions and DCPs, about ground levels, earth works. Once again, we run into the same problem of numerous court cases that have taken place in this state involving model provisions and other matters such as that. In other words, it's going to be a vexed question always, of trying to determine what in fact is an earth work, what is quarrying works, what is the ground level.*

MR SMITH: *It has been a long standing debate, particularly between lawyers. And our latest definition has tried to at least clarify that to the extent where both the developer and the community have got some certainty.*

MR A. SMITH: *And I think we've had at least one Land Environment Court case involving earth works, and Mr Talbot J was struggling without definitions on that.*

MR SMITH: *Yes.*

T. 24/2/05 p. 531-533

The obligation to provide a resilient planning regime in the Tweed Shire Council area does not fall on the shoulders of DIPNR nor the Land and Environment Court, nor for that matter any other department or court, but on the council as the primary planning authority.

Regrettably, this is but the first indication that the council has not adopted a resilient planning system.

3.5.2 Amendments

In July 2002, Resort Corporation lodged its application, a commercial/retail multi-dwelling development at 32-34 Marine Parade Kingscliff.

In the face of substantial opposition and concerns raised by staff, Resort Corporation sought to amend its application to provide for tourist accommodation, in lieu of the residential component of the development.

Faced with a challenge from Mr Paterson, Denise O'Brien wrote the following email to Mr Broyd:

Denise OBrien

From: Denise OBrien
Sent: Thursday, 26 June 2003 3:47 PM
To: David Broyd
Subject: RE: 32-34 Marine Pd

David,

Further to that info I supplied earlier, I have discovered that Rick Patterson will proceed with a Class 4 Action.

I asked him if he minded telling you his intentions and he said no.

The basis for the objection would be that when the amended plans were lodged and changed from residential accommodation to tourist accommodation and it changed the number of car spaces planned and the height of the building that it significantly changed the development and therefore was required to be a new DA rather than amended plans. If it was a new DA SEPP 71 would have applied and the Minister may have called it up. Furthermore, he felt that the first public meeting was not a public meeting and that it should not have been by invitation or limited to one person per family. He claims that many people were put out at that meeting as it was not a meeting of negotiation but rather

the developer walked in and told everyone how it was going to be.

Would it be appropriate to seek legal advice on substantially the same development prior to the meeting on Wednesday?

Also I just realised that the recommendation does not specifically determine to approve the SEPP 1.

And in light of the revised measurements from Col showing natural ground level and existing ground level I think some form of amendment is required to the report prior to the meeting on Wednesday.

Denise

Mr Paterson, a qualified town planner and incidentally employed by the council, was suggesting that the proposed use of the premises replacing the multi-unit residential component with tourist accommodation made the application so significantly different that council could not legitimately treat this as an amendment.

If he was to institute the court proceedings that he was contemplating the consent may have been declared void.

The Ray Group had lodged its SALT applications in 2002 and was seeking to amend the approval under section 96 of the EP&A Act.

On 1 July 2004, council's solicitors advised that, in their view, it was not appropriate to consider the application under section96 of the EP&A Act.

The report to council contained the following analysis:

…The alternative to a Section 96 application is the lodgement of a new development application. Developers in the Tweed and in other Council's subject to the SEPP71 planning legislation are generally reluctant to submit a new development application because of the extensive delays being experienced where the State Government is assessing development applications.

Some development applications being processed by the State Government under the SEPP 71 legislation are taking up to 2 years to obtain approval.

The minutes of council's meeting of 18 August 2004 records:

Council has received an Section 96 amended application for the Salt subdivision development. The main component of the amended application involves modifying the masterplan and subdivision plans by deletion of medium density sites and replacing them with standard residential lots. The proposed amendments result in an additional 121 residential lots and 124 less medium density dwellings. The other amendments relate to dual occupancy site nomination, setbacks, bushfire and the ongoing demonstration of the ration of resort rooms to residential lots.

Council's legal advice and the applicants report and legal advice in support of the application are provided in the attachments. Council's legal advice is that the Section 96 planning mechanism is not appropriate to amend the Masterplan.

The alternate course of action for the applicant is to lodge a fresh masterplan and development application for the proposal with the Department of Infrastructure Planning and Natural Resources (DIPNR). DIPNR would be the consent authority under the provisions of State Environmental Planning Policy No. 71 Coastal Protection.

In the view of the significance of the Salt development to the Tweed the facts of the proposed amendment are submitted for Council's consideration.

These are just two instances where, although questionable, the council has seen fit to allow "amendments" to proceed.

The council has discussed these concerns in its submission in reply (**submission in reply 96**) responding:

Appearance of Cr Warren Polglase & Dr John Griffin - 17 March 2005
Page 1593, 1604 & 1605 of transcripts

Page 1593 of transcript

Question asked by MR BROAD:

That there has been inappropriate use of Council's modification power under section 96 of the Environmental Planning and Assessment Act.

Page 1604/1605 of transcript

Question asked by MR BROAD:

> *There seems to be a suggestion that - at least one document that I've read - that Council should proceed to determine, say, a Section 96 application to modify a consent upon the basis that the alternative would be for a developer to lodge a new development application. Now, that would appear to me to be fundamentally flawed.*

Page 1605 of transcript

Question asked by MR BROAD:

> *And ancillary to that there has been inappropriate use of Council's modification power under Section 96 and instances in respect of that relate to the commercial use of Section 96 in respect of the Salt development, evidence given by Mr McRae as to its commercial use. There are some other concerns which relate to significant changes in the Salt development in respect of, say, the borrow pit. Have you got any views as to whether the issue that I've raised is a concern?*

Council submits the following information which is in response to the issues raised.

There has been an emphasis during the Inquiry on the legitimacy and appropriateness of Section 96 applications to modify development approvals. The assertion being that the amendments to the original development approvals are such that the cumulative impacts of the various changes are not accounted for.

This is not the case as all Section 96 applications in the Tweed Shire Council are assessed in relation to the original development approval. The pressure on Council to accept Section 96 applications instead of requiring a new development application is acknowledged and this is not unique to the Tweed Shire Council. This pressure has come about from the long delays where DIPNR becomes the determination authority for new development applications under SEPP71 legislation.

In the Tweed Shire Council this pressure has not been allowed to compromise the integrity of the planning process. All the Section 96 applications which have been submitted to Council have been assessed on merit having regard to current practice and the outcome of Planning and Environment Court decisions.

Page 13

The issues relating to Section 96 applications are complex and Council undertook a local seminar in July 2004 for Councillors, developers and development professionals on what was appropriate and lawful in relation to Section 96 applications. There are many instances where Council staff have advised planning consultants that Section 96 applications will not be accepted and a new development application is required. This is also the case for the SALT development where the major concerns have been raised during the Inquiry about the appropriateness of Section 96 applications. In all of the Section 96 applications relating to the SALT development, Council staff have sought legal advice before proceeding to assess any Section 96 application. The planning processes have not been compromised and the integrity of Council's planning functions has been maintained at all times.

There appears to be a misconception about Council's actions in relation to these applications. Council planning staff are willing to have every decision in relation to Section 96 applications fully scrutinised and audited. There has not been any inappropriate or unlawful use of Section 96 applications in relation to any development approval in the Tweed and particularly in relation to the SALT development.

There have been some specific allegations made by Mr Broad in relation to the SALT development and these are responded to in the following submissions: -

Mr Wylie was to put forward this view regarding amendments:

Development Amendments…

- It appears TSC & some developers have turned this into a process that is clearly intended to deceive residents. It works like this.
  - The Developer takes to Council its most resident friendly plan which goes thru the usual period of public exhibition, scrutiny & debate leading to its approval.
  - Then the thus far concealed "real plan" surfaces by the drip feed method with timing of each new amendment based on community response to the previous amendment.
  - To diffuse resident reaction, these amendments are communicated in confusing "Council-speak " & very small type so that the average punter has no idea what they are talking about eg "Lot 1, DP 549328; South Kingscliff Developments etc"
  - The final development, after a series of amendments, bears only a vague similarity to the initial proposal.
- Here is a typical example reported in Daily News of 15/1/2005 regarding the development of the former Club Watersports site at South Tweed. The amendment, cleverly timed for public exhibition over the Christmas period ie 22/12 to 10/1, covers the inclusion of, wait for it, a hotel! Just the sort of thing anybody could forget to include in the original application. When questioned, the Mayor said he was aware of "some amendments" but was unaware of the "exhibition period or the new detail."
- Salt was originally approved as 400 hotel rooms & 399 residential sites…but wait, a recent amendment sough to increase both categories by a mere 50%. Another small oversight!
- The Tweed Link (18/1/2005) announces a modification to a major Kingscliff development that includes
  - Additional parking spaces (always welcome…but why?)
  - Internal modifications that reduce the number of bedrooms (suggesting a shift from tourist to permanent occupancy…ah, now it's falling into place))
  - Residential balconies to overhang the title boundary over Marine Parade (stealing public space?)
  - Minor internal modifications
  - This is yet another example of approval by phased stealth with I suspect, the full co-operation of the Balanced team
- It would be interesting to check how many significant changes like this have been slipped thru as "amendments" by this Council

Submission 256

Section 96 of the EP&A Act addresses three aspects, where modification of a consent may occur, without the need for a fresh application to be made:

- those involving minor error, misdescription or miscalculation,
- those involving minimal environmental impact,
- others, where the consent authority is satisfied that the development proposed is substantially the same as that originally granted.

It is this latter instance that public concern, and, in turn, the attention of the Inquiry are directed.

In his advice of 1 July 2004, council's solicitor, Mr Smith explored the effect of the

application then before council affecting the SALT development. His letter is reproduced as it details and considers the modifications sought.

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TWEED SHIRE COUNCIL
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A28

2

1 July 2004

The General Manager
Tweed Shire Council
Tumbulgum Road
MURWILLUMBAH NSW 2484

OUR REF AES NM 040791
YOUR REF DA02/1422

BY FAX: 6672 6250

Attention: Noel Hodges - Garry Smith - Lindsay McGavin

COPIES GIVEN TO
2450 & 2456

Dear Sir

Re: **Salt S.96 – Master Plan**

We refer to your letter of 3rd June 2004 and subsequent conferences and advices in this matter.

We are essentially asked by Council to advise whether a S 96 Application for modification of Development Consent No. 02/1422 which provides for a 473 lot subdivision of land at Casuarina Way, South Kingscliff, is in fact a true modification of the consent and able to be dealt with by the Council pursuant to S.96 of the *Environmental Planning & Assessment Act* or whether a new Development Application is required.

The short answer is in our view this is not an appropriate matter for Council to consider under s.96 of the Act as what is proposed is not substantially the same development as previously approved and is therefore not a modification but a new development requiring a further Development Application.

We set out below matters supporting our view that this is not an appropriate matter for the application of S.96 by the Council:

The Consent

On the 24th April 2003 it seems Development Consent No. 02/1422 was consented to by the Council which involved a 473 lot subdivision which included earthworks and the provision of infrastructure. The consent itself is a staged consent under S.80(4) of the *EP&A Act* but required further development of the lots to be in accordance with Master Plan (ML Design, August 2002). It appears a Construction Certificate was then issued for bulk earthworks and those works were commenced on the 18th June 2003.

It appears on the 2nd and 19th March 2004 the Consent was again modified to include an amended Master Plan, providing a reduction in yield from 1105 titles to 1074 titles, an increase in the total number of lots from 473 to 488, together with the deletion and amendment of various conditions.

The modification of the Master Plan whilst reducing the number of titles, increased the total number of lots by 14 and amended various conditions. The Master Plan was amended by modifying the use of some of the medium density sites , adding medium density sites and deleting integrated housing sites, dual occupancy sites and some tourist sites.

The subdivision plans were amended to reflect the changes to the lot layout.

It also appears that separate D/As were lodged and consents issued for the Outrigger and Pepper resorts and the surf lifesaving facility. Separate D/As have also been lodged for one of the medium density sites (Lot 238 – 16 units) and 2 display homes. All of these applications were lodged in accordance with the Master Plan nomination.

The Section 96 Application

It appears the substance of the S.96 Application that is now before the Council for consideration involves a number of resort and medium density sites now proposed to be developed as conventional lots for detached residential dwellings.

It appears major infrastructure, roadways, parklands and environmental restoration works remain the same as does the building envelope.

There is a useful spreadsheet or summary table of proposed amendments to the Master Plan prepared in respect of the s.96 Application itself by Darryl Anderson Consulting Pty Ltd being the last document in the application itself. The practical effect of amending the Master Plan will be as follows we are told:

- Number of subdivision lots increased by 85
- Tourist resort and residential titles reduced by 95
- Number of resort rooms increases by 50
- Total number of residential 'A' land lots increases by 121
- Total number of medium density reduces by 124
- Duplex lots decreases by 18

[the underlining is ours]

Applicants Barristers Advice

We have been provided with an advice apparently obtained by Hickey Lawyers, from a Mr Peter Tomasetti, barrister dated 6th April 2004.

At Para. 6 Mr Tomasetti advises, inter alia,[and we quote] ... *"There is no doubt that the development once modified will be different but whether the differences are "substantial" and thereby "radically transforming" the approved development is a matter upon which minds may differ "*

Mr Tomasetti regards a potted version of the test set out in the case *Michael Standley & Assoc Pty Ltd v. North Sydney Council* [1998] 43 NSWLR 468 as applicable,which held, he says, in effect that if the development as modified radically transforms the original development approved it is not then substantially the same. Mr Tomasetti emphasises "radically transforms" as the test, but in our view this does not give an overall satisfactory test or basis for the application of s.96. There are more elements to this legal question.

It is apparent Mr Tomasetti is of the view that the amendments to the Master Plan do not radically transform the development itself and therefore it is substantially the same development and therefore can be approved under s.96.

Whilst we do not agree with his comments and conclusions in respect of these matters we do agree with his comments that this is a decision for the Council to make and if it determines that it has jurisdiction to deal with the Application then the decision would be extremely difficult to set aside in a court of law. That however is not a reason for Council to make an incorrect or bad planning decision.

The Applicant's Submissions

We note there is an extremely impressive submission prepared by Darryl Anderson Consulting Pty Ltd on behalf of the Ray Group dated April 2004. It would be fair to say this submission is extremely detailed and in our view the statements contained on page 10 concerning *Moto Projects (No. 2) Pty Ltd v. North Sydney Council* [1999](Bignold J.) are accurate (if incomplete) and further, in our view the case for the applicant is argued with some impressive points, and we simply repeat the 5 dot points at the end of page 10 ...

- *the proposal as modified is still for a mixed/residential tourist development*
- *the basic road layouts have not changed significantly*
- *the basic open space layout and areas have not significantly changed*
- *the proposed change to the mix and distribution of tourist-resort sites and medium density sites is, at a master planning level, of no planning consequence*
- *the variation of the total number of lots and total yield from the site is numerically immaterial and does not give rise to any significant environmental impacts."*

However, we would essentially take issue with the last two dot points in particular, the suggestion that at a master planning level, the master plan is "of no planning consequence".

It is with the greatest of respect that we disagree with the significance, or rather lack of significance accorded to the Master Plan in respect of the Development Approval itself by the applicants consultant, Mr Anderson.

The Notice of Determination of Approval quite clearly indicates that the Determination itself is based on the development occurring in accordance with the plans and details submitted. It is not possible upon the one hand to take the benefit of a Development Consent and, in particular, a Master Plan prepared by the applicant and submitted to the Council as part of the approval process, and then later say it has no real planning consequences.

That could only be true if the Council took no cognisance of the requirements of the Master Plan in the overall development concept of the land including its consideration of such things as open space, roads, spatial layouts, s.94 contributions etc.

We, in particular, do not believe that Council's own officers who assessed the original application or Council in particular in approving the Development Consent could say that none of these matters were taken into account when assessing the Development Application itself, (as proposed by the Master Plan). The Master Plan may still require that there be further development consents in relation to specific areas of development, but that does not mean that the lot layout and uses attributed to those lots was not significant when the Council considered the original application itself. In fact, the opposite would almost certainly be true. The terms and conditions of the Development Consent are clear and unambiguous on this point.

It is this attempt to somehow diminish the importance of the Master Plan in the original approval by the Council and to relegate it to a nothing more than "concept status" that in our view attempts to distort the true effect of the Development Approval in the first place. This distortion is important to assist the applicant's advisers in arriving at the conclusion that because of the lack of planning status of the Master Plan any amendments to it are therefore insignificant and should not be taken into account as being significant when considering the overall development.

We do not agree with these assertions either in logic or in law. We also do not believe these assertions are supported by the case law referred to later in this advice.

Twin Towns Application for s.96

We recall that in relation to Council file PF3668/5 and Consent No. 95/224, the Twin Towns Services Club was confronted with a similar problem that the applicant has been confronted with in this case.

The Club had decided, for market purposes, that it needed to change its Development Consent because what had been proposed and approved was the erection of a resort/hotel complex and it was clear that for the development to succeed commercially, permanent residential occupation was required and there was to be a change from the resort/hotel complex to include the provision of 87 strata title units to be sold to Club members for holiday letting or permanent residential accommodation.

The matter was put before the Council under the provisions of the then S.102(1) of *The EPA Act* [now Section 96] The arguments in favour of the s.102(1) application to support the change to include the 87 strata title units for residential use were briefly as follows:

- ◇ no change to the building envelope
- ◇ no change to site layout
- ◇ reduction in room numbers
- ◇ rooms physical appearance and internal structure would alter little.

An advice was provided by Mr John Webster, Barrister now Senior Counsel, who concluded that in fact and we quote … *"It is my opinion that whilst the final question as to whether the*

"modification" is substantially the same development is one of fact for the Council to determine, the present proposal when considered in total against the development approved is not substantially the same development. I make this conclusion on the basis of the information supplied and the fact that Council officers have not considered the original proposal at all as regards permanent accommodation Mr Justice Talbot in the Prima Holdings case held that this fact weighed heavily in the determination of the provisions of Section 102(1). It is my opinion that a fresh Development Application is required to obtain modification that is now proposed.

We are enclosing a copy of this Memorandum of Advice for Council's convenience. In that case the Club had to put in a fresh D/A. Similarly, in this case, the Council Officers had not considered the planning effects of over 100 single residential lots in the original application and approval but rather the effects of medium density use lots in the proposal. If they had been instead considering the single residential lots this may well have influenced other conditions of the consent.

Whilst the cases are not directly compatible in terms of the developments proposed, the principles, we say, are the same and that a fresh D/A would be needed in this case also.

The Legal Cases

The power relevantly invoked by the applicant in the present case is that conferred by s96(2) which is in the following terms:

2) Other modifications
A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and
(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to e granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and
(c) it has notified the application in accordance with:
  i. the regulations, if the regulations so require, or
  ii. a development control plan, if the consent authority is a council that has made a development control plan under section 72 that requires the notification or advertising of applications for modification of a development consent, and
(d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (a) do not apply to such a modification.

The exercise of that modification power is governed by subs (3) AND (4) which also shed light on the nature and scope of that power. they provide as follows:

3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 79C(1) as are of relevance to the development the subject of the application.*

4) *The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified..*

The statutory modification power conferred by s.96(2) essentially re-enacts the repealed s.102 of the Act which section had been the subject of considerable judicial exposition…

The relevant satisfaction required by s.96(2)(a) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary facts found. Council must be satisfied that the modified development is substantially the same as the originally approved development.

The requisite factual finding obviously requires a comparison between the development, as currently approved and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

"The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted.).. **Bignold J.** (*Moto*)."

We note that a number of legal cases have been referred to in the applicant's submissions, both in the barrister's advice and also the submissions prepared by Darryl Anderson Consulting Pty Ltd. We have been advised in our instructions that this is a significant application as far as the Council is concerned, and therefore we will detail the legal principles in a hope that it will assist Council in this matter:

We might start, conveniently, with a case referred to by Mr Anderson, namely *Moto Projects (No 2) Pty Ltd v. North Sydney Council* [1999]NSW LEC 280 which sets out at page 5 a general history of the power to modify consents although at that time speaking of the prior Section 102 of *The EPA Act* now revised under Section 96, and we quote …

"The comments relating to the statutory power of modification
When first enacted, Section 102 reversed the earlier understanding of the law which held that a Development Application could not be recalled or varied after issuance ....
The original form of Section 102, enacted in 1979, confined the power of modification to details of the consent but the words "details" were removed in 1985 in response to the majority decision in Sydney City Council v Ilenace Pty Ltd. This amendment was obviously intended to enlarge the power to some degree. The meaning of "substantially the same development" is discussed by Stein J. in Vacik Pty Ltd v. Penrith City Council [unreported] Land & Environment Court of NSW Stein J. 24/2/1992 *in terms which I respectfully agree.*
Parliament has therefore made it plain that a consent is not set in concrete. Ite has chosen to facilitate the modification of consents conscious that such modifications may involve beneficial cost savings and/or improvements to amenities. The consent authority can withhold its approval for unsuitable applications even if the thresholds of Subs(1) is passed.
I agree with Bignold J. in Holton v. Woollahra Municipal Council [1997]95 LGRA201 who, at 203) described the power conferred by 102 as beneficial and facultative. Paras. a) b) & c) of Subs(1) provide narrow gateways through which those who invoke the power must first proceed"

Further, in this case at page 307 there was a statement made by Stein J. (as he was then) in the *Vacik* case which quoted with approval and was was as follows.

"In assessing whether the consent, as modified, will be substantially the same development one needs to compare the before and after situations."

Therefore when coming to a decision as to whether the s.96 application in this matter involves substantially the same development it might be a useful exercise to review the "before and after" situations *viz* one fact – is a development substantially the same which originally provided for 124 medium density dwellings, the same as one which now proposes none and proposes 121 residential single lots instead?

We have difficulty in concluding that it is substantially the same development if this direct and obvious comparison is made.

In the further case of *Tipalea Watson Pty Ltde v. Ku Ring Gai Council*[2003] NSWLEC 253 decided on the 24th October 2003 by Bignold J. ... The same paragraph as was quoted as in Mr Anderson's submission – except there were two other relevant observations made in *Moto Projects* that were not referred to by Mr Anderson and they were:

> *"1. The environmental impacts of proposed modifications are relevant to the ultimate factual finding based upon the comparison of the development as modified and the development as originally approved; and*
> 2. *Whereas the required comparison is in respect of the whole of the development being compared a particular of the originally improved development may be found to be important, material or essential to the result of the required comparison."*

7

We say therefore it is dangerous to simply adopt the principle that the comparison to be undertaken is at a general or overall level rather than a detailed level as this may not in fact be appropriate if there are details which ... *"May be found to be important material or essential to the result of the required comparison"*

We note in a more recent decision by Commissioner Tim Moore in the case of *Jaques Avenue Bondi Pty Ltd v. Waverley Council (No. 2)* [2004 NSWLEC101 (8/4/04) the court has consistently upheld that the test is "the development is substantially the same" and this has been held to mean when used in this particular context it is essentially or materially having the same essence. The references in this case to both the quantitative and qualitative tests previously discussed by Bignold J. clearly means that when considering the section the overall change to the development is one consideration but equally so are the elements within the original development approval itself, to be looked at to see if there is a significant difference

We would have thought the reclassification of use of the medium density lots to a single residential development is significant – and if it was not there would be no point in making the application in the first place. They refer significantly to a different type of physical development and also a different type of environment for living purposes. This is in fact a market driven difference in this case and what the application is all about is a fundamental change in land use and amenity requirements.

Medium Density v. Single Residential Lots

We are aware that there are market reasons now for the developer wanting to change the medium density lots and are sympathetic to any development where market forces change after development approval has been received.

There is a clear economic need, if the applicant is correct, to change the use and layout of the lots.

The problem is there is a substantial change in the type of use and physical development of over 100 lots and for the applicant to succeed in asserting this is the same development, the applicant would have to demonstrate from a practical point of view there is no difference in medium density development with single residential lot development.

Whilst council's own planning officers would be the appropriate authority to point out the differences we would have thought the application fails on this question of fact alone.

Council can still decide to approve

It is always open to Council to take a different view to us in respect of this matter and to decide the issue in favour of the applicant.

It is not our role to direct Council in respect of this mater - and to some degree it is true, as Mr Tomasetti points out, minds may differ. However our difficulty in agreeing with the applicant is that we believe the original DA with the Master Plan, was fundamental to that approval, and that the substantial nature of the change from medium density lots to single residential lots is such a

change that this change cannot be considered to maintain substantially the same development as approved.

Finally, the one argument of the Applicant and that being the effect of the Master Plan, may raise an issue of utility and that is, from a practical view, Council should be the authority determining any further D/A because of the planning history of the site and perhaps this issue could be raised if found necessary, with the Department. Perhaps the Minister could provide the council with the power to deal with any new D/A on the basis of the substantial planning history and complexities of the matter that may require an inordinate length of time for some new authority to come "up to speed" as it were.

We would be happy to discuss this advice further.

In the meantime if you have any further queries, please do not hesitate to contact Tony Smith of our office.

Yours faithfully
STACKS //NORTHERN RIVERS
Tony Smith
Solicitor/Director

That application, as will be seen from Mr Smith's letter, sought a number of changes, not the least of which was an increase of 18% in the number of lots. While, at first blush, this number appears significant, the notional population density was only to increase from 1409 people to 1483 people.

It will be seen that at this stage, Mr Smith had concerns that the modifications fell outside the operation of section 96.

Subsequently, the Ray Group was to seek a further amendment to the consent, seeking:

- a small increase in the number of residential lots from 410 to 433 down from the 531 that had been sought in April that year,
- a substantial increase in the number of residential lots from 202 to 477 (a substantial change from the 60 lots that had been sought in April that year).

The effect of the prosed changes is demonstrated by the following table:

	Original	Multiplier	Population	Apr-04	Population	Nov-04	Population
Residential lots	**410**	**2.6**	1066	**531**	1380.6	**433**	**1125.8**
Medium density lots	**202**	**1.7**	343.4	**60**	102	**477**	**810.9**
Total Residential	612		1409.4	591	1482.6	910	1936.7
Change in number of lots				0.96568627		1.486928105	
Population increase					1.05193699		1.374130836
Tourist resort rooms	**613**			**613**		**613**	

It will be seen that, if granted, the modifications would have increased the population density by in excess of one third and the number of lots by almost half.

On any view these are major changes to the approval.

A simple view is that such modifications would result in the development not being substantially the same development as that approved.

Collaterally, it can be argued that the underlying approval was for residential and tourist uses containing various facets, including:

- a mix of medium density and single lot residential development,
- public access to the beach,
- the provision of commercial and recreational facilities,
- landscaping themes,
- environmental protections and the like.

The Ray Group emphasised what it saw as the principal facets of its proposal in the Statement of Environmental Effects accompanying the application. The statement provided the following overview:

SITE MASTER PLAN

Development of the land will be carried out in general accordance with the site Master Plan. In summary, the Master Plan provides for the following key elements;

- Construction of an "Outrigger" branded strata titles resort hotel comprising 334 rooms (i.e. 213 units). The hotel is to be operated by Outrigger Resorts and is the subject of a separate development application;
- Construction of 280 resort units;
- Creation of 612 dwellings in a mixture of medium density and detached dwelling house configurations;
- Relocation of the Tweed Coast Road;
- Provision of a minimum 50 m environmental buffer to Cudgen Creek;
- Construction of a north/south cycleway/walkway within lot 500 (Crown Reserve for Public Recreation and Environment Protection forming part of the beach to the east of the site);
- Dedication and embellishment of a Central Public Recreation Reserve (passive open space) adjacent to the resort/commercial precinct;
- Dedication of the land zoned 7(f) on the eastern boundary of the site abutting the beach foreshore area;

- Provision of a retail/commercial/restaurant precinct adjacent to the resort hotel;
- Provision of a discrete residential precincts defined by open space corridors and roads;
- Provision of public car parking areas adjacent to the Coastal Public Reserve and Outrigger Resort incorporating 337 public spaces;
- Dedication of linear parks to provide east/west connectivity between the creek foreshore and the beachfront;
- Rehabilitation of the lot 500 dunal system in accordance with a Dune Management Plan;
- Rehabilitation of the Cudgen Creek foreshore area in accordance with a Riparian Management Plan (including a north/south cycleway/walkway);
- Provision of emergency services facilities (surf lifesaving) on proposed lot 473.

The Master Plan is based on ecologically sustainable development principles and adopts the concept of new urbanism as its design philosophy. The Plan reflects the outcomes of a number of consultations with Council officers, State Agencies and officers of Planning NSW and achieves a reasonable balance between commercial imperatives and public interest planning considerations.

The Master Plan also reflects the key site opportunities and constraints but is subject to refinement as more detailed planning proceeds with the preparation of each staged development application. However the basic tourist and residential mix will not vary significantly.

While the statement indicates the number of dwellings and tourist rooms, the developer would no doubt argue that the numbers are not central to the application, but rather that the principles of the development are at its core.

Given this more pragmatic approach, issues revolving around lot numbers and density are not central to the approval.

The Ray Group's development manager, Mr MacRae was clearly of this view, when giving the following evidence regarding the applications to increase the lot numbers and density:

MR BROAD: *More recently you have lodged a further Section 96 application which relates to density of development. Now, I understand that that's been withdrawn.*

MR MacRAE: *That's correct.*

MR BROAD: *It was seeking a very substantial change in density. I think Cardno MBK figures were in the order of 37 per cent. The figures provided by Darryl Anderson and Associates I think run out at 37.5 per cent. Is it usual to have such a significant variation in density from what was anticipated with all the work that you've done before lodging the DA to the time where you are actually on ground doing the work?*

MR MacRAE: *I wouldn't say it's usual but then I wouldn't say that the Salt site itself is a normal development site either. I mean, it has a specific requirement under LEP 2000 that requires one more resort room to be delivered than residential block.*

MR BROAD: *But how does that affect density?*

MR MacRAE: *That is - well, I will explain. That is a particular control on that particular site that we've had to deal with from day one and you've got a piece of land*

there that was zoned by council back in 1988 to generate a tourism industry which has not been able to happen until we came along because of the expertise we have in delivering resort product.

Now, we were successful in, and have been successful in, achieving the opening of our first resort and I might add that creating a new tourism driver in a regional area outside of the Gold Coast, which is already known as the tourism hub, is not easy, but until somebody did that that land would sit there and nothing would happen with it, it wouldn't meet the requirements of the Council and State Government's requirements to generate tourism, so we were fortunate through our experience in creating tourist resorts to be able to create the first Outrigger Resort which gave us a certain amount of rooms which gave us a certain amount of land which was the original master plan.

Where if you look at the original master plan there was then to be, I think, four other possible resorts - smaller resorts - dotted around the project. We were then successful in securing another major resort operator, a company called Peppers Resorts, and they were willing to generate another 346 rooms which is their biggest resort in Australia, so we were successful in doing two of the biggest resorts in Australia on that site which then left us land free to - about where the other smaller resorts were going to be – to contemplate a third resort which we are currently doing which then will generate just under a thousand hotel rooms.

That then allows us under the LEP 2000 to generate more density in residential, i.e., that the more resort rooms we can generate then the more residential we can generate. It's all controlled by the resort drivers.

MR BROAD: *Isn't a combination of controls though? Is it simply – are you saying that density is simply a product of how many tourist rooms we can get into this area?*

MR MacRAE: *No, I'm talking about that site.*

MR BROAD: *Yes. Sorry, I mean the site not the area.*

MR MacRAE: *That particular site.*

MR BROAD: *You say that that's the ultimate driver. So that if you can obtain more tourist operators or developers who are willing to put a tourist development in that area you can just run your densities up accordingly because you can always all but match the tourist development with the residential development. The argument is that you've got to be one less room or one less person or whatever it might be. And does that stand alone that the tourist opportunity drives the density?*

MR MacRAE: *Does it stand alone? It's the major factor on that piece of land. The other thing that drives it, of course, is market demand, okay, which has been increasing substantially in the Tweed area over the last three or four years. There's no use attempting to develop more product if it's not going to sell in the marketplace, if it's not required by the market, but the control is definitely the resorts. I mean, you need to*

understand the whole intent of that piece of land was to create the tourism industry or advise - - -

MR BROAD: *It's a combination of tourist and residential.*

MR MacRAE: *Correct.*

MR BROAD: *What I'm trying to struggle with is this: whether there is no other constraint applicable. In other words, effectively, you as the owner and as the developer can reflect density simply by the amount of tourism that you can attract to that site.*

MR MacRAE: *No, not at all. That's the starting point.*

MR BROAD: *Where does it finish?*

MR MacRAE: *Where is the finish?*

MR BROAD: *Where does it finish? Where does density finish?*

MR MacRAE: *Plot ratios, site cover, landscape areas, green space, a whole series of calculations that come along after that. State Government's policy on density per hectare. There's a whole set of criteria that then control what that density can be. But primarily on that site if you don't get the resort rooms developed you don't get the density.*

MR BROAD: *So when you put your DA in you put a DA in that reflected your then opportunity, that reflected what you had been able to achieve with tourist accommodation provided?*

MR MacRAE: *What we had achieved in that first resort because we knew that we could bring Outrigger as the major operator to the site. We speculated on - - -*

MR BROAD: *That you could get another one in.*

MR MacRAE: *That we could get the other - some other - operators in there, but at least Outrigger commercially got us started, got our first international resort up, allowed us to then be able to deliver roughly half of the land - the residential land - or apartments that were contemplated in the original master plan. The original master plan did have medium density, it did have villas and so forth in it. And the risk you take as a developer is we've got half the project set in terms of the first resort. We know we can deliver that. We've got the operator. Hopefully we will be able to by that attract another major operator to do another resort to be able to deliver the rest of the project.*

T. 4/3/05 p. 908-911

In Mr MacRae's perspective, amendment was driven by a combination of need, issues thrown up in the course of carrying out the development, opportunity, or commercial reality.

In order to deal with these aspects, it is necessary to look at some of the history and the detail of the SALT development.

The SALT proposal is built around the zoning of 2(f) Tourist. The primary objectives of this zone are:

> To encourage tourist development and uses associated with, ancillary to or supportive of the tourist development, including retailing and service facilities where such facilities are an integral part of the tourist development and are of a scale appropriate to the needs of that development.
>
> To ensure that prime sites are developed for the best use and fulfil their economic and employment generating potential for the area.

The provision of the residential component is provided for in the subsidiary objective, as follows:

> To permit high quality residential development as being integral and supportive of the primary intent of this zone (tourist oriented development) in terms of design and management structure and only at a scale which enhances the proposed tourist resort character.

The site is affected by clause 53 of the LEP, which operated to require:

> Portions 194, 301 and 312, Kings Beach, South Kingscliff
>
> Development for the purpose of dwelling houses and a hotel, motel or tourist resort (or any combination of them)
>
> (1) An application made pursuant to this item must not be granted unless the consent authority is satisfied that the development, whether or not to be carried out in stages, will include a hotel, motel or tourist resort as the primary development and the number of units/rooms in that hotel, motel or tourist resort will at all times exceed the number of dwelling houses included in the completed development.
>
> (2) If a subdivision is proposed to create an allotment for a dwelling house as part of the proposed development then such allotment must have a minimum area of 450m2.

There were a number of discrete development applications, pertaining to the development of the Outrigger Resort, the subdivision and the earthworks that were determined, by the Council. Additionally, a subsequent application for the Peppers Resort determined by DIPNR following the adoption of SEPP 71.

Initial concerns were raised within council, that as part of the overall development, the remediation of some radioactive sands and the extent of onsite sand extraction would result in the application being classified as “designated development”. The removal of the remediation proposal and legal advice served to quell these concerns.

Ultimately, despite concerns raised from a number of quarters, the applications were

given council's consent on 23 April 2003.

Since that time the Ray Group has sought a number of amendments to the consents though applications brought under section 96 of the EP&A Act.

Some of the amendments that were sought, for example, to overcome site conditions encountered during construction, clearly fell within the ambit of section 96. Others raised concerns. Amongst these were proposals to substantially increase the density of the development, outlined earlier in this part, and to increase the size and depth of the borrow pit.

The latter amendment was to give rise to a borrow pit comprising:

- an area of land affected 2.55 times greater,
- a depth of land disturbed 2.17 times deeper.

Leaving aside the discrete environmental issues that might be associated with this particular undertaking, not the least of which was its possible affect on groundwater, the proposal was to increase by over 5.5 times the amount of sand potentially extracted.

A proposal of this kind must be a concern. Council had previously taken barristers' advice and commenced proceedings in the Land and Environment Court, as it was concerned that the earlier proposal could constitute an "Extractive Industry" and thereby prohibited in the zone.

Mr MacRae was asked a number of questions regarding the role that section 96 applications have in developments, his replies give a substantial insight into his understanding of the utility of the section:

MR BROAD: *The topic that I was really leading to is: what role does section 96 modification applications have in developments?*

MR MacRAE: *From my perspective, an enormous role. If you're doing a dozen apartments in a three-storey building in Kingscliff, it probably shouldn't play much role at all. If you're doing a project on the scale of Salt or even at Koala Beach project, which I also managed, it has an enormous role for things such as finding the contamination issue at Salt, for instance. What that issue was about, in fact, was that the contamination that we eventually found deep down in the site was of more volume and more severe than what was originally anticipated, even with all the enormous amount of testing that was done. And because that generated more volume of that material we had to go back and rewrite the remediation action plan and submit it - - -*

MR BROAD: *That was a site condition problem?*

MR MacRAE: *A site condition problem. Most definitely, you know, you must have mechanisms to allow - to deal with site conditions. Secondly, in my opinion, is again something of the scale of a project like Salt - has to be able to accommodate changes and movements in the marketplace because the market that we deal in changes quite*

constantly. The market we are developing and selling property into right now is quite different to what it was two, two and a half years ago.

We are back to what we call a normal market now where it's a lot harder to sell. You've got to work a lot harder for your product and you've got to listen to your clients' requirements and needs. So when you plan a project originally like Salt three years ago you're planning it to suit a market that is available for you at that time and requires - - -

MR BROAD: *What you perceive the market as being when you - - -*

MR MacRAE: *And, in fact, what the market demands are. I mean, what you do is you take a risk that your project will be approved and you go to the market as early as you can to gauge the reaction of what you believe your product is right and that changes and moves over time almost on an annual basis. So if you don't have a Section 96 process available to you on a project the size of Salt or Casuarina Beach or anything of a large scale that's going to run over quite a period of time, it's more than likely you will find that project will stall half way through because the buying markets' requirements have changed. You're still having to develop a product that is now different to what the market wants.*

MR BROAD: *So is that reflected in changes such as to the ratio between medium density and residential sites?*

MR MacRAE: *Yes.*

MR BROAD: *And what you then, I assume, are doing and saying, "Well, look, there's a movement that we perceive away from medium density demand." That's measured by when you've offered them for sale they're not selling but there is a strong residential demand. ...*

MR MacRAE: *Yes.*

T. 4/3/05 p. 905-906

As will be seen from this extract, Mr MacRae was firmly of the view that section 96 had a role in accommodating commercial risk. This was confirmed later in his evidence:

PROF DALY: *... Moving on from that, you also mentioned that Section 96 of the EPFA [sic. EP&A] Act. It is necessary in a big project like this in the sense that the market shifts and you've got to be able to respond to those market shifts. Effectively what that means is you use Section 96 as a means of accommodating commercial risk.*

MR MacRAE: *As I said before that is one point. The other point is does it mean to accommodate issues that occur on site that you may not have been able to uncover?*

PROF DALY: *Yes. But you do use it as a means of accommodating commercial risk?*

MR MacRAE: *Yes.*

PROF DALY: *Now, as I understand Section 96 and the Act, that wasn't the intention of Section 96 originally. I'm not saying there shouldn't be some accommodating vehicle for market shifts, but I don't think that was the intention of Section 96 when it was promulgated.*

MR MacRAE: *I'm not a planner. I can't answer that question. I just know that if you're in a situation like Salt where if you have to make a change to accommodate a market shift to see the project not fail or not stop - - -*

PROF DALY: *Would not the normal change be to lodge another development application?*

MR MacRAE: *Well, the Section 96 mechanism is there and as long as it's substantially the same development then why should you not be able to make some amendments, especially on a project - let's say - 50 per cent or two-thirds completed where infrastructure and road system is in.*

PROF DALY: *What I'm saying it is certainly used for that purpose, but I'm not sure it was intended to be used for that purpose. It has become a vehicle to assist the commercial risk.*

MR MacRAE: *Well, I don't know what it was intended for.*

T. 4/3/05 p. 914-915

Mr MacRae was careful to separate a development, such as SALT that would potentially take a number of years to complete from a smaller "one off" development such as "a dozen apartments in a three storey building in Kingscliff".

Earlier in his evidence he had given detailed evidence of the studies, consultation and due diligence processes undertaken prior to the lodgement of the application.

Mr Ray had previously appeared at the Public Hearings and had indicated the level of refinement prior to lodging an application, in the following terms:

MR BROAD: *... To what extent have you refined your application before it goes to consideration by council? Is it - when you lodge a DA, are you really putting in place a clear view of what the finished product will be?*

MR RAY: *In the case of a development so complex, yes, you do. And before we actually lodged a development application in that case, we went through an exhaustive process of communication not only with the local authority, but also with all of the relevant government authorities that would have a part to play in the eventual approval process. And indeed, the community. So that was a process that took, in the case of Salt, something past 18 months before that development consent was then ready to lodge.*

T. 24/2/05 p. 505-506

While Mr Ray and Mr MacRae may have put forward these views, the Ray Group's subsequent application to increase the number of lots by almost 50% and the density by

over 35%, does not reflect this.

Ultimately section 96 was being used as a buffer against commercial risk and to pursue commercial opportunities, as the section 96 applications and the evidence of Mr MacRae was to make clear:

MR BROAD: *Have you come to figures on what the potential might be of that site?*

MR MacRAE: *The master plan that we submitted with the Section 96, which was currently - I subsequently withdrew would be probably – I wouldn't say it's the maximum. One of the things that we've strived to do on that project is ensure that we've controlled the floor space ratios and plot ratios and green space throughout the project. That piece of land could probably generate upwards of, at least, between 1800 and 2000 titles if you maximised your opportunities under the planning controls, but that has not been our desire from day one.*

You know, we had two and a half times the required amount of green space on that project. We've not exceeded much more than point eight plot ratio on any of the resort developments we've done and with a planned medium density, where other projects throughout Tweed and generally have even gone up to one point one plot ratio, if you understand what plot ratio is.l But that's a very - much a controlling factor of the density of a building on a piece of land.

So I haven't done the calculations, but I would speculate that you could probably easily do probably 1800 and maybe up to 2000 buildings on that site if you could then generate enough resort rooms to balance it.

MR BROAD: *Yes, to give you the leg up?*

MR MacRAE: *Yes.*

MR BROAD: *When you withdrew that latest Section 96 application, your consultant wrote a letter that, in effect, asked council to - sorry, it may be you or your consultant; I think it was yourself but effectively requested the council not treat the master plan as binding; the original master plan as binding. What position does that then leave council in if it doesn't have some form of binding master plan?*

MR MacRAE: *Well, this became a very interesting and tricky situation because it was through conferencing with council and council's solicitors over this Section 96 application that it actually came to light that a master plan in itself is not binding, it has no statutory approval role. You can't get an approval for a master plan - sorry, unless it is under 71 for the Minister, which isn't relevant to this site. And hence the inclusion of the original master plan and the original development approval, whilst we considered it to be binding was, in fact, not necessarily binding and, therefore - and you probably have read stacks of letters, I guess, on advice to the council about that.*

And, therefore, in this exercise their advice to council was that the master plan shouldn't be part of this Section 96 approval and that if the Section 96 approval or application was

to proceed then we should withdraw that master plan, because it doesn't hold any statutory weight.

MR BROAD: *Does it pay you to have a master plan served to invalidate [sic. underlie]* the *approval?*

MR MacRAE: *I'm not a planner; I'm not a lawyer. I can't answer that question.*

MR BROAD: *Does it undermine any certainty - - -*

MR MacRAE: *For us?*

MR BROAD: *For you and for the - - -*

MR MacRAE: *Yes. Yes.*

MR BROAD: *- - - council and for ratepayers?*

MR MacRAE: *Yes. We would have much preferred to have the master plan approved in the Section 96, like it was in the original approval, but council had to stick with their - I'm speculating council would have to stick with their legal advice. And there was a lot of debate over it.*

T. 4/3/05 p. 911-913

In referring to the non-applicability of section 96 to "a dozen apartments in a three storey building in Kingscliff", Mr MacRae may well have been speaking of the Nor Nor East development.

In July 2002 a development application was lodged for a mixed commercial, retail and residential development. In the face of substantial community and staff concerns, the proposal was "amended" to provide for tourist accommodation, in lieu of the previous residential component.

On 27 March 2003 a public meeting was convened to discuss the amended plans. Set out below in the council's file note of the meeting:

FILE NOTE

Development Application DA02/1136 - mixed commercial/tourist accommodation development including 8 units at Lot 2 Sec 4 DP 9453, Lot 3 Sec 4 DP 9453 Vol 2993 Fol 238, No. 34 Marine Parade Kingscliff

A public meeting was held on Thursday 27 March 2003 to discuss the amended plans with interested residents, the developers and Council staff.

Attendees: David Broyd – Director Development Services
Stephen Enders – Co-ordinator Development Assessment
Denise O'Brien – Town Planner

Peter Madras – Developer
Darryl Anderson – Consulting Town Planner
John Lee- Pacific Projects Group
Paul Brinsmead – Hickey Lawyers

Tim Neilsen – 55 Greer Street Yeerongallly 0419 644 398
Tim Lucas – 16 Sutherland Street 0418 795 508
Don Willoughby – 24 Sutherland Street 02 6674 1175
Julie Murray – 30 Marine Parade Kingscliff 02 6674 2087
Bruce Murray – 30 Marine Parade Kingscliff 02 6674 2087
Bob Murtha – 14 Sutherland Street 02 6674 2482
Karen Shresha – 18 Sutherland Street 02 6674 3848
Rick Paterson – 12 Sutherland Street 02 6674 0094
Mrs E F Whittle – 2/22 Marine Parade 02 6674 2257

The amended plans submitted to Council on 26 March 2003, were reviewed by the concerned residents at a private meeting held on 26 March 2003. The residents submitted the attached list of issues. However the submitted plan were inaccurate and have subsequently been superseded with a revised plan that was tabled at the public meeting.

Peter Madras began by presenting the revised application, detailing that the building had been staggered to represent the slope of the land and that the building had been reduced to only two levels at Hungerford Lane. Additionally setbacks to Hungerford Lane were established which lead to the car park which contains 8 car parking spaces.

The residents raised the following questions/concerns:

Q: *What is the coverage of the site?*
A: 100%

Q: *This application set a precedent with solid walls to Hungerford Lane.*
A: Peter tried to explain that the slope of the land restricts the height and that as you go along Hungerford Lane it is difficult to build any higher as you move from Hungerford Lane. David explained Draft DCP on height and explained that Council was in the process of undertaking a line of view plane analysis.

Q: *The application is and will appear as a four-storey building*
A: Peter acknowledged that there was one section of the building that was four storeys in height (for 2m of the building) but that a SEPP 1 Objection was submitted on the basis of the car parking being setback from Hungerford Lane. David advised that this issued would be assessed on merit

Q: *What is the roof type?*
A: It will be concrete or metal but to the rear (Hungerford Lane) the developers are happy for a condition of consent to ensure the roof will be non-trafficable.

Q: *Will the elevator jut above the roof level (a lift overrun)?*
A: No nothing will jut above the roofline

Q: *Will the general public be advised of the application?*
A: Yes the application will be advertised in the Tweed Link for a period of two weeks from Wednesday 2 April 2003 through to Wednesday 16 April 2003.

Q: *The natural ground level appears inaccurate.*
A: The natural ground level was depicted on a Council Sewer map from the 1960's.

Q: *Car parking is deficient and the developers have only specified that the units be for tourist use to avoid the higher parking rate for residential units. Could a restriction on the title be imposed specifying tourist accommodation only?*
A: Tourist accommodation is permissible and it is only intended for tourist use. David indicated that legally a restriction on title probably isn't an option but that issue will be investigated. The consent can limit the use as per the LEP definition.

Q: *Is there enough room for all cars to leave in a forward direction?*
A: Yes in accordance with the AS which is based on 85% of cars.

Q: *Ground levels should be verified and should be accompanied by survey levels*
A: If deemed necessary Council will request this.

Q: *Why should the residential component get the benefit of commercial setbacks (zero setbacks).*
A: There is no residential component it is tourist development.

Q: *There is no provision for service vehicles.*
A: Darryl Anderson argues that there is no significant change to the existing commercial development, which utilises Marine Parade.

Q: *Southern neighbour concerned with maintaining sight distance into her driveway if alfresco dining is proposed.*
A: No chairs meant to be shown on plans.

Q: *More no parking signs required in Hungerford Lane?*
A: Letter to be sent to Local Traffic Committee.

Council staff noted that more information might be required on the colour scheme, loading facility (lack of justification), garbage disposal details, confirmation of works in road reserve, details of any grease traps proposed which would imply a refreshment room, thus generating different parking requirements.

Denise O'Brien
Development Assessment Unit
28 March 2003

OBJECTIONS TO NOR O NOR EAST DEVELOPMENT

ISSUES.

1 Ground levels inaccurate?. Not survey levels. Previously mis-stated in original proposal. Doubts exist relating to ability to site building on narrow ledge of land fronting Hungerford Lane.

2 Residential set-backs not being observed for rear residential section. Results in no view sharing, or retention of public vistas from Hungerford Lane. This proposal, together with already constructed Marine building will create a precedent for a continuous multi-storey wall of buildings to be erected for the full length of Hungerford Lane behind the commercial zoning.

3 Four storeys in parts. Contravenes three storey limit for zone area. Potential for four storey construction in storage area behind shop area.

4 Is ground floor accurate for current proposal? Lift location not aligned.

5 Access for servicing shops not available- deliveries, waste removal etc.

6 Car parking proposed at rate of one space per unit, on basis of tourist use. This rate is inadequate having regard to large size of each unit and pre-existing deficiencies for public car parking in Kingscliff CBD.

7 All car parks cannot be entered and exited in a forward direction.

8 Car washing bay not provided.

9 Building will be substantially higher than other adjacent newer buildings.

10 Will this amended proposal be re-notified and re-advertised? When?

11 Inadequacy of two days notice of this meeting. Some owners unable to attend.

12 First floor and second floor plans seem to be identical. Elevations show second floor set further back.

13 Top floor pergolas / roofs increase building heights un-necessarily.

14 Two storey proposal will severely impact on views currently enjoyed from many existing premises in Sutherland St. / Hungerford Lane.

15 Proposal deficient in landscaping? Proposals involving trees on roof appear impractical and exacerbate impacts on public and private views.

While the proponent asserted that nothing would be above the roofline, this was not to be the case.

On 18 June 2003 the council determined the application by granting consent. Less than

12 weeks later, the proponent lodged a section 96 application seeking:

> We request council that to amend condition 2, to allow a maximum height of 1.6m to allow for the possibility of kitchen exhaust facilities as required under the Building Code of Australia. In addition we would ask that the condition be widened to include the provision of any and all statutory required items such as vent pipes and any other roof penetrations, etc.

Of course the matter of lift over run had already been dealt with at the approval stage, with the conditions acknowledging that there would be a lift overrun:

> 2. The overall height of the building shall not exceed RL 18.4 metres (excluding any lift over run which shall be no greater than 1.5m above this nominated height). On completion of the building documentation from a surveyor shall be provided to ensure compliance with this condition.

The overall height of the building had been a concern. The condition in the report to council sought to limit the height of the building to RL 17.7 metres, with a lift over run allowance of 1.5 metres. This view had been supported in the following terms:

> The revised development presents a two-storey elevation to Hungerford Lane setback 4m from the rear boundary and a three-storey elevation to Marine Parade. However, due to the slope of the land, the second storey (from Hungerford Lane) will appear as a fourth storey when the site is viewed from the foreshore recreational area across the road. It should also be noted that the application does form four storeys for a length of 7 metres in the centre of the land. The applicant has subsequently lodged a SEPP 1 application, which is addressed further below, however for the purposes of ensuring compliance with the objectives of the zone this element of the development (subject to conditions of consent restricting the overall height of the building to be consistent with recently approved developments) is not contrary to the nature or scale of other development in the locality.
>
> The rear elevation has a total height of 6.4m when viewed from Hungerford Lane (RL 18.9). This is higher than the recently approved "Marine" Development to the west at No. 36 Marine Parade which has a maximum RL of 17.6m in height, however, due to the slope of the land the difference in height will seem greater. Despite the revised drawing reducing the proposed development from a three-storey development to a two-storey elevation to Hungerford Lane there is scope to further reduce this height by reducing the internal ceiling height of each of the accommodation levels. The proposed development incorporates a 3m floor to ceiling height for each tourist accommodation level. This is considered excessive given the obvious issue of view loss for neighbouring properties and can be reduced to 2.7 metres for the first and second level from marine parade and be reduced to as low as 2.4 metres for the second level to Hungerford Lane. This would reduce the overall height of the building by 1.2 metres and would result in a maximum RL of 17.7m, which is just 100mm higher than the recently approved marine development. This is considered to be more consistent with the surrounding development and a far greater outcome for adjoining residents. A condition of consent reflecting this is recommended.

The provision for the lift over run had been a mistake, which the council was keen to remedy. Now it was faced with an application to modify the consent to permit kitchen exhaust facilities ancillary to a ground floor use that was not nominated, not approved and which had not even been the subject of a development application.

Additionally, the proponent had sought to modify the design, which it suggested were:

"largely internalised and insignificant changes in the impacts under the planning guidelines".

The report to council's meeting of 5 November 2003 did not share this view, questioning whether they were so significant that they did not fall within the scope of section 96.

TWEED SHIRE COUNCIL MEETING HELD WEDNESDAY 5 NOVEMBER 2003

CONSIDERATIONS UNDER SECTION 79C OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

S96 of the Act specifies that on application being made by the applicant a consent authority can modify the development consent only if it is satisfied that the proposed modified development is substantially the same as the approved development and that all relevant consultations and submissions have been undertaken.

Having regard for these criteria the variations are assessed as follows:

Variation 1 - Amendment to the submitted drawings

The applicant has lodged amended drawings SK01 Revision B - SK07 Revision B which detail design changes which are largely internalised and insignificant changes in the impacts under the planning guidelines. The design changes are mainly internal and have increased the facilities for the tourist to reinforce th identity as a tourist destination.

The amended plans makes several substantial changes to the originally approved plans, these are recognised to be:

- A revised ground floor plan which shows one single open floor plan compared to the approved smaller three commercial tenancies originally approved;
- A revised ground floor plan with a new entry point for the tourist component;
- New Balcony configurations to Units 101 & 102;
- New internal configurations to Units 101 & 102 & 103 incorporating new laundry facilities, formalised third bedrooms and the introduction of void area to provide light into the bedrooms;
- The incorporation of a new gymnasium, theatre, sauna at the first floor level currently labelled as void area;
- New balcony configurations to Units 201 & 202 & 203;
- New internal configurations to Units 201 & 202 & 203, incorporating new laundry facilities, formalised third bedrooms and the introduction to void areas above;
- The internal configuration changes to the second level necessitate a stairwell being pushed back into the car parking area which reduces the size of car parking space No. 6;

- The amended plans indicate future access to the neighbouring 30 Marine Parade via car parking spaces 7 & 8;
- New internal configurations to Units 301 & 302, incorporating new laundry facilities a new stair well, and the reconfiguration of balconies facing Hungerford Lane;
- The amended sections and elevations are now also indicating a lift over run to a maximum height of RL 19.9m and additional roof penetrations for car exhaust ventilations and additional service pipes beyond the nominated allowable height of RL 18.4m.

Whilst some of the internal re-configurations are of little significance there are other elements that if supported would change the nature of the development to question whether it was substantially the same development pursuant to S96 of the Environmental Planning & Assessment Act 1979.

The ground floor plan was originally approved with three separate retail/commercial tenancies (not restaurant or café). The amended plans show this area as a large open floor area, which could potentially attract a completely different type of business than that originally endorsed in a three-shop layout. Furthermore the submitted amended plans do not provide the final proposed layout and leaves uncertainty to the number and nature of commercial/retail development proposed. Additionally, the S94 contributions have been calculated on the basis of three tenancies. Any change to the original layout is not supported and would change the nature of the original approval.

The incorporation of a new gymnasium, theatre, and sauna at the first floor level (currently labelled as void area) whilst in concept actually endorses the concept of the premises as tourist accommodation further reduces the space available for services such as mechanical ventilation as originally specified by the applicant. If this void area was to be removed or reduced in size the only remaining space for services would be on the roof plane of the highest most point of the building, which is the most visually prominent and the location which would cause the most disruption to the amenity of the adjoining neighbours through view loss, unpleasant outlook, smell of exhaust fumes, smell of kitchen fumes etc. Therefore any change in layout is not supported without the guarantee that all services in relation to the lift, mechanical services, kitchen exhaust, car exhaust etc are adequately catered for away from the upper most level of the roof and below the maximum nominated height of RL 18.4m

The re-configuration to the second floor plan pushes a stairwell into the nominated parking space (No. 6) which reduces the size of this space from 3.5 x 7.2m to as low as 2.4 x 5.2 which is inadequate. Furthermore, spaces No. 7 and No. 8 are marked for future disruption through the introduction of access to 30 Marine Parade via the subject site as recommended by the Council imposed Condition No. 99 i. It should be noted that Council's Development Control Plan No. 2 - Onsite Car Parking specifies that car parking for residential type use (including tourist uses) must be provided for onsite, which is why the absolute minimum number of spaces on site is 8. If space No. 6 is disrupted for the proposed stairwell and spaces 7 and 8 are removed to provide for through access this development will not meet the minimum requirements as required by Council Policy.

The original application specifically omitted any form of lift over-run. The applicant provided at public meetings that there would be no lift over run and that there would be nothing jutting above the nominated roof height. Whilst condition 2 made reference to a lift overrun not exceeding 1.5 metres above the maximum nominated height, the approved plans did not need a lift over-run and were to rely on an alternative lift design and type, which did not need a lift over-run. The reference to 1.5 metres was made in error from a standard condition and therefore, as the applicant is seeking the introduction of a lift over run Council can refuse that part of the Section 96 by not endorsing the amended plans and by deleting reference to a lift over run as part of condition No. 2.

As demonstrated above, the proposed amendments to the configuration of the building whilst presented as minor, are actually significant and could potentially result in a building not substantially the same as that originally approved. The minor internal alterations to the unit configurations could be supported, however, they cannot be endorsed via the submitted amended plans given the number of alterations that are not supported.

Subsequently it is recommended that the amended plans be refused and that no change is made to Council's originally imposed condition No. 1.

Variation 2 - Provision for roof penetrations beyond the max roof height

The applicant has requested an amendment to Condition 2 to allow a maximum height of 1.6m to allow for the possibility of kitchen exhaust facilities as required under the Building Code of Australia. In addition the applicant has asked that the condition be widened to include the provision of any and all statutory required items such as vent pipes and any other roof penetrations etc.

However, subsequent correspondence from the applicant has indicated that they no longer request an amendment to the actual height stipulated within this condition but rather just incorporate the provision of any and all statutory required items such as vent pipes and any other roof penetrations etc.

This effectively requires an amendment to condition 2 of the consent, which currently reads as follows:

> 2. The overall height of the building shall not exceed RL 18.4 metres (excluding any lift over run which shall be no greater than 1.5m above this nominated height). On completion of the building documentation from a surveyor shall be provided to ensure compliance with this condition.

This request is contrary to the applicant's original comments stating that nothing would extend above the nominated roof height. The nominated void area was intended to provide space for mechanical plant equipment and any associated services.

The applicant adamantly provided at public meetings that there would be no lift over run and that there would be nothing jutting above the nominated roof height. Now whilst condition 2 made reference to a lift overrun not exceeding 1.5 metres above the maximum nominated height, the approved plans did not need a lift over-run and were to rely on an alternative lift design and type. The reference to 1.5 metres was made in error from a standard condition and therefore, as the applicant is seeking the introduction of a lift over run Council can refuse that part of the Section 96 by not endorsing the amended plans and by deleting reference to the additional 1.5m and the mention of a lift over run as part of condition No. 2. Furthermore, Council should not be endorsing additional services to be utilising the roof space when the applicant has previously provided the void area for such services.

THIS IS PAGE NO **240** OF THE MINUTES OF THE MEETING OF TWEED SHIRE COUNCIL HELD WEDNESDAY 5 NOVEMBER 2003

CHAIRMAN

TWEED SHIRE COUNCIL MEETING HELD WEDNESDAY 5 NOVEMBER 2003

Therefore, it is recommended that Condition 2 of the consent, shall be amended to delete all references to a lift over run and delete reference to an additional 1.5m in height, and subsequently read as follows;

2. The overall height of the building shall not exceed RL 18.4 metres. On completion of the building documentation from a surveyor shall be provided to ensure compliance with this condition.

Unperturbed, the majority councillors combined to approve the amendments on 19 November 2003.

It is difficult to believe that the suspicions of Mr Wylie are baseless. In both the SALT and the Nor Nor East matters, substantial amendments to the consents were made within a matter of weeks after the consent. In the case of Nor Nor East it took 12 weeks, for SALT it was 9 weeks.

Mr MacRae was at pains to portray the amendment as being driven by a need to obtain another supplier:

MR BROAD: *And what you then, I assume, are doing and saying, "Well, look, there's a movement that we perceive away from medium density demand." That's measured by when you've offered them for sale they're not selling but there is a strong residential demand. The obvious question is this: when you went on the site at Salt, there was a substantial change to the borrow pit - - -*

MR MacRAE: *Yes.*

MR BROAD: *- - - that was used. It went to a volume of approximately five and a half times its original anticipated volume. It went from, I think - I will give you the figures -*

just bear with me a minute and I will get those figures for you - it went from an area of 4.5 hectares by three metres deep to an area of 11.5 hectares by 6.5 metres deep. Now, in my school boy maths I calculated that at about five and a half times the volume. Given that that was only two months after the DA had been approved what circumstances led to such a significant change that were not anticipated when the DA was being dealt with by Council?

MR MacRAE: *Okay. You're focussing on only one point about that volume. Firstly, I'd like to clarify that the original development application that was lodged there was three concurrent applications lodged which was the sub-division - master sub-division - application, the application for the Outrigger Resort and the application to hydraulically transport 700,000 cubic metres of sand to the site. That volume of transportation of sand to the site has not changed.*

MR BROAD: *No, no. We're not talking about that.*

MR MacRAE: *Okay. The methodology of how the 700,000 cubic metres of sand was to be used on site is what has changed because originally we were going to use a small area of borrow pit to do one small stage of the site whilst we were commencing the importation of the hydraulically pumped sand. Two things happened that changed that dramatically; one is that the contract that we had supposedly in place to do that work did not proceed.*

MR BROAD: *You had to go to a different supplier, I'm aware of that.*

MR MacRAE: *And it was a different supplier on it. The different supplier was a different source. It's quite a tricky process to pump sand eight kilometres across land to a site like this so it's not just another source it's a whole different pumper out and so forth. And, secondly, one of the impacts of the actual development approval, which was not given by Council, it came through from DIPNR, was they brought a new policy in during the DA approval process that required, what they call, nil effect on the fresh water aquifer underneath the site. Right through that whole area there's a fresh water aquifer that sits in underneath there.*

The sand that was going to be pumped originally was to come from the Tweed River. It was going to be delivered with salt water. The determination by DIPNR late in the stage of the approval process determined that we couldn't deliver it with salt water because salt was deemed to be a contaminant of the aquifer even though the Pacific Ocean is on one side and the Cudgen Creek is on the other and they're salt water. It was a new policy and they wouldn't - they simply would not bend.

So we had to find another source that can deliver the sand with fresh water which we then went through about another 12 months or 10 months process with another supplier which failed, unfortunately, because they decided that they had a better market for their sand than to sell it to us and eventually now we have that final approval and we are delivering that sand as we speak from another source with fresh water. So there is those two impacts; there was a commercial problem we had with our initial supplier, and,

secondly, even if we'd resolved that with them there was a really tricky engineering problem to solve which was not affecting the fresh water aquifer.

MR BROAD: *My question. My question is - - -*

MR MacRAE: *Now, that changed the earthworks process on site.*

MR BROAD: *I understand there was a change to the process on the site. My question is why was that process changed within two months of the DA? Why hadn't it been highlighted either during the period that the DA was being considered? Is it something that suddenly arose within two months?*

MR MacRAE: *We only knew about the condition from DIPNR right at the end of the DA process. Literally - oh, look, I couldn't give you dates, but within the last few weeks of the final determination of the DA and when the DA was approved then we went back to our original supplier. Okay. He wouldn't abide by the deal we had in place originally so that's why it changed so dramatically.*

MR BROAD: *So as a matter of urgency.*

MR MacRAE: *Yes. It was a matter of urgency. We had an earthworks management plan in place that required only a small borrow pit to start the works on the basis that the hydraulic placement of sand was going to come along fairly quickly afterwards so we had to revise that to be able to continue with the project, and, basically, deliver, say, three quarters of the land by using the bigger borrow pit whilst we sourced another sand supply, okay, which is now, as I said, been resolved, worked out, and that sand is being pumped into that hole today with fresh water so there's a double impact and they both happened almost at the same time, i.e., commercial terms and also the impact of DIPNRs requirements.*

T. 4/3/05 p. 906-908

Mr MacRae's evidence ignores the content of both the application, the engineer's statement and drawings that accompanied it, and relevantly:

The temporary borrow pit on Stage 7 was to be 3 m deep and approximately 4.5 ha in area based on the quantity required to establish the Outrigger Hotel platform, such that that project could commence promptly.

Following further review of the projects critical path analysis and in view of the lead time required to establish the sand pumping pipeline (up to 6 months) it is now proposed to expand the "temporary borrow pits" within Stage 7 and Stage 2 to yield a volume of approximately 450,000 m^3 from an area of approximately 11.5 ha to a depth of approximately 6.5 m. This approach will enable Stages 1 and 2 (and the Outrigger site) to be filled promptly such that civil works can proceed concurrently and without completion to finished surface levels can be carried out as filling is placed, thus reducing the cost and implication of revegetation work. More importantly, the revised strategy will;

- Remove the sand pumping process off the critical path of the first half/phase of the project;
- Ensure that the first phase of the project is not delayed because of failures in the pumping system (i.e. down time, blockages etc) and this benefits the community by completing the major subdivisional works 3 to 4 months earlier;

- Allows a far better control of the tail water as the slurry will be contained in 2 pits/locations (eg. The sand delivery will only be over say 20% of the site and not say 50% of the site as currently approved) and hence a more controlled system will arise for the protection of the aquifer;

- Substantially reduces the amount of double handling of the wet sand as it will now simply be placed directly into the borrow pits, after separation beside the pits. This again assists with control over the protection of the aquifer.

4.0 CONSULTATIONS

In May 2003, Mr Steve Macrae (Ray Group Pty Ltd) and Mr Robbie Marshall (Cardno MBK) discussed the revised earthworks program with Mr Raymond Musgrave and Mr Gary Smith of Tweed Shire Council. It was agreed at that meeting that the revised method has merit and that the consent could be modified to facilitate the revised proposal.

Subsequently, on the 19 June 2003, Mr Gary Smith advised that the proposal arguably comes within the scope of Section 96(1A) of the Act (minor environmental impact) in which case advertising and notification is not required.

The Earthworks Management Plan (Revision C dated 10 April 2003) as approved by Tweed Shire Council covers the handling of the substantial amount of material to be undertaken on site, the hydraulic importation of sand from an off-site source and the placement thereof on site, identifying and preventative management of all adverse environmental impacts that may be caused by moving large quantities of material and corrective actions to ensure compliance to the Environmental Management Plan.

Subsequent to the approval of the above mentioned management plan, the scope of works with regard to the on site borrow to fill changed to the extent that significantly larger borrow pits than were originally envisaged will be created on site to be later backfilled with hydraulically imported sand. Due to these changes the handling of material on site during the two of the six stages differs from that contained in the approved Earthworks Management Plan.

This addendum to the approved Earthworks Management Plan serves to identify the revised material handling requirements, the possible environmental impact associated with large and deep borrow pits and the management of these variables within the parameters set in the approved Earthworks Management Plan.

Cardno MBK

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SALT DEVELOPMENTS PTY. LTD.

C/O RAY GROUP PTY. LTD.

SALT - SOUTH KINGSCLIFF

SCALE :- 1 : 4000 A3
DATE :- FEBRUARY 2003 Rev B
DRAWING No.
7083/1/8-FIG07 B

It is clear that as early as May 2003 the proponent had been discussing amendments to the consent and it is likely that the proponent's engineers had already drawn up the proposals some two months before consent was granted.

While Mr Wylie appears to have directed his concerns towards the role taken by proponents it is appropriate to consider the role of the councillors and staff regarding amendments.

Issues to do with amendments also arose with the Penny Ridge Resort. Dr and Mrs

Wright listed major changes to the Penny Ridge Resort, which adjoins their property:

We will briefly list some of the major changes:-

a/. Forty-seat restaurant becomes one hundred and forty seat restaurant and conference centre, (Sunday Mail 08/08/04 – Item 4).

b/. Private Golf Course for use of resident guests become Public Golf Course with Pro Shop and Buggy Shed.

c/. Units, which were originally designated as tourist accommodation, are presently advertised for sale, ($265,000.00), on public notice boards.

It is our opinion that the, "winery", Development was a devious way of achieving a housing development, (see Sunday Mail article 08/08/04 – Item 4), ie the subject of Penny Brothers first application to Council.

Submission 271

While these changes did not simply arise from amendments made to the original consent, council's file is littered with applications to amend the various approvals that were given.

Councillor Boyd was moved to write (**submission 360**):

Dear Commissioner,

Tweed Shire Council Commission of Inquiry

This development at Carool appears to have lived a charmed life, because of what seems to be protective consideration being given by one or more Councillors.

Local people who have suffered adverse impacts from this project are too frightened to take action against the owner because they fear retribution.

I feel this development from its commencement to the present time should be closely examined and investigations undertaken to ascertain whether there is in fact some connection with a Councillor or Councillors.

Yours faithfully,

Cr Max R. Boyd A.M.
26/1/2005

All this, despite what appears to have been a flagrant disregard for council's planning processes, as evinced in the staff reports attached to the submission (**submission 360**).

In this instance, as suggested by Councillor Boyd, the proponent found support in the majority councillors, with an apparent disregard for both the concerns raised by staff, and a significant history of illegal works and non compliance with consent conditions.

Mr Penny, the proponent, provided a written submission to the Inquiry promoting the councillors and attacking staff.

The value that might otherwise have attached to this submission was promptly dismissed when Mr Penny gave evidence at the Inquiry. His evidence only gave support to the view expressed by Councillor Boyd; the applications had led a charmed life.

The Nor Nor East development is another development perceived by many residents to have obtained favourable treatment by the majority councillors.

The Kingscliff Ratepayers and Progress Association wrote:

Entry/exit into NorNor East is a great example. The developers (Resort Corp) have DA approval to build and entry/exit into their carpark at the rear of their site (32-34 Marine Parade) on Hungerford Lane which is a one-way lane. The size of the approved driveway will allow cars to have defined entry/exits that will improve use and safety.
This 6 metre (approx.) access has been built as a 4 metre access. The developer is seeking approval for this non-adherance to the DA approval. The developer is, among other things, arguing for approval due to the sloping terrain. The slope of the lane has not altered.
The effect of a narrower driveway will further compound the problems for the other users in the lane.
KRPA and the community believe that the developer is hoping for a "well, its already there; and would cost a lot of money & time to replace it; and it shouldn't matter too much" argument from the pro-development councillors.
KRPA believes the construction should be removed and that approved 6 metre driveway be constructed in its place in accordance with the DA approval.

Submission 282

If Resort Corporation had undertaken the works in accordance with the approved plans, the amendment would not have been necessary.

Further problems arose with the SALT development. At the time Mr Webster SC gave his advice on the proposal to extract fill on the SALT site, the Ray Group's consultants were advising that:

"Approximately 100,000 m^3 of cut and fill is proposed on site" (**Letter Darryl Anderson Consulting 21/11/02**).

The summary of proposed earthworks volumes attached to the Cardno MBK report forming part of the modification discussed earlier in this part contains the following reconciliation of the cut:

RECONCILIATION OF CUT	
Cut Area	**Total Volume**
B1	200,000
B2	180,000
B3	59,000
S5	68,000
1A3	27,000
S-W Contaminated	139,000
S-W Clean	5,000
TOTAL CUT FROM SITE	**678,000**
DREDGE	772,000
TOTAL INCLUDING DREDGING	**1,450,000**

On any view, this change from 100,000 m^3 to 678,000 m^3, an almost seven fold increase, should have thrown up concerns.

If there were concerns, they were certainly not evidence in Mr Musgrave's report:

INTER-DIVISIONAL MEMO

This document is

TO : Coordinator Development Assessment

FROM : Coordinator Development Engineering

SUBJECT : SALT Development - Section 96 application for bulk earthworks

FILE : DA02/1422

DATE : 15 August 2003

[L12R0103.DOC]

Background

The applicants have submitted a S96 application to modify the ***Earthworks Management Plan*** associated with the bulk earthworks for the SALT development at South Kingscliff.

The proposed change relates to the time schedule associated with the importation of dredged sand and the relocation of borrow sand excavated on site.

The applicants propose to increase the volume of sand taken from borrow pits B1, B2 and B3 as shown on Figures No. 09A (04-02-03) and 10A (20-6-03) to provide fill for the residential allotments located in the northern half of the development. In the original proposal the applicant intended to fill this area using dredged sand.

The applicants then propose to backfill borrow pits B1, B2 and B3 using dredged sand.

It is understood that the primary reason for increasing borrow pits B1, B2 and B3 is to bring forward the construction time for the residential allotments located in the northern half of the site. The applicants advise that it is likely to take 6 to 8 months for the construction of the dredge pipeline. Filling from borrow pits B1, B2 and B3 can occur as soon as approval is granted.

The Proposal

As shown on Figure No. 09, revision B the applicants propose to haul 100,000m^3 of sand from borrow pit B1 to fill stages 1A1 and 1A2 and 160,000m^3 from borrow pit B2. The excavation from borrow pit B1 will necessitate the crossing of the deviation road. The applicants expect the excavation of B1 to be completed within 15 working days with a truck crossing the road every 51 seconds. The applicants advise that the net impact on traffic flow will be a requirement for two(2) cars to que each time a truck crosses.

Comment

It is considered that the method used by the applicant to determine the que length is **incorrect.** Fortunately, the car que length of two(2) cars which the applicants have determined is correct.

The proposal has several advantages and several disadvantages from a public interest perspective.

Advantages

- Improves the management of the dredge conveyance water since the dredged sand will be confined to pits B1, B2 and B3.

1

- Improves the management of the potential impacts associated with acid sulfate soils and water pollution.

Disadvantages

- Potentially increases the generation of dust along the haul route.
- Impacts on the traffic flow of Casuarina Way at the haul route crossing point.
- Potential impacts to the ground water system.

On balance, it is considered that the S96 application should be supported however appropriate conditions of consent should be imposed.

Proposed Condition

The following condition should be included on the modified consent;

Prior to the commencement of works the applicant shall submit to Council a Traffic Management Plan addressing the following issues;

1. *Road signage in accordance with the RTA – Traffic Control at Work Sites.*
2. *Identifies when the Traffic Controllers will stop vehicles travelling on the deviation road before the haul trucks approach. As a minimum this should occur 10 seconds before the haul truck reaches the road pavement.*
3. *The plan should clearly identify that no haulage shall occur without accredited traffic controllers regulating traffic flow on the deviation road.*
4. *The plan shall require the stoppage of the haulage trucks if six vehicles are qued at any one time. Once the que has returned to two(2) vehicles the haulage trucks may continue.*
5. *The plan shall require the installation of two temporary signs advising motorists to expect delays between nominated dates and times. The sign shall be installed one(1) week prior to the commencement of works and shall be erected on Dianella Drive and on the northern approach to the bridge over Cudgen Creek. All writing on the signs shall be a minimum of 100mm in size.*

Recommendation

That the s96 application to modify the bulk earthworks program be approved subject to the inclusion of the above condition of consent.

Raymond Musgrave
Coordinator Development Engineering

Mr McGavin, who prepared the report to council, was similarly, unconcerned, drawing from the application and reporting:

(a) (i) The provisions of any environmental planning instrument

Tweed Local Environmental Plan 2000

The proposal is permissible with consent. The amendment does not alter the statutory assessment or requirements that were considered by Council during

the assessment of the subdivision approval. The issues raised by the Tweed LEP, the North Coast REP and relevant SEPP's are not altered by the amended application.

…

(b) The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality

The impacts of the altered earthworks procedure are substantially the same as the approved procedure.

Acid sulphate soil, groundwater, dust, and revegetation will all continue to be managed and monitored. The development consent contains conditions covering these issues.

…

(d) Any submissions made in accordance with the Act or Regulations

The application was referred to the Department of Infrastructure Planning and Natural (DIPNR) Resources, NSW Fisheries, and the Environment Protection Authority. No objections are raised by any of the Government Agencies.

It should be noted that DIPNR initially raised significant issues regarding the amendments however a meeting was held between the proponents, their consultants, Council's Officer, Councillor James and DIPNR Officers and the matters were resolved.

The issues primarily related to the consistency of the amended plans with the approved plans.

The application was notified in accordance with Council's Policy on two occasions. The altered haulage/traffic arrangements were not originally proposed accordingly these amendments weer subsequently notified.

Four submissions were received. Two of the submissions are from the same individual The second of these submissions is a response to the applicants response to the first submission.

The submission from the Kingscliff and Tweed Coast Business Association supports the proposal.

The issues raised in the submissions mainly related to consistency of the amended plans with the approved plans in the vicinity of Cudgen Creek. The abovementioned meeting resolved these issues.

Other issues raised in the submission relate to the impact of the borrow pits on

Cudgen Creek, management of tailwater, and acid sulfate soil. All of these issues have been dealt with comprehensively in the assessment of the original application and the development consent conditions. Management of these issues is not altered by the proposed amendment other than some improvement to the control of tailwater.

(e) Public interest

It is considered that an improved construction method and shortened construction time is beneficial and is in the public interest.

Importantly, he raised no question regarding the advice that had been given by Mr Webster SC nor did he raise any concerns whether the application could be dealt with under section 96.

These issues were raised with Mr McGavin during the Public Hearings. He provided the following responses:

MR BROAD: *Can I lead off with a couple of questions? Do I take it that somewhere shortly after you arrived at the council you became involved in the development application for the Salt development?*

MR McGAVIN: *That's correct.*

MR BROAD: *That had been dealt with in about April that year.*

MR McGAVIN: *Thereabouts, yes.*

MR BROAD: *And in about June Council was called upon to consider an application under section 96 - - -*

MR McGAVIN: *Yes.*

MR BROAD: *- - - of the Environmental Planning Assessment Act. Were you involved in that process?*

MR McGAVIN: *Yes.*

MR BROAD: *Now, in dealing with that process did you have regard to the history of the file in respect of the Salt development?*

MR McGAVIN: *Yes.*

MR BROAD: *It was an application which sought to change the area of the sand borrow pit and also its depth. Do you recall that application?*

MR McGAVIN: *I do; that's correct.*

MR BROAD: *I think, ultimately, the application was approved by Council.*

MR McGAVIN: *Yes, it was.*

MR BROAD: *In the course of looking at that matter did you have regard to the advice given to the Council by Mr Webster, a barrister of Sydney?*

MR McGAVIN: *I can't recall specifically.*

MR BROAD: *Mr Webster had given the council some advice which suggested that the initial proposals associated with the Salt development may involved designated development.*

MR McGAVIN: *Okay.*

MR BROAD: *Do you recall seeing that advice?*

MR McGAVIN: *I remember the debate about whether the Salt development had a designated development component or it could be classified as designated development.*

MR BROAD: *There were two components in the argument from Mr Webster: one is the re-mediation of the former sand mining tailing was done; and the other related to the amount of sand which was to be excavated on site and used elsewhere. Did you have any regard - - -*

MR McGAVIN: *I knew that at the time there was similar cases going about whether a designated development - if a component of an application is designated development or part of the application may trigger designated development, that it didn't necessarily mean that the whole application became designated development. So if it was only a component of a larger proposal, then it didn't necessarily trigger designated development provisions for the whole development.*

MR BROAD: *Did you consider whether the increase in the area of the depth - and I think you will find it's probably about five and a half times the volume of sand that was previously proposed to be taken from that borrow pit - would potentially trigger designated development?*

MR McGAVIN: *Yes, there's a lot to consider when you're looking at a section 96 application.*

MR BROAD: *My question is a factual question, not whether - the matters you have to consider. The factual question is whether you did consider it.*

MR McGAVIN: *I would have considered that, along with whether it required a fresh application as well.*

MR BROAD: *Do you recall whether you reported to Council on that?*

MR McGAVIN: *No, I don't think I reported to Council on that specific matter.*

MR BROAD: *Section 96 gives a power to a council to modify a consent - or to a consent authority to modify a consent in certain somewhat limited circumstances. Have you been called upon to consider the extent to which those circumstances apply?*

MR McGAVIN: *Yes.*

MR BROAD: *On a number of occasions?*

MR McGAVIN: *Yes, the threshold test of whether it's substantially the same development.*

MR BROAD: *And in considering, say, a significant increase in something like a borrow pit, what sort of tests do you apply?*

MR McGAVIN: *I think there's probably two that you look at initially. It's the quantitative assessment: the numbers, the amount and those types of things; and also the qualitative assessment as well: what is the nature of the change and what's the outcome of those changes, how would that development be changed in a character-type - looking at its character in relation to the changes.*

T. 3/3/05 p. 841-843

The report to council is, at best, superficial; it suggests an entirely inadequate consideration of the amendment.

Mr Musgrave, another staff member, also similarly gave evidence during the Public Hearings. Mr Musgrave was asked questions regarding his role in the SALT application and whether there were, from his perspective, concern regarding the borrow pits from which the on-site fill material would be taken. He gave the following evidence:

MR BROAD: *Excavation of the site, the borrow pits?*

MR MUSGRAVE: *The borrow pits, yes, they were - we were concerned about the impact on the ground water table from an engineering point of view but after discussions with ..... in those days, or was it DIPNR – I can't remember - the Department that is involved with water resources, they assured us at the end of it that they were comfortable with intercepting the water table.*

MR BROAD: *So you relied on their expertise?*

MR MUSGRAVE: *In relation to borrow pit, yes.*

MR BROAD: *Yes. Subsequently, there was a section 96 application in respect of Salt. That came two months after the approval was granted. That 96 application substantially changed the proposal in respect of the excavation of sand on site?*

MR MUSGRAVE: *It was some time ago and I think there's probably been 40 or 50 section 96 applications but I do recall that - and I can remember being rather smug about the fact that there was a 96 application coming in so soon after we'd just spent many hundreds of hours processing the application and a very short period after that a 96 application came in and we pretty much had to go back and reassess the proposal because I think it was significant. They were talking about those large borrow pits.*

MR BROAD: *They were talking about piping in sand from a different source. I think it was the bolster source.*

MR MUSGRAVE: *Yes, there were two or three pits, I think, they tried on various occasions.*

MR BROAD: *And that was a hydraulic delivery?*

MR MUSGRAVE: *That was hydraulic, yes.*

MR BROAD: *It also provided for a very large expansion of the borrow pit.*

MR MUSGRAVE: *Yes.*

MR BROAD: *It went from 4.5 hectares to 11.5 hectares from my recollection.*

MR MUSGRAVE: *Yes.*

MR BROAD: *And it also went from three metres depth to 6.5 metres deep.*

MR MUSGRAVE: *Yes.*

MR BROAD: *Did the additional depth compound the ground water concerns?*

MR MUSGRAVE: *Again, it wasn't something that I necessarily concerned myself with too much because I relied on the advice from the Department of Water Resources, the experts in that area. From an engineering point of view, it didn't really matter. It didn't really matter providing the sides of the borrow pit were stable and providing people couldn't get access to it and providing the pit was filled up which they are subsequently doing now by hydraulic placement in the correct manner.*

MR BROAD: *You simply relied on the DEC, did you?*

MR MUSGRAVE: *When it came to water resources, yes, intercepting of the water table.*

MR BROAD: *So, your view is that that really didn't throw up any more great issues?*

MR MUSGRAVE: *Not for myself, no. I mean, I - - -*

MR BROAD: *Was it fair to say the proposed change relates to the time schedule?*

MR MUSGRAVE: *Yes.*

MR BROAD: *That's all it was?*

MR MUSGRAVE: *Yes, as far as I was aware, they, as in the Ray Group, wanted to bring forward their construction program and, in order to do that, they needed to obtain more fill material from the borrow pits and that's what they did. They removed more material from the southern borrow pits, took it up to the northern section of the development to complete the residential component.*

MR BROAD: *So, it's just a physical activity. The fact that it was deeper when you previously had concerns about effect on the water table - - -*

MR MUSGRAVE: *Yes. Well, again, we went to Water Resources and after - they deliberated. They certainly deliberated long and hard on the matter and the conclusion they came to was that it was okay. In fact, the water table, I think, from recollection, they were in most cases just above the water table, in most cases. They hadn't actually intercepted the water table and, from recollection, I think imposed some fairly strenuous conditions about intercepting the water table. I can recall at one stage I asked for a Ident survey to make sure that they actually hadn't done that, they hadn't actually over-excavated the pit because probably as we all know that it's quite a large hole in the ground. It's an enormous hole and I'm pretty sure - I'd have to check the file but I think they hadn't done that. They hadn't actually exceeded their depth requirements.*

MR BROAD: *I may have missed but I didn't record having seen any advice - - -*

MR MUSGRAVE: *From the - - -*

MR BROAD: *- - - in respect of the hydraulic concerns, the water table concerns?*

MR MUSGRAVE: *From myself - - -*

MR BROAD: *No.*

MR MUSGRAVE: *- - - requesting the Ident survey?*

MR BROAD: *No, from the Department, DIPNR, or whoever it was?*

MR MUSGRAVE: *I'm sure there must be something.*

MR BROAD: *I may have missed it.*

MR MUSGRAVE: *Yes, I'm sure there's - - -*

MR BROAD: *In which case I'd certainly welcome it.*

MR MUSGRAVE: *Yes, I'm sure there is some correspondence from them in relation to the watertable question because it was quite a large issue at the time, quite a large issue. The concerns were firstly the excavation and the potential to intercept the watertable and their other concern was if they proposed to go via hydraulic transportation method, what impact would the salt water or the fresh water at the time have on the underground aquifer so they were the two concerns that they were struggling with and the consultants working on behalf of the Ray Group were able to satisfy them that the watertable would be okay.*

MR BROAD: *When you wrote a memo on 15 August 2003, you don't appear to have made any mention in respect of their advice.*

MR MUSGRAVE: *The advice may not have come to me. It may have gone directly to Lindsay McGavin who was processing the application.*

MR BROAD: *You only simply raise a proposed condition in respect of signage and some other work.*

MR MUSGRAVE: *Signage, the quality of the fill in terms of the level of testing.*

MR BROAD: *No, it doesn't raise that.*

MR MUSGRAVE: *It doesn't raise that?*

MR BROAD: *That's why I'm a bit surprised.*

MR MUSGRAVE: *Well, there's certainly conditions of consent requiring a certain filling on site. It's probably to a Level 1 standard.*

T. 9/3/05 p. 1113-1117

In fact, Mr Musgrave was only then dealing with an application to enlarge and to deepen the borrow pits, as is clear from the content of his memo.

Mr Ainsworth, an Environmental Health Officer employed by council also had a role in reviewing the applications. Despite his assurances given in his evidence at the Public Hearings, set out below, the file contains a memo summarily dismissing any concerns.

MR BROAD: *Yes. Now, were you called upon to look at a modification of the Salt development shortly after its approval? This is one where they were seeking to increase the depth of the cut section and the size of the cut section.*

MR AINSWORTH: *The bulk earthworks plan?*

MR BROAD: *Yes.*

MR AINSWORTH: *I would have provided comment on that section 96 problem.*

MR BROAD: *The alteration to the bulk earthworks took it from a depth of 3 metres to a depth of 6.5 metres. Would that throw up any environmental issues?*

MR AINSWORTH: *Is that the depth of excavation or - - -*

MR BROAD: *Depth of - - -*

MR AINSWORTH: *- - - the depth of fill?*

MR BROAD: *No, it was the depth of excavation. Would you like me to get the MBK report?*

MR AINSWORTH: *Probably not. It would throw up environmental matters about in that particular subdivision the depth of excavation you mentioned: potential disturbance of radioactive residues, acid sulphate soils, ground water disturbance would be the ones that are immediately apparent to me.*

MR BROAD: *Would you expect there to be some supporting document that dealt with the potential environmental effects to accompany the section 96 application?*

MR AINSWORTH: *A statement of environmental effects. In some cases an EIS: not particularly for that one but sometimes an EIS would be triggered.*

MR BROAD: *Would you anticipate that it would give an indication of ground water levels?*

MR AINSWORTH: *Definitely.*

MR BROAD: *Would it give an indication? Would you expect that it would have some sort of bore holes that would provide some indication of what might be under that surface at greater depth?*

MR AINSWORTH: *Yes.*

MR BROAD: *And would you expect an EIS on that sort of matter?*

MR AINSWORTH: *Not necessarily. I'm not 100 per cent certain what you're asking me. But if they wanted to increase the depth of excavation, there might be a lot of extra questions that council would ask of them. Extra information that council may require, yes.*

MR BROAD: *It wouldn't be usual to simply dismiss the matter without having any concerns?*

MR AINSWORTH: *Definitely not.*

T. 2/3/05 p. 709-711

SALT Development - DA 02/1422

Lots 194, 301 and 312 DP 755701, Coast Road, South Kingscliff

Section 96 application

Due to time delays in establishing pumping line for introduced clean fill sand material, proponent wishes to modify consent to permit additional borrow material to be derived from the development site for the resort development.

The borrow pits will be filled later when the fill pipeline is established.

The applicant is requesting modification to two conditions which will then require compliance with the existing approved Revised Earthworks Management Plan and the amendment / addendum to that document which provides for the use of borrow pit fill from the site.

Acid sulfate soils are required to be tested and managed in accordance with the *Acid Sulfate Soils Management Plan SALT, South Kingscliff (Rev. C Cardno MBK, March 2003)*. This plan basically provided for the testing of materials disturbed below 5m AHD on the western part of the site. The submission notes that all material from the borrow pits will be tested in accordance with the approved management plan. This is considered satisfactory.

The major proposed borrow pit is on the eastern part of the site and remote from the major radiation dump area. However suitable conditions have previously been applied requiring the testing of disturbed materials and post earthworks certification of the site (*Detailed Site Radiation Investigation Report & Remediation Action Plan SALT, South Kingscliff (Rev. B Cardno MBK, March 2003)*). This matter is also considered to have been reasonably addressed.

Therefore no objection is raised to the proposed modification to conditions 20(a) and 52 as outlined in the submission.

Peter Ainsworth

10 July 2003.

Regrettably, the manner in which staff were to carry out their duties is further highlighted in their dealings with section 96 applications affecting SALT.

Senior staff, comprising Dr Griffin, Mr Hodges and Mr Smith gave evidence of council's policy to obtain legal advice given to the council. Dr Griffin and Mr Smith emphasised the adherence to such advice when reporting on development applications:

MR BROAD: *We spoke earlier about the independence of councillors when reporting to meetings. Where legal issues arise, and I'm not talking about where court proceedings are contemplated, is council's policy to accept its legal advice?*

DR GRIFFIN: *For the most part. It hasn't been accepted on every occasion. It has been challenged or there's been a request for another legal opinion or an opinion to be sought from a barrister or the like, but - - -*

MR BROAD: *So, in the absence of that, legal advice would be accepted at face value?*

DR GRIFFIN: *Yes.*

T. 16/2/05 p. 127-128

MR HODGES: *No, I've got very competent staff in the development assessment area. Whenever I've been uncertain about anything I've always got legal advice. There's been some controversial issues since I've been there. Anything that's been - that I wasn't certain or I we weren't certain of, the staff, I'd go to get legal advice on.*

T. 18/2/05 p. 314

MR BROAD: *Now, in respect of reporting, just another question. Council frequently appears to obtain advice from its legal advisers. Is that advice accepted generally in reports?*

MR SMITH: *In relation to the development applications - - -*

MR BROAD: *Yes.*

MR SMITH: *- - - which I have been involved with, we would recommend our own legal advices to the position it should take.*

MR BROAD: *Are there instances when that legal advice is not accepted? Their recommendations?*

MR SMITH: *Oh, there would be some instances where the council, in their consideration, may not have necessarily have agreed with that.*

MR BROAD: *What about in the reports?*

MR SMITH: *I'm not - I can't recall any instances where our reports have gone against our legal advice.*

T. 24/2/05 p. 528-529

Council's solicitor often prompted staff and councillors regarding the legal advice given by his firm in his questions during the Public Hearings. In fact it was perhaps his sole contribution.

Mr McGavin was to put forward a similar view to the other members of staff when he gave evidence:

MR BROAD: *If you have concerns, when dealing with a section 96 application, as to whether it falls within the provisions of section 96, is it something you may take legal advice on?*

MR McGAVIN: *Certainly, yes.*

MR BROAD: *And having obtained legal advice, would it be normally given effect to?*

MR McGAVIN: *Yes.*

MR BROAD: *Would you, preparing a report, disregard or argue against legal advice given to the Council?*

MR McGAVIN: *No, not usually. No, I wouldn't. I would usually follow - - -*

MR BROAD: *Do you recall any instance where you have?*

MR McGAVIN: *No.*

T. 3/3/05 p. 843-844

On 1 July 2004 council's solicitors had given a lengthy advice addressed to Mr Hodges, Mr Smith and Mr McGavin indicating that in their view an application that would increase the density of the SALT development by 37% was not an appropriate matter for the council to deal with under section 96. The full text of this advice is set out earlier in this part.

The report to council's meeting of 18 August 2004, which appears to have been prepared by Mr McGavin reviews the advice given by Mr Smith:

Council's legal advice points out that the original development application with the master plan was fundamental to the approval and the change from medium density lots to single residential lots cannot be considered to maintain substantially the same development as approved.

The Salt development has been controversial with some sections of the community and on this basis the proposed Section 96 planning mechanism to amend the Salt Masterplan was forwarded to Council's solicitors for advice. Council's solicitors have advised that the Section 96 planning mechanism is not appropriate in this instance, however, they also concurred with the applicants barrister that Council can take a different view on the facts of the application and approve the application.

The issue is a difficult one in that the advice provided by Council's solicitors is normally followed rather that the advice submitted by the applicant for development proposals.

In this instance there is unlikely to be many objections to the proposed change

from medium density development to single dwelling allotments particularly given there is not a significant change in the overall population density of the development. The point being that if a new development application was lodged for the changes now being sought it is considered that it would be recommended for approval. The applicants concern that any new development application has to be referred to the State Government for approval with substantial inherent delays in not a valid planning consideration. Nevertheless, the Salt development is a major development with significant tourist implications for the Shire.

While the report had flagged the effect of the legal advice given by council's solicitor in the summary of the report, its effect was to be subsequently dismissed in the body of the report.

Mr McGavin misrepresented the effect if what was being sought when he stated "…given there is not a significant change in the overall population density of the development."

The Ray Group was seeking to increase the residential population from an original 1409 persons to 1937, 37%. To suggest that this is not "significant" misrepresents the truth.

3.5.3 Master Plans

At the time that this Inquiry was announced, the council had been grappling with an application to increase the density of the residential component of the SALT development by nearly 40%.

On 15 December 2004 council passed the following resolution:

TWEED SHIRE COUNCIL
MEETING TASK SHEET

For Meeting held on Wednesday 15 December 2004

User Instructions

If necessary to view the Agenda Item, double-click on 'Agenda Report' (blue hyperlink above).

Resolved Items Action Statement

Action is required for the following item as per the Council Resolution.

TITLE: [PE] Progress Report for the Section 96 Application DA02/1422.18 for an Amendment to Development Consent DA02/1422 - SALT Development

RESOLUTION:

Cr B J Carroll
Cr M R Boyd

RESOLVED that :-

1. Council notes that the applicant has withdrawn all elements relating to density issues from the Section 96 application to amend the Masterplan for the SALT development

2. A memo be prepared on matters remaining within the Section 96 application so that Councillors may decide whether these matters can be resolved under delegated authority by the Director Planning & Environment.

FOR VOTE - Cr Polglase, Cr Murray, Cr Bell, Cr Lawrie, Cr Holdom, Cr Carroll, Cr Boyd, Cr Dale, Cr James
AGAINST VOTE - Cr Brinsmead, Cr Beck

While that part of the section 96 application had been withdrawn, it was not to be the end of the matter.

In withdrawing that part of the application, the proponent's consultant was to write:

Modification of Development Consent No. 02/1422 – Salt 473 Lot Subdivision

Further to our discussions today we confirm that we hereby amend our modification application dated April 2004 (amended October 2004) to delete reference to Amendments to Conditions 1 (a) and 2 relating to the Master Plan. This amendment is made on the basis that Council will confirm in writing that the yields shown on the Amended Master Plan Reference No MP-003 dated October 2004 comply with the requirements of Clause 53 and Schedule 3 of Tweed Local Environmental Plan 2000, in relation to the residential/tourist resort ratio.

We also confirm your undertaking to advise Council tonight that in light of this amendment you will be prepared to determine the Amended Section 96 Application, which now only related to the subdivision layout, under your current delegation of authority.

Please do not hesitate to contact Darryl Anderson should you require any further information in relation to this matter.

This letter was promptly followed by a letter from the Ray Group, dated 21 December 2004, set out below:

I write in regards to recent meetings, correspondence and advice from Stacks Solicitors in regards to the status of the Master Plan for the Salt project in regards to the formal approval process for Development Applications through out the Estate.

Separate to the current Section 96 Amendment to the Subdivision Approval DA 02/1422 currently before Council for assessment\approval, we request Council's urgent written confirmation that the revised Concept Master Plan (Product Key Plan 4267-19-0 dated October 2004, MP-004, as produced by ML Design) as already submitted to Council, complies with the enabling clause in Tweed Shire LEP 2000 that relates to the Tourist Resort Unit\room versus Residential Dwelling mix\ratio.

To support our submission, we confirm that the Concept Master Plan contains:-

- 911 Tourist Resort units\rooms within the already approved Outrigger and Peppers Tourist Resorts, plus the proposed 247 room Resort located on Stage 2A of the project.
- 910 Residential dwellings including all Residential A lots and proposed medium density apartments located on Stages 1A3\7A1, 3A, 5A, 6 and 8.
- Therefore the eventual total yield of the project based on its completion in accordance with the Concept Master Plan will produce one (1) more tourist room than residential dwelling.

The details of the exact mix and ratio of Tourist Resort units\rooms and residential dwellings has been provided to Council in a spread sheet accompanying the Master Plan and Section 96 Amendment Application.

We clearly understand that the future development of the third tourist resort on Stage 2A and the medium density apartments on the other five medium density sites are all subject to:-

- Council's approval of the Current Section 96 Amendment to the Subdivision DA 02/1422.
- Individual development applications and approvals to and by the relevant consent authority for the six sites in question.

We trust that this request is clear and we look forward to a rapid response from council, and should you have any further queries about this request, please do not hesitate to contact the writer.

If the propositions put forward by the Ray Group were accepted, the conditions of consent providing:

FUTURE DEVELOPMENT

1. Pursuant to Section 80(4) of the Environmental Planning and Assessment Act 1979, further development of Lots 169, 171, 172 and 220 for the purpose of tourist resorts with associated and related uses and facilities shall be generally in

accordance with the Concept Master Plan prepared by McKerrell Lynch Architects dated August 2002. Further development of lots shall not be carried out except by means of further development consent or consents.

2. Pursuant to Section 80(4) of the Environmental Planning and Assessment Act 1979 further development of Lots 177, 191, 238, 245, 256, 310, 311, 312, 340, 345, 349, 373, 423, 465 & 466 for the purpose of multi-dwelling housing with associated and related uses and facilities shall be generally in accordance with Concept Master Plan prepared by McKerrell Lynch Architects dated August 2002. Further development of these lots shall not be carried out except by means of further development consent or consents.

would be meaningless.

Mr Broyd, who had left the council by this time, conceded in his evidence:

MR BROAD: *The Salt development proceeded upon the basis that there was a master plan which formed the basis of its approval. In your view, what emphasis should be placed on a master plan?*

MR BROYD: *A master plan, as such, does not have legal status to be adhered to unless it is embodied in a condition of consent in a certain way. But that - a master plan outcome should have embodiment in a development control plan to give it legal weight as an ultimate desired outcome, if you like, given you've got a staged development occurring over a number of years. So whilst the master plan may not have any legal right in its own entity, it really should have some legal basis as that expression of design outcome long-term for the staging of the development to be consistent with.*

MR BROAD: *In considering an overall application for subdivision, do you consider the various aspects, such as density of development?*

MR BROYD: *Yes, you should, yes.*

MR BROAD: *If a master plan is not embodied into consent conditions, how do you then control issues such as density?*

MR BROYD: *If it is not embodied legally in a condition of consent, if it is not embodied in a development consent condition, if it not embodied in a development control plan, then it really comes back down only to the merit assessment of the applications that form the later stages, within which I presume density would be sought to be ..... And that - - -*

MR BROAD: *So, what, '96 applications or something?*

MR BROYD: *Sorry?*

MR BROAD: *Such as '96 applications?*

MR BROYD: *Well, depending upon the original DA and what that provides for and whether it's substantially different and so on, yes. I'm aware that there is this issue*

running over Salt. The details of that issue I'm not aware of. But it really comes down to the merit of the outcomes you're trying to establish in the end and how that is formalised in the initial approvals and reports to Council and policy expression. But if it's not in a consent condition, not in a DCP, that comes down to the merit of each application in that context.

MR BROAD: *So what you might be placed with is a situation where there is no plan, there's no base from which to work?*

MR BROYD: *Well, the proponent could assert there is no formal plan to influence those later applications.*

MR BROAD: *In your view, is it important that the conditions of consent give certainty?*

MR BROYD: *Yes.*

T. 2/3/05 p. 678-679

As Mr Broyd was suggesting, the proponent was, as at December 2004, effectively asserting that there was no formal plan affecting the development. Amongst other things, the proponent was suggesting that the only density controls that affected the development would primarily be determined by their ability to attract tourist facilities. State Government policies on density ultimately overriding the potential lot yield (**T. 4/3/05 p. 910-912**).

Mr MacRae provided this succinct analysis of the council's position:

MR MacRAE: *Well, this became a very interesting and tricky situation because it was through conferencing with council and council's solicitors over this Section 96 application that it actually came to light that a master plan in itself is not binding, it has no statutory approval role. You can't get an approval for a master plan - sorry, unless it is under 71 for the Minister, which isn't relevant to this site. And hence the inclusion of the original master plan and the original development approval, whilst we considered it to be binding was, in fact, not necessarily binding and, therefore - and you probably have read stacks of letters, I guess, on advice to the council about that.*

And, therefore, in this exercise their advice to council was that the master plan shouldn't be part of this Section 96 approval and that if the Section 96 approval or application was to proceed then we should withdraw that master plan, because it doesn't hold any statutory weight.

T. 4/3/05 p. 912

The council is in a vexed position of its own making, or perhaps more correctly, as a result of its own failures.

It failed to provide a master plan for the development.

Rather, it simply adopted a plan put forward by the proponent to guide the development of the site.

It should be emphasised that this was a large and iconic site within the Tweed, having an area of 73.86 ha and an ocean frontage of 1.1 km. All previous attempts to develop the site had failed.

The EP&A Act and Regulations anticipate that master plans will de developed (**section 79C (1)(a)(iv) and 80(11)**).

Regulation 92A Provides:

Preliminary planning: sections 79C (1) (a) (iv) and 80 (11) of the Act

92A Preliminary planning: sections 79C (1) (a) (iv) and 80 (11) of the Act

(1) This clause applies to land if an environmental planning instrument made before or after the commencement of this clause provides, or has the effect of providing, that consent is not to be granted to a development application relating to the land unless:

(a) a development control plan has been approved for the land, or

(b) a contributions plan has been approved for the land, or

(c) the development application is a comprehensive development application, or

(d) there is a master plan for the land.

(2) Pursuant to section 80 (11) of the Act, a development application relating to land to which this clause applies must not be determined by the consent authority granting consent (unconditionally or subject to conditions) unless:

(a) a development control plan has been approved for the land, or

(b) a contributions plan has been approved for the land, or

(c) the development application is a comprehensive development application, or

(d) there is a master plan for the land that has been available for inspection by the public since it was made or adopted,
as the case may require.

(3) Subclause (2) does not prevent an environmental planning instrument from making provisions for or with respect to waiving the need for an approved development control plan or contributions plan, a comprehensive development application or a master plan.

(4) For the purposes of section 79C (1) (a) of the Act, the provisions of any master plan for land to which this clause applies are prescribed as matters to be taken into consideration by the consent authority in determining a development application in respect of that land.

(5) In this clause:

"comprehensive development application" means a development application that makes development proposals, in accordance with an environmental planning instrument, for all of the land identified in an environmental planning instrument as a development site.

"master plan" means a plan, whether it is referred to as a master plan, a development plan, a precinct plan or otherwise (but not an environmental planning instrument, a development control plan or a contributions plan):

(a) that makes provisions for or with respect to the development of land, and

(b) that has been made or adopted by the Minister or a public authority.

The council closely guarded its approvals and its determinative powers against what it might have perceived as an attack brought about by SEPP 71.

SEPP 71 had commenced on 1 November 2002, less than a month after the initial SALT development applications had been lodged. Relevantly, one of those applications was for the subdivision, based on the developers "master plan".

The council failed to make any attempt to enshrine the plan, only imposing conditions giving it a general but non-binding application.
SEPP 71 provides a stark contrast.

Clause 18(1) provides:

18 Master plan required before certain consents may be granted

(1) A consent authority must not grant consent for:

(a) subdivision of land within a residential zone, or a rural residential zone, if part or all of the land is in a sensitive coastal location, or

(b) subdivision of land within a residential zone that is not identified as a sensitive coastal location into:

(i) more than 25 lots, or

(ii) 25 lots or less, if the land proposed to be subdivided and any adjoining or neighbouring land in the same ownership could be subdivided into more than 25 lots, or

(c) subdivision of land within a rural residential zone that is not identified as a sensitive coastal location into more than 5 lots,

unless:

(d) the Minister has adopted a master plan for the land, including any adjoining or neighbouring land in the same ownership, as referred to in paragraph (b) (ii), or

(e) the Minister, after consulting the Natural Resources Commission, has, under subclause (2), waived the need for a master plan for the whole or a specified part of the land referred to in paragraph (d).

In short, a master plan is a pre-requisite to consent for an application like the SALT subdivision.

While there is power for the Minister to waive the need for a master plan, he may only do so in limited circumstances, relevantly, where the existing planning controls are adequate.

Again, in contrast to the process adopted by the council in respect of the SALT application, SEPP 71 requires that the master plan be adopted through a consultation process (**clause 19-22**).

Finally, SEPP 71 provides:

23 Amendment of master plans

(1) A master plan may be amended or replaced by a subsequent master plan.

(2) An amendment to a master plan may be dealt with concurrently with a development application.

It was widely reported that there was a flurry of activity in the lead up to SEPP 71 coming into force, with a large number of applications lodged in the weeks prior to its commencement.

At the same time there was widespread feeling within a number of coastal councils that SEPP 71 would undermine their determinative powers.

While the majority councillors touted their role in securing development in the shire, they, as well as the planning staff, failed to put in place sufficient controls to ensure that the "vision" was carried into reality.

Really, the provision of a binding master plan to serve as the cornerstone of the SALT development was not so great, it only required that the council facilitate development through a DCP.

The Council appears to have conceded that the master plan is not binding. It either ignores or hides concern over the effect of this.

When there was a request to waive the Casuarina Beach master plan, the EPA expressed its view of the importance of a master plan as follows:

> A Masterplan provides the necessary framework to 'lock in' the principal elements of the sites development and ensure that the site is developed in an integrated manner. This is particularly important given the proponents proposal to submit multiple DA's for the site, which in the absence of a masterplan for the site may result in fragmented and ad hoc development.

This view is particularly applicable to the SALT development.

Perhaps ultimately this failure becomes akin to council's failures regarding DCP's generally. This will be dealt with later in this part.

3.5.4 Assuming Concurrence

As has been indicated earlier in this chapter, the planning regime in New South Wales operated at a state and a local level.

Under the regime, the state reserves a determinative role in some circumstances. This determinative role may be exercised exclusively or concurrently.

Where the powers are to be exercised concurrently, commonly where applications involve considerations under SEPP's such as SEPP 14, where a regional plan or LEP requires it or where strict compliance with development standards would prevent consent being given, they are exercised by DIPNR.

A good example arises where the proposal does not meet the planning controls applicable.

In the absence of an ability to obtain some discretion then such an application must necessarily be refused by a consent authority, despite what might otherwise be the merits of the application.

SEPP 1 was made on 17 October 1980. Its aims and objectives are:

> This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5(a) (i) and (ii) of the Act.

It prevails over any inconsistency between it and any other environmental planning instrument, and provides, relevantly:

> Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefor) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6.

The matters which shall be taken into consideration in deciding whether concurrence should be granted are:

(a) whether non-compliance with the development standard raises any matter of significance for State or regional environmental planning, and
(b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

In common with the other SEPP's, the powers are generally exercisable by DIPNR, and in the current context, by referral from councils.

As will be seen from the objectives, the policy intends to provide some flexibility in the operation of planning controls.

There is merit, both in facilitating this policy and in providing a separate review of the application by DIPNR, rather than, relevantly the council.

It is likely, if it was exercised through a central body, there would be a cohesive approach.

The Department does not provide this approach, having firstly delegated its functions and secondly, having made provision for councils to assume concurrence.

This issue was taken up with Mr Murray, DIPNR's manager, Planning and Strategy for the North Coast region. Mr Murray gave the following evidence:

MS ANNIS-BROWN: *Mr Murray, if I could just touch on – you mentioned very briefly the role of DIPNR. If I could just explore that a little bit further with you, and what I'd like to do is specifically talk about the distinctions between the role that DIPNR has - the concurrence role - and the role it has with respect to state-significant development and calling up developments where the Minister then is ultimately the consent authority. So perhaps if you could just start off from a broad role of DIPNR and then go down and perhaps we could look at those issues separately.*

MR MURRAY: *Okay. I mean, obviously, from a very broad role of DIPNR, our new charter is to manage natural resource management, planning, social and economic issues regarding land use across New South Wales. When we come down to things that fall more particularly in my area, a lot of it is administrating the role of the government through the Environmental Planning and Assessment Act, and that has - if you like, to keep it simple, it's split into two roles. One is it's plan making, which is Part 3 of the Act,*

and the other significant role that we deal within the region is a role in development approval, which is the Part 4 section of the Act.

So coming back to the more detailed parts of your question, which was the concurrence role, the Department has a role, or the Director General does through the Act which is basically delegated in a lot of instances down to my level, and in some cases down to my managers below my level. We have a role to give concurrence in accordance with local environmental plans where those plans require the concurrence of the Director General of the Department.

A good example of that would be development within what we call the Seven Zone or the Seven F Zone, which is the coastal zone, and quite often - the LEPs have a requirement at the moment that there's a concurrence role for us and they specify the matters in which we would concur under. There's also a role for the region for the Department to grant concurrence under our Regional Environmental Plan. The main concurrence provision that we have within that relates to the heights of buildings, where it specifies that if a building is over 14 metres, concurrence of the Director General or their delegate - in this case, myself - is required in certain instances.

However, the Department over the years has delegated some of those responsibilities back to council, particularly where they have done a local environmental plan that's been through a strategic planning process – you know, through the normal public exhibition process - and specifies the height that council can assume our concurrence, because the Director General has previously passed that on to the councils - can assume our concurrence role in those instances.

In some cases we do have a concurrence role under what we call State Environmental Planning Policy No. 1, which is development standards. It's where applications seek to vary a numerical development standard. In a lot of instances, those, apart from creating minimum lot sizes in rural areas and allowing dwelling entitlements in rural areas that vary more than 10 per cent, they stay with the Department. However, matters to do with floor space ratio, generally heights, setbacks in those matters can be dealt with with the councils.

In some instances across the whole North Coast, and I know from my previous experience in local government, we would often not use our assumed concurrence role as councils and they ask the Department to take on that role. So that's generally the concurrence role. The main thing to note with that is when we do issue concurrence, we are limited to the matters raised in the clause relating to that concurrence. We can't actually look at issues outside that. It actually says the things we must look at and have regard for. So does that give a general - - -

MS ANNIS-BROWN: *Yes. I just wanted to confirm with you the issues which you specified to which concurrence is limited.*

MR MURRAY: *Yes.*

MS ANNIS-BROWN: *That is specified in each individual LEP?*

MR MURRAY: *Local Environment Plan. And generally they are very similar issues, because we have a look at the - when the LEP has been drafted it comes normally through us and obviously through the Parliamentary Council, and we ask them to keep them as consistent as possible.*

MS ANNIS-BROWN: *Yes, because I was going to say who determines that, otherwise each council would ostensibly be able to limit it to the issues which they feel may be necessary, I suppose.*

MR MURRAY: *We do set some criteria within our regional environmental plan that relates to plan preparation to do with coastal foreshore areas. So we kind of have set the scene, but without directing the specific clause. We've directed the areas that we want them to look at.*

MS ANNIS-BROWN: *Just going back to the assumed concurrence, perhaps you could just elaborate a little bit more on that. You mentioned that it's again limited - or what that means is that the council may assume the DGs concurrence based on a list of matters that has already been prepared. Is that what you suggested?*

MR MURRAY: *Well, what we have done, and I can leave a copy, if you like, with the Commissioner - - -*

MS ANNIS-BROWN: *That would be good.*

MR MURRAY: *- - - is brought a copy - an instrument - or its our circular that actually spells out how council may assume that concurrence. And what it does is it says what you can't assume, and everything else falls within that. And then there's another instrument to do with our Regional Environmental Plan to do with heights of buildings that says that where you've prepared a plan and we've basically agreed with those heights as part of that plan, because it's greater than 14 metres, you can assume our concurrence as a council.*

MS ANNIS-BROWN: *So that application would not even go to the Department.*

MR MURRAY: *No. But some councils do choose to send those applications to us for comment.*

MS ANNIS-BROWN: *Right.*

MR MURRAY: *But it's a decision of the individual council; it's not necessarily a policy thing. Or in other instances, if we get a number of representations, whether it be through local members or community groups, quite often we will actually ask councils to forward us applications to have a look at.*

MS ANNIS-BROWN: *Just with respect to SEPP1, I understand that that is usually delegated to a Departmental or council officer. Is that correct?*

MR MURRAY: *That's correct.*

MS ANNIS-BROWN: *Okay. So how would that work? I mean, what proportion, I suppose, is delegated, and how do those delegations work? Again, is it a list of delegations? Who determines that list?*

MR MURRAY: *It's by exception once again so that you will find in the document I'll leave here called Circular B1. It actually spells that out: how it's in the department it's delegated through our delegations within the department. All councils have different delegations on whether the council officers, or the councillors as the elected body, may use that assumed concurrence and that from my experience varies in a number of different councils.*

MS ANNIS-BROWN: *So that would appear in the general officers delegations - - -*

MR MURRAY: *Delegations of a council whether or not they could assume - if they have got an assumed concurrence - they could use it or whether it has to be the full elected body.*

MS ANNIS-BROWN: *All right. Thank you.*

MR BROAD: *In respect of Tweed Shire Council, is the delegation to the councillors or to staff of the council?*

MR MURRAY: *I'll have to read it. Just to - - -*

MR BROAD: *You can just have a glance and tell me that.*

MR MURRAY: *It's the consent authority so in that case it's to the council - - -*

MR BROAD: *It's the council.*

T. 16/3/05 p. 1414-1417

As indicated by Mr Murray, the department has both delegated its functions and has enabled councils to avoid review by enabling them to assume concurrence.

In order to assist councils in exercising their delegation, the department has published circulars, such as B1, referred to by Mr Murray.

The effect of SEPP 1 has been largely watered down by the policy contained in circular B1, which provides:

12. In pursuance of section 81(1) of the Act, Council may assume the Director's concurrence under S.E.P.P. No.1 in respect of all applications, subject to paragraph 13, except an application:

(a) to erect a dwelling on an allotment of land zoned rural or non-urban or within the zones listed in Schedule A to this circular;

(b) to subdivide land which is zoned rural or non-urban or within the zones listed in Schedule A to this circular;

when the development the subject of the application does not comply with a development standard specifying a minimum area of land.

13. Council may assume the Director's concurrence in respect of a development application referred to in paragraph 12(a) or 12(b) but only if:

(a) only one allotment does not comply with the minimum area; and

(b) that allotment has an equal area to or greater than 90 percent of the minimum area specified in the development standard.

and, as a general guide:

4. If the underlying development is not only consistent with the underlying purpose of the standard, but also with the broader planning objectives for the locality, strict compliance with the standard would be unreasonable and unnecessary.

The circular counsels against reliance on SEPP 1 to overcome what are inappropriate standards, suggesting a need to review the relevant planning controls.

8. If the standard is clearly inappropriate in general terms, the council should review its planning controls by means of a local environmental plan. Where a local environmental plan is being prepared councils should be cautious in using State Environmental Planning Policy No.1 on the basis of the draft plan, since there is no guarantee that a draft instrument will proceed to finalisation. Repeated application of the Policy under these circumstances can bring about a de facto amendment to the plan. The policy is an administrative rather than a policy-making tool and the distinction needs to be kept clearly in mind.

Collaterally, the department has enabled councils affected by the North Coast REP to assume concurrence regarding development over 14 metres high, in coastal areas, providing:

(a) land in respect of which a local environmental plan was made subsequent to the date of this delegation and which provides planning control to development over 14 metres in height; or,

(b) land in respect of which a development control plan (D.C.P.) which specifically controls buildings over 14 metres has been approved by me and where the development complies with the provisions of that plan.

(c) land within 5 kilometres of mean high water mark and within a business or commercial zone; or,

(d) land beyond 5 kilometres of mean high water mark; or,

(e) land within the Shire of Tweed to which Tweed Local Environmental Plan 1987 applies.

It will be seen that both the form of the delegation and the circumstances in which concurrence may be assumed are very wide and, to a large degree, based on assumptions that:

- the councils have appropriate planning controls in place, and
- the powers will be exercised in a proper manner.

Given the reactive approach adopted by the council facilitating higher developments, through the revised height controls, that height is determined by reference to the height of eaves of a building and is not its overall height, and the propensity of the controlling councillors to effect their policies of promoting development, there must be considerable concern at the approach taken.

Quite simply, while the Government has seen fit to ensure independent assessment of certain applications, through the vehicles adopted by the department, namely direct and de-facto delegation of its powers, the intent has not been carried into effect.

While it does not come directly from the evidence, this may stem from DIPNR's inability to consider the applications that would otherwise be referred to it.

Mr Papps, who had been the department's executive director of rural and regional planning spoke of the Government's and, in turn, the department's interest in coastal areas, as follows:

MR PAPPS: ... *From my perspective as an officer of the agency, dealing with the minister of the day, which was Minister Refshauge, it was very clear that the government - the Carr government - had a strong and long-standing interest in coastal protection and coastal management. Professor Thom mentioned a number of initiatives that the Carr administration had introduced in its first term.*

That interest continued and it was very clear within the Department – based on both our own experience and the experience that Professor Thom was talking about in the Coastal Council and Coastal Committee, and reflected in advice to the minister, it was very clear that there was a high level of concern about coastal planning, coastal management, about the sort of tensions that were emerging in many coastal areas between development and protection, about the potential loss of coastal values, the broadest range of coastal values, economic, social and environmental. And so the government was very interested in seeing whether there were new polices, new approaches that it could choose to exercise to give a better reflection of its commitment to good, sustainable development in the coastal zone, and SEPP 71 was one of those initiatives.

T. 10/3/05 p. 1247-1248

Professor Thom, visiting professor to DIPNR, spoke of the drivers underlying the adoption of Coastal Policy as:

PROF THOM: *I think the drivers that were there then are still here now and I think reflected a lot in the continued development pressures that are taking place along the coast. New South Wales is the only State in Australia where we have development pressure in every local government area in the coastal part of the State and as such this is reflected with, I think - reflects, essentially, the strong attractiveness of the coast for people to live, recreate, play, and we've seen that in terms of a high number of investment interests that have existed both at the individual as well a corporate interests.*

So the population driver was there. It came through the '80s into the '90s. It was manifested with population growth figures of the order of 1 to 3 per cent per year for local government areas. In addition to that was consideration from a large sector of the community to protect coastal assets, for example, our beaches. There was no protection for beaches in our legislation which you want to come to in a moment. There was a strong pressure for the State to acquire more coastal land or to convert Crown lands into National Parks and during the course of the past few years as a policy of government a lot more land has been added and new National Parks acquired.

In addition the marine system, the establishment of the Marine Parks Authority, the creation of marine parks. So there was a whole, if you like, interaction between the interests of the economic drivers for provision of land for housing, provision of occupational opportunities for people to work given that in some areas there were quite high levels of unemployment.

T. 10/3/05 p. 1231

It would appear that other than direct intervention through SEPP 71, those concerns are largely being left for councils to deal with, with no departmental review.

Both Mr Papps and Mr Murray the Department's Manager, Planning and Strategy for the North Coast, gave evidence suggesting that the department was under resourced.

Mr Imrie, who had held the position of assistant regional director for the north coast region with DIPNR, gave evidence of the staffing levels of the regional branch:

MS ANNIS-BROWN: *Just to go on from there, you mentioned you had a team of staff working on these matters; development applications and the like. I'm just wondering what your resources were like. I mean, did you have enough staff to do the work at the time? How many, roughly, applications were you dealing with? Things like that.*

MR IMRIE: *I mean, I guess the true answer is: there's probably never enough staff to deal with all of the things that come across a busy, government organisation desk. But we got back and I guess - look, I'm sorry, I can't recall actual numbers. It would be some hundreds of individual matters per month that would comes across my desk, from very minor things to some quite complicated things.*

MS ANNIS-BROWN: *In terms of your staff, what sort of professional skills did they hold? You would have had environmental people, planners; what sort of skill set did they have?*

MR IMRIE: *Yes, certainly, we did. We had one or two people with good environmental skills, who were able to do - particularly, as we had responsibility for state policies dealing with coastal wetlands and littoral rainforest, and in that case, it is necessary to have people with botanical skills, to enable them to identify exactly where the boundaries are. So we had a number of people who - or one person, particularly, who was quite qualified to do that, but others who had an interest and had picked up those sort of skills.*

Some individuals - most people are qualified, I guess, with a planning degree or a geography degree or something, in the first instance, but they tend to add on things that are of particular interest to them. One of the things that was my responsibility was an amendment to the items of historic significance in the region, and that was actually handled by a person who had quite a lot of individual expertise, but he was certainly not qualified in that.

MS ANNIS-BROWN: *So just to go back, you mentioned you would have received - and this is off the top of your head - hundreds of applications per month, ranging from minor to major.*

MR IMRIE: *Yes.*

MS ANNIS-BROWN: *How many staff did you have in your teams? Did you have many teams, one team? I mean, how many staff were dealing with those hundreds of applications per month?*

MR IMRIE: *Generally speaking, a team has got about four or five people in it, and at any given time - I usually had a team that dealt with the northern part of the region, when I was dealing with this area, and if there were particular projects on, there would be a team with the right number of people to do that project in it.*

MS ANNIS-BROWN: *Okay. So you just allocated them as necessary, depending on - - -*

MR IMRIE: *So really it was, if you needed to take people off line to do whatever you were going to do, you would estimate what the time might be and you would take those people and put them in a team to deal with that particular work.*

T. 18/3/05 p. 1705-1707

Mr Imrie gave evidence of the department's role in concurrence matters and the pressures placed on the department:

MR BROAD: *How were they dealt with, concurrence matters? Were you basically reliant on Council to provide the information to you?*

MR IMRIE: *We would actually have the development applications, so whatever the developer had put together, and we had Councils view on it as well. And, essentially, I had delegation to make those decisions, yes. I would make those decisions on the basis that if it was a very complicated matter and we were probably going to say, "No", I would do that in consultation with either my regional director of an assistant director in Sydney, so - but run of the mill stuff, I mean, I would make the decision.*
I think, from memory, we have a time on that. We have 40 days to decide our concurrence, so they were a fairly high priority.

T. 18/3/05 p. 1707

MR BROAD: The other thing you just alluded to was pressure. Can you indicate in some more detail in respect of that?

MR IMRIE: *Well, look, the biggest pressure on us with concurrence things was dealing with stuff in the 40 days. That was the issue. We had a short space of time to decide whether we wanted additional information, and that needed to be done. And, say, in a complicated matter, that meant you had to spend some time on the matter, up front, to decide whether you wanted that - you know, whether you wanted that additional information, because if you didn't, then the 40 day time was running and you had to get that decided.*

T. 18/3/05 p. 1708

MR BROAD: *Was it aggravated by your relative staffing levels?*

MR IMRIE: *I don't think so, no. I mean - - -*

MR BROAD: *You have a view that you had a sufficient number of staff?*

MR IMRIE: *Yes. Look, I think there was, as I say, always more work than you could possibly achieve and, certainly, that was the story for me from the day I started until the day I finished with Planning New South Wales. There was almost always far more work than you could possibly achieve. It was a question of setting priorities and dealing with what you could and what you had to within the time lines. So - - -*

T. 18/3/05 p. 1709

Ultimately, although reluctantly, Mr Imrie was to concede that the effect of the pressure was to undermine the way that matters were dealt with:

MR BROAD: *You're sort of suggesting that there's a bank-up, that you can deal with the priority issues and leave other issues to the side.*

MR IMRIE: *Yes.*

MR BROAD: *What ultimately happens? Do you get through the other stuff or does it slip through cracks?*

MR IMRIE: *Yes, you do have to get through the others. I mean, look, I guess if you look at the history of staffing on the north coast office, when I started, it was a very small staff with far, far more work than could be possibly be achieved, and that actually lifted, I think, in the early '80s, to a grand peak, and gradually, the numbers declined after that. So as time went on, pressures were there and, I guess, if you wanted to look at the overall workload, I mean, it was always very high and very difficult to meet the numbers. But that was, essentially, my job as manager: to move staff and resources around. At one stage, towards the end of my time with Planning New South Wales, we actually employed consultants to assist us to do some of the work, and that was just because - - -*

MR BROAD: *Were you, ultimately, really economising on how you would deal with these matters, to get them out, take a, you know, necessary view, in order to keep the mill rolling, as it were?*

MR IMRIE: *Yes, I guess that's true, yes.*

T. 18/3/05 p. 1709-1710

3.5.5 Community Involvement in Decision-Making and State Agency Input

Public participation in the decisions of council is a corner stone of local government in New South Wales.

Generally, public participation is provided for in Chapter 4 of the Act, which contains the following introductory statement:

Introduction. Under this Chapter, meetings of the council and its committees are required, as a general rule, to be open to the public.
The Chapter provides for public access to information held by councils.
Apart from the provisions of this Chapter, members of the public may influence council decisions concerning matters such as the levels of rates and charges, the terms of management plans, the granting of development consents, etc (which are dealt with in later Chapters) by making submissions, including comments on or objections to proposals relating to those matters.
The Chapter also enables the council to ascertain the views of the local community on various matters through 2 types of polls which may be conducted in the area. A summary of these polls is contained in Part 3 of this Chapter.

So far as it relates to development issues, the community may be involved in the consultation process associated with the development of the planning regime or through its involvement, making submissions regarding individual applications or proposals.

This public involvement may be facilitated by:

- public membership on committees,
- community groups, such as resident or interest groups,
- individuals.

Councils are required to provide for community consultation both under the Act and under the EP&A Act. This part is primarily directed to the approach taken by council as is required by the EP&A Act.

A number of submissions raised concerns over council's processes, subsequently the Inquiry heard evidence from a number of people who had made submissions.

These submissions and the evidence subsequently given suggests a number of concerns, including:

- disregard or dismissal of community concerns,
- a failure to review and to adequately report on concerns,
- preference for the views of some groups as opposed to others.

Added to these matters, were concerns raised by government departments that their concerns were ignored and evidence suggesting that this practice, although not raised by such departments, was more widespread.

In its submission in reply, the Council (**submission in reply 96**) took issue with a number of these concerns.

One of the major issues addressed in the council's reply was that raised by Dr and Mrs Sterne.

In their submission (**submission 281**) they had written:

> We believe the Tweed Planning Department did not adequately carry out their responsibilities in the best interests of all residents in both these applications and appear to have made unreasonably biased decisions based on external influence.

Their submission was to detail concerns, in part emanating from their objection to a proposal to develop an adjoining property, proffering the view:

> Council did not reasonably address our concerns raised during the application process of the proposed neighbouring development. There were a number of significant inconsistencies, omissions and oversights by Council, which have resulted in undue stress, potential complete loss of ocean views, significant financial cost, and potential future conflict. Particularly concerning during this period was a remark made by Mr Papadopoulos, that was passed on to us, that any complaints that we made to Council regarding his development would be ignored. We did not quite know what to make of this comment at first however when we later found out who exactly was part of their consortium and what influence they may have with Council it all became clear.
>
> We believe that other interested parties adversely influenced many of Council's unprofessional actions and decisions, although blatant incompetence by Council staff is a possibility (though still not acceptable.) We have completely lost faith and any trust in the Council Planning Department representatives.

Dr and Mrs Sterne's objection to the proposed development on the adjoining property involved loss of views, overshadowing, density and other concerns.

The neighbouring application followed soon after their application to construct a two-storey dwelling and pool. The neighbouring application was described in the report to the Development Assessment Panel as:

> Council is in receipt of an application for a residential flat building comprising four three bedroom apartments. The building is two-storey in height with an open top roof terrace. are three storey in height. Basement car parking is proposed with access off Orient Lane.
>
> There are some areas of non-compliance and issues requiring specific attention that are addressed in this report, they are:

The issues for consideration were listed as:

> 1. encroachment into the building envelope.
> 2. building setbacks.
> 3. overshadowing.
> 4. roof top terrace & spa.
> 5. public submission.

Submission 281

The adjoining property, as was Dr and Mrs Sterne's, zoned 2(b) medium density under council's LEP. The objectives of this zone are:

Primary objective

to provide for and encourage development for the purpose of medium density housing (and high density housing in proximity to the Tweed Heads sub-regional centre) that achieves good urban design outcomes.

Secondary objectives

- *To allow for non-residential development which supports the residential use of the locality.*
- *To allow for tourist accommodation that is compatible with the character of the surrounding locality.*
- *To discourage the under-utilisation of land for residential purposes, particularly close to the Tweed Heads sub-regional centre.*

Submission 281

The council has adopted DCP No. 6 development control plan affecting multi-dwelling housing. There can be little doubt that this policy applies, as it has been referred to in a number of other applications of a similar nature.

Despite this, there is no reference to DCP 6 in the report to council.

Perhaps, given its aims:

The aims of the DCP are:

A1 To encourage a high quality urban design and residential amenity in multi-dwelling housing development;

A2 To promote wider housing choice and more affordable housing in Tweed Shire;

A3 To set appropriate environmental criteria for solar access, privacy, noise, vehicular access, parking and open space;

A4 To ensure that the impact of multi-dwelling housing proposals on the amenity of adjoining properties is a

prime and initial consideration of applicants when preparing their development proposals;

A5 To provide a comprehensive design oriented approach to multi-dwelling housing in Tweed Shire through a single document; and

A6 To provide a user friendly document with flexible performance-based criteria to guide development.

There are a number of other principles enunciated in the plan that, similarly, should be set out. Those relating to design elements are:

... Too often, development projects are submitted to Councils without a detailed analysis of how the development relates to its immediate surrounds, with the result that often neighbouring property owners are unnecessarily adversely affected by new development.

The key design step to establishing the development context is undertaking a site analysis. This process must consider the interests of the future occupants, the neighbours and the broader community, and allows the designer to gain a full appreciation of the site and the surrounding area. This process includes careful consideration of the opportunities and constraints resulting from various natural and man-made environmental features, both on and around the site.

The objectives of this Design Element are as follows:-

O1. To encourage development that shows "good manners" to surrounding development by considering the characteristics of adjacent sites at the outset of the design process.

O2. To ensure that site attributes and constraints are carefully considered and reflected in the design of urban housing developments.

Those relating to site density are:

An example of how a multi-dwelling housing development may achieve the site density performance criteria is as follows:-

A1. All multi dwelling housing development is to comply with a maximum floor space ratio of 0.5 : 1.

A4. The minimum landscaped area to be provided for multi dwelling housing is 30% of the site area or, the sum of the number of small and large size dwellings multiplied by the respective landscaped area required as shown in Column 2 of Table 2, whichever is the greater:-

TABLE 2

MINIMUM LANDSCAPED AREA

DWELLING SIZE	LANDSCAPED AREA REQUIRED
Small	60m²
Large	80m²

Those relating to sunlight are:

A6. Sunlight to the principal area of ground level private open space of adjacent properties is not reduced to less than two hours between 9.00am and 3.00pm on June 21. Where existing overshadowing by buildings is greater than this, sunlight is not further reduced by more than 20%.

Those relating to view sharing are:

O1. To encourage the sharing of views whilst not restricting the reasonable development potential of a site.

Dr and Mrs Sterne were to raise a number of objections to the proposed development, including:

Shadowing

1. The southern side of the building encroaches 1.5 metres into the 3-metre building line set back and the height of which also encroaches the building envelope. This will interfere significantly with our **amenity**. The developers argue that substantial areas of our dwelling and land will not be in shadow. The analysis provided by the developers is fairly superficial. It does not for example include any specific analysis of the critical elements of our property which will be shadowed (ie those areas in which we do most of our living). In particular, it will cause **excessive overshadowing** so that on 21st June the **pool**, our **main outside living area deck** and downstairs **bedrooms** (that all lie on that side of the property) will be in shadow for most of the day. Some of it will be in total shade all of the day. This does not comply with DCP #6. Furthermore the analysis needs to clearly address existing and future (following redevelopment of our property) situations. A more adequate set back and building envelope would improve our amenity and preserve our lifestyle.

Submission 281

1. We consider that the encroachment of roof into the eastern side building envelope and 3-metre building line set back would interfere with amenity (including sea views to the north) now and when we go ahead with our plans to develop units at the rear of our property at a later date.

2. In addition we consider that the roof which encroaches 1 metre into the 6 metre building line setback (on the western side) and also higher than the allowed 3 metres from ground level interferes significantly with our **amenity** and views.

Submission 281

Building envelope

- The building envelope has not been complied with (as detailed above) and this significantly affects our amenity in terms of excessive overshadowing on the main living areas of our property and also to the loss of sea views from the planned units that we will later develop to the rear of our property. We would these reviewed in order to protect our views and living areas from overshadowing.

Setbacks

- The building setbacks have not been complied with and this significantly affects our amenity in terms of privacy, excessive overshadowing on the main living areas of our property and also to the loss of sea views as detailed above. We would these reviewed in order to protect our privacy, views and living areas from overshadowing.

Submission 281

The report to council's Development Assessment Panel's meeting on 24 September 2003 contains a table setting out the compliance, or otherwise, with council's DCP's. It does not specifically refer to DCP 6.

The following comment regarding density is relevant:

Site Density	0.5:1 Floor space ratio (GFA) (474.25m^2)	0.81:1 770m^2 approx	It is generally accepted that the 0.5:1 ratio is not suited to residential flat design. A ratio of 0.81:1 is significantly lower than the 1.35:1 generally associated with other unit development in the Kingscliff area.

Submission in Reply 96

Within the report, the concerns raised by Dr and Mrs Sterne appear to have been dismissed, apparently with little, if any regard to DCP No. 6, as is evidenced by the statement regarding overshadowing:

The shadow diagrams provided in support of the proposal illustrate that during mid winter (21 June) the private open space area of the proposed dwelling to the south will succumb to a high level of overshadowing. In summer this is not the case.

The land is zoned residential 2(b) and permits multi dwelling housing. The sun path based on the altitude and azimuth of 153.54043 (32mins 26.0929secs and Latitude -28.1877 (11mins 15.90925secs) remains relatively unchanged every year. Any reasonably large building, multi dwelling housing or single dwelling, will cast a shadow in the direction illustrated on the plans. Indeed a two storey single residence may have a larger impact by virtue of the far more lenient setback requirements adopted from the Building Code of Australia. In this regard, it is considered that whilst the overshadowing of adjacent lands is not desirable, the impacts of development on the subject land are foreseeable and should have been more appropriately considered in the design and layout of the approved dwelling over the neighbouring allotment to the south. To this end it is noted that the applicant of the single dwelling house was clearly advised of the potential conflicts that could arise in the event of a multi dwelling housing development being proposed.

The overshadowing likely to occur as a result of the proposed development is not considered to be of such magnitude or impact to warrant the amendment or refusal of the application. This is based partly on the fact that the owner to the south should have foreseen the potential overshadowing conflict and responded with a more appropriate design and layout, that the property to the south will not be excessively overshadowed for a significant period of the year and that the open space areas, in particular the pool, are less likely to be used during mid winter, when overshadowing occurs, but will be used during the warmer months when overshadowing will be at its minimum. It is further noted that the issue of loss of amenity resulting from a multi dwelling housing development was raised in a letter to the southern property owner on 20 February 2003.

In light of the issues raised above the development as proposed is considered satisfactory.

Submission in Reply 96

Here, the author, with a demonstrated brilliance in the principles associated with the earth's rotation around the sun, is able to surmise and to conclude:

- the relative position of the sun will not change (greatly) from year to year,
- bigger buildings cast larger shadows,
- there will be a "high level of overshadowing" during winter, but in summer "this is not the case", and
- that the real problem was caused by Dr & Mrs Sterne, in wanting to build on their land.

This last issue was taken up with Dr Sterne, who gave the following evidence:

MR BROAD: *I've been reading through this report that accompanies this application. And I should indicate that the inquiry's focus is not on individual applications, but to the extent that this appears relevant to the quality of reporting by Council staff it seems to be*

a matter for the inquiry. The report, at page 6, deals with overshadowing and it talks about them in saying:

In this regard, it's considered whilst the overshadowing of adjacent lands is not desirable, the impacts of development on the subject land are foreseeable and should have been more appropriately considered in the design and layout of the approved dwelling over the neighbouring allotment.

That seems to be saying that you, as an adjoining owner, should have taken into account this development when you sited your house. Could I ask you whether you had any knowledge of this development when you lodged your application?

DR STERNE: *No.*

MR BROAD: *None at all?*

DR STERNE: *No.*

MR BROAD: *How long before you had notice of this application had you lodged your application?*

DR STERNE: *I can't remember. It would have been Easter, some time like that, I think. I can't remember off the top of my head exactly when.*

MR BROAD: *But was it a significant time?*

DR STERNE: *Oh, yes, it was after we had put our application in, way after our application was in. I think - - -*

MR BROAD: *Did any member of - - -*

DR STERNE: *I think it was officially lodged in August but we know that the land had sold in the February and we know it sold through developers. So it was - I think it was February or March it must have sold. So we had some sort of idea that it was going to - that a development as going to be put on there.*

MR BROAD: *Did you ever receive any advice from the Council indicating the potential conflicts that could arise in respect of a multi dwelling housing development on the adjoining property?*

DR STERNE: *We got that letter from Gary Smith asking us to put it in writing that we'd accept that, but that was later on in the year.*

MR BROAD: *Any other advice?*

DR STERNE: *Not that I can recall, no.*

MR BROAD: *The report says:*

To this end, it is noted the applicant of the single-dwelling house was clearly advised of the potential conflicts that could arise in the event of a multi-dwelling housing development being proposed.

DR STERNE: *That would have been presumably during our application process.*

MR BROAD: *Were you advised?*

DR STERNE: *I can't remember being advised, however I was certainly aware that the Council would prefer unit development rather than housing development. And my builder told me Council won't let you build a house there.*

T. 2/3/05 p. 726-728

The council had written to Dr and Mrs Sterne's architect on 20 February 2003. Relevantly the letter contained the following paragraph:

Issues have been raised in respect of the zoning of the land, in particular the likelihood of neighbouring land being redevelopment for residential flat building. In this regard, it may be considered beneficial to the application if the owner of the property where to provide, in writing, their views on the likely prospect of a residential flat building being constructed on neighbouring land. In particular, there needs to be demonstrated an understanding on the owners part that the land is zoned with the primary objective of facilitating high-density housing. Such development is likely to impact upon their amenity, including their views, and such impacts need to be considered and to varying degrees accepted prior to erecting a single dwelling house, where favourably determined. Please note that the owner is <u>not</u> being asked to waive their rights in objecting to any future development.

Submission in Reply 96

This letter would suggest that council staff had an inkling of what development may have been proposed for the site.

Dr and Mrs Sterne formed the view that the effect of this paragraph aimed at:

" ... coercing us to put in writing that we would accept that a **high-density housing** development would be built next to us and would impact on our amenity and views. More importantly he states that this "**would be beneficial to our application".** We saw this as a veiled threat intimidating us to agree to something unreasonable in order for our own plans to be passed or passed more promptly. "

This issue was taken up with Dr Sterne during the Public Hearings. He gave the following evidence:

MR BROAD: *You see, the letter that was written to you by Mr Smith says:*

In this regard -

and that is talking about the zoning of the land and the likelihood of redevelopment for residential flat building -

In this regard, it may be considered beneficial to the application if the owner of the property where -

which, in fact, is a typo, it should be "were" -

to provide in writing their views on the likely prospect of a residential flat building being constructed on the neighbouring land.

That doesn't seem to suggest that you should address the position of your house. That's the letter you've referred to me as possibly providing it. Do you have anything else?

DR STERNE: *Not in writing. We went through our letters when we prepared the letter and if I'd have found that in writing I would have included that in there.*

MR BROAD: *In your view, should you have foreseen the potential overshadowing conflict of an adjoining property and responded to it?*

DR STERNE: *I was aware one day a unit development would probably go on there and that's why we actually designed our home so that where the shadow would come would be sat back. So we built on - if you can imagine, the block is an oblong, twice the length as the width - and we built on one half of our property so that we would avoid shadowing. But when you get a building to nine metres, that's going to cast a significant shadow.*

MR BROAD: *So you did take some steps?*

DR STERNE: *Yes.*

MR BROAD: *But you didn't - - -*

DR STERNE: *But that wasn't formal advice to us, that was out of commonsense, really.*

T. 2/3/05 p. 728-729

There is a fundamental misrepresentation in this paragraph. The land is not zoned with the primary objective of facilitating high-density housing. The only high-density housing anticipated in the zoning is in proximity to the Tweed Heads sub-regional centre, not Kingscliff.

The letter suggested that Dr and Mrs Sterne refer any concerns to council's Manager – Building Services – Mr Rick Paterson. Co-incidentally, Mr Paterson was to complain bitterly when the amenity of his property was to be adversely affected by the Nor Nor East development.

The council has responded to the concerns raised by Dr and Mrs Sterne, submitting (**submission in reply 96**):

2. There is no evidence on Council's files of any veiled threats or otherwise that Dr and Mrs Sterne must accept any future development on adjacent land. This claim is rejected. If the reference is to Council's letter of 20 February 2003, particularly under point 3 then a reading of this paragraph clearly shows that this related to the zoning of the land and an acknowledgement by the owners that it was likely that other owners in the area would be likely to implement development that is consistent with the zone objectives. The letter emphasised that the owner was not being asked to waive their rights in relation to objecting to any future development.

...

4. The submissions made by Dr and Mrs Sterne to DA03/0832 were given serious consideration and amendments were required to be made to the application to address some of these concerns. The report to the Development Assessment Panel of 24 September 2003 demonstrates this.

5. The Council's processing of development application DA02/2061 and DA03/0832 was carried out in a professional and competent manner without any outside influence from any of the parties involved. The submission from Dr and Mrs Sterne has provided no evidence to support their accusations.

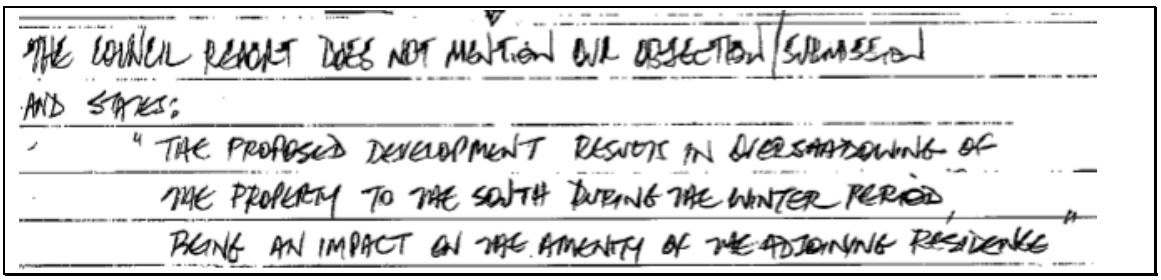
Mr R Ward was also to provide a submission to the Inquiry associated with the manner that the council had, similarly, dealt with a multi-dwelling proposal on an adjoining property. Like the Sternes, his property lay to the south.

The proponent was Pacific Projects Group (Developments) Pty Ltd, a company associated with Councillor Brinsmead's son-in-law.

Mr Ward was to lodge an objection to the application and was, later, to commence proceedings in the Land and Environment Court.

Mr Ward indicated that the objection listed eight points of concern, including overshadowing.

Mr Ward wrote (**submission 254**):


THE COUNCIL REPORT DOES NOT MENTION OUR OBJECTION/SUBMISSION AND STATES:

"THE PROPOSED DEVELOPMENT RESULTS IN OVERSHADOWING OF THE PROPERTY TO THE SOUTH DURING THE WINTER PERIOD, BEING AN IMPACT ON THE AMENITY OF THE ADJOINING RESIDENCE"

Submission 254

Murphy's Road runs generally in a north-south direction at the northern end of Kingscliff Beach. It is situated on the western side of the lots, which have a frontage to the beach reserve.

The proposal had the potential to overshadow both Mr Ward's property, as well as the beach.

The report to council's meeting on 4 September 2002 contains the following:

The applicant has submitted from the shadow diagrams that the proposed development will result in overshadowing of the foreshore open space prior to the prescribed times.

The applicant has submitted that the standard is unreasonable and unnecessary for the following reasons:

- The foreshore reserve is heavily vegetated

- Existing buildings in Murphy's Road result in overshadowing of the foreshore reserve and the beach prior to the relevant times.

- The area of overshadowing in mid summer is approximately 275m^2 being insignificant.

- The areas being overshadowed are not useable passive open space areas and do not contain any public amenities or facilities which the community would be expected to use.

- Shadow does not extend to the beach area.

The applicant has submitted that the NSW Coastal Policy 1997 provides principles however in relation to this matter it states:

'The suggested standard in this principle may be difficult to apply in highly urbanised environments. An LEP or DCP which is tailored to local conditions and which has the overriding objective of minimising overshadowing may be required in these situations.'

The applicant has submitted that it is apparent from the note that it is difficult to achieve the objective of nil overshadowing of waterfront open space or beach areas in urban areas and therefore the standard is not appropriate in the circumstances.

Comment

It is considered that the reasoning provided by the applicant can be supported and it is noted that the area of the coastal reserve is heavily vegetated and does not provide for passive recreation as other areas of coastal land nearby.

The proposed development is generally consistent with the other objectives and principles contained in the Coastal Policy.

The site has been inspected by a representative of the Coastal Council who indicated that a 10m setback from the eastern boundary would be appropriate with regards to overshadowing of the foreshore reserve.

The applicants have provided shadow diagrams for both the proposed 6m setback and suggested 10m setback. These plans show little difference between the two setbacks in relation to overshadowing impacts.

The matter of overshadowing is also explored later in the report:

The over shadowing from the proposed development is both to the coastal reserve and adjoining properties. The applicant has submitted a SEPP No.1 application in relation to the overshadowing seeking a variation to the development standard. This has been addressed in this report.

In addition the proposed development results in overshadowing of the property to the south during the winter period, being an impact on the amenity of the adjoining residence. The property to the south had alterations and additions to an existing attached dual occupancy approved in April 1997. The building is a three storey development and occupies the eastern end of the allotment.

As the allotments along Murphys Road are east west in orientation it is unavoidable that there will be overshadowing to neighbours. It is noted from Council's files that the development o the south has the living meals and balcony areas on the southern elevation and it is considered that these areas will not be significantly impacted upon by the development. It is agreed that there will be overshadowing however it is considered that the shadow impacts will not adversely impact on the living areas of the adjoining dual occupancy.

In the subsequent court proceedings, Mr Ward's consultant swore an affidavit including the following:

7. I have examined shadow diagrams contained within the file of the Second Respondent which were submitted, as I understand it, in support of the Development Application. A copy of those plans is contained behind Guide Card 4 of Exhibit "JG-1". I have also examined shadow diagrams prepared by David Cooke & Associates Pty Limited on behalf of the Applicant. A copy of those diagrams is contained behind Guide Card 5 of Exhibit "JG-1". As a result of my examination, the following matters are apparent:

(i) The 2 sets of shadow diagrams, which should be identical, show significant variance.

(ii) The shadow diagrams submitted on behalf of the First Respondent, show less overshadowing of the Applicant's property than is the case in the diagrams prepared by the Applicant's consultant.

The diagrams suggest that significant winter overshadowing of the Applicant's property would occur earlier than was portrayed in the Development Application and that the extent of the winter overshadowing would be more significant than portrayed in the Development Application.

(iii) The proposed building will shadow the beach foreshore in contravention of the provisions of clause 32B of the North Coast Regional Environmental Plan 1998. The Second Respondent approved an objection pursuant to State Environmental Planning Policy No. 1 to the clause 32B Development Standard as part of the Development Application. While the winter shadowing of the foreshore does not appear to be extensive the maximum mid-summer shadowing at 6.30 p.m. covers approximately 605 sq m. of the foreshore, according to the shadow diagrams prepared by the Applicant's consultant. The report prepared by the Council's Director of Development Services (contained behind Guide Card 2 of Exhibit "JG-1"), and considered by the Council at its meeting of 4 September 2002 states that this overshadowing is "approximately 275 sq. m."

8. The Report of the Council's Director of Development Services (Guide Card 2 of Exhibit JG-1") does not consider shadow impacts in the context of the specific provisions of Development Control Plan No. 6, a Development Control Plan promulgated by the Tweed Shire Council and in force at the time of the Development Application's consideration and at the present time. Section 3.3.1(A6) of DCP6 provides that:

"Sunlight to the principal area of ground level private open space of adjacent properties is not reduced to less than 2 hours between 9.00 a.m. and 3.00 p.m. on June 21. Where existing overshadowing by buildings is greater than this, sunlight is not further reduced by more than 20 percent."

9. The shadow diagrams prepared for the Applicant show significant loss of sunlight to the yard area of his property for the hours between 9.00 a.m. and 3.00 p.m. on 21 June. The clause of DCP6 extracted in the previous paragraph was not addressed in the Report of the Director of Development Services and, as a consequence, it apparently was not considered by Council in determining the subject Development Application. A copy of DCP 6 is contained behind Guide Card 6 of Exhibit "JG-1".

10. Clause 32B(4)(a) of the North Coast Region Environmental Plan 1998 (NCREP) provides as follows:-

"(4) **The Council must not consent to the carrying out of development:**

(a) **on urban land at Tweed Heads, Kingcliff, Byron Bay, Ballina, Coffs Harbour or Port Macquarie, if carrying out the development would result in beaches or adjacent open space being overshadowed before 3.00 p.m. mid-winter (standard time) or 6.30 p.m. mid-summer (Daylight Savings Time) or ..."**

11. The Development Application included an objection under State Environmental Planning Policy No. 1 (SEPP1) because the proposed development was in breach of the development standard extracted in the previous paragraph. The extent of the breach was reported by the Council's Director of Development Services as "approximately 275 sq m. being insignificant". The shadow diagrams prepared for the Applicant indicate that the breach is to the order of 605 sq m at 6.30 p.m. on December 21.

12. Determination of the objection in relation to a breach of a development standard contained in Clause 32B(4)(a) of the NCREP, appears to have been made on the basis of the incorrect information contained in the Report of the Director of Development Services.

13. It is apparent from the shadow diagrams prepared for the Applicant that the shadow diagrams provided to the First Respondent by the Second Respondent

in support of its Application were deficient in that they disclosed overshadowing of a significantly less a degree than that contained in the diagrams prepared for the Applicant

14. Compliance with the requirements of DCP6 with respect to winter shadowing of the Applicant's property was not specifically considered in the Report by the Director of Development Services to Council and was not addressed by Council in arriving at its decision.

15. Determination of the SEPP1 objection, in relation to the breach of the Development Standard contained in Clause 32B(4)(a) of the NCREP, appears to have been made on the basis of incorrect information contained in the Report of Council's Director of Development Services. The report of breach of 275 sq. m. is significantly less than 605 sq. m. calculated from the shadow diagrams prepared for the Applicant.

16. In light of the foregoing, it is my opinion that the impacts of shadowing in relation to the Applicant's property and the beach foreshore were not fully and properly considered by Council. Furthermore, it is reasonable, in my opinion, to conclude that had Council been fully and properly informed regarding these impacts then the subject Development Application may have been refused or approved in modified form.

Submission 254

The Council failed to consider the true position regarding overshadowing. Additionally, it paid little heed to the situation as it knew it.

Other submissions received by the Inquiry similar concerns that their objection had been ignored or that they had not been able to address council to ventilate their concerns.

The Cudgen Progress Association wrote:

1. **Community Consultation**
Tweed Shire Council gives only lip service to its often stated intention to include community consultation and input when controversial Development Applications and other planning matters are current. On numerous occasions residents have packed meeting venues to capacity and unanimous votes have been recorded. Councillors have been present and have then gone on to vote against the wishes of residents. We have seen four storey buildings approved in three storey zones with concessions given to developers re number of car parking places and other matters.

Submission 201

Mayor Polglase provided a submission to the Inquiry. Under the heading "No evidence of wrongdoing", he wrote:

The central arguments that (a) Councillors have been illegally funded by developers, (b) Council is performing inefficiently, (c) it is approving developments against the wishes of the majority and (d) it is failing to consult the community are all patently incorrect.

a. All Councillors have complied with their legal obligations to declare their election funding to the State Electoral Office under the State Government's own electoral laws, so the allegations of illegal funding by developers are patently wrong.

b. The argument that Council is run inefficiently is also wrong since the Council has gone from the bottom half to number five in the State, by the Government's own efficiency performance measures.

c. During most of my time as Mayor, the State Government itself has been in charge of major development applications. In fact all recent major development proposals, such as Salt and Casuarina were either approved by the State Government or by previous Tweed Shire councils. There is therefore no evidence of wrongdoing by my Council in this respect either.

d. The Council I preside over has one of the most open and transparent systems of community consultation in NSW. We not only comply with all consultation requirements of the relevant Acts of Parliament, we also hold monthly Community Access meetings where residents and ratepayers raise issues of their choice at sessions attended by all Councillors.

Further, Council communicates its activities and proposals to all residents and ratepayers with our own registered weekly newspaper, the Tweed link. This popular, non-partisan publication includes details of development applications, Council job vacancies, invitations to tender for Council business and other Council related news.

Submission 180

Subsequently, when addressing the "Impact of the dismissal of Council, he suggested:

There is strong evidence that a Tweed Council run by the State Government in Sydney through an administrator would rob residents and ratepayers of their voice in the affairs of local government.

My Council has listened to the voice of local residents opposing a number of major developments: ...

In its submission, the council's executive Management Team described its consultation model (**submission 329**):

"Tweed Shire Council encourages a two-way flow of information between Council and the community. Council actively consults its constituents on their views and reactions to Council proposals by the following methods."

Submission 329

It then set out the various facets of the model, including the Tweed Link, the Communications Committee, public meetings, community meetings, Tweed Futures Strategic Plan, community access, committees and council meetings.

Mission statements, such as that adopted by the council have been in vogue over recent years. While it may provide stature for council's portrayal of itself, the mission may not be reflected in the council's actions.

Frances Rollings, Julie and John Blom provided this view (**submission 270**):

We, as objectors, consider the procedures and processes adopted by Council in relation to the approval process for the Lot 370 development to be inappropriate for the following reasons.

- The Council failed to respond to requests from several objectors for the opportunity to address a full meeting of Council about outstanding concerns prior to the DAP approval of the project. The development was approved at a Development Assessment Panel (DAP) meeting on 18 July 2003 without objectors having opportunity to comment on amended plans or the Traffic Report.

- As the approval had not been issued, the DAP approval was called up to a full council meeting when objectors contacted Cr James after they had been informed via local gossip of the approval. Throughout the ensuing weeks despite a Notice of Recission, the call up to a full Council meeting, a Public Access Address outlining resident concerns and planning issues, three legal letters, advice from the Director of Development Services (DDS) and knowledge of an inaccurate planning report, councillors in favour of this development continued to use the DAP approval and the time the applicant had to wait as reasons to approve the project.

- In a private meeting with Mayor Polglase after the Notice of Recission had been lodged he informed objectors that the Minutes showed that the development had been approved and if they rescinded the approval, the applicant could take the Council to court. We believe that the Local Government Act 1993 Section 109 Item b allows the Council to revoke or modify an approval.

- The Planning Officer misinformed the objectors and legal representation regarding applicable Development Control Plans by indicating that there was no Development Control Plan for such a development. Objectors later discovered that DCP6 was applicable to the residential component of the development.

- Council failed to address the Guidelines in the applicable Development Control Plan (i.e. DCP6).

- The original Development Application was lodged October 2002. The Traffic Report was not furnished until May 2003. This means that on both occasions when it was advertised, the Application was incomplete and information was unavailable for objectors to comment on.

- The Planning Report was erroneous and these errors were never corrected although we notified the Councillors in writing of these errors and omissions prior to the meeting at which the majority council refused to rescind the approval.

- The DDS had issued advice to all Councillors regarding issues with the development. Some councillors who had not received the information were denied the opportunity to read this advice prior to voting even though they had requested time to do so.

- When the DDS became aware of the significance of the residents issues he attempted to facilitate negotiations with the applicant as per Council's Application Determination Policy. The DDS informed Councillors of the need for negotiation and his failed attempts to contact the applicant. Despite this, the majority councillors refused to rescind the approval.

We consider the relationship between some councillors and proponents of development to be inappropriate for the following reasons:

- When the DDS in a meeting with the Mayor and objectors indicated that he had been unable to contact the applicant directly or through his architect to facilitate negotiations, the Mayor stated that he had met with the applicant and he was unwilling to negotiate. It is interesting that while the DDS was unable to contact the applicant, the Mayor said that he had been in contact.

- When the DDS informed the Council meeting that he had been unable to contact the applicant, Cr Beck said that the applicant was on holidays and was disappointed that he would miss the meeting. Some objectors saw the applicant on the development site the previous day. The applicant and his architect arrived in the public gallery after the item had been considered.

Any other matter that warrants mention, particularly where it may impact on the effective administration of the area and/or the working relationships between the council, councillors and its administration

- When the objectors met with Mayor Polglase after the Notice of Recission had been lodged and in the absence of the DDS, the Mayor stated that Planning Department thought that they could do something about this but they couldn't. We do not believe that the Mayor was supportive of the efforts of the DDS to follow Council's Application Determination Policy.

Submission 270

It will be seen that the concerns spread far wider than community involvement in decision-making and suggest a greater malaise in council processes.

The 14 September 2004 edition of the Tweed Link, the council's newsletter contained the following extract regarding Resort Corporations proposal to buy council owned land at Cabarita.

THE TWEED TWEED SHIRE COUNCIL

Tweed Link

A TWEED SHIRE COUNCIL PUBLICATION ISSUE 382 SEPTEMBER 14, 2004 ISSN1327-8630

Is this an opportunity too good to miss?

Pandanus Parade Cabarita Beach has caused much controversy. Tweed Shire Council outlines for the first time why it needs community input into its decision on whether to accept an offer for this land. The land is highly constrained by a restriction linked to the hotel property. It is on 60 per cent of the land (outlined below) and requires that it be used as a carpark.

What is the offer?

Council has been offered in excess of $5 million. This offer compares favourably with Council's own independent valuation of the land. It is a market based offer. The money will be spent solely on community projects and redevelopment of Cabarita's Main Street.

The developers of Cabarita Beach Hotel site Resort Corp have offered to provide an underground car park for 38 vehicles on the site and to provide ongoing maintenance of the car park in conjunction with upkeep of the building that will involve commercial and residential development. If the offer is accepted Council would require a restriction on the title for the proposed carpark to be maintained in perpetuity. In addition Council is planning a multi level carpark in Hastings Street behind the Coast Road opposite Pandanus Parade.

PO Box 816
Murwillumbah 2484

Dear Shire residents,

Tweed Shire Council is custodian of the entire Tweed Shire extending from its 37 kilometres of coastline to its towns, villages and rural areas.
Council has acknowledged the need to protect and enhance our assets as our population increases.
Council is seeking input from the widest possible cross section of the community in relation to the offer as outlined on this page.
It is an offer that could mean a big difference in the Council's capacity to finance future community projects such as the ones listed on the next page.
There are potentially significant community benefits to be obtained through using this amount of funding to provide and maintain community facilities in Cabarita Beach, Bogangar and other areas of the Tweed. Council will not be accepting this offer until community input has been obtained.
It could mean much needed projects are completed in an accelerated timeframe.
Take the time to tell Council what you think. Pick up the phone, send an e-mail, write a letter and either fax or post it to Council.

Yours faithfully
Dr J Griffin

Tweed Link Issue 382, 14 September 2004

This proposal and Resort Corporation's ancillary proposal to develop facilities that included development of the surf club site were the subject of considerable unrest in the local community.

On 1 August 2004 a community protest rally had attracted an estimated three hundred people.

The council was to consider the community's response to the call contained in the Tweed Link of 14 September 2004.

The report recorded that council's "hot line" had received 93 calls, apportioning the responses as:

"14 Undecided
35 For
41 Against"

It apportioned the 1798 written responses as:

"14 Non Committal
35 For
1749 Against"

The Council subsequently provided tables that provided a short statement of reasons for those supporting the sale but, conversely, categorising those objecting to it, as will be seen in the following extracts:

Pandanus Parade - Analysis - Hotline Calls

UNDECIDED	FOR	Reasons for Support	AGAINST	Reasons for Objections					
				Public Land	Access to Beach	U/Ground Parking	Semi Privatisation of Beach	Objection to Resort Corp	Other
	1	In favour for proposed work on the Kingscliff Amenities Hall.							
			1	1					1
			1	1					1
			1					1	1
			1	1					
			1	1					1
			1	1					1
	1	Golden opportunity not to be missed. Suggested funds be used to buy land for beach access at Pottsville.							
1									
			1	1		1			1
			1						1
			1	1					
			1	1					
			1	1				1	1
			1					1	1
	1	No further comment.							
	1	One condition - look after Hastings Point Headland and also Cudgera Creek.							
			1	1	1			1	
			1	1					1
			1	1					1
1									
			1						1
	1	Supports the sale subject the funds being spent on the listed 'potential projects'.							
			1		1			1	1
			1	1			1		1
			1	1	1				
			1	1				1	1
			1	1	1				
			1					1	1

No of same Proformas Received	No of Signatures on Each Proforma	Reasons for Support	Reasons for Objections			
			Public Land	Access to Beach	U/ground Carparking	Semi privatisation of beach
	1		1			
	1		1	1		1
	1		1	1		
	1		1	1	1	
77	1409		1409			1409
	1	Wants info to make informed decision				
	1	Enable major coastal works				
	1	Enable major coastal work				
	1		1	1		
	1					
	1		1	1		
	1					
	1		1	1		
	1		1	1		
	1					1
	1					
	1					
	1					
	1	Provided attractive beauty and tranquillity of area be retained				
	1					
	1		1	1		1
	1		1			
	1	Facilities for shire		1		
	1			1	1	1
	1				1	

The report provides the following commentary on the survey:

Following the consultative spread there was considerable response received by Council. Because of the volume of responses it is not possible to provide details of each one as part of this report.

However, appended to this report is a summary of the "Hot Line" and written responses.

The "Hot Line" report shows 93 calls were received.

The Staff Member receiving these calls has categorised these as being: -

14 Undecided
21 For
41 Against

Included in the final page is a summary of the reason for objection.

The written responses have been assessed by a Staff Member and also the appended report indicates:

14 Non Committal
35 For
1749 Against

The summary has endeavoured to show the reasons for support and the reasons for objection.

By way of comment it would appear that the objection on the basis of affecting the access to the beach would not be valid, as the proposal does not use any of the roadway being Pandanus Parade,

However, it is noted that the possibility of making Pandanus Parade a pedestrian mall has previously been raised by the representatives of Resort Corp and is referred to in a letter to Resort Corp dated 13 December 2002 which states in part as follows:

"You indicated that your vision includes the closing of Pandanus Parade to traffic and turning this into a public open space mall and the development of a quality commercial and residential resort on the balance land owned by the Council and the surf club.

I would be prepared to recommend to Council that your proposed vision for this area should significantly supported provided it complies with Tweed Shire Council and State Government planning requirements."

The final form of road surface and pedestrian use would be a decision to be made as to what provides the best community outcome.

The issue of loss of carparking close to the beach is covered by the provision of the 38 basement public car parks. The on street car parking would be a factor dependent upon street design.

The main issue would appear to be what decision Council makes on the use of the "public" land considering three (3) of the titles have a restrictive carparking covenant attached.

Council would have to consider this aspect when making a final decision on this matter and these three issues are dealt with later in this report.

There have been two issues raised since the land sale proposal in the Tweed Link for which legal advice has been sought.

The first of these relates to the continuation of the covenants after the classification of the land with the introduction of the new Local Government Act 1993.

Stacks the Law Firm presented advice on this matter on 1 October 2004 and the response is as follows: -

Council Meeting Minutes 19 January 2005 p. 173-174

In this superficial manner, the report responds to the council's resolution of 18 August 2004:

"…that Council commence a community consultation program to present the opportunities outlined in the Report to the broader community."

In 2003 Resort Corporation had put forward a proposal to develop the land owned by council, the surf club and the former hotel site that it had acquired. Mr Brack, council's

Corporate Performance and Audit Officer, had written a discussion paper on the project. It contained the following statement:

> Public confidence in Council can be eroded if the manner in which Councillors and Council Officers negotiate, access and approve this joint venture arrangement, if it is not conducted in a manner which delivers good governance, through best practice and complies with the highest level of public accountability.

While the consultation process was occurring, council's Manager of Strategic Planning, Mr Jardine wrote:

> In reaching those conclusions I am not commenting on the merits of redeveloping the land. My only concern is the process for achieving Council's intended outcome. Indeed the Strategic Planning Unit has already come to similar conclusions in respect of the future of this land in the drafting of DCP 50 – Bogangar/Cabarita Beach Locality Plan. We have been preparing the DCP in conjunction with a Steering Committee made up of local residents.

Each of these gentlemen was to decry or to reluctantly concede meanings otherwise suggested by these documents (**T. 16/3/05 p. 1450-1451; p. 1766-1768**).

The concerns over the consultation processes associated with the Cabarita Beach proposals spread wider.

The Tweed Link report contained a letter from Dr Griffin that included the following statement:

> *It is an offer that could mean a big difference in the Council's capacity to finance future community projects such as the ones listed on the next page.*

Tweed Link Issue 382 September 14, 2004

The following page contained a list of "Potential Projects", comprising:

Potential Projects

This list is for discussion purposes only and has not been determined by Council.

Norries Headland Coastal Management Plan of Works	$700K
Cabarita Main Street	$400K
Cabarita Beach Sub Office	$400K
Black Rock Bridge car park & beach access	$100K
Pottsville Community Land Purchase	$500K
Ambrose Brown Park	$100K
Hastings Point Headland Redevelopment	$300K
Cudgen Crk Restoration Pedestrian Link; K'cliff CBD to Sutherland Point	$300K
Sutherland Point	$500K
Kingscliff Amenities Refurbishment Hall & Drop In Centre	$500K
Respite Centre Kingscliff	$500K
Kingscliff Foreshore including toilets	$300K
Tweed River Foreshore & Fingal Boat Harbour	$400K
Fingal Head Rovers Surf Life Saving Club	$500K
Surf Life Saving Sinking Fund for services	$500K
Rolling funds to seed Section 94 Works brought forward	$500K

Tweed Link Issue 382 September 14, 2004

The validity of Dr Griffin's statement was called into account by the Cabarita Beach/Bogangar Residents Association, who wrote (**submission 273**):

> On September 16, 2004 the Association wrote to Council requesting details of proposed expenditure as detailed in their published proposal in terms of projects to be undertaken at Cabarita Beach/Bogangar. This correspondence was answered on October 12, 2004 only after a second request for information had been forwarded to Council and, surprise, surprise **detailed items of expenditure for projects already completed!!! (Refer Norries Headland project).**

The Association's newsletter attached council's letter of 12 October 2004, which is set out below:

TWEED SHIRE COUNCIL

Please Quote Council Ref: DW1102203; DW1060076 [eltr]

Your Ref No:

For Enquiries Please Contact: Mike Rayner

Telephone Direct (02) 6670 2470 L11F02

12 October 2004

Cabarita Beach Bogangar Residents Association Inc
29 Watergum Place
CABARITA BEACH NSW 2488

Attention: Ms C Lynch - Secretary

Dear Ms Lynch

Sale of Public Land - Tweed Link 14 September 2004

I refer to your letter dated 16 September 2004 specifically referring to the issue of the Tweed Link dated 14 September 2004. You asked for an explanation of the expenditure items raised with regard to Cabarita / Bogangar. As clearly stated in the 14 September edition of the Tweed Link a number of potential projects were listed for discussion purposes only. The obvious intent here was to provide an indication to the community of the scope of projects that could be undertaken should Council resolve to proceed with the sale of the Pandanus Parade land. Specifically in regard to the 3 projects mentioned by you I can advise as follows:-

1. **Norries Headland**
   As you would be well aware, Council in March 2000 adopted an improvement plan for Norries Headland. These works included construction and rationalisation of car parking, installation of pathways, boardwalks, and associated facilities, landscaping, improvement of public safety and signage. Final expenditure would be subject to the extent of the embellishment undertaken. This would be determined during the detailed design stage.

2. **Cabarita Main Street**
   Following the successful completion of Main Street development works in Tweed Heads, Murwillumbah and Kingscliff, Cabarita Beach is seen as the next priority for a Main Street Program. The details of such works would be developed in close consultation with the local community and in particular businesses operating within the precinct. Typical works would include nature strip landscaping and tree planting, installation of street furniture and improved safety for pedestrians.

.....Cont./2.....

THE TWEED
VALLEY OF CONTRASTS

CIVIC AND CULTURAL CENTRE, MURWILLUMBAH
P.O.BOX 816, MURWILLUMBAH, N.S.W. 2484
TELEPHONE: (02) 6670 2400 FAX: (02) 6670 2429

PLEASE ADDRESS ALL COMMUNICATIONS TO THE GENERAL MANAGER
ABN 90 178 732 496
www.tweed.nsw.gov.au

Cabarita Beach / Bogangar Residents' Assoc Inc. Page 2

3. **Cabarita Sub-Office**
Given the increased population on the Tweed Coast Council has given consideration to the development of a sub-office. Such office typically would allow access to Council's cashiering services, dissemination of information and meeting rooms where local residents could meet Council staff as appropriate. An opportunity may exist to incorporate such a facility within the proposed multi level car park in Hastings Road should that proposal proceed.

I trust the above information satisfactorily answers the matters raised in your letter.

Yours faithfully

Don Buckley
ACTING GENERAL MANAGER

Submission 273

This was but one of a number of concerns raised by the association. In turn, it was but one residents' group raising concerns over council's consultation processes.

While some residents' associations, such as the Hastings Point Progress Association and Fingal Head Community Association expressed more general concerns, others such as the Kingscliff Ratepayers and Progress Association, the Caldera Environment Centre and the Cabarita Beach/Bogangar Residents Association provided detailed submissions. Concerns regarding community consultation were recurrent themes.

The Pottsville Community Association wrote:

The Pottsville Community Association wishes to make the following submission in an endeavour to assist the inquiry to arrive at a just and fair conclusion. This Association with a membership of 252, was formed in 1988 and has worked with the Tweed Shire Council to obtain satisfactory outcomes for all of the community. During most of this period we have achieved this goal, however with the very pro development Councils of recent times it would appear that there is a very large bias towards certain sections of the community with little regard for the concerns and intentions of the majority of residents and ratepayers.

Submission 28

A number of speakers representing these and other representative groups appeared during the Public Hearings. The evidence given by representatives of these named groups was generally impressive and supported a view that these groups had seriously endeavoured to represent their communities but, to a large degree, had been spurned by the council. In those circumstances they were to raise both specific concerns regarding particular developments and council practices and wider concerns over council's consultation processes affecting both its planning regime and its determinative processes.

Collaterally, there were other groups who were supportive of council's processes. In part they comprised sporting bodies or cultural groups who perceived that they had achieved their goals though their consultations with and through the intervention of the council. While these provide a positive note, they neither answer nor direct themselves to the wider issues of community involvement in decision-making.

Conversely, the Banora Point Residents Association expressed "its full support for the democratically elected council of the Tweed Shire…", adding that:

"Residents can now have hands on treatment for the many concerns i.e. roads, drainage, flood mitigation etc."

The author, Mr Tate, who had run for council on Councillor Murray's team, gave evidence during the Public Hearings.

Mr Tate saw the election of Councillor Murray as obtaining representation for the local area, describing the effect of his election as:

> MR TATE: *...Now, when John got elected - we got him in, and we worked very, very hard to do that. When we did get him elected it was absolutely staggering what we could get, because I had asked David Broyd, because he was – he was one that would not come to light with things that I need for the people of Banora Point. I asked John to get them when he was elected. He rang me after a week and said, "Come over to my place. I've got the" - he had a stack of reports that high for me to read. That is what's happened. There's been a total - it has been absolutely fantastic. And this is what worries me, that here we are, we've just got an elected councillor and there's a chance we mightn't have him for much longer.*

T. 2/3/05 p. 715

Quite clearly, Mr Tate saw Councillor Murray's election as a means to obtain the consultation that the resident's association had hitherto lacked.

Like the Banora Point Residents Association, the Kingscliff and Tweed Coast Business Association was to express its support for the council and its concern that it might be dismissed, writing:

> This association, that includes members with Professional Planning skills & training, has been able to verify that our Council now has more Development Control Plans (DCP's), Master Plans & Management Plans in place than ever before. This association and various members have participated with Council in many community consultation committees that do show a determination for transparency & proper processes.

Overall, the Tweed Shire Council is one that is working extremely well. It does have the confidence & support of the business community. It's numerous community consultative committees and advisory bodies are inclusive of people from all sides of the local population & from all sides of Council. The interface between Council and this community appears to work very well and all Councillors and senior Council staff deserve praise for their commitment to work with and not against this community. Even those that may be considered minority Councillors occupy positions within Council on Committees generally of their own selection once again showing a determination towards a conciliatory approach between Councillors.

This Shire has been subject to rigorous & unfounded community debate on several issues that has become too misinformed, too emotional, too personal & too political. This process, left to its own devices, will generally downgrade itself into a vacuous state of nothingness where those once passionate souls drop off the protest wagons to attend to other matters infinitely more important to life than being constant critics. In the case of the Tweed, the incessant ramblings of a few could easily be over looked except for the fact that they have pre empted this powerful Inquiry.

This is a 'new' Council with many community achievers at the helm in terms of the Councillors themselves. This Inquiry must respect the wishes of the majority of residents who democratically elected these people only a few short months ago. They are doing a wonderful job & should be allowed to settle into a governance style that has yet to be fully developed. This Council must be allowed to run its course.

Submission 35

Mr McIntosh gave evidence during the Public Hearings. While Mr McIntosh may have been somewhat vague precisely about who was a member of the association, those that he did recognise and nominate as members, including Mr Richards, Mr Roughead, Mr Blundell and Councillor Murray were either developers themselves, closely associated with developers, or alternatively, a councillor.

The material in the Baudino files records:

Subject: Tweed
Please note that I am today advised that the 3 Chambers of Commerce in the Tweed have held a joint meeting. The 3 Chambers of Commerce are the Tweed Heads Chamber of Commerce, the Kingscliff and Tweed Coast Chamber of Commerce and the Murwillumbah Chamber of Commerce.

The Chambers of Commerce have agreed to form a body to be called the Tweed Business Council. The Tweed Business Council has been formed to also be a participant in public debate and particularly, to make appropriate press releases and comments, letters to the editor, etc. in support of the Balance Council and pointing out the deficiencies of the Greens, Boyd and Labor.

John Penhaligon has been appointed the spokesperson and the person responsible to run this.

Accordingly, I believe that Winning Directions need to add onto their PR campaign another heading for the Tweed Business Council.

We need to produce a further press release announcing the formation of the Tweed Business Council and John Penhaligon as the spokesperson. Winning Directions need to get in contact with John Penhaligon. You can get his contact details directly from Idwall Richards.

I also understand that John Penhaligon has a further idea that he would like to run a number of advertisements drawn up like a job application. This job application would indicate that it is an application for a job with the following characteristics:

- a senior executive position
- in charge of a budget in excess of $100 million per annum
- business and management experience essential
- history of management and performance of the applicant will be critical

It will then go on to list all of the requirements that are clearly not met by the Greens, Max Boyd and the Labor Party.

Following on from this job application advertisement, he then intends to run some further advertisements, together with press releases and commentary about the lack of qualifications and the quality of people running for the Greens, Labor, etc.

Accordingly, can you include this organisation as another body that we should take account of and actively encourage and manage.

Regards

Paul Brinsmead

Direct Email: brinsmeadp@hickeylawyers.com.au
Direct Line: 07 5556 7401

(15.01.04)

Extracts from Baudino files

(b) The 3 Chambers of Commerce on the Tweed, the Tweed Head's Chamber of Commerce, the Murwillumbah Chamber of Commerce and the Tweed Coast Chamber of Commerce have agreed to combine to form a body called the Tweed Business Council. The Tweed Business Council will undertake its own third party campaigning. Its mediums will be:-

- It is also distributing a monthly and in some cases, bi-monthly newsletter. This newsletter will be fundamentally used to back the achievements and the record of the Balance council and to sell their ongoing vision for the Tweed. This newsletter will also aggressively deconstruct and attack the Labor party and Max Boyd and the Extreme Greens;
- It will undertake an extensive PR press release campaign;
- It will extensively advertise as part of a campaign selling the achievements of the Balance council and engaging in negative advertisements attacking the Greens, Max Boyd and the Labor party.

Extracts from Baudino files

It was to put out material, such as that, drafted on their behalf by Tweed Directions:

WHY INDPENDENTS MUST BE ELECTED ON 27TH MARCH, 2004

"The current Council has brought the Tweed to record levels of opportunity, growth and employment." – BIG BOLD

Welcome to the first edition of the Tweed Business Council's 'messenger'. We have formed to promote the views of the business and wider local community ahead of the March 27 poll.

The body of the group consists of the Tweed Heads, Kingscliff/Tweed Coast and Murwillumbah Chambers of Commerce. As a group of reputable citizens and businesspeople, we will express opinions on the current Council, future Councillors and any other parties or groups, without fear or favour.

Our aim is to ensure the Tweed doesn't fall into the wrong hands while raising issues of concern.

In order for the Tweed to stay protected and continue to flourish, it's important to strike a balance between the environment, development, economic sustainability and the quality of life.

In this issue we show results of an in-depth study conducted by professional analyst, Mr Alan Midwood and briefly examine our current Council over the past four years.

The current Council is led by Mayor Warren Polglase and consists of two factions: the majority group: George Davidson, Lynne Beck, Bob Brinsmead, Phil Youngblutt, Gavin Lawrie and Wendy Marshall; and a minority faction of Max Boyd, Henry James, Bronwynne Luff and Barbara Carroll.

The Polglase-led Council and in particular the pro-business Councillors (Davidson, Beck, Brinsmead, Youngblutt, Lawrie and Marshall) were elected in the last elections to bring responsible financial management, the highest quality of business and development opportunities to the Tweed, to create opportunity, growth, employment and wealth.

As the minority faction (Boyd, James, Luff and Carroll) resent any business and development opportunity, the majority Councillors have led the way over the past four years and gained several credible accolades on behalf of the Tweed.

Both factions in Council strive to protect the natural environment of the Tweed, however the majority group have proved that to establish and maintain a balanced cycle in the environment, a need for sensible economic infrastructure and development is a necessity. High quality development does bring new projects and a modern touch to a village, but it also revamps the environment with millions of dollars. In most cases, what is dying bushland is soon turned into world-class landscaping and flora.

The Tweed Business Association (TBA) do praise the minority Councillors for having such a heart-felt concern for the environment, but must emphasise, like most greenies, their attitudes lie in not progressing and thinking of the future of our children. With such negative and 'anti-everything' attitudes, the TBA would not like to see people like this try and plan for the future when they themselves cannot adapt to change …… remember change is inevitable, why fight it when we should be planning and catering for it. A perfect example of a greenie-led (Boyd-led) Council is the Byron Council – in dire financial straits and near dismissal. The Tweed has been there before when it was led by Max Boyd, it was considered for sacking – lets not go there again.

The majority group (Polglase, Davidson, Beck, Brinsmead, Lawrie, Youngblutt, Marshall) are responsible for improving and igniting the Tweed. The TBA would like to point out what a pro-business Council has done for the Tweed:

- When the majority group took the reins in Council, they raised it from being ranked dead last (176th) to 5th position! (It's also a fact that other NSW Council's have approached the majority Councillors to find out their secrets of success!)
- Ensured the highest quality community infrastructure surrounding projects that were approved by the State government such as Salt and Casuarina.
- Put in place a new regime to collect contributions and cash from developers and businesses. Many Councils in New South Wales have actively set out to study and follow Tweed's example on how to extract such contributions for the benefit of all ratepayers.
- Unemployment has been reduced from high double digit figures down to close to the national average.
- Approved a diversity of projects, ensuring different socio and economic needs are met and prides itself on not rezoned any land so as to allow further development. It has instead ensured that land available and previously zoned for development is developed to the highest standards and quality, benefiting all aspects of the Shire.
- The Council has overseen, in partnership with the State Government, the development of new road and other infrastructure. The new national highway was opened during the period of this Council. Focus has now been turned onto alleviating traffic in South Tweed – a result of destruction from the previous Max Boyd Council. The Council is also working on plans for Tugun and Sexton's Hill in conjunction with the State Government.
- Instigated a new planning vision by way of a new strategic plan for the whole of the Tweed. The Mayor, Warren Polglase, has been active in meeting community groups and putting in place a new strategic plan for the intention of more definitively and stringently defining development rules and standards.

The TBA wishes to congratulate the current Council, in particular Warren Polglase, George Davidson, Lynne Beck, Bob Brinsmead, Gavin Lawrie, Phil Youngblutt and Wendy Marshall, on picking up the pieces of a mis-managed Council (Max Boyd) and setting new precedents in economic and environmental conduct. The majority Councillors have given the Tweed a future and proven time and time again their professionalism and experience is second to none.

Don't take our word though, see the following factual report and see just how far the Tweed has progressed and the secure future is holds, all due to a pro-business business Council.

ADD IN REPORT FROM ALAN MIDWOOD!

Extracts from Baudino files

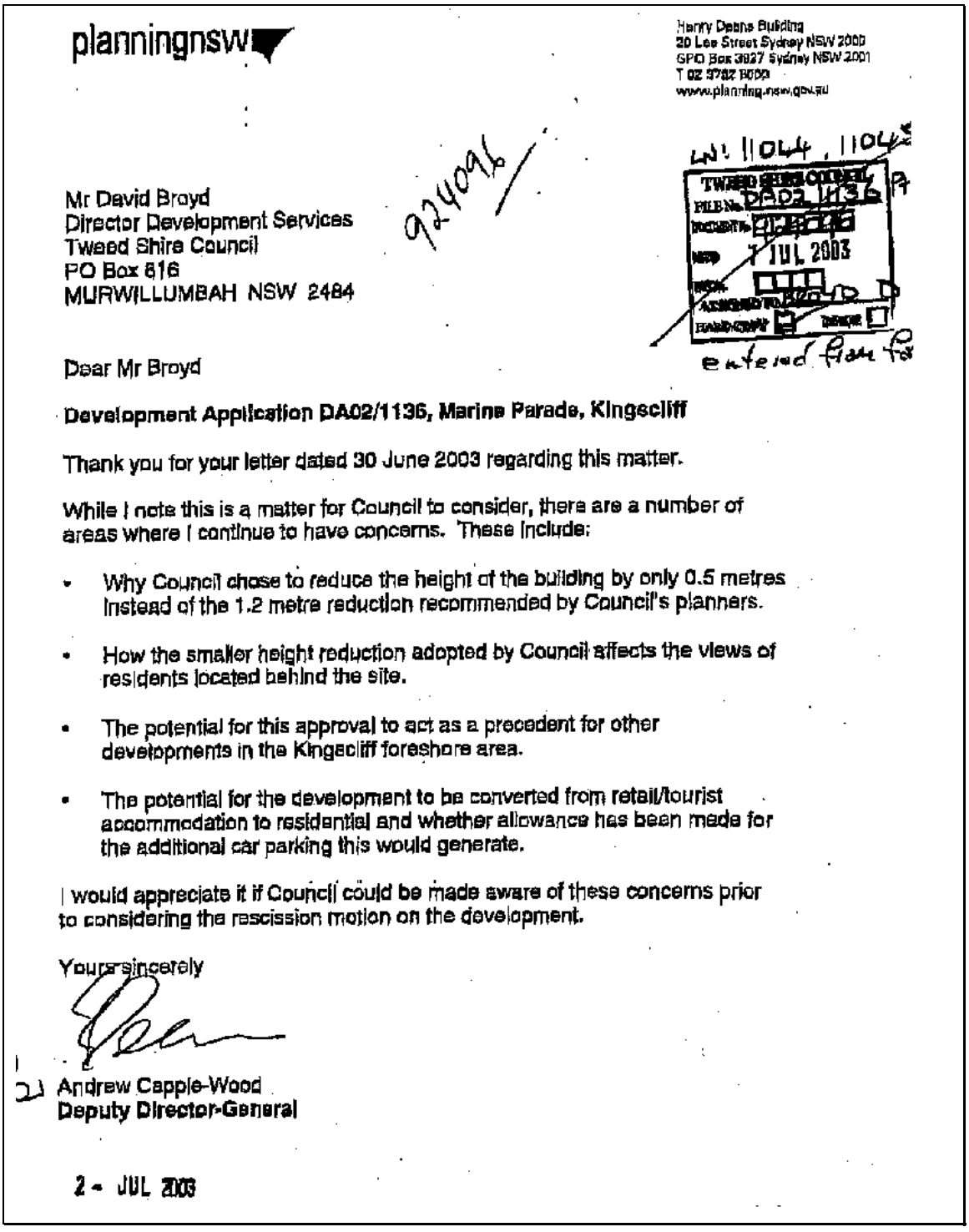
Any suggestion that the assertions by Kingscliff and Tweed Coast Business Association or any of the other business association joined in this triad, or any statement made by those associated with them regarding the consultation processes of the council lacks credibility.

On 26 June 2003 Denise O'Brien, a town planner, who had responsibility for the Nor Nor East development sent an email to David Broyd regarding threats made by another member of council's staff, Mr Paterson, to bring proceedings in the Land and Environment Court. The email contains the following statement:

"Also I just realised that the recommendation does not specifically determine to approve the SEPP1."

This was to be followed by a further email sent on 3 July 2003 recommending that Mr Broyd exercise his delegated authority to assume DIPNR's concurrence. Mr Broyd duly did so.

In the period betweed these emails, Mr Broyd had written to DIPNR advising of the consent granted by council. DIPNR responded by letter dated 2 July 2004 raising serious concerns, as follows:



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TWEED SHIRE COUNCIL
FILE No. DA02/1136
DOCUMENT No.
7 JUL 2003
ASSIGNED TO
BATCH
entered from fax

Mr David Broyd
Director Development Services
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

Dear Mr Broyd

Development Application DA02/1136, Marine Parade, Kingscliff

Thank you for your letter dated 30 June 2003 regarding this matter.

While I note this is a matter for Council to consider, there are a number of areas where I continue to have concerns. These include:

- Why Council chose to reduce the height of the building by only 0.5 metres instead of the 1.2 metre reduction recommended by Council's planners.
- How the smaller height reduction adopted by Council affects the views of residents located behind the site.
- The potential for this approval to act as a precedent for other developments in the Kingscliff foreshore area.
- The potential for the development to be converted from retail/tourist accommodation to residential and whether allowance has been made for the additional car parking this would generate.

I would appreciate it if Council could be made aware of these concerns prior to considering the rescission motion on the development.

Yours sincerely

Andrew Cappie-Wood
Deputy Director-General

2 - JUL 2003

The concerns were ultimately to come to nothing. The rescission motion was lost.

The council was subsequently to deal with a section 96 application that sought, inter-alia, to make provision for penetrations to facilitate for possible kitchen exhaust facilities above the roof.

Despite the concerns that were raised by DIPNR, there is no reference in the report to council of DIPNR's concerns or that the application was referred to DIPNR for its consideration.

The concerns raised by DIPNR were simply ignored.

In January 2000 council considered whether it should approve a proposed Dune Management Plan for the Kings Beach development.

Both DLWC and NPWS had written to the council earlier in the month advising that the plan was not acceptable. The report to council recognised:

"The South Kingscliff land is probably the most important land in NSW for ensuring quality planning and physical results on the ground."

The report recommended against approval of the plan.

Despite this, the council approved the plan, ignoring the both staff and departmental concerns.

On 24 February 2000 DLWC wrote:

> The Dune Management Plan approved by Council in January 2000 is not acceptable to the Department (DLWC).
>
> A new Dune Management Plan should be prepared. It is recommended that the proponents and/or their consultants liaise with DLWC and Council staff to obtain detailed written criteria for the preparation of an acceptable Dune Management Plan.

The council was between a rock and a hard place.

On 24 December 2002, Professor Thom of the Coastal Council had written to the council raising a number of concerns over the SALT proposal. The letter had recommended that the building line be placed 50m further westward, upon the following premise:

3. Following ESD principles, especially the precautionary principle (but not excluding intergenerational equity and biological integrity principles), the building line should be at least 50m landward of the western 7f zone boundary for the Outrigger Hotel and 25m for house lots. This will provide greater security for the investment into buildings over the next 50-100 years during which sea level is projected to rise c.0.48m±.30m (IPCC, 2001). The hazard study by WBM provides for a line of erosion over the next 50 to 100 years. Whilst conservative, the methodology used does not define lines which are absolute and definitive in time and space. There is nothing in these estimates to indicate that sea-level rise will cease at 100 years and hence erosion will cease. Moreover there is some expectation that erosion rates may accelerate over the period 2050 to 2100 but this is difficult to quantify given uncertainties attached to the IPCC projections on rates of sea-level rise. Capital investment of the scale envisaged at SALT is considerable. The size and bulk of the Outrigger Hotel is of particular concern. As an erosion scarp approaches a larger building, there is need to consider a **zone of reduced foundation capacity** some distance landward of the scarp to be determined by slope, soil and design factors. It is our understanding that WBM did not factor in the potential for slumping landward of an eroding scarp due to load. We suggest that engineering design refer to the work of Nielsen Lord and Poulos (1992) published in Australian Civil Engineering Transactions, Vol.CE24, No 2, PP 167-174. Outrigger Hotels and Resorts Australia Pty Ltd has indicated the hotel's reluctance to move the building alignment. However, there should be a further opportunity for the hotel to consider its position given the risk to the investment and potential to impact on the integrity of the beach and frontal dune over the life of the building. Given the scale of the hotel site a further 50m should offer investors a greater level of security with an additional buffer area which could be attractively landscaped to add to the amenity of the site.

Professor Thom's views were acknowledged in the subsequent report to council,

3.3 COASTAL EROSION

Professor Thom, the Chair of the NSW Coastal Council has stated his position to Council that the Outrigger building should be setback a further 50m and that the residential allotments should be setback a further 25m due to the potential coastal erosion hazards which may result in the future. This advice is largely based on his experience and knowledge of coastal processes and adopting a precautionary approach to this issue.

For the purpose of managing coastal erosion issues and development along this section of the coastline, Council has relied on the position of the 50 year hazard line plus 30m as the setback requirement for development. This is reflected by the zone boundary between the 2(f) and 7(f) zone.

The Coastline Hazards Identification (jointly commissioned and also adopted by DSNR and Council) by WBM Oceanics has found that in this area of the coastline it appears that a limited erosion occurred over recent years. This study remapped the various hazard lines and in this location located the 100 year hazard line seaward of the existing 7(f) zone boundary putting all development proposed by this development westward of this hazard line.

It must be acknowledged that this is a difficult issue and as Professor Thom points out there is a level of uncertainty in predicting such hazard lines. However, based on Council's past planning approach to dealing with this issue and equity to this landowner it is considered reasonable to base Council's judgement in managing the conclusions of the WBM Oceanics Study and the current Tweed LEP 2000 zones.

the concerns raised by Professor Thom were ultimately dismissed on "…Council's part planning approach to dealing with these issues and equity to the landowner…"

Professor Thom had also raised the Coastal Council's concerns over the surf lifesaving facility emphasising the hazards of the beach:

4. The provision of the Surf Lifesaving Facility with the hotel is a major concern to the Coastal Council. The beach here is highly energetic and hazardous as mapped by Professor Andrew Short for NSW Surf Life Saving. To provide a facility would encourage visitors and residents to swim in dangerous surf conditions. It is impossible to guarantee long-term continuation and vigilance at such a facility. Coastal Council is worried that SALT would use this facility to help promote tourist and residential use and thus put lives at risk. The alternative is to place a "permanent closure for swimming" or "swim at own risk" signs. In addition there is the issue of Tweed Shire Council's liability as the beach will be under its care and control.

While the report to council was to speak of the proposed lifesaving facility, the concerns were directed to the possible ongoing costs that might be incurred by the council and did not refer to concerns as having been raised by Professor Thom.

Professor Thom's concerns over long-term vigilance may well be realised. Mr Aldridge and Mr Raftery both gave evidence of the failure of the surf club facilities at Casuarina Beach. Their evidence raises serious concerns, as indicated by this extract from Mr Aldridge's evidence:

MS ANNIS-BROWN: *Mr Aldridge, if I could just start by raising one of the issues that you put in your submission to the Inquiry and that was with respect to Casuarina Beach and the patrol of that beach. You state in your submission that:*

After only two years of patrols the developer has now said that they will not patrol the beach and certain councillors on the Tweed Shire Council have agreed to spend ratepayers' funds to pay for lifeguards on the beach.

If you could just explain to the Inquiry perhaps your understanding of what the agreement was and what subsequently happened?

MR ALDRIDGE: *Certainly. As you well know, there's a long history with the development of Casuarina and what occurred was that when the approvals were put through the presiding mayor was Mayor Beck and there were no covenants put in place for compulsory contributions for lifesaving for the developer, part of the many negotiations that took place. The developer clearly marketed the subdivision on the basis that lifeguards would be provided and that it was actually going to be a surf community. Because the covenants weren't put in place, what occurred was that the developer voluntarily maintained patrols for two approximately two years and for the upcoming season decided that he didn't want to anymore. There was no statutory obligation and, again, Councillor Beck pushed very hard for the Council to pay for manned patrols on Casuarina Beach which is the only beach that gets manned patrols for the whole summer paid by Council.*

MS ANNIS-BROWN: S*o when you say the developer voluntarily for two years put in place people to patrol the beach, or lifeguards, as you say, there were not covenants put in place for him to do so but that was part of the deal, the initial deal or what was your understanding of that?*

MR ALDRIDGE: *My understanding - it was simply an agreement the developer had with Council.*

MS ANNIS-BROWN: *Right.*

MR ALDRIDGE: *There was no statutory requirement and I believe that it was a very good marketing tool for the developer and it was a good investment to attract people to the area.*

MS ANNIS-BROWN: *So, that agreement was for the two-year period or - - -*

MR ALDRIDGE: *I don't know if there was a set timeframe.*

MS ANNIS-BROWN: *Right, okay. So, the current situation is Council is paying for lifesavers on the beach?*

MR ALDRIDGE: *My understanding of a recent resolution the Council has agreed to contribute for paid lifeguards on Casuarina Beach. That's my understanding, yes.*

MS ANNIS-BROWN: *Do you know round about when that resolution of Council took place?*

MR ALDRIDGE: *My sense is within the last three months. I'm not sure of the exact - - -*

MS ANNIS-BROWN: *So, fairly recent?*

MR ALDRIDGE: *Fairly recent, yes.*

PROF DALY: *Could I ask, is there a surf club at that beach?*

MR ALDRIDGE: *No.*

PROF DALY: *So, where do the lifesavers come from?*

MR ALDRIDGE: *In the future or currently?*

PROF DALY: *Currently?*

MR ALDRIDGE: *My understanding is that they are paid lifesavers who - professional lifeguards. The surf club at Cabarita had helped out from time to time yet these are either independent people or they're professional lifeguards who are employed.*

PROF DALY: *And, do they have premises or - how do they - - -*

MR ALDRIDGE: *No, it's simply a temporary set-up so they man the beach.*

PROF DALY: *Do they do it on the weekends?*

MR ALDRIDGE: *What they do as I understand it is that during the holiday periods in particular and certain weekends over summer.*

PROF DALY: *Is that beach a fairly safe beach or not?*

MR ALDRIDGE: *The research that was done when Casuarina was being approved rated it one of the most dangerous beaches on the Tweed Coast and, in fact, the New South Wales' coast.*

T. 10/3/05 p. 1212-1214

The report to council provides details of the council's consultation with government agencies, under the heading "NSW Coastal Policy 1997" the report states:

The proposed subdivision layout provided results in a significant amount of coastal foreshore area being 400-500 metres from a formalised public park. The lack of more widely available public car parking in association with the accessway provided at approximately 80m intervals is considered inconsistent with objective 7.1 of the NSW Coastal Policy 1997. DLWC considers that the current proposal is deficient through its lack of vehicle parking spaces to facilitate public access to Lot 500. This will result in a potential future conflict between beach users and residents over on street parking. Accordingly, DLWC recommends that additional public parking be provided at approximate coastal locations.

The proposed development site incorporates significant earth fill for a large proportion of its eastern side presumably to assist in gaining ocean views. Goal 3 of the NSW Coastal Policy seeks to protect and enhance the aesthetic qualities of the coastal zone. For this development proposal, consideration and application of the design and location principles contained in the coastal policy (Appendix C Table 3) will be required. In this regard DLWC recommends that particular attention be given to avoiding potential overshadowing impacts and to maintenance of natural vistas from the foreshore and beach.

Under the heading "Coastline Hazards" the report states:

The SALT proposal represents a significant new residential development adjacent to the Tweed Coastline on a currently undeveloped site. Accordingly, the determination of the seaward boundary of the proposed development is considered crucial. Tweed Shire Council has recently completed a Tweed Coastline Hazard Definition Study (WBM 2001) as the initial stage in the preparation of a long term coastline management plan for the Shires coastline. The Study indicates the coastline adjoining the proposed SALT development is subject to the coastline hazards of short term storm erosion, long term shoreline recession and climate change including a postulated sea level rise impact from the greenhouse effect.

Appendix D of the Tweed Coastline Hazard Definition Study defines a landward extent of coastline hazard zones for various planning timeframes based upon the above hazards. Figure D18 of Appendix D indicates that the subject land is located landward of the 100 year hazard lines.

In the absence of the adopted Coastline Management Plan for the Tweed Shire Coastline it is recommended that in defining the building setback line that Council consider: -

- *Coastline hazard impacts including climate change and the need to accommodate natural shoreline fluctuations in the long term without demands for future protection and associated beach restoration works.*
- *The provision of public foreshore access requirements in perpetuity.*
- *Maintenance of natural aesthetic quality including the potential visual impact of development as viewed from the foreshore and beach.*
- *The uncertainties arising from future conditions that require a risk adverse or precautionary approach to decision-making.*

Neither of these sections encompasses the concerns that had been raised by Professor Thom. His concerns are not dismissed; they are ignored.

The DEC, which in part had previously been the NPWS, provided a submission to the Inquiry. The Department raised a number of concerns illustrating them by reference to particular developments.

The department listed its concerns as:

After reviewing the key development projects in the Tweed Shire where we have been involved, there are a number of recurrent themes in the planning process that have been a source of disappointment to us. These include:

1) Council seeking our advice on protection of threatened species or Aboriginal heritage and then appearing to ignore it, resulting in apparent benefit to the development proponent and undesirable or excessive loss to the environment.

2) Development companies being allowed to pre-empt land use planning decisions by undertaking so called 'farming' and 'maintenance' works resulting in the degradation of the land's natural and cultural values during the planning process. This includes during the preparation of draft Local Environmental Plans (LEP) and the development assessment (DA) process. The slow pace of both in Tweed allows these damaging activities to continue for long periods.

3) Council, or other determining agencies, allowing piece-meal and ad-hoc development without adequate consideration of the cumulative impacts on the environment. This includes accepting additional DAs and modifications to development approvals beyond the scope of the adopted master plan or initial DA for the proposal.

Typically, at commencement of a major development, impacts and trade-offs are agreed to and encapsulated in a masterplan or concept plan. Later variations result in erosion to environmental / cultural values and gains to developers in terms of more residential / tourist development areas. Often, the cumulative impacts of these 'minor' variations are not fully assessed.

In turn, it raised the following particular issues regarding the SALT development:

SALT – DEC File no 03/01209

Proponent: Ray Group Pty Ltd.

Primary consultant: Aspect North – Guy Holloway.

Key Council staff: Noel Hodges, Garry Smith, Lindsay McGavin, Steve Enders (former employee).

Other Key Agencies: Department of Infrastructure, Planning and Natural Resources.

Background:

The SALT development is a major coastal development with the initial stages approved immediately prior to the introduction of the State Environmental Planning Policy No. 71 – Coastal Development (SEPP 71) being enacted. Crown Land bounds the development to the north, Seaside City to the South and Cudgen Creek to the west and the coastline to the east. A key development initiative of the SALT development was the raising of the site by up to four metres, by the importation of sand, to provide for coastal views.

The DEC provided numerous submissions to Council, regarding this development, in particular, with respect to the development's likely impact upon Cudgen Creek, the coastal dune system and threatened species. Key issues of concern raised were the cumulative impact of the development, need for environmental buffers and mitigation for threatened species.

Potential Issues:

1/ DEC advice on development matters being overlooked.

The DEC's recommendation for a minimum of 50 metres environmental buffer (development free) between the high tide level of Cudgen Creek and the development has not been implemented. The development encroaches significantly within the buffer and Cudgen Creek. The result is that there are now numerous additional housing lots adjacent to the reduced Cudgen Creek buffer as well as infrastructure such as pipelines and walking tracks in the proposed buffer zone.

2/ Council, or other determining agencies, allowing piece-meal and ad-hoc development without adequate consideration of the cumulative impacts on the environment.

Rather than accepting one single development application for the proposal, Council accepted numerous DAs for the development. The DEC is aware of separate DAs for the pipeline, sand extraction, tourist resort / apartments / subdivision, Peppers resort, boat shed and butane gas storage facility. It is understood there have been numerous S96 amendments to development applications lodged since.

It appears that there has been a lack of cumulative environment impact assessment for the overall development.

3/ Other matters.

The planning process for the assessment of the impact of the development upon threatened species is questioned. A Species Impact Statement (SIS) was avoided by preparing Threatened Species Management Plans, for those species likely to be impacted by the proposal. It is apparent from the resultant development that the threatened species conservation outcome that may have otherwise been attained through the SIS process has not been achieved.

Having become aware of the concerns raised by the DEC regarding the SALT and Koala Beach developments, the Ray Group wrote to the Inquiry, hotly defending its position.

This was to result in further correspondence from the DEC, which, while providing some clarification, does not detract from the thrust of the original letter.
Mr Diacono, the Manager, Conservation Planning with the northeast branch of the DEC gave evidence during the Public Hearings, confirming the department's concerns.

He confirmed the department's view that there had been a number of recurrent themes in the planning processes that had been a concern to the department, providing a view:

MR DIACONO: *I would see the disappointment being particularly aimed at Tweed Shire Council in the way it has interpreted the planning legislation. We deal with*

development basically from Newcastle through to Tweed, and different councils have got different ways of doing things, and there are different outcomes, but we seem to have more disappointments at the Tweed end than we do in other areas. Now, I think it's – Tweed Council has a very difficult job because it has a very rich biodiverse area to deal with, and it's got the greatest demands on the land, I'd say apart from the Hunter Valley, in our whole area. So it is a very difficult tightrope for Tweed Council to talk, but, on the other hand, the outcomes sometimes can be quite disappointing.

T. 9/3/05 p. 1140-1141

Similarly, the Department of Lands wrote, expressing the following concerns:

AREAS OF CONCERN – SPECIFIC DETAIL

1. Construction of Parking and Access on Reserve 72592 for Future Public Requirements at Pottsville.

- Reserve 72592 is administered by the Department of Lands; not a reserve under the care, control and management of Tweed Shire Council (TSC)
- In 2002 TSC constructed a parking area within the Reserve to support commercial development on adjacent lands (lots 1 and 2 in DP 1002122).
- TSC did not obtain the consent of the Minister administering the Crown Lands Act 1989, as owner, for the construction
- TSC has also required under the EP & A Act the provision of rear access to properties through the Reserve.
- TSC did not obtain the consent of the Minister administering the Crown Lands Act 1989, as owner, for the lodgement of development applications for these commercial developments.

2. Unauthorised clearing in Coastal Dunes.

- TSC is the appointed corporate manager of Crown reserve 1001008 for Public Recreation and Environmental Protection (notified 31 October 1997) and is charged with the care, control and management of this reserve.
- Illegal tree clearing is a continual problem occurring in this coastal reserve, particularly with large areas of new residential development in the area.
- TSC, as corporate manager of the reserve acts to discourage illegal tree clearing through public education and the erection of visual barriers in some areas. However, after supporting large scale urban and tourist development in the area between Pottsville and Kingscliff known as Casuarina Beach, Council has chosen not to deal with any illegal clearing in this area.
- As corporate manager for Crown Reserve 1001008, managing illegal tree clearing is a responsibility of the Tweed Shire Council. However, in November 2003 the majority of Councillors voted not to support a Department of Lands proposal to erect signs in areas that had suffered illegal clearing. As a result this Department has had to use departmental funding and staff time for the development and installation of signs and

visual barriers, and to undertake public education in the area despite this being a Council responsibility.

3. Lot 490, South Kingscliff

- Lot 490 at South Kingscliff comprises Reserve 1002202 for "Tourist Facilities and Services" notified 6 November 1998. Tweed Coast Reserve Trust (managed by TSC) was appointed trustee on 23 April 1999.

- Despite earlier recommendations (tabled in Council's Minutes 5 May 2004) that the Tweed Coast Road not be relocated through Lot 490 until the "draft DCP 46 and the draft Plan of Management and the tendering process for Lot 490" are finalised, Council resolved in May 2004 to approve the relocation of the road through Lot 490 on "the alignment proposed by the Ray Group" and subject to the Ray Group funding the road on the condition that the Ray Group be reimbursed by the successful tenderer for Lot 490".

- The Ray Group is a development consortium responsible for the development of Salt, a new suburb south of Kingscliff.

- In response to significant community concerns regarding this decision and Council's management of Lot 490, the Minister for Lands removed Lot 490 from the management of Tweed Shire Council and appointed an Administrator to manage the Reserve (by gazette dated 28 May 2004).

- Issues being raised by the community in regard to lot 490 include:-
- The decision regarding the location of the road;
- Council's relationship with the adjoining developer;
- The reliance by TSC for income from Lot 490 to offset the costs for a new bridge across Cudgen Creek and other infrastructure;
- The adequacy of the section 94 Contribution Plan to require adjoining developers to meet the true costs of the provision of services and infrastructure in the South Kingscliff area.

- The Department is especially concerned at the approval of the Salt and Casuarina Beach developments despite the apparent lack of an adequate Section 94 contribution plan.

- Further, the approval to these developments was given on the assumption the Department of Lands would concur with the formalisation of the new road through lot 490 and the loading of infrastructure costs onto that land.

Mr Hodges was not aware that any department had raised concerns:

MR BROAD: ... *In the period that you have been in your job, have you seen any concerns raised other government departments in respect of the planning decisions of the Council?*

MR HODGES: *No, not at all. I've had some interaction with the planning staff at Grafton and I've also had some discussions on major development, which I've been trying*

to get off the ground at Seaside City, with the SEPP 71 team, if you like, that are in Sydney. And they're all was, you know, we've got a good working relationship with the State government. I think they appreciate the professionalism of the staff, and it's not through my instigation, it's happened over time, that they've developed with the Tweed Shire planning staff.

T. 18/2/05 p. 336

In its submission in reply (**submission in reply 96**), the council responded to the concerns in the following manner:

State Government Submissions about Tweed Shire Council

The submissions which have been made by various State Government Departments about the Tweed Shire Council to the Inquiry were only received on 1 April 2005. There has not been sufficient time to analyse all these submissions and make a detailed response. However the most critical submissions have been made by the Department of Environment and Conservation (DEC) by staff from the former National Parks and Wildlife Service. The allegations which these staff have made about Tweed Shire Council are difficult to comprehend as the former Parks and Wildlife Service has had input and provided conditions to preserve the environment on all the major developments in the Tweed. Not only have these officers specified all of their environmental requirements for these developments they have formulated appropriate conditions and agreed that these conditions have been fully complied with before Council has issued final approval certificates for these developments.

In recent years all major developments has been the State Government's responsibility and any shortcomings in recent approvals could only be attributed to their own staff. The suggestion that developers are using existing use rights to increase development yields prior to LEP changes through clearing and drain maintenance is incorrect and cannot be substantiated. Council staff have fully co-operated with these representatives from the former Parks and Wildlife Service. All existing use right applications have been properly assessed based on best practice and recent Planning and Environment Court decisions.

The statements made about disappointment in the environmental outcomes of development in the Tweed are incomprehensible and illogical given their input into development requirements and their agreement as complying.

The major developments in the Tweed, ie. SALT and Casuarina are acknowledged as best practice in meeting environmental outcomes for coastal development in New South Wales and other areas of Australia. The allegations made by the DEC cannot be substantiated and have no validity. The instances where works have allegedly been carried out causing environmental harm could have been addressed by the former Parks and Wildlife Service under their own legislation. At page 8 of their submission the statement is made that there was insufficient evidence to prosecute the matter yet this example is still used to castigate Council.

Another submission which is critical of the Tweed Shire Council is that from the Lands Department. Again this submission is simply incorrect and demonstrates a narrow focus with a complete lack of understanding how development contributions can be lawfully obtained. The allegation is that the SALT and Casuarina Beach developments were approved without an adequate Section 94 contribution plan and with an assumption that the Department of Lands would concur with the formalization of the new road through Lot 490 and the loading of infrastructure costs onto that land. The developments at SALT and Casuarina Beach were required to provide all the relevant Section 94 contributions as part of their development approval conditions. These contributions included the road upgrading costs of the Old Bogangar Road. The traffic from these tourist developments has been planned along the relocated Tweed Coast Road and not as a continuation of the road through Lot 490. All of the requisite contributions towards the upgrading of the Old Bogangar Road have been obtained. In addition some monies were sought from the SALT development for the upgrading of the timber bridge linking Lot 490 to Kingscliff. A contribution was obtained from the SALT development to provide pedestrian and cycle access to Kingscliff. The timber bridge has been assessed by Council's engineers and with the reduced traffic flows as most of the traffic is now using the upgraded Old Bogangar Road instead of coming through Lot 490, the life of the existing bridge is estimated at another 15-20 years. There is no nexus legally available to have the SALT and Casuarina Beach developments upgrade the bridge in these circumstances.

The existing road linking the SALT development with Kingscliff is an old mining road which has been constructed in the Lot 500 coastal reserve. There is a temporary road which was approved across some allotments in the SALT subdivision in the interim of relocating the old mining road to link with the main access road along the SALT development. The Department of Lands required a new road within Lot 490 rather than allow a temporary road to be relocated north of the SALT subdivision and have the existing mining road remain in Lot 500. The Department of Lands approved the lodgement of the development application for the proposed new road through Lot 490. This fact seems to be overlooked after there was a public outcry when Council sought to approve the new road.

The management of Lot 490 was taken out of Council control and the Ministers' Steering Committee for Lot 490 has basically confirmed the original Plan of Management prepared by Council and road location which was sought to be approved by Council. The infrastructure costs proposed for Lot 490 are no different to any other development in this location.

It is difficult to see how the council could have arrived at conclusions that the statements were “incomprehensible” or “illogical” or that they “cannot be substantiated” and “have no validity”, nor to attribute “any shortcomings in recent approvals to the staff of these departments.”

3.5.6 Enforcement and Compliance

In its submission to the Inquiry the DEC raised concerns over illegal clearing practices that had occurred in the Tweed, including the clearing of threatened species habitats.

The submission indicated that in one instance “a series of stop work orders and Interim Protection Orders had been issued over the Kings Forest lands.”, with the intent of preventing clearing until the council could put planning processes in place.

This issue was taken up with the department's representative, Mr Allen when he gave evidence during the Public Hearings that such clearing was not a one-off event.

MR BROAD: *One of the issues that has come before the Inquiry a number of times is the issue of unauthorised clearing. We have had suggestions over the last couple of days that in respect of one particular property, that there has been clearing in mangroves associated with a creek. We have had an area which has been put to agricultural use contrary to the zoning. There seems to be a fairly live issue in respect of unauthorised clearing.*

Now, has your Department had concerns in respect of unauthorised clearing within the Tweed Shire Council area?

MR ALLEN: *Yes, we have.*

MR BROAD: *And has that been recurrent or is it just a one-off instance?*

MR ALLEN: *I would say it's recurrent.*

MR BROAD: *And is the nature of the clearing relatively minor but relatively recurrent, or is it something that really does bring concerns forward?*

MR ALLEN: *I would say it does bring forward concerns, yes.*

MR BROAD: *Again, are there particular instances where your Department's concerns have been raised in respect of clearing?*

MR ALLEN: *Yes. There are a number of instances where we have brought our concerns to Council, keeping in mind we also have our own legislative response to clearing as well.*

T. 11/3/05 p. 1388-1389

When asked to provide examples, Mr Allen spoke of work on the Kings Forest property. While the discussion had been initially confined to illegal clearing, it soon became apparent that the work, which included draining wetlands was potentially likely to have a significantly wider impact, as was made clear by Mr Allen:

MR BROAD: *Instances where your Department has become concerned about unauthorised clearing, can you give some examples again?*

MR ALLEN: *One example is the Kings Forest property, which covers an area of almost 900 hectares. On that property, there has been clearing, including recent draining of a SEP 14 wetland.*

MR BROAD: *That is more than just clearing, isn't it?*

MR ALLEN: *Yes.*

MR BROAD: *What sort of works were involved?*

MR ALLEN: *Tree removal of up to approximately 80 or over trees, native trees, as well as - - -*

MR BROAD: *To what sort of diameter?*

MR ALLEN: *Up to, I would say probably 60 centimetres, about so, in diameter.*

MR BROAD: *And your inspections, did that indicate that they had been deliberately removed; in other words, had they been cut down or perhaps knocked down.*

MR ALLEN: *Yes, they had been cut down. The concern that we have from our Department, which we are still investigating, has been threatened species habitat. However, the works were identified as - it was put to Council and it took a number of months to get - for the Council to finalise its investigations, but I understand the Council engaged a consultant to provide advice and it was - the Council resolved that the - although I don't think it was consensus - that the works were existing, were ancillary to existing and continuing uses on the land.*

MR BROAD: *You were saying that it is insensitive* [*sic. sensitive*] wetlands.

MR ALLEN: *Yes.*

MR BROAD: *What sort of existing or ancillary use could be made of these wetlands?*

MR ALLEN: *The connection between - the way it was termed in the consultant report was that it was an ancillary use, and the connection that they had was the two key activities being undertaken on the property over the last - since the 1960s - were pine forestry activities through pine plantation, and grazing. And the annexure between the two is that - or the draining of the wetlands, that annexure is that it's draining the lands to make it more productive to facilitate forestry and grazing. So not specifically growing the trees on the - or grazing the cows in the wetlands themselves, but by putting a drain in you lower the water table and that means the adjacent lands aren't so sodden, and therefore, making more - - -*

MR BROAD: *So you effectively have a much wider spread than simply the area of the drain?*

MR ALLEN: *That's right. It's either - - -*

T. 11/3/05 p. 1389-1390

In this case, the department had been forced to seek interim protection orders to protect the site.

To Mr Allen's knowledge, such orders had only been used in twelve instances since 1974.

Importantly, as Mr Allen was to indicate, the council had been aware of the department's concerns but had not responded:

MR BROAD: *I now briefly come to interim protection orders. Now, you've referred to the Department having a power to seek interim protection orders. Has the Department exercised that power in respect of properties within the Tweed?*

MR ALLEN: *Yes, it has.*

MR BROAD: *Yes. In what circumstances?*

MR ALLEN: *Essentially that power is one of the strongest provisions under the National Parks and Wildlife Act. It was used very rarely by the Department and has been only used, I think, in 12 instances since 1974. I could be corrected there, so - but that's an estimate. We have issued an interim protection order in - over one particular area in the Tweed and it was only after ongoing degradation of a particular area which had been previously identified to have very high conservation values including natural, scientific and cultural values.*

MR BROAD: *Was the council aware of your concerns in respect of that particular area?*

MR ALLEN: *Yes, the council is aware.*

MR BROAD: *Have the council taken any action in respect of the degradation?*

MR ALLEN: *Not specifically other than agreeing to take part in joint meetings with the Department of Environment and Conservation and the property owner. There was one action where they did take - if I can step back to - sorry, I make a mistake there. There was an action that the council did take specifically towards one of the parties involved. This particular land which I'm referring to is the King's Forest property.*

There have been a number of land owners over a series of years and one of the land owners the council did take action against and they - that person was taken to the Land Environment Court with respect to undertaking agricultural activities in land zoned 2C, urban expansion, and the court ruled in favour of the council's decision that the works were unauthorised. So yes, in one instance with one particular land owner, the council did take action, however that was after a series of - after National Parks had put forward a series of stop work orders which were subsequently breached and then that's what rolled over to us putting the - our Department putting the interim protection order in place. But since then there hasn't been any such enforcement.

MR BROAD: *Do I assume that the Department's interim protection order was based in part, at least, by failure of the council to take adequate steps?*

MR ALLEN: *In part. It lies very closely with the recommendation – this particular property has a lot of background, as I'm sure you would be aware of some. One of the recommendations of the Bulford report which was the Local Government Inquiry was*

that the council duly proceed with the preparation of the draft local environmental plan. That has - we're still awaiting that plan to be finalised and the - in the interim protection order that we put forward the purpose of that is to protect the land's values until such time as an appropriate zone be identified for that land.

T. 11/3/05 p. 1394-1395

Kings Forest was highlighted in other submissions and by other speakers.

Mr Hopkins, of the Caldera Environment Centre wrote (**submission 316**):

2. Tweed Shire Council is lax in prosecuting developers for willful unauthorised clearing and/or protecting native vegetation from "accidental" clearing, draining & burning. There have been many instances along the Tweed Coastal Zone, but also in the hinterland. Council rarely takes the initiative in these cases and is often utterly negligent in performing its duty of care. Road verges suffer from Council's disregard for endemic roadside vegetation whilst a fetish for pruning, slashing and mowing.

Submission 316

Mr Hopkins, the group's spokesman, gave evidence during the Public Hearings enlarging on this statement:

MR BROAD: *Yes. In your submission in paragraph 2 you state:*

Tweed Shire Council is lax in prosecuting developers for wilful unauthorised clearing and/or protecting native vegetation from accidental clearing.

Are there circumstances that your group has seen where it can say, "Yes, we believe with some level of certainty there has been wilful unauthorised clearing"? Do you - have you seen instances where - - -

MR HOPKINS: *Yes, I believe that King's Forest has a long history of deliberate clearing. Specially heath land, which is mown very regularly for no apparent purpose. And I think the main purpose is to degrade the site so that it has less environmental value.*

MR BROAD: *And has that been occurring over a short period, or a longer period? Or what sort of period?*

MR HOPKINS: *I think it has been occurring over a long period of time. And - - -*

MR BROAD: *Can you give some parameters for that?*

MR HOPKINS: *Well, it happened in the days of Narui Norren, who were the previous owners to the current ones.*

MR BROAD: *Has it occurred more recently?*

MR HOPKINS: *Has it occurred - very - quite recently, since Leader Development bought the property. And there's now an injunction over part of that property for creek side clearing. And there's been quite recent argument about whether the interim protection order should be extended, and whether it should apply to the northern part of the site as well as the southern part of the site.*

MR BROAD: *Did the council secure that injunction?*

MR HOPKINS: *No - well, I think they did, actually. Yes. But it was largely the effort of Henry James.*

MR BROAD: *Now, in respect of other examples you might be able to give, can you assist the inquiry?*

MR HOPKINS: *Yes, I can remember down at - this is going back some time, at Black Rocks where the developer had approval to farm - it was zoned agricultural at that stage. So he did a lot of clearing and planted pumpkins. And it was quite obvious that the pumpkins had no commercial value, but the agricultural pursuits were followed, we believe for purposes of degrading the site environmentally.*

MR BROAD: *In what sort of time frame again are you talking about?*

MR HOPKINS: *Well, this is going back quite some time. But some of these practises - well, drainage practises are very common. People will drain a wetland - developers will drain a wetland and then persistently redrain and have flood gates that won't allow the ingress of high tide, for example. So that just a constant flow of water out of those sites. And then we have fires which may or may not be accidental that happen after - - -*

MR BROAD: *The drainage work. Can you point to some examples?*

MR HOPKINS: *Again, they're mostly on the lower Tweed Coast. They happened on the site that was owned by David Brown, many years ago. There's been instances - more recent instances at Cobaki Lakes where a survey road was put through without any approval, and it was massively wider than was - like, it was a full on road rather than just a site line for surveying purposes. And that was - yes, surveying was given as the purpose for that road. So it's very very common in this shire.*

T. 25/2/05 p. 621-623

Other submissions also raised concerns over illegal or unauthorised clearing or other damaging works.

Of particular concern was evidence regarding clearing at Hastings Point.

Ms Mann and Mrs T Brill both provided submissions regarding clearing on lot 156 Creek Street Hastings Point (**submissions 177 and 276**). Ms Mann wrote:

Since mid 2001 Hastings Point/Creek St residents have been writing innumerable letters and making phone-calls to Council in regard to unauthorised clearing on, and the illegal barbed-wire enclosure of, Lot 156. W.E. Holdings Pty Ltd purchased this Lot (at Creek St Hastings Point) soon after the election of the pro- development faction in 1999. Lot 156 has incurred a long and well-documented history of illegal activities. These documents exist in the TSC files, and the current owners would surely have been advised of them.

Lot 156 adjoins the Cudgera and Christie's Creek. An estuary which, notably, is one of the last relatively undeveloped and pristine waterways along the entire Tweed coastline, National Parks & Wildlife assert " development of this land(Lot 156) is likely to be seriously constrained by the fact that a significant proportion of the land is zoned for environmental protection." (letter available)

However the Tweed's Estuary Management Plan, and LEP requirements, have been steadfastly ignored by Council and have resulted in land and waterway degradation through unlawful clearing, earthworks, fencing and the activity of livestock, (NB: there is no existing use right for grazing,

agriculture is not only prohibited on land zoned 2(e) but allowed, with lawful consent, only under exceptional circumstances in 7(a)). Unauthorised clearing of areas of high conservation value also, regularly, occurred. The owner was 'advised', by council staff in August 2001, not to clear sensitive and well-defined areas.

* On 14/2/02, 13/3/02 and 10/4/02 I represented residents at TSC's public access to make known our concerns. Unauthorised and illegal clearing in 7(a) areas, intimidatory actions from a hostile 'caretaker', regular day and night dog patrols behind residents houses, and illegal barbed-wire enclosures had all become, and were to remain, a feature of life at Creek St. A residents petition with hundreds of signatures was presented to Council, but not acknowledged. Rare responses from TSC were predictable -'Resolved, no action would be taken'. (Letters available).

Submission 177

Mrs Brill provided a sixty-two-page submission detailing her concerns, providing a chronology of the events that had occurred together with photographic evidence.

The quality both of the submission and of the supporting evidence, particularly the photographs attached leads to an overwhelming conclusion that illegal clearing has taking place on this property over a significant number of years. The concerns regarding the clearing are magnified by the fact that much of the clearing has been undertaken in a sensitive wetland area.

In her evidence at the Public Hearings, Mrs Brill was to confirm that much of the wetland area was zoned 7(a) Environment Protection (Wetlands and Littoral Rainforests).

Zone 7(a) land is subject to primary objectives, being:

- to identify, protect and conserve significant wetlands and littoral rainforests.
- to prohibit development which could destroy or damage a wetland or littoral rainforest ecosystem.

and secondary objectives, being:

- to protect the scenic values of wetlands and littoral rainforests.
- to allow other development that is compatible with the primary function of the zone.

Under the zoning, no development is allowed without consent.

The permissible uses that are allowed with consent include beach maintenance, bushfire hazard reduction (not being exempt development) and noxious weed control. Nothing in Mrs Brill's submission suggests that any of these were being undertaken, or were the subject of any consent.

Agriculture is permissible, provided:

> (2) …the applicant demonstrates to the satisfaction of the consent authority that:
>
> (a) the development is necessary for any one of the following reasons:
>
> (i) it needs to be in the locality in which it is proposed to be carried out due to the nature, function or service catchment of the development,
>
> (ii) it needs an identified urgent community need,
>
> (iii) it comprises a major employment generator, and
>
> (b) there is no other appropriate site on which the development is permitted with consent development (other than as advertised development) in reasonable proximity, and
>
> (c) the development will be generally consistent with the scale and character of existing and future lawful development in the immediate area, and
>
> (d) the development would be consistent with the aims of this plan and at least one of the objectives of the zone within which it is proposed to be located.

Agriculture is defined in general terms in the LEP as including:

> …horticulture and the use of land for any purpose of husbandry, including the keeping or breeding of livestock, poultry or bees, and the growing of fruit, vegetables and the like. It does not include forestry, or the use of an animal establishment or a retail plant nursery.

The use of the land to graze goats and horses and indicated by Mrs Brill appears to fall within this definition. Council's consent is required before such activities can be undertaken.

As has been indicated earlier in this part, the evidence provided by Mrs Brill particularly the photographs overwhelmingly supports the view that the property has been the subject of illegal clearing.

Mr and Mrs Catchpole provided a submission to the Inquiry in which they wrote:

Never prosecute or criticise developers for acts of environmental destruction

Some Tweed Shire Councillors never seem to want to take action when acts of environmental destruction or illegal land clearing occur in the Tweed Shire, especially where it involves developers.

This gives people (and especially developers) the impression that they have open slather on environmental destruction in the Tweed Shire with no prospect of ever being prosecuted, fined, or in many cases even reprimanded. The only time ratepayers hear about this destruction and lack of action is usually when non-balance team councillors bring it up in a council meeting due to a complaint from the public.

Submission 67

They then set out a number of instances where they suggested that illegal clearing had taken place, including Casuarina Beach, Kings Forest and Koala Beach, attributing the failures on the majority councillors, writing:

... Councillor Bob Brinsmead and other balance team councillors voted against taking any action against the developer. For about 12 months the developer set up a temporary marketing facility in front of the large hole they had cleared in the dunes, giving clients a false impression of views that would be available.

Submission 67

And, regarding the erection of signs notifying the destruction of trees:

... Most councils welcome this form of deterrent to stop trees on their coastlines from being totally destroyed, but not the Tweed Shire Council. Councillors, lead by councillors Beck and Brinsmead, thought it not warranted in this case as it may upset some Casuarina residents (or perhaps the estate developer?). In the end it was left up to the Lands Department in conjunction with the Tweed dune care people to organise the erection of the sign without any help from the council.

Submission 67

They were then to detail their attempts to obtain a response when excavation and filling works were undertaken at the Koala Beach estate.

We rang the Environmental Protection Authority (EPA) to see if anything could be done about the pollution of the creeks taking place. The EPA told us to ring the Tweed Shire Council (TSC) as they have the powers to do something about it. We rang the TSC to be told that, "as this development was approved by the State Government under planning policy SEPP71, the State Government was the consent authority and the problem had nothing to do with them". We again rang the EPA and told them of our experience. They said that it was the sort of response they would expect from the TSC as, even though TSC were the local authority with the powers to prosecute developers for this sort of pollution, they never seem to use them. We were then told that unfortunately the best you could expect in a case where a developer was involved was a "You've been a naughty boy and don't do it again" letter sent to the developer (if you were lucky). The EPA took the name of the council employee we had spoken to at the TSC and said they would ring him and tell him of the council's responsibilities.

The silt traps were erected two days later, after the damage had been done. As far as we know, no further action was taken. I'm sure if we had complained about a small builder who had not installed silt traps at his building site, the final outcome would have been different.

Submission 67

Mrs Brill's submission documents the attempts to have council take action.

Numerous requests to Council by local residents for removal of the goats went unheeded.
Eventually a brief shower of rain resulted in the hatching of flies in plague proportions,coupled with the strong stench of wet goat dung. Increased complaints forced Council mid December to order the removal of the goats.
The goats and their now numerous offspring remained on the subject site till mid January 2002.
The installation of the goats resulted in the complete destruction of the understorey flora of the remaining vegetation on the subject site.
Following the showers the run-off from the subject site entered the surrounding estuary waters and the inevitable pollution,though never measured,would have been of a serious high level.

Submission 276

Council has failed to take legal action against W.E.H for this unauthorised illegal clearing(see photos)

Clearing continued throughout the property in the following eight months.

Community Access - Tweed Shire Council meetings
14th Feb 02
13th Mar.02
10th Apr.02
18th Apr.02

Ms Trish Mann spokesperson on behalf of concerned residents,Creek St Hastings Point raised the following issues :-

(a) The clearing of mangroves and other vegetation in 7(a) Wetlands .
(b) Illegal grazing of horses and their destructive effect in 7(a) Wetlands
(c) Disregarding buffer zone construction of barbed wire fencing into mangrove and tidal waters.
(d) Illegally installing a herd of goats on the property and the resultant environmental damage to the area.
(e) Criticised Council's acceptance of statement "only regrowth slashed –no more than 100 mm thick." (Scott Elliott representing W.E.H. Pty Ltd. Community Access address to Council 13th March 2002.)
(f) Berated Council for failing to reply adequately to her correspondence - the presentation of her petition - ignoring the community's complaints re Council's constant failure to take legal action as required against W.E.H. for violation of Council's own regulations governing 7(a) Environmental Protection Wetlands. (see Councillors letters enclosed)

Community complaints to Council continued throughout the following eight months and gave cause for the June 1990 Local Environmental Study by James Warren and Assoc.commissioned by Council to come under review.(see enclosed copy Tweed Shire Council meeting 16Oct 2002 recommending an amendment to TLEP2000 to rezone parts of the property to 7(a) Environmental Protection)- hence the $300,000 offer by WEH to Council.(see enclosed – Promedia-Media release,19/11/02 and newspaper cutting 20/11/02.

Council meeting 4th Dec 02 resolved to adopt Town Planner's recommendation for rezoning.

The Balance team majority continued to support the developer's claim all clearing activities were "for maintenance purposes only".

Letter to Ms Mann 27th Feb,2002 Council resolved "that Council defers any decision in relation to this matter until Bolster and Co Solicitors have been given the opportunity to provide within 30 days a history of previous use of the property from the deceased estate. Until Council considers this information no action will be taken against the landowners for the clearing of the property ."

Submission 276

As will be seen from the latter extract, when the matter came to a head, the councillors sat on their hands; not taking any steps that would prevent further destruction pending the outcome of their enquiries.

Although it is conceded that the council did eventually take proceedings in the Land and Environment Court, the action appears to have been precipitated by an Ombudsman's investigation of the issue. In November 2002 the council instructed its solicitors to institute proceedings, some eighteen months after the activities had commenced.

The report to council's meeting of 16 October 2002 contained the following description of the property:

> A large portion of the property in the south east corner is zoned 2(e) Residential Tourism, but is an area dominated by mangroves, marshland, and tidal flats – likely to provide important habitat for estuarine flora and fauna. (See Figure 3 – Area of Investigation). The area is also congruous and contiguous to wetlands found within Cudgera and Christies Creek, some of which have been identified under State Environmental Planning Policy No. 14 Wetlands.
>
> Part of the property, identified as the Area of Investigation in Figure 3, is not considered suitable for urban/tourist development because development would require removal and destruction of marine vegetation and fishery habitats. Any development of this part of the property would also require the acceptance of various government agencies including National Parks and Wildlife Service, NSW Fisheries and the Department of Land and Water Conservation. Approximately 3.5 hectares of land currently zoned 2(c) is inappropriately zoned. This area should be zoned Environmental Protection Zone

Given that description it is surprising even though that report acknowledged the clearing and agricultural activities and recommended re-zoning of areas as 7(a) wetlands and littoral rainforest that the council at its meetings failed to require that no further activities take place until resolution of the issue.

While it is often dangerous to criticize outcomes in court proceedings without greater knowledge of the processes and the evidence associated with the particular case, it is difficult to see how some two and a half years after what appears to have already been substantial clearing; orders restraining further clearing, requiring fencing of an area and eradication of weeds; provides a sufficient response (**Land and Environment Court Order 13/5/03**).

Mr Malecki provided a submission that also raised concerns over clearing activities. He wrote about clearing opposite two developments in Murphy's Road, Kingscliff. One; Soraya, being developed by Resort Corporation, and the other; Zen, by the Usher Group. Both of these companies are linked to Councillor Brinsmead.

Mr Malecki wrote of his contact with council officers and the response of Mr Burton:

I called the Tweed Shire Council and notified Graham Burton and he said that it was hard to police and prove who had committed the crime. I mentioned the use of signs declaring the site as vandalised or use of a barrier to start the dune restoration. His response was that it could cause more harm by angry persons tearing down the sign, or cutting down more trees. I do not understand why he seems afraid to do anything about. If I was to cut down a tree in front of my residence on Marine Parade, I do not feel that the same would apply. The same as if I would like to build a house and raise the ground level 4 meters so I could have a view. I do not think the council would approve of it and quote that it is against their regulations.

Submission 83

When dealing with Mr Burton's subsequent response over Mr Malecki's concerns over clearing in front of the "Zen" development, he wrote:

··· He didn't sound convincing that he would do anything about. This is prime protected coastal land that is being allowed to have the trees cleared so that developments can have a view. Crown land adjacent to these sites is not heavily cleared so it is obvious they were cleared to afford views for the developments.

Submission 83

Mr Malecki also provided Mr Burton's response to his concerns over clearings adjacent to the SALT development:

I asked Graham Burton during one of the same conversations about my concern that Salt had cleared more land than what was in the original proposal. He stated that they did clear more land than in the approved DA because the sand was tainted and needed to be neutralised.

Submission 83

Part 2 of council's files on the SALT application (**DA 02/1422**) contains reference to concerns over removal of vegetation from the coastal dune area. The file contains photographs clearly showing that living (green) material had been cut down, despite assertions that only dead material had been removed.

The evidence that has been brought to the Inquiry's attention has come from the public, concerned over the destruction of flora and the consequent loss of fauna habitat.

Where the community has public access to areas they are able to report instances of habitat destruction. Where such events occur on private property, there can be considerable difficulty, as was acknowledged by Mr Hopkins of the Caldera Environment Centre, when giving evidence during the Public Hearings. Mr Hopkins indicated an approach that had been adopted in the area:

MR HOPKINS: *Well, I should say that a lot of these places are hard to view. And we had a run-in with Councillor Brinsmead on the King's Forest site, where we were trying to see what the damage that was being done was. And - - -*

MR BROAD: *What was - - -*

MR HOPKINS: *- - - Councillor Brinsmead arrived with the police to order us off the site. But we were actually on a public road. But as – if you don't have the ability to fly over a lot of these sites, it can be quite hard to access them legally. We used to have a pilot who would take us up, but unfortunately he died a hang gliding. So we can't use that. And it's very expensive to fly over sites.*

T. 25/2/05 p. 623-624

In its submission to the Inquiry, the Centre had written:

8. We believe local town planners are intimidated by the pro-development agenda of the majority faction. The independence of key Council managers is compromised by the special circumstances under which they were appointed. It is widely believed that the previous Development Manager was forced out of his position because he made recommendations contrary to the desires of the majority faction.

Submission 316

There can be no doubt that Councillor Brinsmead attempted to intimidate a group who were attempting to view potentially illegal clearing on the Kings Forest site.

Mr Hopkins and others were to detail Councillor Brinsmead's prompt response to a call from the owner's representative.

But for the seriousness of the underlying proposition that councillors should act as agent for or advocate for private owners, Councillor Brinsmead's attempts to excuse his involvement would provide an amusing sidelight to the proceedings (**T. 17/3/05 p. 1666-1669**).

It is, however, quite clear that he undertook a quite improper and intimidatory role.

While this part suggests that councillors have been primarily responsible for a lack of action, Mr Hopkins, as did Mr Malecki, put forward a view that staff were also derelict in their response.

MR BROAD: *Is there a dichotomy in the response by staff from that of councillors?*

MR HOPKINS: *Well, I think the staff are very - they have a - quite a heavy work load, and they probably don't get the opportunity to go into the field as often as they could, or they would like. And I guess it's very time consuming to go and see what's happening.*

MR BROAD: *But the point I was trying to make was this, you appeared to be putting the blame towards the councillors. My question to you really - - -*

MR HOPKINS: *Okay - - -*

MR BROAD: *- - - are staff saying, "Look, here is an instance, here's our report on it, you as councillors should consider this matter". Or is that the staff are not putting the reports out?*

MR HOPKINS: *Well, I think both happens. I think there are cases where the majority of councillors will vote down an attempt to prosecute for that type of damage. It does happen.*

T. 25/2/05 p. 624-625

Concerns over the lack of adequate response by the council were not limited to loss of habitat and included building works.

Dr and Mrs Wright wrote to the council on 20 February 2001 raising a succession of apparently illegal works on the adjoining property being developed as the "Penny Ridge Resort":

When the site was originally bulldozed, no one at Tweed Shire Council seemed to know, and no one was able to find out for us.

When a house was built by Dixon Homes, no one at Council seemed to be aware of it, and again, repeated requests failed to produce any information.

A concrete slab was laid at the entrance to the access road, at Mr. Wharton's own initiative. Why did the Council meet part of the cost?

We understand that a water tank and a caravan are sited on an access road,(Crown Land). Why is this permitted?

We are also informed that buses have already conveyed visitors to the development, ahead of the approval conditions being met.

QUERY.

We want to know how far this developer will be allowed to ignore, flaunt, and try to change the development guidelines, before Council takes appropriate action.

How many more changes will be permitted?

Submission 271

Councillor Boyd wrote:

This development at Carool appears to have lived a charmed life, because of what seems to be protective consideration being given by one or more Councillors.

Local people who have suffered adverse impacts from this project are too frightened to take action against the owner because they fear retribution.

I feel this development from its commencement to the present time should be closely examined and investigations undertaken to ascertain whether there is in fact some connection with a Councillor or Councillors.

Submission 360

On 31 October 2003 Mr Smith, who was then Acting Director Development Services furnished the attached report to the councillors, the general manager and the directors.

Council at the meeting on 17 September 2003, dealt with a report in relation to the above subject and resolved as follows:

A. *Penny Brothers Pty Ltd be given final notice to comply with the conditions of consen of Development Consent K99/1450 being for the construction of a tourist resort comprising a winery building, 16 accommodation units, 4 bungalows and an 18 hole golf course at Lot 1 DP 1043885 Carool Road, Carool.*
B. *If after twenty eight (28) days of the date of the notice referred to in "A" there are still outstanding conditions, the matter be referred to Council's Solicitors to initiate appropriate action in the Land and Environment Court.*

Attached for your information are copies of letters dated 22 September 2003, 22 October 2003 and 29 October 2003, sent to Penny Brothers Pty Ltd, in relation to the above resolution.

The letters are self-explanatory.

When asked about the issues that were being referred to and that had happened to the developer, Mr Penny replied:

MR PENNY: *The situation was a smoke-screen put forward by the Planning Department to overcome about two years of messing around on the development. That was their only way out to not finalise the issues. The issues that they were trying to go into were issues that were parts of developments 2 and 3. We had changed at that time the development areas, sections 1, 2 and 3: we had changed 3 to 1. And most of these conditions referred to stages 2 and 3 which was the major development of the resort, which still hasn't happened, and those conditions are still relevant to those things. And after a period of probably about – nothing happened about it. It was resolved between the officers and ourselves and that was end of the story.*

MS ANNIS-BROWN: *So the buildings they refer to that weren't compliant, what were they?*

MR PENNY: *There were none. They were challenged. I was prepared to - in fact one of their officers resigned and said - made a comment quite clearly that in his opinion I was being victimised, etcetera. He had resigned after 20 years because of the internal fighting between the Planning Department and the Building Department. If they were talking about any works that weren't completed, the fact is there were building inspectors on site every second day.*

Now, if you can do something illegal when people are telling you what to do - again it was a smoke-screen and nothing happened. Everything in our resort development has been by-the-board. There has never been illegal works. Council have had every opportunity. All they have created is delays. However, I'm a happy person today because I believe the staff – if you look at an overall situation, we tackled the most difficult, probably, development of the hinterland - there's nobody else prepared to do it and there won't be anybody else for the next 10 years; it's too hard.

The seascape and the change in the front is too easy. But we're there and we're there eight years later developing a thing still with anti probably - not so much anti-feelings but we're happy where we are. We have had assistance by both sides of the Council. And the thing that I want to say to you quite clearly today: you're putting forward a submission here to try and change Council. The thing that you can't take away from the councillors is experience. And the reason that Council, internal Council, would possibly have some problems are because they don't listen enough to the councillors.

And I include in that Max Boyd, who I don't think has ever done me any favours. However, the man has integrity and he has experience. And he leads a strong opposition which makes the other side of the Council terribly accountable. It makes them think. Every time he opens his mouth he is talking common sense. Now, that's a thing that the Council has got at the moment. And my on-the-street sort of appreciation of what you're trying to do is bring an individual person back into a situation where these councillors have been appointed, elected clearly by the people - they're the voice of the people. I've read papers all my life, since I was 10 years old, and this particular inquiry doesn't run along any lines that I've ever come across.

T. 25/2/05 p. 586-587

A report to council on 17 September 2003 had raised a series of apparent non-compliances including effluent disposal, non-compliant building work, work being undertaken in a road reserve and over a crown road, landscaping and car parking works.

These concerns were generally met with by application to modify the consent to either delete conditions or to legitimise the works, duly acceded to by the majority councillors.

In November 2003 the council was called upon to consider an application to modify the consent granted for the Nor Nor East development.

One of the matters before the council was an application to modify the consent to effectively legitimise work that had already been completed. In this case the vehicular entry had been built with a 4-metre width, not 6-metres as approved.

While the report to council goes to great lengths to find some provision in the Building Code of Australia enabling council to approve it, the application only arose because the developer chose to build something that had not been approved.

Further Information

Since preparing this report the Inquiry has received further documents from the DEC supporting its concerns.

It has not been possible to include a fulsome analysis of these concerns in this report.

The DEC has informed the Inquiry that further clearing and draining works have been undertaken on the Kings Forest site during the period in which the Inquiry was receiving submissions, hearing evidence and preparing this report.

In January of this year the DEC sent an email to Mr Hodges of the Council advising that it had conducted an inspection that had revealed further works and asked the Council what actions it proposed.

The Council did not see fit to indicate these matters to the Inquiry.

Photographic evidence and a copy of the email are attached in Section 8 - Appendix A – Information Provided by Department of Environment and Conservation on Land Clearing at Kings Forest and Appendix B – Information Provided by Department of Environment and Conservation on Land Clearing at Kings Forest – Further works as at July 2005.

3.5.7 Developer Contributions and Infrastructure

In their submission to the Inquiry, the Council's Executive Management Team wrote:

Financial Management Practices

Tweed Shire Council has continually improved its financial performance to a level admired by most Local Governments within New South Wales. Strong financial management practices, management reporting and compliance with all budgetary and statutory requirements are evident in the financial results and the Department of Local Government Comparative Information, published each year.

With the Shire population increasing 80%, from 44,450 in 1985/86 to approximately 80,000 in 2003/04, coupled with the associated additional services and infrastructure needs, the financial health and sustainability of Tweed Shire is all the more impressive.

Council has in place a variety of personnel, plans and committee's to deal with the operations, expansion and maintenance of Shire activities. These include:-

Section 94:- a multi-disciplinary team responsible for the ongoing review and implementation of Section 94 Plans to ensure developers pay their share of future infrastructure requirements associated with growth and development. This includes validation of calculations and providing works schedules within each plan. The funding provided by developer contributions is vital to ensure developers make equitable payments towards shire facilities, and there is no subsidisation by ratepayers. Council collected $13.8m in Section 94 & 64 contributions in 2003/04.

The following is a list of the categories of Section 94 Plans currently in place that show Tweed Council has been proactive in ensuring developers pay for infrastructure costs associated with growth:-

Drainage	Roads	Traffic Facilities
Parking	Open Space	Community Facilities
Path/Cycleways	Street Trees	Bridges
Cemeteries	Surf Lifesaving	Council Admin Office

Mayor Polglase, likewise, emphasised the positive steps the council had taken to fund its growth expectations:

MAYOR POLGLASE: ... *The Tweed Shire Council is a Council that has probably been for many years been at the lower end of the - of the development area, in area of growth and expectation from within the community, and because of lifestyle and the area we live in many people wish to move to live in this environment. The Council has a responsibility to be able to look forward to how to provide adequate services, as regard infrastructure and community lifestyle, which has the expectations.*

Tweed Shire, in the last number of years, has put together what we call a management plan, which is the Bible of the Council for that year. In that plan it demonstrates how the Council will look after and fund growth expectations, how we can contribute - get funds

contributed from the development industry to make that growth happen, how we can respond to community expectations, and one of those main strengths of the Council is that we do have a very strong community system which has representation from a large and broad number of community people who have input into the Council's direction, and that then is put into our management plan, which gives Council a direction which we believe the community should go.

T. 16/2/5 p. 31

The majority councillors had sought election on a pro-development platform, emphasising the benefits that would follow or derive from the developments they were promoting.

Mayor Polglase gave evidence during the Public Hearings that recognised the provision of community services as a challenge for the council (**T. 16/2/05 p. 34**).

Collaterally, he was satisfied that the charges levied against developers (section 94 charges) had placed the council in a strong position:

MAYOR POLGLASE: ... *- we get contributions from developers, we get contributions through section 94 charge, we have grants. But over a period of time we are able to assess what our grants will be, from the previous year. We assess on developers' contributions because it is a growth in the Tweed Shire, those contributions have been quite excessive, because of the growth. So Council has a very strong financial position to what it was quite a number of years ago. It is very financially strong as a Council.*

We, in turn, look at the income generated, and then we proportion, say, in our section 94 fund we regenerate funds from developers, we look how we can spend that money within the community for what we get coming in. So we don't go out and spend money that we haven't got. We maintain a very strict financial control because that is one of the assets, I think, of Tweed Shire Council's management, is that we are very strong on asset management, financial control, and that has been why the Council has been able to move forward and do large infrastructure projects, where we will be spending approximately 70,000 million dollars in the next 18 months on large infrastructure projects. Now, that would not have been able to have been achieved if it was not through good prudent budget management of the staff of the Council.

T. 16/2/05 p. 34-35

Through this and other evidence, the senior council staff and the mayor were portraying the council as:

- being in a strong financial position
- providing appropriate measures and procedures for sharing the costs of providing infrastructure, equitably, through appropriate section 94 plans
- applying the plans in an even handed manner
- providing infrastructure to meet the increased demand of the population growth associated with the developments, and more generally.

Others in the community did not share this view.

Submissions received by the Inquiry and evidence given during the Public Hearings suggests that there is widespread community concern that:

- developers do not shoulder a sufficient part of the burden of providing new infrastructure
- there have been inappropriate concessions granted to certain developers
- that there has been an historic and continuing lack of spending to maintain or to upgrade infrastructure.

Mr Wylie wrote the following commentary regarding SALT:

- A real concern for Kingscliff residents was the impact that additional traffic would have on our health, safety & lifestyle. We were told that 80% of Hotel guests would travel by plane/coach etc & therefore have no impact on traffic volumes. The issue of permanent resident's vehicles was never responded to. Once again, the Ray group was allowed to escape its responsibilities to provide adequate roadways to channel its new population around Kingscliff as did the Casuarina development. The majority of Salt traffic now travels through Kingscliff (along McPhail/Viking & Sutherland Street) & in doing so, travels right past the TAFE, our public swimming pool & the community tennis courts. How could any fair minded Council allow this to happen to residents?

- The traffic then crosses an old timber bridge across Cudgen Creek. The state of the bridge & its lack of safe passage for pedestrians & cyclists was already a concern but the Salt volume seriously challenges its inadequacy & safety. As the Salt development was approved, we noticed that the 2 tonne limit signs, intended to keep trucks on the major arterials, simply disappeared…amazing! At a recent public meeting, the TSC's Engineering Directo Mike Rayner claimed that the bridge still had 10 years life in it. Given its current state of disrepair & hugely increased volumes, this seems a highly optimistic estimate. In fact it is so optimistic that it leads me to suspect tha once again, the TSC has a hidden agenda, most likely with the Ray Group & other interested semi-rural landholders.

Submission 256

Mr Freiburg put forward the following view:

I WOULD LIKE TO COMENT ON THE MANNER IN WHICH THE PRESENT PRO DEVELOPMENT SECTION OF COUNCILLORS ARE SO HELL BENT ON DEVELOPMENT THAT THEY DON'T WANT TO SEE, THEY HAVE'NT GOT THE INFASTRUCTRE TO HANDLE THE INCREASE IN PEOPLE AND TRAFFIC.
MAJOR POLGLASE HAS GONE ON RECORD SAYING THE WHOLE OF THE TWEED SHIRE RATEPAYERS SHOULD HELP CARRY THE COST OF THE DEVELOPMENT BETWEEN KINGSCLIFF AND CABARITA, AND YET IGNORE THE PLIGHT OF THE 3,500 HOME DWELLERS WHO ARE AFFECTED BY THE TRAFFIC GRIDLOCK THAT HAPPENS ALMOST ON A DAILY BASSIS ON KENNEDY DRIVE. AS THERE ARE MOST TIMES 4 LANES OF TRAFFIC HOME OWNERS CAN WAIT FOR UP TO 10 MINUTES TO MAKE A DASH TO GET OUT OF THERE PREMISES, NOTHING IS BEING DONE EASE THE RISK OF LIFE AND LIMB, THEY FACE ON A DAILY BASSIS WE ON THE SOUTH SIDE OF KENNEDY DRIVE CAN'T GET A FOOT PATH WE HAVE TO WALK THROUGH WET GRASS TO GET TO THE SHOP. AND YET ARE EXPECTED TO HELP DEVELOPERS

Submission 167

When the SALT proposal was put to the council, the SEE accompanying the application proposed certain measures that would be undertaken by the developer, including:

- "Transfer of approximately 16.19 ha of land (22% of the site area) to council as open space and environmental buffer";
- "Provision of a new bridge over Cudgen Creek at South Kingscliff subject to section 94 credits."

At that time the development application was contemplating 612 dwellings and 614 tourist units/rooms.

At that stage, adopting council's occupancy rates of 2.6 persons per detached dwelling, 1.7 persons per medium density dwelling and 3 persons per tourist room, the proposal would generate some 3,248 persons.

By the time that the application came before council for its determination on 23 April 2003, the proponent was "willing to upgrade the existing Cudgen Creek Bridge to the value of $232,000 worth of works".

Given that the proponent was then seeking to develop a total of 1105 lots, this represented a contribution of approximately $210 per lot.

The report provided the following commentary on the proposal:

3.8 CUDGEN CREEK BRIDGE

As part of the application the developer originally offered to construct a new bridge over Cudgen Creek in the existing location but however, requests that Council reimburse part of the costs of this through its' S94 contribution plan for roads.

Council at its recent meeting resolved to place on exhibition an amendment to this Plan to include the bridge within the works schedule and collect a local area contribution from the SALT development and Lot 490. This would in effect result in the SALT development paying for a large portion of this bridge which is unacceptable to the developer.

Through negotiations it has agreed that an alternative to building a new bridge is a requirement to upgrade the bridge, including the construction of a pedestrian cycleway across the bridge. The developer has made a submission to carry out works for the upgrading of this bridge. This is considered acceptable and should be conditioned as part of any consent.

By April 2004, the proponent was seeking to increase the density by over 35%. The effect of this increase, if granted, does not appear to have been reflected in any consideration of an increased contribution towards the upgrading of Cudgen Creek Bridge.

In its email of 1 April 2004, the proponent was coy regarding its proposals:

Cudgen Creek Bridge

- Our proposal to design, gain approval and build the free standing cycleway, plus make a contribution to Council in lieu of the bridge upgrading was supported by all present.
- CMBK are to provide the bridge refurbishment cost figures to Mike Rayner for acceptance.
- CMBK to immediately arrange a workshop with Patrick Knight regards the design parameters for the cycleway.
- The contribution amount is to be agreed and paid prior to Stage 2 linen plan sealing.

The report to council's meeting on 18 August 2004 did not address this issue.

It is clear that the council was faced with a substantial increase in the traffic likely to be utilising its road infrastructure, but apparently not addressing what further contribution the developer should make.

In January 2000, Mr David Broyd who was then council's Director Development Services, had prepared a briefing note for the then proposed Kings Beach North – section 94 plan:

> It is anticipated that this bridge will require reconstruction at a cost of $960,000 to $1M. Hence, there needs to be a strategic assessment as to the needs/validity of reconstructing/upgrading the bridge and how the costs of such reconstruction/upgrading should be apportioned. The strategic assessment relates to traffic, the tourism benefits to the region of enabling traffic – vehicular, cyclists and pedestrians to access Kingscliff township from the South Kingscliff tourism development and the economic benefits to the performance of the existing Kingscliff Retail Centre. Use and benefit of the tourist resorts to the existing and future residents of Kingscliff and West Kingscliff is also a factor. A main issue here is the proportionate responsibility for the reconstruction/upgrading between the developers of the Kings Beach North tourism/residential development and a more regional/Shirewide responsibility for such financing. The timing need for such reconstruction/upgrading is also an issue.

The council did adopt a section 94 plan for Kings Beach North that came into effect on 2 August 2000. It was subsequently amended on 21 July 2003, primarily as a result from a previously anticipated primarily tourist development to a mixed tourist/residential development and re-named SALT.

A review of this plan, the Kings Beach/Kings Forest Contributions Plan and the Terranora Village Estate – Open Space and Communities Facilities Plan (in their current form) suggests a common approach is being taken to each of these areas.

It is difficult to compare the amounts levied in these plans with other contributions plans adopted by the council. Accordingly, there can be no concluded view whether the amounts levied under these plans differ greatly from that applying generally throughout the Shire.

It is worth noting that the SALT contributions plan facilitates the apportionment of open space as 40% structured open space and 60% passive open space. This reverses the approach usually taken by the council, which it acknowledges as the Land and Environment Court practice.

> As a result of the change in the population mix at SALT, there is a requirement to amend the assumption in CP 25 to include a component of structured open space. Based on the agreed proportion for open space of 1.13ha/1,000 persons for structured open space, the following is required to be provided for a projected permanent population of 1,409 at the SALT development:
>
> - 1.13ha x 1.409 = 1.592ha structured open space, say 1.6ha.

As is noted earlier in this part, the SALT SEE proposed to transfer slightly over 16 ha of land to the council as open space.

While the area of land substantially exceeded the amount then calculated to be required under the contributions plan, about two thirds was unsuitable, as acknowledged in the report to council's meeting on 23 April 2003.

> …An audit of passive open space carried out with the applicant has looked at the useability of this open space and only included passive open space which contributes positively to the public use of these areas and meets Council's design standards. This audit concluded that 6.9 hectares to be confirmed of passive open space will be provided which satisfies Council's requirements.

While the offer appeared generous, the council was really only obtaining little over 1 ha of useable open space. Collaterally, the proponent was divesting itself of responsibility of land that could not be developed and, in turn, sold.

Later when seeking a 37% increase in the density of the development, the proponent was offering to cede 16.774 ha, acknowledging then that about 9.5 ha was then required (**Annexure to letter 1/11/04 from Darryl Anderson Consulting**).

If the same land was being offered to the council then this could have resulted in a significant shortfall in the useable open space required.

Such an assessment is merely hypothetical, as the application was not ultimately dealt with.

The Nor Nor East file contains a useful comparison between the levies imposed on a tourist development as opposed to a multi-dwelling housing development, it is reproduced below:

S94 & S64 CONTRIBUTIONS	TOURIST ACCOMMODATION	MULTI-DWELLING HOUSING
S64 Contribution – Water	$5,168	$18,608
S64 Contribution – Sewer	$4,231	$15,235
S94 Contribution – No.4 Tweed Road Plan	$11,158	$11,158
S94 Contribution – No.5 Local Open Space Structured	Not Applicable	$3,037
S94 Contribution – No. 5 Local Open Space Casual	$1,321	$654
S94 Contribution – No. 11 Library Facility	Not Applicable	$2,912
S94 Contribution – No. 13 Eviron Cemetery	Not Applicable	$570
S94 Contribution – No. 15 Community Facilities	$2,952	$2,952
S94 Contribution – No. 16 Emergency Facilities	$905	$905
S94 Contribution – No. 18 Council Administration	$1,311.83	$1,500.44
S94 Contribution – No. 22 Cycleway	$1278	$630
S94 Contribution – No. 26 Regional Open Space Structured	Not Applicable	$4,975
S94 Contribution – No. 26 Regional Open Space Casual	$1,752	$931
TOTAL	$30,076.83	$64,067.44
DIFFERENCE	$33,990.61	

Clearly the provision of tourist accommodation is unlikely to engender a need for certain infrastructure, such as cemeteries, it is difficult to reconcile the great disparity between the water and sewer contributions.

Put in perspective, this equates to:

- slightly over one fourth of what would be payable for multi-dwelling housing,
- approximately one fifth of what would be payable for an ordinary residential allotment,
- two thirds of what would be payable by a motel or for short term caravan park sites, and
- two fifths of what would be payable for public use toilets.

Later, in November 2003, the proponents of the Nor Nor East development were able to coax further reductions in these charges, reducing them by a further 7.5%.

On face value, these figures suggest mismanagement on the part of the council.

There is another major discrepancy thrown up in the fees and charges levied by the council under its 2004/2005 Management Plan, as shown in the table below:

Title of Fee/Charge	Ledger Number	*Fee or Charge Levied 2003/2004 $*	**Fee or Charge Levied 2004/2005 $**
Water Levies per ET			
a) Pottsville/Burringbar, within rateable area, DCP10		*1800.00*	**1800.00**
b) Pottsville/Burringbar, outside existing rateable area		*1416.00*	**1416.00**
c) Mahers Lane lower section, Council		*715.00*	**715.00**

meeting 19/2/86			
d) South Kingscliff area, incl Kings Forest for supply of PID demand		*211.00*	**215.00**

The levies for the South Kingscliff area are not comparable to the other areas. In the absence of an adequate explanation, it is likely that the community would perceive that developers in this area are obtaining substantial concessions.

Councillor Boyd raised concerns over concessions being granted to developers (**submission 359**). He attached an extract of the minutes of council's meeting on 27 March 2002 when the council considered a section 96 modification providing a tourist accommodation at Cedarwood Court South Kingscliff.

Its effect was to reduce the contributions payable by the developer by $260,345.19

Councillor Boyd also furnished a copy of the minutes of council's meeting on 1 March 2000, where the number of car parking spaces required under the draft Kings Beach North section 94 plan had been reduced from the usual requirement of 300 per kilometre to 200.

Elsewhere, Councillor Boyd, as did others, raised concern over concessions granted to the Chiltern-Hunt subdivision at Terranora.

In what appears to have been the gainsaying of the proponent's aspirations, the then majority councillors ignored staff recommendations, substituting their own conditions when granting consent to the application.

The effect of their approval was to deny the council an area suitable for passive open space, replacing it with a lot, "the majority of which is taken up by the existing dam that is to be retained as a stormwater quality pond", and leaving council in a vexed position of having land that could not be classified as operational and community land. In doing so, the councillors nullified any ability to embellish 1000m^2 with playground equipment, as had been anticipated.

In a memo dated 2 July 2003, Mr Broyd estimated the benefits to the developer from these two items as $267,000.

The submission provided by Chiltern-Hunt contains the following explanation:

4.2 Deletion of a Public Reserve Lot

This lot was not deleted, but relocated and increased in area, to provide a landscaped corridor along the avenue of Norfolk Island pines. In addition a neighbourhood park is to be constructed at its upper end. In addition two other landscape parks are being supplied. The total area of casual open space is 12,020 square metres.

The development was required to supply a minimum of 1836 square metres of casual open space based on council's policies. The current policy requires 34 square metres for each allotment. The Company has supplied 6 1/2 times the minimum requirement of casual open space. This does not include a further 10,375 square metres in the form of landscaped water bodies.

In addition before the park was relocated it was inappropriate for the purpose in that it did not comply with council's own policy for neighbourhood parks. It was more than the prescribed maximum walking distance from all lots in the estate and could not provide the 50 percent road exposure required by Council. Based upon a suggestion submitted by "the Friends of Terranora" the park was relocated.

It fails to provide an adequate explanation.

Dr Cuthbert wrote regarding the Azzure subdivision at Terranora:

Dear Sir,
I would like to bring to your attention an apparent anomaly in the approval process of Tweed Shire Council.

A recent approval for a subdivision of 3 blocks [DA617945 ,679 TerranoraRd]required kerb and guttering of Terranora Rd .However the subdivision Azzure Terranora ,a much larger subdivision, was not required to kerb and gutter Terranora Rd.
Council officers had recommended that this be a requirement for the subdivision,in line with usual council policy,but the councillors overturned this recommendation.

The differing requirements suggest either inappropriate inconsistency or preferential treatment of Azzure for some Reason.

Submission 193

Dr Cuthbert gave evidence during the Public Hearings, suggesting great similarities (other than the lot yield) between the two developments.

MR BROAD: *Now, can I explore that a little bit with you. The property in Terranora Road, is that near to Azua [sic. Azzure] Terranora?*

DR CUTHBERT: *It would be approximately one kilometre away?*

MR BROAD: *On the same road?*

DR CUTHBERT: *On the same road.*

MR BROAD: *The Azua [sic. Azzure] subdivision, how many lots is that?*

DR CUTHBERT: *I think - I'm not exactly sure but I think it's 68 in the - at least the first part.*

MR BROAD: *68 as against 3?*

DR CUTHBERT: *Yes.*

MR BROAD: *Now, the period in which the subdivisions were approved, were they approved in what years?*

DR CUTHBERT: *Again, I don't have specific information, but the Azua [sic. Azzure] Estate I think would have been approved possibly two years ago, and the - - -*

MR BROAD: *And the three lot subdivision?*

DR CUTHBERT: *The other three lot subdivision was approved this year in January.*

MR BROAD: *And what do you say, other than the physical position, are the points of comparison that lead you to conclude that there isn't, basically, a parity in the subdivision conditions that were imposed, or the development conditions?*

DR CUTHBERT: *Well, my understanding of subdivision requirements are that properties are required to kerb and gutter their road frontage, and both these places front on to Terranora Road. Again, Terranora Road has been identified as a main road within the Tweed Shire, and Council's aim, my understanding, is to upgrade that road and they're expecting a significant increase in volume of traffic.*

Both properties have similar situations in that they're both on the top of the ridge along Terranora, which means that the land slopes down towards Terranora Road. There is significant run-off of water from both properties, or would be, on to Terranora Road along the frontage. In fact, Azua [sic. Azzure] Estate has regularly, over the years, had large amounts of water and mud flowing on to the road during heavy rain, and yet for reasons which are not apparent, the Council officers recommended that Azua [sic. Azzure] should have kerb and guttering along Terranora Road, and the Council – Councillors overruled that whilst the subdivision, which is next door to where I live, which is only three blocks, has been required to have subdivision – have kerb and guttering.

So basically, we've got a situation where kerb and guttering is required, presumably on the basis of planning for something like, perhaps, 80 metres of the road, and yet Azua [sic. Azzure] which probably fronts something like 500 metres, is not going to have kerb and guttering. Presumably, if that's required at some stage, ratepayers will pick up the tab.

MR BROAD: *Do I assume that the Azua [sic. Azzure] subdivision has internal roads?*

DR CUTHBERT: *Yes, it's got internal roads.*

MR BROAD: *And are they required to be kerbed and guttered?*

DR CUTHBERT: *As far as - yes, as far as I know.*

MR BROAD: *Now, do the lots that you speak of, the frontage to Terranora Road, do lots within the Azua [sic. Azzure] subdivision obtain their road access from Terranora Road?*

DR CUTHBERT: *No.*

MR BROAD: *Right. The three lot subdivision, do they obtain access from Terranora Road?*

DR CUTHBERT: *Two of them won't and one of them will.*

MR BROAD: *Right. Yes, thank you. I think that is the issues that I wanted to find from you, just to deal with the parity issue. Yes, thank you for attending.*

PROF DALY: *Did you attend or did you read any of the papers associated at the meeting where the Councillors decided not to make it a condition that the Azua [sic. Azzure] people kerb and gutter that road frontage?*

DR CUTHBERT: *No, I just - it was certainly a significant feature in the daily news that there had been a number of conditions which Councillors had overturned, that had been recommended by the Council officers in regard to that subdivision.*

PROF DALY: *In those reports, did you see any explanation why the conditions were overturned?*

DR CUTHBERT: *None at all.*

PROF DALY: *They were just overturned?*

DR CUTHBERT: *Yes.*

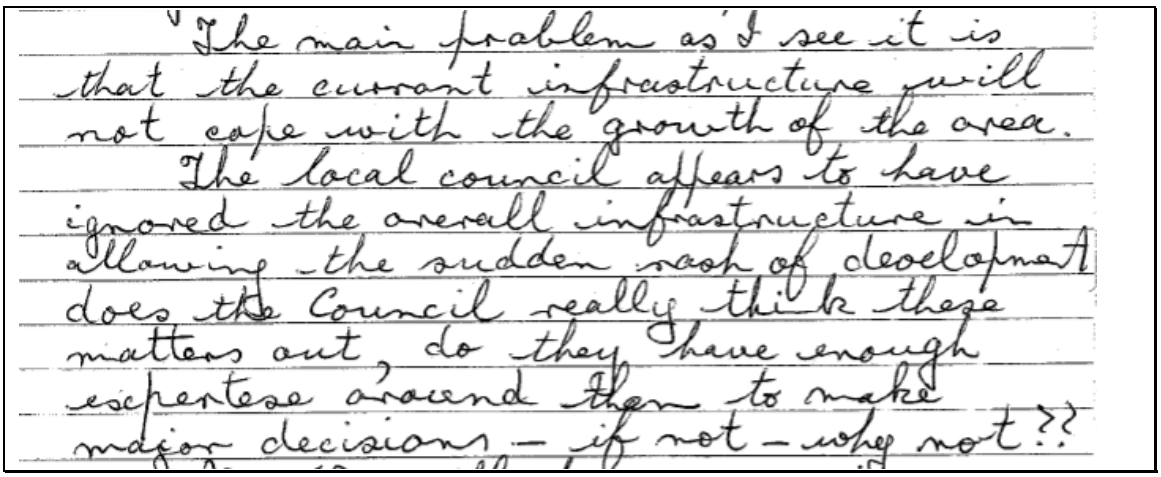
T. 11/3/05 p. 1381-1384

It is clear, that in many of the instances cited above, the councillors have adopted a different agenda to that proposed in the reports. In those circumstances it is not surprising that members of the public perceive that the majority councillors have favoured developers.

It is difficult to perceive that the staff have misinterpreted the plans in the manner that would be suggested by the councillors' actions and by the proponents.

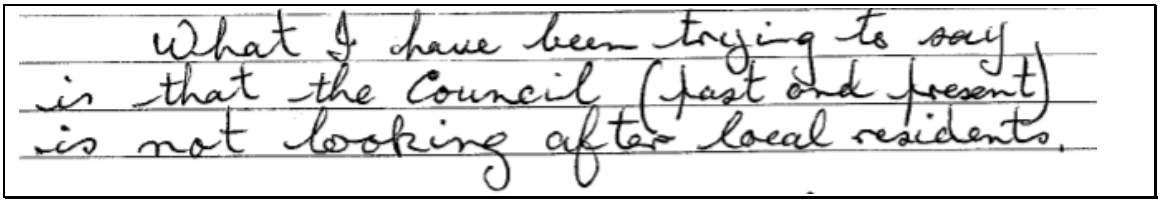
Mr Freiberg, whose submission is referred to earlier in this part raised concerns over the ability of the existing infrastructure to cope with the demands stemming from the developments.

Mr Jones raised similar concerns in his submission:


"The main problem as I see it is that the current infrastructure will not cope with the growth of the area. The local council appears to have ignored the overall infrastructure in allowing the sudden rash of developmt does the Council really think these matters out, do they have enough experience around them to make major decisions – if not – why not??

Submission 238

Citing a number of concerns ranging from water supply to street lighting and roads, concluding:


What I have been trying to say is that the Council (past and present) is not looking after local residents.

Submission 238

Dr Malouf, who had raised significant concerns regarding council's selection processes for the site of the Mooball-Burringbar sewage treatment works, raised additional concerns that the proposal works would not cater with the existing population.

MR MALOUF: *We believe that the process are incorrect that have been done here. We believe that there's no duty of care have been shown to the community or the environment. The fact that I think is of most importance here is that they have stipulated that this particular site is to cater for 700 - an estimated population of 750. We know from the census that they provided to us from 2001 that the population figure in 2001 for the three villages is 1600.*

PROF DALY: *Yes, you mentioned that in the addendum to your report.*

MR MALOUF: *Where is the vision and the forward planning? They're not even building something that's going to cater for something that was in 2001. I mean, it's just crazy.*

T. 3/3/05 p. 838

This evidence was supported by figures provided by the council:

Paul,

Please find attached statistics report complied from the ABS 2001 census for the area you have requested.

Census collection district

Mooball, Sleepy Hollow	1071703	467 persons
Burringbar	1071701	332 persons
Crabbes Creek / upper Burringbar	1070710	805 persons
Total		1604

If you require further information please do not hesitate in contacting me.

Regards

Paula Telford

Corporate Performance Officer

On 16 April 2003 there had been some attempt to deal with the concessions afforded to tourist developments.

The report, which acknowledged:

Reports from Director Development Services

2. ORIGIN: **Strategic Town Planning Unit**

FILE REF: **GT1/LEP/2000 Pt1; LEP 2000**

REPORT TITLE:

Tourism Development in Tweed Shire

SUMMARY OF REPORT:

There has been a substantial increase in interest in the development of tourist accommodation and facilities in Tweed Shire. These applications and enquiries have focussed upon the effectiveness of current Council planning legalities and policies and community concerns for the achievement of the real economic benefits and employment generation sought from such tourism development.

The elements of a staged way forward to complete this review and make changes to refine the legal and policy provisions are:-

- Amendments to existing planning controls in respect of tourist accommodation.
- An interim report to Council that provides a clarified policy platform for the assessment and determination of development applications and enquiries.
- A facilitated workshop involving representatives of the key local stakeholders, interest groups and tourism industry experts to progress debate about the legal and policy provisions.

RECOMMENDATION:

That Council prepares and exhibits amendments to relevant Development Control Plans and S94 Contributions Plans to require tourist accommodation to meet the same planning controls and multi dwelling housing, as follows:

- Development Control Plan No 6 – Multi Dwelling Housing:
  - Include in Clause 1.5:

    "A7. To ensure that tourist accommodation which is capable of being used as permanent residential accommodation meets the same standards as multi dwelling housing".

  - Include in Clause 1.6 the following paragraph:

    "This DCP applies to tourist accommodation".

  - Any necessary textural changes throughout the document to add or include tourist accommodation where multi-dwelling housing controls apply.
- Development Control Plan No 2 – Site Access and Parking Code:
  - Replace Item B6 in Table 4.9B with the following:

and recommended the preparation and exhibition of relevant DCP's was promptly quashed by the majority councillors.

A number of the residents of Seaview Road Banora Point wrote:

> Over more than the past 30 years, residents of the southern end of Seaview Road East Banora Point have been in contact with the Tweed Shire Council dozens of times regarding the condition of, and lack of, curb and guttering of this particular road.
>
> In May 2002 on the front cover of the "Tweed Link" (copy attached) Council listed Seaview Road for work to be carried out. This did not eventuate.

Submission 64

> Council's response to all requests over a thirty odd year period, apart from being vague, usually revolve around a parcel of land of 5-1/2 hectres at the northern end of Seaview Road (which incidentally has been sold and resold on numerous occasions). It would appear that the Council keeps deferring work in this street in the hope that "one day" they may be able to have the roadwork carried out at the cost of the developer of this site.

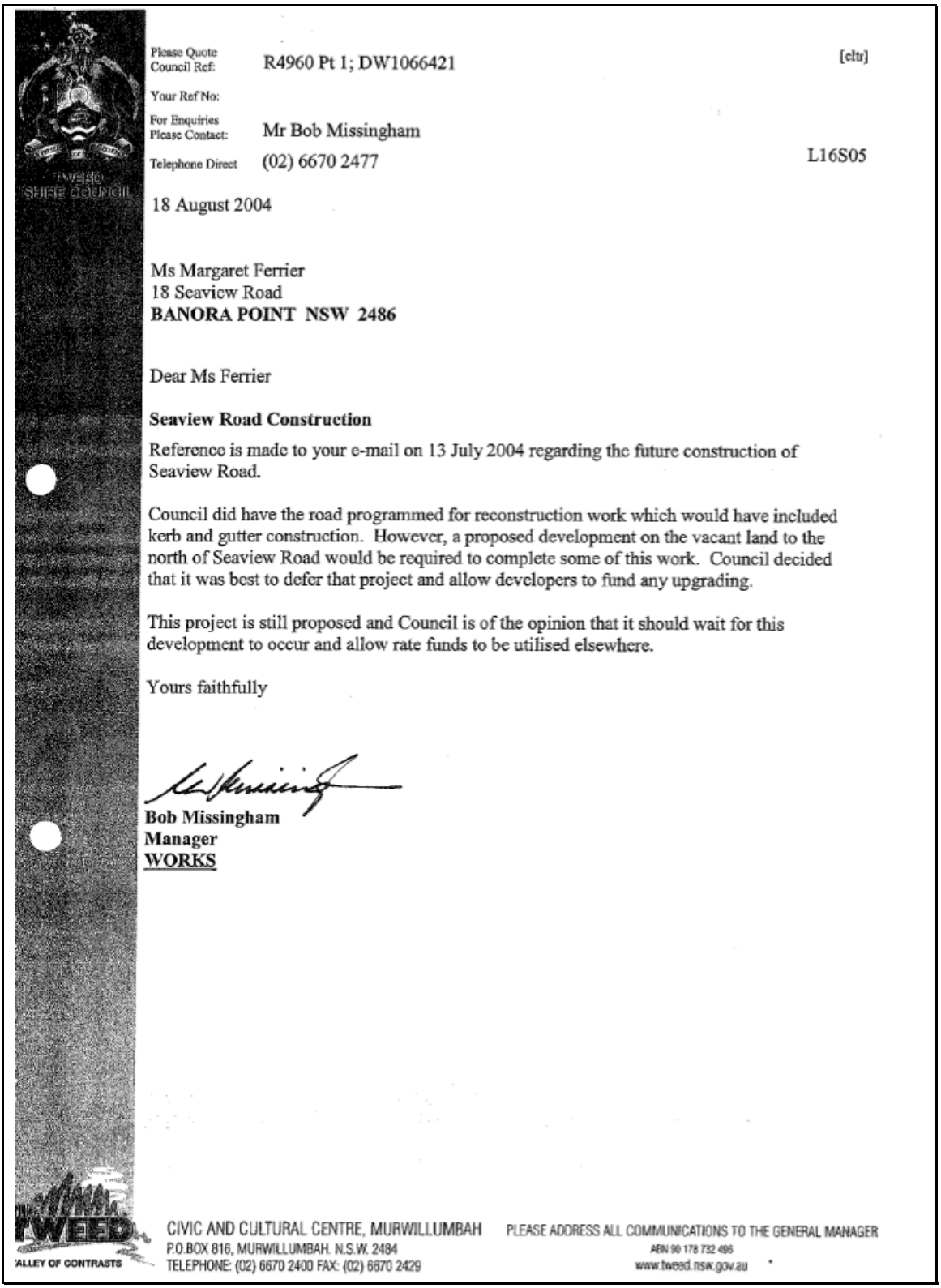
Submission 64

concluding

> Council has been most forthcoming in providing footpaths, bicycle tracks etc., especially in relation to new major developments in the area, at the same time, ignoring their responsibility to older established areas.

Submission 64

The submission attached a letter from the council dated 18 August 2004, it reads:



Please Quote Council Ref: R4960 Pt 1; DW1066421 [eltr]

Your Ref No:

For Enquiries Please Contact: Mr Bob Missingham

Telephone Direct (02) 6670 2477 L16S05

18 August 2004

Ms Margaret Ferrier
18 Seaview Road
BANORA POINT NSW 2486

Dear Ms Ferrier

Seaview Road Construction

Reference is made to your e-mail on 13 July 2004 regarding the future construction of Seaview Road.

Council did have the road programmed for reconstruction work which would have included kerb and gutter construction. However, a proposed development on the vacant land to the north of Seaview Road would be required to complete some of this work. Council decided that it was best to defer that project and allow developers to fund any upgrading.

This project is still proposed and Council is of the opinion that it should wait for this development to occur and allow rate funds to be utilised elsewhere.

Yours faithfully

Bob Missingham
Manager
WORKS

TWEED SHIRE COUNCIL

TWEED VALLEY OF CONTRASTS

CIVIC AND CULTURAL CENTRE, MURWILLUMBAH
P.O.BOX 816, MURWILLUMBAH. N.S.W. 2484
TELEPHONE: (02) 6670 2400 FAX: (02) 6670 2429

PLEASE ADDRESS ALL COMMUNICATIONS TO THE GENERAL MANAGER
ABN 90 178 732 496
www.tweed.nsw.gov.au

Submission 64

Mrs Ferrier gave evidence at the Public Hearings detailing the concerns regarding:

- the construction of the road,
- the lack of drainage,
- the need for garbage trucks to reverse down the road as they cannot turn,
- that flooding occurs with consequent effect on insurance premiums.

Lastly, Mrs Ferrier was to dispel any suggestion, as had been implied by council's works manager, Mr Missingham, that there was any imminent development that might lead to works being funded:

MR BROAD: *... you've got this site at the end of the road - - -*

MS FERRIER: *Yes.*

MR BROAD: *- - - which is to be developed; is that being developed?*

MS FERRIER: *No. It has been sold at least on three occasions since I've lived there in 15 years and it has never been developed. It's just sitting there; it's a dead-end street.*

MR BROAD: *Do you recall receiving any notification from Council that says there's an application before Council to develop it?*

MS FERRIER: *No.*

MR BROAD: *So it has sat there for 15 years?*

MS FERRIER: *Not that I'm aware of.*

MR BROAD: *A copy of the Tweed Link that you have attached to your submission talks about the Seaview Road proposals being brought into a draft budget. Do you know if that was adopted?*

MS FERRIER: *No, not that I know of. Because we have had no notification at all.*

MR BROAD: *So it has slipped through the cracks?*

MS FERRIER: *We have heard nothing. That was - we saw that in 2002; that was the end. We didn't hear anything else. Because we all thought it was going to happen. We were pleased to see that; and nothing happened.*

T. 17/3/05 p. 1631

It is sometimes difficult to determine why funds have not been forthcoming. In the case of Seaview Street it appears to that council would have the residents wait out the developer's (if there were one) intentions.

In the case of the Kingscliff Amenities Hall, the lack of an obvious reason was the subject of local speculation. The Monitor wrote:

Despite the provision of funding and numerous promises by Council to refurbish the historic Kingscliff Amenities Hall, Council has constantly stalled and prevaricated over commencement of the required work.

Council is holding $30,000 in insurance payout for damage to the roof of the Hall in the January 2002 hail storms.

It had set aside $500,000 and, in November 2004 promised a further $500,000 toward restoration work on the Hall.

Despite the availability of funds for in excess of 2 years, no work has been done and the Deputy Mayor, Cr Lynne Beck, told the media in December 2004 that the Hall was an eyesore and should be demolished.

Local developers and Tweed Directions Inc contributors Idwall Richards and the Usher Powell Group have land-holdings in Marine Parade Kingscliff opposite the Amenities Hall which partly obstructs their view to the ocean, and is visually unaesthetic in its current neglected state.

Conclusion

It would appear that Council is deliberately allowing the Kingscliff Hall to deteriorate to a state where repairs can no longer be justified at the public expense. Its removal would substantially benefit land values of development interests who contributed funds to the majority faction campaign.

Submission 294

Others suggested that deals had been done with the surf club or a nearby developer. Whether related to the Inquiry or otherwise, the roof of this building was replaced over the period of the Public Hearings.

In January 2000 Mr Broyd had acknowledged that the Cudgen Creek Bridge would need re-construction and moved to put in place a contributions plan that would provide funds to meet some of the costs.

Despite the strong financial position asserted by Mayor Polglase and by council's senior management team and despite the major subdivisions since approved that are serviced by the bridge, proposals for its replacement appear to have vanished, as evinced by Mr Missingham.

MR BROAD: *In the same memo - that's back on 28 January 2000 – Mr Broyd indicated that the bridge over Cudgen Creek would require construction at a cost of $960,000 to $1 million. Can I ask you two questions in respect of that: is there any proposal currently before council - and I don't mean immediately before council - for a reconstruction of that bridge?*

MR MISSINGHAM: *Not immediately.*

MR BROAD: *Is there a long-term proposal to reconstruct that bridge?*

MR MISSINGHAM: *The last information we had when the bridge was assessed by the private consultants was that with some work on the decking, the bridge would last probably up to another 15 years. So it would be looked at at that stage.*

MR BROAD: *So what was anticipated five years ago - the suggestion that it needed to be reconstructed - appears to have gone by the board.*

MR MISSINGHAM: *I'm not too sure exactly what the reference was made to, but if that bridge was to be reconstructed totally, it would cost $960,000 to $1 million if you had to reconstruct it.*

MR BROAD: *All I can draw from is this: Mr Broyd's memorandum says:*

It is anticipated that this bridge -

that is, the Cudgen Creek bridge -

will require reconstruction at a cost of $960,000 to $1 million. Hence there needs to be a strategic assessment as to the needs/validity of reconstructing/upgrading the bridge and how the cost of such reconstruction/upgrading should be apportioned.

Is that something that's disappeared into the ether?

MR MISSINGHAM: *It's not - as I said, council don't have anything on their books immediately to do any reconstruction of that bridge.*

T. 4/3/05 p. 981

Mr McIntosh wrote:

One of the allegations continually repeated in the media by Councillor Dale and the Tweed Monitor group is that Council has granted special favours to developers. These allegations have mostly been made in general rather than in specific terms, and for this reason they are impossible to answer except through Council's budget and the independent auditor'ss report that certainly do not support the allegations.

Submission 190

It would be too tedious to run down the legion of stupid, ill-informed accusations like Mr. Cornford's. They have been repeated so often that some people have come to accept these fictions as fact. Mostly the accusations about developer benefits are so generalized that they can't be answered except by referring to Council's published statistics that have been openly available to everyone. Even the independent auditor's reports have shown quite clearly that developer contributions have risen substantially over the last five years. (Up from 3% to 7% of the budget) It is the ratepayers who are contributing less (Down from 49% to 40%).

Submission 190

The evidence does not support these views.

3.5.8 Invalid Conditions

When the majority councillors made substantial changes to the recommended conditions of consent for Chiltern-Hunt Australia's subdivision at Terranora there was widespread public concern.

Those concerns have been voiced in a number of submissions.

Chiltern-Hunt Australia has provided its perspective in its submission:

If the Council had not removed the conditions The Company would have gone to the Land and Environment Court seeking removal of the conditions. Legal advice provided to The Company was to the effect that the Land and Environment Court would promptly remove the conditions.

Submission 318

A challenge to the conditions of consent arose in Resort Corporation's Nor Nor East development.

The council had imposed conditions of consent that:

- acknowledged the nature of the consent, notified that any change would require a separate approval and warned that such approval might attract further contributions under section 94 of the EP&A Act;
- prohibited the retail/commercial units from being used as a café or restaurant, by imposing a covenant on the title.

The report to council had proposed a further condition that prevented the tourist units being leased for more than three months.

This was to be supported by a covenant that prohibited permanent residential occupation of these units and ensured their use as tourist accommodation.

In support of its application to remove the conditions that had been imposed, Resort Corporation provided an advice from Mr Noel Hemmings, QC. Mr Hemmings had been a judge in the Land and Environment Court and his views have substantial standing.

Mr Hemmings advice ultimately shows up the inherent weaknesses in the definitaion of "tourist facilities" in council's LEP and emphasises the simple fact that its weaknesses can not be shored up by conditions of consent that attempt to cover over these weaknesses.

The definition of "tourist facilities", "tourist accommodation" and "rural tourist facility" each refer to the premises or facilities being "principally" used for tourist activities.

Relevantly, the definitions do not require that the premises or facilities be solely or exclusively used for that purpose nor do they attempt to provide a definition of tourist use by, for example, length of stay.

Any attempt to define or to provide certainty through conditions of consent will always be open to challenge.

The council's inability to contemplate how to respond to concerns was demonstrated by senior staff, including Mr Hodges and the Manager, Development Assessment, Mr Smith.

Mr Smith gave the following evidence, when asked to deal with a hypothetical situation:

MR BROAD: *Can I put a hypothetical proposition to you? You spoke earlier of the pre-lodgment meetings. Can I put a hypothetical on this basis to you: that if at a meeting you have a proponent who says, well, look, we've got an option to purchase this particular piece of property - I won't try and nominate any place - it's zoned 2E - and that's residential/tourist - we're wanting to build a three-storey complex, we want to have a mixture of residential and tourist accommodation. What's the nature of advice you'd give them so that they can go away and present an application to you?*

MR SMITH: *Well, firstly, that would be something that would be permissible within that zone. And if there was going to be a mix of both types of uses, then the application should be clear on what units or what part of the building's going to be used for tourist accommodation and what part's going to be used for permanent residential*

accommodation, because in the assessment of the application that has an implication in relation to contributions and car parking, particularly.

MR BROAD: *What do you then say to them in respect of defining the use? How do you define the use on a plan?*

MR SMITH: *By - there's a nomination of the particular units that are going to be the permanent occupation units and those that will be available for tourist accommodation.*

MR BROAD: *What indication do you give to a person who says, well, what do you mean by "tourist"?*

MR SMITH: *Short-term holiday accommodation, not the permanent residential address or the person who owns the unit, as a guide.*

MR BROAD: *Is short-term residential accommodation 18 months out of two years, is it three months out of two years?*

MR SMITH: *Not necessarily, no. That's been debated and it's been debated at a State Government level as well in DIPNR, as far as trying to put conditions on applications in our shire with not a lot of success either. There's no - we have not got any specific time-frame for what is tourist accommodation, short-term tourist accommodation. It's been discussed and at this stage we have not put a specific time period, whether it be a number of days or months or whatever out of a year.*

T. 24/2/05 p. 525-526

The paucity of council's ability to deal with the issue was made clear by the following question that followed on from this evidence:

MR BROAD: *You, as a head of the council's planning branch, do you have a view whether that is a good position to be in, to not be able to tell a developer, well, this is what tourist accommodation is?*

MR SMITH: *I think the broad description that we've given should be sufficient for the developer to understand that if they're genuine in their proposal that it is a mixed development and the unit will only be available for tourist accommodation, then I think that would be sufficient.*

T. 24/2/05 p. 526

This naïve and simplistic view avoids reality. In Mr Smith's view the problem was not one that falls at the feet of council but at a wider level:

MR A. SMITH: *So the problem being thrown up by the tourist residential question at the moment is just another problem of regulation?*

MR SMITH: *That's correct, yes.*

MR A. SMITH: *And it entirely depends on whether the - really, the State government and the council, and other authorities, get together and find a proper resolution to the problem of notifying purchasers when they purchase properties that this is going to be the restriction requirement.*

MR SMITH: *I think that would be very desirable, yes.*

MR A. SMITH: *And the restrictive covenant would seem to be the most sensible way. You'd agree with that?*

MR SMITH: *Yes, I agree with that, yes.*

MR A. SMITH: *There's also be a lot of discussion about definitions and DCPs, about ground levels, earth works. Once again, we run into the same problem of numerous court cases that have taken place in this state involving model provisions and other matters such as that. In other words, it's going to be a vexed question always, of trying to determine what in fact is an earth work, what is quarrying works, what is the ground level.*

MR SMITH: *It has been a long standing debate, particularly between lawyers. And our latest definition has tried to at least clarify that to the extent where both the developer and the community have got some certainty.*

T. 24/2/05 p. 532

This attempt to spread blame outwards from the council to the State Government level and to suggest its nub as being outside council was promoted by council's solicitor, Mr Smith.

Mr Smith put the proposition to Dr Griffin:

MR SMITH: *I think the question relating to tourist developments and residential is a perennial problem that most of the councils in New South Wales have to struggle with. Wouldn't that be right?*

DR GRIFFIN: *Well, certainly those councils in the coastal strip and I think it would probably be not just New South Wales, I think those issues and certainly discussions that I have with my peers in other States, in the bottom corner of Western Australia they are confronted with those issues as they are on the Gold Coast, Sunshine Coast and up in the Cairns region of Queensland.*

T. 16/2/05 p. 132

It is true that, when dealing with matters under SEPP 71, DIPNR has also apparently struggled with the conditions it sought to impose.

On 10 February 2004 David Gibson sent an email to council regarding Resort Corporation's proposal at Cabarita Beach:

They are sticking to their LEP argument that a tourist development can contain both permanent ad tourist accommodation, so we will likely condition that the building contain approx. 60-70% tourist accommodation - how we police that requirement is anyone's guess??! AT this stage the applicants are refusing to actually nominate which units will be permanent & which will be tourist - presumably because they have pretty much sold them all already off the plans!

The issue of dealing with consent conditions was taken up with DIPNR's Manager, Planning and Strategy for the North Coast Region. It was his hope that the current proposals affecting planning would overcome the root cause of the problems:

MR MURRAY: *But to my knowledge, it's an issue that we are talking about and trying to deal with. But it's a hard issue, and part of the issue we have is that so many Local Environmental Plans across the coast have different definitions of what tourist accommodation is and isn't. And to get that consistent approach is very hard. Within one local government area, obviously you're dealing with one definition. And that's part of the rationale of the proposed planning reforms, where we're actually seeking to develop a new LEP template, that will apply to the whole State. And that's already been out for round one of exhibition, and is hopefully going out in the next month or two for the second round. But it standardises definitions across the State.*

MR BROAD: *But this has previously been done, or purported to have been done under the model provisions to the Environmental Planning and Assessment Act, hasn't it?*

MR MURRAY: *But the way the model provisions work, councils were given the options to actually adopt the model provisions. The proposed reforms to the planning systems are, is every council will follow the new planning template.*

MR BROAD: *There have been at least two attempts to impose new model provisions. I think there was the model provisions 2000, and there was a previous model provisions, I think - which would have come in about '79.*

MR MURRAY: *Yes, there was the original ones, then there was a subsequent amendment. The difference is that the Minister has announced and the Government has announced, and the department is preparing, a standard template. And the requirement will be through the proposed amendments to the Environmental Planning and Assessment Act, that each council within a three or five year period, depending on where they're located in the State, will be required to prepare a new planning scheme that conforms with the template. So they don't have the choice. As it stands at the moment, they removed the - they're not direct - there's not a direction requiring people to use the model provisions. Councils - - -*

MR BROAD: *That they don't have to adopt the model provisions.*

MR MURRAY: *They don't have to adopt them. The part of the new template proposal is, is that all councils will have standard zones. So no matter where you are, everyone will understand what a residential low density zone is, what a commercial or business*

zone is. They'll be the same zones, the same principle uses. And they will relate to the same principle definitions.

MR BROAD: *Yes, but don't the model provisions go substantially further than just having common zones?*

MR MURRAY: *The model provisions basically give a list of definitions.*

MR BROAD: *That's right.*

MR MURRAY: *Plus some standard clauses. As I said, the proposed LEP template will have standard definitions that everyone will have to adopt. So there will be a standard set of definitions across the State. So if you look up what a dwelling is, it will be the same in every environmental planning instrument.*

MR BROAD: *So the definition of a floor will be the same?*

MR MURRAY: *That's the proposal, and that's the draft - they've already put out that document once for public comment, and in response from industry, from the community and from local government. They're working on adding things, because it - you know, people said, "You didn't have enough residential zones in it to cater for our needs". Some of the definitions needed to be worked on. And that's the proposal.*

So the new - the proposed new planning system will deliver a standard LEP template which will have standardised zones, standard provisions for the majority of things that we - you know, that occur. Like acquisition, development near zone boundaries, etcetera. And a standard set of definitions that each council will be required within a three or five year period to review their LEP, and have that. So we'll have a consistent approach.

MR BROAD: *Can councils - is it anticipated that councils will be able to add to or modify definitions?*

MR MURRAY: *That's still under discussion, but the proposal was that unless there was - my understanding of the first reading of the paper that went out was the definitions were to be set. However, there may be opportunities following community consultation. But once again, they would have to put up a case. But no decision has been made on that.*

T. 16/3/05 p. 1426-1428

DIPNR had provided a submission to the Inquiry accompanied by extracts from its files relating to a number of developments within the council area. These documents suggested that Mr Murray had had considerable involvement in providing consent conditions associated with "tourist" developments. Mr Murray was taken to this involvement in an attempt to obtain DIPNR's perspective:

MR BROAD: *This is - well, put it this way. There seems to be some issues about being able to define what tourist - not what tourist accommodation is but what tourist usage is; and it seems to stem around being able to define what short term accommodation is.*

Now, do you see - does the department see difficulty in respect of defining what short term accommodation is?

MR MURRAY: *It's a general issue talking generally without looking at Tweed's specific definition; but it's a general issue that we've had a number of discussions within the department and other issues within the region that we've had to deal with that issue, and a lot of it comes back to the form of structure. The type of management that they're using seems to be the way that we can get used to or get our heads around what they're doing. Sometimes we get proposals which would - we have had a recent proposal not lodged formally but a concept put before the department that was dealt with in Sydney which dealt with single dwellings across a site that were going to be managed for tourism purposes.*

And we couldn't see how that was a definite tourism site and raised that issue back with the developer because of the way they had structured their development. And a lot of the other cases - my understanding is that particularly our urban assessments unit who deal with the majority of the development applications that deal with this are looking at the management structures, and how the development is structured, and the facilities, and how the site integrates, to actually look at how it's used for that tourism purpose.
MR BROAD: *Now, when it came to considering the Resort Corp proposal for development at Cabarita Beach, the urban assessments unit dealt with the objectives of the Tweed Local Environment Plan and its definition that:*

Tourist accommodation as being used as a building principally used for the accommodation, but does not include a building elsewhere specifically defined.

It said:

Any approval under the DA will thus be only for tourist accommodation use, applied for on the DA form.

And it goes on to continue:

With no permanent occupancy accommodation permitted under this consent.

Now, the consent conditions anticipated that there would be a covenant restricting their use to be placed on the title of each tourist accommodation lot, restricting the stay of users within each lot to 40 continuous days. Is that the view that the department takes as appropriate, to ensure this short term use of accommodation?

MR MURRAY: *Not being involved in the assessments team, I can't actually speak on that. But we don't actually have a - I'm not aware of a written policy across the department to specify that. But that would - that's been the approach that the urban assessments branch has taken in respect of this application.*

MR BROAD: *Right. Is there continuity in the urban assessment team's approach, to your knowledge?*

MR MURRAY: *Well, to my knowledge, that's the intention. The purpose of having the applications assessed that were State significant under SEPP71, was to actually bring continuity and uniformity to the approach of assessment across the coastline, because of the issues raised through the aims and objectives of the SEPP. That's the purpose.*

MR BROAD: *Now, in another one of the files that were dealt with, there was a suggestion - and that's in respect of Peppers Resort - that:*

The tourist facility approved will not be occupied by any proprietor or occupier for longer than 42 consecutive days or an aggregate of 150 days in any 12 month period.

Now, you've got a difference in approach there. You don't appear to be supporting it by an 88B instrument, or covenant. And you've got a difference in the number of days, both in the short - 40 days against 42 days, but the overall 150 days. Is the department trying to deal with the problem of tourism use of resorts?

MR MURRAY: *I can't speak on behalf of the urban assessments branch, because I'm actually not involved in that branch.*

T. 16/3/05 p. 1423-1425

A review of the conditions of consent sought to be imposed by DIPNR equally suggests that they are susceptible to a challenge.

If the council had looked to DIPNR for guidance, then there is strong evidence that, like council, it had little appreciation of the effect of the LEP.

After all it was also imposing conditions that in all likelihood were invalid.

If DIPNR has concerns over the quality of council's LEP and planning documents they were not communicated to the Inquiry.

There is a sidelight to this issue.

Originally the Nor Nor East development proposed a multi-dwelling housing component.

In a letter dated 27 September 2002 Resort Corporation's solicitors wrote:

> You indicated that you have substantial issues regarding this development application and that the community also has some substantial issues. You indicated that you would not be recommending the approval of the development application based on the large number of issues. Fundamentally it is your view that the proposed development application is an over-development of the site.

In due course the application was amended to substitute tourist accommodation for the residential component. The proposal thereby became entitled to a number of building and financial concessions, and was subsequently approved.

Attempts to impose conditions ensuring that the tourist component is used for the purpose have failed. The definition of "tourist accommodation" in council's LEP is simply unenforceable.

Mr Smith's suggestion:

> MR SMITH: *I think the broad description that we've given should be sufficient for the developer to understand that if they're genuine in their proposal …*

T. 24/2/05 p. 526

will have evaporated with the first unit sale. A developer neither has any power to, nor any interest in enforcing the use; after all, he's obtained the concessions, got his price and is off to do his next project.

3.5.9 Special Treatment

Mayor Polglase was anxious to promote a view that all was well in the Tweed, that the council had fulfilled its responsibilities, and that the Inquiry was both unjustified and would find no evidence of wrongdoing.

His response to the Terms of Reference included the following statement (**submission 180**):

> 2. There is no evidence that Council has failed to process development applications responsibly. This is particularly true in the case of major development proposals, which are in any case now dealt with by the State Government.

Submission 180

Mr Robertson, the publisher of a local newspaper and who had stood as a number two candidate on the John Murray team pursued a similar theme in his submission (**submission 196**):

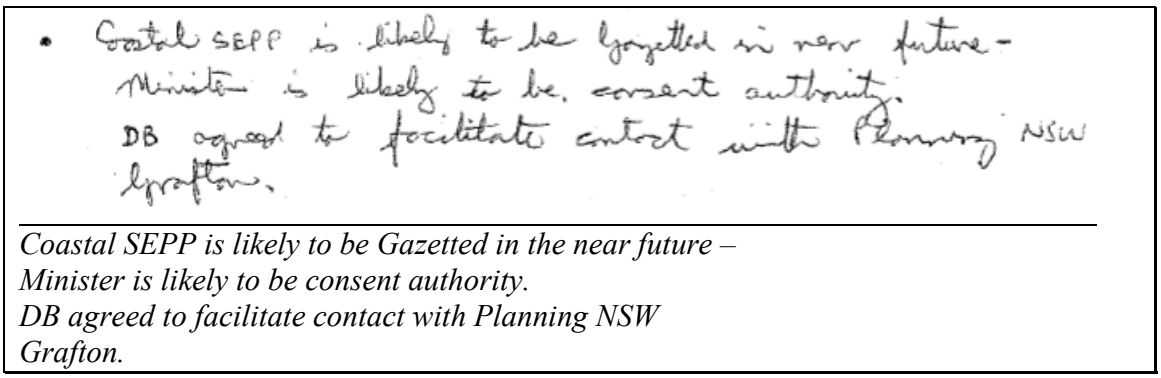
> The council has no control over large developments, like all NSW Coastal Councils, Sydney Labor has the final say, they, not Tweed Shire Council passed Salt, Casuarina, Peppers, they have control of Lot 490, Terranora Quarry, The Bug Farm, Chinderah Marina. Whatever influence developers have, it could only be over Sydney Labor.

There is some, but not a great deal of truth, in these statements.

In November 2002 the State Government introduced SEPP 71 – Coastal Policy.

Its effect has been to divert councils' powers to determine certain development applications, principally "significant Coastal Developments". These are now dealt with by the Minister for Infrastructure and Planning.

SEPP 71 did not come as a surprise to councils. On 9 September 2002, council's Manager, Development Assessment, Mr Smith wrote:


• Coastal SEPP is likely to be gazetted in near future - Minister is likely to be consent authority. DB agreed to facilitate contact with Planning NSW Grafton.

Coastal SEPP is likely to be Gazetted in the near future –
Minister is likely to be consent authority.
DB agreed to facilitate contact with Planning NSW
Grafton.

Smith – memo 9/9/02

In the six month period preceding its operation the council had received some important applications, including the SALT subdivision, the Outrigger resort at SALT, redevelopment of the Dolphin Hotel as well as applications to provide accommodation at Kingscliff.

Amongst these applications at Kingscliff had been Resort Corporations application for a mixed commercial/retail and multi-dwelling residential development known as Nor Nor East.

This proposal, as originally lodged would not have been affected by SEPP 71. The development pre-dated SEPP 71 and was not "significant coastal development" as defined in the SEPP.

In late September 2005, about five weeks before the introduction of SEPP 71 council's Director of Planning, Mr Broyd and another member of staff, Mr Enders, had met with Resort Corporation's representatives and had indicated that they would not be recommending approval of the application.

In the wake of this, Resort Corporation was to "amend" the application by replacing the "residential" component with "tourist accommodation".

This "amendment" was lodged on 28 March 2003, relevantly after SEPP 71 had commenced.

While the SEE lodged with the new plans described it as an "amended" application, the application was both significantly, and materially different from that originally lodged.

Importantly:

- the intended use of two of the three floors had totally changed;
- the change in the use of these floors brought dramatic change to the planning considerations;
- the classification of the structure under BCA had changed;

- DCP6 no longer applied;
- the section94 contributions that would be payable had altered considerably;
- the planning provisions contained in a number of council's DCP's, including those affecting density, setbacks, open space, parking had significantly changed and, additionally;
- there had been substantial changes to the building plans.

In *Seeto v Marrickville Council [1999]* NSW L&E Court 70, the Land and Environment Court accepted and endorsed earlier decisions that had held that, if the amended form differs in any material respect from the original application, it amounts to a fresh application.

In those earlier cases the courts had been considering the effect of changes that had been made to the plans. These changes were significantly less than the changes put forward by Resort Corporation.

In light of these judgements, the changes sought by Resort Corporation were so significant that council was being asked to deal with a fresh application.

As this new application included "tourist facilities", as defined in SEPP 71, the council was required to refer it to the Minister for Infrastructure and Planning.

The council failed to do so.

On 18 June 2003 the application came before the council to determine. The summary of the Report described the amendments as follows:

> …The application was originally lodged in July of 2002. However, given the number and nature of objections originally received and the advice of non acceptability from the Director Development Services, the applicant lodged amended plans….

The body of the report was slightly more fulsome but disguised the real thrust of the "amendments".

> The application was originally lodged in July of 2002. However, given the number and nature of objections originally received and the advice of non acceptability from the Director Development Services, the applicant lodged amended plans. The amended plans were received on 28 March 2003 and detailed several changes including:
>
> - A change to the definition of the accommodation section of the building from multi dwelling housing to tourist accommodation;
>
> - The staggering of the building to better represent the slope of the land;
>
> - The reduction in height of the building to Hungerford Land (from tree storeys to two storeys); and

- A four metre setback to Hungerford Lane;

SEPP 71 was not ignored, but dismissed in the following terms:

State Environmental Planning Policies

SEPP71 Coastal Protection

This application was originally lodged on 9 July 2002, which was prior to the introduction of SEPP 71 (1 November 2002). Despite this, given the nature of the development it is considered necessary to have regard to Clause 8 – Matters For Consideration of the SEPP.

Clause 8 details 16 matters for consideration of which most matters relate to maintaining public access to and along the coastal foreshore, and ensuring the scenic qualities of the coast are protected. Therefore, they are not specifically applicable to this application. Clause 8 (d) is considered to be the most relevantly applicable provisions, which reads as follows:

d) the suitability of development given its type, location, and design and its relationship with the surrounding area.

As mentioned above the amended application, subject to the recommended condition of consent to reduce the overall height of the building, is considered consistent with recently approved development in the locality. It is a contemporary design, which presents well to both Marine Parade and Hungerford Lane. This development is attractive and will provide appropriate facilities for the location.

The application complies with Clause 8 of SEPP 71.

Having no doubt heard of the consent granted by the council, Mr Paterson, council's Building Services Manager and a disgruntled resident raised his concerns.

These were reported in an email from Denise O'Brien to Mr David Broyd:

Denise OBrien

From: Denise OBrien
Sent: Thursday, 26 June 2003 3:47 PM
To: David Broyd
Subject: RE: 32-34 Marine Pd

David,

Further to that info I supplied earlier, I have discovered that Rick Patterson will proceed with a Class 4 Action.

I asked him if he minded telling you his intentions and he said no.

The basis for the objection would be that when the amended plans were lodged and changed from residential accommodation to tourist accommodation and it changed the number of car spaces planned and the height of the building that it significantly changed the development and therefore was required to be a new DA rather than amended plans. If it was a new DA SEPP 71 would have applied and the Minister may have called it up. Furthermore, he felt that the first public meeting was not a public meeting and that it should not have been by invitation or limited to one person per family. He claims that many people were put out at that meeting as it was not a meeting of negotiation but rather

the developer walked in and told everyone how it was going to be.

Would it be appropriate to seek legal advice on substantially the same development prior to the meeting on Wednesday?

Also I just realised that the recommendation does not specifically determine to approve the SEPP 1.

And in light of the revised measurements from Col showing natural ground level and existing ground level I think some form of amendment is required to the report prior to the meeting on Wednesday.

Denise

Apparently Mr Paterson did not carry out his threat.

In what are clearly dubious circumstances, the council has entertained and dealt with the Nor Nor East applications for the SALT and Outrigger developments.

In August 2004 the council was considering an application to modify the consents to increase the density of the development by over 35%. The summary of the report to council's meeting on August 2004 records:

The alternate course of action for the applicant is to lodge a fresh masterplan and development application for the proposal with the Department of Infrastructure Planning and Natural Resources (DIPNR). DIPNR would be the consent authority under the provisions of State Environmental Planning Policy No.71 Coastal Protection.

In view of the significance of the Salt development to the Tweed the facts of the proposed amendment are submitted for Council's consideration.

The body of the report enlarges on this statement, indicating:

…The alternative to a Section 96 application is the lodgement of a new development application. Developers in the Tweed and in other Council's subject to the SEPP71 planning legislation are generally reluctant to submit a new development application because of the extensive delays being experienced where the State Government is assessing development applications.
Some development applications being processed by the State Government under the SEPP71 legislation are taking up to 2 years to obtain approval.

and

The issue is a difficult one in that the advice provided by Council's solicitors is normally followed rather that the advice submitted by the applicant for development proposals.

In this instance there is unlikely to be many objections to the proposed change from medium density development to single dwelling allotments particularly given there is not a significant change in the overall population density of the development. The point being that if a new development application was lodged for the changes now being sought it is considered that it would be recommended for approval. The applicants concern that any new development application has to be referred to the State Government for approval with substantial inherent delays in not a valid planning consideration. Nevertheless, the Salt development is a major development with significant tourist implications for the Shire.

Council needs to consider the facts of this application and resolve accordingly.

The issue of dealing with applications to avoid the operation of SEPP 71 was taken up with Mr Papps, who had been Director of Rural and Regional Planning with DIPNR.

While reluctant to give a legal opinion, Mr Papps said:

MR PAPPS: *I would have regarded that as - I would have regarded that as generally an undesirable - generally, an undesirable situation. ...*

T. 10/3/05 p. 1268

The council has been at great pains to defend its position regarding this application, emphasising that this aspect of the matter was never dealt with.

Whether the matter was dealt with or not dealt with is not the issue.

Quite clearly staff were promoting special treatment for this developer.

It would appear that this was not the only time such a statement could be made. It applied to the SALT developments.

Clause 16 of the LEP provides:

16 Height of buildings

(1) **Objective**

- to ensure that the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.

(2) Consent must not be granted to the erection of a building which exceeds the maximum height or number of storeys indicated on the Height of Buildings map in respect of the land to which the application relates.

(3) If an application for development consent made to the consent authority prior to the commencement of *Tweed Local Environmental Plan 2000 (Amendment No 46)* is not determined by the consent authority before that date:

(a) the amendments made to Schedule 1 to this plan by *Tweed Local Environmental Plan 2000 (Amendment No 46)* do not apply to the determination of the application, and

(b) the application is to be determined under this plan as if those amendments had not been made (that is, having regard to the definitions of ***height*** in relation to a building and ***storey*** in force under this plan immediately before that commencement).

Importantly, subclause 2 prohibits the erection of buildings that exceed the maximum height or the maximum number of storeys indicated in the "Height of Buildings" map.

The map, adopted on 7 April 2000 indicated areas where particular provisions had been made for either the maximum height of buildings or maximum number of storeys and includes Tweed Heads, Fingal, Kingscliff and Pottsville.

Most importantly the map provides:
"Areas Outside Those specified are 3 storeys maximum".

When the SALT subdivision and "Outrigger" development applications were lodged the LEP contained the following definition of "storey":

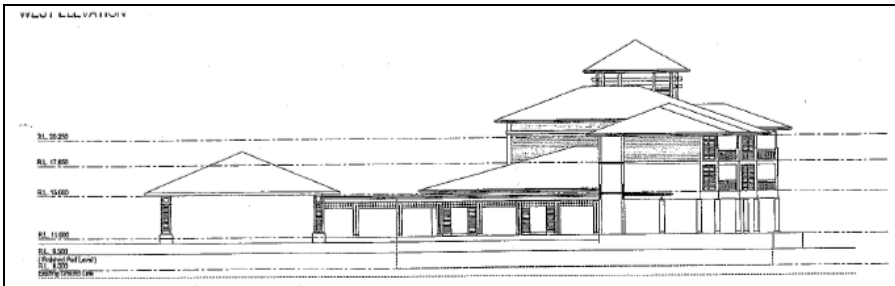
"Means

a) The space between 2 floors, or
b) The space between the floor and any roof immediately above it, or
c) Foundation areas, garages, workshops, storerooms and the like, where the height between ***natural ground level*** *and the top of the floor immediately above them is 1.5m or more.*

For the purpose of counting the number of storeys in a building, the number is to be the maximum number of storeys of the building which may be intersected by the same vertical line, not being a line which passes through any wall of the building."

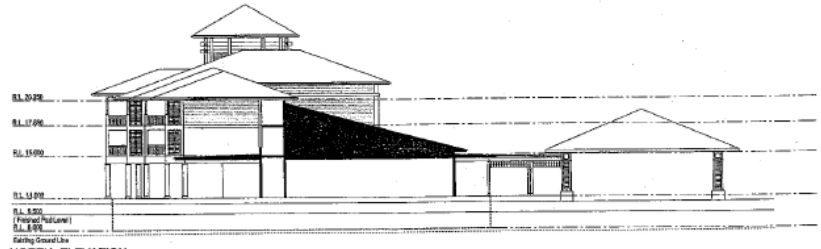
Of course this presented problems for the proposal, firstly because the Ray Group intended to fill the site to a depth of up to 3.5 metres, secondly because it was seeking to construct two major resorts on the site and thirdly as it was proposing medium density developments on a number of lots.

The developer had, no doubt, been at pains to point out the importance of overcoming the height restrictions. Its resort proposals were significant, as will be seen from the following elevations of the Outrigger and Peppers resorts (p. 11).



SOUTH ELEVATION

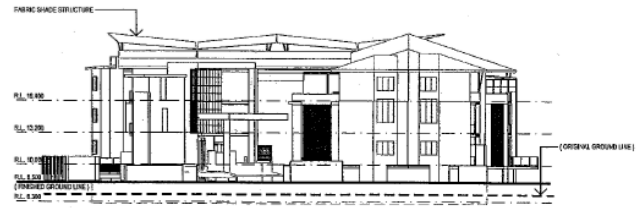
EAST ELEVATION



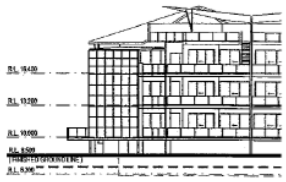
NORTH ELEVATION

OUTRIGGER

BUILDING 1
NORTH ELEVATION



BUILDING 1
WEST ELEVATION



BUILDING 1
EAST ELEVATION

BUILDING 1

PEPPERS

Even before the applications were lodged, the SEE for SALT was able to state:

> …To assist in resolving this issue, Council has resolved, pursuant to Section 54 of the Act, to prepare a draft Local Environmental Plan Amendment to vary the definition of storey and include other provisions as follows;
>
> - *"The definition for building height be amended to reflect "finished ground level" rather than "natural ground level";*
>
> - *A definition of finished ground level be introduced as follows;*
>
> *(a) Where land is within an area designated by the Council as flood liable land, the adopted design flood level adopted by Council; or*
>
> *(b) Where land is not within such an area, the level of the land (after earthworks) as approved by the Council, or where no earthworks are proposed, the natural ground level of the land.*
>
> - *The definition of storey can be amended to read;*
>
> *(a) The space between 2 floors; or*
>
> *(b) The space between the floor and any ceiling or roof immediately above it, or*
>
> - *Foundation areas, garages, workshops, storerooms and the like, where the height between* ***finished ground level*** *and the top of the floor immediately above them is 1.5 m or more.*
>
> *A storey which exceeds 4.5 m is counted as 2 storeys."*

The proposed amendments to the LEP had not been gazetted when the SALT and Outrigger applications were lodged, nor had they been placed on exhibition. section 79C of the EP&A Act requires that a consent authority, whether a council or otherwise, take into consideration the provisions of:

> (i) any environmental planning instrument, and
>
> (ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and
> (iii) any development control plan, and
>
> (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
>
> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),
>
> that apply to the land to which the development application relates,
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
>
> (c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

…

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards:

(a) subsection (2) does not apply and the discretion of the consent authority under this section and section 80 is not limited as referred to in that subsection, and

(b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note. The application of non-discretionary development standards to complying development is dealt with in section 85A (3) and (4).

…

(6) **Definitions**
In this section:

(a) reference to development extends to include a reference to the building, work, use or land proposed to be erected, carried out, undertaken or subdivided, respectively, pursuant to the grant of consent to a development application, and
(b) ***non-discretionary development standards*** means development standards that are identified in an environmental planning instrument or a regulation as non-discretionary development standards.

The wording of clause 16 of the LEP was unequivocal; the council could not approve the application. There was no way that the clause could be interpreted as anything but a non-discretionary development standard.

If the application were to proceed, then it would be necessary for the changes, as foreshadowed in the application to be made.

The solution was simple: discard natural ground levels as the datum to measure building height.

The council went about the process, and by 23 April 2003, the date of determination had placed the amendment on exhibition. The path had been cleared of obstacles; all that now remained was PlanningNSW's concurrence, duly given at the stroke of a pen (**Letter 23/4/03**):

- In relation to DA02/1423 Concurrence is granted to the SEPP No. 1 objection to the 3 storey height limit in the Tweed LEP 2000 to allow for the four storey resort hotel development. Concurrence is granted as the development will be compatible with the proposed overall development on the site and will accord with the amending provisions contained in the Tweed LEP presently on exhibition.

Based on the barest of consideration (**DUAP Minute 22/4/03**):

18. **SEPP No. 1 Concurrence for height of building under Tweed LEP 2000 (DA02/1423)** Clause 16 of the Tweed LEP limits the height of buildings in this location to 3 storeys. As the buildings' ground floors/foundations are more than 1.5 metres above natural ground level, the proposed buildings are classified as four storeys high as defined by the Tweed LEP 2000. A SEPP No. 1 objection to this standard has been forwarded to the Department seeking the D-G's concurrence. The objective of the height provisions in the LEP is to ensure the height and scale of development is appropriate to its location, surrounding development and environmental characteristics of the land. The objection to the height standard must consider if the standard is unreasonable or unnecessary in the circumstance.

19 Tweed Shire Council has commenced the preparation of an amending LEP to change these height provisions to refer to height above finished ground level. The amending LEP is presently on exhibition till the 14 May 2003. If this provision was in place, the development would be classified as three storeys high and comply with the LEP. The issue of height is also discussed above in relation to concurrence under the North Coast REP. The height and scale of the development will be compatible with the surrounding development and new urban environment that will result from the overall development of the site. Under the circumstances it is considered that the standard relating to height is unreasonable and unnecessary in the circumstance.

In providing this assistance to the proponent, the council has potentially opened a "Pandora's box":

MR BROAD: *Now, the council has recently moved to redefine the concept of "existing ground level", as I understand it; is that correct?*

MR SMITH: *Yes, yes.*

MR BROAD: *Does that facilitate a two-stage development, where one can apply to fill and subsequently apply for the end development that one wishes to pursue?*

MR SMITH: *Part of the new definition or current definition includes the finished ground level being the level of the land after earthworks, as approved by council. So that, in theory, somebody could apply to do earthworks on a site and then subsequently come back with an application. But those earthworks would be subject to a development application and consideration under the normal assessment.*

MR BROAD: *Does it only apply to areas where the original land contours can't be ascertained, such as areas where there's been sand mining?*

MR SMITH: *No. It has reference back to the current local environmental plan date of introduction, which was April 2000.*

MR BROAD: *But is it limited to those areas only where levels cannot be established with certainty?*

MR SMITH: *No. It applies equally across the - - -*

MR BROAD: *It's got general application, has it?*

MR SMITH: *It applies equally across the whole of the shire.*

T. 24/2/05 p. 526-527

In July 2002 the council was considering an application by Crownland Developments for a commercial/residential/tourist development at Wharf Street Tweed Heads. It would comprise two, eighteen storey buildings.

This $69 m venture was seen as an "application of the highest significance" (**Council Minutes 17/7/02**).

In July 2002 the application had become bound up in concerns whether the council should deal with the application or whether the Minister should deal with it.

On 11 July 2002 the proponent wrote a letter to council requesting that it urgently write to both the Minister and his head of staff, in the following terms:

CROWNLAND
developments

URGENT - PRIVATE & CONFIDENTIAL

Thursday, 11 July 2002

The General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484
By facsimile: (02) 6672 8029

Attention: Mayor Warren Polglase

Dear Sir

RE: **Latitude 28**
Letter to Dr Andrew Refshaugee

Further to our conversation and as an urgent matter may I ask you to address and fax a letter to the Minister for Planning and cc the letter to his Chief of Staff, details are as now follows:

The Honourable Dr Andrew Refshauge
Deputy Premier, Minister for Planning
GPO Box 3451
SYDNEY NSW 1043
By Facsimile: (02) 9228 4400

Ms Deborah Willcox
Chief of Staff
GPO Box 3451
SYDNEY NSW 1043
By Facsimile: (02) 9228 4400

The letter needs to clearly address each of the following points.

- The elected council wishes to determine the application in its own right and as indicated would be the case by the Minister previously.
- A majority of the councillors support the application.
- The SEPP 1 objection relating to 2 storeys additional height is a matter that the councillors are generally comfortable with.

Suite 204, Edgecliff Centre, 203-233 New South Head Road, Edgecliff, New South Wales 2027
Tel: 02 9362 3417 Fax: 02 9362 4811
Crownland Developments (No1) Pty Limited A.C.N. 088 712 088

- The project is within the Tweed CBD's Core, and adjoins the approved and partially built Twin Towns Resort. The Twin Towns Resort is of similar scale and indeed is of the same height as that which is being sought by the Latitude 28 project.

- The increased height results in an increase in overshadowing to the adjoining Chris Cunningham Park of 4%. This increase in overshadowing occurs at 6.30pm on 21 December, however and most importantly there is no shadowing before 5pm on 21 December.

  During winter, the park is not overshadowed at all at 3pm 21 June.

  The times and dates stipulated here are those referred to in the Coastal Policy Guidelines.

  Council considers in the context of the overall application and the matters covered within this letter that this is an acceptable outcome.

- The project has been through one redesign with the input of extensive community consultation and resulted in a reduced scheme by in excess of 60 units, together with a more pleasing architectural solution.

- The project has gone through 2 advertising periods of 30 days each and only 1 letter of objection has been received by council.

- The project has extensive local business, community and trade union support.

- The project will be the impetus for further investment in the Tweed and most importantly will revitalise a vacant and disused site in Tweeds Core CBD.

- The project provides significant Socio-economic benefits for the Tweed Sub Region including

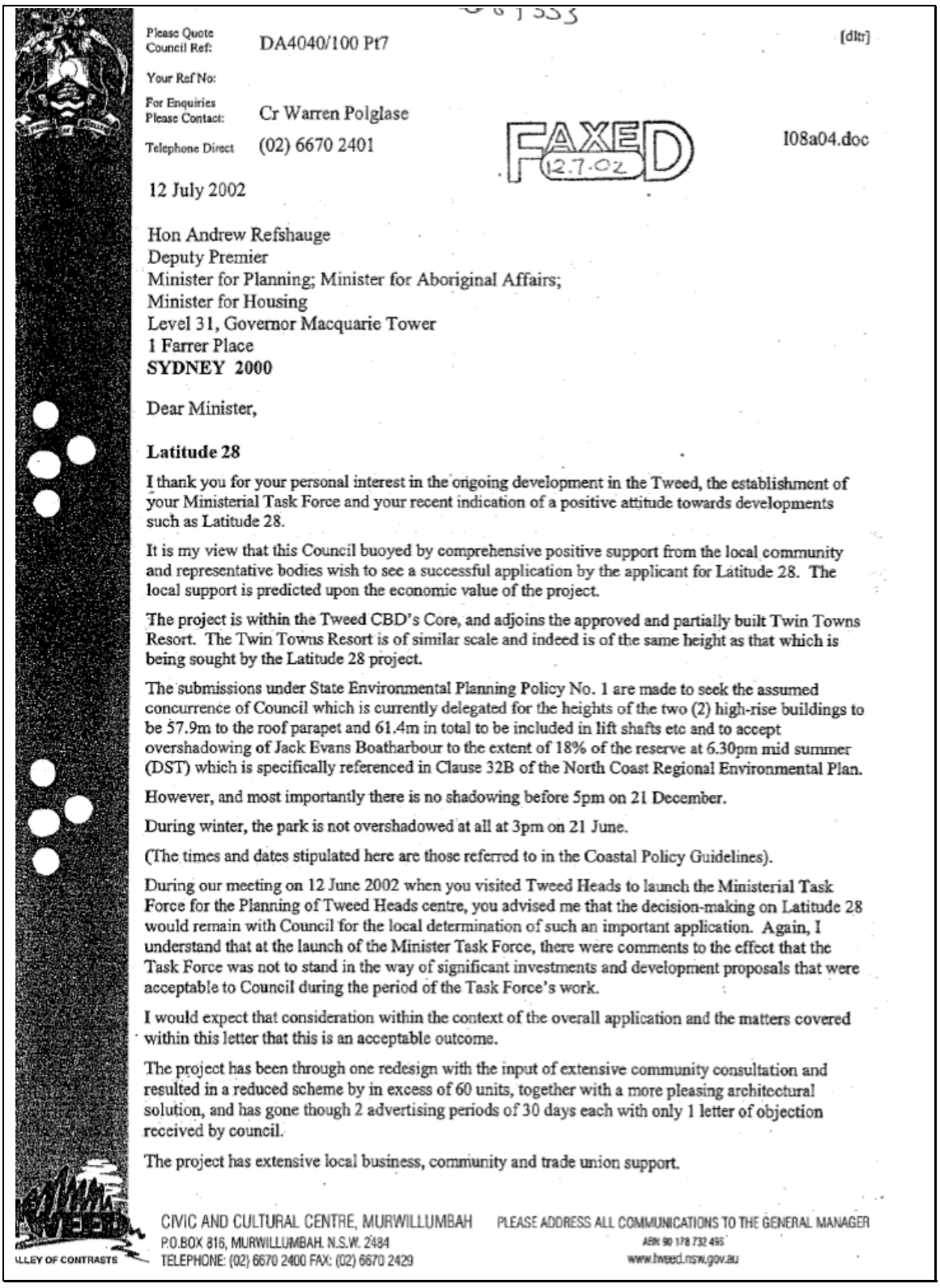
Total value of development	$120 million
No. of permanent jobs generated by the Completed development	150 full time jobs
No. of jobs during peak construction Period	350 jobs
Wages payable per annum to employees At completion of project	$4.78 million
Flow ons to local business	$10.93 million
Estimated local expenditure per annum generated by tourist accommodation	$10.4 million
Additional rates per annum to Council	$232,000
Value of streetscaping works	$830,000

I will call you tomorrow to further discuss.

Yours sincerely

Andrew Wiesener

The council dutifully obliged sending a letter to the Minister on the following day that echoed, almost verbatim, the matters that had been put forward by the proponent.



Please Quote Council Ref: DA4040/100 Pt7 [dltr]

Your Ref No:

For Enquiries Please Contact: Cr Warren Polglase

Telephone Direct (02) 6670 2401

FAXED 12.7.02

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12 July 2002

Hon Andrew Refshauge
Deputy Premier
Minister for Planning; Minister for Aboriginal Affairs;
Minister for Housing
Level 31, Governor Macquarie Tower
1 Farrer Place
SYDNEY 2000

Dear Minister,

Latitude 28

I thank you for your personal interest in the ongoing development in the Tweed, the establishment of your Ministerial Task Force and your recent indication of a positive attitude towards developments such as Latitude 28.

It is my view that this Council buoyed by comprehensive positive support from the local community and representative bodies wish to see a successful application by the applicant for Latitude 28. The local support is predicted upon the economic value of the project.

The project is within the Tweed CBD's Core, and adjoins the approved and partially built Twin Towns Resort. The Twin Towns Resort is of similar scale and indeed is of the same height as that which is being sought by the Latitude 28 project.

The submissions under State Environmental Planning Policy No. 1 are made to seek the assumed concurrence of Council which is currently delegated for the heights of the two (2) high-rise buildings to be 57.9m to the roof parapet and 61.4m in total to be included in lift shafts etc and to accept overshadowing of Jack Evans Boatharbour to the extent of 18% of the reserve at 6.30pm mid summer (DST) which is specifically referenced in Clause 32B of the North Coast Regional Environmental Plan.

However, and most importantly there is no shadowing before 5pm on 21 December.

During winter, the park is not overshadowed at all at 3pm on 21 June.

(The times and dates stipulated here are those referred to in the Coastal Policy Guidelines).

During our meeting on 12 June 2002 when you visited Tweed Heads to launch the Ministerial Task Force for the Planning of Tweed Heads centre, you advised me that the decision-making on Latitude 28 would remain with Council for the local determination of such an important application. Again, I understand that at the launch of the Minister Task Force, there were comments to the effect that the Task Force was not to stand in the way of significant investments and development proposals that were acceptable to Council during the period of the Task Force's work.

I would expect that consideration within the context of the overall application and the matters covered within this letter that this is an acceptable outcome.

The project has been through one redesign with the input of extensive community consultation and resulted in a reduced scheme by in excess of 60 units, together with a more pleasing architectural solution, and has gone though 2 advertising periods of 30 days each with only 1 letter of objection received by council.

The project has extensive local business, community and trade union support.

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ALLEY OF CONTRASTS

The project will be the impetus of further investment in the Tweed and most importantly will revitalise a vacant and disused site in Tweeds Core CBD.

Council's Director of Development Services has completed a report on the Latitude 28 development application for consideration at the Council meeting of 17 July 2002.

The project provides significant Socio-economic benefits for the Tweed Sub Region including:-

• Total value of development	$120 million
• No. of permanent jobs generated by the completed development	150 full time jobs
• No. of jobs during peak construction period	350 jobs
• Wages payable per annum to employees at completion of project	$4.78 million
• Flow ons to local business	$10.93 million
• Estimated local expenditure per annum generated by tourist accommodation	$10.4 million
• Additional rates per anum to Council	$232,000
• Value of streetscaping works	$830,000
• Stamp duty payable to the State	$2.93 million

Therefore, Latitude 28 represents a very positive and land mark development for Tweed Heads that will be the catalyst for other major and beneficial investments. This is to seek your assurance that given your advice to myself and that Council is about to make a determination on the application, the decision-making process on Latitude 28 development application will remain with Council.

Yours faithfully

Cr Warren Polglase
MAYOR

On 17 July 2002 the council was to consider a report recommending that, for a number of significant reasons, the application be refused. On the previous day Planning NSW had advised that it would exercise its concurrence power, rather than allowing the council to assume it. As a result, the matter could not be dealt with.

Despite the recommendations of the staff, the council resolved:

RESOLVED that:-

1. The Director-General of PlanningNSW be advised that Council supports approval of Development Application 0023/2002DA for two (2) eighteen storey residential/tourist/commercial buildings on the corner of Wharf and Bay Streets, Tweed Heads in its submitted form and is satisfied that the State Environmental Planning Policy No 1 objections to the 50m AHD height restriction in Clause 16 of Tweed Local Environmental Plan 2000 and Clause 32B of the North Coast Regional Environmental Plan in relation to overshadowing of foreshore reserves are justified.

2. Council fully supports the Mayor and General Manager in strongly representing the above position at the meeting with PlanningNSW on Wednesday, 24 July 2002.

The provision of letters, such as that sent to Minister Refshauge regarding the Latitude 28 proposal, undermines the independence of the council and suggests favouritism.

Mr Stuart Reid presented a lengthy and detailed submission to the Inquiry. He subsequently gave evidence during the Public Hearings.

The submission provides a chronological history of his dealings with Resort Corporation, which had expressed an interest in acquiring his property in the context of its plans to re-develop his, council owned lands and the former Cabarita Hotel site at Cabarita.

Mr Reid's submission relevantly records:

> 43. **26 November 2002** – Letter sent via email from **Stuart Reid** to **Paul Brinsmead** responding to the offer documentation supplied by Mr Brinsmead. This response requested further information, including proof of Tweed Shire Council support for the implementation of their plans for the wider precinct (as presented in the meeting of 19 November 2002).

Submission 298

Subsequently, the submission details an email from Paul Brinsmead responding to Mr Reid's request for "proof", relevantly:

> *....Our clients have shared their vision with **Senior Council Officers and Councillors who have, as you put it, "expressed enthusiastic support for our client's vision".** Our client also believes that in order to secure agreement of the Surf Club to a relocation, the earlier that our client can achieve that agreement, the more likely that arrangement can be locked in.'* And further...*"You have requested that our client obtain some confirmation that the council will support the relocation of the proposed Surf Life Saving Club building and will entertain the acquisition of the remaining lands. **Our client will supply us with a letter from the Mayor's office confirming this.** We will provide this to you **within a couple of days**.'*

Submission 298

The submission later records:

> 47. **13 December 2002** – Facsimile from **Paul Brinsmead** to Stuart Reid which contained a copy of a letter from John Griffin (General Manager, TSC) to **Peter Madrers** (Resort Corp Cabarita P/L and Pacific Projects Group P/L) stating that Tweed Shire Council representatives had discussed the development concept of Resort Corp and also indicated support for their development concept for the precinct. [Cr Henry James claims in an email that this letter was the subject of a lengthy planning workshop. The letter itself reflects and intent to pursue the Resort Corp vision – in spite of opposition and concerns expressed by the community to the draft Precinct Plan (e.g. refer 23, 24, 26, 28) and well before any DCP process had been initiated (refer 65)].

Submission 298

The council's files contain the following letter:

TWEED SHIRE COUNCIL

Please Quote Council Ref: DA4100/10 Pt.2 & DA02/1646 DW 713146 [altr]

Your Ref No:

For Enquiries Please Contact: Dr John Griffin

Telephone Direct (02) 6670 2415

19jj11.doc

13 December 2002

Mr Peter Madrers
Resort Corp Cabarita Pty Ltd
Pacific Projects Group Pty Ltd
21 Adori Street
CHEVRON ISLAND 4217

Fax No: (07) 5570 0901

Dear Mr Madrers

Cabarita Beach Hotel/Motel, Pandanus Avenue and Council Owned Land and the Surf Club Land North of Pandanus Avenue

You have previously met with representatives of Tweed Shire Council and advised us of your proposed development plans for the Cabarita Beach Hotel/Motel.

Any quality development of the Cabarita beachfront commercial and residential precinct will provide a significant economic benefit to the Tweed generally.

We also note that you have met with Mr David Broyd, Mr Garry Smith and the Mayor and Deputy Mayor to share your vision for the development of what you have called the second stage of the Cabarita commercial precinct. You indicated that your vision includes the closing of Pandanus Avenue to traffic and turning this into a public open space mall and the development of a quality commercial and residential resort on the balance land owned by the Council and the surf club.

I would be prepared to recommend to Council that your proposed vision for this area should be significantly supported provided it complies with Tweed Shire Council and State Government planning requirements. To this end I would recommend Council to agree to enter negotiations with you concerning the land owned by the Council to agree as to appropriate terms for the development of this land. I would suggest that Tweed Shire Council would agree to assist in encouraging the Surf Club to work with you so that any development of a surf club is developed in a position which will be of the most advantage to the Surf Club, the aesthetics of the area and the community generally.

I understand that your organisation would build a surf club to the currently designed standard at no cost to the Surf Club or Tweed Shire Council. I would seek your confirmation of this.

We look forward to meeting with you further to progress your vision for the development of the second stage of Cabarita very soon.

Yours faithfully

DR JOHN GRIFFIN
General Manager

Copy to: Mayor & Deputy Mayor

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Collaterally, Mr Reid's submission notes, only four days later:

48. **17 December 2002** – Letter from **David Broyd** (Director Development Services, TSC) responding to letter sent by email of 26 November 2002 broadly advising that council had not taken planning of the Cabarita precinct any further (since the Deicke Richards draft Precinct Plan) and that, when such planning was to be initiated the process would be very inclusive of adjacent residents and other residents of Cabarita Beach/Bogangar. [The questions concerning whether council had entertained the sale of those lands was not answered].

Submission 298

It may be that this practice was only confined to higher levels, council's Manager, Development Assessment gave evidence that he had never experienced such a situation:

MR BROAD: *Just one final question. Does your department operate independently of developers?*

MR SMITH: *Yes.*

MR BROAD: *Absolutely?*

MR SMITH: *Yes.*

MR BROAD: *So if a developer wrote to your department and said, "Look, we require this letter to go to such and such a department", would it be usual for your department to gainsay what the developer expressed, and simply on forward that?*

MR SMITH: *No, not in my experience. If a letter was sought of that nature, I would ask for a letter to come in and ask what the nature of the - you know, what is the zoning or whatever. But, no, I've never experienced personally any situation like you've described.*

T. 24/2/05 p. 529-530

This pre-disposition towards the perceived needs of proponents and the underlying suggestion that they should receive special treatment may also be gleamed from the following evidence of Mayor Polglase regarding the Expo-Park proposal:

MS ANNIS-BROWN: *Just to go on to your comments, and that was in the Tweed Daily News on 14 January 2004. ...*

You go on to say, as you're quoted here:

Councillor Polglase said this latest proposal would attract more people to South Tweed from as far as Lismore and South Tweed's traffic problems highlighted the need for a regional shopping centre on the Tweed Coast.

If I could just come to that first quote, and that is the mini Harbour Town project. What did you mean by that statement?

MAYOR POLGLASE: *Well, you're probably aware there's a project up in the Gold Coast called Harbour Town, which has many similarities to what I believe they were trying to develop down here. That's my relationship to that statement.*

MS ANNIS-BROWN: *What are the similarities?*

MAYOR POLGLASE: *Well, the similarities are they would have a series of boutique shops and outlets that cater for various garment manufacturers, bedding, all those sort of things that people want to buy. They buy them at sort of a discount price in some areas. It's like a multi-warehouse for products to be put forward by major suppliers, and that's the sort of concept I believe they were trying to develop down here. It's been very successful at Harbour Town up on the Gold Coast.*

MS ANNIS-BROWN: *You refer to shops and outlets. Is that not retail development?*

MAYOR POLGLASE: *Well, most of that stuff there is like a warehouse type of facility where you could buy stuff at warehouse prices. It's a mixture, I would presume.*

MS ANNIS-BROWN: *But you would agree it does include retail.*

MAYOR POLGLASE: *I wouldn't agree entirely, no. It has a mixture, as I said before.*

MS ANNIS-BROWN: *Yes, but it does include retail.*

MAYOR POLGLASE: *It has a mixture.*

MS ANNIS-BROWN: *A mixture of what?*

MAYOR POLGLASE: *Retail and wholesale.*

MS ANNIS-BROWN: *Right. Retail and wholesale.*

MR BROAD: *Does the local environment plan differentiate between a sale at a retail price and a sale at a wholesale price?*

MAYOR POLGLASE: *I don't believe that it's written in black and white in the environmental plan, no.*

MR BROAD: *You're differentiating the use on the basis of a perceived price, aren't you?*

MAYOR POLGLASE: *I made a statement that I believed this facility was very similar to the one that was being made at Harbour Town.*

MR BROAD: *I'm not asking you about the statement.*

MAYOR POLGLASE: *Yes.*

MR BROAD: *I'm asking you about your last answer to Ms Annis Brown's question.*

MAYOR POLGLASE: *My answer reflected what I thought the concept of the process was going to be.*

MR BROAD: *Some was going to be sold at wholesale price and some would be sold at retail price. And what you're saying is the use would be differentiated by the price at which the goods were sold.*

MAYOR POLGLASE: *What I'm saying is they're a mixture - they'll be selling at various prices, yes.*

MR BROAD: *Yes. And what I'm suggesting to you is, irrespective of the price, you are dealing with a retail use of the premises.*

MAYOR POLGLASE: *No, that's not correct. I think you misunderstand that before any of these premises can have tenants in them they must apply to Council with a DA for the process that they're going to be using. Council will then determine whether that use is permissible or not. I was reflecting a proposal which I thought was beneficial to the Tweed, but in the planning exercise we're under, each tenant will have to apply to the Council for his use and how it's going to be used. Council will then determine whether that meets the requirements of the zoning at that time.*

MR BROAD: *Yes.*

MS ANNIS-BROWN: *Were you aware that the application that was submitted to Council was for light industrial development?*

MAYOR POLGLASE: *No, I wasn't.*

MS ANNIS-BROWN: *Would you agree that retail use of that development, now that you know it was light industrial* development, would be a permissible use within that zoning.

MAYOR POLGLASE: *The applications that come before Council will be considered when they lodge a DA. We're not making any statements to say that we'll support one or the other. We've got to see what proposals come before us for consideration.*

T. 17/3/05 p. 1541-1544

Councillor Lawrie similarly vouched his willingness to provide favours to those who he perceived as being worthy, moving wetlands to less sensitive areas. He gave the following evidence:

CR LAWRIE: *That's - I'd like to say, Mr Broad, there has been rezonings, which have facilitated different development. Now, if I may give an example of that, in the lead up to the LEP 2000, there was a zone line imposed on the zoning maps, regarding the Terranora Lodge development, which exactly cut in half the southern half of that land, and that land was slowly sloping and undulating towards very rough, steep, descending, 7F land - to the river. The zone line cut that whole swathe of land in half. It proceeded*

to the next property and some poor lady had her house in the wrong zoning. Her whole property, every improvement on her land, was in the 7F zone.

MR BROAD: *It was in existing use?*

CR LAWRIE: *Well, the house had been there for 50 years.*

MR BROAD: *It wasn't under threat.*

CR LAWRIE: *Beg your pardon?*

MR BROAD: *It wasn't under threat.*

CR LAWRIE: *It makes it impossible to sell, sir. If you try to sell land with a 7F zoning, no one will buy it for a residence and that has happened just recently with Sir John Rimrod, the one time primate of the Anglican Church of Australia, who approached me, just recently, regarding his land at Bray Park. And his land, too, to his horror, said to be the result of a "mapping irregularity" had been zoned to a point where it was impossible to sell and I have approached the general manager - - -*

MR BROAD: *Can I cut you short? Does Council have a role in facilitating the sale of land and residence?*

CR LAWRIE: *No.*

T. 17/2/05 p. 185-186

3.5.10 Facilitating Developments through Planning Amendments

When lodging the SALT development applications, the proponent highlighted an agreement that had already been reached with the council to amend council's LEP.

This agreement, which has been dealt with earlier in the last section would overcome an absolute prohibition in clause 16 of the LEP.

In the absence of an amendment, which in turn had been placed on exhibition, it was doubtful that the council could consider the application.

There may have been a number of alternative approaches, such as an amendment excluding the SALT site from the operation of clause 16, but the council chose a more indirect and opaque method, altering the definitions that provided the foundation of the clause.

In a sense, this was a "sledgehammer" approach as the amendment could potentially affect any application within the shire.

Again, the last part included part of the evidence given by Councillor Lawrie who spoke of the need to move the 7(f) zoning boundary, which defined the protected wetlands and environmentally sensitive areas.

CR LAWRIE: *... to his horror, said to be the result of a "mapping irregularity" had been zoned to a point where it was impossible to sell and I have approached the general manager - - -*

T. 17/2/05 p. 185-186

There is no doubt that these amendments which were made to council's LEP were made either to facilitate the development then proposed or to ensure an outcome that fell outside proper planning principles.

In the earlier part of this section of the report, there are other examples of situations where there have been other instances where there have been amendments to DCP's and the like, including section94 plans, that have actively served to promote the interests of various proponents.

Collaterally, the council has both ignored and thwarted attempts to rectify weaknesses in its planning regime.

On 11 April 2003, council's then Director, Development Services, Mr Broyd, wrote to Mr Paul Brinsmead regarding proposals to amend the LEP. Mr Brinsmead was both solicitor for and a principal of Resort Corporation, which was then exploring a proposal for a residential/tourist development at Cabarita. The letter, relevantly, provides:

I refer to your letter of 7 March 2003 and subsequent letter. This particularly focused upon the provisions in the Tweed Local Environmental Plan 2000 regarding tourist accommodation and its implications for this development proposal. There are related issues included in the assessment and negotiations for the Development Application for SALT at South Kingscliff, and some other foreshadowed Development Applications.

There are two matters, therefore, that are important for formal consideration and potential decision by Council – being the provisions in Tweed LEP 2000 and some Development Control Plans in relation to tourist development and tourist accommodation, and some aspects of the preferred means of redevelopment of the Cabarita Hotel. The former matter will be subject of a report to Council at its meeting of 16 April 2003, and the latter will be reported to Council at its meeting of 7 May 2003. The reason for the latter report being submitted to a later meeting is that there are related issues regarding other developments and the parameters of the preparation of a draft Development Control Plan for Cabarita Beach/Bogangar that need to be considered further before such reporting takes place.

The planning amendments anticipated by Mr Broyd anticipated that tourist accommodation meet the same controls applicable to multi dwelling housing in certain DCP's and section 94 plans.

The detail of the proposal is recorded in the following extract from the minutes:

2. Tourism Development in Tweed Shire

GT1/LEP/2000 Pt1; LEP 2000

Cr Boyd
Cr Luff

PROPOSED that Council prepares and exhibits amendments to relevant Development Control Plans and S94 Contributions Plans to require tourist accommodation to meet the same planning controls and multi dwelling housing, as follows:

- Development Control Plan No 6 – Multi Dwelling Housing:
- Include in Clause 1.5:

  "A7. To ensure that tourist accommodation which is capable of being used as permanent residential accommodation meets the same standards as multi dwelling housing".

- Include in Clause 1.6 the following paragraph:

  "This DCP applies to tourist accommodation".

- Any necessary textural changes throughout the document to add or include tourist accommodation where multi-dwelling housing controls apply.
- Development Control Plan No 2 – Site Access and Parking Code:

- Replace Item B6 in Table 4.9B with the following:

Item	Development	Comment	Public Transport, Bus Stop Seating	Bicycle parking	Delivery, Service Vehicle parking (50% must be truck size)	Resident Parking	Staff parking	Customer car parking
B6	Tourist accommodation		1/15 units	2/unit, class 2 AS 2890.1. Residential buildings without access to ground level private open space only.	1/50 units	1.5/dwelling. 25% to be accessible and marked for visitors.		

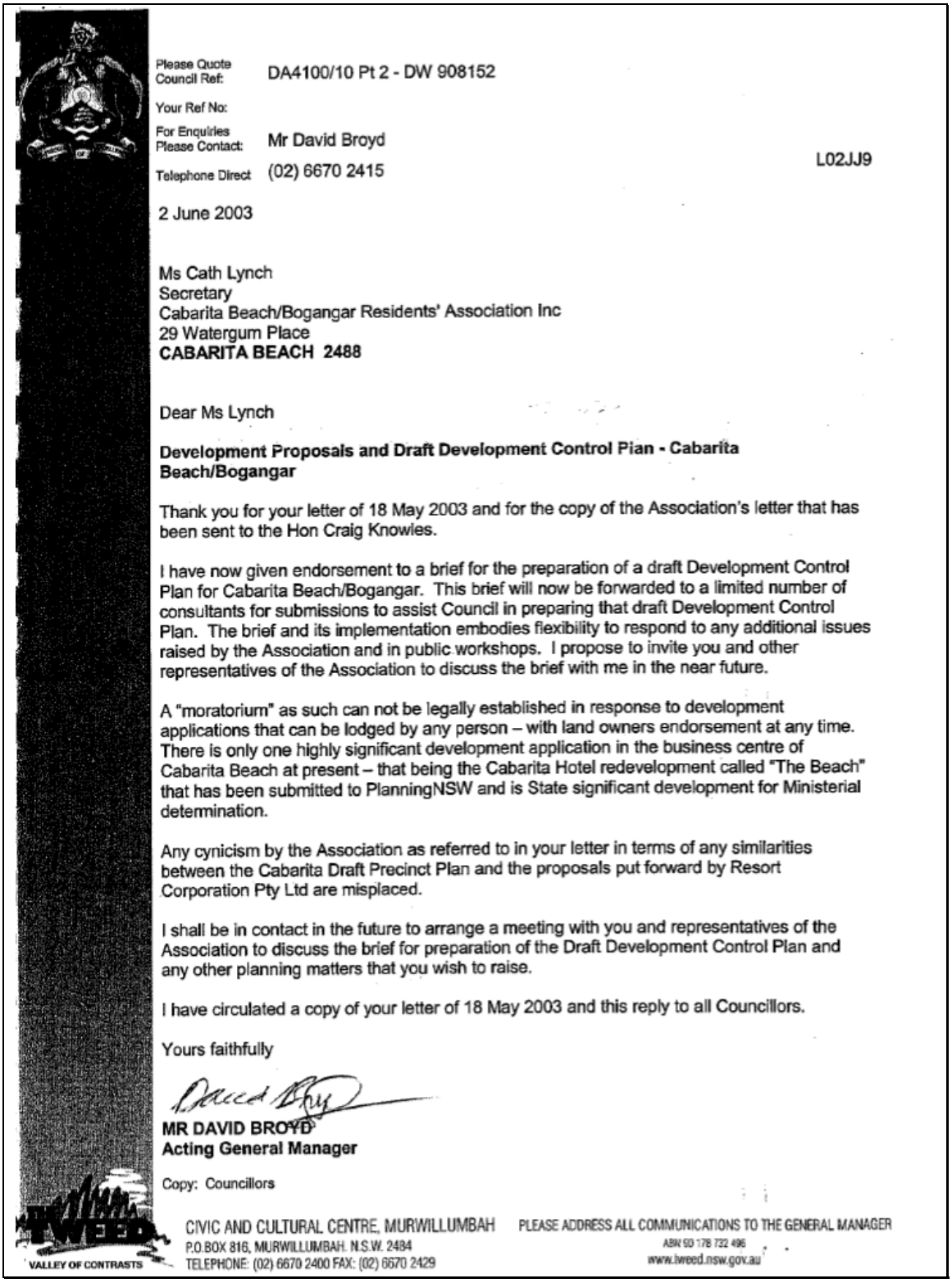
- All S94 Contribution Plans: include "tourist accommodation" in the same category as multi unit dwellings, or the like, for purposes of calculating contribution rates.

The Motion was **Lost**

Voting For	Voting Against
Cr Boyd	Cr Polglase
Cr Carroll	Cr Beck
Cr James	Cr Lawrie
Cr Luff	Cr Marshall
	Cr Youngblutt

The majority councillors used their numbers to thwart the proposal.

On 2 June 2003 Mr Broyd wrote to Ms Cath Lynch outlining the council's proposals for Cabarita Beach, including the preparation of a draft Development Control Plan.



Please Quote Council Ref: DA4100/10 Pt 2 - DW 908152

Your Ref No:

For Enquiries Please Contact: Mr David Broyd

Telephone Direct (02) 6670 2415

L02JJ9

2 June 2003

Ms Cath Lynch
Secretary
Cabarita Beach/Bogangar Residents' Association Inc
29 Watergum Place
CABARITA BEACH 2488

Dear Ms Lynch

Development Proposals and Draft Development Control Plan - Cabarita Beach/Bogangar

Thank you for your letter of 18 May 2003 and for the copy of the Association's letter that has been sent to the Hon Craig Knowles.

I have now given endorsement to a brief for the preparation of a draft Development Control Plan for Cabarita Beach/Bogangar. This brief will now be forwarded to a limited number of consultants for submissions to assist Council in preparing that draft Development Control Plan. The brief and its implementation embodies flexibility to respond to any additional issues raised by the Association and in public workshops. I propose to invite you and other representatives of the Association to discuss the brief with me in the near future.

A "moratorium" as such can not be legally established in response to development applications that can be lodged by any person – with land owners endorsement at any time. There is only one highly significant development application in the business centre of Cabarita Beach at present – that being the Cabarita Hotel redevelopment called "The Beach" that has been submitted to PlanningNSW and is State significant development for Ministerial determination.

Any cynicism by the Association as referred to in your letter in terms of any similarities between the Cabarita Draft Precinct Plan and the proposals put forward by Resort Corporation Pty Ltd are misplaced.

I shall be in contact in the future to arrange a meeting with you and representatives of the Association to discuss the brief for preparation of the Draft Development Control Plan and any other planning matters that you wish to raise.

I have circulated a copy of your letter of 18 May 2003 and this reply to all Councillors.

Yours faithfully

MR DAVID BROYD
Acting General Manager

Copy: Councillors

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A number of community representatives, including Ms Lynch, were selected to have input into the draft plan in the lead up to its exhibition.

On 16 June 2004, slightly over a year after the proposal to prepare the plan was notified, the plan came before the council with a recommendation, inter-alia that it be placed on exhibition.

The report to council provided the following description of the background to and content of the plan:

> The Bogangar/Cabarita Beach Steering Committee was established to guide the development of a Development Control Plan for the designated study area of Bogangar and Cabarita Beach. The Committee has finalised a Locality Plan that provides for more than a traditional DCP and establishes a Planning Framework for the coordinated desirable future development in the area. The plan establishes a framework to address infrastructure issues such as car parking, walkways/cycleways, foreshore improvements, traffic management and streetscape improvements. The Plan also provides traditional design guidelines and development control measures to be used in conjunction with other DCPs.

However, as is indicated by Ms Lynch in the Cabarita Beach/Bogangar Residents' Association's submission, the draft raised further issues.

The report referrd to and detailed these further issues, recommending that they be included in the plan, and in turn the plan be placed on exhibition.

> Two issues that require further consideration by Council are the Pandanus Parade Precinct and the design guidelines for tourist accommodation.
>
> 1. **Pandanus Parade Precinct -** the current Plan sets up a framework envisaging the area to be developed primarily for the purpose of a "village square" creating a focal point and central hub for local residents and tourists. It provides for limited mixed use development over part of the Precinct, and proposes to retain car parking. The main emphasis is to retain the majority of the land in public ownership for public purposes.
>
>   Given the prime focal location of the site it is considered there is an opportunity to use the site for more integrated mixed use development (for example, retail/commercial uses at ground level complemented by multi residential accommodation above). There is also potential for the area to be developed into a dynamic focal point for the village and the whole of the Tweed Coast. Public space to create a "village square" can be obtained by closing all or part of Pandanus Parade and designing a streetscape or mall plan to create a public focal point for the village. Areas adjoining the village square can be developed to complement the village square and enhance to the vibrancy and usage of the square.
>
>   It is acknowledged the Precinct should contain a public/community purpose to be utilised as a "village square". However, it is also considered that the Precinct has the ability to be designed to include mixed retail/residential development that will complement the vibrancy of the "village square". The other significant issue in the Precinct, car parking, can be incorporated by the provision of underground car parking. Car parking requirements can ensure the existing number of car parks is retained and additional parking is provided to accommodate any new development. Detailed urban design can also address

other issues such as emergency vehicle access, surf club vehicle access, service vehicle access etc.

Providing for more integrated mixed use will ensure maximum use is made of a prime unique location. It is recommended that Council amends DCP 50 by incorporating the following changes:

1. Allowing mixed use development (retail/commercial on ground level and residential accommodation above) over all the allotments instead of restricting development to the front four allotments adjoining the foreshore Precinct.

2. Providing for the creation of a restricted pedestrian way along Pandanus Parade. This would involve closing all or part of Pandanus Parade to create an open mall. This would be supported by the preparation of a streetscape/village square urban design plan.

3. Providing the majority of car parking below ground.

2. **Development Controls -** residential development controls within the DCP are currently restricted to multiple dwelling units. The DCP remains silent with respect to tourist accommodation development. Currently, Council has few controls regulating tourist accommodation. This makes it difficult for Council's Development Assessment Officers to assess such developments, and usually leads to a lot of debate and confusion when attempting to manage such development.

The issue of applying multi-dwelling unit development controls to tourist accommodation was discussed amongst the Committee. Whilst initially receiving support from some members of the Committee the concept was not adopted by the Committee for inclusion within the DCP. Adopting the same development controls for both multi-dwelling units and tourist accommodation has the following benefits:

- Provides consistency when applying uniform development controls to these two similar styles of development;
- Provides certainty to all concerned (developers, Council and general public);
- Establishes controls for Council officers providing guidelines upon which tourist accommodation development can be assessed;
- Establishes a degree of control to ensure development is consistent with the character and amenity of the area;
- Provides certainty to a desirable outcome for the area.

The strategic planner, who had been responsible for the preparation of the plan gave evidence during the Public Hearings, detailing both the fate of the proposed items and their intended effect [note: Mr Butron is incorrectly referred to as Mr Bruton in the transcript]:

MR [sic. BUTRON]: *Yes, we did. The recommendation that actually was put to council at the end of the day was to adopt the majority of the DCP prepared by the committee except for two amendments; one relating to Pandanus Parade precinct and the other relating to tourist accommodation.*

MS ANNIS-BROWN: *Could you just elaborate on what those amendments involved?*

MR [sic. BUTRON]: *Concerning the Pandanus Parade precinct the committee resolved - it wasn't unanimous - but it resolved to keep that as a village green for car parking and for open space purposes. The recommendation that went to council recommended that that could have a higher order use in terms of possibly mixed use development, retail activities as well as residential tourist accommodation above, with still the potential to actually have a village green as such or a village square. The second amendment to the DCP that was recommended related to tourist accommodation.*

Speaking to development control planners downstairs they don't have too many guidelines relating to tourist accommodation and so when applications come in they sometimes rely on DCP6, which is multiple dwelling units, or, basically, they use a merit assessment village application. What I was trying to do is to basically apply multiple dwelling units or some multiple dwelling units design guidelines and apply them to tourist accommodation.

MS ANNIS-BROWN: *Where is the matter up to now?*

MR [sic. BUTRON]: *The matter was put on hold by the director pending Council's deliberations with Pandanus Parade Land.*

MS ANNIS-BROWN: *Okay. So nothing further has occurred since that committee put its views forward?*

MR [sic. BUTRON]: *No.*

MS ANNIS-BROWN: *Okay. All right. I think that's all for the minute.*

MR BROAD: *The proposals in respect of tourist accommodation, what were you trying to achieve? Were you trying to achieve a guideline as to area, as to set-backs; what exactly was the tourist accommodation proposal?*

MR [sic. BUTRON]: *Yes. Basic design guidelines such as set-backs, such as private open space, balcony space, etcetera, making them consistent with a multiple dwelling unit DCP, things such as car parking, etcetera, that have some sort of variation with tourist accommodation were going to be considered as part of that as well.*

MR BROAD: *So you were bringing them up to being equivalent?*

MR [sic. BUTRON]: *More or less, provided - most of those applications, my understanding, are based on merit assessment, but it provided a basis upon which to assess tourist accommodation.*

MR BROAD: *The inquiry has heard evidence that there are certain concessions in respect of set-backs, in respect of car parking requirements generally throughout the Tweed in respect of tourist accommodation; would the proposals being put forward by you have taken away those concessions?*

MR [sic. BUTRON]: *Not necessarily, no. With car parking, it wasn't going to touch the car parking issue because there's a separate DCP concerning car parking; it would have re-assessed issues such as set-back, yes.*

T. 25/2/05 p. 632-634

In the year since council had first written to Ms Lynch when the draft DCP came before the council, only three development applications affecting properties at Cabarita Beach appear to have been received by council, comprising:

- an application to erect nine signs;
- to provide for the temporary surf club;
- to locate a bottle shop.

However, there were very important machinations taking place, each involving Resort Corporation:

- DIPNR was in the throes of determining the re-development of the Cabarita Hotel site, called "The Beach House", which contained fifty-seven tourist accommodation units;
- council was dealing with a proposal to purchase its land at Cabarita for a similar style development.

The additional issues could only detrimentally affect these proposals.

A number of submissions had highlighted concerns over the Cabarita Beach DCP, the relationships between the principals of Resort Corporation and Councillor Brinsmead and the council's proposal to sell its land to Resort Corporation.

Similarly, many submissions had expressed concern that the council was facilitating the Resort Corporation proposal and had likewise facilitated the SALT development through amendments to its LEP.

In light of these concerns the issue was directly put to Mr Hodges:

MR BROAD: *Is the Council changing its plans, its policies, to meet the perceived needs and demands of the developers?*

MR HODGES: *No, I wouldn't like to put up any policy to meet the developers. I think we need to have a high standard of development. I think the high rise standards that have been developed for the Tweed, I think - I don't think they're as good as on the ones up north.*

MR BROAD: *What about the definition of natural ground level?*

MR HODGES: *Well, I think, rather than have a definition, I think it's far more preferable to have a fixed level for the purposes of determining the Earth, which is another way of avoiding all the problems that we get into here.*

T. 18/2/05 p. 327-328

Other staff appear to have differing views.

Mr Butron's concerns were directed to parity issues. Mr McGavin suggested that his concerns were directed more to definitional or enforcement issues.

MR BROAD: *It's a matter which ultimately wasn't dealt with. Can I turn now to another point. Over the course of the inquiry, the inquiry has been directing its attention to the resilience of Council's Local Environment Plan its DCP has imposed. In your view, having worked previously at other councils, are those codes resilient?*

MR McGAVIN: *I think so. The LEP and the DCPs, in general, are similar to the other councils that I've worked in on the coast. I've worked in three other councils. There are similar aspects to those DCPs and the LEP. I think there's always an opportunity to review and update and make things contemporary and things like that. But obviously, you know, it takes resources to do that. But generally, yes.*

MR BROAD: *Have you brought matters forward for review and update?*

MR McGAVIN: *Yes, I have.*

MR BROAD: *And in the time that you've been with Council - what, some 18 months now?*

MR McGAVIN: *Thereabouts, yes.*

MR BROAD: *Has there been successful outcomes in those matters?*

MR McGAVIN: *They're probably still ongoing, given the time that I've been at Council. But generally it's well received with - you know, if you put something forward to suggest a - something that, you know, could be updated or reviewed, you know, the discussion and the debate that goes on, obviously some of these things can't be changed overnight but usually there's a fairly healthy debate that goes on when something's put forward.*

MR BROAD: *In respect of the Cabarita Beach development by Resort Corporation, you had a role in drafting the conditions of consent to be submitted to DIPNR?*

MR McGAVIN: *That's correct.*

MR BROAD: *Do you recall receiving an email from David Gibson at DIPNR? It's dated 10 February 2004 and it simply says:*

They -

that is, the developers -

are sticking to their LEP argument that a tourist development can contain both permanent and tourist accommodation, so we will likely condition that the building contain approx 60-70 per cent tourist accommodation. How we police that requirement is anyone's guess.

And it goes on further. Is that a matter which raises concern to you when it comes to questions of resilience?

MR McGAVIN: *That's to do with the tourist accommodation definition in the LEP.*

MR BROAD: *Yes.*

MR McGAVIN: *And that's probably the ones that I've put forward and should be looked at. And, to me, you could change a word in that definition and it would probably clear up some of the different interpretations that we're getting from legal people and DIPNR and so forth about how that - what that definition means. So that's - sure, that's one.*

MR BROAD: *Have you put that forward?*

MR McGAVIN: *I have, yes.*

MR BROAD: *And whereabouts does that change lie at present?*

MR McGAVIN: *I've put it forward to my director and he's indicated to me that he wants to discuss it further and flush it out.*

MR BROAD: *When did you put that forward?*

MR McGAVIN: *When did I put it forward? I've spoken to him verbally about it and I put - sent him an email a week, week and a half ago about setting out some of my, you know, my thoughts of how something like that could be done to resolve the issue.*

MR BROAD: *Has this been an issue that's gone back? I mean, these - the email I quoted to you is dated back in February 2004. Have you raised that previously with him?*

MR McGAVIN: *I have. I've had a couple of discussions about just my opinion of what the issue is with the definition. And that's just one opinion, I suppose, but I have raised that.*

MR BROAD: *Your approach to him didn't arise as a result of concerns raised in this inquiry, did it?*

MR McGAVIN: *No, I've had that concern dealing with those types of applications and having to try and work out what does it mean and what the definition means and what do we want. So I've had - it's been on my mind for quite a while.*

MR BROAD: *Are there other matters similarly on your mind that have been on your mind for quite a while?*

MR McGAVIN: *Not particularly, not that I could probably jump out and say off the top of my head. Nothing that I could, sort of, immediately, sort of, produce.*

T. 3/3/05 p. 849-851

If Mr McGavin's evidence is to be accepted as credible, then it adds weight to the view that the council has adopted strategies both facilitating or avoiding amendments to its planning regime to provide its intended opportunities to proponents.

The definitions contained in the LEP provide three alternative methods to define "finished ground level, in relation to land".

Alternative (b) provides:

(b) the level of the land approved by the consent authority as the finished ground level of the land prior to the commencement of *Tweed Local Environmental Plan 2000 (Amendment No 46)*,

At the time the council dealt with the SALT development applications, the proposed amendment that would generate this definition was related to certain aspects of the SALT development.

The opportunity to utilise a two-stage process, firstly to fill the land and then to develop a multi-storey building remained open until 7 January 2005.

Whether responsibility for this delay falls at the feet of council or DIPNR has not been ascertained by the Inquiry.

The simple fact remains that this amendment facilitated the SALT and possibly other developments through an inappropriate planning amendment.

3.5.11 Overcoming Potential Constraints

The DEC provided a submission to the Inquiry that voiced that department's concern that proponents were pre-empting their development proposals by degrading the natural and cultural values of the land that would be the focus of their proposals.

Implicit to this was a suggestion that the council was not taking sufficient steps to prevent or to respond to such actions.

Given their source, these statements were a great concern.

Separately, a number of submissions had raised the same issue, but on lands not identified by the DEC. One particular submission (**submission 276**) provided compelling evidence in support.

Ancillary to and no doubt deriving from these types of concerns, were further concerns raised by the DEC that the council was not paying adequate regard to, nor giving effect to its responsibilities under the EP&A Act and other legislation seeking to preserve natural and cultural values of land within the shire.

Again, these and associated issues were taken up in many submissions received from the public. Issues raised in submissions included:

- loss of wildlife habitat
- disregard for the intrinsic values of certain lands
- disregard for the principles of natural resource management
- flawed processes when considering the natural values of sites
- disregard to evidence identifying the presence of rare, endangered or protected species
- that council, as a proponent of development, was itself proposing and facilitating developments (notably the Piggabeen bypass and Mooball Burringbar Sewerage Treatment Scheme) with disregard to the natural values of the land or of adjoining land.

These issues suggest both a wider failure on the part of the council, as well as more specific concerns that proponents were taking steps, commonly badged as "maintenance works" on their lands that would alter or remove vegetative cover or, on a larger scale, would radically change the structure of the land, through practices such as wetland drainage.

Such practices would have a domino effect removing the flora, the habitat for and food source of resident species.

Ultimately, such practices, if effectively carried out, would remove the impediments to a successful application.

Such concerns should be read against the DEC's statement that:

> The Tweed Shire Council Local Government Area is recognised to support some of the highest biodiversity levels in Eastern Australia and also contains Aboriginal sites and objects, and lands of cultural significance to the Aboriginal community.

Elsewhere it was suggested that the biodiversity levels exceeded those in Kakadu and were akin to those in the Daintree.

The DEC's submission listed the Kings Forest, Seaside City and Koala Beach sites as well as the Gales Holdings sites at West Kingscliff as sites where these practices had occurred.

It is useful to set out the department's comments in respect of each site:

Kings Forest

The land was subject to unauthorised clearing, including the clearing of threatened species and their habitat when previously managed by Narui Gold Coast Pty Ltd. The property manager at the time of the unauthorised works was Mr Timothy Barr. To ensure there were no further unauthorised works, the DEC (formerly National Parks and Wildlife Service (NPWS)) issued a series of Stop Work Orders and Interim Protection Orders (IPO) over the Kings Forest lands. The intent of the IPOs was to prevent the clearing of the site until the draft LEP for the site could be finalised. An IPO currently applies to the southern portion of the Kings Forest lands only.

The DEC has recently become aware of further works over the land undertaken by the current land manager (Project 28 Pty Ltd / Leda Holdings Pty Ltd / Leda Development Pty Ltd (Leda)) that may degrade the natural and cultural heritage values. The works appear to be draining SEPP 14 – Coastal Wetlands and the clearing of threatened species habitat. The DEC has reported this matter to Council and requested a meeting with Leda and Senior Council staff to address the issue.

Potential Issues:

1/ Development Companies being allowed to pre-empt land use planning decisions by undertaking so called 'farming' and 'maintenance' works resulting in the degradation of the land's natural and cultural values during the planning process.

In 2001, a Local Government Investigation was undertaken into Tweed Shire Council's handling of the rezoning process for the Kings Forest Estate. Robert Bulford led the inquiry and prepared a report with a number of recommendations.

The Bulford Report, among other things, recommended that council duly proceed forward with the relevant planning procedures towards its proposed draft LEP for the Kings Forest Estate.

In 2003, the former Tweed Shire Council Planning Director David Broyd developed a framework for the finalisation of the draft LEP, which identified that Leda would submit a concept master Plan for the entire site. It was subsequently agreed that a Plan of Management for Koalas and the recently identified Long-nosed Potoroo was also to be prepared, along with an Aboriginal Cultural Heritage Impact Assessment and a Bushfire Assessment Report. These documents would then be considered as a part of the draft LEP process. Leda agreed to the proposal.

Originally due in October 2003, these documents remain outstanding.

In the interim, Leda has undertaken 'property management' activities. The DEC is of the view that some of these works extend beyond previous agreements with Council and the DEC. These activities include tree removal and drainage works within threatened species habitat and SEPP 14 – Coastal Wetlands. The elected Council resolved that the works were existing and continuing uses, (ancillary to grazing and forestry) under the *Environmental and Planning Assessment Act* 1979. Council's resolution was made further to a Report to Council from Council staff that relied upon a consultant report from Darryl Anderson, advising that the works were continuing and existing uses. Council's resolution was a not a consensus and Council has taken no further action. The DEC believes that works have continued.

Prior to investigating the tree clearing and drainage matters, the DEC awaited Council's advice. At he time Leda had advised the DEC that only pine trees had been removed. A

subsequent DEC site inspection held in December 2004 revealed that a large number of native trees had been felled in addition to exotic pine trees. The DEC is currently investigating the matter.

Seaside City

2/ Development companies being allowed to pre-empt land use planning decisions by undertaking so called 'farming' and 'maintenance' works resulting in the degradation of the land's natural and cultural values during the planning process.

Clearing works have been undertaken over the site on a number of occasions, particularly within the riparian zone to Cudgen Creek.

Koala Beach

2/ Development companies being allowed to pre-empt land use planning decisions by undertaking so called 'farming' and 'maintenance' works resulting in the degradation of the land's natural and cultural values during the planning process.

Clearing and earthworks were undertaken within Stage 5 prior to development approval, impacting upon wetlands and removal of threatened species habitat. It is understood that Council did not undertake any action on the matter. The DEC had insufficient evidence (under it's different legislation) to take the matter to a prosecution.

Gales Holdings

The West Kingscliff lands have been identified to support a number of threatened species, including the Mitchells Rainforest Snail (Theresites mitchellae), Wallum Tree Frog (Litoria olongburensis) and Bush Hen. Some of the highest conservation value lands have been identified in the Council's draft LEP – Amendment 21 environmental protection.

There have been a number of development applications in relation to the land including a proposed shopping centre, sand extraction and the relocation of the Council's West Kingscliff Sewage Treatment Plant.

Contractors for Gales Holdings have been undertaking clearing works (in the form of slashing and tree removal) on the site during the draft LEP and development application process.

Potential Issues:

1/ Development companies being allowed to pre-empt land use planning decisions by undertaking so called 'farming' and 'maintenance' works resulting in the degradation of the land's natural and cultural values during the planning process.

Clearing and slashing works have occurred over the subject lands by the developer over a period of time, despite the landowner being aware of the land's value as threatened species habitat. The land is subject to Council's Tree Preservation Order. The DEC is currently investigating the matter.

Subsequently, the department's representatives, Mr Diacono and Mr Allen gave evidence supplementing and enlarging these statements.

Mr Diacono was asked to comment on the department's concerns and gave the following evidence:

PROF DALY: *Yes. The second point that Mr Smith raises in terms of this disappointment:*

Development companies being allowed to pre-empt land use planning decisions by undertaking so-called "farming" and "maintenance" works resulting in the degradation of the land's natural and cultural values during the planning process -

including the preparation of LEPs and DA assessment processes.

The slow pace of both in Tweed allows these damaging activities to continue for long periods.

Would you like to comment on that?

MR DIACONO: *Yes, I would. It's a very curious situation to find ourselves in, in that we know a development company has purchased some land. Currently the land is zoned for agricultural pursuits, generally speaking. We know, Council knows, the developer knows that, eventually, they would like to develop for the housing or a resort, or something like that, and yet they carry on with their farming activities which, in fact, basically degrade the natural features of the land and, in a lot of instances, what happens is that the land mightn't have been farmed for years, and*
what you find is that the natural vegetation starts to come up again, and when these heathy-type of vegetation species start to come up and not grass, your native species start to re-occupy it and so its biodiversity value increases.

And then the developer might say, "Well, we need to maintain it as farm land," so to speak and so they'll go through and they'll slash it, or they'll sow grass seeds and, in doing so, they reduce the biodiversity value. And so, ideally, where we should be going is that the land is identified for development. It should go through a local environment study and a local environment plan so it's quite clear to everybody that certain portions of the land will be developed. That's fine, they can be managed with that development in mind. Other portions should be managed for conservation.
And so the slow process, basically, provides developers with an opportunity to degrade the biodiversity or the cultural heritage values of the land prior to the re-zoning.

PROF DALY: *Are you suggesting that the people who do this farming or maintenance, as you've expressed here, are doing it so that they increase the chances of the developer being interested in their property?*

MR DIACONO: *Well, yes, and they do it for two reasons, one, I guess, if you're about to buy a block of land and you see nice grass on it, then it looks more attractive to go about the buy the land, but the other point being is when you have to do the necessary flora and fauna studies, because grass is growing there which doesn't support the native fauna, as oppose to heath or whatever growing there, then your flora and fauna study*

basically comes up to say that there are no threatened species and, therefore, the concurrence role of the Department is not basically invoked.

PROF DALY: *Does the Council have a role in policing, if that's the word, such activities?*

MR DIACONO: *It does in that there's a fine line of negotiation between the developer and Council to say, okay, let's get this local environment plan out and sort it out as quickly as possible so there is surety for all parties involved, and I would imagine that what would happen is that companies come up with a number of good excuses as to why they can't get the plan done, they can't do this and they can't do that. Meanwhile, the time extends. Meanwhile, there are these maintenance or farming activities which are basically degrading the environment so, in the end,*
what you think would be good environmental land and which aerial photographs from the past indicate is good environmental land, is now grass pastures, cow paddocks which don't support any native species, or very few.

T. 9/3/05 p. 1142-1143

The issue of unauthorised clearing was raised with Mr Allen, who gave the following evidence:

MR BROAD: *One of the issues that has come before the Inquiry a number of times is the issue of unauthorised clearing. We have had suggestions over the last couple of days that in respect of one particular property, that there has been clearing in mangroves associated with a creek. We have had an area which has been put to agricultural use contrary to the zoning. There seems to be a fairly live issue in respect of unauthorised clearing.*

Now, has your Department had concerns in respect of unauthorised clearing within the Tweed Shire Council area?

MR ALLEN: *Yes, we have.*

MR BROAD: *And has that been recurrent or is it just a one-off instance?*

MR ALLEN: *I would say it's recurrent.*

MR BROAD: *And is the nature of the clearing relatively minor but relatively recurrent, or is it something that really does bring concerns forward?*

MR ALLEN: *I would say it does bring forward concerns, yes.*

MR BROAD: *Again, are there particular instances where your Department's concerns have been raised in respect of clearing?*

MR ALLEN: *Yes. There are a number of instances where we have*
brought our concerns to Council, keeping in mind we also have our own

legislative response to clearing as well.

MR BROAD: *Could I also - could I explore that with you shortly.*

MR ALLEN: *Sure.*

MR BROAD: *Instances where your Department has become concerned about unauthorised clearing, can you give some examples again?*

MR ALLEN: *One example is the Kings Forest property, which covers an area of almost 900 hectares. On that property, there has been clearing, including recent draining of a SEP 14 wetland.*

MR BROAD: *That is more than just clearing, isn't it?*

MR ALLEN: *Yes.*

MR BROAD: *What sort of works were involved?*

MR ALLEN: *Tree removal of up to approximately 80 or over trees, native trees, as well as - - -*

MR BROAD: *To what sort of diameter?*

MR ALLEN: *Up to, I would say probably 60 centimetres, about so, in diameter.*

MR BROAD: *And your inspections, did that indicate that they had been deliberately removed; in other words, had they been cut down or perhaps knocked down.*

MR ALLEN: *Yes, they had been cut down. The concern that we have from our Department, which we are still investigating, has been threatened species habitat. However, the works were identified as - it was put to Council and it took a number of months to get - for the Council to finalise its investigations, but I understand the Council engaged a consultant to provide advice and it was - the Council resolved that the - although I don't think it was consensus - that the works were existing, were ancillary to existing and continuing uses on the land.*

MR BROAD: *You were saying that it is insensitive [sic. in sensitive] wetlands.*

MR ALLEN: *Yes.*

MR BROAD: *What sort of existing or ancillary use could be made of these wetlands?*

MR ALLEN: *The connection between - the way it was termed in the consultant report was that it was an ancillary use, and the connection that they had was the two key activities being undertaken on the property over the last - since the 1960s - were pine forestry activities through pine plantation, and grazing. And the annexure between the two is that - or the draining of the wetlands, that annexure is that it's draining the lands*

to make it more productive to facilitate forestry and grazing. So not specifically growing the trees on the - or grazing the cows in the wetlands themselves, but by putting a drain in you lower the water table and that means the adjacent lands aren't so sodden, and therefore, making more - - -

MR BROAD: *So you effectively have a much wider spread than simply the area of the drain?*

MR ALLEN: *That's right. It's either - - -*

MR BROAD: *Now, the report you spoke about, was that a report obtained by the Council or was that a report provided by the owner?*

MR ALLEN: *I understand - I can't specifically answer that. My understanding was, yes, I am - I'm not too sure of the answer of that. It was either provided by the owner of the land to the Council as - I think – I think my understanding was the owner of the land was requested for that report for sometime prior to any works going on the land and what the situation was meant to be, and there was an agreement between our Department, the DEC, Council, and the land owner, there was an agreement that there would be no interim protection put - order put over the land, which is an order that our Department put over the land - - -*

MR BROAD: *Can I come to the interim protection.*

MR ALLEN: *Yes, sure.*

MR BROAD: *I would just like to explore one or two other things. In reading the Salt file, there was a concern raised that certain of the dunal vegetation was removed. Did that come to the Department's attention?*

MR ALLEN: *We did raise that and investigate that, and it was identified that discussions had taken place between the land owner concerned, Council, and the Department of Infrastructure Planning and Natural Resources, and indicated that was agreed to. That's my understanding, so we didn't actually pursue that matter much further.*

MR BROAD: *The suggestions were that green material was cut, not just dead material, and the photographs in the file certainly suggest that there was green material cut.*

MR ALLEN: *That's correct.*

MR BROAD: *Now, in respect of Council's response where unauthorised clearing has taken place, does the Department regard the Councillors having acted responsibly?*

MR ALLEN: *I would find that difficult to answer on behalf of the Department as such. Yes, I find that - - -*

MR BROAD: *Would you proffer your view?*

MR ALLEN: *The view of myself is I usually tackle, as in other Councils, to - I would normally prefer a co-ordinated approach, like a joint approach whereby we usually offer assistance to the Council and do joint investigations, and go down that line, and hopefully gain - basically do a joint investigation. For example, the Council, we might write a letter to the land owner. Council will - advising of the threatened species legislation and that this site might contain threatened species or Aboriginal sites, and we would seek the Council to write a joint letter advising them that it's breached the Local Environmental Plan, that these lands are environmentally sensitive and go down that direction. So it varies from instance to instance, to answer your question.*

MR BROAD: *When I was talking about the Salt dune area, that of course falls within the 7F zone under Council's Local Environment Plan. Has the Department had concerns over the way the Council has exercised its control, its planning control over the 7F zone?*

MR ALLEN: *In one of our submissions - I wasn't the author of the submissions for the Salt development, but I am aware of those matters because I discussed them with my co-worker. And it was our recommendation, from my recollection, that we actually recommended there be no development within that 7F zone, and that that entire 7F zone be revegetated with, or maintained, or revegetated with species indigenous to the local area, and there be, as I identified previously, a buffer to - from the beach-front to the actual development itself.*

And a number of issues that we raised were the impacts of - the value of that dunal system to provide habitat for native species, including threatened species.

MR BROAD: *It is a regenerating system, surely, after the sand mining?*

MR ALLEN: *Yes, it's regenerating the system. The ecosystem that's present on the dunal system, if the whole debate about - like whether this land should be developed along this dunal system of the Tweed Coast. It has been - much of the land has been sand mined. It does have species that are not naturally from the area. However, it is still being utilised. There was a sea-bank in there, and the native species indigenous to the local area did come back within that sea-bank, and with respect to fauna, like the animals that occur, the birds, the turtles that nest in the sand, a lot of the blossom bats and the like, they don't mind whether it's been disturbed. They're utilising the habitat nonetheless.*

MR BROAD: *As an overview, leaving aside Salt.*

MR ALLEN: *Yes.*

MR BROAD: *Does the Department have concerns in respect of Council's responses to developments adjacent to the 7F zone?*

MR ALLEN: *We would have. It's primarily the development within the 7F zone that we would be concerned with.*

T. 11/3/05 p. 1388-1393

The evidence provided by and on behalf of the DEC was not the only evidence suggesting that work was being undertaken with a view to overcoming potential constraints. Mrs Brill and Ms Mann sent separate submissions to the Inquiry detailing activities at Lot 156 Creek Street Hastings Point.

As is noted elsewhere in this report, Mrs Brill's submission represents a comprehensive diary of continuing activities, affecting both:

- 1(a) Environmental Protection (wetlands and littoral rainforest land), and
- 2(e) Residential Tourist land.

Her submission refers to:

- slashing twenty years of undisturbed marshland vegetation on tide affected salt marsh;
- fencing activities in tidal, mangrove areas and across sections of the tidal areas of Christies Creek;
- running livestock on the property, contrary to the zonings, which prohibit agricultural activities;

in mid to late 2001.

- Running further livestock (goats);
- removal of vegetation using heave and subsequently agricultural machinery;
- filling and levelling of the tidal flow lines;
- further clearing of rushes, salt grasses and small mangroves on the eastern bank of the channel;
- fertilising or seeding, then subsequently watering part of the land;

in the early part of 2002.

These works were significantly incompatible with the 7(a) Environmental Protection zoning affecting part of the property and appear to otherwise have been illegal and possibly incapable of approval under the zonings.

On 24 October 2002 the "Daily News" reported the owner's intent to "establish a mobile home park and tourist resort" on the property.

At that time the council was considering whether it should move to extent the area of the 7(a) zoned land.

The owner/proponent's response to the rezoning was perhaps predictable, as indicated in its press release:

PROMEDIA M
RELEASE

PROMEDIA
MEDIA RELEASE

LAND OWNER OFFERS FUNDS FOR ENVIRONMENTAL PROTECTION

release date: 19.11.02

A LANDOWNER is offering the Tweed Shire Council a $300,000 contribution towards the purchase of environmentally-valuable land in northern New South Wales.

Scott Elliott, a director of Walter Elliott Holdings, has pledged the funds in written correspondence to the council and has made it contingent on the council not rezoning a three-hectare section of his company's land at Hastings Point.

He says a flora and fauna study currently under way on his 18-hectare parcel of land in Creek Street will show it has limited environmental value and its existing zoning should be retained.

"I am committed to the protection of sensitive land in the Tweed Shire and I'm prepared to put my money where my mouth is," says Mr Elliott.

"I'm asking the council to consider the best outcome for the community and in this instance I believe the financial contribution towards the purchase of other land is the best option.

"The offer of $300,000 is in addition to about $2 million I'll have to pay the council in developer contributions should my plans for a manufactured home estate be approved."

Mr Elliott says that under his development plans, which are yet to be submitted to the council, about 50 per cent of his Hastings Point property will remain untouched.

"Considering we won't be touching half the site anyway I feel the offer we are making is in the best interests of the community," says Mr Elliott.

"It will result in about 50 per cent of my site remaining in its current state and, on top of that, the council will have about $300,000 to buy more land in the shire."

Mr Elliott says he is unaware whether the Tweed Shire currently has a mechanism to allow developer contributions for the purchase of environmentally-sensitive land.

"I'm trying to determine that, but should they not have one I believe it is worthwhile debating the merits of establishing it."

The Tweed Shire Council is expected to discuss the rezoning of the three-hectare portion of the Walter Elliott Holdings land at its meeting on Wednesday (NOVEMBER 20).

Should the rezoning proceed Mr Elliott says he will be forced to reconsider his development plans.

"We may be left with no alternative but to pursue the highest density development in terms of height and lots," he says.

"That would be an unfortunate outcome.

"Obviously our preferred position is for the council to delay their decision until they have seen our development application and the flora and fauna study.

"They then get to vote on the merits of our proposal."

ENDS

FOR FURTHER INFORMATION PLEASE CONTACT JOHN MOSSOP AT PROMEDIA – 07 5592 1696

Mrs Brill's submission highlights a most important failure, so far as this Inquiry is concerned, the council's failure to take effective steps, both to respond to events as they occurred and to prevent further damage.

Even though an alliance of concerned local residents had informed council of the actions as early as 2001 when the acts commenced, the council took no effective action until November 2002, when it instructed its solicitors to commence legal proceedings.

Even then, the action appears to have been reluctant and limited in its scope,

The issue in this instance is not whether the council has the capacity to deal with a complaint or, if appropriate, to take enforcement proceedings. Nor is it a matter where the EP&A Act or other Acts do not facilitate enforcement proceedings or give appropriate powers to judges when dealing with such matters.

It is a matter of willingness within councils, in this case Tweed Shire Council.

Council's submission in reply (**submission in reply 96**) provides the following response:

Appearance of Cr Warren Polglase & Dr John Griffin - 17 March 2005
Page 1593 & 1605 of transcripts

Page 1593 of transcript

Question asked by MR BROAD:

> *That there has been a failure by Council to instigate enforcement actions.*

Page 1605 of transcript

Question asked by MR BROAD:

> *Another issue that has arisen is the suggestion that Council has failed to instigate enforcement actions.*

Council submits the following information which is in response to the issues raised.

Council has a designated officer to handle all development complaints and pursue enforcement and if necessary prosecution in relation to illegal works or non-compliance with development conditions. Development conditions are also enforced through all planning, subdivision, engineering, building and environmental staff requiring compliance with development conditions before construction certificates, subdivisions, buildings and other developments are issued with final clearances. These final approvals are not issued unless the development conditions of approval have been satisfied.

All complaints about illegal works are investigated and satisfied by Council's inspectors and development compliance staff. There are over 30 staff involved in enforcing development approval conditions. In addition Council has rangers and other specialist staff who handle complaints about traffic, parks, dogs, rubbish, roads, noise etc. In many ways all of the staff employed in Council respond on a daily basis to complaints and instigate compliance with Council policies, local government regulations and State Government legislation. There has not been any failure by Council to instigate enforcement actions.

In some instances the matters escalate to a point where the non-compliance or illegal work is put to Council for a decision to commence legal action to rectify or prosecute the matter. Where the matters escalate to Council for commencement of legal action the elected body considers all the staff recommendations and other representations and decides on the matter. In some instances this may be a decision not to proceed with legal action however this is not representative in any way of a general failure to instigate enforcement actions.

While the council may have the capacity within its staff, it appears to lack the willingness, particularly where matters have come before the elected body (principally the majority councillors) to take resolute action.

In turn submissions, for example those coming from Mr Malecki, Mr Ward and Councillor Boyd (**submissions 83, 254, 98**) suggest that this direction has permeated to the staff.

The DEC's representative, Mr Allen, spoke of the need for that department to obtain Interim Protection Orders to prevent further degradation of the Kings Forest site:

MR BROAD: *I now briefly come to interim protection orders. Now, you've referred to the Department having a power to seek interim protection orders. Has the Department exercised that power in respect of properties within the Tweed?*

MR ALLEN: *Yes, it has.*

MR BROAD: *Yes. In what circumstances?*

MR ALLEN: *Essentially that power is one of the strongest provisions under the National Parks and Wildlife Act. It was used very rarely by the Department and has been only used, I think, in 12 instances since 1974. I could be corrected there, so - but that's an estimate. We have issued an interim protection order in - over one particular area in the Tweed and it was only after ongoing degradation of a particular area which had been previously identified to have very high conservation values including natural, scientific and cultural values.*

MR BROAD: *Was the council aware of your concerns in respect of that particular area?*

MR ALLEN: *Yes, the council is aware.*

MR BROAD: *Have the council taken any action in respect of the degradation?*

MR ALLEN: *Not specifically other than agreeing to take part in joint meetings with the Department of Environment and Conservation and the property owner. There was one action where they did take - if I can step back to - sorry, I make a mistake there. There was an action that the council did take specifically towards one of the parties involved. This particular land which I'm referring to is the King's Forest property.*

There have been a number of land owners over a series of years and one of the land owners the council did take action against and they - that person was taken to the Land Environment Court with respect to undertaking agricultural activities in land zoned 2C, urban expansion, and the court ruled in favour of the council's decision that the works were unauthorised. So yes, in one instance with one particular land owner, the council did take action, however that was after a series of - after National Parks had put forward a series of stop work orders which were subsequently breached and then that's what rolled over to us putting the - our Department putting the interim protection order in place. But since then there hasn't been any such enforcement.

MR BROAD: *Do I assume that the Department's interim protection order was based in part, at least, by failure of the council to take adequate steps?*

MR ALLEN: *In part. It lies very closely with the recommendation – this particular property has a lot of background, as I'm sure you would be aware of some. One of the recommendations of the Bulford report which was the Local Government Inquiry was that the council duly proceed with the preparation of the draft local environmental plan. That has - we're still awaiting that plan to be finalised and the - in the interim protection*

order that we put forward the purpose of that is to protect the land's values until such time as an appropriate zone be identified for that land.

MR BROAD: *So it isn't degraded?*

MR ALLEN: *Pardon?*

MR BROAD: *So it isn't degraded in the interim period?*

MR ALLEN: *Well, that is our intention but it's only put - it's only currently in place over approximately a third of the King's Forest lands.*

MR BROAD: *Has the interim protection order proven to be effective?*

MR ALLEN: *Yes. Since the - - -*

MR BROAD: *So that it has been given effect to?*

MR ALLEN: *The interim protection order, there's actually been four that have been placed over the land now. Since the imposition of the first interim protection order which was on 2 August 2002, the land has turned from being an area of land that had been effectively been bulldozed, trees chopped down and cleared to areas of wet and dry heaths and scribbly gum forest regenerating to two metres in height in some areas, sometimes three metres. There's also been the rediscovery of a threatened species that was thought to be extinct. So I would be able to answer very confidently that yes, the interim protection order had been effective in those areas where it has been maintained.*

T. 11/3/05 p. 1394-1396

As was emphasised by Mr Allen, the department's action was predicated by the Council's failure to have taken effective steps to stop the acts.

While the council does not have the power to make or to seek Interim Protection Orders itself, it does have effective powers to:

- seek orders both restraining breaches of the EP&A Act and requiring remediation (**section 123**);
- To prosecute breaches of the EP&A Act (**section 125**);
- to make orders requiring that a person cease prohibited activities (**section 121**).

While the first two of these powers are clearly set out in the EP&A Act, the last is not so clear.

Section 121B enables a council to make orders, the table to the section does not clearly enunciate both the role of council to protect the natural and cultural aspects of land and the power to prevent activities that would threaten, let alone destroy, these attributes. This point is emphasised by the provisions of section5A of the EP&A Act, which provides:

5A Significant effect of threatened species, populations or ecological communities, or their habitats

For the purposes of this Act and, in particular, in the administration of sections 78A, 79C (1) and 112, the following factors must be taken into account in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats:

(a) in the case of a threatened species, whether the life cycle of the species is likely to be disrupted such that a viable local population of the species is likely to be placed at risk of extinction,

(b) in the case of an endangered population, whether the life cycle of the species that constitutes the endangered population is likely to be disrupted such that the viability of the population is likely to be significantly compromised,

(c) in relation to the regional distribution of the habitat of a threatened species, population or ecological community, whether a significant area of known habitat is to be modified or removed,

(d) whether an area of known habitat is likely to become isolated from currently interconnecting or proximate areas of habitat for a threatened species, population or ecological community,

(e) whether critical habitat will be affected,

(f) whether a threatened species, population or ecological community, or their habitats, are adequately represented in conservation reserves (or other similar protected areas) in the region,

(g) whether the development or activity proposed is of a class of development or activity that is recognised as a threatening process,

(h) whether any threatened species, population or ecological community is at the limit of its known distribution.

In its submission in reply, the council emphasised its capacity to inspect and take steps responding to non-compliant or illegal work.

This ignores the thrust of the submissions, which was while the council has the capacity to respond to illegal or non-compliant works, it often fails to do so.

Collaterally, submissions suggested that where works had been undertaken this work, though illegal or non-compliant, was legitimised by a subsequent development application.

Mr Rouse detailed concerns over illegal building work on an adjoining property (**submission 178**). Subsequently Mr Rouse gave compelling evidence during the Public

Hearings. The effect of Mr Rouse's evidence related to the construction of a driveway on an adjoining property in contravention of consent conditions.

The conditions of consent required that the walls be retained and required a structural engineer provide a certificate of adequacy.

On 18 March 2002 the solicitor retained by Mr Rouse wrote to the council:

35 BERYL STREET, TWEED HEADS
PO BOX 593 TWEED HEADS NSW 2485
TELEPHONE 07 5536 9455
FACSIMILE 07 5536 8211
E-Mail legal@oneillssolicitors.com.au

O'NEILLS SOLICITORS
QUEENSLAND AND NEW SOUTH WALES
ABN 31 040 290 633

Our ref: JON.mc.misc 91/20
Your ref:

18 March, 2002

Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484
Health & Building Department
Attn: Ross Cameron

FAX: (02) 66702429

Dear Sir,

RE: VAUGHAN ROUSE - 14 MURRABA CRESCENT TWEED HEADS

We advise we act on behalf of Mr Rouse the registered proprietor of the aforementioned property with respect to a complaint concerning 16 Murraba Crescent, Tweed Heads.

Our client states that approximately 3 years ago premises were constructed on the aforementioned site (16 Murraba Crescent) and as a result of the proprietors gaining access to the site, excavated a large portion of land which was retaining our client's swimming pool.

Our client is extremely concerned as a result of this excavation as his swimming pool is in jeopardy of collapsing as a result of the proprietors undermining our client's swimming pool.

Our client requires you to urgently attend upon the premises with a view to making an appointment with our client to inspect affected area.

Our client sees this as the responsibility of either the Council or the proprietors of 16 Murraba Crescent due to their initial actions.

Our client is also anxious to know the following:-

1. Whether the proprietors had the consent to come across our client's nature strip.

2. Our clients state that the most practicable approach would have been for the registered proprietors to alter the access and to cut across the front of the their own nature strip thereby undermine our clients' swimming pool.

TELEPHONE 02 6674 4888 • FACSIMILE 02 6674 4388 • E-Mail legal@oneillssolicitors.com.au

Mr Rouse would spend the next two years attempting to have the council enforce its consent conditions. These attempts would be characterised by:

- council delays in providing access to information that Mr Rouse appears to have been legitimately entitled to;
- providing, at his cost, an overwhelming amount of expert evidence from structural and geotechnical engineers demonstrating that the bank was both unstable and provided a threat to his property;
- almost unbelievable attempts by council staff to ignore, avoid, cover over and misrepresent matters.

Ultimately, council's letter of 9 March 2004 speaks for itself:

Council Ref: DA3630/402 Pt1
For Enquiries Please Contact: Rick Paterson
Telephone: (02) **6670 2440** L08cc02

9 March 2004

Mr V Rouse
14 Murraba Crescent
TWEED HEADS 2485

Dear Sir

Lot 2 DP 807725, No. 16 Murraba Crescent, Tweed Heads

Further to your address to Councillors at Council's Community Access Meeting, held on 11 February 2004, I confirm that a comprehensive report was subsequently prepared and submitted to Council's meeting held on 3 March 2004 in relation to the issues raised by yourself in regard to the vehicular access to your neighbour's property, and support thereof.

After consideration of this report Council resolved as follows:-

*"**RESOLVED** that Council advise Mr V Rouse that while the driveway was not constructed exactly as approved, the driveway as constructed is acceptable in terms of Council's Access to Property Policy and design requirements; that the batter is considered stable; that a retaining wall is not considered necessary in these circumstances; and that Council proposes to take no further action in this matter at this stage."*

In accordance with the above resolution, it is proposed to now close Council's file in relation to this issue.

Yours faithfully

R Paterson
Manager Building Services

CIVIC AND CULTURAL CENTRE, MURWILLUMBAH
P.O.BOX 816, MURWILLUMBAH. N.S.W. 2484
TELEPHONE: (02) 6670 2400 FAX: (02) 6670 2429

PLEASE ADDRESS ALL COMMUNICATIONS TO THE GENERAL MANAGER
ABN 90 178 732 496
www.tweed.nsw.gov.au

The author of this letter, Mr Rick Paterson, found himself on the other side of the fence, as an objector to the Nor Nor East development.

In November or December 2004 the developer constructed the driveway contrary to the conditions of consent. Mr Paterson wrote to the council objecting to an application to modify the consent to legitimise the illegal work:

ENTERED

R & E Paterson
12 Sutherland Street
KINGSCLIFF 2487

31 December 2004

General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH 2484

W: 11044, 11045

TWEED SHIRE COUNCIL
FILE No. DA02/1138 Pt6
DOCUMENT No. 1/1422517
RECD 05 JAN 2005
ASSIGNED TO O'BRIEN D
HARD COPY ☑ IMAGE ☐

DA01

Dear Sir

SECTION 96 APPLICATION – DA02/1138.09
32-34 MARINE PARADE KINGSCLIFF

LOT 2 DP 979921
LOT 3 - DP 964996

Receipt of your letter dated 16 December 2004 is acknowledged relating to the above.

I wish to register the strongest objection to this Section 96 Application to alter the driveway access details relating to this proposal.

Reference is made to our letter of 20 August 2002 (copy attached) focussing attention on the fact that this driveway access would be non-compliant with requirements for traffic movements for this type of development and citing this as a major reason why the original Development Application should be refused.

Issues of concern related to an inability to access and egress the site in a forward direction in a narrow lane situation, and non-compliant parking bay access geometry.

It appears these concerns were well founded at the time, as this Section 96 seeks to amend the access details to provide for a workable outcome.

A principal concern now is that the garage access opening proposed but already provided is some 4 metres in width (not 8 metres as originally proposed) and this 4 metre width will only physically provide for a single vehicle access/egress width.

This will mean vehicles entering the car park risk colliding with vehicles exiting the site, and will also necessitate vehicles queuing in the lane.

In addition, the geometry constraints imposed by this narrow garage opening will restrict access/egress movements to the south western car parking space, to the extent that egress would only appear possible by an almost blind 90 degree steep uphill reverse movement, concealed by proposed landscaping, into oncoming vehicular and pedestrian traffic using Hungerford Lane.

The single ingress/egress problem will be greatly intensified when the sister development to the east, comprising of a further 4 units, is progressed. This will increase the number of car parking spaces serviced by the 4 metre opening from 8 to 14. Advice from DIPNR confirms that determination of this application is imminent as the assessment has been completed and the file has been referred to the Minister.

Also bear in mind that this lane access is the sole practical means of delivery to the whole of this commercial and residential building servicing both delivery and

removalist vehicles, because of street width, car parking and dining blister obstructions in Marine Parade.

Having regard to all of the above issues, I believe Council would be acting very irresponsibly and neglecting its duty of care to the public as well as future occupants of the buildings should approval be granted to endorse the construction proposed and in fact currently provided for, by the reduced entry opening.

It is re-iterated that had all of the issues raised in our original submission of 20 August 2002 (including this issue) been adequately assessed collectively and cumulatively, then the Application would most likely have warranted refusal.

This current Section 96 amendment Application simply seeks to retrospectively address previously identified non-compliant shortcomings of this proposal, which should have been exhaustively pursued at the time of the original assessment; and it now glosses over their unauthorised construction.

The floor and wall constructions already completed would have required the preparation of structural details and material orders well in advance, so it is obvious that those responsible for the works to date were fully aware months ago that this alteration was to occur. It is considered that this action demonstrates a total disregard and contempt of Council and the development approval processes in general.

It is considered that for Council to now act in a responsible and conscionable manner, to ensure traffic safety issues are properly observed, and to retain credibility, the following actions should be pursued:-

1. Refuse this Section 96 application on the basis of its non-conformity, and the potential traffic dangers it creates.
2. Direct full compliance with the development consent issued, by requiring the access/egress width to the car park to be increased to provide for simultaneous ingress/egress.
3. Institute legal proceedings against those responsible for carrying out the construction works associated with the access to the car park contrary to the development consent, and prior to obtaining Council approval.

Yours faithfully,

E Paterson

Encl.

The application was considered at council's meeting on 16 February 2005. Councillors Boyd and Holdom, while agreeing to the modification sought an amendment providing:

> "Council takes the appropriate action to initiate legal action to be taken for the unauthorised works".

As is clear from Mr Paterson's letter, the developer had undertaken illegal work, further, the works were not in the nature of an oversight, requiring structural details to be drawn

up and the purchase of the elements, including probably structural steel for the opening as well as the door.

The issues raised by Mr Paterson point up considerable safety issues affecting both within the site and the adjoining laneway.

The report to the meeting does not highlight the issues that were raised by Mr Paterson. Given the skills that have led to his employment as council's Manager Building Services unit there is considerable weight in his statements.

The report seeks to find legitimacy in the illegal works and weakly recommends the amendment sought.

The amendment proposed by Councillors Boyd and Holdom was lost.

The council had overcome the potential constraints of the illegal work, on one hand it ignored them, on the other, it legitimised them.

Running alongside these concerns are further concerns that the council has largely ignored its responsibilities variously as a landowner, a developer, a consent authority and as a custodian of public land in undertaking works.

Dr Malouf had provided a submission to the Inquiry that raised concerns over the selection of the site for the proposed Mooball/Burringbar sewerage treatment works site.

Two issues arose:

- whether the council had the capacity to grant the subdivision that would permit its acquisition of the site, and
- whether the proposed plant was a permissible use of the site.

During the Public Hearings, Dr Malouf spoke about how the particular site became council's preferred option:

> MR MALOUF: *...We were endorsed by the community and we then started our investigation process as to what had been going on, what Council had done to date to inform people and it became obvious that nothing had been done within the Mooball community and it was very suspicious the way they actually went about the purchasing of the property, negotiating the purchase, making that property the preferred site because prior to negotiating with this particular property, they had a number of options.*
>
> *This property became available suddenly in March of 2002 we found out. It was suddenly put on to their list of options. It was suddenly purchasable. It was suddenly the preferred site and we have the documents that we've provided for that.*

T. 3/3/05 p. 827

The site, known as the Quinn site, adjoins land that is zoned 7(l) Environmental Protection (Habitat) under council's LEP. Its primary and secondary objectives are:

Primary objectives

• to protect areas or features which have been identified as being of particular habitat significance.
• to preserve the diversity of habitats for flora and fauna.
• to protect and enhance land that acts as a wildlife corridor.

Secondary objectives

• to protect areas of scenic value.
• to allow for other development that is compatible with the primary function of the zone.

The LEP seeks to protect lands zoned Environmental Protection (Habitat) from the adverse impacts of development by imposing constraints on the activities that may be undertaken on adjoining lands, providing:

28 Development in Zone 7 (l) Environmental Protection (Habitat) and on adjacent land

(1) Objective

• to protect wildlife habitat from the adverse impacts of development.

(2) Unless it is exempt development, a person must not clear vegetation from, drain, excavate or fill land within Zone 7 (l) except with development consent.

(3) The consent authority must not grant consent to development (other than for the purpose of agriculture, a dwelling house or a home business) on land within Zone 7 (l) without having regard to any representations made by NSW Fisheries and the National Parks and Wildlife Service.

(4) The consent authority must not grant consent to development on or adjacent to land within Zone 7 (l) unless it has taken into consideration:

(a) the likely effects of the development on the flora and fauna found in the locality, and

(b) the potential for disturbance of native flora and fauna as a result of intrusion by humans and domestic and feral animals, increased fire risk, rubbish dumping, weed invasion and vegetation clearing, and

(c) a plan of management showing how any adverse effects arising from the development are to be mitigated.

The Quin site also adjoined a watercourse, as Dr Malouf indicated:

MR MALOUF: *... Now, this is a sewerage plant in a rural community. In any community, this is a very sensitive development. Things should be done right by the community, by the environment, and by their processes. We know because they've done best practice in another area in Tweed Shire at Uki where they have had the scientific up to date research and development advice and the technology to supply a sewerage plant there which is right. They have now come to us and, for whatever their reasons are or their objectives are, we are getting not the best practice; we are actually getting the worst practice, from the community's view, as well as problems and concerns relating to the environment.*

It is not accepted anywhere any more that you put these sewerage plants on a watercourse. This is going right next to our creek, it's going on an area that floods, it's going right near the township, it's right on the main drive, etcetera, etcetera. There's all these issues that they know from the advices they've had from, in my submission, from Dr Keith Bolton, who is running other sewerage plants in other shires such as Byron and Lismore, where they've advised councils on the best waste water management programs. We are not being given the best.

T. 3/3/05 p. 832

Again, the LEP seeks to protect water bodies by controlling development on adjoining lands providing:

31 Development adjoining waterbodies

(1) Objectives

• to protect and enhance scenic quality, water quality, aquatic ecosystems, bio-diversity and wildlife habitat and corridors.

• to provide adequate public access to waterways.

• to minimise the impact on development from known biting midge and mosquito breeding areas.

(2) This clause applies to land that adjoins the mean high-water mark (or the bank where there is no mean high-water mark) of a waterbody.

(3) Consent must not be granted to development on land to which this clause applies, within such distance as is determined by the consent authority of the mean high-water mark or, where there is no mean high-water mark, the top of the bank or shore of a stream, creek, river, lagoon or lake unless it is satisfied that:

(a) the development will not have a significant adverse effect on scenic quality, water quality, marine ecosystems, or the bio-diversity of the riverine or estuarine area or its function as a wildlife corridor or habitat, and

(b) adequate arrangements for public access to and use of foreshore areas have been made in those cases where the consent authority considers that public access to and use of foreshore areas are appropriate and desirable requirements, and

(c) the development is compatible with any coastal, estuary or river plan of management adopted by the Council under the *Local Government Act 1993* that applies to the land or to land that may be affected by the development, and

(d) the development addresses the impact of increased demand from domestic water supply on stream flow.

(e) the development addresses the likely impact of biting midge and mosquitoes on residents and tourists and the measures to be used to ameliorate the identified impact.

(4) The consent authority may require as a condition of consent to any development that the following be carried out:

(a) the rehabilitation of land adjoining the waterbed to create a vegetated riparian zone or wetland,

(b) works to stabilise the bank or shoreline of a waterbed.

(5) In determining a distance for the purposes of this clause, the consent authority shall have regard to:

(a) the preservation of the scenic quality of foreshores, and

(b) minimising the risk of pollution of waterways, and

(c) the protection of foreshore ecosystems, and

(d) the intended or planned use for the foreshore.

In March 2002 the council representatives, including Mayor Polglase, Councillor Marshall, Mr Rayner and Mr Ainsworth met with other members of the Burringbar Sewerage Community Reference Group. Dr Malouf indicates that the Quinn site was added to the list of possible sites at this meeting and indicated as the preferred site.

A copy of the minutes of this meeting appears below:

(4)

Minutes of the BURRINGBAR SEWERAGE COMMUNITY REFERENCE GROUP committee Meeting Held Thursday 14 March 2002

File No: Burringbar - Sewera

VENUE:

Peter Border Meeting Room

TIME:

1:00pm

PRESENT:

Ian Norris, Chris Hennessey, Cr Warren Polglase, Cr Wendy Marshall, Peter Ainsworth, Bruce Douglas, Stuart Cahill, Bob McTaggett, Mike Rayner.

APOLOGIES:

Alexandra Abedrabbo, Joanne Wyatt, Tom Tabart.

MINUTES OF PREVIOUS MEETING:

RESOLVED that the Minutes of the Burringbar Sewerage Community Reference Group meeting held Friday 18 December 1998 be accepted as a true and accurate record of the proceedings of that meeting.

BUSINESS ARISING:

Nil

GENERAL BUSINESS:

Update of Scheme Status

Burringbar - Sewerage

Mike Rayner provided a brief history on the project update and details of the successful negotiation for a preferred sewerage treatment works site on part of the property owned by Mr B Quinn on the Mooball / Pottsville Road.

Presentation of Options Report

Burringbar - Sewerage

Ian Norris provided a detailed summary of the Options Report including proposed scheme area population loadings, options for treatment and costings.

Options Report Review

Burringbar - Sewerage

The Committee discussed at length and resolved that the draft report should be amended in two areas:-

i) All reference to owners names of potential treatment works sites should be removed from the report. The Quinn site should be added and noted as the preferred site but that the community and agencies are welcome to identify other sites if appropriate. To this end pages 69 – 70 of the report will be deleted. Table

6.1 will remain but with the Quinn property added (the description line from table 6.1 and all reference to the owners in that table will therefore be deleted). (4

ii) In the light of the Uki tender, all costings mentioned in the report should be reviewed and updated.

iii) The schematic drawings may need to be amended to reflect the option of the Quinn site.

Project Program

Burriagbar - Sewerage

The Project Program should be prepared before the next meeting.

Community Consultation

Burringbar - Sewerage

The Committee will meet in potentially 6 – 8 weeks to review amendments to the Options Report and Program with a view to reporting to Council with a recommendation that consultation be undertaken with the local community.

NEXT MEETING:

The next meeting of Burringbar Sewerage Community Reference Group will be held within 6 – 8 weeks.

The meeting closed at 2:30pm.

Director's Comments:
NIL

The result of this meeting was clearly to adopt the Quinn site as the preferred option without regard to its inherent character, its proximity to protected areas and without regard to whether, in those circumstances, the council could approve sewerage treatment works on the site.

Council's acquisition of the site would involve the excision of that particular part through a subdivision.

The Quinn site is on the Pottsville – Mooball Road and is zoned 1(a) Rural.

Subdivision within this zoning is constrained by clause 19 of the LEP that provides:

19 General

(1) Objective

• to provide a comprehensive system of planning controls for the subdivision of land in the Tweed local government area.

(1A) Despite Part 2 but subject to this Part, a person must not subdivide land without consent.

(2) Subdivision under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986* may be carried out without consent if the land is within Zone 2 (a), 2 (b), 2 (c), 2 (d), 2 (e), 2 (f), 3 (a), 3 (b), 3 (c), 3 (d), 3 (e), 4 (a), 5 (a), 6 (a) or 6 (b).

(3) A person may, with consent, carry out a minor boundary adjustment, notwithstanding that the new lots may not comply with any relevant development standards applicable to the zone in which the land is situated.

(4) Consent is not required for a subdivision effected for the purposes of widening a public road, creating an allotment for use by a public utility undertaking, or as a public reserve or the like, notwithstanding that an allotment created by the subdivision may not comply with the minimum lot size applicable to the zone in which the land is situated.

As at 14 March 2002 the council had successfully negotiated the purchase of the lot.

On 18 December 2002 it resolved as follows:

17. Burringbar - Mooball Sewerage Study Community Consultation

Sewerage-Burringbar

591
Cr Luff
Cr Marshall

RESOLVED that Council:-

1. Adopts the Draft Revised Options Report as the Final Options Report.
2. Proceeds with the Environmental Study for the preferred option, being the Hybrid Modified Gravity and Low Pressure Sewerage System combined with an activated sludge package treatment Plant located on parts of Lots 8 and 10 DP 820055 Pottsville – Mooball Road.
3. Finalises the purchase of parts of Lots 8 and 10 DP 820055 for $55,000.
4. Commences levying a special rate on the Burringbar and Mooball villages starting in 2003/2004.
5. Adopts a fixed term (10 years) levy of $350.00 per tenement added to the sewer rate for those properties covered by this scheme.
6. Offers a discount of 20% off the Burringbar – Mooball sewerage levy (total cost of $3,500) to applicable residents who pay this levy in a lump sum before the second rate instalment in 2003. A pro-rata discount of 20% less 2% for each year to residents who request to pay a lump sum after the second instalment in 2003.
7. Writes to all Burringbar and Mooball property owners advising them of the cost sharing arrangements, future sewer rates, approximate cost of sewer connection and time frame for the implementation of the project.

Voting - Unanimous

The council appears to have neither lodged nor sought a development application for the subdivision nor to have lodged a development application for the proposed sewerage treatment site as at 18 December 2002.

Dr Malouf gave the following evidence regarding these issues:

MR BROAD: *You speak of the DA, development application subdivision process, and you refer to clause 28 of the Local Environment Plan. I think actually - I'm probably quoting the incorrect section. You deal with the subdivision powers in the Local Environment Plan and to clause 19. Now, are you suggesting that as far back as March 2002 the Council had exercised its powers to allow a subdivision under clause 19(4) so that it could acquire the land?*

MR MALOUF: *In March 2002 in the minutes of their meeting they were presented - the community reference group which was devoid of any representation from Mooball - with a statement by the person in charge of the department saying that they had successfully negotiated for the purchase of land for what they considered to be the preferred site. What eventuated after that was that they had to purchase part of the person's property who owned the property in order to have this site and how they did that was without development consent. Now, we sought legal advice in regard to this and there were two issues here. One issue is the prospective use of classification on land that's being legally transacted upon and we were advised there that the prospective use of land is a no-go. The land assessment has to be - - -*

MR BROAD: *Now, can I - - -*

MR MALOUF: *Sorry?*

MR BROAD: *- - - slow you down a little bit because I think you're jumping ahead. What your advice seems to be is this. Under clause 19 of the Local Environment Plan, subclause (4) provides that:*

Consent is not required if a subdivision is effected for the purposes of, inter alia, creating an allotment for use by a public utility or public reserve or the like.

So what they were doing is exercising their subdivisional power to create such a lot. Is that what we're talking about?

MR MALOUF: *Well, carrying on from that - - -*

MR BROAD: *No, I want to just get to the first part.*

MR MALOUF: *It leads to your question.*

MR BROAD: *The next question, if I can roll them out as I see them, is that what you were saying is, if you haven't got that use approved on that site you can't exercise that power?*

MR MALOUF: *That's right.*

MR BROAD: *Right. That's where I was working to.*

MR MALOUF: *But, the second point that came up legally in that if they continued along to use the omission of development consent, if their assessment, their options report on the sites, if their assessments are flawed in regard to inaccurate statements, false statements, misleading statements in regard to choosing that site and saying that it is the preferred site when you're using false information to do that, that is wrong and, therefore, it is also wrong to then use section 19(4).*

MR BROAD: *So that would undermine the power.*

MR MALOUF: *Yes.*

MR BROAD: *Now, the other side of it, if I can jump forward again, is this. Is Council therefore in acquiring this land pre-empting its own decision-making on any development application affecting this land?*

MR MALOUF: *Is it pre-empting their own decision on - - -*

MR BROAD: *Because Council - - -*

MR MALOUF: *They are because they're signing, according to them which we believe their options report has a number of inaccuracies in it, is not appropriate. They're using information that's not correct to get what they want and why the other section that you mentioned, 28, doesn't become applicable is, it is only applicable for developments that require development consent. So, if they run things without development consent, one of the advantages to them is not to then look at other aspects of the Local Environmental Plan and this becomes very important in regard to this because right next to the site for the sewerage plant is an environmentally protected area. The other question that we raise in relation to that too, with all those matters - - -*

MR BROAD: *Can I stop you?*

MR MALOUF: *Yes, sorry.*

MR BROAD: *Rather than going through all the pace, you say in your submission that a DA has not been received in respect of this land.*

MR MALOUF: *A subdivision of the land.*

MR BROAD: *No. Sorry, okay. There's no DA for subdivision.*

MR MALOUF: *Yes.*

MR BROAD: *That appears to be covered by the clause we were last talking about.*

MR MALOUF: *Yes.*

MR BROAD: *In respect of the proposed use for a sewerage treatment plant, has there been a development application lodged?*

MR MALOUF: *Not to date, no.*

MR BROAD: *And, what you're saying is that there is adjoining land which falls within clause 7L of the Local Environment Plan and there is particular applicability of clause 28 which - - -*

MR MALOUF: *Yes, which they've been able to ignore because they didn't run it with development consent.*

MR BROAD: *But, has there been any construction of the plant at this stage?*

MR MALOUF: *No, they're still in the process of evaluation. We've just received the environmental impact statement on the actual site but what our point is, as community members, why would you bother running it without development consent. I mean, the advantages of not having development consent are obvious. Neighbours aren't notified. The townsfolk aren't notified. The plans aren't exhibited for comment so it's kept quiet.*

MR BROAD: *But what you're also effectively doing is taking it outside some of the relevant provisions of the state Environment Act [sic. Local Environment Plan].*

MR MALOUF: *Exactly, because that section 28 that you mentioned, and I've given you the information there, that has to be commented on if a development consent is required. By their avoiding development consent, they walk away without commenting on that 7L zone next door.*

T. 3/3/05 p. 828-831

Clause 19(4) provides that subdivision consent is not required in certain circumstances, including the creation of a lot for a public utility undertaking.

There is no doubt that the council had married the sewerage treatment plant to the Quinn site. In December 2002 the council was moving to the next stage in the process, preparing an environmental impact statement. This suggests that the proposed use would fall within the definition of "designated development" and attract closer ecological scrutiny than other developments that are potentially less harmful.

The council had zoned the adjoining land as environmental protection. Dr Malouf spoke of its attributes:

MR BROAD: *Is the site, by virtue of the zoning alone, identified as being of particular habitat significance?*

MR MALOUF: *Yes. Not the site that they plan to put it - - -*

MR BROAD: *No.*

MR MALOUF: *- - - but the adjacent site is zoned 7L, which is an environmental protection habitat zone.*

MR BROAD: *Is it an area where there is a diversity of habitats, flora and fauna?*

MR MALOUF: *Yes, and that's been identified in the environmental impact study.*

MR BROAD: *And you say it also acts as a wildlife corridor?*

MR MALOUF: *It's a wildlife corridor from the creek up into the national park.*

T. 3/3/05 p. 837-838

The report to the meeting on 18 December 2002 does not refer to any of these matters, let alone raise them as issues. The site is referred to summarily, as follows:

SEWAGE TREATMENT PLANT SITE

The preferred option is the lowest total nett present value cost option for the Hybrid Modified Gravity and Low Pressure Sewerage System combined with an activated sludge package treatment plant and effluent discharge to the creek (effluent re-use options will be investigated in the effluent re-use study, which will form part of the REF).

The preferred treatment plant site is located on parts of Lots 8 and 10 DP 820055 Pottsville – Mooball Road. The purchase of this site is conditional upon community acceptance. Based on submissions received from the community the proposed site was well accepted by the local community. It will be recommended to finalise the purchase of parts of Lots 8 and 10 DP 820055 for $55,000.

In March 2002 the council was able to acquire a piece of land. For whatever reason the council was to promote and to subsequently adopt this piece of land as the site for the proposed sewerage treatment plant.

In doing so it chose to ignore what were and remain very serious constraints on the intended use of this land.

Concerns were also raised regarding the council's dealings with the Piggabeen bypass.

Ms Young, a local resident, raised concerns that:

- the environmental impact statement for the bypass was flawed;
- that as a result and, despite clear evidence from persons living in the area who had regularly seen koalas, the council failed to protect the area, and
- failed to put in place a koala management plan.

Ms Young spoke of the failures during the Public Hearings:

MS YOUNG: *... In the development application the - under the Environmental Planning and Assessment Act, it was interesting to note the SEPP44 Koala Habit*

Protection - an assessment by Peter Parker, indicates that this policy does not apply in this instance. Peter Parker FIS conducted an environmental impact study over a 10-day period between November 1998 and February 1999 in which they found no evidence of koala. They found no evidence of a lot of things that actually exist there. Because of that there was no need to put in place any management for koala habitat.
Council then proceeded with its preliminary works for the road. The preliminary works involved the clear-felling of certain trees.

Work had been progressing for about a week and a half and they got to the second last tree. They weren't exactly in a row, but if you can imagine a sort of a line of trees, they got to the second last tree and they found a koala at the top of the tree. Okay. So they stopped work and thought nothing of it - "That's fine. The koala will go away. We'll go down and we'll just continue." My concern is that a management plan for an - not an endangered species but an endemic species or an indigenous species, should take into account the fact that for 17 years I have been telling the Council that koalas live there. Now, you could be very lucky and go along and
manage to chop all the trees down in one go and not come across a koala, but there was nothing in place for if they did come across a koala, you know, and I - by virtue of an environmental impact study that was five years old, that over a 10-day period had seen no koalas, they had no obligation to - they had no back-up plan, they didn't know what to do.

MR BROAD: *When you say you had been telling the Council about the koalas being there, was this in the period leading up to the fauna impact statement?*

MS YOUNG: *Oh, yes. Since 1988 I have been telling them.*

MR BROAD: *And were you aware that they were obtaining a fauna impact statement?*

MS YOUNG: *No. I - my first knowledge of the fauna impact statement in this notification that Council sent to me on 5 March 2004 referring to an environmental impact statement that was done in 1999. I was not aware that it was done.*

T. 25/2/05 p. 651-652

In her submission she had written:

Tweed Shire Council either does not have the expertise to manage fauna or is in blatant disregard of proper processes and procedures in this area. Does Council have a permit to relocate koalas and if so is there a qualified person to oversee this operation? I strongly urge your Commission to either revoke this permit or at least put processes in place to ensure the wellbeing and proper care of native fauna and the environment within the Shire of Tweed. Furthermore I urge your Commission to investigate this DA regarding the suitability of the route chosen in view of recent engineering evidence since the trees were clear felled.

The need for a Pigabeen deviation between Anconia and Carramar Drive is not an issue.

In 1989, shortly after Council obtained the parcel of land from NSW Department of Education (price unknown); Tweed Shire Council instigated an EIS for this parcel of land. This report only identified a few rare trees and no endangered species of fauna. Concurrently the engineering Department prepared a report outlining three (3) possible routes for the Pigabeen deviation. One route would have had minimal impact on native flora and fauna, the second route had an impact on wetlands and the chosen route severely depleted the feeding trees of a known koala corridor.

In the ensuing 14 years there were two further EIS reports (1993, 1995) both stating a known koala populations (transient).

Approval to commence work was given by the Department of Urban Affairs following a motion from Cr. Polglase seconded by Cr. Luff at council meeting 630066. There are 24 conditions attached to this approval which give the overall impression of an environmentally conscious council development.

The reality is far removed from the paperwork. Contractors started clear felling the marked route in November 2004 after Country Energy had cleared a substantial area of the development site in July 2004.

A Council "fauna expert" appeared each morning and conducted a cursory examination of the trees. On the day (26 November 2004) that a lone male koala was located in a remaining tree the contractors worked elsewhere on the route, however they left their vehicles and some machinery parked under this tree for one and half days. (There is a legislated exclusion zone applicable when koalas are found during construction).
BY THE TIME THIS KOALA WAS FOUND ALL SURROUNDING FEED TREES HAD BEEN FELLED.

Whatever the koala management plan consisted of it was either inadequate, unsupervised or in total ignorance of grassroots reality. A koala Management Plan for after the even seems ludicrous given the known nature of the area.

It is not enough to have a person 'look out' for koalas so that they are not killed or injured whilst particular trees are felled. The area in question should not have been touched until reasonable precautions had been undertaken to ensure that no kolas were within one weeks feeding distance to the affected area. This parcel of land contained the LAST KNOWN KOALA POPULATION in the proximity of Tweed Heads. Dr. John Griffin and others were well aware of this. The department responsible needs to take a broader world view regarding future developments. It is not enough just to focus on the affected area when dealing with native fauna.

At the time of writing, 20 January 2005, no work has been conducted in this area since early December 2004. I am led to believe, but cannot verify, that a further engineering report has shown the preferred route is not appropriate in its present form. If this is the case Council is guilty of gross negligence in unnecessarily destroying a known koala food corridor.

The matter suggests, as did the Mooball/Burringbar sewerage treatment site, an entirely flawed process.

SEPP 44 commenced on 13 February 1995. Accordingly it was in place during much of the time that the council was undertaking the studies leading up to the work.

The aims and objectives of the SEPP are:

3 Aims, objectives etc

This Policy aims to encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas to ensure a permanent free-living population over their present range and reverse the current trend of koala population decline:

(a) by requiring the preparation of plans of management before development consent can be granted in relation to areas of core koala habitat, and

(b) by encouraging the identification of areas of core koala habitat, and

(c) by encouraging the inclusion of areas of core koala habitat in environment protection zones.

Having regard to the evidence of Mrs Young, the area could not otherwise have been described as "core koala habitat" as there was clearly a resident population of breeding koalas.

The SEPP anticipates that in considering applications, councils take a step-by-step approach, in the following order:

7 Step 1—Is the land potential koala habitat?

(1) Before a council may grant consent to an application for consent to carry out development on land to which this Part applies, it must satisfy itself whether or not the land is a potential koala habitat.

(2) A council may satisfy itself as to whether or not land is a potential koala habitat only on information obtained by it, or by the applicant, from a person who is qualified and experienced in tree identification.

(3) If the council is satisfied:

(a) that the land is not a potential koala habitat, it is not prevented, because of this Policy, from granting consent to the development application, or

(b) that the land is a potential koala habitat, it must comply with clause 8.

8 Step 2—Is the land core koala habitat?

(1) Before a council may grant consent to an application for consent to carry out development on land to which this Part applies that it is satisfied is a potential koala habitat, it must satisfy itself whether or not the land is a core koala habitat.

(2) A council may satisfy itself as to whether or not land is a core koala habitat only on information obtained by it, or by the applicant, from a person with appropriate qualifications and experience in biological science and fauna survey and management.

(3) If the council is satisfied:

(a) that the land is not a core koala habitat, it is not prevented, because of this Policy, from granting consent to the development application, or

(b) that the land is a core koala habitat, it must comply with clause 9.

9 Step 3—Can development consent be granted in relation to core koala habitat?

(1) Before a council may grant consent to a development application for consent to carry out development on land to which this Part applies that it is satisfied is a core koala habitat, there must be a plan of management prepared in accordance with Part 3 that applies to the land.

(2) The council's determination of the development application must not be inconsistent with the plan of management.

Clearly, the council could, after going through the steps outlined above and after adopting a management plan, have granted consent for the road.

Ms Young's evidence suggests that the council did not go through this process and appears to have acted with cavalier disregard to an important koala population that it had been made aware of many years previously.

This was not the only instance where concerns over a cavalier approach to road making arose, or where koalas had become the focus of concerns.

In its submission to the Inquiry, the DEC wrote:

CLOTHIERS CREEK ROAD – DEC File no 02/06313

Proponent: Tweed Shire Council.

Primary consultant: Jim Glazebrook and Associates, Peter Parker.

Key Council staff: Mike Rayner, Ian Munro.

Other Key Agencies: Department of Infrastructure, Planning and Natural Resources.

Background:

Clothiers Creek Road connects the Yelgun to Chinderah Pacific Highway Motorway to the coastal developments of Cabarita, Casuarina Beach and SALT. The road traverses Cudgen Nature Reserve. Sections of the road, due to an error in gazettal, occur within Cudgen Nature Reserve. The adjacent lands support high conservation values, including SEPP 14 – Coastal Wetlands and Koala habitat. Clothiers Creek road has been identified as having the highest road mortality rate for Koalas in the Tweed Coast.(Biolink 2001).

In 2001, Council advised the then NPWS that to provide for traffic safety the road was required to be upgraded. Since June 2001 the DEC (formerly NPWS) has provided advice to the Council's Engineering Section advising that such a proposal is supported, on the basis that a route of minimal impact is chosen and that sufficient mitigation measures are included to provide for native fauna, in particular the Koala. The DEC identified the need to upgrade of the Road as an opportunity to remedy both the risk posed to humans and koalas by improving safety and including mitigation measures for fauna.

Potential Issues:

1/ DEC advice on development matters being overlooked.

Council's engineering staff did not chose the route of minimal impact and neglected to incorporate sufficient mitigative measures for native fauna.

The delays with the planning process appear unjustified and to be associated with avoiding costs and deflecting Council's responsibility to provide mitigation relevant to the impacts of the proposal. Council's Engineering Section has refused to accept advice from the DEC or from Council's own planning staff. For example, the DEC requested additional information in order to make its concurrence decision, and Council and its consultant refused to provide the information as requested. This was despite the DEC explaining clearly that the DEC must be satisfied that it understands the impacts of the proposal and the proposed mitigation before it makes its concurrence decision. The DEC's intention was not that it would refuse the proposal but that a minimum standard for managing threatened species, in particular the Koala, and their habitat had to be provided prior to the DEC granting concurrence. Council's Engineering Section deferred blame for the delaying of the road to the DEC and has recently stated that on reviewing the traffic usage of the road subsequent to the opening of the interchange, the upgrade was no longer considered necessary at this stage. Council's Planning Section has provided contrary advice, indicating the road upgrade is required.

Lot 490 lies to the south of Cudgen Creek, west of lot 500 and north of the "SALT development. It comprises an area of 24 ha. It was sand mined and it is ecological values have been affected by this process. It has significant potential as a major tourist site with council anticipating eco-tourism development. On 6 November 1998 Lot 490 gazetted as a Crown Reserve – for Tourist Facilities & services. On 23 April 1999 the council was appointed as Corporate Manager of lot 490.

Lot 490 is Crown Land and was formerly managed by the council as trustee.

The coast road (also referred to as Casuarina Way) ran parallel to the coast along the western boundary of lot 500, which is immediately adjacent to or is the rear of the coastal dune formation and runs down the coast to the east of the SALT development.

The SALT development proposed to realign the coast road by moving it westwards away from lot 500. On 2 September 2002 the Ray Group lodged SALT DA – seeking re-alignment of coast road westwards. On 10 September 2002 DLAWC gives consent to lodgement of a DA for a temporary road over lot 490. Moving the road westward would allow further lots east of the road. Some submissions suggested that this would make these lots more valuable.

Approval of the SALT application which facilitated the move of the road westwards meant that the existing formation over or adjoining lot 490 would not coincide with the position of the newly formed road at the boundary of lot 490 and the SALT development.

At the request of the Ray Group the council granted consent for the realignment of the Coast Road. The Ray group offered to meet the cost of construction of the road as an interim measure, pending resolution of the longer term development of the site.

As the council was only trustee of the land, any work referable to this consent would require the consent of the Crown.

In 2001 and prior to the SALT application, the council had prepared a draft DCP (DCP46) for lot 490, its operation also extended to lot 500. If adopted, DCP 46 intended to operate as a Plan of Management (PoM) under the Crown Lands Act.

Lot 490 is zoned 7a – environmental protection & 2f – tourism under council's LEP.

The council went through a process to determine the future options for the development of lot 490. DCP 46 intended to guide this future development by dividing the land into 5 management units:

- Gateway to Kingcliff – a small section of the northern part
- Beachside – adjoining lot 500
- Creekside – along Cudgen Creek
- Lot 500

The DCP anticipated that there may be some adjustment in the boundaries of these units, which may include adjustments, providing:

> To provide a spatial context in association with the Vision and objectives for development of the site, the Plan has defined 5 Management Units with desired objectives and outcomes. While it is intended to provide a specific envelope for the differing development components, some flexibility in extent can be permitted as part of the design process.
>
> **Accordingly, boundaries of the Management Units are indicated by broken lines (see Figure 2 for indicative Management Unit boundaries).**
>
> While the total area of Management Units 2 and 3 is fixed, some adjustment to the position of their boundaries may be permitted as part of the design process (13), which may include adjustments to the position of the Coast Road

The detail of the Beachside unit anticipates the possibility of re-location of the coast road to this unit, however the DCP did not anticipate that the road be moved a substantial distance westward and away from this area.

> This Management Unit encompasses the eastern area of the development site but does not include the fore dune area of Lot 500. Location of the existing road is flexible to the extent necessary to accommodate any facilities proposed to meet the objectives of this Management Unit and to integrate with the freehold to the south while maintaining the intent of the Management unit's locative parameters. Development of this Management Unit will need to be consistent with section 6.4. Dune Management.

The design philosophy anticipated that the dunal system (lot 500) would be stabilised with formal access points to the beach. It was expected that any relocation (of the road) would have a neutral or better effect on the total quantum of accessible public open space.

Specifically, the plan anticipated that the coast road may be moved west from its alignment to provide a better linkage from the Beachside management unit and the beach. It anticipated that the northern and southern end would conform with the Cudgen Creek bridge & the existing road (on SALT), which then ran behind the dune. It provided:

> "… the location of the road may be moved with the prior agreement of the adjoining owner and subject to the requirements of this plan…"

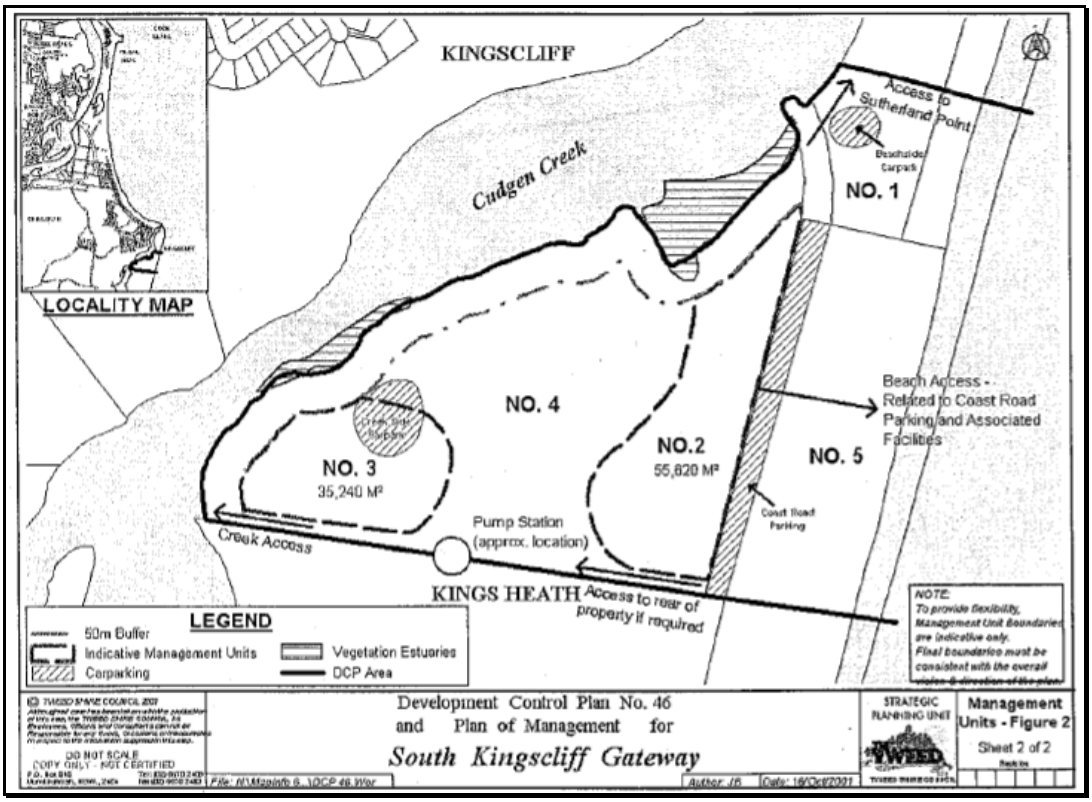
The DCP anticipated that a major focus of the development would be the use and enhancement of the natural values of the site & surrounding areas.

6.6 Environmental Protection/Enhancement

The development site has the potential for meeting a number of significant Statewide objectives in terms of economic, social and environmental considerations. A major focus of the development will be the use and enhancement of the natural values of the site and surrounding areas. Council will consult with the NPWS in respect of any Development Application within the area of the Creek buffer **(3)**. To this end, any development will need to have a major focus on rehabilitation and enhancement of the site in terms of environmental potential and should incorporate the following objectives:

- to ensure that the development takes account of the existing physical constraints of the land.
- to retain, where possible, healthy and desirable existing vegetation to enhance the visual appearance of the development and to ameliorate the rawness of new development, therefore improving the character and value of the area.
- to retain trees or stands of trees of aesthetic or ecological significance.
- to remove undesirable plants from the site.
- to encourage regeneration of natural vegetation and to ensure a comprehensive landscaping and environmental enhancement program forms part of any development plan.
- to recognise and protect areas of environmental significance, particularly those lands zoned 7(a) Wetlands and 7(l) Littoral Rainforest zones eg, Mangroves and Coastal banksias. These areas are to be protected from encroaching development and public use by buffers, so as to prevent degradation.
- to manage public access within and around areas of environmental significance, manage public access and generally ensure their suitable integration into the development areas.
- to ensure proposed development of lands alongside 7(a) or 7(d) zoned land, clearly demonstrates by detailed studies that such development can take place without causing undue environmental disturbance and/or damage. Where appropriate, remedial measures to minimize such damage must also be included.
- to implement an amelioration program for Coastal Banksia and related Queensland Blossom Bat habitat and food source ensure the fulfillment of a no net loss criterion. Compensatory plantings must be established in the locality prior to the removal of existing plants in any subsequent Management Lot development.
- Apart from formal landscaping within Management Units 2 and 3, plantings are to consist exclusively of local coastal species. Exotic species can be used only if it can be demonstrated that they could not become weeds on adjacent land **(12)**.

The DCP divided the use of the land into 5 discreet units, as set out in the following plan:



The use of the units would be as follows:

APPENDIX 1: LIST OF ACCEPTABLE USES FOR MANAGEMENT UNITS

The following acceptable uses have been provided for each of the Management Units identified in this Plan. These uses should be considered as possible examples for use of these particular areas. Development proposals should consider these as a starting point only (unless otherwise stated).

MANAGEMENT UNIT 1: GATEWAY TO KINGSCLIFF

- Car parking total of maximum 150.
- Walkways and accessways.
- Pedestrian crossing across Cudgen Creek utilizing the existing road bridge **(4)**.
- Information and Kiosk stands linked to parking and any accessway.
- Landscaping to retain bushland setting.
- Any other facility or use that is compatible with the objectives of this Management Unit.

MANAGEMENT UNIT 2: BEACHSIDE

- Accommodation, Catering and Conference Facility.
- An indicative maximum of 150 accommodation rooms capacity or equivalent.
- Active recreation activities which could include (but not excluded to) swimming, tennis, croquet, surf lifesaving.
- Passive recreation facilities which could include (but not excluded to) bird watching, interpretative centers.
- Landscaping to connect to other Management Units.
- Walkways and accessways to connect to other areas of Lot 490 and Lot 500.
- Any other facility or use that is compatible with the objectives of this Management Unit.

MANAGEMENT UNIT 3: CREEKSIDE

- Accommodation facilities offering a range of low to medium priced options which can include (but not excluded to) caravans for short-term stays, lodges, tent sites. There is a potential that the southern Kingscliff Caravan Park could become part of this Management Unit.
- Facilities that could include (but not excluded to) kiosks, ablutions, information and interpretative facilities, walkways and accessways connecting the area to the rest of the site.
- Car parking facilities of minimum 20 spaces.
- Walkways and accessways that connect the Management Units together as well as providing access to the foreshores.
- Any other facility or use that is compatible with the objectives of this Management Unit.
- The Unit is 3.5ha in area and may accommodate up to an indicative maximum of 0 units/sites.

MANAGEMENT UNIT 4: ENVIRONMENTAL ASSETS

- Rehabilitation and revegetation of native vegetation.
- Road pedestrian and cycleway access that is compatible with the overall plan objectives.
- Any other use that is compatible with the objectives of this Management Unit.

MANAGEMENT UNIT 5: LOT 500

- Rehabilitation and revegetation of native vegetation.
- Walkways and accessways that connect the Management Units together as well as providing access to the foreshores.
- No built facility that cannot be removed in 30 minutes (for surf lifesaving provisions only if part of the overall development).
- Public car parking and associated facilities utilizing appropriate parts of the current Coast Road corridor.
- Any other use that is compatible with the objectives of this Management Unit.

On 8 October 2003 the council considered the draft DCP 46. The recommendations suggested that the council seek support from DIPNR to finalise the plan, there be an increase in the possible yields, that the draft DCP be exhibited and that determination of position of coast road be deferred.

The Council resolved to seek DIPNR's support to finalise plan, to increase possible yields, to exhibit the draft DCP and, importantly, to accommodate re-alignment of coast road westwards subject to Ray Group providing interim funding for it.

In 2003 the Ray Group lodged a development seeking permanent realignment of the coast road over lot 490 to meet the approved position of the road on the northern boundary of SALT and to move the road west.

On 5 May 2003 the council considered the application. The report recommended that the re-location of the road was premature as the DCP and a tender for lot 490 were not

complete, that the DEC was not satisfied with the proposed location of the road because of concerns over fragmentation of habitat and that the DEC were not satisfied with aboriginal heritage issues.

The council, by majority resolved that the application be accepted in principle and requested that conditions of consent be provided to the next meeting.

The DCP has not been adopted. The road re-alignment within the SALT development and council's approval of 5 May 2004 has seriously undermined its intent. The road divides the Environmental Assets Management into 2 separate portions substantially undermining the natural values of this area.

In its submission to the Inquiry, the DEC wrote:

> Lot 490 is Crown Land that has been identified for tourism development. Lot 490 supports wetland identified under the SEPP 14, coastal heaths, threatened species habitat and a regionally significant wildlife corridor. Lot 490 also functions as a riparian buffer to Cudgen Creek.
>
> The DEC has provided Council with a number of submissions highlighting the conservation valuer of the land and the need to improve appropriate buffering to Cudgen Creek. A particular matter of concern was the relocation of the Coast Road and the bulk and scale of the development proposed.
>
> **Potential Issues:**
>
> **1/ DEC advice on development matters being overlooked.**
>
> The DEC 's advice with respect to the location of the road that transverses the land appears to have been overlooked. It is considered that Crown Land supporting high conservation values in a prominent coastal location should be managed in such a manner as to protect its natural values. The DEC considers that the nature and scale of the development is contrary to the management of the land's natural values.
>
> It is understood that the relocation of the road was agreed to in early planning meetings between the Ray Group, Council and the Department of Lands (then Department of Land and water Conservation). It appears that the relocation of the road in the proposed alignment, and the provision for bush fire asset protection zones within the Crown Lands (contrary to the Planning for Bushfire Protection Guidelines 2001) provides for additional housing / resort lots on the SALT development that would have not been accommodated otherwise.

These matters are most concerning. They are telling, and indicate a blatant disregard for the constraints imposed by the natural values of the site.

3.5.12 Special Treatment

Barbara Fitzgibbon takes a keen interest in the activities, having attended council meetings on a regular basis over the last 23 years (**T. 23/2/05 p. 446**). She was able to provide a potted history of the SALT development in her submission taking the matter from early indication given by the Mayor to the various amendments that have been sought. Part of the submission is set out below:

29/08/02: Mayor Polglase announces council is ready to back Salt despite community concerns.

02/12/02-19/01/03 SALT went on exhibition. Over Xmas.

5/03/03: Assessment of the traffic impact of the Salt development led Tweed Council's professional staff to put an amendment (Version 4.7) of The Tweed Road Plan before council, so that the promised bridge across Cudgen Creek could be added to the works program. *No changes are proposed to normal sector contributions, however it is proposed to locally levy South Kingscliff developments* (Lot 490 and Salt) *for the cost of the Kingscliff Bridge. It is proposed to publicly exhibit the amended plan in accordance with statutory requirements.* RECOMMENDATION That. -

1. Council adopts version 4.7 of the Tweed Road Contribution Plan (Contributions Plan No. 4) as a basis for exhibition and community discussion.

2. Draft Plan Version 4.7 of the Tweed Roads Contribution Plan be exhibited as required by the Environment Planning and Assessment regulations to repeal and replace Version 4.6

This never went on exhibition because it was "unacceptable to the developer". Somewhere between 5/03/03 and 23/04/03 when the report for the Salt DA went to council, it was pulled.

23/04/03: Salt DAs were presented at this meeting for DA 02/1422 for a 473 lot subdivision, DA 02/1423 for the construction of an Outrigger branded strata title resort hotel, comprising 334 rooms of which 121 were dual key, and DA 1748 for conveyancing of approximately 750,000 cubic metres of river sand from Action Sands site located at Chinderah, via a hydraulic pipeline. A master Plan is referred to in regard to these documents.

Beachside public parking is severely curtailed.The developers argue that the beachgoing public can also share the obligatory parking for the Outrigger. The reference to the bridge over Cudgen creek was as follows " As part of this application the developer originally offered to construct a new bridge over Cudgen Creek in the existing location but however requests council reimburse part of the coasts of this through its Section 94 contribution plan for roads Council at its recent meeting resolved to place on exhibition an amendment to this plan to include the bridge within the works schedule & collect a local area contribution from the SALT development and Lot 490. This would in effect result in the Salt development paying for a large proportion o f the bridge which is unacceptable to the developer. Through negotiations it has been agreed that an alternative to building a new bridge is a requirement to upgrade the bridge, including the construction of a pedestrian/cycleway across the bridge. The developer has made a submission to carry out works for the upgrading of this bridge. This is considered acceptable and should be conditioned as part of any consent.

Passive open space considered to satisfy requirements but no active open space was provided.... option to contribute to the acquisition and embellishment of land in the West Kingscliff area. Approved.

1/09/03 Letter from Ray group to D Broyd Tweed Shire Council again attempting to gain confirmation of the realignment route of Cas. Way (the Coast Road)

17/09/03 to 20/10/03- exhibition of DA 03/12588 re using Tweed Turf and Sand site fill, instead of the original Action Sands site (originally as having benefits for river maintenance). Approved.

25/09/ 03: Another letter from Ray Group to D Broyd Tweed Shire Council asking for confirmation

of the 24/9/03 proposal that the council and reserve trust should agree to adopt a recommendation that Ray Group be allowed to submit a formal DA for the Casuarina Way/ realignment through Lot 490.

8th October 2003 Cr Brinsmead successfully moves at extraordinary meeting of Tweed Shire Council to seek State Government approval to vary the 490 DCP to allow up to 15% of the total site area for buildings and to agree to the Ray Group request for the realignment of the Coast Road through Lot 490, even though a DCP and Plan of management have not been finalised.

15/10/03 Amendments to those parts of DA1422 dealing with Lot 500 and 7F zone management.- (an amendment of a document put in by Aspect North in July 2003) Approved

2/12/03: Amendments to Salt DA 02/1422 advertised in the link.

16/12/03: The Daily News reports on two angry prospective buyers who had put down deposits for blocks in Salt which the developer has now withdrawn from sale because of change in Master Plan. Brian Ray has said that this will see the reconfiguration of draft stage 4 lots into smaller ones, which he says his company would build on and sell as house and land packages.

18/02/04 DA 02/1422.12 -amendments to tourist units. The amended proposal involves consolidation of the five tourist resort sites into 2, and changing the roadway near Peppers. There is also a Section 96 application to reduce unit rooms in the Out rigger resort from 334 to 318 by eliminating dual key rooms on the eastern wing of the building. Approved.

3/03/04: Peppers DA DA 03/1774 for a 341 room resort, part of which is effectively five storeys high goes before council. Part 2 of the recommendation for approval states that development should be carried out in accordance with the definition of a tourist resort as in Tweed LEP 2000 (ie no units within the resort to be used for permanent residential accommodation) was deleted by the majority faction, before approval. The applicants had asked verbally that the restriction on the title not be placed as it could affect their financing of the project.

6/04/04: The date of a letter from Hickey Lawyers, signed by Paul Brinsmead, supporting substitution of residential blocks for the nine resort and medium density sites. .There was also a request from Ray Group's Darryl Anderson for this amendment.

19/05/04: DA 04/0168 for Surf Lifesaving facility & Public Amenities building at the Salt development before council. The construction of a Surf Lifesaving facility was part of the original conditions, but this DA goes way beyond a facility. It is evident that there is a push to establish a club. A 6/5 vote approved this and the building when finished will be of a design that will allow expansion into a club. In Cr Polglase's absence, Cr Beck as acting mayor used her casting vote.

10/06/04: On the council agenda there is a Section 96 modification application from Salt for DAs 02/1422.18 & 02/1422. These seek amendments to the Master Plan & subdivision approval: to reduce the number of medium density sites & medium density dwellings; to increase the number of residential lots; to increase number of lots by 86; amendment to the residential building setbacks of some lots; & amendment to bushfire management in regard to fencing.

7/07/04: A Surf Life Saving Club was approved even though it does not fufil NSW Surf Lifesaving Club conditions. This will in time get that association's go ahead, after Brian Ray has pressured senior figures in that organisation.

18/08/04: DA 02/1422.18 for the section 96 amendments was deferred, on the request of the Ray Group, evidently for a cosmetic makeover. The Ray group stated that *receipt of funds from sale of the land is necessary to fund the construction of the resorts.* as *resorts are not viable in their own right* .

1/09/04: On Council agenda the Section 96 modification application from Salt -DA 02/1422.18 and another request for Salt's proposed road alignment through Lot 490 .
6/10/04 DA95/0176.02 for Section 96 amendment to DA95/0176 for Loders Road quarry (extractive industry). Fill source for Salt has changed again. DA04/0456 is seeking permission for a pipeline to carry the fill over part of Casuarina.

20/10/04 DA 02/1423.09 sought approval to open part of the Outrigger resort before total completion. (estimated 54 of 213 units will not be internally completed.by target date) This was approved.
3/11/04: DA 02/1423.09 for amendment to DA 02/1423 for erection of Outrigger & two lot stratum subdivision (on 3 lots)

10/11/04: In the council news sheet, The Link, are notifications for exhibition. DA 04//0868 alterations and additions to life saving building that will allow Club facilities.

10/11/04: Notifications for exhibition of DA 02/1422.18 & DA 02/1422 are in The Link. These refer to amendments to the subdivision layout to accommodate medium density sites, and to the master plan to allow 7 substantial changes. The latter includes another tourist resort with 247 units = 187 units, resulting in a change to the total number of resort rooms from 664 to 991 and an increase in the total number of dwellings from 653 to 910. (exhibition 10/11 to 24/ 11)

15/12/04 Progress report on Section 96 amendment DA 02/1422.18 of DA 02/1422 This item was moved into the confidential session because of receipt of a letter from DIPNR in answer to planners' query about the legality, the applicant's submission and legal advice and the council's legal advice.

Despite the fact that Section 96 amendments should not be approved for any DA that results in substantial change to the DA originally approved, the majority faction have been pressuring to get this through.

This is still under discussion.

Submission 369 p. 21-23

The extract draws from a number of sources, including council meetings and other sources to provide its base.

It demonstrates the significant number of times that the application itself or matters, such as those affecting Lot 490, came before council in a little over 2 years.

Surprisingly, it does not refer to any direct notification being given by the council to residents, but appears largely to rely on notification or reporting in local media or council's newsletter, the Tweed Link.

It will be seen that over the period of the extract the development applications for the SALT and Outrigger proposals were lodged, and 11 amendments to the original or associated development application are noted.

A review of these amendments suggests that not all amendments have been picked up in this chronology.

While Mrs Fitzgibbon may have chosen not to include all applications, given her attention to detail, it is likely she was not aware of others.

Mrs Fitzgibbon did not raise concerns over council's notification policies in her submissions. Her regular attendance at council meetings may have obviated the necessity for notification.

The great majority of residents and ratepayers do not attend council meetings with the frequency of Mrs Fitzgibbon, they rely upon the council to provide notification of proposals that might affect their lifestyle and amenity.

Submissions to, and evidence given, during the Public Hearings of the Inquiry raised three general themes:

- a lack of notification;
- insufficient detail in notification;
- abuse of the role of the Tweed Monitor.

A significant number of submissions raised concerns over an article that appeared in the Tweed Link on 14 September 2004. The article dealt with council's deliberation over the proposal by Resort Corporation to purchase council owned land at Cabarita Beach. The form of the article appears below:

THE TWEED TWEED SHIRE COUNCIL

Tweed Link

A TWEED SHIRE COUNCIL PUBLICATION ISSUE 382 SEPTEMBER 14, 2004 ISSN 1327-8630

Is this an opportunity too good to miss?

Pandanus Parade Cabarita Beach has caused much controversy. Tweed Shire Council outlines for the first time why it needs community input into its decision on whether to accept an offer for this land. The land is highly constrained by a restriction linked to the hotel property. It is on 60 per cent of the land (outlined below) and requires that it be used as a carpark.

What is the offer?

Council has been offered in excess of $5 million. This offer compares favourably with Council's own independent valuation of the land. It is a market based offer. The money will be spent solely on community projects and redevelopment of Cabarita's Main Street.

The developers of Cabarita Beach Hotel site Resort Corp have offered to provide an underground car park for 38 vehicles on the site and to provide ongoing maintenance of the car park in conjunction with upkeep of the building that will involve commercial and residential development. If the offer is accepted Council would require a restriction on the title for the proposed carpark to be maintained in perpetuity. In addition Council is planning a multi level carpark in Hastings Street behind the Coast Road opposite Pandanus Parade.

PO Box 816
Murwillumbah 2484

Dear Shire residents,

Tweed Shire Council is custodian of the entire Tweed Shire extending from its 37 kilometres of coastline to its towns, villages and rural areas.
Council has acknowledged the need to protect and enhance our assets as our population increases.
Council is seeking input from the widest possible cross section of the community in relation to the offer as outlined on this page.
It is an offer that could mean a big difference in the Council's capacity to finance future community projects such as the ones listed on the next page.
There are potentially significant community benefits to be obtained through using this amount of funding to provide and maintain community facilities in Cabarita Beach, Bogangar and other areas of the Tweed. Council will not be accepting this offer until community input has been obtained.
It could mean much needed projects are completed in an accelerated timeframe.
Take the time to tell Council what you think. Pick up the phone, send an e-mail, write a letter and either fax or post it to Council.

Yours faithfully
Dr J Griffin

The following page provided a list of projects that might possibly benefit from the proceeds of the sale.

The article was inappropriate, it did not:

- consider whether council should be dealing with, let alone divesting itself of the land;
- consider alternatives, whether limited to the car parking lots or otherwise;
- put forward any views of the surf club, which was ultimately the pawn in the game;
- consider the proposal in the light of strategic planning for the area, which incidentally had been put on hold.

On the following page, the article put forward "projects" that might be funded from proceeds of the sale.

The article prompted the Cabarita Beach/Bogangar Residents' Association to write to council's general manager expressing concerns:

CABARITA BEACH/BOGANGAR RESIDENTS' ASSOCIATION INC.
(President: Terry Kane . **Secretary:** Cath Lynch . **Treasurer:** Mary Collie)
29 Watergum Place, Cabarita Beach 2488 : Tel. 66.76.0752

October 12 : 2004 TSC120904

Dr. John Griffin
General Manager
Tweed Shire Council
PO Box 816
Murwillumbah 2484

Dear Sir,

Re: Sale of Public Land bounded by Pandanus Pde & Palm Ave, Cabarita Beach

We refer to Issue No. 382 of the Tweed Link in which Council sought public input on the above proposal.

Our Association has devoted considerable time and effort in order to present our community's views on this subject, some of which would already be known to you via various Press Interviews; additionally, we have taken the time to prepare Petitions for our local residents to express their views. The originals of these Petitions are enclosed with this correspondence.

At the outset, we wish to object most strongly to the use of the Tweed Link, an official informational publication of Council, to openly promote the aforementioned sale in a manner which indicated bias in favour of the proposal "Is this an opportunity too good to miss" and failed to explore other alternatives; additionally, the "carrots" offered lack detail and are misleading in themselves.

Our endeavour to obtain detailed information (refer our correspondence dated September 16, 2004) have failed to elicit this information and indeed, that correspondence has been ignored.

Secondly, we object to the limited availability of the "hotline number" during this process, (only 5 working days with set hours) and the fact that many questions raised were unable to be answered by the person manning the facility. In spite of the many questions raised per telephone and the promise that Council officers would be asked to contact these persons, this in actual fact has not occurred. Additionally, half of the consultation period occurred during school holidays which is in direct contravention of Council's Community Consultation Guidelines. To summarise, Council's approach to this proposal has lacked depth, detail and the process is far from transparent to the community.

Thirdly, we object to the "shelving" of our Draft Development Control Plan until such time as the abovementioned proposal has been finalised.

In December, 2001 Council released a Draft Precinct Plan; this plan was compiled without any community input and was rejected outright by our Association at that time stating our wish for green open space at the heart of the village.

In October, 2003, an entire session of the Steering Committee working on the Draft Development Control Plan was given over to a presentation from Resort Corp.; this was rejected in the majority as constituting overdevelopment of the site.

In November, 2003 Mayor Polglaise wrote to our Association enclosing the same plan presented to the DCP Steering Committee, requesting our feedback, and this was also rejected by the Association membership.

It is our belief that the first part of the process that must be established is whether or not it is in the best interests of the community to sell this land. When this is finalised one way or another, we may then proceed to the second stage of what may or may not be built on the said land.

This is the considered opinion of the Association and its membership and a vast number of residents of the village as demonstrated by the attached petitions and the Public Meeting held on October 10, 2004.

Yours sincerely,

Cath Lynch
Secretary

Encl: 56 pages of Petitions consisting of 1056 signatures.

This form of biased advertorial is not an appropriate method to notify the public of the proposal, nor given its content, an appropriate method to stimulate debate.

In a later letter the association queried the projects put forward by the council, seeking details regarding some of the projects:

CABARITA BEACH/BOGANGAR RESIDENTS' ASSOCIATION INC.
(President: Terry Kane **. Secretary:** Cath Lynch **. Treasurer**: Mary Collie)
29 Watergum Place, Cabarita Beach 2488 : Tel. 66.76.0752

September 16 : 2004 TSC160904

Dr. John Griffin
General Manager
Tweed Shire Council

Email Transmission.

Dear Dr. Griffin,

Re: Sale of Public Land: Your Reference "Tweed Link" 382: September 14, 2004.

I refer to your letter in the above publication and would like to query the expenditure items raised with regard to Cabarita Beach/Bogangar.

1. What projects are envisaged for Norries Headland that would constitute an expenditure of $700,000 ?
2. What are the specific details relating to the expenditure of $400,000 for Cabarita Main Street ? Would this perchance relate to the closure of Pandanus Parade and the beautification of this area ?
3. What is the Cabarita Sub Office attracting further expenditure of $400,000 ?

The community certainly has not been consulted on the above issues and those areas on which we were allowed to address through the Draft Development Control Plan have been cast aside until such time as they become irrelevant, an action which is strongly resented by this Association and residents of our village.

Your prompt response would be appreciated.

Yours sincerely,

Cath Lynch

Secretary

Council's reply was little more than pie in the sky:

TWEED SHIRE COUNCIL

Please Quote Council Ref: DW1102203; DW1060076 [eltr]

Your Ref No:

For Enquiries Please Contact: Mike Rayner

Telephone Direct (02) 6670 2470 L11F02

12 October 2004

Cabarita Beach Bogangar Residents Association Inc
29 Watergum Place
CABARITA BEACH NSW 2488

Attention: Ms C Lynch - Secretary

Dear Ms Lynch

Sale of Public Land - Tweed Link 14 September 2004

I refer to your letter dated 16 September 2004 specifically referring to the issue of the Tweed Link dated 14 September 2004. You asked for an explanation of the expenditure items raised with regard to Cabarita / Bogangar. As clearly stated in the 14 September edition of the Tweed Link a number of potential projects were listed for discussion purposes only. The obvious intent here was to provide an indication to the community of the scope of projects that could be undertaken should Council resolve to proceed with the sale of the Pandanus Parade land. Specifically in regard to the 3 projects mentioned by you I can advise as follows:-

1. **Norries Headland**
   As you would be well aware, Council in March 2000 adopted an improvement plan for Norries Headland. These works included construction and rationalisation of car parking, installation of pathways, boardwalks, and associated facilities, landscaping, improvement of public safety and signage. Final expenditure would be subject to the extent of the embellishment undertaken. This would be determined during the detailed design stage.

2. **Cabarita Main Street**
   Following the successful completion of Main Street development works in Tweed Heads, Murwillumbah and Kingscliff, Cabarita Beach is seen as the next priority for a Main Street Program. The details of such works would be developed in close consultation with the local community and in particular businesses operating within the precinct. Typical works would include nature strip landscaping and tree planting, installation of street furniture and improved safety for pedestrians.

.....Cont./2.....

3. **Cabarita Sub-Office**
Given the increased population on the Tweed Coast Council has given consideration to the development of a sub-office. Such office typically would allow access to Council's cashiering services, dissemination of information and meeting rooms where local residents could meet Council staff as appropriate. An opportunity may exist to incorporate such a facility within the proposed multi level car park in Hastings Road should that proposal proceed.

I trust the above information satisfactorily answers the matters raised in your letter.

Yours faithfully

Don Buckley
ACTING GENERAL MANAGER

The article was simply offering a gift horse. In its submission to the Inquiry, the association reported its "dental inspection" in the following terms:

> On September 16, 2004 the Association wrote to Council requesting details of proposed expenditure as detailed in their published proposal in terms of projects to be undertaken at Cabarita Beach/Bogangar. This correspondence was answered on October 12, 2004 only after a second request for information had been forwarded to Council and, surprise, surprise **detailed items of expenditure for projects already completed!!! (Refer Norries Headland project).**

The council has adopted a notifications policy, DCP 42.

The policy expresses its aims and objectives as:

5.0 AIMS AND OBJECTIVES OF THE PLAN

5.1 To fulfil Council's service responsibilities and policies on community consultation for development assessment, and to set out Council's requirements for the notification of development applications.

5.2 To provide for public participation in the consideration of applications which may detrimentally affect the enjoyment of property and/or public amenity or be the public interest.

5.3 To allow for a reasonable time for inspection and making of submissions on applications while recognising the obligations of the Council to determine applications within prescribed periods.

5.4 To provide a direct avenue of access to the application process by affected and interested residents and owners who wish to express their concerns and opinions about proposals to Council staff, Councillors or relevant Council Committee.

5.5 To ensure that decisions are well considered and soundly based having regard to the interests and opinions of all stakeholders.

5.6 To set out the rights of adjoining owners and residents to make comment on applications and in respect of the determination of applications by the Council.

5.7 To set out the matters to which the Council will have regard when forming its opinion as to whether or not the enjoyment of adjoining or neighbouring land may be detrimentally affected by a proposed development or building after its erection.

5.8 To set out the Policy for advertising of applications and notifying persons other than persons who own land adjoining the land which the application applies.

5.9 To clarify the circumstances when notice is not required.

5.9 To detail the form that the notification will take and the requirement of the notification plan.

These aims and objectives generally parallel the underlying precepts of the Act and the EP&A Act.

The policy contains an extensive listing of instances where notification will be given. The policy requires that the council give notice to immediately adjoining owners and other owners who may be detrimentally affected, according to the following criteria.

(i) the views to, from, and across/over the land;

(ii) overshadowing;

(iii) privacy;

(iv) noise;

(v) the visual quality of the building in relation to the streetscape and neighbouring properties;

(vi) the scale of the proposed buildings;

(vii) the likely effect on the drainage of adjoining sites;

(viii) the siting of the proposed building in relation to the application site boundaries;

(ix) hours of use;

(x) nature of use;

(xi) light spillage or reflection;

(xii) means of access to or provision of private parking on the application site;

(xiii) any covenant or easement benefiting the adjoining or neighbouring land or the Council;

(xiv) the height, materials and position of fences erected on the boundary;

(xv) traffic generation;

(xvi) particular circumstances of the application; and

(c) any community group or government agency which may be affected by or have a legitimate interest in the application.

These criteria suggest that the policy generally anticipates the circumstances when notification would be appropriate and provides a suitable platform for notification.

Given this, it was surprising to receive Mr Nelson's submission (**submission 12**) suggesting that he and his sister-in-law had not received notification of a proposed 3 storey multi-dwelling development. Even more concerning is a suggestion that the council was limiting the operation of the policy to limit the costs to be borne by developers.

10/12/2004.
The Commissioner,
Dear Sir,

I wish to make a submission to the Commission regarding the appropriateness of procedures adopted by Council to Development applications,perticularly D.A. DA04/1129,15b Charles St.,Tweed Heads.

1]On 4/10/2004 I was given a copy of a letter sent to neighbours who reside in the Razorback,a street above and parallel with Charles St.They had been on holiday and it stated in the letter that submissions closed by 7/10/2004.

2]Although residents of Charles St.,neither we or my Sister-in Law,Colleen Durham,who had recently purchased number 15 Charles St.,received notice of the Application.As I am an invalid,I was unable to ascertain whether a Notice had been placed on Site.

3]We only had 3 days to object to the application,and did so.Unfortunately I have misplaced copies of the documents,but believe the Tweed Shire Council should have them.I have enclosed documents sent by Council.

4]I received a letter from Council dated 13/10/2004 acknowledging receipt of my submission.

5]Prior to purchasing our property in 2001 I researched the Tweed Town Plan,and was assured by Council Staff that Charles St. was zoned for low density,maximum 2 storey development,and if the basement exceeded 1.5 metres this was classed as 1 storey.Application DA04/1129 is for a part 2 storey,part 3 storey 6 dwelling development.

6]I phoned Iain Lonsdale[contact for this Application]and was told by him that Council was in the process of approving another 3 storey development in Charles St.,a precedent would be set and it was basically unfortunate for residents who had bought in this street because of the low density zoning.

7]When I asked Mr. Lonsdale why residents of Charles St. had not been notified of the proposed development[particularly Colleen Durham who would be most directly affected]he replied that it was too great a financial impost on Developers to pay for more than 4 notices to be sent out.Consequently,only a few residents of the Razorback received them.

This development is completely inappropriate for this area,my reasons for this were stated in my submission to Council.

I feel the whole episode is another example of the type of collusion between Council and Developers that the Public Inquiry has been established to investigate,and therefore would like to have this matter included in the Hearing,

Yours faithfully,

David Nelson.

Other concerns were raised by Dr Wright, whose property adjoins the Penny Ridge Resort.

Dr Wright wrote:

> Despite the fact that we were never notified of any proposal, bulldozers cleared 100 acres of rock and vegetation, (approximately 1997), and an 18 hole golf course was built.

> Subsequently a house was constructed on the land. During its construction, (Dixon Homes), inquiries were made to Council Office since we had received no prior notification. No one seemed to know of its existence or seemed to be able to find out (see attached newspaper article Daily News 04/07/02 – Item 2).

The issue was taken up with Dr Wright during the Public Hearings, when he gave the following evidence:

> MR BROAD: *Please take it as read that the Inquiry has read through your submission, it's aware of the contents and what we want to explore with you is some of the aspects of*

it. So if we don't explore all aspects please don't assume that we haven't read it. One of the issues that seems to stem from your submission is that you may not have received notification of the developments that were occurring on the property next to yours. Can you indicate the nature and extent of notification that you received?

DR WRIGHT: *Initially we were not notified of anything at all. My first discovery that anything was happening was when I heard bulldozers working on the land and when I went to our eastern boundary I discovered that the entire property had been clear bulldozed and there was a large pile of trees down at their south-eastern corner. I went to council offices and asked what was happening and nobody seemed to have an idea. I asked them to inquire. I went back one week later and nobody still seemed to have any idea. So - - -*

MR BROAD: *So did that appear to be work that was being carried out without an application having been made to council?*

DR WRIGHT: *Well, I was not aware of an application. We had not been notified.*

MR BROAD: *But when you came back a week later you said that nobody knew about it.*

DR WRIGHT: *Yes. Well, I wasn't sure whether the staff really didn't know or whether they were disinterested or there was some other explanation. I then went back on a third occasion and asked to look at a map of the area and picked out the site and said and said, "This place has been clear bulldozed. Can you please explain to me what's happening?" And I still received no reply.*

PROF DALY: *Right, could I just interpose there? How large was this site?*

DR WRIGHT: *This was the entire property, 100 acres or 30 - - -*

PROF DALY: *100 acres had been cleared?*

DR WRIGHT: *Yes.*

PROF DALY: *And the council didn't know anything about it?*

DR WRIGHT: *Well, they said they - the council officer said they didn't know.*

MR BROAD: *And what was the existing growth on the property?*

DR WRIGHT: *Sorry?*

MR BROAD: *What was the prior existing growth?*

DR WRIGHT: *I'm not sure that I understand.*

MR BROAD: *What were they clearing?*

DR WRIGHT: *A variety of trees. I'm not an expert on biology but there were a variety of trees, grass, shrubs, things like that.*

MR BROAD: *And what sort of dimension were the trees? Were they saplings or - - -*

DR WRIGHT: *No, no, there were a number of large trees. They would have been 7 or 8 metres tall dotted over the property and there was a fairly large pile of firewood at the end of it. It would probably be about the size of, you know, this end of the court.*

MR BROAD: *Now, at that stage was there any building work occurring?*

DR WRIGHT: *No, no.*

MR BROAD: *No. Subsequently when building work started to occur, did you receive any notification that council had received an application, a development application?*

DR WRIGHT: *No, not at all, and yet we had received - I think I mentioned in my submission a neighbour who also abuts our property wanted to move some surface rocks and sell them to gardeners and things like that. He had to put a - we got a submission about that but we didn't get any submission about a house.*

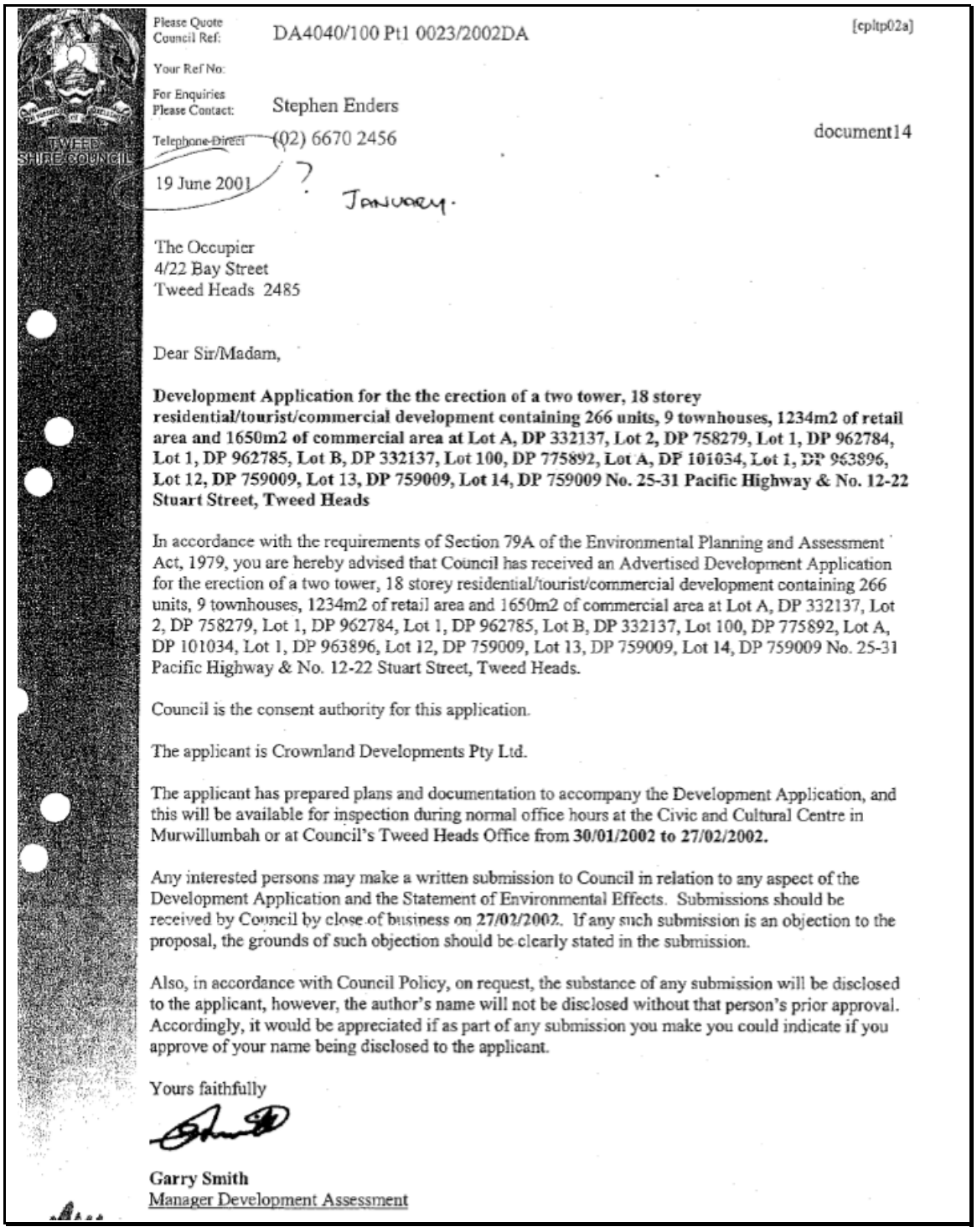
T. 11/3/05 p. 1373-1375

It is somewhere difficult to form a concluded view regarding this evidence as the works may have been undertaken without development consent. This view is supported by the council's file, which records other non-approved work as having been undertaken.

The policy requires that council's notice contains the following details:

(a) address of the site (Lot No. Deposited Plan, and House No.);
(b) the name of the applicant;
(c) a brief description of the proposal expressed as informatively as possible in a short statement;
(d) identification of the consent authority;
(e) the period during which a person may inspect the application;
(f) where and when the plans can be inspected;
(g) an invitation to make a submission;
(h) the dates of the period specified under (e) above; and
(i) a statement regarding confidentiality of submissions made.

As an example, the pro-forma notice to be issued for the Latitude 28 proposal is set out below:



TWEED SHIRE COUNCIL

Please Quote Council Ref: DA4040/100 Pt1 0023/2002DA [cpltp02a]

Your Ref No:

For Enquiries Please Contact: Stephen Enders

Telephone Direct (02) 6670 2456 document14

19 June 2001 ? January.

The Occupier
4/22 Bay Street
Tweed Heads 2485

Dear Sir/Madam,

Development Application for the the erection of a two tower, 18 storey residential/tourist/commercial development containing 266 units, 9 townhouses, 1234m2 of retail area and 1650m2 of commercial area at Lot A, DP 332137, Lot 2, DP 758279, Lot 1, DP 962784, Lot 1, DP 962785, Lot B, DP 332137, Lot 100, DP 775892, Lot A, DP 101034, Lot 1, DP 963896, Lot 12, DP 759009, Lot 13, DP 759009, Lot 14, DP 759009 No. 25-31 Pacific Highway & No. 12-22 Stuart Street, Tweed Heads

In accordance with the requirements of Section 79A of the Environmental Planning and Assessment Act, 1979, you are hereby advised that Council has received an Advertised Development Application for the erection of a two tower, 18 storey residential/tourist/commercial development containing 266 units, 9 townhouses, 1234m2 of retail area and 1650m2 of commercial area at Lot A, DP 332137, Lot 2, DP 758279, Lot 1, DP 962784, Lot 1, DP 962785, Lot B, DP 332137, Lot 100, DP 775892, Lot A, DP 101034, Lot 1, DP 963896, Lot 12, DP 759009, Lot 13, DP 759009, Lot 14, DP 759009 No. 25-31 Pacific Highway & No. 12-22 Stuart Street, Tweed Heads.

Council is the consent authority for this application.

The applicant is Crownland Developments Pty Ltd.

The applicant has prepared plans and documentation to accompany the Development Application, and this will be available for inspection during normal office hours at the Civic and Cultural Centre in Murwillumbah or at Council's Tweed Heads Office from **30/01/2002 to 27/02/2002.**

Any interested persons may make a written submission to Council in relation to any aspect of the Development Application and the Statement of Environmental Effects. Submissions should be received by Council by close of business on **27/02/2002.** If any such submission is an objection to the proposal, the grounds of such objection should be clearly stated in the submission.

Also, in accordance with Council Policy, on request, the substance of any submission will be disclosed to the applicant, however, the author's name will not be disclosed without that person's prior approval. Accordingly, it would be appreciated if as part of any submission you make you could indicate if you approve of your name being disclosed to the applicant.

Yours faithfully

Garry Smith
Manager Development Assessment

This document meets the requirements of the policy.

While the council is giving effect to its policy and is making plans and documentation available, it requires that persons wishing to view them to either attend its Murwillumbah or Tweed Heads offices. This issue was taken up with Dr Griffin during the Public Hearings:

MR BROAD: *Dr Griffin, council has adopted a notification policy which deals with the way that the community is notified of development applications that have come before council. In my review of some of the files, the notifications don't often appear to have a great amount of detail of the particular development, rather they tend to suggest that, you know, the community can attend council's chambers and view material. Is that the usual course adopted?*

DR GRIFFIN: *That has been, yes.*

MR BROAD: *Yes. Other councils provide a copy of plans or elevations or some councils, even on their websites provide statements of environmental effects. Would that be seen as beneficial?*

DR GRIFFIN: *Certainly with any communication process, the more information that's provided the greater benefit it is in the decision making process.*

MR BROAD: *Yes. There have been a number of submissions that raise concerns about the lack of information that's generally available. Why has this policy been implemented that, you know, people are invited to attend council offices to view material?*

DR GRIFFIN: *I would suggest that a lot of the development proposals have extensive documentation. Some go into box loads of documentation and to have a number of copies of those distributed around is a logistical issue.*

MR BROAD: *What about the simplest though such as, you know, elevations, things like that?*

DR GRIFFIN: *Yes, I would suggest that they would be quite appropriately done by a more detailed mechanism.*

T. 16/2/05 p. 129

3.5.13 Coastal Protection

After many years in its formulation, coastal protection principles were introduced by way of a Ministerial direction requiring that councils take into account Coastal Policy when dealing with development applications. As Professor Thom, who had formerly been chair of the Coastal Council said in his evidence during the Public Hearings:

PROF THOM: *... There was a recognition that councils would be cognisant of the implications of that policy in consideration of whatever; environmental protection, economic development, provision of social services, amenities, whatever fell within the confines of the coastal zone. And the important thing about the Coastal Policy was that it was restricted to a geographically defined zone - a one kilometre zone - that was marked on one to 25,000 maps. Those maps had been signed by the Minister as the maps that concur with the provisions in the Coastal Protection Act.*

T. 10/3/05 p. 1230

Professor Thom who had been involved in the formulation of Coastal Policy from its outset, as far back as 1979, indicated the underlying consideration leading to the adoption of the policy as:

PROF THOM: *I think the drivers that were there then are still here now and I think reflected a lot in the continued development pressures that are taking place along the coast. New South Wales is the only State in Australia where we have development pressure in every local government area in the coastal part of the State and as such this is reflected with, I think - reflects, essentially, the strong attractiveness of the coast for people to live, recreate, play, and we've seen that in terms of a high number of investment interests that have existed both at the individual as well a corporate interests.*

So the population driver was there. It came through the '80s into the '90s. It was manifested with population growth figures of the order of 1 to 3 per cent per year for local government areas. In addition to that was consideration from a large sector of the community to protect coastal assets, for example, our beaches. There was no protection for beaches in our legislation which you want to come to in a moment. There was a strong pressure for the State to acquire more coastal land or to convert Crown lands into National Parks and during the course of the past few years as a policy of government a lot more land has been added and new National Parks acquired.

In addition the marine system, the establishment of the Marine Parks Authority, the creation of marine parks. So there was a whole, if you like, interaction between the interests of the economic drivers for provision of land for housing, provision of occupational opportunities for people to work given that in some areas there were quite high levels of unemployment.

T. 10/3/05 p.1231

The development of Coastal Policy was part of a package and the extent of this package was explored with Professor Thom:

PROF DALY: *... Now, let me go into a little more detail on the recent development of coastal policy. The information I have is that on 26 June 2001 the Premier and the Deputy Premier announced an $11.7 million coastal package.*

PROF THOM: *Yes, coastal protection package, yes.*

PROF DALY: *Right. A number of things were associated with that, and I will run through them very quickly. I don't need you to comment on them at the moment, I will come back. There was to be a comprehensive coastal assessment, there was to be a State Environment Planning policy developed, there was a New South Wales water quality management strategy to be developed, there was to be an extension and an updating of the New South Wales coastal policy of 1997, there were to be amendments to the Coastal Protection Act of 1979, there was to be a new coastal zone management manual, there was to be a New South Wales government coastal land acquisition program which you've just mentioned, and there was to be a consultation and participation for Aboriginal communities.*

That was 2001 and there's about seven or eight different items on that. To what extent is that program the truth without going into any great detail? Have we got two of those items done, have we got eight of them done? Where is it at?

PROF THOM: *Okay. The comprehensive coastal assessment was the big ticket item in terms of investment by the State. That terminates end of this financial year in June of this year. That particular program has two facets; one is the Statewide collection of data and information which involves a number of agencies, a number of projects. The second part was a pilot study which focussed on Tweed - on Tweed Shire.*

PROF DALY: *I will come back to that later.*

PROF THOM: *The Coastal Protection Act was amended. It was substantially amended largely as a result of the beach management review that I referred to and in that we gave standing to beaches as an environmental entity. Prior to that beaches had no standing in law. And the reason for that is that beaches have this complex tenure arrangement in relationship to beaches and now we have beaches with standing to be, in a sense, be protected on the balance of assessments.*

Water quality work was undertaken essentially by the LDPA now DEC and information has been provided to councils all up and down the coast to assist councillors with their assessment of water quality. Very similar to the Beachwatch program in the Sydney area. The work that was to be done on the assessment of - reassessment of the coastal policy has not been done. I can come back to that because that comes back into our discussion on regional strategies.

The work that was done on the manual is progressing. We have done fairly extensive work on the manual revision. That has been held up as a result of the establishment of the Catchment Management Authorities and the relationship between local governments, CMAs and the Department is now being thought through. We're fairly well advanced and we hope that that will be sorted out this year. The one - the area - that has received probably more publicity than anything else as a result of the reforms Statewide was the introduction of that State Environmental Planning policy number 71.

T. 10/3/05 p. 1233-1234

While the Coastal Council has been disbanded and its role largely subsumed by SEPP 71, in reviewing the governance issues associated with the manner that the council has exercised its planning functions, Coastal Policy is highly relevant.

Professor Thom indicated:

PROF DALY: *Let me now come to the Tweed itself. In your role as Chair of the Coastal Council would you have been sought by either the Department - in that time it would have Planning New South Wales, I assume - or the Council to consider issues to do with individual developments?*

PROF THOM: *The Coastal Council had from time to time been in a position to give advice to the Department on development - the particular developments in the Tweed; not just - some on a larger scale and some on a smaller scale. Because one of the roles that the Coastal Council had was to provide advice to the Minister on Local Environmental Plan changes. That was a direct role. There was no direct role, formal role, for advice on development applications, although from time to time the Council's advice was sought. But that advice, of course, went to the Department and to the Minister.*

PROF DALY: *Thank you for that. Can you name any particular developments that you became involved with in any way?*

PROF THOM: *The coastal council was involved in providing advice to the department on the Salt development; it was not on the Casuarina development.*

T. 10/3/05 p. 1239-1240

In August 2001 the council was considering the Crownland Development's proposal to develop a mixed commercial/residential/tourist development at Tweed Heads, known as "Latitude 28".

In a meeting of the Development Assessment Panel on 29 August 2001 overshadowing issues associated with coastal protection policy were raised.

On 25 January 2002 the council wrote to the proponent's consultant regarding the coastal protection issues:

Compliance with Clause 32B of North Coast Regional Environmental Plan.

It is evident from the shadow diagrams submitted with the application that at 6.30pm midsummer 26% of the Jack Evans Boatharbour foreshore area will be affected by overshadowing with parts of the reserve being affected from approximately 5.00pm onwards.

Clause 32B(4)(a) of the NCREP states as follows:

"*(4) The council must not consent to the carrying out of development:*
(a) on urban land at Tweed Heads, Kingscliff, Byron Bay, Ballina, Coffs Harbour or Port Macquarie, if carrying out the development would result in beaches or adjacent open space being overshadowed before 3pm midwinter (standard time) or 6.30pm midsummer (daylight savings time).

Advice is being sought from planningNSW but this Clause has the potential implication of preventing Council from being able to consent to the proposal if the beach area and surrounding open space area contained within the Jack Evans Reserve constitutes "a beach" or "adjacent open space" for the purpose of this clause.

The view foreshadowed in the letter from the council was subsequently confirmed by DUAP (**Letter 29/1/02**):

Your letter suggests that the proposed development will overshadow to the waters edge in the Jack Evans Boat harbour at 6:30pm midsummer. This will result in the adjacent open space identified as Chris Cunningham Park also being overshadowed at this time. The Department believes that the provisions of Clause 32B of the North Coast REP apply to this development. The clause limits Council's power to deal with a development application that would result in beaches or adjacent open space being overshadowed at the times identified above. It is also advised that the Department considers that this is a prohibition that cannot be varied by the use of State Environmental Planning Policy No 1.

Jack Evans Boat Harbour and Jack Evans Reserve are adjacent to an inland tidal estuary and not adjacent to the ocean coastline. Having received the letter from DUAP, the council obtained legal advice to the effect that the prohibition applied.

The council did not ultimately deal with the proposal as it was "called up" for determination by DUAP.

In September 2002 the council was dealing with an application to build a multi-storey development at Murphy's Road Kingscliff. The development backed onto the coastal reserve and would, if approved, overshadow parts of it between 3pm midwinter or 6:30pm midsummer.

The report to council's meeting on 4 September 2002 contained the following statements:

North Coast Regional Environmental Plan 1988

The proposed development is accompanied by an application under State Environmental Planning Policy No.1 – Development Standards in relation to clause 32B(4)(a). This clause requires:

a) on urban land at Tweed Heads, Kingscliff, Byron Bay, Ballina, Coffs Harbour or Port Macquarie, if carrying out the development would result in beaches and adjacent open space being overshadowed before 3pm midwinter or 6.30pm midsummer.

The applicant has submitted from the shadow diagrams that the proposed development will result in overshadowing of the foreshore open space prior to the prescribed times.

The applicant has submitted that the standard is unreasonable and unnecessary for the following reasons:

- The foreshore reserve is heavily vegetated
- Existing buildings in Murphy's Road result in overshadowing of the foreshore reserve and the beach prior to the relevant times.
- The area of overshadowing in mid summer is approximately 275m^2 being insignificant.

- The areas being overshadowed are not useable open passive space areas and do not contain any public amenities or facilities which the community would be expected to use

- Shadow does not extend to the beach area.

The applicant has submitted that the NSW Coastal Policy 1997 provides principles however in relation to this matter it states:

'The suggested standard in this principle may be difficult to apply in highly urbanised environments. An LEP or DCP which is tailored to local conditions and which has the overriding objective of minimising overshadowing may be required in these situations.'

The applicant has submitted that it is apparent from the note that it is difficult to achieve the objective of nil overshadowing of waterfront open space or beach areas in urban areas and therefore the standard is not appropriate in the circumstances.

Comment

It is considered that the reasoning provided by the applicant be supported and it is noted that the area of the coastal reserve is heavily vegetated and does not provide for passive recreation as other areas of coastal land nearby.

The proposed development is generally consistent with the other objectives and principles contained in the Coastal Policy.

The site has been inspected by a representative of the Coastal Council who indicated that a 10m setback from the eastern boundary would be appropriate with regards to overshadowing of the foreshore reserve.

The applicants have provided shadow diagrams for both the proposed 6m setback and suggested 10m setback. These plans show little difference between the two setbacks in relation to overshadowing impacts.

Overshadowing

The over shadowing from the proposed development is both to the coastal reserve and adjoining properties. The applicant has submitted a SEPP No.1 application in relation to the overshadowing seeking a variation to the development standard. This has been addressed in this report.

In addition the proposed development results in overshadowing of the property to the south during the winter period, being an impact on the amenity of the adjoining residence. The property to the south had alterations and additions to an existing attached dual occupancy approved in April 1997. The building is a three storey development and occupies the eastern end of the allotment.

As the allotments along Murphys Road are east west in orientation it is unavoidable that there will be overshadowing to neighbours. It is noted from Council's files that the development o the south has the living meals and balcony areas on the southern elevation and it is considered that these areas will not be significantly impacted upon by the development. It is agreed that there will be overshadowing however it is considered that the shadow impacts will not adversely impact on the living areas of the adjoining dual occupancy.

It will be seen that, at no place in either of these parts, is there direct reference to the provisions of section 32B of the North Coast Regional Plan.

When considering the Latitude 28 proposal a year earlier, the council had sought and obtained advice from DUAP that confirmed that clause 32B prevented consent where overshadowing occurred.

Clause 32B provides:

North Coast Regional Environmental Plan

32B Development control—coastal lands

(1) This clause applies to land within the region to which the NSW Coastal Policy 1997 applies.

(2) In determining an application for consent to carry out development on such land, the council must take into account:

(a) the NSW Coastal Policy 1997,

(b) the Coastline Management Manual, and

(c) the North Coast: Design Guidelines.

(3) The council must not consent to the carrying out of development which would impede public access to the foreshore.

(4) The council must not consent to the carrying out of development:

(a) on urban land at Tweed Heads, Kingscliff, Byron Bay, Ballina, Coffs Harbour or Port Macquarie, if carrying out the development would result in beaches or adjacent open space being overshadowed before 3pm midwinter (standard time) or 6.30pm midsummer (daylight saving time), or

(b) elsewhere in the region, if carrying out the development would result in beaches or waterfront open space being overshadowed before 3pm midwinter (standard time) or 7pm midsummer (daylight saving time).

The report was attempting to subsume this absolute bar to consent by adopting a discretionary view ostensibly available under Coastal Policy. This was fundamentally wrong, as the Plan was a planning instrument with binding operation. The policy, as its name suggests, was not binding, providing general principles. It was however an extremely important document, setting out the principles to be applied, "designed to guide management and planning of the coastal zone into the next century" (**Coastal Policy p. 8**).

Among the goals of the policy are:

- the natural environment be protected, rehabilitated and improved
- there be appropriate public access and use
- there be integrated planning and management.

These goals would be achieved by objectives, including:

- areas of high aesthetic quality being protected
- development complementing the surrounding environment
- minimising urban impact on the environment
- public access being increased when environmentally sustainable
- consistent and complementary decision making
- coordinated implementation of policy.

Underlying these would be strategic actions, relevantly requiring that development proposals conform to specified design and planning standards to control height, setback and scale and to ensure public access and to "ensure that beaches and foreshore open spaces are not overshadowed".

In order to give effect to Coastal Policy, the policy provided that, as one of the strategic actions:

- Local councils will be required to make new local environmental plans consistent with the Coastal Policy and to adopt planning and development controls specified in the policy where appropriate.

It is clear from the report to council of 4 September 2002, regarding the Murphy's Road proposal that the council was not recognising nor giving effect to the principles of the policy.

In March 2002 the council had received advice from Mr Webster, barrister that clause 32B should be regarded as a "development standard" in terms of SEPP 1. This would have the effect of cutting down what otherwise appears to be an absolute prohibition and allowing the council (through the DUAP delegation) to grant concurrence to a non-complying development under SEPP 1.

A year later the council was promoting the defeasance of the policy.

In the latter case, the proponent, Resort Corporation, was promoting a view that it was acceptable to ignore the policy on grounds that Murphy's Road was a "highly urbanised" environment, where the policy recognised its application was likely to be more difficult.

If the proposal was for a development along such a highly urbanised area such as Bondi or nearby beaches it might have had application. Council appears to have been dealing with the demolition of a single residence in this instance.

Professor Thom was referred to his concerns as Chair of the Coastal Council when he gave evidence at the Public Hearings.

He gave the following evidence regarding filling of the site, setback from the foreshore reserve, the beach, surf lifesaving club ad overshadowing:

MS ANNIS-BROWN: *Mr Thom, just on that Salt proposal, I understand that the coastal council had some concerns with respect to that proposal. In particular, I understand the coastal council raised concerns over the filling of the site, the set-back of the resort from the coastal reserve, and the over shadowing of the foreshore reserve. Perhaps if you could just elaborate on those issues, perhaps if we could start with the filling of the site, what were the coastal council's concerns in particular.*

PROF THOM: *You also missed one, namely the one that you were just questioning the two previous speakers about, namely the beach, and the surf lifesaving.*

MR BROAD: *I was about to come to that.*

PROF THOM: *I'm glad it wasn't forgotten.*

MS ANNIS-BROWN: *All right.*

PROF THOM: *The issue with the fill, I guess the - as you are probably aware, the area had been heavily mined for rutile zircon and ilmenite. In fact, it's probably the area that had the greatest concentration per linear metre of coast of any place in New South Wales, Queensland, maybe anywhere in the world. It was the pick of the crop, so it was mined three times, to my knowledge, may have been more, and so the surface - the soil conditions over most of the area that I understand was covered by salt, maybe not all but most of it, had been mined. So that you did not have, if you like, a natural soil condition.*

So in terms of, sort of, modelling what might happen when you added another layer of sediment over the top, you couldn't use, if you like, a natural situation to do the modelling, and so it was of concern that that uncertainty associated with what might happen with subsoil drainage given that addition and the uncertainty at the time that the matter was being discussed as to where would be the source of that sediment, gave me and the council reasons to ask the question why go in this direction.

The second issue was more of a, if you like, an issue associated with coastal aesthetics that we have, and it was agreed, and I understand the developer was in agreement with this, but certainly I understand from the planning, were going to insist on having a

vegetated fore-dune, and that vegetated fore-dune would grow to heights of up to 10 metres, say. Different types of plants would grow, particularly the native plants that were being encouraged.

The concept of exposing from say a seaward side or from the beach, the housing, and let's assume they're two storey for most of the houses going on there, that scenic view of the housing was seen to be, if you like, against the spirit of the coastal policy, because we did have, I think it's called goal 3 on - that deals with amenity, the view that we try to soften the physical character of building against the landscape, and in fact we later added to this with the development of New South Wales coastal design guidelines that came out in 2003, where we adopted the principle of design with nature.

So we saw that concept of buildings that would tower above the vegetation providing the views as was proposed by the developer to the sea was contrary to the spirit of that. So that was a concern that we had with respect - those two concerns that we had with respect to the fill.

MS ANNIS-BROWN: *There was also the issue of over-shadowing, but was that part of the set-back measures?*

PROF THOM: *Yes, the over-shadowing was more of an issue with the development of the resort. ... The other concern that I had about the structures, particularly the resort structures was that they, in my view, and it was a personal view that I held, I am a coastal geomorphologist by background - I am concerned about the future location of high investment properties close to the shoreline, for over the next 50 to 100 years we will be experiencing sea level rise of a magnitude somewhere between 20 and 80 centimetres, as the advice comes through from the inter-governmental panel on climate change. That will potentially lead to coastal erosion, and potentially lead to the beach-line getting closer to the major investment property.*

I strongly advised the developer and - we had correspondence, that the development should be further landwards. Similar, I quoted the example of the Pacific Bay Hotel at Charlesworth Bay at Coffs Harbour, as an example where a major development was located several hundred metres back from the shoreline, that it would be - still could be an economically viable investment located further back. He took the view that it would not be an economically viable investment if it was located further back, and subsequently approval was given for its current location.

T. 10/3/05 p. 1240-1242

The issues raised by Professor Thom, on behalf of the Coastal Council were referred to in the subsequent report to council when the matters were to be determined.

The principles of Coastal Policy and in turn the concerns raised by Professor Thom were averred to rather than fully discussed. In doing so, the report fails to pay sufficient attention to the importance of the policy and provided few measures that would provide a backbone supporting the policy.

For example, absent in the report is recognition of the dangerous nature of the beach, while, collaterally the report recognises the increased image that will occur:

3.7 SURF LIFESAVING FACILITIES

The subdivision design makes provision for an allotment for the provision of surf lifesaving facilities adjacent to the central park area and the Outrigger resort. The application also provides a concept plan for a 2 storey building on this site.

The applicant has offered to fund the construction of this facility and the surf lifesaving personnel in the short term and dedicate the facility to Council at a later date. It is intended that the Ray Groups' initial funding will be succeeded by funding from fees paid by the unit owners and managed by the Body Corporate. The concern with this proposal is that Council may be required at a later date to resource and man this facility, particularly as the population at SALT increases and there is a community expectation created for the provision of surf lifesaving facilities.

In light of the existing clubs along the Tweed Coast struggling in terms of providing adequate resources to meet surf lifesaving demands, this is of concern in considering whether the accept a further facility.

An urgent need has therefore been identified that a Strategic Plan for the provision of surf lifesaving facilities needs to be developed for this section of the coastline to establish what facilities and where they are required to be provided in the future. Other issues such as whether any new facility should be an outpost to existing facilities or stand alone facilities also needs to be addressed in this plan.

The applicant has commissioned Surf Lifesaving NSW to look at this issue and is currently providing the funding for such a study to be carried out. It is understood that this study will not be completed for another 4-6 months. Council has also resolved to prepare such a Plan.

In light that no such strategy is in place it is difficult to make a proper assessment of whether there is a genuine community need for a facility at this site specifically or whether there may be alternative sites where a facility could be located.

There is however no doubt that approval of this development will bring to the area a significant population increase and result in increased usage of this beach. Considering that the beach has a Class 6 rating from Surf Lifesaving NSW which indicates a relatively dangerous beach for swimmers, it would lead to the conclusion that a facility of some sort, to ensure the public safety of swimmers using the beach will be required in this location, particularly having regard to the resort developments and the number of visitors unfamiliar with the conditions who will be frequenting the area.

It is also in the interest of the resort operators to ensure that safe swimming conditions exist in proximity to their developments.

Based on this understanding the developer has agreed to fully fund and provide the facilities in consultation with Surf Lifesaving NSW and the outcomes of the Strategic Plan when finalised. Ongoing funding for the provision of these services will be via a levy per bed on the resort operators. Any consent granted by Council should contain a condition requiring this to occur.

Perhaps most importantly, the report dismisses the concerns of Coastal Council, summarily, by reference only to a second and subsequent letter from the Coastal Council:

> The Coastal Council of NSW was consulted in reference to the application as there are significant coastal issues and the Executive Officer was involved in the prelodgement consultation process. Coastal Council originally provided a response to Council raising a number of issues in which the applicant responded to. The applicant's response was forwarded to Coastal Council for further comment. Comments provided in their latest response to Council of relevance to the determination of the application are as follows: …

While the report does contain major parts of this subsequent letter, it fails to reproduce all of the letter, and importantly, the council's concerns over the dangers of the surf:

Coastal Council of NSW

26174, 18698

TWEED SHIRE COUNCIL
FILE No. DA02/1422 Pt 8
DOCUMENT No. 391363
RECD - 4 APR 2003
DOC No.
ASSIGNED TO EDOELSS
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Our Reference: S03/00564/1

31 March 2003

Dr John Griffin
General Manager
Tweed Shire Council
P O Box 816
Murwillumbah NSW 2484

Attention: Mr Garry Smith, Development Assessments

Dear Dr Griffin

DA 02/1422 FOR A 473 LOT SUBDIVISION – KINGSCLIFF

Thank you for forwarding to me the response of the Ray Group Pty Ltd to our submission on this DA. It is necessary to clarify some of the comments made in their response.

1. Consultation: reference is made to other members of Coastal Council in their various capacities who have attended meetings. Only the Chair is privileged to speak for and on behalf of the Council. This is important as the key objective of the NSW Coastal Policy is to protect the coast for *future generations*. That is not necessarily the perspective of individual interests (eg PNSW or Mr Vincent) represented on the Council, but as Chair I am obliged to keep that key objective in mind at all times. This offers the Coastal Council the role of placing developments in an ESD framework so that issues such as "setbacks" are examined with the precautionary principle in mind stretching out 100 years plus. Thus it is important not to take the positions of other representatives as the position of Coastal Council given its statutory role in providing advice as required under the NSW Coastal Policy 1997. The presence of either Julie Conlon or myself at meetings is the best indicator of a Coastal Council presence. In this context we are still of the view that Coastal Council was consulted relatively late despite the involvement of PNSW, UDAS and Mr Vincent.

2. We do not wish to comment further on any Dune Management Plan given the involvement of DLWC in consultation with TSC. The critical point for Coastal Council is the ecological integrity of a buffer zone which will from time to time be destroyed in whole or in part by storm wave attack. This means that public access should be on designated tracks to minimise dune sand disturbance. I believe the DMP will aim to do this.

3. The Coastal Council remains unconvinced on the justification for raising the site. We support a full EPA investigation of potential impacts. I have also provided, on request to David Broyd, the name of an independent groundwater hydrologist who may assist TSC with assessment of impacts.

4. The set back issues remain of concern to Coastal Council given our role in providing advice relevant to the interests of future generations. I am familiar with expert advice and respect the way in which such advice is developed. I have also been around long enough (40 + years) to have expertise in how coastal erosion has developed so I remain to be convinced by WBM or anyone else of projecting any degree of certainty into erosion estimates. Anyone familiar with IPCC reports on global change will be aware that it is very difficult to place lines on maps which will offer positions of shorelines in the future. So with respect I must still offer my view based on knowledge of shoreline erosion processes that the precautionary principle should be invoked as far as possible. This is for the interests of the investor as well as the public authority/community who will be involved with the area in the future. I simply cannot understand the argument that the economic viability of the Outrigger building is threatened by

a further setback. To argue that 100 years is a magic number for a building, and to put reconstruction into that time frame when limits are placed on where the reconstruction can take place is begging the question. As the erosion scarp approaches the footprint of the building then the Nielsen, Lord, Poulos point becomes relevant. It is cited in the Coastal Council report as another reason to be cautious on a potentially receding shoreline, not to be dismissed as irrelevant.

5. To say that there needs to be equity in approval processes with Casuarina development avoids a key reason for SEPP71. Experience from developments such as Casuarina has led Coastal Council to offer advice on the need to create a more consistent and stringent method for assessing developments in the Coastal Zone of NSW. The Coastal Zone has special legislative status in NSW and must be treated accordingly by all consent authorities. Unfortunately Coastal Council in its early incarnation was not involved with Casuarina: under SEPP71 it would be and hence it is possible a different outcome may have resulted.

6. The surf life saving issue and resulting liabilities for rescue, injury or death remains a difficult issue. I would advise Tweed Shire Council to consult with Angus Gordon General Manager of Pittwater Council on this matter. He is well versed with legal and management issues associated with swimming and surfing on Crown Land. Incidentally a surf rating of 6 is very high and to say that "lives can be protected" is expecting from TSC a long-term commitment which must be a concern? Will the hotel and residents be permanently levied to ensure lifeguard facilities during daylight hours at this site?

I hope these additional comments are useful to Tweed Shire Council

Yours sincerely

Bruce Thom
Chair

CC: David Papps, Executive Director, PNSW, Regional and Rural NSW Division
Steve Murray, RPC, PNSW North Coast

The summary provided later in this section, set out below, and the analysis elsewhere in the report fails to emphasise the importance of Coastal Policy.

Issues raised by the Coastal Council are addressed throughout this report however in summary it is considered difficult to require of justify further setting back of the development having regard to Council's existing policies and approach to managing coastal erosion issues particularly having regard that the WBM report shows the 100 hazard line as being seaward of any development on this site. Issues in regards to the merits of filling the site must be weighted up against the socio-economic benefits, which will derive from the establishment of a major international resort within this area. In regards to surf lifesaving facilities from the NSW Coastal Council response it is implied that the developer should be responsible for the provisions of surf lifesaving facilities. Negotiations with the developer have reached a point where the developer has agreed to the provision of these services and facilities and that the cost of ongoing running of these facilities will be paid for by the future resort owners and operator and managed by the Resort Body Corporate. Conditions of consent are proposed which requires this to occur.

As foreshadowed by Professor Thom in his letter of 31 March 2003, when he wrote:

"I simply cannot understand the argument that the economic viability of the Outrigger building is threatened by a further setback".

Ultimately the report went to the council with a late addendum, that read:

> C. Council adopt a policy statement as follows: -
>
> *"The filling of the site for the SALT development has been endorsed by Council given the resultant financial benefits to the overall funding package that enables viability of tourism development and the consequent economic and employment benefits to the Shire. This endorsement is based on merit assessment and factors that are pertinent to this development application should not be interpreted by any other landowners and/or developers as setting any form of precedent for other development proposals on the Tweed Coast".*

Through 2001 to 2003 the council variously cut down the intended role of Coastal Policy. Perhaps the weakness was rooted in the role of the Coastal Council.

> MR BROAD: *The role the coastal council had was an advisory role - - -*
>
> PROF THOM: *Correct.*
>
> MR BROAD: *- - - and a council could simply ignore its advices.*
>
> PROF THOM: *That's correct. The coastal council's role, as you say, and that was defined in Part 2 of the old Coastal Protection Act, as an advisory body.*
>
> MR BROAD: *In turn, in respect of Salt, you wrote to DIPNR; was DIPNR bound to accept your views?*
>
> PROF THOM: *No. ...*

T. 10/3/05 p. 1242-1243

3.5.14 Designated Development

The SALT proposal anticipated substantial earthworks on the site, firstly, to remediate areas with increased radioactivity levels associated with the sand mining that had previously occurred and, secondly, to raise the levels by about 2 –3 metres over the entire site.

The SEE accompanying the development application anticipated that approximately 700,000m^3 of sand would be imported onto the site. Additionally temporary borrow pits would be established on the site from which sand would be drawn and placed on other parts, as the work proceeded.

The developer initially proposed to transport the 700,000m^3 of imported sand either by road or hydraulically.

The size of this enterprise is demonstrated by an analysis of the road transportation alternative prepared by Mr Morgan, set out below (**memo 18/9/02**).

> I have reviewed the above DA and comment as follows.
> The application is firstly for the importation of 700 000m3 of fill to site hydraulically or by road. There are no details of proposed haulage routes, time line for haulage, traffic impacts of haulage or noise of haulage vehicles & road life impacts. Whilst the application indicates hydraulic placement as preferred the DA is for Road Haulage with a subsequent future DA for hydraulic placement if determined feasable.
> Assuming a truck & trailer carries 17m3, it equates to 41176 loaded trucks of fill and a total of 82,353 truck trips for the filling operation.
> Obviously the time frame for the haulage is critical to the impacts raised above, if for instance 6 months was used it would equate to 624 truck movements per day or 62 per hour which is considered significant.

In reviewing the application and the supporting material, the council raised concerns over the extent and depth of radioactive sands on the site. It identified at least a former dam site, possibly a tailings dump, where high radioactivity levels might exist (**council letter 9/10/02**).

The SEE raised the remediation of this land in the context of SEPP 55:

> STATE ENVIRONMENTAL PLANNING POLICY NO. 55 – REMEDIATION OF LAND
>
> In summary, clause 7 of this policy provides that the consent authority must not consent to the carrying out of any development on land unless it has considered, among other things, whether the land is contaminated, based on a preliminary investigation of the land carried out in accordance with the Contaminated Land Planning Guidelines.
>
> The Contaminated Land Planning Guidelines (Department of Urban Affairs and Planning, Environment Protection Authority, 1998) provide information relating to preliminary contamination investigations. In addition, Council has adopted a Contaminated Land Policy, which contains details of the information required to be submitted with applications for development.
>
> As reflected in Condition 91 of Development Consent K99/1755 issued by the Minister on 18 May 2000, an ilmenite dump exists in the southwestern area of the site. This area, and the site generally have been subjected to a detailed contamination assessment including surface and sub-surface measurement of radioactivity levels. As a consequence of these investigations, a Management Plan has been prepared proposing mixing of areas with higher concentrations of radioactivity with clean sand to dilute levels to below the threshold level. A copy of the Management Plan relating to this issue is attached at **Annexure J**. Remediation will be carried out as an integral part of the bulk earthworks proposed for the site consistent with the requirements of this State Environmental Planning Policy, The Contaminated Land Planning Guidelines and Council's Contaminated Land Policy.

Each of these aspects of the proposal might be described as "designated development" or might otherwise be prohibited within the zoning of the land. In order to determine its course, the council sought advice from its barrister, Mr Webster SC.

Mr Webster's advice was that both aspects, the filling and the remediation, were "designated development".

The question that then arose was whether the council could consider the development applications.

In order to resolve the issue, amendments to the proposal were suggested by the proponent's engineers.

1. The area of contamination and the applicable remediation works (which is the 133,000 m^3 previously stated in the Earthworks Management Plan), for which the area is now clearly identified, would be contained within an area that would be removed from the current Development Application and would become the subject of a future DA which would require and EIS. Hence, removing the requirement for an EIS in regards to contamination from this current application.
2. The current DA area would be reduced as above and the preparation works required to allow the future imported fill to be placed on the site would be undertaken by methods that removed only the vegetation and did not otherwise disturb the existing materials on site (That is, that there would be no cut/winning/extraction of sand material involved in the initial site preparation).
3. The 180,000 m3 of cut/fill material that was to be conducted and as mentioned in the Earthworks Management Plan would not be undertaken. This material would remain untouched hence, this would not be an extractive industry.
4. The importation of the 700,000 m^3 of fill material will definitely be hydraulically delivered and placed. The option to deliver the fill material by truck is deleted. The placement of this material on site will be undertaken in a single operation. That is that there will be no storing, stockpiling or re-using of the material on site because as the sand slurry exits the end of the pumped pipeline it is immediately placed in its final position and other than final trimming (detailed profiling) this material will not be moved a second time.
5. After these above mentioned works are completed, all following works will be in the form of normal civil engineering subdivisional works.

On 21 November 2002 the amendment was formalised by Darryl Anderson Consulting:

Darryl Anderson Consulting Pty Ltd

TOWN PLANNING & DEVELOPMENT CONSULTANTS

21 November 2002

Our Ref: SALT 01/02 Pt 3

1180.10

TWEED SHIRE COUNCIL
FILE No. DA02/1422 Pt2
DOCUMENT No. 407297
RECD 21 NOV 2002
BOX No.
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Your Ref: DA 02/1422

The General Manager
Tweed Shire Council
PO Box 816
Murwillumbah NSW 2484

Attn: Stephen Enders

Dear Sir

Development Application No. 02/1422 – Proposed Subdivision of Lot 194, 301 and 312 DP 755701, Lot 490 DP 4702 and Lot 500 DP 727470, Tweed Coast Road, Kingscliff – "SALT"

As recently agreed with Council officers, we hereby amend the above development application pursuant to Clause 55 of the Environmental Planning and Assessment Regulation, 2000. In summary, the amendments include the following;

- The 700,000 m^3 of fill material will be conveyed to the site by hydraulic means and not by road transport. Approximately 100,000 m^3 of cut and fill is proposed on site. Details of the earthworks program are contained in the amended Bulk Earthworks Management Plan and amended Engineering Plans, copies of which are attached.

- No "development" will be carried out on that part of the site (generally west of the new Coast Road) containing elevated radiation levels with the exception of the drainage corridor shown on the amended plans. We submit that the amended application addresses the requirements of Clause 7 of State Environmental Planning Policy No. 55 – Remediation of Land in that that part of the site, which is proposed for residential/tourist development, does not contain elevated radiation levels and is therefore suitable for the proposed development. In so far as the drainage corridor is concerned, it is submitted that based on the existing contamination information available, Council can be satisfied that this corridor is suitable for the proposed drainage outfall. It should be noted that a separate development application would be submitted within approximately 3 months for remediation of the remainder of the site in general accordance with the Remediation Action Plan previously submitted.

  We submit that the amended application is not caught by the definition of contaminated soil treatment works in Clause 15(c)(ii or iii) of Schedule 3 of the Regulations in that the area to be disturbed by the drainage corridor does not involve the treatment of more than 30,000 m^3 of contaminated soil nor will it result in the disturbance of more than an aggregate area of 3 ha of contaminated soil. Council may therefore process the amended application on the basis that it is not designated development pursuant to Clause 15 of Schedule 3.

- A reduction in residential lot yields to 333 lots as indicated on the attached table. Development of the site in accordance with the amended proposal results in the following yields;

Total Dwellings Proposed	457
Total Resort Rooms	534

  Significantly more resorf rooms than dwellings are proposed and accordingly the amended proposal satisfies the requirements of Schedule 3 of Tweed LEP 2000.

Its effect was to remove the area of the tailings dump from the application and to promote the view that fill and the removal of sands were "earthwork" and thereby capable of consent.

If accepted, this view would at least remove the need to prepare an EIS.

Collaterally, the proponent had instituted proceedings in the L&E Court that intended to provide a determination of the issue.

In December 2002 Mr Ayling SC provided an advice to the council. In that advice Mr Ayling noted:

> **Permissibility.** The basis upon which it has been suggested that the proposal may not be permissible is, as I understand it, that site works necessary to provide a suitable plane surface to allow buildings, roads and drains to be constructed will, because the land is at present dunal and topographically quite irregular, require approximately 100,000m^3 of sand or sandy soil to be "cut" (that is, removed from its position *in situ*). That sand or soil will be placed in lower-lying areas as fill. (In addition, a further 700,000m^3 of sand will be imported to the site for filling. I do not understand the application to relate to the excavation site elsewhere, or the hydraulic transfer works themselves.)

This statement may have been incorrect as it appears that the proposal was for at least 1 borrow pit, 3 metres deep and 4.5 hectares in area (**SEE for section 96 modification June 2003 p. 2**).

Any consent based on Mr Ayling's advice must be suspect.

Importantly, the council does not appear to have considered the extraction of the sand from the borrow pit as an "extractive industry" not withstanding that the definition includes works:

> (b) that disturb or will disturb a total surface area of more than 2 hectares of land by:
>
> (i) clearing or excavating, or
> (ii) constructing dams, ponds, drains, roads or conveyors, or
> (iii) storing or depositing overburden, extractive material or tailings, or

The report to councils meeting on 23 April 2003 records that court proceeding's had been instituted regarding the filling process:

> While the original applications were lodged in October 2002 there was a significant delay involving legal clarification through the Land and Environment Court on whether the proposals included designated development. Following that clarification from the Court the development applications were exhibited until 21 February 2003.

Council's file contains a copy of its submission to the L&E Court; it describes the filling proposal as:

> In this case, the proposal, if it is to be categorised in the conventional way for the present purpose, is for subdivision. The site is very irregular in its topography and could not be made suitable for that use (if subdivision is indeed a use) unless it were subjected first to substantial cutting and filling. It is understood that cut on site is expected to produce about 100,000m^3 of material for re-use, and that a further 700,000m^3 of sand is to be brought from a distant site by hydraulic transfer. Further, part of the site is contaminated as a result of past mining activity and must in due course be "remediated" (although any actual remediation *may* not be a part of the present application, depending upon whether Regulation 55 has been complied with in recent days). Any area of contaminated land is, however, to be excavated and filled for drainage purposes, and soil removed from the excavation will be stored on site. If the Court is of the view that Pain J was correct in *Maxwell*, it will be necessary to look at these specific parts of the proposal in more detail, as it is arguable that one or the other (that is, the cut on site to produce fill material or the storage of contaminated soil), is designated in terms of Schedule 3, or that both are.

It will be seen that this fails to refer to the 3 metre deep borrow pit extending over an area of 4.5 hectares.

The Inquiry does not know the detail or fate of these proceedings, there was some suggestion that the matter did not proceed to a hearing and judgement.

If there were concerns that an ancillary part of the submission application involved designated development, they should have been enlivened by the subsequent application to modify the consent a mere two months after it had been granted.

Council was being asked to modify the consent to allow a borrow pit about 6.5m deep extending over an area of about 11.5ha. This was to increase the volume of the pit by about 5.5 times.

The supporting statement by Cardno MBK provided:

> Subsequent to the approval of the above mentioned management plan, the scope of works with regard to the on site borrow to fill changed to the extent that significantly larger borrow pits than were originally envisaged will be created on site to be later backfilled with hydraulically imported sand. Due to these changes the handling of material on site during the two of the six stages differs from that contained in the approved Earthworks Management Plan.

Clearly, the works could not be described as "cutting and filling" in the terms of the council's submission to the court.

Sand was being extracted from a part of the land, about 11.5ha in area to a depth of about 6.5m. The pit formed by this extraction would be filled at a later date. This was not an instance where sand was being moved around the site, levelling its surface.

Mr Musgrave dismissed the changes, summarily (**memo 15/8/03**).

> The applicants have submitted a S96 application to modify the **Earthworks Management Plan** associated with the bulk of the earthworks for the SALT development at South Kingscliff.
>
> The proposed change relates to the time schedule associated with te importation of dredged sand and the relocation of borrow sand excavated on-site.

Mr McGavin, who prepared the report to council's meeting on 1 October 2003, summarised the proposals as:

> The amended application for the "Salt" subdivision seeks to modify the method of bulk earthworks associated with the development. The amendment proposes to gain the fill material for the northern residential stages of the subdivision from within the borrow pits located on the site rather than via the hydraulic pipeline from the Action Sands extraction site at Chinderah.

The report described this application in conjunction with other applications to change the source of the sand and deliver it by hydraulic methods.

Relevant portions of the report are set out below:

> The amended proposal currently before Council involves using sand from the approved borrow pit sites to fill the northern stages of the subdivision rather than the approved hydraulic sand pumping method. Sand will still be required to be pumped to the site to fill the borrow pits to the approved finished levels.

The proposal will shorten the length of time required to complete the filling of the northern stages given that the approved pipeline would take six months to complete.

The applicant has provided the following explanation and rationalisation for the amended proposal-

"In summary, the earthworks Management Plan approved by Condition 20(a) and Condition 52 proposed a borrow pit in the south eastern (Stage 7) part of the site to obtain fill material to create the Outrigger Hotel platform. It was intended that imported fill material would then be placed (hydraulically) on Stages 1, 2, 3, 4, 5, 6 and ultimately Stage 7 (including the temporary borrow pit) to achieve the design fill levels.

The temporary borrow pit on Stage 7 was to be 3 m deep and approximately 4.5 ha in area based on the quantity required to establish the Outrigger Hotel platform, such that that project could commence promptly.

Following further review of the projects critical path analysis and in view of the lead time required to establish the sand pumping pipeline (up to 6 months) it is now proposed to expand the "temporary borrow pits" within Stage 7 and Stage 2 to yield a volume of approximately 450,000 m^3 from an area of approximately 11.5 ha to a depth of approximately 6.5 m. This approach will enable Stages 1 and 2 (and the Outrigger site) to be filled promptly such that civil works can proceed concurrently and without delay. It also has the advantage of avoiding the need to temporarily "revegetate" the filled areas as completion to finished surface levels can be carried out as filling is placed, thus reducing the cost and implication of revegetation work.

More importantly, the revised strategy will: -

- *Remove the sand pumping process off the critical path of the first half/phase of the project;*
- *Ensure that the first phase of the project is not delayed because of failures in the pumping system (i.e. down time, blockages etc) and this benefits the community by completing the major subdivisional works 3 to 4 months earlier;*
- *Allows a far better control of the tail water as the slurry will be contained in 2 pits/locations (eg. the sand delivery will only be over say 20% of the site and not say 50% of the site as currently approved) and hence a more controlled system will arise for the protection of the aquifer;*
- *Substantially reduces the amount of double handling of the wet sand as it will now simply be placed directly into the borrow pits, after separation beside the pits. This again assists with control over the protection of the aquifer.*

(i) The provisions of any environmental planning instrument

Tweed Local Environmental Plan 2000

The proposal is permissible with consent. The amendment does not alter the statutory assessment or requirements that were considered by Council during the assessment of the subdivision approval. The issues raised by the Tweed LEP, the North Coast REP and relevant SEPP's are not altered by the amended application.

The impacts of the altered earthworks procedure are substantially the same as the approved procedure.

LEGAL/RESOURCE/FINANCIAL IMPLICATIONS

None

CONCLUSION
It is considered that the amended proposal is an efficient method to carry out the required earthworks resulting in shortened construction times and improved environmental management.

The issue was taken up with Mr McGavin during the Public Hearings:

MR BROAD: *Can I lead off with a couple of questions? Do I take it that somewhere shortly after you arrived at the council you became involved in the development application for the Salt development?*

MR McGAVIN: *That's correct.*

MR BROAD: *That had been dealt with in about April that year.*

MR McGAVIN: *Thereabouts, yes.*

MR BROAD: *And in about June Council was called upon to consider an application under section 96 - - -*

MR McGAVIN: *Yes.*

MR BROAD: *- - - of the Environmental Planning Assessment Act. Were you involved in that process?*

MR McGAVIN: *Yes.*

MR BROAD: *Now, in dealing with that process did you have regard to the history of the file in respect of the Salt development?*

MR McGAVIN: *Yes.*

MR BROAD: *It was an application which sought to change the area of the sand borrow pit and also its depth. Do you recall that application?*

MR McGAVIN: *I do; that's correct.*

MR BROAD: *I think, ultimately, the application was approved by Council.*

MR McGAVIN: *Yes, it was.*

MR BROAD: *In the course of looking at that matter did you have regard to the advice given to the Council by Mr Webster, a barrister of Sydney?*

MR McGAVIN: *I can't recall specifically.*

MR BROAD: *Mr Webster had given the council some advice which suggested that the initial proposals associated with the Salt development may involved designated development.*

MR McGAVIN: *Okay.*

MR BROAD: *Do you recall seeing that advice?*

MR McGAVIN: *I remember the debate about whether the Salt development had a designated development component or it could be classified as designated development.*

MR BROAD: *There were two components in the argument from Mr Webster: one is the re-mediation of the former sand mining tailing was done [sic. tailings dump]; and the other related to the amount of sand which was to be excavated on site and used elsewhere. Did you have any regard - - -*

MR McGAVIN: *I knew that at the time there was similar cases going about whether a designated development - if a component of an application is designated development or part of the application may trigger designated development, that it didn't necessarily mean that the whole application became designated development. So if it was only a component of a larger proposal, then it didn't necessarily trigger designated development provisions for the whole development.*

MR BROAD: *Did you consider whether the increase in the area of the depth - and I think you will find it's probably about five and a half times the volume of sand that was previously proposed to be taken from that borrow pit - would potentially trigger designated development?*

MR McGAVIN: *Yes, there's a lot to consider when you're looking at a section 96 application.*

MR BROAD: *My question is a factual question, not whether - the matters you have to consider. The factual question is whether you did consider it.*

MR McGAVIN: *I would have considered that, along with whether it required a fresh application as well.*

MR BROAD: *Do you recall whether you reported to Council on that?*

MR McGAVIN: *No, I don't think I reported to Council on that specific matter.*

MR BROAD: *Section 96 gives a power to a council to modify a consent - or to a consent authority to modify a consent in certain somewhat limited circumstances. Have you been called upon to consider the extent to which those circumstances apply?*

MR McGAVIN: *Yes.*

MR BROAD: *On a number of occasions?*

MR McGAVIN: *Yes, the threshold test of whether it's substantially the same development.*

MR BROAD: *And in considering, say, a significant increase in something like a borrow pit, what sort of tests do you apply?*

MR McGAVIN: *I think there's probably two that you look at initially. It's the quantitative assessment: the numbers, the amount and those types of things; and also the qualitative assessment as well: what is the nature of the change and what's the outcome of those changes, how would that development be changed in a character-type - looking at its character in relation to the changes.*

T. 3/3/05 p. 841-843

Section 3 Addendum 3.2.4.1

DIPNR – Examples of public objections to development applications.

Application Number: DA 477-11-2003
Location: South Kingscliff
Estimated Costs: $35,000,000
FTE Jobs Created: 611
Submission received: 13
Objection issues raised by public:

(a) Height of buildings

"Consideration: The land has a three storey height limit under Tweed LEP 2000 above natural ground level. It is noted that the site is to be substantially filled to obtain better ocean views and mitigating the need for unauthorised vegetation removal from the coastal reserve. … Given the development's non-compliance with the current definition of height as defined by Tweed LEP 2000, an objection under SEPP No. 1 – Development Standards (SEPP 1) has been lodged by the applicant…
Resolution: It is considered that the anticipated impact of the development's height in terms of visual impact will be outweighed by the embellishment proposal on the adjacent reserve and the social and economic benefits accruing from the development. The appropriate concurrences, where required, have been granted subject to appropriate conditions."

Application Number: DA 176-04-2003
Location: Lot 1 DP 247808, Pandanus Parade, Cabarita.
Estimated Costs: $18,750,000
FTE Jobs Created: 68
Submission received: " A number of submissions have been received from local residents objecting to the proposed development"
Objection issues raised by public:

(a) Loss of public tavern

"Ultimately it was decided to remove the tavern component of the proposed redevelopment primarily because of the negative impact of a hotel in a development in a development incorporating accommodation and other commercial tenancies catering to the family market. The value of the prime beachfront land has also made it financially undesirable to the owners to continue to operate the hotel in its current location.
As liquor licensing regulations prohibit the licences from being relocated further than 1km from the original locations, it is critical that Resort Corp relocate the tavern within the Cabarita township, otherwise these licences will be lost. Resort Corp has indicated that they intend to relocate the hotel/tavern to a temporary location within 6 months after the exiting tavern closes its doors, which will trade until such a time as it can be permanently relocated to a permanent location within town – possibly within a new Cabarita Beach surf club, which is intended to be built on a block on the opposite side of Pandanus Parade to the current tavern site. It is therefore not envisaged that the tavern will be lost to the town for a long period of time as a social meeting place for local residents and beach users."

(b) Overshadowing

"Obviously properties to the south of the subject site will be overshadowed to a degree in the afternoon, but the degree of overshadowing is tempered by the significant difference in existing ground levels (with the subject site being excavated substantially more in the past than adjoining properties to the south) and the shadow cast by existing established vegetation. In this regard, the four storey component of the development will have no additional impact. The beach itself will not be overshadowed at any time by the proposed building.

Application Number: DA 456-10-2003
Location: Lot 100 DP 775892, Lot 2 DP 758279, Lot 1 DP 962784, Lot 1 DP 962785, Lot B DP 332137, Lot 12, 13 and 14 DP 759009, Lot 1 DP 963896 and Lot A DP 101034.
Estimated Costs: $44,000,000
FTE Jobs Created: 550
Submission received: 9 Public submissions – 4 objections.
Objection issues raised by public:

(a) Height of buildings and potential over shadowing

"It has been identified that the proposal will overshadow Chris Cunningham Park in midsummer and as such a SEPP No. 1 objection was included as part of the DA submission."

(b) Increased traffic and lack of off-street parking (existing)

"Vehicular movement within the site is not supported by the Department. As such it has been discussed with Council that prior to roads approval being granted, the proposal be amended to ensure appropriate turning spaces can be established along Navigation Lane and therefore no require movement through the site. This position is supported and appropriate conditions have been included in the recommended conditions of consent."

Application Number: DA 492-11-2003
Location: Lot 4 Section 4 DP 172565, 30 Marine Parade, Kingscliff.
Estimated Costs: $1,900,000
FTE Jobs Created: 14
Submission received: from local community.
Objection issues raised by public:

(a) Height

"Consideration: The land has a three storey height limit under TLEP 2000 above natural ground level. Due to the development's non-compliance with the current definition of height, an objective under SEPP No. 1 – Development Standards (SEPP 1) has been lodged by the applicant.
Resolution: It is considered that the impact of the development's height in terms of visual impact will be minimal from Marine Parade as the fourth storey is setback 17m from the front and consists of the life area and lobby. This structure will not be visible from the street or the foreshore. However it is visible from the foreshore park. The development however, is consistent in height with the adjoining property.
The appropriate concurrences have been granted subject to conditions."

(b) Over shadowing of the foreshore.

"Consideration: Overshadowing of beaches is not permissible under SEPP71 and the NCREP….
Resolution: The overshadowing is considered minimal encroaching approximately 4m on an area with predominant tree cover adjacent o Marine Parade…. This degree of overshadowing is considered acceptable with minimal environmental impact and impact on dune stability. The appropriate concurrences have been granted subject to conditions."

(c) Loss of view

"Consideration: Adjoining properties to the south of the development currently enjoy panoramic views. The proposed development will reduce the horizon view, however views to the west and east will still be available.
Resolution: The loss of partial view can not be avoided and maintaining partial view and the incorporation of view sharing is a reasonable outcome".

(d) Loss of property value

"Consideration: The proposed development complies with the zone and relevant instruments. It is situated on a boundary to residential zone.
Resolution: Issue noted."

Application Number: DA 175-04-2003

Location: Lot 54, Casuarina Way, South Kingscliff
Estimated Costs: $5,000,000
FTE Jobs Created: 55
Submission received: "No public submissions were received regarding the Application."

Application Number: DA 175-04-2003

Location: Lot 463 DP 1040725, Sassafras Street, Pottsville
Submission received: 20
Objection issues raised by public:

(a) Absence of embellished playing fields

The Applicant has entered into a deed of agreement with the Tweed Shire Council ensuring the developers commit to developing a playing field on 4ha of land already dedicated to the council. It will form a separate development application. Passive recreation opportunity will be introduced through the subdivision.

(b) Ambiguous dedication of Lands

Objection was raised to the ambiguity of lands to be dedicated to Council. The proposed dedication as identified by the Michel Group Services Plan No. 5695-153A identifies 104.2ha to be dedicated to Council broken down as 17.78ha of 2(c) land, 73.84ha of land zoned 1(a) and 7 (a) and 12.62ha of land zoned 7(a) and 7(l). Contrary information is then presented indicating that part of this land is then dedicated as being residual common lands to the subdivision.
The applicant has agreed that the dedication of 104.42ha be maintained and placed under a protective covenant as a condition of planning which will restrict the use.

Governance and the Community

Governance and the Community

4.1 *Councillor's Relationships with Developers*

4.1.1 Community Attitudes Towards the Council

The role of a councillor is defined in section 232 of the Act. There are two parts to the section. The first focuses on a councillor's role as a member of the governing body, and the second describes the role as an elected person. The first part emphasises the governance duties of a councillor including the allocation of resources, the creation and review of policies, objectives and criteria related to regulatory functions, and the review of performance, management plans and revenue policies of the council. The second part enjoins a councillor to represent the interests of the residents and ratepayers, to provide leadership and guidance to the community, and to facilitate communications between the community and the council.

The various dictates of the Act might be summed up as requiring councillors to provide good governance in the context of representing the interests of the community. The Terms of Reference obliged the Inquiry to consider a number of specific issues, each of which related to the governance of the council.

In both written and oral submissions to the Inquiry a number of people made criticisms of the majority group of councillors, claiming that their relationships with some proponents of development were too close, and that this coloured their actions in relation to planning and development processes (3) in particular, and more generally their governance of the council.

The kind of criticisms made against the majority councillors is summarised in the following extract from **submission 123** (Harvey):

3. **The relationship between elected representatives and proponents of development is too close.**

The direct family relationship of Councillor R. Brinsmead to Resort Corp is a major concern that cannot be allayed by his abstaining from voting on issues of direct involvement.

The close relationship between the Mayor, W. Polglase, and the Ray Group has already been discussed under a previous term of reference (2).

The relationships between the pro-development Councillors and developers cannot be above suspicion because of the inordinately large level of funds provided to the former group by the latter group during the recent Council elections. Claims by the pro-development Councillors that they did not know exactly which developers provided what funds are spurious. It is of sufficient benefit to the developer industry if there is a general bias toward developers by the pro-development 'block' of Councillors. There is a clear track record of granting concessions and exemptions (such as the provision of car parks and public open space) to developers and looking favourably upon serial amendments to change original approval conditions.

Despite the earlier Bulford Inquiry finding that Councillor R. Brinsmead was "too close to developers", he has continued to promote developers' interests publicly in a biased manner. (For example, his letter "Criticism of Ray Group Unwarranted" in the Daily News.)

There appears to be a network of developers, large scale landholders seeking developments, publishers (Tweed Weekly News), businessmen and Councillors with both formal (e.g. Chamber of Commerce) and informal ties that maintain an ongoing media campaign in favour of developers, pro-development Councillors, and (more recently) an attempt to undermine the Inquiry.

4. **The elected representatives of the Council are not in a position to direct the affairs of Council in accordance with the Act.**

The pro-development majority were elected under false pretences by misleading the public that they were 'independents' with a balanced outlook. The 'block' voting approach of the pro-development group (with only a few token exceptions) shows that democracy is not operating at the local government level.

Public comments by the Mayor, W. Polglase, about the absence of environmental sensitivities in Lot 490 because it previously had been sand mined reveal incompetence in directing environmental planning. Cudgen Creek, running adjacent to Lot 490, is a fish nursery and is environmentally sensitive. A policy of neglect of environments that previously have been degraded through sandmining and arguing for their development instead of restoration and protection is unacceptable in a local planning authority.

The contempt displayed by members of the majority block of Councillors towards the Public Inquiry is an indication of their lack of capacity to direct the Council in a proper manner.

There were a number of submissions that presented a contrary view (**submission 213 Leybourne**):

REF: Tweed Shire Council Public Inquiry

The present Council was elected by the residents and ratepayers of the Tweed Shire, and I feel that this democratic process should be allowed to follow its full course.
If the electorate is unhappy with the Councils performance, they can reflect this dissatisfaction at the next Council elections.

The community at large have shown their support by electing the majority of the previous council to continue the growth, stability and healthy community of the Tweed Shire in a responsible manner.

My personal view is that the Council are representing the best interests of the community by consultation, workshops and community involvement at all levels of the decision making process in regard to development in the Tweed Shire while adhering to the strict laws and guidelines the State government has laid down. As a member of the Tweed Shire Strategic Planning Committee, in the capacity of community representative, I saw first hand how every effort was made to consult, listen to, and learn from all sectors large and small, with each being as important as the other. The process of consultation and mind set to "get it right" impressed me greatly.

I do recognise that the Council have to make hard decisions in planning for the future of the Tweed Shire that do not please some members of the community, that being the case in all areas of government whether it be Federal, State or local, but my experience has been that "the door" is always open, with council willing to meet and explain any areas that are unclear on a wide range of issues, and participate readily in community festivals and events.

The general perception is that the community finds the Council very accessible, accountable and transparent, with the right balance of strength of leadership and management skills and that it is a Council working with great pride, determination and dedication for the betterment of the Tweed Shire in present day and the future.

As a resident and business person in the Tweed for the last 20 years, I can say that I sincerely believe that the elected representatives have adequately, appropriately and reasonably carried out their responsibilities in the best interests of the "majority" of ratepayers and residents in an environment free from conflicts of interest.
Note: To please **"all"** the people all of the time would be "a perfect world".

I genuinely hope that the findings of the Inquiry recommend that the present day Tweed Shire Council stay in office to further maintain the management of our unique area as voted by the electorate.

Numerically the number of submissions in favour of the Council, and the majority councillors, outweighed those that were critical. The difference between the two streams of submissions (anti- and pro-) was in the level of detail in their arguments. Very few of the pro-council submissions were as reasoned and articulate as submission 213. In many of the submissions supporting the Council and councillors, the writers were clearly passionate in their support, but commonly failed to present evidence that was directed at the Terms of Reference of the Inquiry. There were many references to democracy and a general assumption that the central issue of the Inquiry was whether or not the Council might be sacked. Such a focus was premature and irrelevant to the task of the Inquiry: the gathering of evidence related to the Terms of Reference. No findings could be made until all the evidence was gathered and analysed. The repeated phrase "don't sack our Council" was unaccompanied any reference to the Terms of Reference.

Many of the submissions supportive of the Council appeared to be driven by the writers' dislike of the State member for the area. More broadly, there was a strong sense of conspiracy: the Inquiry was presented as a "plot" by the State government in Sydney. There were a number of submissions that sought to express the writers' antipathy to the Inquiry. The Inquiry obtained a video of a meeting protesting against the holding of an Inquiry. It was well attended, and was held at the South Tweed Sports Club on 18 January, 2005. The attendees were exhorted to write a submission to the Inquiry to say that they did not want the Council to be sacked, and many did just that. There was a rush of short submissions repeating the refrain in the days following the rally. When the writers of such letters appeared at the Public Hearings they confessed that they had not read the Terms of Reference.

The "Fight Back" group that organised the 18 January meeting also produced a newsletter. The constant theme in the newsletters suggested that the local State member (Neville Newell) would sack the Council, and replace it with a "Neville Newell puppet". The fact was that Neville Newell had no role in relation to the Inquiry, and certainly no powers to sack the Council. The newsletter urged its readers to 'send a letter to the Inquiry stating "Do not sack this duly elected Council". Many did send a submission, but did not get beyond the mantra: "Do not sack this duly elected Council". The letters generally provided no information relevant to the Inquiry's Terms of Reference; this is not surprising because the newsletters did not mention what the Terms of Reference were. Instead of attempting to inform the Inquiry the "Fight Back" group engaged in a grubby and irrelevant exercise in State politics, with extravagantly false claims that the Inquiry would cost NSW ratepayers in excess of $5 million. The newsletter focused on State issues (police, rail, hospitals) that were totally irrelevant to the appraisal of the governance issues laid down by the Terms of Reference.

THE TWEED Fights back!

Newsletter Date
15 January 2005
Volume 1, Issue 1
Defending the Tweed

Tweed's declaration to Neville Newell MP

"Don't sack this Council to cover up your failings!"

Inside Stories

Special points of interest:

* Warringah sacking - similarities with the Tweed Council
* What did Mr Newell say on the 10th November 2004
* Wintersun Donation - monumental blunder!
* Neville Newell MP - what his Labor Party friends think of him!
* Fight Back Forum How You Can Help

On the 27th March 2004, residents of the Tweed Shire went to the polls to elect a new Council. Following on from a lengthy count (11) candidates were identified to serve the community as local Councillors. Immediately the results were announced one candidate who missed out challenged the result requiring an expensive re-count (cost to Council $8,000).

On the 21st April 2004 the poll was declared with no change to the original result & Council finally got under way.

On the 10th November 2004, just over 6 months later, Minister for Local Government Tony Kelly & his Parliamentary Secretary Neville Newell announced a Royal Commission-like Inquiry into the Tweed Shire Council. On this same day both these politicians contemptuously pointed the finger of blame for the Inquiry directly at the majority bloc of Councillors.

Ominously, the NSW Government has conducted many of these same Inquiries into various Councils over the past (10) years with all Councils being sacked. Sackings have occurred even where no evidence of wrongdoing has been found & where no recommendations of further follow up were made to the Police, ICAC or the Dept Local Government.

Neville Newells minders want to sack this Council to divert attention away from his poor performance as a local Member of Parliament.

Neville Newell wants to sack the Tweed Council to divert attention away from his own political short comings!

Now most people were resigned to accept his poor representation until the next state election but he has stirred the complacency within this Tweed over this expensive and totally unnecessary attack on local democracy!

Mr Newell you may have woken the sleeping giant!

Warringah Council sacked! - zealots & conspirators" the problem! (just like the Tweed!)

Extract from Public Inquiry Report - Warringah Council

The dominant group within the Elected Body has argued that the problems of Warringah Council have been caused by a small group of people, variously described as zealots & conspirators. The core of this argument is that a few people who stood for election in 1999, and were not successful, have endeavored since then to bring the Council down. There is evidence that these people have been active in their opposition to the dominant group, and at times their behavior has ranged from being inappropriate to being outright obstructive.

How similar is this to the Tweed?

History will record the zealots, conspirators & failed Council candidates hounded the Waringah Council to the point the NSW government sacked the Council despite **no evidence** of wrong-doing being found by the Inquiry.

Do you want **your** Council sacked because some can't accept the referees verdict?

Tuesday 18th January 2005 South Tweed Sports Club
6.30 pm Drinks 7.00 pm Start

Fight Back Forum

Volume 1, Issue 1
Tweed Fights back

Fight back!

(Newell)...extremely unhelpful to northern NSW residents"

Sue Dakin - Country Labor (Ballina) - on how Neville performed over the trains fiasco

The disgust with how Neville Newell MP conducted himself with the loss of the train service between Murwillumbah & Casino was not restricted to non-Labor Party supporters. Even those within his own Party were outraged at his poor performance. One quote attributed to Sue Dakin, President of Country Labor's State Electoral Council said Mr Newell was... ***"...extremely unhelpful to northern NSW residents" and gave a final opinion on his overall performance in relation to the loss of the train service..... "It's just unconscionable" she said.*** Well we agree Sue! We also happen to think Mr Newell has been extremely "...unhelpful" on a wide range of other issues to do with the Tweed. We also happen to think that what Mr Newell is trying to do with this Council is also "....unconscionable!" To have this Inquiry thrust on Councils in NSW to cover up his own inept performance is totally unacceptable. Shame on you Neville Newell!

Even those within the Labor Party are ashamed of Neville Newell's performance.

Kangaroo Court

Newell sets his own rules for the Inquiry

Despite Commissioner Daly stating he wanted an open & transparent Inquiry, our local MP Neville Newell decided this was not good enough for the zealots & conspirators who desperately wanted to make their submissions anonymous! In what can only be described as 'contemptuous' Mr Newell issued a Media Release saying he had received calls from locals who were concerned with "....retribution" if they went public with their accusations. The question begs to be asked if Mr Newell reacts to representation like this why didn't he react when thousands marched in support of the local Club Industry and the hundreds of people who rallied against the closure of the Murwillumbah to Casino rail link? The only reason for this 'back door' option is to allow his failed candidate friends a platform where they can unleash their vengeance on a community that didn't back them into Council! He may even give them assistance to write their letters! Parliament House has often been called a 'Cowards Castle.' Neville Newell wants his own 'Cowards Castle' here on the Tweed. As one letter writer recently commented, "...what retribution? Perhaps their wheelie bins might not be collected!"

Maybe these people are just too embarrassed to make their silly statements in public?

"Neville Newell has snubbed his nose at the Inquiries Commissioner by inviting anonymous submissions via his own electoral office. The opportunities for abuse are overwhelming!

Fraser says it's a "..witch-hunt!"

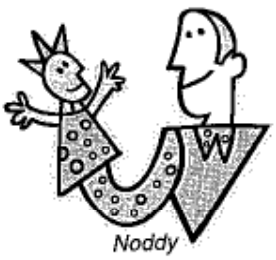
Shadow Minister for Local Government says "...call it off"

"In his haste to discredit the Tweed Council Mr Kelly has by-passed his newly established 'flying squads' and established a 'boots & all' Commission of Inquiry." said Andrew Fraser MP on the 26th Nov 2004. Mr Fraser went on to ask why Mr Kelly has ".....turned a blind eye" to the problems at Labor-led Strathfield's Council suggesting there was a bias between the handling of the two Councils.

Mr Fraser attacked Minister Kelly over the Wintersun donation stating "..even the most rudimentary investigation into this matter would have revealed that Wintersun Festival Association had made no donation.." Mr Fraser has become the champion for Tweed's democratic processes! Thank you sir!

Opposition spokesperson for Local Government Mr Andrew Fraser MP. "This is a witch-hunt!"

Tuesday 18th January 2005 South Tweed Sports Club
6.30 pm Drinks 7.00 pm Start
Fight Back Forum



Protect your vote!
No Puppet Council!
Join 'Fight Back' today
P.O. Box 907
MURWILLUMBAH
NSW 2484
"Leave our elected Council in place Neville Newell!"

"Neville Newell's New Year wish list?"

1 A Mega Marina at Chinderah?

2 A Mega Bug Farm at South Chinderah?

3 A Nerang-like (cheapest) highway option for Sexton Hill? (Mega Headache for Banora Pt!)

4 A Mega Quarry at Terranora?

5 Sacking the duly elected Tweed Shire Council?

NOT HAPPY NEVILLE!

Who do you want running your Council?

Do you want a Neville Newell 'puppet' from Sydney running your Council or do you want the local Councillors YOU VOTED FOR making decisions about the Tweed?

* **Send a letter to the Inquiry stating "Do not sack this duly elected Council"**
* **Submissions must be in by 28th January 2005. Send to.....**
* **Office of the Commissioner Tweed Shire Council Inquiry Locked Bag A5045 SYDNEY NSW 1235**

'Fight back' Forum

Hear how your democratic rights are under threat!

Prior to the 1999 Council elections when this place was a socially & economically disadvantaged area (see story p2) a dinner meeting was called to support a new direction with Tweed Shire Council. Given just (4) days notice some (400) people turned up showing how concerned local residents were with the state of affairs the Shire was in. It was 'time' to act then & it's 'time' to act again now! History will show that the last 4 years of council were enormously successful in that they took a Council that was last in NSW based on financial rankings to become one of the top performers in the state. In every measurable way, this Council has been transformed from an 'underachiever' (see story Good Old Days?) into a role model for all Councils through our NSW. This Council is currently rated at #5 of all NSW Councils based on fiscal performance. In 1999 it was a case of getting this Shire out of the doldrums. In 2005 it's a case of saving our democratically elected Council & stopping a Newell puppet making uninformed decisions about Tweed issues. If you love the Tweed, if you believe we need to take a stance of democratic processes than we need you to attend a special Fight Back Forum.

Tuesday 18th January 2005 South Tweed Sports Club
6.30 pm Drinks 7.00 pm Start
Fight Back Forum

Fight back! Volume 1, Issue 2 Page 3

Gary Raso leads the charge for democracy!

Local Cudgen farmer Gary Raso is heading up 'The Tweed Fights Back for Democracy' campaign.

Gary holds no political affiliations whatsoever and says his main reason for getting involved with this whole process of challenging Neville Newell's attempts to sack this Council is that it is undemocratic.

"Like them or not, these Councillors were duly elected as a unit back in March last year and they must be allowed to serve their term." he said. "This is Australia , not some lawless country where mob rule is the order of the day. How dare a small handful of complainers hold the Tweed communities democratic rights to ransom?"

Mr Raso said he was disturbed that early comments from Neville Newell & Minister Kelly indicated this Council has been pre-judged & the verdict was a pre-determined conclusion.

"Mix politics and justice together and the result is tarnished before it even gets under way. We're being taken for fools here!" Mr Raso said.

"The Tweed deserves better than what we are seeing unfold here. No-one wants to see a Kangaroo Court. This will hurt the Tweed"

Estimates are that this Inquiry will cost NSW ratepayers in excess of $5 million dollars!

So how could the Tweed use this money?

100+ More Police ✓

Less crime / more security / 24 x 7

Rail Link restored ✓

Give the Pensioners & disabled a break!

Hospital Funding ✓

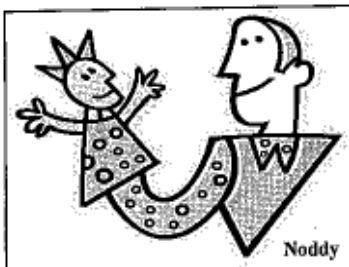
Shorten our record waiting lists

More elective surgery / More doctors

Better roads ✓

Stop the congestion, plan a Tweed bypass!

This is a fully paid for supplement paid for by Tweed Fight Back



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P.O. Box 907
MURWILLUMBAH NSW 2484
"Leave our elected Council in place Neville Newell!"

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- Send a letter to the Inquiry stating "Do not sack this duly elected Council"
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Office of the Commissioner Tweed Shire Council
Inquiry Locked Bag A5045 SYDNEY NSW 1235

"No Neville Newell puppet for Tweed Shire Council!"

Neville Newell's 2005 Wish List?

1 Mega Marina at Chinderah?
2 Mega Quarry at Terranora?
3 A Mega Bug Farm at South Chinderah?
4 Mega Highway thru Banora Point?

Only a duly elected Council made up of locals gives the best protection against unwelcome surprises! A Council controlled by a Neville Newell 'Puppet' will give residents no protection, no representation & no recourse!

TRIVIA CORNER

"Watchdog group calls for sackings"

Q. Was this a 'recent' press headline credited to the Tweed Monitor?

A. No. This story ran in the Daily News 29 Nov 2000 (they've been complaining for a long time!)

Q. Who was the President of Tweed Monitor at the time?

A. Steve Dale of course

Tweed Monotonous?

Did you vote for Tweed Monitor?

Tweed Monitor Boss Laurie Ganter missed out on Council & now leads the charge with complaints against this successfully elected Council via his pretend 'watchdog' group.

This apology is but one of many more that may be on their way from the quickly retreating 'watchdog' for some of the offensive & misleading remarks they have been making of late.

Yipe Yipe Yipe Yipe Yipe

(Advertisement)

STATEMENT OF APOLOGY BY

The Monitor, Keeping an eye on the Tweed

I refer to the article in the DAILY NEWS last Monday 22 Nov 04 on the SALT Development headed, "Developer Squeezing more in".

I have since received a letter from Mr Brian Ray's solicitor advising that he has been offended by this article which was written from a Tweed Monitor press release.

I confirm that no offence was intended. It was not my intention or **The Monitor's** intention to offend Mr Ray or the Ray Group

On behalf of myself as President of Tweed Monitor and on behalf of **The Monitor** I unreservedly apologize to Mr Brian Ray and the Ray Group. It is our opinion that Mr Brian Ray and the Ray Group has done all that was required by the Tweed Shire Council and the NSW State Government at all times during the approval process for the SALT Project. Furthermore I retract any and all offending statements in the above named article

In particular the Ray Group has consulted with and responded to many community requests in the development of the SALT Project which have improved the project in the eyes of the community

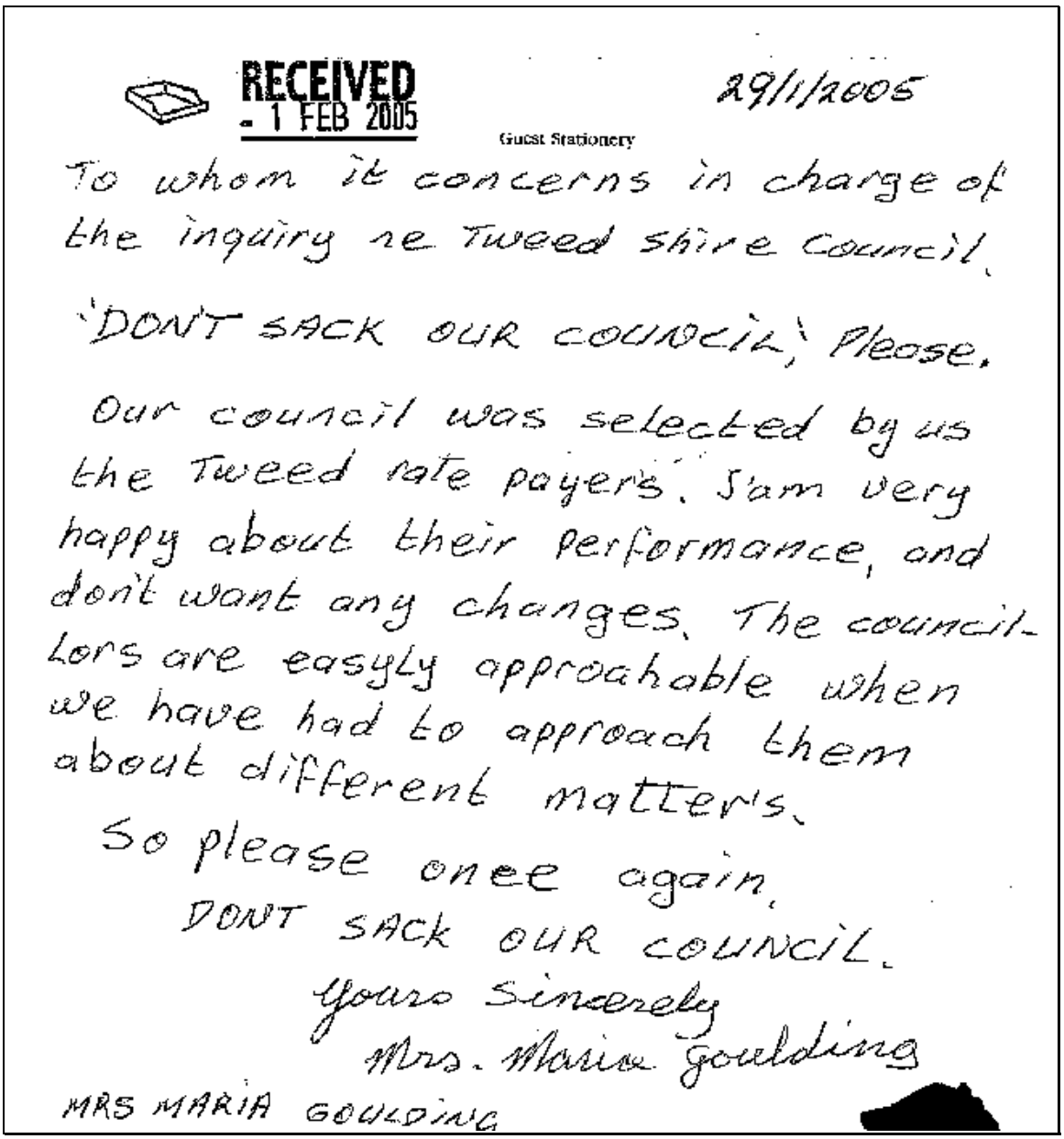
While I personally admit no intention to defame or believe I did defame Mr Brian Ray and the Ray Group, **The Monitor** also accept the explanations Mr Brian Ray has given in his article in the Daily News on 27 Nov 04, "Ray pours scorn on claims" as being fair and reasonable. Further it is confirmed that myself or **The Monitor** will cease and desist in any further defaming comments of Mr Brian Ray and the Ray Group in the future.

Laurie Ganter
President
The Monitor
Keeping an eye on the Tweed

The poor one eyed 'watch dog' incessantly barks at one group of people. Maybe it has too many masters? Perhaps it should be euthanized?

This is a fully paid for supplement paid for by Tweed Fight Back

The general tone of many of the submissions sent in support of the Council is illustrated by the following examples: **submissions 375, 89, 110, 148, 240.**



RECEIVED
- 1 FEB 2005

29/1/2005

Guest Stationery

To whom it concerns in charge of the inquiry re Tweed shire Council.

'DONT SACK OUR COUNCIL' Please.

Our council was selected by us the Tweed rate payers. I am very happy about their performance, and don't want any changes. The councillors are easyly approachable when we have had to approach them about different matters.

So please onee again.

DONT SACK OUR COUNCIL.

Yours Sincerely

Mrs. Maria Goulding

MRS MARIA GOULDING

Submission 375

17-1-05

Office of the Commissioner
Tweed Shire Council Inquiry
Locked Bag A5065
Sydney NSW 1235

Dear Sir,

Do not sack this duly elected council which was voted for by the Tweed people of which I am one. as this council is currently rated #5 of all NSW councils based on fiscal performance, surely it deserves a chance to show what it can do.

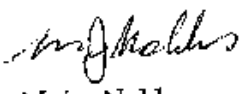
P Keevers.

Submission 89

Office of the Commissioner
Tweed Shire Council Public Inquiry
Locked Bag A5045
Sydney NSW 1235

Dear Sir,
I wish to make a submission to this inquiry that the council was elected by the people of the Tweed in March 2004.I therefore think that they should be allowed to serve the people that elected them for their full term. Some people did not like the outcome and could not accept the decision .Democracy says that 50% plus 1 is a majority. Therefore I am demanding that this inquiry is stopped now and let the people's choice do their job without interference from anyone. If the people want change they will do it at the next election.

Yours sincerely



Moira Nobbs

Submission 110

RECEIVED
25 JAN 2005

20-1-05

To the Commissioner

I am a pensioner who arrived in the Tweed 6 years ago in June.

I go to war widows meeting every month & I hear what is said

I do not understand this investigation

The people I hear talking have only got praise for the councillors and are fed up with the negative attitude a few people have

My husband went to war to fight for freedom and the democratic way.

I went to the polling booth and voted as we all did let the people have who they voted for.

Edna Joyce Bruce

Submission 148

"DO NOT SACK THIS DULY ELECTED COUNCIL"

In support of The Tweed Shire Council Please Do Not Sack them some of these councilors are first timers and are in my opinion doing a great job. How dare Neville Newell start a witch-hunt into this council who I might add do more than him for the community. He took away our XPT train that is a disgrace to the community up here on the tweed. This council needs a go to prove them selves and they can't do that over night as they have only been in not quite a year.

I took great pride in electing this councilor for the tweed and new councilor for banora point and I did a great deal of homework before I elected them and him, which is something I have never done before, I wanted the best man for the job to represent me as a member of the community. I am new up here on the tweed by about 2 & ½ years and take great pride in the area I have chosen to live in and like all the long-term people who have lived up here for years I care about this beautiful countryside up here on the border of NSW. **(GODS COUNTRY)**

Submission 240

In contrast, the submissions that were critical of the Council were frequently extensive, containing large amounts of supporting data and, most importantly, were focussed on the Terms of Reference. The following extracts from **submissions 362 and 369** point to the differences in the quality of the evidence submitted.

2. RELATIONSHIPS WITH DEVELOPERS

These are constantly massaged through social and developer oriented networking, through council appointments to important community/council committees of individuals sympathetic to the developers' and majority factions' course of action, and through a variety of modus operandi. These relationships become apparent during the discussions of development proposals during council meetings, the way in which councillors push through certain developments, the statements made to the media, observed actions and overheard comments.

* A letter from Cr Brinsmead in the Daily News (13/12/04) ardently supports Brian Ray at a time when there is concern about another controversial amendment submitted for the Salt development. See appendix ..B.

* During the 1999 council term it was not unusual for individuals connected with Lenen Pty Ltd developments in particular, to hand typed material, or deliver spoken reminders to Cr Brinsmead or Cr Beck during meetings. Amendments privileging a particular development, or arguments to shore up voting, were often then put by the councillors involved. A letter to the editor supports this statement.

J. Murray (not Cr Murray) wrote of being in the gallery - *Frank Wilson & Co walked into the chamber to give Bob Brinsmead some coaching. How much more blatant and brazen is the relationship between developers and the majority faction in council to become before the media questions the propriety of this relationship* (D.N. 14/4/00)

* Cr Polglase defended the pre-council meetings held between majority faction councillors and developers stating that councillors had the chance 'to hear arguments of people who had particularly important issues coming to the council." (D.N. 17/03/00) At this time the Salt development was one of a number of controversial issues already in progress or about to get off the ground.

* A story in the Tweed Sun 25/6/03, in regard to the Resort Corps Nor Nor East development on Marine parade Kingscliff, reported the following - " A developer's eleventh hour request to remove conditions banning permanent residents from its tourist-targetted complex at Kingscliff has been granted by Tweed Shire Councillors ... Cr Lawrie's suggested change followed a fax set by the project's architects to five of the six majority faction councillors and the Mayor, and distributed to the remaining councillors at the meeting."

* See Appendix C.. reporting, material sent to majority faction councillors, Cr

Submission 369

Brinsmead's acknowledgement that he "goes along with developers" and Cr James comments about developer control.

* Frank Wilson, for Lenen Pty Ltd had been trying to get approval for bed and breakfast establishments on Lorna Street Seaside City, in an effort to circumvent any attempts to rejig the layout of Seaside City. Against council's legal advice, at the 28/04/04 council meeting, Cr Beck attempted to change the definition of bed and breakfast establishments, by changing the word 'dwelling' into 'building'. Had she been successful, this would have allowed B& B s where they are presently not allowed, and benefited Lenen Pty Ltd.

* the recently formed developer dominated Tweed Coast and Kingscliff Business Corporation has among its members Idwell Richards, A Blundell, P, Brinsmead, A Powell, P Usher, P. Madress, J. Murray, W. Polglase, B.Bell Brian Ray, J. Penhaligan, Alan Black, John Coleman, Paul Walters ...

Submission 369 - Continued

1.1 I served as Director Development Services at the Tweed Shire Council between 27 May 1991 and 21 November 2003. On 24 November 2003 I commenced the position of Director of Environment and Planning at Wollongong City Council.

1.2 During my tenure as Director of Development Services at Tweed Shire Council I was the President of the Planning Institute of Australia NSW Division from 1 July 2000 to 30 June 2004.

1.3 In responding to the best of my ability and knowledge to the Commission of Inquiry's Terms of Reference, I shall seek to give emphasis to positive suggestions for the future efficiency and effectiveness of the Shire Council – and in particular its environmental planning responsibilities. Some of these suggestions may be considered in relation to the NSW State Government's planning reform agenda and other initiatives.

1.4 My submission will predominantly focus on the period of September 1999 to November 2003. Councillor Lynne Beck was the Mayor and Councillor Bob Brinsmead the Deputy Mayor from September 1999 to September 2001. Councillor Warren Pollglase was Mayor and Councillor George Davison Deputy Mayor for the period September 2001 to the time of my departure.

1.5 I express two generalised opinions based upon my experiences at Tweed and particularly relating to the period 1999 to 2003. On a very high proportion of occasions in dealing with planning and environmental matters, the majority "Tweed Balance Team" of Councillors demonstrated a predisposition to advocate and pressure on behalf of certain development proponents in ways that were dismissive of legalities, policies, or professional advice and consideration of wider public interest issues. Secondly, that high level predisposition and bias in my view in serving the interests of certain development

Submission 362

proponents was to the detriment of the environmental and community values of the Tweed. The conduct was not befitting of the quality of planning and political decision making necessary for a Shire that has one of Australia's highest growth rates, and the second highest biological biodiversity on the Australian eastern seaboard. It could be argued that the majority "Tweed Balance Team" Councillors had a mandate for such behaviour from the election results of 1999 – and I acknowledge that. I do believe however that there would be a "significant distance" between the electoral basis for that mandate and the actual conduct of the Councillors and the consequent developmental and environmental outcomes during that period of office.

1.6 I have structured this submission to reflect the issues underpinning the terms of reference for the Inquiry. In doing so I recognise that many of the statements that I make trigger consideration under a mix of those issues but I have endeavoured to make those statements under the issue that is most pertinent.

1.7 My submission and particularly some of the recommendations reflect my very strong motivation to enhance the recognition of the role of planning as a profession within local government. Also I advocate mechanisms that recognise that significant role together with a Code of Conduct and protocols that give greater respect to that role and protection from inappropriate attempts by Councillors, development proponents and other stakeholders to intimidate and pressure staff into certain positions on major planning matters. This is critically important because of the evidence of increasing numbers of senior planners departing NSW Local Government - as substantiated into the Planning Institute of Australia National Inquiry into Planning Education. There is a crucial need to retain high quality professional planners in local government because of the role being closest to the community and assisting communities to achieve sustainable development and environmental outcomes.

2 "Whether the elected representatives have adequately, appropriately and reasonably carried out their responsibilities in the best interests of all ratepayers and residents, in an environment free of conflicts of interest".

2.1 The dominant 'Tweed Balance Team" certainly provided a very overt, and exerted strong advocacy and pressure on behalf of certain development proponents. This was most

apparent during Council meetings, meetings involving development proponents, staff and Councillors and through pressure sought to be applied on staff by phone calls and in discussions. I acknowledge a certain predisposition for those Councillors to take political positions consistent with the major political platform upon which they were elected - "getting development to happen in the Tweed". However in my opinion, behaviours were extensively and consistently inappropriate given the roles and responsibilities of Councillors in the Local Government Act, Codes of Conduct and other procedures/guidelines. This certainly raises concerns of political conduct in response to the extent of developer funding that assisted with the election campaign and related public trust and conflict of interest issues. In my opinion there were numerous occasions when decisions were made to substantially benefit development proponents contrary to the public interest.

Submission 362 - Continued

3 **"The appropriateness of the procedures and processes adopted by Council in relation to its Environmental Planning responsibilities, including the processing applications for development – particularly those of a significant nature".**

3.1 A key issue here particularly between September 1991 and September 2001 was the frequent involvement of Councillors – particularly the then Mayor and Deputy Mayor, Councillors Lynne Beck and Bob Brinsmead respectively – in meetings with development proponents. Many of these meetings was seeking to negotiate outcomes and to resolve the most significant outstanding issues. The role adopted by the Councillors present was very frequently one of advocacy and support for the positions and view points of development proponents. Whilst I do not believe that any pressure from Councillors resulted in changes of position by myself or my professional staff, there were certainly cases of pressure to attempt to achieve more favourable outcomes for development proponents. A prime example was a meeting involving the development proponents of the Health Resort proposed for the southern most lot within the Casuarina Beach property. This meeting involved the proponents and the consultant representatives and to the best of my recollection was attended by four or five Councillors whose attendance was not previously known by myself or my professional colleagues. This was a very adversarial meeting and I recall participation by Councillors in a manner that was supportive of the development proponents and predominantly dismissive of professional analysis and State Government (then Department of Land and Water Conservation) advice.

3.2 During the period of September 1999 until my departure, there was a highly frequent incidence of political decisions made contrary to professional recommendations. I

Submission 362 – Continued

The reason why numerous submissions made in support of the Council, and the pro-development councillors, were both brief and irrelevant to the Terms of Reference are apparent in the evidence given by Mr Gary Raso (**T. 17/03/05 p. 1670-1682**). Mr Raso was the organiser of the Fight Back Forum, referred to above, and took responsibility for the newsletters that were published in connection with the Fight Back group. Mr Raso displayed no understanding of the structure, legal base or the Terms of Reference of the Inquiry. On the basis of extra-ordinary ignorance, Mr Raso sought to lead a movement that would try to discredit the Inquiry, and if possible have the process stopped. His actions, and his cohort's actions, bordered on contempt. Unknowing of the most basic aspects of the Inquiry, Mr Raso set about "educating" the community.

Mr Raso's evidence shows that:

- He had no understanding of the Terms of Reference of the Inquiry
- He organised the January rally without reading the Terms of Reference
- He believed that every Inquiry (under section 740 of the Act) inevitably led to a council's sacking, and that the recommendation of the 2003 Warringah Council Inquiry had recommended against dismissal of the council
- He believed that an Inquiry could only investigate corruption
- He considered that an Inquiry had to follow a previous investigation or a visit from the "flying squad"
- He spoke passionately about democracy as the reason for opposing the Inquiry, whilst the evidence of the First Report shows clearly that the interests that Mr Raso was representing had perverted the course of democracy in the 2004 election
- He admitted to not having a sufficient understanding of the processes of the Tweed Inquiry when he organised the rally and began to publish newsletters
- He did not know that the Inquiry involved a process of Public Hearings even though the Hearings were opened on 16 December 2004, a full month before Mr Raso began organising his crusade
- He failed to look at the Inquiry's web site, and did not read the information paper contained therein that was designed to assist the public in gaining an understanding of the processes of the inquiry
- He believed that the Inquiry was driven by some political outcome
- He admitted that he had not read the evidence brought before the inquiry but, on the basis of obvious prejudice, believed that the unseen evidence was trivial
- He was not personally conversant with Section740 of the Act, which enabled the Inquiry to be called, and relied solely on newspaper comments for his understanding of that section
- He felt satisfied that whilst on his own evidence he was crassly ignorant of the process he was opposing, he was in a position to educate others

Led by a person with such a limited and distorted understanding of the processes and legal requirements of a Public Inquiry, it is little wonder that the many people "educated" by Mr Raso provided submissions that were irrelevant to the Terms of Reference.

PROF DALY: *Our next speaker is Mr Raso.*

GARY RASO, sworn

PROF DALY: *Could you give your full name, your address, your occupation, please?*

MR RASO: *My name is Gary Raso. I'm a farmer from Cudgen and I'm a long-serving life member of Cabarita Surf Club.*

PROF DALY: *Thank you. Have you been involved with a group which has a title something like Fightback Defend the Tweed?*

MR RASO: *Yes, we had a - I was involved in organising a newsletter sort of thing that went in - insert went to a publication on the Tweed and also our alley at South Tweed Bowls Club.*

PROF DALY: *What was the relationship of the group to this Inquiry?*

MR RASO: *It's all about democracy, Mr Commissioner. The fact that this Inquiry was called without any real basis of corruption or anything that's been done wrong. The original reasons given were lot 490, I believe which has turned into nothing. It was also Wintersun donations which was nothing. I mean, all these things could have been dealt with by an investigator or by the flying squad that could have been sent up from Sydney and didn't appear to be and a lot of my friends and people in circles I hang around in were very concerned that democracy wasn't being followed and it may be that a political agenda was at the root of it.*

PROF DALY: *Have you read the terms of reference of the Inquiry?*

MR RASO: *Yes, I have.*

PROF DALY: *Right. Is there any mention in those terms of reference of corruption?*

MR RASO: *No.*

PROF DALY: *Do you believe that the Inquiry is about investigating corruption?*

MR RASO: *Now that I've read it I believe it's about conflicts of interest and perceived things, yes.*

PROF DALY: *Well, that's one issue but there's several others such as the development processes of the Council. When did you read the terms of reference? Was that before you organised the rally and your - - -*

MR RASO: *The terms of reference were in the Tweed Link, I believe, and also in the daily news.*

PROF DALY: *Yes, but had you read them before you organised your rally?*

MR RASO: *The rally was organised probably only in about three or four days and we ended up with about 300 people there which - I was pretty surprised but prior to that we'd got together to form a group just to put a newsletter, to put some sort of balance to the - for want of a better word - to the things that were being written in the paper and other perceptions about the Council.*

PROF DALY: *That hasn't answered my question. The question was, had you read the terms of reference before you either organised your newsletter or organised the rally?*

MR RASO: *Oh, I'd say I probably would have but I don't think I would have fully understood it. I'm a farmer not a lawyer, mate. I'm a farmer not a lawyer. I don't understand a lot of that stuff fully.*

PROF DALY: *Yes, but organising newsletters and organising rallies are fairly difficult, onerous and consuming tasks. I would have thought that anyone who was entering into those tasks would have taken great pains to understand what they were rallying against.*

MR RASO: *The whole rally was based on the lack of democracy.*

PROF DALY: *I don't see how that comes in the terms of reference?*

MR RASO: *Well, we voted in a Council that's going to be sacked and - -*

PROF DALY: *Is it? I wouldn't have - - -*

MR RASO: *Well, Tony Kelly himself said in the paper that over the last ten years the Councils that they have investigated have been sacked, all of them. Warringah, which had no - the finding there was that, to my understanding, was that they shouldn't be sacked; Walgett - Mr Bob Bulford actually was the commissioner there - he said that they shouldn't be sacked either and they were.*

PROF DALY: *I was the Commissioner for the Warringah Inquiry. The report that I wrote on that was 868 pages long and I did recommend that the Council, that the Civic offices be vacated. That, in your parlance, is that the Council might be sacked but there was 868 pages of evidence that led me to that conclusion.*

MR RASO: *And the grounds were that there was perceived conflict of interest or perceived developer contribution, was there?*

PROF DALY: *I'm not going to try and summarise 868 pages, indeed, a sentence. If you're interested it's on the website of the Department of Local Government and you can read it. The point is that somehow you've assumed one possible outcome of the Inquiry ignored, apparently, the terms of reference or not understood them and then set about some sort of attack on the whole process.*

MR RASO: *I'm definitely not attacking the process, definitely not attacking the process. I fully support any inquiry that's based on facts or evidence.*

PROF DALY: *Who funded your newsletter and funded your rally?*

MR RASO*: The rally was fairly hastily organised. I funded that but the money - I got the money back. We handed a bucket around at the end of the - or basically, Bob Robinson handed the bucket around and that was paid for out of that. There was a security guard there. The room we got for nothing and the newsletter was funded by me.*

PROF DALY: *You funded the newsletter out of your own pocket?*

MR RASO: *Yes. That's right, yes.*

PROF DALY: *No other input from other groups or people?*

MR RASO: *Well, hopefully we might have a fundraiser in the future that might help pay for it but, no.*

PROF DALY: *Okay, thank you.*

MR BROAD: *It must have cost you a lot of money this - - -*

MR RASO: *The bill to date is just under $5,000.*

MR BROAD: *You've got very strong convictions?*

MR RASO: *Yes, I have. My grandfather died from injuries he received in Changi fighting for democracy for this country and I don't - myself and other people in the Tweed don't perceive this to be a very democratic process.*

MR BROAD: *And, for that you're willing to pay out - - -*

MR RASO: *Sure.*

MR BROAD: *- - - $5,000.*

MR RASO: *Sure.*

MR BROAD: *Yes, thank you. Could I ask you, in respect of the forum, what did you hope that you would achieve?*

MR RASO: *Are you talking about the rally held at the sport club?*

MR BROAD: *Yes, all of that?*

MR RASO: *Yes, just to help people understand the issues involved and the background of the previous inquiries mainly.*

MR BROAD: *Do you think you were able to get that view across?*

MR RASO: *Yes, I think so.*

MR BROAD: *Do you think you honestly presented that view?*

MR RASO: *Well, I didn't present all of it. There were others involved but, yes, I think on the whole it got across, yes.*

MR BROAD: *Do you think there was any - well, put it this way: do you think you had a sufficient understanding of the processes of this Inquiry when you held that rally?*

MR RASO: *No, no, but I did have, I think, sufficient understanding of the background and - of the previous inquiries and the outcome of those.*

MR BROAD: *Did you understand at the time that the meeting took place that the Inquiry was calling for submissions?*

MR RASO: *Yes, it was, yes.*

MR BROAD: *Did you understand that the Inquiry would be having public hearings?*

MR RASO: *No.*

MR BROAD: *You didn't?*

MR RASO: *No, in fact when the public hearings started, just previous to that we stopped the newsletter. Didn't think it was the right - - -*

MR BROAD: *Right, so what, you thought that the Inquiry would conduct its business behind closed doors?*

MR RASO: *No, it's a public inquiry but submissions were called for and I just imagined you guys would read the submissions and make your mind up.*

MR BROAD: *Did you ever go on to the Inquiry's website and read the information paper about the Inquiry?*

MR RASO: *No. I have been to previous - to other websites but not that one, no.*

MR BROAD: *And, did you understand what the processes were to be after the Inquiry had finished gathering evidence? Do you understand what the processes are now?*

MR RASO*: I don't fully understand what you're saying. No, of course I don't. I'm not a lawyer. I don't fully understand the processes.*

MR BROAD: *But, you understand - did you ever read section 740 of the Local Government Act?*

MR RASO: *No.*

MR BROAD: *It sets out the purposes of such an inquiry and also sets out the role of the Commissioner. You haven't read that?*

MR RASO: *No.*

MR BROAD: *Yet you've just said to me that you believed when you conducted the forum that you got the message out - a true message out to the people?*

MR RASO*: The message that I was getting out to the people was that this Inquiry - I mean, you guys have got almost a fully Royal Commission type of inquiry here. There is nothing before it. There's no flying squad coming in. There's no investigators coming here to make sure that the claims were substantial or substantiated.*

MR BROAD: *Do you understand that this Inquiry has got no relationship to questions of corruption?*

MR RASO: *At the moment, yes, I do understand that.*

MR BROAD: *Did you understand that at the time?*

MR RASO: *No.*

MR BROAD: *Did you understand that there was not relationship to any flying squad as you call it? There wasn't a need for this Inquiry to have as its background that a flying squad had taken place?*

MR RASO: *So, you guys just rock up to a Council and investigate any time you want to, is that how it works?*

MR BROAD: *Well, the situation is that the Commissioner is appointed in circumstances where the Minister has come to an opinion that an inquiry is warranted.*

MR RASO: *So, are you talking about Tony Kelly here?*

MR BROAD: *Yes, that's the current ..... yes.*

MR RASO: *Yes, the Local Government Minister? Yes.*

MR BROAD: *Did you understand that?*

MR RASO: *Yes, that's why I think it's politically driven.*

MR BROAD: *You see this as just being something that's being driven by some political outcome perceived by the Minister?*

MR RASO: *Sure, sure.*

MR BROAD: *You don't see any foundation?*

MR RASO: *It - look - well, there's plenty of foundations. If you ring up the Commissioner's office, it'll put you on to Mr Daly's office.*

MR BROAD: *Can I go back a bit? Have you sat in here in any day - - -*

MR RASO: *Once.*

MR BROAD: *- - - prior to today and listened to evidence?*

MR RASO: *Once, yesterday.*

MR BROAD: *Have you looked at the reports of the nature of the evidence that has been given during the course of the inquiry?*

MR RASO: *No, I haven't got enough time to do that.*

MR BROAD: *Do you have any understanding of the width of matters that have been brought forward to the inquiry?*

MR RASO: *I understand there's a lot of trivial matters, yes.*

MR BROAD: *But other than some trivial matters, you've got no understanding of matters, which might involve planning issues, which may affect the state government's role in planning?*

MR RASO: *The only thing I understand are things that are in the media or have been brought to my attention by other people in Tweed.*

MR BROAD: *Thanks. Now, ultimately, was it your hope that by having this rally, the inquiry would be stopped?*

MR RASO: *I think, perhaps, not stopped. I mean, it was too late to stop it. Just educate people to understand that this was a politically driven - - -*

MR BROAD: *What, to suggest that they shouldn't support it?*

MR RASO: *Oh, I wouldn't say not support it. It's up to them as individual people, what they want to do. I was giving my opinion of the way I saw it.*

MR BROAD: *But they should perceive that it's politically motivated?*

MR RASO: *Yes.*

MR BROAD: *And what would that, then, have the effect of doing? Do you - - -*

MR RASO: *Give them a more informed decision, whether they wish to support it or not.*

MR BROAD: *Do you think it might be seen as undermining the inquiry?*

MR RASO: *Maybe, yes.*

MR BROAD: *Yes, thank you.*

MS ANNIS-BROWN: *Just one question, Mr Raso. Mr Broad raised with you the issue of - or section 740 of the Local Government Act that actually permits the Minister to*

appoint a Commissioner and run an inquiry. You said you weren't aware of that section. I just note in your submission, you talk about:

Using a legislative loophole to sack the Council by having an inquiry, which legislation says the Minister must have, before the Council is sacked.

MR RASO: *That's right.*

MS ANNIS-BROWN: *It appears to me that you do have some knowledge of the legislation - - -*

MR RASO: *Well, I might, but if that's part of section 740, then I probably read that part - I haven't read the full script of 740, whatever it is.*

MS ANNIS-BROWN: *So you were aware of section - - -*

MR RASO: *I'm aware that - - -*

MS ANNIS-BROWN: *- - - 740 - - -*

MR RASO: *Yes, I'm aware that the Minister - - -*

MS ANNIS-BROWN: *- - - in order to write this?*

MR RASO: *I'm aware that the Minister can call an inquiry and his – he can then sack the Council and the basis of the inquiry has no bearing on it.*

MS ANNIS-BROWN: *In your belief, that's what section 740 says?*

MR RASO: *In part, apparently, yes.*

MS ANNIS-BROWN: *Apparently, or it does?*

MR RASO: *Well, I'm not sure whether it's part of section 740. I wasn't aware that it was part of section 740. I just know that from media reports, the Council can be subject to inquiry and, subsequently, the Minister can sack the Council, irrespective of the outcome of that inquiry and it has been shown to happen.*

MS ANNIS-BROWN: *You're just stating you're not quite well aware of 740, but you just stated that you hope to educate people about what the inquiry was about.*

MR RASO: *That's right.*

MS ANNIS-BROWN: *I'm a bit perplexed as to how you could hope to do that - - -*

MR RASO: *I'm not fully - - -*

MS ANNIS-BROWN: *- - - if you - - -*

MR RASO: *I'm not fully briefed on all aspects of this inquiry.*

MS ANNIS-BROWN: *No, but you hope to educate - - -*

MR RASO: *I'm a farmer.*

MS ANNIS-BROWN: *No, no.*

MR RASO: *Sorry?*

MS ANNIS-BROWN: *You said, "You wanted to educate people about the inquiry" - - -*

MR RASO: *About certain aspects of it, yes.*

T. 17/3/05 p. 1670-1680

PROF DALY: *Just one other point that flows on from some of the things raised; you said that you, yourself, are not conversant with the details of section 740 of the Local Government Act - - -*

MR RASO: *I wouldn't know them by name, no.*

PROF DALY: *- - - but you have come to some understanding of it through media reports?*

MR RASO: *Sure.*

PROF DALY: *Is that right?*

MR RASO: *Yes.*

PROF DALY: *Yes. You have faith that the media, the people reporting it, have an understanding of section 740 of the Local Government Act?*

MR RASO: *I should hope they would have.*

PROF DALY: *Why?*

MR RASO: *Well, they're reporting on it, that's their job. And having different media outlets reporting the same thing, I would imagine they would have done their research.*

PROF DALY: *Do you think, in hindsight, that it might have been wiser, before you attempted to send out newsletters and to hold rallies, that you knew a little more about what section 740 - - -*

MR RASO: *Well, we could all learn a little more in hindsight.*

T. 17/3/05 p. 1681-1682

Mr Raso stated that he "was a farmer, not a lawyer mate. I don't understand a lot of that stuff fully". It was unlikely that Mr Raso wrote or edited the material that appeared in the Fight Back newsletter. The articles and lay-out suggested that a professional, or professionals, in the newspaper/advertising/promotions business had to be involved. At the Fight Back rally a Mr Bob Robertson "handed round the bucket" to obtain funds to help pay for Fight Back. Mr Robertson is the proprietor and editor of the *Tweed Weekly News Views and TV Guide*, as well as a print shop. It is likely that Mr Robertson and/or some like-minded persons were the organisers of Fight Back with Mr Raso acting as the front-man.

Mr Robertson made a submission to the Inquiry dated 25 January 2005, three days before the two month period provided for the receipt of submissions was to close. Mr Robertson wrote a number of articles/editorials in his newspaper (delivered to all householders in the Tweed area) attacking the Inquiry. When questioned at the Public Hearings (**T. 25/2/05 p. 564-567**) Mr Robertson admitted that he had only read the Terms of Reference of the Inquiry after receiving an acknowledgement of his written submission dated 8 February 2005. That letter included a copy of the Terms of Reference. It is clear that Mr Robertson could not have read the Terms of Reference until just before the reconvening of the Public Hearings on 16 February 2005. Mr Robertson offered his highly opinionated, and generally incorrect, judgements on the Inquiry over several weeks without any knowledge of the defining basis of the Inquiry, the Terms of Reference. Mr Robertson's style of journalism follows the negative and vitriolic patterns fostered by Tweed Directions in the 2004 election. It is a travesty of what an independent press might represent.

MR BROAD: *Did you read the terms of reference?*

MR ROBERTSON: *Only when they were sent to me by you. When you sent them to me, I read the terms of reference.*

MR BROAD: *Had you written your submission before you read the terms of reference?*

MR ROBERTSON: *Yes.*

MR BROAD: *In anywhere in the terms of reference did you find reference to matters of corruption?*

MR ROBERTSON: *No. But it had been perceived before hand - and the word "perceived" has been used here a lot - that it was over corruption. And no matter what you say or what you do, the people in this community will think that this Council is corrupt and that statement has been made in the press many, many times.*

MR BROAD: *You, yourself, had the leading role in respect of what statements are made in the press, don't you?*

MR ROBERTSON: *Well, if you call my little paper cutting influence, yes, we're probably the largest circulating paper in the Tweed.*

MR BROAD: *And therefore you have an influence?*

MR ROBERTSON: *Probably so.*

MR BROAD: *Did you, yourself, attempt to make clear that this was an inquiry that this wasn't an inquiry that centred around corruption?*

MR ROBERTSON: *No, because I didn't realise it wasn't until I got the terms of reference from you, and I don't think I've mentioned corruption in my papers. I don't think I've actually mentioned corruption in any of the statements that I've made in the paper, only in my submission.*

MR BROAD: *This isn't an inquiry that is looking at questions of corruption, is it?*

MR ROBERTSON: *No, I understand it's not in corruption. It's - - -*

MR BROAD: *It's in governance.*

MR ROBERTSON: *It's in governance, and as I've stated in my paper, I don't think you will find anything under governance that this Council has done wrong.*

MR BROAD: *The inquiry is directed towards conflicts of interest, isn't it, amongst other things?*

MR ROBERTSON: *That's what it would appear to be.*

MR BROAD: *Relationships between developers and councillors?*

MR ROBERTSON: *Yes, well, that's what it would appear to be going towards, yes.*

MR BROAD: *During the time that you were a candidate for the elections, did you take the opportunity of finding out what you possible role might be as a councillor?*

MR ROBERTSON: *Yes, indeed, yes.*

MR BROAD: *Were you aware that councillors operate under a code of conduct?*

MR ROBERTSON: *Yes, I am.*

MR BROAD: *Have you read that code of conduct - - -*

MR ROBERTSON: *No.*

MR BROAD: *- - - in respect of Tweed Council?*

MR ROBERTSON: *No.*

MR BROAD: *The code of conduct, which is adopted by Tweed Council, which was adopted on 4 August 2004, raises in point 1.4.2: "When does a conflict of interest arise?" It provides:*

A conflict of interest arises if it is likely that the person with a private or personal interest could be prejudicially influenced in the performance of his or her public or professional duties by that interest.

It goes on:

Or that a reasonable person would believe that the person could be so influenced.

Do you believe that it is relevant for this inquiry to consider whether there could be a perception, the councillors receiving donations from Tweed Directions could be perceived as having a conflict of interest.

MR ROBERTSON: *That's a matter for interpretation. My interpretation is not, because I didn't know who was donating and - - -*

T. 25/2/05 p. 564-567

The fact was, however, that Mr Robertson was not an independent. He controlled the paper with the highest circulation in the Tweed. He was a candidate in Mr Murray's group at the 2004 election. He was part of the Tweed Directions team. His group received $23,710.12 in political donations. $2500 of that represented a sum in kind made by one of Mr Robertson's companies for the printing of election material. The candidates (in the team of six) contributed $10. Mr Robertson made the feeble excuse that his independence was not compromised by accepting Tweed Directions' money because he did not know who had contributed the money. As the ICAC 1990 report observed (see First report of this inquiry) "payment without favours" puts those who accept on the road to corruption. Mr Robertson claimed that acceptance of the money placed no obligations on the group. Further, he was not concerned because as he stated "there was no hope of me being elected" (**T. 25/2/05 p. 558-560**). Mr Robertson said that he had no direct contact with Tweed Directions. But this was not true. He had initially had a commercial arrangement with Winning Directions (a company run by Mr Staerk, the Tweed Directions director), but mid-way through the elections became aware of Tweed Directions. As both a candidate and a newspaper man, and a prominent and well-connected citizen in the Tweed area, it would have been impossible for Mr Robertson not to have known of Tweed Directions. Equally compelling is the fact that Mr Robertson profited handsomely from the Tweed Directions campaign. According to the records of the NSW Election Funding Authority Mr Robertson's Print Shop was paid $46,887.50 for printing material for Tweed Directions and its team of candidates.

The misinformation and the twisted information provided by the likes of Mr Raso and Mr Robertson followed and built on the Tweed Directions' hoax perpetrated on the electorate in the 2004 elections.

PROF DALY: *Thank you. I'd like to start with just some background questions regarding your candidature at the 2004 elections. You were a member of a group that was led by Mr Murray?*

MR ROBERTSON: *That's correct.*

PROF DALY: *According to the Electoral Office, your group received $23,700 in donations, including $10 that was raised by the candidates, and also including $2500 in kind from Fincare which is your company, I understand.*

MR ROBERTSON: *That's correct.*

PROF DALY: *So you were principally supported by Tweeds Directions in your campaign.*

MR ROBERTSON: *Yes, I would so that's correct. Yes.*

PROF DALY: *Just one question about that. The expenditure was $20,760.93. What happens to the balance? You actually had 23,700 in kitty, but you spent something over $20,000. What happens to the balance of that money?*

MR ROBERTSON: *I wouldn't have a clue. That's not my department. John Murray was the leader of the team. I didn't know the finances. I would understand that it would have been returned to Tweed Directions, but I have no knowledge of that.*

PROF DALY: *In the course of receiving that money, did you have any direct contact with Tweed Directions?*

MR ROBERTSON: *None whatsoever in relation to the money or the funding of the group, no.*

PROF DALY: *That was handled principally by Mr Murray?*

MR ROBERTSON: *Yes. As far as I'm aware, yes.*

PROF DALY: *And, as a group, there were six people in your - - -*

MR ROBERTSON: *Six people in our group, yes.*

PROF DALY: *Did you discuss the Tweed Directions's money?*

MR ROBERTSON: *No. We had meetings - obviously as a group we had meetings and the question was never raised.*

PROF DALY: *You didn't query why they were giving you the money. No one raised that?*

MR ROBERTSON: *No, we didn't query it. We understood because - that we were a group of people who had forward thinking ideas. It was a group of community achievers and I saw no reason to query it. We were not asked for any obligation. We weren't obligated to Tweed Directions. There was no obligation asked of us. It was as had been in previous elections.*

PROF DALY: *Thank you. Mr Broad?*

MR BROAD: *If I can just continue on with that. Did you consider, knowing that there was substantial funding coming from Tweed Directions, whether, if you were elected, there would be some form of obligation?*

MR ROBERTSON: *Well, there was no hope of me being elected. I would - my wife would have killed me if I was. There was no hope of that. I was a number two on a team, on a new team but, no, I had no knowledge of where the money was coming from, nor did I know who was putting the money in. We were all kept at arm's length for that, and I certainly wouldn't have been obligated. If you read my election, the stuff that I put into the paper, I made it quite clear that I wouldn't be obligated to anybody.*

MR BROAD: *I assume that you had some contact with Tweed Directions, not in the sense of your candidature, but in respect of material lodged through your newspaper.*

MR ROBERTSON: *Yes. My contract initially was with Winning Directions. When I saw material starting to be produced that we didn't print, being one of the largest printers in the Tweed, we contacted Winning Directions and asked if we could do a quote for their printing, and I did quotes and we won the contract. At that time and up until half way through the elections, I was not aware of Tweed Directions, only Winning Directions. It wasn't until halfway through the election that I - that Tweed Directions came into it, as far as I was concerned.*

T. 23/2/05 p. 558-560

4.1.2 Public Perceptions of Councillors' Links with Developers

The term *perceptions* was discussed a number of times during the Public Hearings. It was raised in two main contexts. A number of members of the community claimed that from information gleaned from newspapers, from attendance at council meetings, from public meetings and from other sources the pro-development councillors were perceived to have a bias towards developers in matters such as approvals or modifications of development applications. The strength of that perception appears to have grown when the level of the funding support given by Tweed Directions was revealed, some five months after the 2004 elections. The contrary view of perceptions was put forward by the pro-development councillors and their supporters. They argued that the councillors had no inappropriate links with developers, and that the perceptions held by some members of the community were created by lies and distortions put forward by their political enemies in the local media.

The pro-development councillors and their supporters dismissed the importance of perceptions. They argued that facts were paramount, not perceptions. This was a view put

forcefully by Paul Brinsmead (**T. 23/2/05 p. 438**). It is ironic that he was dismissing the importance of perceptions when in the same appearance at the Public Hearings he was attempting to create a perception that his role with Tweed Directions during the election period was relatively minor. In fact, he was one of the chief strategists of the whole campaign.

MR BROAD: *If there was a perception that the relationship between your father as a councillor and yourself would be of benefit, would that be justified?*

MR P. BRINSMEAD: *You need to be very careful about perceptions. I've sat through a couple of days in this Commission and I've seen some of the reporting. There's been a lot of discussion about perceptions. Perceptions are like opinions, everyone has them. Perceptions are like rumours, they're like innuendos. There may be many perceptions, for instance, that in the community that all politicians are corrupt. There may be a perception, for instance, that this Commission has already come to a pre-determination or that this Commission is politically biased.*
But just because there's that perception doesn't mean it's true. Simply because that perception is out in the community doesn't mean it's true. Now, I would have thought that this Commission is about finding truth and facts.

T. 23/2/05 p. 438

The fact is that perceptions at any level of politics are important. Voters are never fully informed about the matters that influence their votes. Much of what they hear comes from media reports and they have little opportunity to assess the reliability of what they hear and read, and no ability to obtain all the facts about any issue. In the case of Tweed Shire Council there have been problems with individuals and community groups obtaining information on issues in which they have an interest (see later in this part). Combined with this, the pro-development councillors adopted a confrontational approach to individuals or groups in the community who might question or oppose any aspect of the pro-development agenda. A lack of access to information combined with dismissive, abusive, and belligerent attitudes towards those questioning or opposing the agenda made fertile ground in which perceptions of a lack of good governance might grow.

To a large degree the democratic system is built around community perceptions. The ability of a council to govern efficiently and effectively is judged by the community on how well or poorly policies and actions affect individuals and the community. In Local Government the most contentious issues are often related to planning and development processes. Where a council espouses a pro-development stance, most perceptions are likely to be shaped by how the council manages its responsibilities in these areas.

It is perhaps inevitable in Tweed Shire, where the last two elections have been fought over levels of development, that most people's perceptions are formed by their evaluation of how the Council manages such issues.

The Inquiry does not seek to form opinions on whether or not certain levels of development are good or bad for the social and economic well-being of Tweed Shire. It does have an interest in how close councillors were to proponents of development, and how the pro-development councillors managed the development processes of the Council.

Councillors elected as the Balance Team in 1999 loudly and often proclaimed their open door policy and encouragement of property development and investment. Former councillors Beck and Brinsmead were prominent in such promotions. In the 2004 election the ties of the pro-development candidates to the development lobby were formalised through the financing and campaign management of Tweed Directions. The extent of the connections was hidden from the public, but the release of information by the Electoral Funding Authority pointed to how basic and essential the support of proponents of development was to the very narrow electoral success of the pro-development group. Without doubt this would have raised the consciousness of the community to the fact that the ruling group in council not only had a pro-development agenda, but they owed their place on Council to developers.

Tweed Shire has a close-knit business base, revealed by the 1999 support of the Balance Team candidates by 300 of the 400 businesses targeted. The social and economic links between business people make it inevitable that pro-business councillors and business interests are strong. The connections of several former councillors with business are well known to the community. Those connections are strengthened, and made apparent, by the participation of former councillors Polglase, Brinsmead, Murray, Beck and Lawrie with business associations and chambers of commerce. Since property development has been the largest single industry in levels of investment and employment in Tweed in recent years, these councillors would be perceived by members of the community of having strong relationships with people in the property industry.

The former Mayor (Mr Polglase) has a strong relationship with Mr Blundell, the founder of Tweed Directions and a prominent developer. Former councillor Mr Brinsmead has strong family relationships with the` development industry.

The submissions that referred to the connections of councillors to proponents of development made mention of Mr Brinsmead more often than any other councillor. It was his family connections and his vibrant advocacy of the development industry (if not individual developments) that appear to have gelled sections of the community into perceptions that he, and other councillors, were not considering the whole community when performing their duties.

Where a councillor, who is a strong advocate of the economic virtues of development, has a son, son-in-law, and a daughter involved with developments in Tweed Shire (either as developers or providing professional assistance) almost unavoidably the perception of bias or favours to developers might be formed. Paul Brinsmead vigorously attacked any such perceptions (**T. 23/2/05 p. 442-444**).

MR BROAD: *... Now, why it suggests is there's a failure, or there had been a failure, within Council to disseminate information between councillors. To what extent doe [sic. does] that sort of failure affect your sort of business operation?*

MR P. BRINSMEAD: *Obviously, it would be a better situation for us if every councillor is informed.*

MR BROAD: *Given your relationship with your father, does that adversely affect perceptions, or the way you conduct your business?*

MR P. BRINSMEAD: *I don't understand the question.*

MR BROAD: *Okay. Do you run the risk that information not becoming publicly available, or not even available to our councillors, can entrench a view that there is some sort of relationship which is untoward between your father and yourself in respect of his role as a councillor?*

MR P. BRINSMEAD: *Well, I said to you before, I have very strong concerns about perceptions, and I think you are treading on dangerous ground and you risk a situation where if this Commission keeps asking about perceptions it will be seen by the media, by the public, that you're not interested in the facts and the truth. Perception is innuendo. It's rumour. Isn't the truth the thing that's important? Aren't you about finding the truth and finding the facts?*

MR BROAD: *I won't press that question. It's not an answer to it.*

MS ANNIS-BROWN: *I just wanted to clarify, you've mentioned that you believe you get a hard time from Council - - -*

MR P. BRINSMEAD: *Yes.*

MS ANNIS-BROWN: *- - - probably harder than some other developers, given your relationship with your father. I just wanted to know whether you've taken, or have implemented any practical measures to try and avoid that, if you like, and, I mean, setting up Chinese walls - we discussed that during the inquiry - things like that.*

MR P. BRINSMEAD: *Look, I've always been very concerned about it, and I know my father is as well. I mean, as someone who wants to remain in the Tweed and someone who is both a lawyer and a developer, I mean, we would like a situation where we're acknowledged that we're making a contribution. I mean, every human being wants that. So one of the things that I did do at an early stage in conjunction with my father, particularly as my legal career expanded with further projects on the Tweed, we spent a great deal of money getting QCs opinions in terms of what are the obligations of a councillor, when do circumstance arise that he should not participate in debate, he should not vote on issues, and, look, we obtained that opinion probably four or five years ago, and that's been a guiding principle in terms of a clear understanding for him because, you know, both from my perspective and from my father's perspective, he wanted to avoid a situation, obviously, where he either had a conflict and to do as much as he could to avoid being in a situation where it might be seen that he might have one.*

MS ANNIS-BROWN: *So you wouldn't meet at any stage with your father regarding developments that are before Council that you're involved in?*

MR P. BRINSMEAD: *No. And very careful about that.*

MR BROAD: *What about developments in which you are retained in the capacity of a lawyer?*

MR P. BRINSMEAD: *No. Again, it's - I very rarely talk to my father about applications that are happening, business that is happening. Often things come before Council where he, as a councillor, doesn't even know it's about to happen and he sees it on the agenda, knows I'm involved, and has to withdrawn.*

T. 23/2/05 p.442-444

Former Councillor Brinsmead (**T. 18/2/05 p. 255-256**) recognised that perceptions of conflicts of interest could arise from his family's development activities and/or the fact that he accepted Tweed Directions funds. He denied that the perceptions had any grounding in fact.

MR BROAD: *Would you accept that the acceptance of donations, whether through Tweed Directions or otherwise, by councillors or by candidates standing for election, if those donations are from substantial developers, may be perceived as giving rise to a conflict of interest?*

CR BRINSMEAD: *I can't control what some people are going to perceive, especially if you have a sort of a political debate on it and people pushing a various barrow.*

MR BROAD: *Do I take it you are conceding that there could be a perception?*

CR BRINSMEAD: *Any perceptions is possible.*

MR BROAD: *Another matter that falls from these perceptions of conflict of interest of course form part of the terms of reference of the inquiry and that is the relationships between the councillors and developers. Councillor Brinsmead, it's well known - and I'm simply raising it - that your son and son-in-law are developers within the Tweed Shire Council.*

CR BRINSMEAD: *That's correct.*

MR BROAD: *Does that place pressure on you in the performance of your role as a councillor?*

CR BRINSMEAD: *It certainly does.*

MR BROAD: *Now, I know that on a great number of occasions you have indicated that you have a pecuniary interest and that you have left the Chamber. I think that's a common thing and I think it was referred to, I think, by the Mayor as being commonly occurring and perhaps the most common declarations of any councillor. I'm not suggesting that there's anything wrong with that. I simply indicate that is a comment; so I'm not seeking to attack you on that. Does it, in your view, the relationship between yourself, your son and son-in-law, put pressure on other councillors?*

CR BRINSMEAD: *They never indicated to me that it does. They would have to speak - you should put that question to them. I have no indication from them that they've ever suggested as such, no.*

MR BROAD: *Do you ever advocate their developments with other councillors?*

CR BRINSMEAD: *No. I'm not saying that it has never on any occasion been discussed. But I've never felt obliged to go out and lobby for a particular line through any relationship with family, no.*

T. 18/2/05 p. 255-256

Whatever denials that might be forthcoming about reality versus perceptions, the fact that a large number of people in the community suspected serious conflicts of interest did exist, and that some councillors had inappropriate relationships with developers. All of this shaped and coloured the community's view on the Council's governance, and the confidence of the community in the Council. The sense of such views was provided in **submission 33** (Cooney).

Dear Sir

the biggest and most serious problem in regards to the Tweed Shire council is one I strongly suspect we share with most councils in rapidly developing areas, especially on the east coast of Australia. That is without doubt the Laws that cover them are inadequate and although they have improved there are still loopholes which are all to easily exploited. The Tweed Shire I suspect with a lot of other shires has a long history of corruption which has been on all sides of the political spectrum. I am the third generation of my family to reside in the Tweed Shire and as long as I can remember it has always been the case. It has always been seen as the pathway to prosperity as opposed to serving the community in particular the rate payer. It has always been stacked with Real Estate agents , Solicitors , large landholders and people who stand to benefit from their position. Over the years there are a lot of not only councilors but entire families who have done very very well for themselves as a direct result of being elected to council.

That in essence is corruption and unless laws are changed so that there is no way that can happen it will always be the case. One lot of corrupt councilors will simply be replaced by the next, despite past councilors even ending up in jail there is no shortage of upwardly mobiles falling over themselves to get elected. Mostly because they know they will benefit greatly from their position on the council. Even after they have lost their position on council they have through their position on council been working very closely FAR TOO CLOSELY with developers and have established a relationship/friendship with them. In other words they through council are moving in the right circles which even if they do everything by the book whilst on council, they can exploit after their time on council is over.

There is a simple question that anyone can ask the answer to which starts to lead you down the path that begins to unravel the truth and expose the corruption. Why do certain people namely developers and business people spend, I've heard figures of half a million or more being bandied about, to get a councilor or certain councilors elected that earn less than thirteen thousand a year. Already the thing is beginning to smell, and more importantly what do those people expect in return for their investment? The community in general and the representatives they would like to see elected do not have that sort of money. Straight away our democratic process has been severely compromised and the contest has become very one sided.

For years the Tweed Shire has been seen as a no go area for developers which is not entirely true. That is because the vast majority of residents both old and new do not want to see their beautiful beaches and precious agricultural land covered in ugly lumps of concrete. The councilors of the time mostly during the period when Max Boyd was mayor held the same view which is good council as they are representing the view of the community that elected them. Developers frustrated with this attitude realizing there was huge amounts of money to be made in essence bought the council. They threw very large amounts of money behind the people they wanted to get elected and you would be amazed at how effective slick glossy advertising can be. The end result is we have a council that does not represent the vast majority of rate payers or their views. The current council and the previous one are the most divisive, bitterly opposed council in the shires history , never have I seen the community so divided over the council.

The pro development faction in council has time and time again ignored the communities wishes. They fall over themselves backwards to cater to the developers every whim bulldozing the general community and their views out of the way. On the developers behalf they have challenged, indeed broken NSW planning laws (height limits), deceived the community and attempted to bully the community into consenting to developers wishes. For example Pandanus Parade Cabarita, the local residents were bitterly opposed to developers proposals to develop it. The council on the developers behalf, that is the pro development faction ran a campaign sprooking for the developer. They were in all the papers they could

get in, ran a slick deceptive advertising campaign in supportive papers like the weekly TV guide. They did everything they could to dupe the general public into believing it was a good thing for everyone. In fact it was full of lies, they said the sale of the land was a forgone conclusion as the developers had an agreement with council which was legally binding, implying that they owned it anyway and if the community didn't like it there was nothing they (the council) could do about it. The money from this sale which in a lot of peoples opinion did not represent it's true market value, would be spent on improving all the Tweed Coasts public facilities. Firstly all the public facilities are more than adequate already, the NSW government has already funded the council in the form of grants e.t.c. to see that they are. The money they had allocated for work to Norries Headland (Cabarita) some seven hundred and fifty thousand had indeed already been carried out bar the resurfacing of the bitumen(car park).

That is just one small example, you do not have to dig very deep into the workings of council to find out what developers want and get In return for their investment . Years ago the corruption was blatant with councilors taking bribes, kickbacks e.t.c. from developers. These days it is lot less obvious and a lot more sophisticated. These people (councilors) are not dumb they are often solicitors, well educated e.t.c. and know the law. They also know how to exploit it to their advantage make a lot of money and get away with it. In the past they would do things like buy land cheaply, get council which they were part of to rezone it and sell it at a handsome profit. Get roads put in, sealed, adjoining their or their families land increasing the value of it. There was all sorts of ways of exploiting their position on council for financial gain. For example Kriegelburg a past councilor when on the council was developing a housing estate at Pottsville. It was subject to an environmental impact study because it was valuable wet land. Being on the council he knew all about it and went in with a bulldozer flattening the place before it could be carried out. He got the sack from council for it and a slap on the wrist, but the development went ahead and he made a lot of money so it didn't matter the money was in the bank.

These days it works more like this, for example councilor Brinsmead. The legal firm his daughter works for got the contracts involving very serious amounts of money for Casuarina Beach and Salt developments. His son and son in law worked for both developments making a great deal of money , in fact so much money they could afford to do their own development. Their company Resort Corp is the developer as everyone knows of the Beach development at Cabarita, councilor Brinsmead did not vote on the resort corp development. But you could not expect anyone to believe his fellow pro development councilors would not fight tooth and nail to get it across the line and cater to Resort Corps every whim which includes the Pandanus Parade fiasco. He has kept his nose clean, broken no laws but his direct family has benefited to the tune of millions of dollars and that is how it works. He did vote as far as I know on both Casuarina and Salt.

All sorts of deals done behind closed doors and it's all worked out before it comes before council. None are written down so they can not be produced as evidence but everyone knows what goes on. They approve the development and indirectly benefit from it, some are developers themselves and as such should never be allowed to stand for council. Anyone involved either directly or indirectly should not run for or be allowed to sit on the council. Even if they have broken no laws and done nothing wrong the office of councilor is very much compromised by their involvement with developers. The public perception is that deals are being done and some how they are making a lot of money out of it. Which unfortunately I believe is absolutely true, the particular councilors the gang of six and I don't have to tell anyone who they are everyone knows. They have and are involved with probably a number of companies and evade any wrong doings by listing them in their wives or families names concealing their involvement. That is a sneaky way of absolving themselves, I hope the law in regards to this has been tightened as it has been used to great effect in the past.

These Councilors the pro development faction have been very foolish in allowing themselves to be used by the developers. Obviously impressed by wealth, pictures of Lin Beck then mayor on the front page of the newspaper, being swooned around the proposed Casuarina beach development in a chauffeur driven Limousine courtesy of the developer, grinning like a cat in a fish shop does nothing for public confidence in a transparent council. The pro development faction has allowed itself to be seduced by power and wealth thus compromising their position. They are perceived as being the puppets of the developers which is a foolish position to put yourself in. When the axe falls it is their heads that will be on the chopping blocks not the developers. They obviously aspire to be like them (very wealthy) which is fine but the office of councilor should never be used or abused to reach those aspirations. If they wish to be involved in development they should not be on the council already there is a conflict of interest and their position compromised.

The looser in all this is the rate payer, the residents, the everyday people who make up the vast majority of the shires residents. Their voice is all too often lost in all the horse trading between developers and the pro development faction in council. They have barred the public from council meetings, namely because there are a lot of people bitterly opposed to what they are doing to the shire, a lot of people very very angry with the council and despise the sneaky manipulative tactics used by them to bully people into accepting developments. The way they behave at council meetings alone should warrant their removal from council. Let alone the appalling way they treated the previous town planner for doing nothing more than his job. David Broyd was relentlessly persecuted, abused , pressured by the pro development faction. He suffered a marital breakdown as well as close to a nervous breakdown and if you need evidence of how nasty and horrible the pro development faction can be look no further than their treatment of him, all of coarse on the developers behalf. Fearing a loss of power at the last election they installed a very pro development replacement for David Broyd before the election in case they no longer held the majority faction.

As I have already stated the big loser is the ordinary everyday person, the pro development faction does not seem to understand that peoples homes, lifestyles , leisure , activities , way of life , heritage , enjoyment , pleasure and so much more are being directly effected by these developments. People who have lived there for generations are being forced out of their homes, they simply no longer can afford to live there, the rates are way too high, they can not afford the rent , wealthy people move in and all of a sudden after fishing there for generations they can no longer use the beach because THEY do not want 4WD's on THEIR beach, they do everything they can to make these beaches as private as possible even though they are public beaches. They do this by restricting access, providing as little parking as possible and doing whatever they can to discourage the general public from using it.

Our children will not be able to enjoy the same lifestyle we have these developments have a much greater impact than people think they do. Beaches no longer have 4WD access, no dogs are allowed on the beach, there is no parking when you get there, access to the beach is as limited as the developer can make it , of coarse strongly supported by council. In essence the developer tries to make public beaches as private and as exclusive to their clientele as possible. They have also with the pro development factions support tried to steal our non profit public organizations. Casuarina beach for example tried to steal our public Art Gallery, they tried with their mates in the councils support to relocate our public Art Gallery to the Casuarina beach development. Question : why would you build a public Art Gallery on private land in a huge multi million dollar privately owned up market development ? Answer : because the developer thinks it will enhance his development, make it more exclusive , add prestige to it and more importantly increase its value. All three developments on the Tweed Coast, Salt , Casuarina and the Beach (Resort Corp) have tried once again with the pro development factions support to steal Cabarita surf life saving club of which I am a past member.

The breadth, scope, and time frames of the examples put forward by Mr Cooney illustrate that the perceptions held by some members of the community were not based on one or

two factors but represented a perception that might have built up over a number of years and which was derived from many instances of perceived conflicts and poor governance.

The perceptions were strengthened by the fact that some members of the community could illustrate the bases for their conclusions over a number of years and over a number of issues. Some of these are: bloc voting on major and contentious development applications; regular meetings of councillors with developers; interactions of developers with councillors at council meetings where their developments are being considered; councillors holding pre-meeting discussions at which decisions would be made; voting and debating issues where family or other conflicts of interest arise; exaggeration and lies being used to sway votes on issues; pressure and slurs cast on staff who did not agree with councillors' views on matters; inappropriate attacks on other councillors.

Examples of such evidence are presented in the following excerpts from Fitzgibbon (**submission 369),** Broyd (**submission 362),** Hopkins (**submission in reply 12),** and in other examples in Addendum 4.2.1.1**.** Detailed analyses of some of these issues are provided in Section3 of this report. Here, the purpose is not to make a judgement on the merits or otherwise of the various examples put forward. It is to suggest that the perceptions built up about the Council extend over many issues and over many years.

3.BLOCK VOTE ACKNOWLEDGED

There are numerous examples which underline the reality of developer biased factions in council. A random selection follows.

* A Gavin Lawrie letter to the editor says *I admit that I am philosophically aligned to the balance team. That will always be the case* . (19/7/01 D.N.) One of his supporters, Alan McIntosh, a member of the recently formed developer dominated Tweed Coast and Kingscliff Business Corporation, confirmed the block vote when he tried to deny Cr Lawrie's membership with the exaggerated statement. *Gavin Lawrie has crossed the floor many times in the council and makes decisions on merit.* (Tweed Sun Letter to the Editor)

* Cr Brinsmead, commenting on a mayoral election, is reported as saying that " his first priority was always the solidarity of the Balance team and that he would do what was best to secure that for the future." (16/7/01: D.N.) He also admitted to pre-council meetings being held on Mondays at Avocadoland, and the attendance of developers. He stated that " he wanted the council's meeting agenda to be revamped so people with matters before the council could respond to reports from officers which only became available Monday morning." (17/3/00 D.N.)

* Cr Beck on Radio 97 (March 13 99) confirmed meetings were taking place on a regular basis.

* Cr Davidson made a statement to the paper that " he had told Mayor Beck that he would not attend *secret meetings* of Balance team councillors to discuss issues with developers and would only turn up to meetings open to all councillors " (9/5/00)

* Cr Polglase confirmed that at one of the fortnightly " queries were raised by Bill Bedser over his(Polglase's) decision not to vote with his majority colleagues on some issues." In defending the holding of these meetings he said the reason for attending the meeting was ' to hear arguments of people who had particularly important issues coming to the council." D.N. 17/03/00

*. From my seat in the gallery it is obvious that members of the majority faction have already made their decisions before the meeting commences as to what the vote will be, who will move and second, and who will speak to a motion. A prime example of this is to be found under the sub-

Submission 369

heading The General Manager's Contract, when a carefully formulated motion by Cr Carroll addressing issues of due process, was dismissed out of hand.

4. PATTERNS OF BEHAVIOUR

A number of the actions outlined in this section, if considered by themselves, might possibly be accepted as minor lapses. Cumulatively, the following examples of exaggerations, outright lies, derogatory language, innuendo, dismissive attitudes, arrogance, inappropriate responses to the community and to official rebuke, taken at random, highlight the manner in which the majority factions have dispensed with the recognized standards of behaviour expected from councillors, and suggest that there has been a consciously adopted code of behaviour.

* Exaggerated statements and lies are frequently used by Cr Beck to support an issue.

i. In attempts to close down Counterpoint Youth concerts coordinated by former councillor and environmentalist, Ron Cooper, she fabricated a statement re the potential existing for someone's death, and attributed it to a police officer. Sgt Hunt of Murwillumbah had to deny this. " To the best of my memory I didn't say anything like that. I wouldn't have used that expression, it's too inflammatory.(D.N. 8/9/00)

ii. Cr Beck claimed only 1000 signatures out of 2,5000 signatures against extension of Coolangatta runway (which she supports) were legitimate, only to have the spokeswoman for the collecting group verify their legitimacy (D.N. 7/9/00)

iii. When Cr Boyd reminded Cr Beck, a vociferous opponent of the new art gallery, that she had said "The new art gallery at Greenhills will be built over my dead body" she denied making the statement .(20/11/02) The D.N. confirmed that she had indeed made the statement.(

iv. In April 2000 when a development proposal placed by Lenen Pty Ltd for lots 312301 & 197 was not getting the green light from the planning department, because it did not conform in a number of areas, Cr Beck, then Mayor, together with Frank wilson for Lenen, floated the story that the Hyatt resort group were going to pull out of the project. As it later transpired, there was no truth in the statement that Hyatt had ever been involved in this development. The lie was a ploy aimed at putting pressure on the planning staff to approve, and also to create concern in the community about employment opportunities lost.

* At the 17/05/04 council meeting Cr Murray, during the discussion of a proposal to put a road through the centre of Crown land Lot 490, twisted a phone conversation with the president of the Kingscliff Ratepayers' & Progress to make it seem as though the association agreed with the new Director of Development's support for the road. What the president had said was, that the association supported the original and long term objection by the planning department.

* Councillors who became part of the 1999 and 2004 majority factions walked out of a council meeting in March 97. This was in protest against a shirewide plan that proposed developers rather than ratepayers should be responsible for certain costs through contributions plans.

* In September 2003 the majority councillors boycotted a meeting when it seemed that the non-availability of some majority faction councillors might result in a vote against approval of a controversial development in Uki. The Tweed Sun under the heading MAJORITY COUNCILLORS BOYCOTT MEETING NO QUORUM SO NO MEETING(10/9/03) noted that Cr Davidson was the only one of the 1999 majority faction to turn up at the meeting. According to a Daily News report Crs Luff and James of the 1999 minority group had expected something untoward when a *"smiling" "Lyn Beck*

(had) *told them there were other ways of blocking the minority faction's vote*. Barry Longland, a Uki resident opposing the D.A. also claimed Cr Lawrie had told him earlier that day that he would not be at the meeting and *'didn't think much would be happening'* . Interestingly the developer involved was also absent, when he would have been expected to be there. The absent councillors all provided "good" reasons for absence, but the majority faction's attitude was expressed by Cr Younblutt when he said that it seemed many opponents of the Uki project were being *led by the nose by ... green extremist deadbeats* (D.N. 5/9/03)

* Cr Beck's attitude towards Australia's indigenous residents leaves much to be desired, both as a mayor and as an ordinary councillor.

i. In May 2000 Cr Beck described the State Government's rate exemption of property owned by Aboriginal groups as " divisive and discriminatory." (Bulletin 19/5/00)

ii. In July 2000 Cr Beck refused to use the preamble, acknowledging the area's original Aboriginal inhabitants at meetings, as resolved by previous council. (D.N. 26/7/00).

iii. At the 18/2/04 council meeting Cr Beck's attitude to Tweed's indigenous residents was again on show when she argued against making a contribution towards " Annual Harmony Day."

* Councillors in the majority faction have been quick to denigrate those who have taken action against them.

i. The mayor Cr Polglase, in denying mishandling of the planning process on Lot 490 made various statements including the following about Minister Kelly's statement (It) *was riddled with factual errors ... the clear intent seems to be to attack the council and it is absolutely unwarranted* (d.n. 1/12/04)

ii. Cr Lawrie's is threatening to go to the Supreme court, challenging with, (it) *has the power to overrule any inquiry the state government should implement*.

iii. Cr Brinsmead's in comments re the Inquiry said of Minister Kelly and local member Neville Newell - *As far as these politicians are concerned, the findings of this inquiry are predetermined..s* He later parroted Andrew Fraser's statement in parliament saying that *this politically inspired commission of inquiry should be called off*. (22/12/04 D.N. letter) This is a continuation of activities during the lead up to the election when attempts were made to score party political points rather than concentrating on local government issues.

iv. Cr Beck commented on the inquiry - *it might get people on oath telling the truth which was not done at the Bulford inquiry. The Bulford inquiry was a farce*.

v. Cr Murray stated - *I feel this is a kick in the guts.... this is a very progressive council and I am impressed with how it works*.

vi. Cr Brinsmead has refused to apologise for slurs he cast on planning officers and on Mr Bulford himself in regard to the events surrounding the Bulford inquiry, referring to the report as "irrelevant" and Bulford's reporting of a plane trip to Grafton as *an amazing fabrication and a stupid one at that*. Cr Brinsmead's " Democracy Subverted ", a paper published on the same issue under parliamentary privilege, contains similar derogatory comments.

vii. The removal of administrative powers over Lot 490 brought the comment from Cr Beck that it was *Quite a joke really"* (D.N. 24/05/04), and from Cr Murray, that he ' was appalled at the move *to meddle* in the affairs of a duly elected council " and that " he blamed a *small noisy and misinformed mottvated by rent-a-crowd* from Kingscliff motivated by a failed council candidate for turning the issue into a political circus." (T.S.. 26/05/04)

viii. Cr Lawrie's comment was to deny council mismanagement & term the action a party

political move that used a *noisy, unruly group,* who were *grossly melodramatic, sensational and exaggerated.* (D.N. 27.05.04)

*Certain majority faction councillors, through letters to the editor in various local publications, and in commentary during council meetings are prone to use derogatory terms to belittle minority councillors and individuals in the community, through slurs and innuendo.

i. The 1999 majority faction made a feature of using the term BANANA PARTY to describe the minority councillors. BANANA as spelled out by Cr Lawrie in a letter to the Editor (D.N. 18/2/02) stands for "build absolutely nothing anywhere near anybody". Crs Brinsmead and Lawrie have been the main perpetrators, but Cr. Murray also puts it to use.

ii. Crs Lawrie and Murray are also prone to use words such as "evil and sinister" (Cr Lawrie T.S. 3/3/04) when describing the minority group's arguments.

iii. Cr Murray has described those in the community with whom he does not agree, as "radicals" and "stupid minority weirdo groups" (Tweed Weekly & TV Guide, 12/01/03)

iv. Cr Lawrie when commenting that Cr James had voted in support of a brothel item and voted against Latitude 28, insinuated that Cr James had supported brothels because of a personal interest in them. A little later,when Cr lawrie added "It's a sad indictment of where his values lie.." and was asked to apologise, with a smile said, "I unreservedly withdraw it and slap myself on the wrist." Cr Lawrie is not averse to throwing mud in the hopes it will stick.

v. In reference to Professor Ian Lowe, one of a series of pre-election speakers propounding ideas of how we can look after the Tweed, Cr Brinsmead sneered, *Professor Lowe is still running around with that tired and discredited old greenie choice between economic growth and quality of life.* (16/02/04 D.N. letter)

vi. See Bulford Report re unsubstantiated & vicious attacks on professional staff

vii. See Cr Brinsmead's reference to a member of the public as *a cripple* under the sub-heading Kings Forest in the Planning process section.

* It is very obvious that the majority faction takes no notice of the arguments put forward by the minority group. They chat to each other, read the local paper, pass notes to each other, make sotto voce comments about the speaker. A couple of examples will suffice,

i. *Here we go again! Knows it all. Thinks he's an expert on everything.* (Cr Lawrie's comments about Cr James who does his research thoroughly and is a very knowledgeable councillor.)

ii. During the 19/05/04 meeting Cr Bell read the Daily News while Cr James was speaking to a well formulated motion, pushing it aside as soon as Cr James finished.

iii. During the 17/05/04 meeting , again Cr James was the butt. - Cr Murray's comment was,*Why listen to him- he's not commerce or a designer.* -

* One of the most vicious concerted and prolonged attacks on an individual in the community that I have heard from the gallery involved suggestions of illegalities and an attempt to draw others into the same net. This was spearheaded by Cr Murray at the 16/06/04 council meeting and his target was the organiser of the Art, Food & Jazz Festival, and recently a council candidate not sympathetic towards the majority faction.

Protests from the minority group about a *witchhunt* being conducted were laughed off, and at a later meeting the majority faction showed how far they were determined to go in pursuit of that organiser, by voting to impose on her conditions with which other organisations seeking funding from council were not being forced to comply. Once again attempts by the minority group to ensure that due

process was observed were rejected summarily, despite a comprehensive motion by Cr Carroll that would have laid down a practical framework for management of council donations.

* At the council meeting following the ABC Four Corner's programme, OCEAN VIEWS, Cr Carroll found it necessary to ask those in the majority group to mend their behaviour. Her words were reported in the Tweed Sun(23/7/03) - *This behaviour was on national show for all to see on Four Corners, but the effects of it are experienced by people sitting in the chamber week after week ..Nobody should be fooled into thinking that the nastiness, spite and disregard for the impact of the snide behaviour on others is just the normal to-ing and fro-ing of political life.... .. What is not normal is the toxic impact on councillors and staff of being embroiled in then unresolved issues of past feuds between individuals, of staff being denigrated at council meetings , of the regular misuse of debating time spent on imposing political beliefs and values on others, of comments reeking of just plain nastiness.*

Submission 369 - Continued

3 **"The appropriateness of the procedures and processes adopted by Council in relation to its Environmental Planning responsibilities, including the processing applications for development – particularly those of a significant nature".**

3.1 A key issue here particularly between September 1991 and September 2001 was the frequent involvement of Councillors – particularly the then Mayor and Deputy Mayor, Councillors Lynne Beck and Bob Brinsmead respectively – in meetings with development proponents. Many of these meetings was seeking to negotiate outcomes and to resolve the most significant outstanding issues. The role adopted by the Councillors present was very frequently one of advocacy and support for the positions and view points of development proponents. Whilst I do not believe that any pressure from Councillors resulted in changes of position by myself or my professional staff, there were certainly cases of pressure to attempt to achieve more favourable outcomes for development proponents. A prime example was a meeting involving the development proponents of the Health Resort proposed for the southern most lot within the Casuarina Beach property. This meeting involved the proponents and the consultant representatives and to the best of my recollection was attended by four or five Councillors whose attendance was not previously known by myself or my professional colleagues. This was a very adversarial meeting and I recall participation by Councillors in a manner that was supportive of the development proponents and predominantly dismissive of professional analysis and State Government (then Department of Land and Water Conservation) advice.

3.2 During the period of September 1999 until my departure, there was a highly frequent incidence of political decisions made contrary to professional recommendations. I recognise that

Submission 362

a) There is a clear entitlement of Councillors to make decisions by majority vote contrary to professional recommendations given the roles that are legally defined in the Local Government Act, Charter and other guidelines; and

b) The provisions of the then current Local Environmental Plan and Development Control Plans were inconsistent with the political positioning and stances on individual matters taken by majority Councillors – which is also a reality of Local Government and the lead times in preparing and finalising Local Environmental Plan and associated Development Control Plans.

3.3 Notwithstanding the above, in my opinion, there was a high proportion of these decisions made that were reflecting the particular interests of the development proponents and "getting things to happen" with lack of regard and consideration to the wider planning report evaluation and the legal obligations of Councillors as the planning consent authority under the Local Government Act, 1993 and the Environmental Planning and Assessment Act as amended 1979.

3.4 I can provide a number of examples to reflect the above opinion but they include:

a) Decision making on Casuarina Beach in terms of public road access and "legibility" of road layout in the development;

b) The proposal for the Health Resort on the southern most subdivided lot of Casuarina Beach in terms of environmental protection and public open space provision adjacent to the coastal foreshore;

c) The decision to delete all recommended conditions relating to the development of Nor Nor East Marine Parade, Kingscliff for serviced apartments. This essentially enabled the development to operate as residential apartments and longer term stays. This is a critical factor in that there were concessions in development standards relating to the DA for serviced apartments that were not available for a development application for residential units at the same site; and

d) Major concessions on public open space and other developer contributions to public benefit eg kerb and guttering, in relation to the development approval for the Terranora Lodge rural residential subdivision.

3.5 A number of committees were established with participant composition that would give a favourable approach to the development proponents of an area and to the political positions of the majority "Tweed Balance Team" on the Council during 1999 to 2003. One prime example is the establishment of the LEP Advisory Committee that focussed upon the provisions of the Rural 1(a) zone and for rural subdivision. This Committee had a high proportion of landowners, Councillors and consultants who were the key supporters of more flexible standards for rural subdivision and development. This frequently led to high level differences between the professional advice being given by myself and Manager Strategic Planning Douglas Jardine, and the positions taken by the majority of the participants in these LEP Advisory Committee meetings. The protocol was - partly through my strong insistence – that there was a report from myself to subsequent Council meetings reflecting the professional position with the LEP Advisory Committee minutes attached for consideration in relation to these reports. Behaviours by participants at meetings towards professional staff were occasionally very inappropriate.

3.6 The frequent incidence of political decisions contrary to professional recommendations led to discussions about the appropriate procedures relating to ultimate decisions on these matters. I consistently insisted that when a development application had been recommended for refusal, that if the Council sought to approve that development, then the resolution at that meeting should be one of "deferring the development application for the Director of Development Services to provide a further report to the next meeting of Council including appropriate conditions in the event that Council decided to approve this application". This was frequently misunderstood or questioned by Councillors within the "Tweed Balance Team". The report back from myself would always contain consistent recommendations with the previous report with such draft conditions contained within a section of the report subtitled "Options".

Submission 362 -Continued

3.7 Of some significance are meetings held between development proponents of major projects: Kings Forest and Seaside City and Casuarina Beach - where there was consistent attendance by the then Mayor Councillor Lynne Beck and Deputy Mayor Councillor Bob Brinsmead with associated strong support and advocacy in the main for the development proponents positions. There would be many interchanges in such meetings of development proponents apparently "feeding" those Councillors information/positions/questions that were then communicated to myself or other professional staff present and apparent that Councillors and proponents had prior discussion about tactics. An example of this was the meeting of January 2001 involving Mr Tim Barr Project Manager of Narui, the then owners of Kings Forest. A highly inadequate development application had been submitted and the meeting was called to advise of the wide range of information inadequacies and the intent for the development application to be refused in the near future. Councillors Beck and Brinsmead were also present at this meeting and were "very interventionist" in the conduct of the discussions.

3.8 I welcome any review of Council's administrative and professional processes delegations and procedures operational at the time of my Director role. I do submit however that such protocols and procedures were of a high quality and that the quality of reports made on development applications and other planning matters to Council were also of a consistent high quality, independence and professional basis.

4 **"The appropriateness of the relationship between elected representatives and proponents of development in the Council area".**

4.1 In my opinion there was a clear link between the strength of advocacy and pressure sought to be imposed – particularly by the Mayor and Deputy Mayor during the period of September 1991 to September 2001 – for major development proponents who were also the most prominent contributors to the "Tweed Balance Team" election funding. These major development proponents and contributors to election funding were also the developers of the major projects proposed in the Tweed during that period – Casuarina Beach and Kings Beach in particular. The very strong and interventionist behaviour of the "Tweed Balance Team" Councillors and particularly the Mayor and Deputy Mayor of the time – Councillor Lynne Beck and Councillor Bob Brinsmead respectively, certainly

reflected the political platform of their election campaign of "getting development to happen in the Tweed".

4.2 Whether or not there was a direct link that is ever proven between development proponent funding and Councillor biases and misbehaviour in relation to advocacy, there is certainly a major undermining of public trust in any accountability and objectivity in the assessment of such major development proposals given the very substantial election funding.

4.3 The most apparently inappropriate Councillor behaviour that reflected the relationship between Councillors and development proponents were:

a) the presence of Councillors, particularly the then Mayor and Deputy Mayor, at meetings between professional staff and development proponents with the Councillors being strong advocates on behalf of the development proponents. Frequently the Mayor and Deputy Mayor were not invited by the staff organisers to the meetings;

b) the very close consultation and liaison that occurred between Councillors and development proponents during the course of such meetings – and indeed during the course of many Council meetings with some occasions of consultation between Councillors and development proponents from the gallery during the actual conduct of a Council debate relating to such a relevant development matter;

c) the deliberate and direct attempts to pressure and undermine credibility of myself and other planners involved in Council meetings or other meetings to discuss projects;

d) direct phone calls from the then Mayor to planning staff working on projects, to question and pressure outcomes favourable to the proponents;

e) explicit criticism of staff – notably myself in the media in relation to development projects.

Submission 362 - Continued

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RECEIVED
09 MAR 2005

Commissioner Daly
Office of the Commissioner
Locked Bag A5045
Sydney South NSW 1235

Dear Sir,

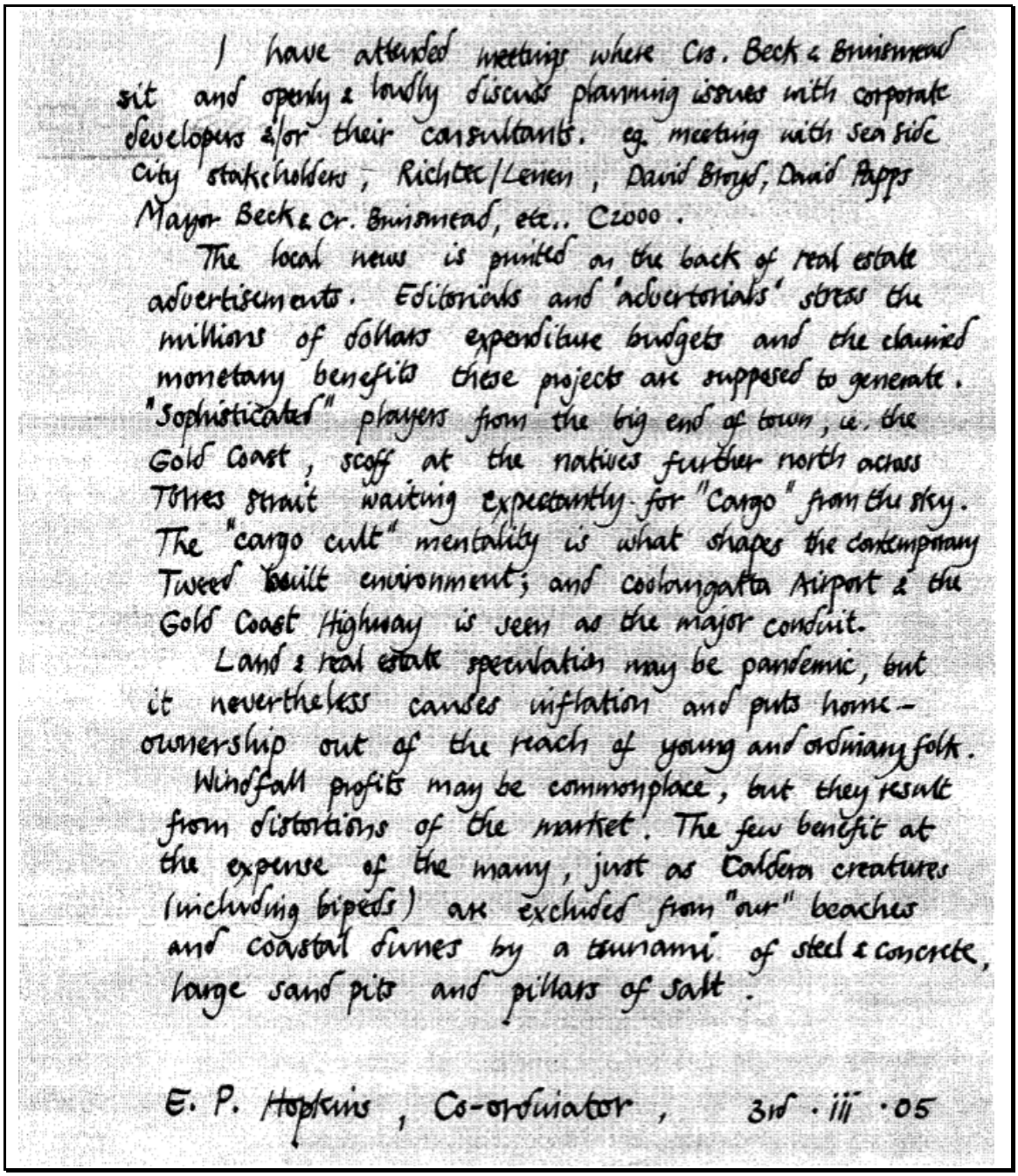
RESPONSE TO T.S.C. PUBLIC INQUIRY

After my appearance before the Commission I would like to respond as follows:

- I found the expetience fairly intimidating partly because the gallery was largely comprised of the General Manager, The Mayor and majority faction "heavies" Crs. Beck & Brinsmead et ors.
  - Sitting at the front table with Council's legal representative immediately at (the right) hand and under the close scrutiny of camera men & reporters etc.
  - Sitting under the elevated rostrum of the Inquirers.

  For a hostile witness there may be some benefit to the Commission, but an inexperienced willing witness is likely to feel unable to respond with spontaneity under these arrangements.
- I wish to make it clear that defects or lack of parity in the D.A. process are not due to faults of the local planning staff, but is due to the close nexus between development corporations, the local media and Councillors like Beck & Brinsmead who belligerantly push the process towards the outcomes they seek.

Submission in Reply 12



I have attended meetings where Crs. Beck & Brinsmead sit and openly & loudly discuss planning issues with corporate developers &/or their consultants. eg. meeting with sea side city stakeholders, Richter/Lenen, David Boyd, David Papps Mayor Beck & Cr. Brinsmead, etc.. C2000.

The local news is printed on the back of real estate advertisements. Editorials and 'advertorials' stress the millions of dollars expenditure budgets and the claimed monetary benefits these projects are supposed to generate. "Sophisticated" players from the big end of town, ie. the Gold Coast, scoff at the natives further north across Torres strait waiting expectantly for "Cargo" from the sky. The "cargo cult" mentality is what shapes the contemporary Tweed built environment; and Coolangatta Airport & the Gold Coast Highway is seen as the major conduit.

Land & real estate speculation may be pandemic, but it nevertheless causes inflation and puts home-ownership out of the reach of young and ordinary folk.

Windfall profits may be commonplace, but they result from distortions of the market. The few benefit at the expense of the many, just as Caldera creatures (including bipeds) are excluded from "our" beaches and coastal dunes by a tsunami of steel & concrete, large sand pits and pillars of salt.

E. P. Hopkins, Co-ordinator, 3rd · iii · 05

Submission in Reply 12 – Continued

The evidence of the former Mayor (**T. 16/2/05 p. 38-48**) gives some credence to some of the allegations made by members of the community. The Mayor substantiated the facts of meetings with developers and decisions on outcomes being made before council meetings.

MR BROAD: *Yes. Now, what about councillor attendance in meetings between staff and government departments or developers?*

MAYOR POLGLASE: *Yes, I have attended numerous meetings where there has been developers, government staff and our officers and myself. I have been asked to attend those meetings by request, to just sit in and listen to what the discussions are all about. Sometimes, I've just been at meetings with government departments and Council staff and meetings with developers and Council staff and myself.*

MR BROAD: *Is that the subject of some formal protocol within Council or is it a rule of thumb?*

MAYOR POLGLASE: *I believe it's the way you do good business.*

MR BROAD: *Yes, but is it formally adopted?*

MAYOR POLGLASE: *It's not a protocol of Council, no. It's not a Council policy - - -*

MR BROAD: *And that's a policy that you adopt, personally, or is it a policy that's adopted by the councillors as a whole.*

MAYOR POLGLASE: *No, it's a policy - it's not a policy at all. As I mentioned before, I believe it's the mayor's role to be able to be actively involved in processes, to understanding what the debate is, because sometimes there is a various of opinion between the different parties and, at the end of the day, Council may be called upon, through a report to Council, to resolve that issue by recommendation of a Council officer, whereas a government department may have a different point of view, or a developer may have a different point of view. But I believe that as mayor, you are responsible to listen to all points of view, to be able to make a determined judgement.*

MR BROAD: *When you have been answering those last couple of questions, have you been differentiating between a role that you adopt, as against a role that other councillors adopt?*

MAYOR POLGLASE: *I can only speak for myself, personally, on this matter, because as I mentioned before, as the mayor, I believe I had those privileges - to be able to attend those meetings.*

MR BROAD: *Is that because you, as a mayor, have a particular role associated with your ability to provide a casting vote?*

MAYOR POLGLASE: *Well, no, I don't believe that's so at all. I believe that you, as the mayor, has a role to be able to be fully informed of all debates, which may take place when you're dealing with certain issues. Not all - not all issues are - that come to Council require the mayor's input. Sometimes, we determine - probably 95 per cent of our issues are determined by delegated authority, but there is only a small portion, which come to Council for consideration.*

MR BROAD: *And when you attend meetings, do you do so only on the basis that there has been a request, either from Council staff or from a developer or other representative, say, another government body?*

MAYOR POLGLASE: *No, I have attended several meetings just with ordinary developers and I believe that I have sent a list of those to the Commission some time - a couple of days ago. So they set out for me that I attended, where I spoke with developers - very few meetings. Most meetings I have attended to has been in the presence of Council staff.*

MR BROAD: *Yes, so the meetings I was referring to were meetings involving Council staff and representatives, and the question I was directing yourself to was whether those meetings you attend, at the request of staff, at the request of the developer, at the rest of someone else, such as a government department; are those the nature of the requests that form the basis of your attendance?*

MAYOR POLGLASE: *Yes, that's - most of the meetings I attend are at - by request.*

MR BROAD: *You don't invite yourself along?*

MAYOR POLGLASE: *No.*

T. 16/2/05 p. 38-39

MAYOR POLGLASE: *Well, there's two roles to play. There's the corporate body of council prepares a report to come to Council. In that report, they address the issues and policies that Council works under, which is mandatory. The elected members of Council also have a community role to play. They have a role to listen to all sections of the community as regards to various applications that come before them. Those opinions will vary from group to group, which Council should reflect in the decision making process, because we, as a Council, have set the policies and set the guidelines for our staff to work with. We then are responsible to adhere to those policies, but we also have the response of getting some areas to listen to what the community expectations are.*

And just to give you a insight into that, just recently, a recommendation came to Council, where the Council officers recommended a certain – a further process - the community did not support that. We went to the Land and Environment Court, representing the community expectations, and Council won. So that then demonstrates, I believe, that Council has a role to listen to its community, because sometimes the policies we put in place three or four years ago, cannot necessarily reflect the way it should be today. So we always have to listen to the community expectations, to maybe re-look at some of our policies in the future.

MR BROAD: *Please don't think I'd overlooked that. The Local Government Act specifically provides that the role of the councillor, as an elected person, is to represent the interests of the residents and the rate payers, which is what you have been talking about, to provide leadership and guidance to the community, and to facilitate communication between the community and the Council. And that, you've just indicated, is very much the role that you see. At what stage does your role as a councillor stop being an overview role, in respect of the body of Council, not as a community representative, when matters come before Council? When there's an individual application before Council, when does your role stop?*

MAYOR POLGLASE: *Our role stops when Council has made a determination on that particular application.*

MR BROAD: *So your role as a councillor is not simply an overview role? It can be, when you're called upon to determine applications, a coalface role?*

MAYOR POLGLASE: *It is.*

MR BROAD: *When you have meetings with developers, whether with Council staff developers, whether with Council staff developers and representatives of government bodies, is it your usual practice to keep minutes or some record of your meetings?*

MAYOR POLGLASE: *I personally don't keep those records or files on those meetings at all. Council staff, if they're attending, normally take notes on various issues. My role is probably there, listening to the debate going on between the various people that are involved and listening to the debate and what they're talking about so that I'm better informed in the decision process I'm about to make.*

MR BROAD: *So you see your role as a listener.*

MAYOR POLGLASE: *I can honestly say that in most of these meetings I have, I have very little input into the meeting at all. I believe it's not my role as mayor of the Council to make any determination whatsoever but to listen to the debate because many times I'm asked questions by fellow colleagues of what's going on and what's happening here. I'm in a better position to explain - well, yes, there's a report coming to Council on this issue and you will be required to make a determination on that report.*

MR BROAD: *You spoke about making a determination. Does your role involve advocating a particular view?*

MAYOR POLGLASE: *At the meetings, no.*

MR BROAD: *So it's simply there to obtain a better understanding?*

MAYOR POLGLASE: *That's what I have been saying.*

MR BROAD: *If you have a meeting with a developer where no Council officer is present - sorry, I will go back one. Have you had meetings with developers where Council officers are not present?*

MAYOR POLGLASE: *Yes, I have.*

MR BROAD: *If you have those meetings, do you keep any record?*

MAYOR POLGLASE: *No, I do not keep any record because the meeting is normally discussing a point of view which they may want to enforce more strongly to me personally. Now, I have an open door policy for everybody so if they wish to make a point of view to me, I quite believe that I should be responsible and listen to that point of*

view because it may be involved in the debate down the track of Council. So I see no problem in sitting down and talking with these people on various issues because that, I believe, is part of the role which makes Council function better and to listen to all points of view. You don't necessarily agree with them, but I believe you have a right to listen to them.

T. 16/2/05 p. 41-43

MR BROAD: *I'm not asking you that. The minutes of Council meetings suggest that in a number of instances there is a sharp divide in the voting for and against a number of developments; those that come before Council. There seems to be a very sharp divide between one group of councillors and another group of councillors. That also seems to extend beyond development matters into matters such as issues involving this inquiry. Is it a fair assumption that there is a sharp divide in views in the Council?*

MAYOR POLGLASE: *On some issues there are; there is that view. But some issues there are not. I have seen applications that have been supported by all members of the Council where there has been previous disagreements between issues. And I've seen that in Council too. But there are a proportion of councillors who support opportunities and there are those who would support it in a lesser manner. But to say there are strong views - I don't support that statement at all. I believe there are various views within elected members who would like to see things done another way; and they make their point in the debate. Just because their point in the debate is not supported by the vote of Council doesn't mean to say they're wrong.*

MR BROAD: *You're part of a group of councillors that align themselves as being in favour of development. When a development application is to come before Council do you, as a group, meet to discuss the merits or otherwise of the development application?*

MAYOR POLGLASE: *There are times when we discuss it amongst ourselves to see what merit there is to this application, what merit there may not be. Yes, that happens every now and then.*

MR BROAD: *As a group?*

MAYOR POLGLASE: *Well, not always as a group. Sometimes we meet as a group. Sometimes we meet as individuals.*

MR BROAD: *And would you invite other councillors who may not be part of that group?*

MAYOR POLGLASE: *In my opening statement I said I have always had an open door policy. If those people wish to come along and debate those issues with me, they are quite welcome to do so.*

MR BROAD: *Are they informed?*

MAYOR POLGLASE: *I've never informed them, no.*

T. 16/2/05 p. 47-48

The public advocacy of certain development projects by some councillors appeared to be substantiated in the evidence provided by Dr. Jenkins, a member of the Upper House of the New South Wales Parliament.

MR JENKINS: *Yes. I think, from my point of view, the issue that really brought this to a head was the sale of land at Cabarita. I became involved in this because I live at Cabarita and I was approached by the resident associations there to assist them. And if I might just read - I wrote a letter to the Tweed News. May I read some of that letter? Is that appropriate or not?*

PROF DALY: *Perhaps you could give us the sense of what you wrote.*

MR JENKINS: *All right.*

PROF DALY: *And perhaps you could supply us with a copy of it.*

MR JENKINS: *Sure, yes. There was a protest meeting called at Cabarita Beach in October and I attended this protest meeting, and my personal view is that I moved to Cabarita because I wanted my kids to grow up in an area that's quiet and safe and reasonably - very similar to the area I spent some of my time growing up in. I mean, I like walking up to the shop and meeting Heather and knowing that she's going to be there, and picking up my mail and doing those things that are part of a small beachside town environment. And I think most of the people in Cabarita also moved there for that very reason.*

They don't want the sophisticated, highly urbanised, highly developed Noosa, Gold Coast type development. But I went to the protest meeting with a reasonably open mind to listen to what people had to say and I don't think I have ever seen such an overwhelming, completely unambiguous cry from the vast majority of the residents at Cabarita saying, "We don't want this development here." And - now, that doesn't necessarily mean it's a bad thing. It means they may not understand, but I think in retrospect they really did understand what was going on.

They understood what the development was. They were just saying, "We don't want this here." Subsequent to that - and there was a petition passed around with numerous hundreds of signatures on it saying, "We don't want this." Subsequent to that I went to a meeting with some of the councillors and the Mayor, a business meeting several days later, and I think - I sat through the meeting and I was hoping - what I was hoping was - and the developers were there. The developers for this project were there. What I was hoping would happen was that the developers would say, "Well, look, there's so much community opposition to this. Let's look at some alternative, a compromise between these two obliterating developments and 1950s time warp. Somewhere in the middle was a place where we can meet." But it wasn't. It was a, "This is an irrelevant nuisance that we have to ignore or overcome."

PROF DALY: *Was that expressed just by the developers - - -*

MR JENKINS: *No.*

PROF DALY: *Or was it expressed also by councillors?*

MR JENKINS: *No. It was expressed by councillors too.*

PROF DALY: *Who were the councillors?*

MR JENKINS: *Look, I think, from memory, Mr Brinsmead and the Mayor were there, and I think Mr Murray was there. I don't remember whether there was a third councillor there or not. I didn't actually take notes of which councillors were there, but Mr Polglase and Mr Brinsmead were there, as were the developers and several other members of the Kingscliff community. Again, I expected a compromise there and, to a certain extent, people that I had helped get elected, I was extremely personally disappointed in some of the attitudes that I was seeing there.*

But I think most disappointing of all, and in fact what convinced me that I should take a stand on this issue was - and I'll read from my own notes which I made during the meeting, if that's appropriate? I can't hand you these notes - they're under parliamentary privilege - but I can read to you from some of the notes that I made, and I'll just read you the last few. I have to just find the date. The last comment I made before I left the meeting was, "Why would the Council withhold 500,000 is the Surf Lifesaving Club rejected the offer?" Because that was a very clear implication, that if they didn't go along - - -

PROF DALY: *The offer that you're referring to there is an offer by the developers to incorporate - - -*

MR JENKINS: *To incorporate within the surf club. But there was an implication there that if the surf club didn't take this offer, that there was going to be trouble getting the section 94 developer grants. And I wrote in my book, I said, "Why? Why would they do this?" And that was, if you like, the final straw. I just said, "This is ridiculous" There's something wrong here as to why this development is being pushed so hard in the face of such overwhelming community opposition. There's no compromise being talked about, there's no - it's an all or none response, and with a - and this is my personal opinion, I may be wrong - with an almost vindictive threat at the end that if they don't go along with it, "We'll make life difficult for the section 94 grant." And as I said, I wrote in my book, "Why would they do this?"*

T. 9/3/05 p. 1021-1023

Former Councillor Brinsmead (**T. 17/3/05 p. 1658-1659**) denied that he had acted as a public advocate. There was a strong public impression, however that he did champion the causes of developers adduced from his public statements and letters to the newspapers.

PROF DALY: *We had evidence from Mr Jenkins, who is a member of the Parliament, suggesting that he had attended meetings where you were also attending and that you appeared to him to have an advocacy role for the developer in relation to certain issues in that Cabarita Beach area.*

CR BRINSMEAD: *That's not true.*

PROF DALY: *Well, can you expand on that.*

CR BRINSMEAD: *Well, there was a public meeting. I don't know where he would have - he's got no basis to claim that I have - I've never had an advocacy role. I've never had an advocacy role even personally. I've never taken a final view or the final disposition of what should happen at that area. The only thing I remember - I've got the correspondence here I had with Cath Lynch who sent me a picture of her vision of what should happen at Cabarita, and I congratulated her for that because she was putting forward a constructive view. And I said, I will take no position on this, and at the end of the day I may not support - you may be surprised to know that at the end of the day I may not even support the Resort Corp position. But in my discussion, if people privately wanted to engage me on it, it was to encourage people to understand the debate, and not misrepresent what this group want, this group want and was proposing and so on. And then it might be an intelligent discussion and arrive at a better point.*

PROF DALY: *Two points in that. One is, where does the line between advocacy and explanation end, is the first point. What's your comment on that?*

CR BRINSMEAD: *Well, an advocacy is a position where you, without qualification - without qualification at all you unconditionally support something. I haven't taken that position. I haven't taken that position either privately or publicly. Publicly I've never said a thing. Publicly I don't - I haven't taken a position on it, except that I did attend one – and that was the only time. It was Kingscliff Tweed Coast Business Association. The proponents of Resort Corp were invited to come and to answer questions. I believe the only comment I made wasn't - if I can remember that, vaguely, pretty vaguely, I think if I made any comments that evening the only comments that would have been made would have been maybe a discussion on some issue of surf club, but not on the offer itself. I wasn't an advocate.*

T. 17/3/05 p. 1658-1659

Mr Newell, the State member for Tweed, provided another example of former Councillor Brinsmead role as a public advocate (**T. 18/3/05 p. 1720-1722, and letter dated 6/05/05**).

MR NEWELL: *I think in terms of - I'd have to say yes. But as the local member, obviously I may get concerned about - and make representations for people who have concerns about other areas, as indicated previously. SEPP 71 obviously put the major responsibility for a lot of the larger developments onto DIPNR, on the State government, which in many instances people thought that was a good thing, because they felt they'd get a better evaluation and a more open process through the Department, rather than through the Council.*

PROF DALY: *Do you have any advocacy role in relation to such developments?*

MR NEWELL: *Well, I'd have - you'd have to - I think I couldn't deny that being a State member I'd have - if I'm talking to the Minister or one of their staff about the matter, that I might indicate a preference in that sense as to whether the thing should be given the okay, or should be modified in some way to better reflect sustainability or community expectations in terms of a development.*

PROF DALY: *Some of the developments that have come before us in evidence have led to public meetings and so forth about certain issues. Do you go to those meetings? Do you get involved in that sense?*

MR NEWELL: *I'm just trying to think when the last one I would have been to if I did. I certainly - certainly with the South - some of the ones at South Kingscliff, there was public - wasn't so much a public meeting, it was a meeting of community groups that we had at Twin Towns Services - sorry, resort - Twin Towns Resort here. With regards public amenity, public access, open space, and so forth, where it was felt that what was proposed I think in the master plan at that stage, just wasn't addressing adequately the needs of the general public, in terms of maintaining access to the beach and so forth. So I certainly attended a meeting there, and I actually - yes, I attended a meeting there and I participated. It was interesting, there was two groups. There was the pro-developers, who essentially wanted to give the developer everything he wanted. And then there was another series of community groups who were saying, "Whoa, we want public access and so forth". And they had one lot in one room, and another lot in another. And there was communications between us at times.*

PROF DALY: *And what was your role? Were you there just to observe what was happening, and you'd get an idea of the - - -*

MR NEWELL: *No. Essentially I think I'd have to say I had a little bit more role in that particular instance. The person who was I guess doing the running between the groups was a departmental person - whose name just escapes me at the moment, I'm sorry about that - who was in charge of planning here on the North Coast, and she was doing the negotiations.*

It was interesting that at one stage we could hear a councillor yelling his head off in the other room, because they weren't - didn't seem to be getting their own way or didn't like what was going on. At the same time, we were talking to the - when I say we, the community groups and myself were talking to the - talking as to what we would accept. And I did have a role in terms of saying at one stage that what was coming through just was not acceptable, and we wouldn't countenance it. And so there was public space and some parking and so forth put along the beach front.

PROF DALY: *So the councillor in the other room, that councillor was actively advocating some sort of - - -*

MR NEWELL: *Well, I can't say what they were saying, but we could hear the voice.*

PROF DALY: *Yes.*

MR NEWELL: *It wasn't a very friendly raised voice, I would say.*

PROF DALY: *Yes. But the other room, your said they were the pro development people.*

MR NEWELL: *As a - as the way - - -*

PROF DALY: *Who were wanting a certain outcome for the South Kingscliff development. In another room there were community groups who were opposing aspects of the development.*

MR NEWELL: *The plan. Not the plan as such, but aspects, yes.*

PROF DALY: *Yes. But there was a councillor in there, working with the pro-development group?*

MR NEWELL: *I don't think he was on his own, but he was the one we could hear.*

PROF DALY: *Right. You mean there was more than one councillor there?*

MR NEWELL: *I understand, yes.*

PROF DALY: *Do you know who that councillor was?*

MR NEWELL: *The voice we could hear was Bob Brinsmead.*

T. 18/3/05 p. 1720-1722

Parliament of New South Wales Legislative Assembly

Neville Newell MP

Member for Tweed

Parliamentary Secretary to the: Minister for Rural Affairs, Minister for Local Government, Minister for Emergency Services, and Minister Assisting the Minister for Natural Resources (Lands)

Emeritus Professor Maurice Daly
Inquiry Commissioner
Tweed Shire Council Public Inquiry
Locked Bag A5045
Sydney South NSW 1235

6/05/05

Dear Professor Daly

My apologies for the delay in responding to your questions.

Question 1 ***the issue that was being discussed?***
Public access (carparks and road access) public amenity (public toilets and picnic facilities) to the beach and foreshore at the proposed Lenen Pty Ltd/ Sheraton Hotels development.

Question 2 ***the location of the meeting?***
Twin Towns Resort, Tweed Heads. The Terraces meeting room was divided into two with each seating approx 25.

Question 3 ***the date of the meeting?***
Early evening on the 1st May 2000.

Question 4 ***the structure of the meeting in the sense of whether or not it was called by the council, by a community group or by the developer involved?***
There were two groups;
Group 1 – myself, environmentalists, Kingscliff Residents & Ratepayers; Cudgen Progress Assoc; Tweed Monitor; Cabarita Bogangar Residents Association.
Group 2 – pro development Councillors including Cl Bob Brimsmead, the then Mayor Lynne Beck. Cl Brimsmead was verbally castigating TSC planner David Broyd and Cl Henry James.
The facilitator and negotiator was Sue Holliday former officer in NSW Planning north Coast – based in Grafton. She was accompanied by David Papps, former officer Department of Urban Affairs and Planning.

Group 1 insisting on consideration of public access and amenity.
Group 2 seeing it of little relevance and advocating for minimum amount and poor location for maximisation of the developer's interests in lots.

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Country Labor

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Question 5. ***what was the meeting designed to achieve?***
To achieve consensus between the groups.

Question 6. ***what were the outcomes of the meeting?***
Parking and access near the beachfront were included in DA for that subdivision.

This agreement has since been overridden, with the present Ray Group's Salt development on this site. There is no public access to the Salt beachfront.

These answers are to the best of my recollection of this meeting. I hope they are adequate.

Please contact my office if any more detail is needed.

Yours sincerely

Neville Newell.

Neville Newell MP
State Member for Tweed

In a number of submissions there have been allegations that former Councillor Brinsmead was a loud and persistent advocate for development in general and some development projects in particular. Mr Brinsmead does not accept that he took that role, or at least that he acted within the bounds of the Local Government Act in doing what he considered to be the best for the community of Tweed Shire. The incontrovertible fact, however, is that all the evidence points to an outcome where the perception of councillor bias and conflicts of interest in acting as advocates for developers and development has weakened the status of the Council in the eyes of many in the community. This perception had grown to such a point that a further perception arose: that conflicts of interest were so widespread and engrained in the Council that it had become dysfunctional.

4.2 *Community Consultation*

4.2.1 Community Access Meetings

The perception of a dysfunctional council led to members of the community losing confidence in the ability of the Council to provide competent, effective local government (**submission 65**). The 2004 election was won by the Tweed Directions' team by a handful of votes. Half the community expressed their lack of confidence in the majority councillors, and the evidence that came to the Inquiry suggested that the divisions within the community (mirroring divisions within the Council) were at least as strong in 2005 as in March 2004.

Office of the Commissioner
Tweed Shire Council Public Inquiry
Locked Bag A5045
Sydney South NSW 1235

Dear Professor Daly

I am writing to you in regard to the inquiry you are conducting into the operation of the Tweed Shire Council. I wish to make a submission to your inquiry.

I have read the terms of reference for the inquiry and I acknowledge that I am not in a position to make an informed comment on the first three beyond stating that the information which I have gained from local newspapers regarding the role of persons interested in promoting, and likely to gain from the promotion of development activities in the area, is most concerning.

I wish to direct the comments of my submission to aspects which I believe are covered under terms of reference 4 and 5. My concerns are that the council is dysfunctional in operation. I base this concern on my personal observation of the council in session, on a national television broadcast of Four Corners last year and from reports of council proceedings described in the local media.

It appears to me that the council is so faction-ridden that the chances of it operating in a coordinated, cooperative manner for the best interests of the residents and ratepayers are slim indeed. To believe that effective working relationships exist among councillors and between some councillors and members of the administration is difficult given the poor communication skills and strategies displayed on many occasions and well documented in council minutes and on film.

The people of the Tweed Shire deserve and are entitled to competent, effective local governance. A case could be put that effective governance is being comprised by the inability of the current councillors to work as a team with common goals and a willingness to subsume personal interests for the best interests of the residents and the area. In summary, in it my view that the current council does not enjoy the confidence of the community.

I trust you will take my concerns into account.

Yours sincerely

Barbara Dobinson

Barbara Dobinson (Mrs)

In a divided community, appropriate levels of consultation by the Council were vital if good governance, and the perception of good governance, were to be effected. The two major props supporting community consultation were a Community Access program, and Tweed Link. The Community Access program was a monthly two hour session (4.30-6.30 pm on the second Wednesday) where members of the community could address the body of councillors on issues. Tweed Link is a weekly information paper published by the Council, and delivered to all households in the Shire.

COMMUNITY CONSULTATION

Council has continually made best endeavours to communicate with the community and to have involvement with its governance. The activities have centred around a Community Access program at which on a monthly basis members of our community and others can bring issues directly to the body of Councillors by personal representation, as well as other public meetings. Two additional activities have been developed that have been extremely successful for Council and its community, The Tweed Link - a weekly information paper distributed to all households in the Shire by Australia Post, commenced in 1996 (Appendix 14[xiv]) and the Tweed Futures Program, the report of which has been included at Appendix 15[xv].

Submission 312

The Community Access program allows residents to speak to councillors and staff about issues. The Tweed Link newsletter is meant to inform residents of various operational aspects of the Council, including new development applications. Both appear to be designed to fulfil the Council's Communication Policy (Policy and Delegations Manual SectionO6.6 Council Administration 2002).

The Communication Policy proclaimed that all citizens have a right to the best possible access to Council's policy, regulation, and other public documents, and to trained staff. It also stated that it is the right of all Shire citizens to participate in the decision-making processes that affect their future. It laid down that the attitudes, concerns, and needs of all Shire citizens must be known and considered in all Council decisions as far as possible. It argued that a harmonious future for the Tweed Council area depended on honesty, mutual trust, cooperation, and a willingness to respect other points of view.

The high-blown rhetoric of the Communication Policy appears to have broken down in its application. The Community Access meetings limited each speaker to five minutes[10], and the speakers were not allowed to ask questions of the councillors or staff. Since this was the only formal vehicle for members of the community to put forward their "attitudes, concerns and needs" it is difficult to see how the Council would gain from them a suitable understanding of the community concerns, and how that would translate into genuine consideration being given to them in the decision-making process.

The likelihood is that for any speaker an appearance at a Community Access meeting would be daunting. In a few minutes they would have to express their views about

[10] In some cases speakers were permitted to a longer time.

matters that might have troubled them for some time, and which appeared so complicated and important to them that addressing the Council might be the only solution. From the councillors and staff perspective the task was also difficult. In a two hour session twenty of more speakers could address them on a broad range of topics.

In practice the Community Access program might be seen as cosmetic, or a token gesture. Evidence to the Inquiry certainly pointed to such conclusions by some members of the community. The evidence of Mr Clinch (**T. 4/3/05 p. 991-993**) displays the frustration that could be born of the process.

MR CLINCH: *...So when we took it to Council we did a very in-depth Power Point presentation, including aerial photographs, and we spent probably over a thousand hours of research and when it came to the decision-making meeting which we attended, our points were basically disregarded.*

PROF DALY: *The meeting that you just referred to, was that a full Council meeting?*

MR CLINCH: *That was open to the public. I think it was in October last year. And from what I understood, it was - the decision was to be made upon the result of that meeting.*

PROF DALY: *Right. You said you did a Power Point demonstration. Who was the audience for that?*

MR CLINCH: *The Council - the whole Council chamber.*

PROF DALY: *It was within the Council chamber?*

MR CLINCH: *Yes. It was a Community Access meeting.*

PROF DALY: *Right. And then there was a subsequent meeting at which the development was discussed and a decision made?*

MR CLINCH: *Yes.*

PROF DALY: *Was there a recommendation from the professional officers about what might be the best outcome?*

MR CLINCH: *I don't quite understand you.*

PROF DALY: *Well, you said that at a subsequent meeting which you attended, the Council made a decision about the issue that you had placed before it. Had the staff of the Council examined that issue and made any recommendation?*

MR CLINCH: *Some of the councillors made points which we were concerned about and tried to have those considered, but it seemed from where we sat was that a decision had already been made and basically they were bullied into submission, is what it appeared to be.*

PROF DALY: *The points which you have put forward - you said you did a thousand hours of research on it.*

MR CLINCH: *Yes.*

PROF DALY: *Were they adequately canvassed at that meeting?*

MR CLINCH: *The Power Point presentation was very thorough. I had - I think it was over 20 minutes when normally you would be allowed five. There were a lot of clear photographs. I spoke for that whole time. I had a speech prepared which I had to ad lib the last half of it because it was becoming too drawn out. We handed to all the councillors a copy of the letter we had supplied to the quarry and we had also - in that same folder to each of the councillors was a whole range of photographs being a select group from the actual presentation. So the whole Council was very well informed with what our concerns were. At that decision meeting some of the issues were brought up. The Chairman said that basically from what he's heard we would be better off - we weren't to speak because it was, though open to the public, we had to sit and just be an audience.*

PROF DALY: *Let me return I had earlier asked. The issues that you raised and the information that you - your view on those issues was quite bountiful. At the discussion where a decision was made, was there a discussion that involved that material?*

MR CLINCH: *Only - - -*

PROF DALY: *Was that germane to the discussion or was it somewhat ignored and a decision made?*

MR CLINCH: *Some of it was spoken of but basically brushed off. Comments we had made had been referred to but the Chairman basically said that from what he's heard or from what he's been told, words to that effect, that he felt we'd be better off and didn't take it any further. We did bring to the attention of Council that we had had meetings with the manager of the quarry and one day when he answered the phone we were sitting in his office.*

I counted up the recordings on the calendar behind him, and in the first six months of last year they had already extracted, according to their own record on the calendar, 237,000 cubic metres, whereas they are supposed to be limited to 200,000 cubic metres per annum maximum. I brought that to the attention, both in my letters of submission to the Council and in my Power Point presentation, and recommended that they perform an audit to prove what I said was correct and I don't know whatever happened of it, but the letter I saw of the minutes stated that they were already acting within their approvals.

T. 4/3/05 p. 991-994

In the 2002 Policy Document (O4.1 Consultation) it is stated that "to ensure that consultation is genuine and is seen as genuine by the community, commitment to the consultation process should be demonstrated by councillors as well as senior officers and

program managers. The document went on to say that consultation is a central point in sound decision making. “It allows local government to make informed decisions about issues that effect residents. The consultation process aims to maximize opportunities for residents to be informed, and to have their concerns heard and taken into account before a decision is made by council. …To be effective appropriate consultation methods should be based on input from relevant key informants and stakeholders who will have an understanding of how best to access and involve those residents who are most affected by or interested in a potential decision or policy change. To be effective appropriate consultation needs to commence early in any decision-making process”.

In Section O6.6.4 of the Policy Document it is stated that “council may initiate a consultation process” when there is expressed community concerns through letters, telephone calls, resolutions of groups etc.

The evidence presented to the Inquiry shows that the council made no real effort to enter into consultation in the manner outlined in the Policy Document. This is particularly evident in relation to high profile issues such as developments in Cabarita (4.3). The problem of lack of consultation, and the lack of regard for community opinion, is clearly more widespread in recent years in other parts of Tweed Shire (**submission 201**).

Sally Sanders

From: MARION GARDNER [mng-cudgen@better.net.au]
Sent: Wednesday, 26 January 2005 3:53 PM
To: InquiryCommissioner@dlg.nsw.gov.au
Subject: Tweed Shire council Inquiry - Cudgen Progress Association

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27 JAN 2005

CudgenProgress Association Phone/Fax: (02) 66743229
President: Mr C. Redman 21 Clarke St
Secretary: Mrs R. Wallace CUDGEN. 2487
Treasurer: Mrs F. Goddard January 26, 2005

Office of the Commissioner,
Professor Michael Daly,
Tweed Shire Council Inquiry,
Locked Bag A5045,
SYDNEY SOUTH. NSW 1235

Dear Sir,

RE: TWEED SHIRE COUNCIL INQUIRY

Cudgen Progress Association hereby submits its submission to the Tweed Shire Council Inquiry. We refer to both the present and the previous Councils.

1. **Community Consultation**

Tweed Shire Council gives only lip service to its often stated intention to include community consultation and input when controversial Development Applications and other planning matters are current. On numerous occasions residents have packed meeting venues to capacity and unanimous votes have been recorded. Councillors have been present and have then gone on to vote against the wishes of residents. We have seen four storey buildings approved in three storey zones with concessions given to developers re number of car parking places and other matters.

2. **Sewerage Treatment Plant**

At a meeting in Kingscliff Amenities Centre called to discuss whether to update the present Kingscliff Sewerage Treatment Plant or to build another plant in a different area, Councillor Briiinsmead, in reply to a question by one of our members, stated that we would be kept informed of developments. This did not happen. We received no correspondence or even phone calls and the then Mayor, Councillor Beck, announced that a new plant would be built closer to Cudgen. On another occasion at a meeting re the plant it was stated many times that residents would be kept informed of developments. Our names and addresses were taken for feedback. We received no information.

3. **Bullford Inquiry**

Recommendations of the Bullford Inquiry have never been implemented. As you are probably aware, this inquiry was called after Councillors were unhappy with rulings made by the Shire Planning Officer, Mr David Broyd. Mr Bullford found that, in fact, the opposite was the case. Mr Broyd's integrity was proven and several Councillors were castigated for their own actions. This had no effect and the same conduct is constantly being observed by residents.

4. **Council Elections**

Prior to the election for the previous Council a Murwillumbah businessman, Mr W. Bedser, a self acknowledged liar, allegedly funded candidates for election to the tune of approximately $500,000 provided that they supported developers in Council decisions including the re-zoning of prime agricultural land in Cudgen.

Before the election of the current Council, a company, Tweed Directions, formed by Mr A. Blundell, financed the candidature of persons who were willing to vote in Council with a pro-development attitude. The amount of money spent, mostly developer contributions, was reportedly greater than that of the Sydney City Council. Mayor Polglase, following the election and subsequent narrow win of pro-developer Councillors, promised that "things would be different" and residents' wishes would be seriously considered. This has not been the case.

5. **Beach Fishermen**

Beach fishers who have licenses for four wheel drive access to Tweed beaches and who seem likely to lose this amenity have been lobbying Councillors and have frequently phoned about this matter receiving no replies.

6. **Chinderah Roundabout**

On one occasion Councillor Lawrie attended a meeting of Cudgen Progress Association and, following the meeeting, our President, Mr Carl Redman, accompanied Cr Lawrie to the Chinderah roundabout to point out our concerns re trafic safety problems. Cr Lawrie has never contacted this Association by either correspondence or phone. The safety problems still remain.

7. Development Applications

Even when controversial Development Applications are passed by Council regardless of Council Officers' recommendations, we are constantly seeing serial amendments being sought by developers to alter the design. Developers seem to think that they can make controversial additions to DAs by stealth. These are more often than not agreed to by Council. We are of the opinion that all these questions should be addressed in the original Development Application when residents and ratepayers can have input into decisions.

8. Councillor Attendance at Association Meetings.

This Association has invited Councillors to attend our monthly meetings which are well publicised. Apart from Councillor Bronwyn Luff of the previous Council who frequently attended our meetings, listening to our concerns and following them up, the only Councillor to visit us has been Cr Lawrie and his subsequent interest has been a non-event. When Mr Ron Cooper was a Councillor he regularly attended our meetings and those of other Associations.

9. Cabarita Beach

The Council's decision to grant public land to the developeers of "The Beach" resort at Cabarita Beach has angered Cabarita Beach/Bogangar residents as well as those from all over the Shire. Recently it has come to light that some 25 public car parking spaces have been rented to Resort Corp. the developers, who, by the way, are close relatives of Councillor Brinsmead. This has placed both residents and business people of Cabarita Beach at differences with Council.

10. Lot 490

Residents of Kingscliff and surrounding areas are angry that Council proceeded to grant the developer of "Salt", south of Kingscliff, permission to build a road through the centre of this area before it had been decided as to what type of development of this area would be undertaken. Placing this road through the centre of Lot 490 would allow the developer 15 more lots to be sold at $300,000 each ($4,500,000). Another road leading to Lot 490, reportedly built by Country Energy, has just appeared out of nowhere, without reference to residents.

11. Chinderah Marina

Council have given only token support to residents' wish that no marina should be built on the Tweed River at Chinderah. To allow construction of a huge marina at this flood prone spot on the river is unforgivable. Submissions against this development have previously been made by residents to the Department of Infrastructure, Natural Resources and Planning.

12. Cudgen Farmland

This association has constantly fought to keep Cudgen's prime agricultural land zoned as such. Over recent years speculators have purchased sections of this farmland and do nothing with it while waiting for it to be re-zoned for Gold Coast style development which would, as the Member for Tweed, Neville Newell, has stated would "give them a massive but short-term windfall". In the meantime this valuable land, presumably rated as farm land, lies dormant while farms on all sides flourish, giving jobs and, by the ripple effect, contributing to the welfare of this Country.

13. Voting Within Council

Prior to the Council election Crs Beck, Bell, Brinsmead, Lawrie, Murray and Polglase all declared that they were "Independent" but, with very few exceptions have voted in block to the advantage of developers and against the wished of residents. This Association unreservedly endorses the actions of the real independents, Crs Boyd, Carroll, Dale, Holdom and James.

Trusting that this submission will be of benefit to your inquiry,

Yours faithfully,

Ruth Wallace
Hon. Secretary

One explanation for the lack of consultation with community groups is that Council does not have any area/precinct/consultative committees (Policy Document O6.6.5 2002). There are a large number of community groups within Tweed Shire, and some of them have existed for decades. The Council keeps a register of groups. The purpose of the register is to feed information from the Council to groups. There are no consultative mechanisms attached to the registering of groups.

Where there have been major development issues that have attracted wide community interest in recent years, it has been the community groups who have called public meetings to air issues, rather than the Council.

The emphasis of the Council has been on providing certain information to the community (through mechanisms such as Tweed Link, or through specific information provided to registered groups), but not to consult widely with the community.

There appears to be two problems with the information flows. One is the way in which the information is presented, especially in respect of development issues. The New South Wales planning and development process systems are highly legalistic in their structures, and are over-burdened with complexity in their multiple parts (section 3). When Local Environment Plans, Development Control Plans, and Master plans are added on top of this base, the ability for citizens to unravel just what might be proposed in a development or its modification, and what they can do to express their "attitudes, concerns and needs" and so "participate in the decision-making processes" is quite difficult. The material that might be available to the public is written in a language that is incomprehensible to many people. There is no attempt to provide a plain English guide to major projects. When a council, such as Tweed, has no structures for engaging community groups in consultation the frustrations can multiply to the point where confrontation ensues. When a council is controlled by pro-development councillors who appear to have developers' interests at heart, and who are dismissive of the "attitudes, concerns and needs" of sections of the public, the frustrations can boil over to a point where many people in the community lose confidence in the capacity of the council to provide good governance (**submission 136**).

Office of the Commissioner
Tweed Shire Council Public Inquiry
Locked Bag A5045
SYDNEY SOUTH NSW 1235

19th January 2005

SUBMISSION TO INQUIRY

Dear Sir,

I write in support of the inquiry into the Tweed Shire Council.

Since this present Council was elected, with massive election funds donated to the "Balance Team" by major Development Companies, it has been business as usual for Developers and carried over from the previous Council which was also dominated by a Developer friendly majority.

Our local Ratepayers & Progress Association is snowed under at times, checking Development Applications for developments in Kingscliff and surrounding areas. I feel we should be concerning ourselves with lobbying Council about footpaths, parks and roads, and not have to be watchdogs on over-development of the area we live in.

At times we have had to turn ourselves into amateur Solicitors and Town Planners to be able to work out Development Applications. Even when we think we can live with these resorts, we suddenly find there are amendments being quietly slipped into Council business.

I believe it is time for this inquiry.

Yours Sincerely
D Wood
David Wood

The first problem is the intelligibility of the information that the public might receive. The second is even more fundamental: that is, whether the public can receive the information at all. section12 of the Act lays down a long list of material that must be made available to the public free of charge. It is the duty of the council to appraise the public of their rights under section12.

12 What information is publicly available?

(1) Everyone is entitled to inspect the current version of the following documents free of charge:

- the model code prescribed under section 440 (1) and the code of conduct adopted by the council under section 440 (3)

- the council's code of meeting practice
- annual report
- annual financial reports
- auditor's report
- management plan
- EEO management plan
- the council's policy concerning the payment of expenses incurred by, and the provision of facilities to, councillors
- the council's land register
- register of investments
- returns of the interests of councillors, designated persons and delegates
- returns as to candidates' campaign donations
- agendas and business papers for council and committee meetings (but not including business papers for matters considered when part of a meeting is closed to the public)
- minutes of council and committee meetings, but restricted (in the case of any part of a meeting that is closed to the public), to the resolutions and recommendations of the meeting
- any codes referred to in this Act
- register of delegations
- annual reports of bodies exercising delegated council functions
- applications under Part 1 of Chapter 7 for approval to erect a building, and associated documents
- development applications (within the meaning of the *Environmental Planning and Assessment Act 1979*) and associated documents
- local policies adopted by the council concerning approvals and orders
- records of approvals granted, any variation from local policies with reasons for the variation, and decisions made on appeals concerning approvals
- records of building certificates under the *Environmental Planning and Assessment Act 1979*
- plans of land proposed to be compulsorily acquired by the council

- leases and licences for use of public land classified as community land
- plans of management for community land
- environmental planning instruments, development control plans and plans made under section 94AB of the *Environmental Planning and Assessment Act 1979* applying to land within the council's area
- the statement of affairs, the summary of affairs and the register of policy documents required under the *Freedom of Information Act 1989*
- Departmental representatives' reports presented at a meeting of the council in accordance with section 433
- the register of graffiti removal work kept in accordance with section 67C.

Information that is not covered by section 12 may be made available under Freedom of Information provisions. Under section 343 of the Act the council's Public Officer has the responsibility of assisting people to gain access to public documents of council. Mr Donaghy was a long serving Public Officer for Tweed Council, performing his duties through to late 2004. Mr Donaghy was questioned about his role when he appeared at the Public Hearings (**T. 4/3/05 p. 966-973**). Mr Donaghy suggested that Tweed Council had the most liberal approach to availability of documents of all the councils in the State. When a document was refused under the Freedom of Information provisions the applicant was free to go to a review, but Mr Donaghy claimed that in 30 years only two had proceeded to a review, and none had so far been found in favour of the applicant. He suggested that the Inquiry should consult developers and consultants, who he said were the most frequent requesters of information. The developers and consultants would acknowledge just how liberal the council's policy was. Mr Donaghy appeared to vacillate when asked whether, when a member of the public (as opposed to developers and consultants) requested documents, they would have their rights under Section12 be made known to them. Mr Donaghy's answer was, to say the least, curious. He said: "Well, they were (*informed of their rights*), in this respect. Either they got the document or they didn't". In response to more questioning he gave a definite, but not convincing, yes to the issue of whether or not the public were made aware of their rights under section 12. When a hypothetical situation of a member of the public seeking assistance about gaining access to a council-held document was put to Mr Donaghy he responded by asking what was the purpose of those people seeking the document. Further in the questioning he was asked about requests for information over the phone. He replied that unless he knew the person they would have to go to the council offices to make the request. It was pointed out that section 12 made no differentiation between people, that in the words of the Act "everyone is entitled to inspect the current version of the following documents free of charge". "Everyone" meant that the council had no jurisdiction to decide who was or was not able to receive documents listed under section 12. They did not have to tell Mr Donaghy, or anyone else in the council, what their motives were. They did not have to be known to Mr Donaghy to receive information.

MR BROAD: *You indicated earlier that you were the public officer of council, and you were appointed as public officer by the general manager under section 342. The public officer has a number of functions, and your authorities include the power to deal with requests from the public concerning council's affairs?*

MR DONAGHY: *Correct.*

MR BROAD: *You have the responsibility of assisting people to gain access to public documents of the council?*

MR DONAGHY: *Correct.*

MR BROAD: *And that access is facilitated by section 12 of the Local Government Act?*

MR DONAGHY: *Correct.*

MR BROAD: *You are entitled to receive submissions made to council?*

MR DONAGHY: *Correct.*

MR BROAD: *You've got power to accept service of documents?*

MR DONAGHY: *Yes.*

MR BROAD: *You can represent the council in legal proceedings?*

MR DONAGHY: *Yes.*

MR BROAD: *And you have general functions as are conferred on you.*

MR DONAGHY: *Correct.*

MR BROAD: *The wording of section 342 suggests a positive role on you as public officer to assist the public in obtaining access to council documents under section 12. The Inquiry has heard evidence that suggests that there have been problems obtaining access to documents when requests have been made. What process does the council go through to ensure that the public is able to exercise access under section 12?*

MR DONAGHY: *Can I just ask a question in relation to that? What access to documents did the people not receive, that's - - -*

MR BROAD: *Well, there's been a number of - - -*

MR DONAGHY: *Were they planning documents, were they legal documents?*

MR BROAD: *There's a number of suggestions - - -*

MR DONAGHY: *Right.*

MR BROAD: *- - - that relate to planning documents. They relate to documents which were on exhibition and so there's a diverse - I don't think anyone has indicated that they lack the ability to obtain legal documents. I don't think anyone has raised that as a matter, but certainly, when it comes to documents accompanying development applications, they're raised, so I'm just wondering what process is put in place to ensure that access is made available.*

MR DONAGHY: *Mr Commissioner, the position was this, that all documents or requests for documents came through me, and I would say that Tweed Shire has probably taken the most liberal approach in relation to the receiving or exposing of documents than any other council that I know, and this is representative - if you look at our reports, you will look in the section concerning the Freedom of Information, either under the council's annual report, or the report to the government under the Freedom fo [sic. of] Information Act, and you will find that there is very, very few - I think we averaged about five or six applications under the Freedom of Information Act in relation to access to documents, and let me explain it a little bit further.*

What they were mainly about was this, where people were refused a document, because it was an exempt document under schedule 1 to the Freedom of Information Act, they would then take the matter further, so what they would do, they would make application. The application would be refused. They would then go to a review, and the matter would possibly go to the ADT, and in my 30 years' experience in local government, at Tweed Shire, only two have ever went to the ADT, and when they went to the ADT, one case was found in favour of the council, and the other one was still in the process of being attended to when I left the employment of council - - -

MR BROAD: *What I was specifically - - -*

MR DONAGHY: *- - - but in relation to the question, more specifically, in my time at Tweed Shire Council, no one was ever disallowed to look at documents unless it was an exempt document under schedule 1 to the Freedom of Information Act.*

MR BROAD: *But would you agree with me that section 12 of the Local Government Act sits separately from the Freedom of Information Act?*

MR DONAGHY: *It does.*

MR BROAD: *Were you applying schedule 1 of the Freedom of Information Act?*

MR DONAGHY: *No. I was applying schedule 12 - section 12 of the Local Government Act.*

MR BROAD: *Yes. And so in answering my question about section 12, why did you refer to the Freedom of Information Act and the provisions contained - - -*

MR DONAGHY: *Well - - -*

MR BROAD: *Let me finish.*

MR DONAGHY: *Sorry.*

MR BROAD: *The provisions contained in that Act which exempted documents from access.*

MR DONAGHY: *The is other documents outside schedule 12 that some people want to have access to. A typical example would be reports that haven't been dealt with by Council, which come under section 12 and also come under section - schedule 1 of the Freedom of Information Act. But to answer it fully, no one, to my knowledge, was not given access to documents that I couldn't give to them. In actual fact, our policy was extremely open and if you talk to, I don't know, all the developers and what have you and, more so, the consultants, they were the people that mainly looked at the documents.*

MR BROAD: *Now, when a member of the public came to Council and when they sought access, were they given an indication of their rights under section 12 of the Local Government Act.*

MR DONAGHY: *Well, they were, in this respect. Either they got the document or they didn't get the document. But as I say, in 99.9 per cent of the times, people were given access to the document.*

MR BROAD: *No, I'm trying to differentiate whether they got access and whether Council indicated that they had a right under the Local Government Act to apply for access. I'm not looking at the end result. I'm trying to find out whether the public was made aware of their rights under section 12.*

MR DONAGHY: *The answer is, "yes".*

MR BROAD: *Now, in what circumstances - I'll withdraw that. How often would people seek access under the Freedom of Information Act?*

MR DONAGHY: *On a monthly basis, maybe three maybe four?*

MR BROAD: *And by comparison, how often - - -*

MR DONAGHY: *Can I just go further on that question?*

MR BROAD: *Yes, sure.*

MR DONAGHY: *If a person sought information under the Freedom of Information, right - and there's a charge, obviously, under that Act, as you're well aware - if I could give that information under section 12, I would not charge them. I would say, "Here is the document under section 12."*

MR BROAD: *"You've got a right under section 12"?*

MR DONAGHY: *Yes, "Here's the document. Not a problem." If I would say to the people, "I cannot give you that document. It's an exempt document under schedule 1 of the Freedom of Information Act", they would say, "All right. I won't seek that document." But if they wanted to proceed further with the matter and fill out an application, then the procedure under the Freedom of Information Act would then come into force.*

MR BROAD: *If a person came off the street and said to you, "I'm a neighbour of a property. I'd like access to their engineering report in respect of their driveway." What would happen?*

MR DONAGHY: *What was the purpose of those people seeking that document?*

MR BROAD: *For their information. Do they have to - - -*

MR DONAGHY: *For what purpose?*

MR BROAD: *Let me turn the question around. If a person comes to you and seeks access to an engineering report in respect of a property – a neighbouring property - - -*

MR DONAGHY: *An engineering report that went to Council.*

MR BROAD: *Yes, that's held by the Council. Now, can I ask you this question: is there motive relevant to your determination?*

MR DONAGHY: *Could be.*

MR BROAD: *Why?*

MR DONAGHY: *It could be.*

MR BROAD: *Why?*

MR DONAGHY: *Well, you don't know the motive may be.*

MR BROAD: *But how is that relevant to a - - -*

MR DONAGHY: *But is it a report that has gone to Council or is it just a report - - -*

MR BROAD: *No, a report held by Council. We'll do a hypothetical.*

MR DONAGHY: *Right.*

MR BROAD: *Council has got a report, which it holds, right? It may - let's put it this way, it's a supporting document for a development application.*

MR DONAGHY: *Not a problem. He's entitled to get it.*

MR BROAD: *In what circumstances would their motive be relevant?*

MR DONAGHY: *I don't really know, at this point in time. I'd have to check that.*

MR BROAD: *But you raised it as an important issue.*

MR DONAGHY: *No. I didn't raise it as an important issue. It could be an issue.*

MR BROAD: *It was the first issue you raised when I asked the question.*

MR DONAGHY: *Sorry, what?*

MR BROAD: *That indicates it's important in your mind.*

MR DONAGHY: *No, not necessarily.*

MR BROAD: *Now, Council's access to information; does Council provide access only to inspect documents at its Council chambers?*

MR DONAGHY: *Yes.*

MR BROAD: *Does Council makes copies available?*

MR DONAGHY: *Yes.*

MR BROAD: *Does Council charge for copies?*

MR DONAGHY: *If it's one or two copies, no, but if it's a substantial amount of copies, yes.*

MR BROAD: *If someone was to ring up - say a professional adviser was to ring up and say, "You've got such and such a document on exhibition. It's associated with DA. It's a statement of environmental effects." They say, "Look, can you post out a copy to us? We've got a client who wants to make a submission." Does Council make that available by post?*

MR DONAGHY: *If you knew who the person was who was making that request, otherwise you wouldn't?*

MR BROAD: *Why would you differentiate?*

MR DONAGHY: *It could be anyone.*

MR BROAD: *Yes?*

MR DONAGHY: *It could be anyone.*

MR BROAD: *But section 12 doesn't differentiate between someone you know and someone you don't.*

MR DONAGHY: *It doesn't, no.*

MR BROAD: *Well, why would you not make it available?*

MR DONAGHY: *Well, if you didn't know the person, it could be anyone.*

MR BROAD: *But how is that different? If someone gives you an address and their name - - -*

MR DONAGHY: *So if someone rings you up and wants something, you just give it to him? Is that the case?*

MR BROAD: *But if I'm under a statutory obligation to make things available, to provide access, and they can have access at the Council chambers - - -*

MR DONAGHY: *Sure.*

MR BROAD: *- - - why - - -*

MR DONAGHY: *Well - - -*

MR BROAD: *Is there a different between making it - - -*

MR DONAGHY: *Our policy was that if we didn't know the person, they would come in and get access to that document.*

MR BROAD: *Yes, thank you.*

PROF DALY: *Well, thank you for that. We just wanted to cover those few issues, but thank you for your attendance.*

MR DONAGHY: *Can I make any other comments.*

PROF DALY: *No.*

MR BROAD: *If there's a matter that requires a briefing note, that may be something.*

PROF DALY: *Yes, if you would provide a briefing note. I made it very clear - you possible were not here when I made the opening address. I made it very clear that the inquiry is an inquiry and I don't want people making statements or personal comments. We ask questions that are relevant to the terms of reference of the inquiry. If you have a matter that you would like raise, please write it down and send it to us.*

MR DONAGHY: *Thank you.*

T. 4/3/05 p. 966-974

Mr Donaghy's evidence suggests that Tweed Council had responded often, and without presenting difficulties, to developers and consultants' requests for documents. The council adopted another, more obstructive, attitude to the general public.

Contrary to Mr Donaghy's assertions, the evidence before the Inquiry suggests that council at times made it difficult for members of the public seeking information. The Inquiry received a number of complaints about the access of the public to documents. In fact, Ms. Lucienne, a lawyer, who appeared just after Mr Donaghy and had listened to his evidence, told the Inquiry that she had made a Freedom of Information request to council in March 2002 and did not even receive an acknowledgement of the letter, let alone any documents (**T. 4/3/05 p. 987**) in the three years after filing her request.

MS LUCIENNE: *I think one of the concerns that I have is that people feel that there's very little approachability with council. I mean, I've heard testimony here today that if somebody writes to the council under FOI that they will get a response. I personally have written to council under FOI requesting a response in March 2002 and never even got a letter back, so people feel like it's just a blank wall. And also I think one of the concerns is the SEPPs, LEPs, DCPs and everything else do look great in writing, but for most of us where we've observed council regulations over a number of years about - I mean, you've seen the list of things that you can't do or couldn't do on that land from walking a dog to camping.*

T. 4/3/05 p. 987

The evidence provided by Mr Rouse detailed a long, and ultimately futile, attempt to obtain documents from the council regarding structures built on an adjoining property (**submission 178, tabled documents 32, 34, 44, additional material 72 & 76**). The mass of evidence that Mr Rouse provided tells a story of a strange, and at times obstructive, attitude towards his requests for information or assistance. Some information was provided but other documents were said to be lost, and attempts to seek out other information or advice from the council were often thwarted (an extract from Tabled Document 44 Addendum 4.2.1.1 provides an indication of how Mr Rouse was treated). In the General Manager's Submission in Reply a rebuttal of Mr Rouse's claims was made (**submission in reply 98**). The weight of evidence, however, is in favour of Mr Rouse's version of events.

Submission in Reply to Tweed Shire Council Public Inquiry

Appearance of Mr V Rouse – 2 March 2005
Driveway Concerns
Page 756 of transcript

Question asked by MR BROAD

You've had delays in obtaining documents under the Freedom of Information Act ?

Council submits the following information which is in response to the issue raised.

Council has responded to each of the three Freedom of Information applications lodged by Mr Rouse within the 21 day time limit for Council dealing with the application.

In response to the last application, to which reference was made during Mr Rouse's appearance at the inquiry, Council has provided a significant amount of information to the applicant within the 21 day period. Information pertaining to internal working documents and personal information were not provided in accordance with the application of the Privacy and Personal Information Act.

Mr Rouse was provided with information pertaining to his rights for an internal review if he was aggrieved by Council's determination in respect to his application.

Submission 178

Mr Rouse's battle to obtain documents and to get a hearing from councillors and staff is just one of many instances (according to the evidence that came to the Inquiry) where members of the community believed that they were treated poorly by the council. The Inquiry has not sought to make judgements on the merits of the issues that had prompted various people to seek information or explanations from the council. The Inquiry's interest is simply on the level of access given to the public.

The evidence points to a serious lack of consultation with the community on certain issues, and substantial difficulties experienced by those who sought information or explanation. The bigger the issue, in the eyes of the community, the more difficult the access seemed to have become. In various instances the community concerns coalesced into community action through local community groups. Rather than attempt to consult and allow the community groups to have a real input into the decision-making, the reverse happened all too often. The community groups were tagged as trouble-makers, and both individuals and community organisations were denigrated by some councillors, and treated as political bodies who stood in the way of the pro-development council achieving its ends. This politicisation of issues served only to alienate members of the community. Those involved in community action were dismissed as "silly and misinformed" by some councillors. The evidence makes it clear that the council itself would be responsible if indeed the people were misinformed. An obstructive system of releasing information to the public (as opposed to developers and consultants), and a fundamental lack of consultative processes with community groups, would explain any information gaps.

The community groups were otherwise attacked by the pro-development councillors and their allies as zealots and conspirators, peddling lies to the community, and being ignorant of the facts. The community groups were branded as being formed to block and destroy developments that (in the view of the councillors) would be in the best interests of the community. The fact was that some groups had existed over decades (in contrast to

the Balance Team and Tweed Directions group). They were generally made up of people with genuine interests in the well-being of their communities (**T. 16/3/05 p. 1466-1467**). The essential fact was that the various community bodies made up a substantial part of the fabric of the community. The pro-development body politicised the community groups' genuine concerns, and ostracised them from having any real input into the council's processes. This was wrong in terms of the council's charter (section 8 of the Act) and in terms of the responsibilities of the councillors defined by section 232 of the Act.

MR BROAD: *And, is your Association the major community association?*

MR GLADWIN: *Yes, it's - - -*

MR BROAD: *I know there's a business association there.*

MR GLADWIN: *Yes, it's quite interesting actually. This is a little red herring that often comes up. Our wonderful association has a heritage, a golden thread as Mr Rumpole would say, that goes back to 1934, a continuous heritage to 1934. Our research officer has actually filed away our minutes from the war where we had a minute's silence for members' children who have died. We also were predominant in bringing water, electricity, police, fire, et cetera - sewerage, to the town and somehow we're portrayed continually as an anti-development group which is as far from the truth as you could possibly get. In fact, I'd further say that I'm probably the only recipient of aggression requiring police attention through our Association's endeavours to improve the main street. I don't know if it's - I didn't record it in there but I was actually physically assaulted because of a pro-development stance from our Association. That was some - probably four or five years ago now.*

MR BROAD: *Your membership? How many people?*

MR GLADWIN: *Off the top of my head, I think we have a financial membership of 60, 70. Our meetings generally have somewhere between 20 or 30 people. Interestingly, two councils ago when we had a council which generally reflected community outlook, we actually discussed going to bi-monthly meetings and sometimes when we only had seven, eight people there because the council of that time was generally catching the inappropriate developments that we feel now we have to look out for and I'd like to say too we're not vexatious at all. I mean, we're far from it, you know. I mean, I'd love to be surfing right now but one is involved with one's community for the greater good, for your children, for the rules to be obeyed.*

MR BROAD: *In pursuing an understanding of developments, have you attempted to obtain information from Council?*

MR GLADWIN: *All the time, all the time, when - - -*

MR BROAD: *Has information been forthcoming?*

MR GLADWIN: *No, very difficult. For example, a major development at Salt which is south Kingscliff geographically – our Association initiated a consultation. It's bizarre when a lay group has to initiate something as major as that. ...*

T. 16/3/05 p. 1466-1467

The denigration of community groups, the intransigence of certain councillors in listening to sectors of the community, and the fierce determination to push through certain outcomes by the majority councillors smacks more of the attitudes of a Third World Junta rather than a council in New South Wales. In behaving in such a way the council acted in a fashion quite outside of its own policy framework on community consultation.

The most dismal part of the behaviour of some of the pro-development councillors was the abuse and ridicule of the community members. This appeared to run parallel to deliberate attempts to deny members of the community access to documents, and any detailed understanding of the stage of the approval process was, when decisions were being made, and explanations of why certain decisions were made. Good governance for the whole of the community cannot exist in such circumstances.

The evidence concerning the actions of pro-development councillors in this regard is substantial and compelling. The following examples are illustrative of a much larger body of evidence that came before the Inquiry (**T. 3/3/05 p. 777-783; submission 332; submission 333; submission 369**).

MRS SMART: *...We went to great lengths to get these important reports. We [sic. they] weren't there. We meant business too. We went to say, "Why should this happen at the top of this hill; the isolation of an aged care facility?" And we were just basically ridiculed. I myself and Sandy Lambert, the other person at the helm of our community group that opposed that, we went to community access and we were treated like I couldn't begin to tell you. I mean Mr Brinsmead strutting around the room and not even listening to us and having a little bit of a conversation with Phil Youngblutt and treating us like we were nothing in that room in the shire.*

I mean, we're supposed to be the people and they're supposed to listen to the people but also take into consideration what reports are issued, and that they did not do. They do not represent us in any way.

MS ANNIS-BROWN: *So when you say they must take into consideration reports that are issued, in your view, was it appropriate for councillors to make that decision in the way that they did?*

MRS SMART: *Well, considering what came out of our individual report by Darryl Anderson explaining that there was no DCP for that area; that there was no infrastructure and that they had actually - council had made decisions not to do anything at that point about rezoning anything. There was just - nothing had happened in that area. It defies logic that this was pushed through and sneakily pushed through on the end of that year in*
December when they knew there was so much controversy. So it was despite the community outrage. It was irrelevant. They wanted it through and we want to know why.

What was the reason behind this?

T. 3/3/05 p. 777

MRS SMART: *Well, it was basically each and every opportunity we had - well, we had - we tried to speak to councillors. They seemed to stick together in a block and make a block decision and try to pull them away independently. And I had one experience with Mr Youngblutt. I rang him to speak to him about the development. I said, "Well, what do you think about what is happening?" And he basically screamed down the phone at me and I was just speaking with - I just wanted to speak with a councillor and find out what his opinion was on such a development and to basically put my view across.*

The man screamed out as if, "Don't question me," and he was like a crazyman. And then I spoke to Councillor Lawrie and he actually came up to where we - where the proposed site was and I spoke to him. I said, "Why? Why should - why against all odds should this be here?" "Well, you're here and why shouldn't it be?" They seem to make a block decision and it seems that there was an advocate which was Mr Brinsmead and they seem to all follow suit behind it by - - -

MR BROAD: *Can I - - -*

MRS SMART: *Yes.*

MR BROAD: *- - - stop you there? You say that Councillor Brinsmead was an advocate.*

MRS SMART: *Yes. He was claiming in newspaper items that it was a state of the art facility and we need facilities like this down here and that basically our concerns were fairy floss. This was in one of those newspaper items. And that this is basically - and then he was photographed as well in front of the facility at the end of it.*

T. 3/3/05 p. 780

PROF DALY: *But given that you were clearly unhappy with the proposal, and you had a group that was working around that, I'm very puzzled as to why you - one of your group didn't go to the meeting at which it was approved.*

MRS SMART: *Well, to what I can understand, I don't think we were aware it was on the agenda on that last meeting. So that's – my recollection is of that; that we weren't actually aware it was going through and it seemed to have been snuck through just before Christmas.*

PROF DALY: *So you didn't get notification of that - - -*

MRS SMART: *No, nothing. We got nothing in writing from anyone.*

PROF DALY: *Okay. You said there was a recision motion.*

MRS SMART: *Yes.*

PROF DALY: *Who proposed that?*

MRS SMART: *To my recollection, I think it was Henry James and Bronwynne Luff.*

PROF DALY: *Right. And did that come up at the next council meeting?*

MRS SMART: *On 23 January 2002 it was lost.*

PROF DALY: *Did you or any of your group attend that?*

MRS SMART: *There were some people who attended that one, yes: residents of our group, yes - ratepayers. And they were disgusted actually. I had very young children at that time, a one-year-old and a two-year-old, and the fact that I was trying to follow this through competently and competently look after my children at the same time was very difficult. But I did it to the best of my ability.*

PROF DALY: *I'm not saying you should have been there. I'm just trying to ascertain whether someone from your group was there.*

MRS SMART: *My neighbours, in particular, I know were there. They came back; they were disgusted at what they saw and the behaviour in the shire - in the council chambers.*

PROF DALY: *What were they disgusted about?*

MRS SMART: *The way Bronwynne Luff was treated in the room, standing up against it, and that's it. They were appalled at the behaviour and just the tunnel-vision that basically all our points were irrelevant to them.*

T. 3/3/05 p. 782-783

For the first time in Muwillumbah, a residential development of 100 lots has being proposed along side existing housing. The Master Plan for this development has previously been made available for public comment - which prompted over 200 respondents.

A brief summary of Resident's concerns include-

- Inadequacy of the surrounding road network – both major and minor roads to cope with the transport of building equipment and materials throughout construction, and thereafter the increased volume of traffic from the new residential development.
- Risks to pedestrian safety with greater than 600 additional vehicle movements per day along existing residential roads which have no footpaths.
- Earthworks outside TSC's Development Control Plan reducing an existing hill's height by 15 metres so it is less steep for the development and building up low lying land with 270,000 cubic metres of landfill to raise it out of the floodplain - we do not understand how this can be allowed. Why have a development control guideline if it is ignored?
- Lack of known parameters to control noise and dust during the proposed development (which could continue for many years).
- The validity of the conclusions of the Master Plan's Traffic Impact Assessment due to its poor data collection and reporting, research methodology, assessment and omissions.
- Lack of information regarding the impact of the development upon flora / fauna
- Lack of consideration to strategic planning or vision for Murwillumbah's future. This is an enormous issue given that the Strategic Future Plan for Tweed has recently been completed which states that adequate infrastructure needs to be in place before any further development.

Submission 332

The lack of insight and planning is incredible particularly when an alternate traffic solution has been proposed – to build a bridge over the Rous River from the development site. This would provide access into the development for construction and residential traffic, provide a ring road to town, alleviate traffic along existing roads, maintain the amenity of existing affected residents and provide essential upgraded infrastructure to accommodate Murwillumbah's expanding population. This proposal has never been explored by Council. Our summation is that the TSC is not looking at the needs of Murwillumbah and its future, but accepting sub optimal significant development whilst minimising costs to the developer (Metricon).

As an affected resident and ratepayer, we are upset that we have been treated with such little respect from the TSC. The proposed development has been a cause of major stress in the past year - to the extent of discussing whether we should move considering we work from home and therefore will be affected for years by the constant noise from earthmoving and building. Our dismay with the TSC is sourced from the lack of information, feedback and regard for our stated concerns. Collectively, an enormous volume of resident's concerns have been forwarded to the TSC regarding the proposed development - however, despite a community meeting held by the TSC, few of the stated concerns have been addressed. We feel we have been given lip service only. We have a copy of a report from the TSC to the Councilors that the Master Plan was to be approved in December 2004. It was only through pressure by residents and the impending Public Inquiry that the decision was deferred until further investigations into traffic. This is my point – the issue of traffic has been acknowledged as a major concern by residents and the TSC from the onset. How can the TSC recommend a decision to approve the proposal when a major component of the assessment remains incomplete?

We are not opposed to development – we want it to occur with balance and consideration to existing amenity.

Submission 332 - Continued

The Office of the Commissioner
Tweed Shire Public Enquiry
Locked Bag A5045
SYDNEY SOUTH NSW 1235

RECEIVED
2 8 JAN 2005

SUBJECT: ASPECTS OF COUNCIL'S FAILURE TO CARRY OUT ITS DUTIES

In my dealings with Council over the past four years, I have come up against a brick wall of inaction.

One telephones; the staff one speaks to says they will attend to the matter; nothing is done.

A procession of staff comes to investigate a matter; one hears no further.

I have received a letter telling me that by a specific date unauthorized construction by a neighbour will be rectified; three and a half years later, nothing has been done. Council now says it would cost them too much to take the offending property owner to court to enforce their orders.

The matters mentioned above relate to

a building codes
b health and safety matters

If Council, through its negligence or inefficiency allows rampant unauthorized building by property owners who ignore and violate codes and regulations to the detriment of their neighbours, especially where health matters are concerned, then Council's duty must be to rectify the matter complained of.

I would like to make an oral submission. Alternatively I have correspondence between myself and Council which can be made available.

Another matter concerns zoning; property being used by business contrary to its zoning.

27 January 2005

Miss V Schelling

Submission 333

MS ANNIS-BROWN: *Mrs Fitzgibbon, we've been hearing during the inquiry, or had discussions particularly with the councillors, discussions regarding the issue of community consultation and how the Council consults with its community and how much information is available. You mention in your submission that community consultation has often been cosmetic. I'd just like you to elaborate on that, if you may?*

MS FITZGIBBON: *Well, there are policies that there should be community consultation, and they're fairly detailed policies. Sometimes they're followed through but, quite often, they are not followed through, as I say. The process isn't followed. I think I mentioned about three or four illustrations there where I believed it wasn't happening, and jumped from those particular ones to the Futures Committee. Now, that was supposed to be a fairly widespread committee, but of the business commercial representatives, there were about four or five of those and there was only one who was a*

truly community representative, and then when we got to the Council representative of that particular committee there were three from the majority faction and only one from the minority group who – and when I talk about the minority group, they are the ones that we tend to look to to follow some of our community requests through and try and get a good - get a hearing for them.

PROF DALY: *In your view, have there been instances where people who have criticised the Council been - have adverse comments been made about that criticism?*

MRS FITZGIBBON: *You mean within the Council Chambers itself?*

MS ANNIS-BROWN: *Yes.*

MRS FITZGIBBON: *Yes, not only just to have criticised the Council but yes, whoever posed some particular say, planning issue or have made statements about some issue. I have heard very very critical and pretty disgusting sort of remarks that are coming from people who I feel should have some sort of a thought to their position.*

T. 23/2/05 p. 447

(d) Communication with Ratepayers.

(i) The Council claims to act in a 'transparent manner'. In reality, the "Tweed Link", an information leaflet published by the Council, lists development applications in very limited detail and in a manner that is insufficient for most ratepayers to interpret. Furthermore, it was used recently to garner public support for the sale of the Cabarita land by promoting a bogus list of projects hastily cobbled together.

When shire ratepayers meet to register their concerns about a development or to protest the actions of the Council, they are belittled by the pro-development Councillors through disparaging comments in local papers. For example, the NSW State Government intervention in the Lot 490 matter was "nothing but a win for silly misinformed individuals" (to quote Councillor John Murray in the Tweed Weekly). The sale of the Cabarita land has (to date) still not been taken off the agenda despite a massive public reaction opposing the deal. Instead, a 'probity officer' has been appointed to examine the procedures followed.

Submission 123

The vicious, dismissive, vituperative language used by some of the former councillors against members of the community is well illustrated in a letter dated 23 March 2005 and sent to the Daily News newspaper by former Councillor Lawrie (and forwarded by him to the Inquiry: **submission in reply 59**). How could a community believe that the council was representing the interests of the whole community when a substantial section of the community is publicly attacked as being whinging, whining, critical and ignorant? Good governance cannot be expected to survive in such an atmosphere.

Your paper, at the behest of a young and apparently inexperienced editor, published every whinging, whining, critical and ignorant letter from an equally whinging, whining, critical, ignorant sector of the community vis a hotbed of discontent, mainly at Kingscliff, Cabarita and Pottsville, stirred up by the very unrepresentative ratepayer associations in those areas.

Submission in Reply 59

4.3 Council's Use of Closed Meetings

4.3.1 The Act

The Act, in Chapter 4 Part 1, has a number of sections under the general title: *How can the community influence what a council does? Open meetings.*

It is clear that the Act intends that meetings of a council should be a forum open to the public wherein the community can hear what councillors discuss and how they come to their decisions. The general title of Chapter 4 clearly implies that there is an expectation in the Act that the presence of members of the public will have some influence on the decision makers.

The prelude to Chapter 4 states that:

> *Apart from the provisions in this chapter, members of the public may influence council decisions concerning matters such as levels of rates and charges, the terms of management plans, the granting of development consents , etc…by making submissions, including comments on or objections to proposals relating to these matters.*

Openness and engagement of the council with the community in its decision-making is intended to underlie the relationship.

Section 10 makes it clear that attendance at council meetings is a right. The Act says that it is an entitlement that must be ensured by the council.

10 Who is entitled to attend meetings?

(1) Except as provided by this Part:

(a) everyone is entitled to attend a meeting of the council and those of its committees of which all the members are councillors, and

(b) a council must ensure that all meetings of the council and of such committees are open to the public.

(2) However, a person (whether a councillor or another person) is not entitled to be present at a meeting of the council or of such a committee if expelled from the meeting:

(a) by a resolution of the meeting, or

(b) by the person presiding at the meeting if the council has, by resolution, authorised the person presiding to exercise the power of expulsion.

(3) A person may be expelled from a meeting only on the grounds specified in, or in the circumstances prescribed by, the regulations.

Section 10A discusses the situations in which a council may close a part of a meeting to the public. The closure of a meeting is intended to be protective of individuals, to prevent council conferring commercial advantages or releasing confidential commercial information, to protect information that might prejudice the maintenance of law, security issues, and information related to legal privilege.

10A Which parts of a meeting can be closed to the public?

(1) A council, or a committee of the council of which all the members are councillors, may close to the public so much of its meeting as comprises:

(a) the discussion of any of the matters listed in subclause (2), or

(b) the receipt or discussion of any of the information so listed.

(2) The matters and information are the following:

(a) personnel matters concerning particular individuals (other than councillors),

(b) the personal hardship of any resident or ratepayer,

(c) information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business,

(d) commercial information of a confidential nature that would, if disclosed:

(i) prejudice the commercial position of the person who supplied it, or

(ii) confer a commercial advantage on a competitor of the council, or

(iii) reveal a trade secret,

(e) information that would, if disclosed, prejudice the maintenance of law,

(f) matters affecting the security of the council, councillors, council staff or council property,

(g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege,

(h) information concerning the nature and location of a place or an item of Aboriginal significance on community land.

(3) A council, or a committee of the council of which all the members are councillors, may also close to the public so much of its meeting as comprises a motion to close another part of the meeting to the public.

(4) A council, or a committee of a council, may allow members of the public to make representations to or at a meeting, before any part of the meeting is closed to the public, as to whether that part of the meeting should be closed.

The clear and unambiguous intention of the Act is that council meetings should be open to the public except in a limited number of occasions where the various matters contained in section 10 A might be involved.

4.3.2 Council's Processes with Closed Meetings

Preliminary evidence before the Inquiry suggested that a very large number of meetings had parts of them closed to the public. The evidence was preliminary because by the resumption of the Public Hearings, on 16 February 2005, information requested by the Inquiry from the Council on the details of closed meetings from September 1999 to the end of 2004 had not been supplied.

The Inquiry was interested in gaining the minutes of the closed meetings to discover the reasons given for their closure, and to consider the matters that were discussed in closed sessions. Despite several requests over some weeks the information from the Council did not reach the Inquiry until the Public Hearings were well advanced. This did not afford the Inquiry the opportunity to ask the Mayor and the General Manager questions about the closed sessions based on an analysis of the data. When the information did reach the Inquiry there were 11 volumes of material. Questions put to the Mayor and the General Manager could not be based on this information.

The questioning of the Mayor about closed sessions of council meetings was limited to more general issues than details of the closure of certain meetings and the items considered (**T. 16/02/05 p. 80-83**).

The Mayor stated that he was a layman in relation to what matters should or should not be relevant to holding closed sessions. The process appeared to have been fairly broad and somewhat informal. The Mayor would ask if any councillor wished to make any item confidential. The Mayor explained that the General Manager and the staff provided material on matters that might be confidential (usually legal or tender issues), and that he relied on his legal advisors about whether something should, or should not, remain confidential.

Some submissions to the Inquiry had suggested that a majority of items handled in closed sessions were related to development applications. The Mayor said that this was not correct, and that the development issues that might be treated in closed sessions would be associated with Land and Environment Court matters.

He stated that he had never known the Council to approve a development application in closed session. When asked about whether the Council discussed section 96 amendments in closed sessions he answered that there was none that he was aware of.

MS ANNIS-BROWN: *Thank you. I would just like to go now to the use of closed meetings by Tweed Shire Council, pursuant to Section 10 of the Local Government Act. We have noted, having looked through several minutes of Council meetings, that there is quite a large number of confidential sessions that are occurring, and that Council, in fact, exercises this ability quite - you know, on a regular basis. I would just like to talk about what your understanding is of the use of that closed meeting provision of the Act.*

MAYOR POLGLASE: *Well, my understanding is, and I'm speaking from a layman's point of view here - I'm not an officer of Council legal directions - that any issue dealing with contracts, staff matters, or legal matters should - should come before - should be held in a confidential session of Council. We ask the question in Council during the meeting process: does any Councillor wish to move any item from confidential to open Council? That question is asked. That is made. We - we, as elected members of Council, are probably at the - at the direction of our - of our staff, take on board why they have put it in confidential. There are seven issues - several issues that may be confidential. There's questions being asked, "Well, why is that in confidential" and there is a response because it relates to some legal decision or some tender we're dealing with, or something like that. We - we, as Councillors, consider that we take on board the advice given to us by our staff and we - we act upon it.*

MS ANNIS-BROWN: *So you are saying that the staff actually recommend through the General Manager that sessions be closed?*

MAYOR POLGLASE: *The confidential report comes to Council. We get it the same day as we get our normal reports, on a Friday usually. There is a confidential section in Council which is put together by the – the General Manager and his team. There are sometimes when those issues are moved out of confidential, and then most times that they remain in confidential. We - we don't often challenge that because we believe that as officers of Council they have every right and understanding. It may be advice that comes to - they may have sought advice from our legal people to put this item in confidential. Therefore, it's left in confidential. It's – I suppose it's a matter of opinion what should or should not be in confidential but I believe that compared to other organisations we have very fewer items in confidential.*

MS ANNIS-BROWN: *The other thing that has also come to the Inquiry's attention is that the majority of the closed sessions actually deal with development applications. What is your view about that?*

MAYOR POLGLASE: *No, that - they - that's - that's, in my opinion, not correct. Some of the issues dealing with a development application may be some legal advice or where we're going into the Land Environment Court for a session in there where there are portions when we seek legal advice and Council may want to discuss that in a confidential because if it goes to the open Council it consequently exposes our case and there are those – but there are not - there are no major determinations that I understand*

ever made in-confidence on those - on any development application. It may be to do with issues with an application, as I said mainly to do with legal advice as sometimes we determine something that's not what - what the applicant wants, then we get advice. We're going into the Land Environment Court. We may get legal opinion and a legal - and a report to Council. Therefore, it has to remain in that situation.

MS ANNIS-BROWN: *So just to clarify - I am a little bit confused – when you say "It may be a matter that we've received legal advice on", are you receiving the legal advice to close the meeting or legal advice in relation to the meeting?*

MAYOR POLGLASE: *No, receiving legal advice as per a way the – our legal people present the case in the Land Environment Court or any other court they may - may be dealing with.*

MS ANNIS-BROWN: *Okay. So in every instance that you have closed the meeting and used the legal provision within Section 10 of the Act, you are suggesting that each matter is before the court?*

MAYOR POLGLASE: *No, I'm not saying that at all. I'm saying some matters that we discuss are court issues. Some matters may be discussing about a fine or something about taking action against a particular person. Well, then, that - that should remain in confidential and the - the report that goes to Council is in confidential. The recommendation is - is made available in the open environment.*

MS ANNIS-BROWN: *Yes. Why would that be confidential if you are wanting to fine someone, for example for - what would you be wanting to fine someone for?*

MAYOR POLGLASE: *Well, there may be an issue where that person has breached a certain thing in Council. If Council wishes to take certain action against that particular person and that will finish up in a court, Council may determine not to, but under the policy of Council the Council staff say this is - "This is contrary to what our policy is, we should consider what we should do", it comes before Council to make the determination whether we process it as - to go forward into a legal environment or whether Council may determine some other way, and therefore it's kept in confidential.*

MR BROAD: *Mayor Polglase, in what circumstances do you think it is appropriate for the Council to go into closed session when it is considering whether to approve a development application?*

MAYOR POLGLASE: *I've never known our Council to approve a development application in confidential. There's no reason for Council to go into confidential session of Council to approve a DA, and I - and I - I've often - off the top of my head I don't think we've ever done it.*

PROF DALY: *Could I ask a supplementary question there. Has Council ever gone into closed sessions when considering a Section 96 amendment to a DA?*

MAYOR POLGLASE: *Not that I'm aware of.*

T. 16/2/5 p. 80-83

The General Manager advised (**T. 16/2/05 p. 125-126**) that recommendations about closed meetings came from the staff and were reviewed by the executive management team. He said that councils had received advice from the Department of Local Government that contract items should be dealt with in the confidential agenda. He suggested that the council made a genuine attempt to keep confidential items to a minimum.

PROF DALY: *Thank you. Another issue which we did talk about with the Mayor earlier and that is closed and extraordinary meetings of council. In the process the recommendation to close the meeting goes through you but as the Mayor explained, the question of whether or not to close the meeting is raised by councillors generally. Is that correct?*

DR GRIFFIN: *The council staff make a recommendation in the preparation of the various agenda items for council, whether they suggest it should be an open or closed council. That is reviewed by the executive management team in reviewing the agenda paper before it gets finalised. There is a genuine attempt to keep confidential items to the minimum, having regard for section 10 of the Act, and it's in more recent times since we've had direction from the Department of Local Government that we've put in our contract items into the confidential agenda because we used to do them in open council and we were advised that that was not appropriate and they should be in the confidential section. So, that has raised a number of items that now go into confidential.*

PROF DALY: *And as you know, the Local Government Act of 1993 had a very strong purpose of making the operations of councils transparent and open. Section 12, as you would well be aware, lists a very large number of items that have to be available to the public and so forth. The material which I've seen suggests that over the past four or five years there's been something over 140 council meetings that were closed to the public. I can understand what you were saying about contract issues. I can understand what the Mayor was saying about some issues that may be related to a court case like the Land Environment Court and so on, but that seems a very large number of meetings to be closed and the public not being able to know exactly what's debated, what's said, what positions people take. Does it seem a large number to you?*

DR GRIFFIN: *On just about every council meeting there is a section on confidential items. There would - it would be rare for a council meeting not to have confidential items, and the same with some of the reserve trust meetings for the same reasons. The number of items in them are predominantly contract items, and as I said, those were previously done in open council but there was usually an item or so that would be done in the council. The numbers I'd have to refer back to statistical data to find out the range.*

T. 16/2/05 p. 124-125

In his Submission in Reply (**submission in reply 98**) the General Manager provided information on the number of items dealt with in closed sessions of council meetings. The information dealt with only two years: 1 September 1999-1 September 2000 and 1

September 2003 and 1 September 2004. The data show that 36.8% of the 253 items dealt with in those two years concerned tenders, consultancy appointments, and contract variations. There had been a 32.5% increase in the number of items in these categories over five years. The total number of items dealt with in closed sessions in 1999-2000 was 12.6% greater than the number of items dealt with in 2003-2004.

Appearance of Dr J F Griffin – 16 February 2005
Closed Council Meetings
Page 125/126 of transcript

Question asked by PROF DALY

> *I did request that information from the Council, and by the way we requested quite a deal of information from the council and its been provided, but I still haven't got a very good understanding of why so many council meetings have been closed and can you provide further information on that ?*

Response by DR GRIFFIN

> *Yes, I could provide some briefing notes on that particular information, Commissioner.*

Council submits the following information which is in response to the issue raised.

A summary of items considered at closed Council meetings in accordance with Section 10 of the Local Government Act, 1993 for the period 1 September 1999 to 6 September 2000 and 1 September 2003 to 1 September 2004 are detailed as follows:-

Items considered at Closed Council Meetings

	1/9/1999 to 1/9/2000	1/9/2003 to 1/9/2004	TOTAL
Tenders - consultancy appoints - contract variations	40	53	93
Land matters – sale or purchase	18	9	27
Leases/licences/agreements	18	9	27
Planning Legal Advice	12	15	27
Illegal Works	19	5	24
General legal issues	9	14	23
Privacy	9	11	20
Land/Environment Court	9	2	11
Staff issues	1	0	1
TOTAL	135	118	253

The Inquiry made an analysis of the 11 volumes of minutes of items that were dealt with in closed sessions over the entire five year period from the election of a new council in 1999 to the end of 2004. The interest of the Inquiry was twofold. First, it sought to understand the frequency of closed sessions, and the scope of the matters considered. Second, it had an interest in whether or not planning, property, and development issues were disproportionately dealt with in closed sessions.

In all 604 items were considered in closed sessions of council meetings (**Addendum 4.3.2.1**). The 604 items were considered in 129 meetings of council, suggesting that some part of every meeting was closed to the public.

31.6% of the items dealt with tenders and related issues.

51.7% of the items considered in closed sessions were unrelated to planning, property or development issues.

48.3% were related to planning, property and development issues. When the detail of the minutes is examined there is strong evidence that this proportion of items (292 in total) was unreasonably high. About one third of the items related to legal advice, and these possibly represent the bulk of items that might have legitimately been placed in closed sessions. There are some items that appear to be borderline matters in terms of whether they should have been put into a closed session. The legal items and the borderline items make up around one half of the matters related to planning, property, and development issues. On the evidence before the Inquiry it appears that around half of the matters in this category of issues should have been dealt with in open sessions of council.

Included in the items that appear to have been put into a closed session for discussion and resolution are some that pertain to major, and sometimes contentious, developments. These include Wardrop Valley, Seaside City, Terranora Area E, Paradiso, Casuarina Beach, Cobaki Lakes, Kings Forest, SALT, Chinderah Bay, Bilambil Sports Fields, Banora Point, Hastings Point, Pottsville, Carool, and various matters in Kingscliff.

Whether the staff who made recommendations about items that should be made confidential, or the councillors who voted on whether particular item should be heard in closed sessions were taking a cautious approach to the matters before them, the result is that too many issues have been pushed into closed sessions without sufficient cause.

An alternative explanation to caution on the part of councillors and staff is that there were issues that they simply did not want the public to hear the discussions that took place. Given the level of community interest and concern about a range of issues in the planning, property and development spheres it would have been prudent of the council to make their consideration of such issues as transparent as possible.

Regardless of the particular issues at hand, the Act is very clear in its intentions. All members of the public have a right to participate and influence Council in its decision-making. It is difficult for this to happen if a large amount of Council's deliberations are hidden from public scrutiny.

4.4 *Managing Complaints*

4.4.1 The Lack of a Council System

One of the more puzzling features of the Tweed Shire governance system is the complete lack of a complaints management system until 15 December 2004. As part of a policy review a complaints management system was approved by council in December 2004, and was to be made operational over the following months. As of 18 March 2005, when the Public Hearings finished, the new system was not fully functional.

The General Manager in his submission in reply (**submission in reply 98**) stated that prior to December 2004 the council did not have a formal complaints handling policy. Before the adoption of the new policy, council would treat complaints in one of two ways. Complaints that were made verbally to the council (either by visiting the council or by telephone) were treated as *Customer Work Requests* made to the council's administrative support staff or the works depot. The requests were recorded in the council's records system, called Dataworks, and it was up to an identified officer to handle the complaint. There was no apparent check on how satisfactorily the complaint was dealt with, what kind of resolution was adopted, and the significance of the complaints to the council's management plans or their broader policy directions.

The second form of complaints was those that were addressed in a letter to the General Manager. These were also logged in Dataworks, and a response was to be made within 14 days of receipt of the letter, either by the General Manager or other officers. It was left to the officers to whom letters may have been directed to "implement appropriate action". There appears to have been no checks made on how appropriate the actions might have been, or indeed whether any action was taken at all. Complaints from the public were not seen as a means of communication from the community, either informing the council on things that it may not have known or expressing to council the levels of satisfaction or dissatisfaction with its services.

The new council policy allocates the responsibility of monitoring complaints handling to the Corporate Performance and Audit Officer. The process is facilitated by a multi-disciplinary committee.

Submission in Reply to Tweed Shire Council Public Inquiry

Appearance of Mr R Norvill – 18 February 2005
Complaint Handling
Page 293 of transcript

Question asked by MR BROAD

It might be a good matter, perhaps, for a briefing over something like that, if you can respond more formally.

Council submits the following information which is in response to the issue raised.

Prior to 15 December 2004, Council did not have a formal complaints handling policy, however it did have two mechanisms whereby complaints could be lodged:-

- Customer Work Request; and
- Written Form.

Customer Work Request (CWR) – which are generally verbal or telephone initiated complaints, which relate to residents reporting such issues as potholes on roads, leaking water meters, overgrown allotments, barking dogs, noise and dust problems.

The complaints can be either made to Council's Administrative support staff or the works depot. These officers record the complaint as a customer work request in Council's Records Management System- Dataworks. The CWR appears on the Dataworks task list of an identified officer who is responsible for managing the completion of the complaint.

Written Form – Other than a CWR complaint, it is Council procedure for complaints to be sent in writing to the General Manager. All correspondence including written complaints are recorded in Dataworks which is Council's Records Management System. All items are recorded in a category, against a name or company and a subject.

Council's records management procedures, requires its senior officers to allocate the correspondence to the :-

- General Manager;
- Director or Executive Manager; and
- Manager or Coordinator.

However, where the records management officers have been able to ascertain that other Council Officers usually senior management staff who are responsible for, or are managing the matter pertaining to the particular item of correspondence then it is referred to that officer. The General Manager, Director, Executive Manager, Manager or Coordinator may refer to a particular officer items of correspondence to implement appropriate action.

Council's corporate policy no. O6.25 – Response to Correspondence- requires officers to respond to all correspondence within 14 days of receipt of the correspondence.

Appointment of Governance Officer
The General Manager and the Executive Management Team at Tweed Shire Council has consistently been developing good governance practices and associated effective and efficiency measures.

A major strategy in developing good governance has been the establishment of the Governance Section within the Office of the General Manager division in January 2005 and the appointment of the Governance Officer to manage the section. This strategy was formulated in early 2004. It is the role of the Governance Officer to implement and manage good governance practices and to assist in improving the general performance of the organisation. Reference material such as the ICAC/LGMA Governance Health Check and Department of Local Government Reform Program Check List will be important tools for ensuring that good governance is delivered within the organisation.

Further additional resources are being placed in the areas of Corporate Performance and Internal Audit to assist the Governance Officer in achieving these objectives.

Governance Health Check.
A Governance Health Check is a self audit guide to good governance in local government which was released to all NSW Council during 2004. The document was jointly prepared by Independent Commission Against Corruption (ICAC) and Local Government Managers Australia (LGMA).

The document contains 26 elements of corporate governance and is a reference guide for Council's to measure their progress in a level of achievement against each of the segments

Tweed Shire Council was nominated by its General Manager to be part of the test study during 2003, for the LGMA & ICAC jointly prepared Governance Health Check, with Councils Corporate Performance & Audit Officer being responsible for the study. Tweed Shire Council has been recognized by both ICAC and LGMA in its contribution to the document.

Tweed Shire Council has fully embraced the ideals contained in the Governance Health Check. A review of the 26 elements has resulted in Council preparing new or amending previous policies in accordance with the health check requirements.

The study did identify complaint handling as one area that Council should improve within its corporate performance.

Governance Health Check Implementation
Council has undertaken a comprehensive training session for all staff on a number of policies developed in July/September of 2004 which were adopted on 15 December 2004. Ongoing training has been identified of high importance

There is only one area where council does not comply at all with an element of health check:-

- committees

…

Complaints Handling Policy
A brief review of council's processes was undertaken during May and June of 2004, which resulted in a new policy being drafted by September 2004, information for the policy was drawn from a number of sources, including:-

- Good Conduct & Administrative Practice Guidelines for state and local Governments – complaint handling NSW Ombudsman – 2003; and
- Other NSW or QLD Council's complaint handling policies.

In preparing this policy, it was identified that a designated Council Officer should be responsible for monitoring complaints handling and response to correspondence. This officer is now the Corporate Performance & Audit Officer. Previously it was the responsibility of each Director of Council to monitor the CWR and response to correspondence performance of their respective divisions.

Since December 2004, the Corporate Performance and Audit Officer is reviewing statistical reports monthly on customer work requests and correspondence not being responded to within 14 days. The next stage of the monitoring process will be to undertake monthly a random sample of customer work requests and correspondence to review the actions taken by Council Officers in dealing with the matters.

Complaint Handling Policy Implementation
To facilitate the implementation of the new policy within the organisation, a multi-disciplined committee and a terms of reference has been established for that purpose.

The committee will determine the definition of a complaint, how they should be received within the organisation, how a complaint should be recorded, the effectiveness of using the Dataworks records management system as the recording system, statistical and performance review mechanisms.

Mr Norvill, the Executive Manager of the council, has had the overall carriage of implementing the new complaints handling process. The essence of the new policy is the centralising of the complaints handling system, instead of leaving them to the various divisions of the council. The aim is for the more controlled system to ensure that classes of complaints are recognised and that the complaints are handled thoroughly. Mr Norvill (**T. 18/2/05 p. 291-294**) intimated that the council received between 250 and 300 letters a day. It is not apparent from his evidence what proportion of these might be complaints.

Mr Norvill, when giving evidence, was unsure about whether the council had a previous complaint handling system. As noted above the General Manager indicated that it did not

have such a system. It is, at the very least, curious that the senior officer responsible for overall control of the new policy was uncertain about whether the new policy was actually replacing an older policy. It is a strong indicator of the fact that managing complaints made by the community was not a priority of the council between 1999 and late 2004.

Mr Norvill also suggested that the nature, scope and number of complaints were not made known to the Mayor and other councillors. If a member of the community takes the time and effort to register a complaint to the council it signifies that that person, at least, has a genuine problem with some aspect of council's services. If a number of people make complaints there is a clear message coming to the council about its service delivery. If the policy makers, the councillors, are not made aware of what the community concerns might be there is a breakdown in the governance structure.

MR BROAD: *... And one of the issues that has been raised previously is a question of complaints management. Council has indicated that it doesn't see that there's a problem with complaints. It indicates that, I think, there was some 36 complaints to the Department of Local Government and I think their suggestion is, well, the Department didn't act on those complaints and therefore they weren't serious. Is that the sort of view that the Council has in respect of external complaints?*

MR NORVILL: *I just might add - well, certainly that's a political comment. I don't view that personally and professionally - that by only 36 complaints by the Department of Local Government; that's not a major issue. I view any complaints that we need to follow through and part of the restructuring - as I have moved into this role, I have looked into the issue of updating our complaints-handling policy and we put that to Council at the later part of last year; and with the fact that I do view complaint handling as a very important area and that it needed improvement.*

And our complaints-handling policy, which was developed over the last six months of last year, reflects a different focus on complaint-handling and the need not just to - probably up to now that each division has looked after their own complaints - that there has got to be a centralised approach to ensuring complaints are followed through with a one-person final responsibility and with different levels of complaints. So we can generate our new policy that will start enhancing our complaint-handling policy. But, certainly, those comments about the Department of Local Government - I mean, politics - and they make the comments on that. I view it very seriously, the Department of Local Government complaints.

MR BROAD: *Now, does complaints-handling fall under your responsibilities, your general responsibilities of governance?*

MR NORVILL: *The area of complaints, taking now that the organisation is going through change - with this adoption of the new complaints handling policy, as part of the corporate performance of the organisation I am accepting that responsibility from now. We got this signed off on 15 December: that we take a more controlled approach to ensure that all complaints are handled thoroughly. Prior to this we have certainly left it up to each of the divisions to handle their complaints and to manage those complaints to*

ensure letters are answered within 14 days, complaints are handled, reports are generated and so forth.

But we're saying as another level to ensure that that is happening, we have adopted this new complaints-handling policy that hopefully will assist that. Now, out of that complaints-handling policy I have brought together a multi-disciplined team this year, 2005, to certainly go through and identify the type of complaints, go through all the process of setting up procedures, how to best keep track of that: is our current computer system adequate for that; do we look at some other computer system. And also to formalise a role, within my corporate governance area, of a person who is designated the role of looking after those complaints.

MR BROAD: *So are you in a state of flux? Have you adopted a policy back in December and are now putting into place a series of options, which will then allow it to be implemented?*

MR NORVILL: *That's exactly what it is, Mr Broad.*

MR BROAD: *So whilst it's being adopted, it's not really on the ground running?*

MR NORVILL: *It's not on the ground running, although we - I should add that since the adoption of this, the role of monitoring things such as - we get about 250/300 letters a day - the monitoring of outstanding correspondence, that they get answered within a certain period of time. Those types of issues, I've now put into our corporate performance area, and that person looks as that on a monthly basis and goes out and talks to management at different levels, to see - say, "Look, why haven't these letters been followed through? What's the action?" So they, actually - I've got that going - - -*

MR BROAD: *That's assistant management tool?*

MR NORVILL: *Yes, I've got that going now. I didn't wait 'til we got our group together, but I've actually brought that together since the adoption of this policy.*

MR BROAD: *In preparing the policy, did you consult with other councils?*

MR NORVILL: *I, personally, didn't bring the policy together. I was involved in it. Our internal auditor brought the policy together. He looked at other complaints handling systems during the - bring together that revised policy.*

MR BROAD: *Now, you refer to the policy as updating your previous policy. Was there a formal policy that had been adopted, previously?*

MR NORVILL: *The previous - there was - I'm just trying to think exactly how it - let me double check on that. I'm not sure how it actually worked.*

MR BROAD: *It might be a good matter, perhaps, for a briefing over something like that, if you can respond more formally.*

MR NORVILL: *Okay.*

MR BROAD: *Can I change topics? I just asked Councillor - - -*

MS ANNIS-BROWN: *Sorry, just to finish on that, Mayor Polglase indicated the other day that he was unaware of the number of complaints or the types of complaints that were being brought to Council or that Council was dealing with. I'm just wondering; you mentioned that you had had a system of handling complaints, however, you're subsequently improving that with the new policy. Was there a system in place, where Councillors were being made aware of what types of complaints were being dealt with and how well they were being dealt with by Council, and what was the result of that management?*

MR NORVILL: *The Council, themselves? Elected members?*

MS ANNIS-BROWN: *Yes.*

MR NORVILL: *No, I don't believe there was a formal mechanism. No, there certainly wasn't any formal mechanism of feedback to the Councillors.*

MS ANNIS-BROWN: *Do you believe that's something that you would be looking at?*

MR NORVILL: *And that should be part of the management plan of the organisation - the general manager report on a quarterly basis. And that certainly should be happening.*

MS ANNIS-BROWN: *So you're looking at implementing such as a system or - - -*

MR NORVILL: *Well, I - part of the management plan of the organisation looks at a set of performance indicators and certainly, now that we've adopted this, that would be an additional type of performance indicator. We would be providing feedback to the councillors. But I just might add on that, too; we do provide feedback to - we have a Communication Committee, which is consisting of community representatives and some Council officers, that - we do sit down with the Communication Committee and talk to them about the complaints and how they are being handled, and we are going to actually make that community representative very much part of the guidelines we put together in complaint handling. ...*

T. 18/2/05 p. 291-294

The officer with the direct responsibility for operating the new complaints handling system is Mr Brack, the council's internal auditor. Mr Brack has direct responsibility for all complaints except those that are concerned with a staff member's performance. In his evidence (**T. 16/3/05 p. 1448-1450**) Mr Brack explained that these would be referred to the General Manager who would handle the process from that point.

MS ANNIS-BROWN: *Mr Brack, just to go on, we understand and we've been advised that council adopted a complaints management policy on 15 December 2004. I'm just*

wondering what involvement you had in development of that policy and its ultimate adoption.

MR BRACK: *Right. I actually wrote the policy. We discussed with officers and it was approved on 15 December. At the moment I am heading up an implementation team which is looking at complaints – the whole complaints process through council. That process - I've actually got a terms of reference which will take us through the next three months to look at definition of a complaint, how we handle it internally, what type of system we should use to record complaints. So it's a whole, complete review. I identified that probably we should do this probably eight, nine months ago when I wrote the policy, and I'm currently - as part of my role, I'm Council Complaint Handling Officer.*

MS ANNIS-BROWN: *So does the policy clearly define a complaint as opposed to, for example, a service request, or is that something you're currently working on in the workshops?*

MR BRACK: *That's something we're currently working on in the workshops. There was a definition of a complaint, and virtually it talks about requests for serve.*

MS ANNIS-BROWN: *Right. So a complaint is defined as a request for service?*

MR BRACK: *Service, yes. And also it is - I think it's a problem with council as well.*

MS ANNIS-BROWN: *So how does council, I guess, deal with things that aren't requests for service, because there would be complaints or issues that would be raised with council that may not necessarily be requests for service, and I would imagine that something like filling in a pothole or – I mean, things that are specifically services that council provides, it's simply a request - a complaint, for example, with respect to staff's behaviour or perhaps things that, you know, they may not be happy with in terms of performance of council. How is that dealt with, for example.*

MR BRACK: *I'll explain. We have two different types of complaints. We have a service complaint, and that's covered by our customer request system - request for service, for council action, for pothole, leaking water meter, and so forth.*

MS ANNIS-BROWN: *Sure.*

MR BRACK: *Other complaints, we request for them to be put in writing, and they go through our processing in council that way.*

MS ANNIS-BROWN: *So what is that process? For example, someone writes to say they're not happy with a staff member's performance. What would happen? Okay: the first step is they must put it in writing. What occurs next?*

MR BRACK: *Right. In regard to a staff member, that is normally referred to the general manager, and then the general manager handles the processes.*

MS ANNIS-BROWN: *So it would go directly to the general manager rather than that person's supervisor or manager, perhaps?*

MR BRACK: *Well, it should go through the general manager. Anything regarding a staff complaint normally goes through to the general manager, that's correct.*

MS ANNIS-BROWN: *Okay. And then the general manager would do what with it: deal with himself, or would he refer it to the manager of the division; or what is the practical implementation?*

MR BRACK: *It would actually depend on the nature of the complaint. If it was determined by the general manager to be a serious complaint, he'd probably handle it himself; probably refer it to myself to be considered to be independent to do the investigation. If it was only a minor complaint it could be referred to the director of that division.*

MS ANNIS-BROWN: *What's the definition of a serious complaint? Is there one?*

MR BRACK: *There's probably not, no - in regard to probably allegations of fraud, corruption.*

T. 16/3/05 p. 1448-1450

The new complaints handling system has a structure for reviewing complaints and avenues for appeal if a complainant is unhappy with the outcome. There is, however, no definition of what would be considered as a serious complaint.

Table 4.4.1.1

Analysis of Complaints to the Minister for Local Government and the Director General of Local Government 1999-2004

Issues Raised	1999	2000	2001	2002	2003	2004
Access to Freedom of Information material	1	4				
Councillors remuneration	1	1				
Performance of council	1					
Property related	9	30	69	43	47	86
Property related: Section 430 investigation			128	78	2	2
Finance	1					
Elections	3	2	1	1	1	5
Council Newspaper	1	1				
Rates		3				
ICAC					2	2
Council's complaints handling system		2	14	18	29	1
Calls for an investigation of council		1				
Complaints about Mayor		1	2			
Roads and bridges			2			
Code of conduct			2			
Pecuniary interest conflicts of interest			5	1	3	20
Environment				6	11	1
Not relevant to Inquiry's Terms of Reference	16	25	26	48	38	47
TOTAL	34	70	255	195	133	164

The Inquiry analysed the records of letters and complaints sent to the Minister for Local Government and the Department of Local Government from the Tweed Shire area from 1999 to the end of 2004. The volume of correspondence increased 382%, from just 34 items in 1999 to 164 items in 2004. In 1999 47% of the material sent to the offices concerned issues that were not relevant to this Inquiry's Terms of Reference. In 2004 only 28.7% of the material dealt with issues that were outside of the Terms of Reference. It is clear that community concerns about the issues that are being inquired into here have grown significantly over the past five years.

The amount of correspondence ballooned in 2001 and 2002 when the Director General instigated an investigation under section 430 of the Act. The investigation, conducted by Mr Bulford, focussed on two sets of issues dealing with development projects at Seaside City and Kings Forest. In the case of both projects the ways in which certain councillors, staff and consultants handled the development processes were primary to the investigation.

Issues to do with planning, development processes and other property-related matters have dominated the flow of correspondence in every year, and the volume of letters dealing with such matters grew year-by-year. In 2004 there were 9.8 times more letters dealing with such issues than in 1999. In 1999 such issues made up 26.5% of the communications from Tweed to the Minister's and Department's offices; when issues that are not relevant to the Inquiry's Terms of Reference are excluded, property/development matters made up half of the correspondence. By 2004 property/development matters were 53.7% of all correspondence, and when the issues that were not relevant to the Inquiry's Terms of Reference are excluded the percentage jumps to 75.2%. Clearly, the concern, interest and complaints about how the council managed its role as both the planning agency and the development consent authority were paramount in Tweed Shire.

Since the council did not have a complaints handling system in place between 1999 and 2004 the volume of material sent to the Minister's office and the Department reflected this lack. If the council had had an appropriate system for handling complaints it would, in all likelihood, have had a better understanding of community concerns about planning and development issues. The dismissive and belligerent attitudes of some councillors towards community criticism, and the inability of the council to create an effective complaints management system, forced people to write to groups beyond the council, be they Minister's or Departmental offices, or the local newspapers. Problems of communications and interaction between the community and the council were exacerbated by the absence of a complaints handling system, and the quality of governance was surely a casualty.

The Inquiry received details of references made by persons in Tweed Shire to the Independent Commission Against Corruption (ICAC) over the period from 06/1999 to 09/2004. 38 such references were made. 65.8% of these concerned issues of planning and development, and councillors and staff actions in that domain with allegations of corruption. 15.8% of the references related to alleged corruption of councillors and/or staff in other matters. Although none of these references led to action by ICAC, they point to the kinds of issues that troubled members of the community.

An analysis was also made of references made by members of the Tweed community to the New South Wales Ombudsman over the period 1999- September 2004. 56 such references were made over the period, with 47.4% occurring in 2003 and the first nine months of 2004. Precisely half of the 56 references dealt with property and planning issues, and 57% of them were made in 2003 and the first nine months of 2004. The evidence simply builds into a recurring pattern: there were many people in the Tweed community whose principal concerns about the governance of the council were based on how the council was managing its responsibilities in the planning and development processes areas.

One of the more disturbing aspects of the lack of opportunities of the public to express their concerns to the council was the reluctance of a number of people to either write a submission to the Inquiry or to appear at the Public Hearings. At the opening session of the Hearings on 16 December 2004, and again on their resumption on 16 February 2005, it was made clear that the Inquiry would not accept anonymous submissions and would not hold any closed sessions during the Public Hearings. Despite this advice there were a large number of phone calls to the Inquiry office from members of the community who wished to send anonymous submissions or to give evidence in closed sessions. When questioned by officers assisting the Inquiry as to why these people were reluctant to come forward with their evidence in the public domain, the general response was that they feared the consequences. Exactly the same attitude was presented by staff, leading the Inquiry to conclude that both staff and members of the community were fearful about giving evidence despite the protection afforded them by the Royal Commissions Act 1923. These protections were spelt out in the information paper that was available on the Inquiry web site, and which was forwarded to those who made enquiries at the Inquiry office.

The fact that so many members of the community and council staff expressed a fear of recriminations if they were to give open evidence was a cause of great concern to the Inquiry. Both the Mayor and the General Manager were asked to give public assurances that neither staff nor the general public should hold any fears if they provided open evidence. The Mayor and the General Manager issued statements to such effect to the staff of the council. The Inquiry is not aware that any similar assurances were given to the community. Despite these assurances staff still contacted the Inquiry expressing their reluctance to write open submissions or to appear at the Public Hearings.

The original assurance given by the General Manager to staff was not as robust as had been expected, and a number of staff contacted the Inquiry expressing their conviction that it did not guarantee them against recriminations. In response to these comments a request for a further and stronger assurance to staff was made. The General Manager complied with this request.

In his evidence to the Inquiry the Mayor (**T. 16/2/05 p. 78-80**) used the fact that a second, and stronger, assurance was provided to staff as an explanation of why staff was reluctant to provide evidence. The problem with Mr Polglase's argument is that both staff and community members had expressed their fears *before* any assurances were sought. Staff reacted to the General Manager's first statement by requesting stronger assurance,

leading to the second statement. Just how the issuance of that second, and stronger, guarantee would increase the fear level of staff is not apparent.

MS ANNIS-BROWN: *Okay, thank you. I would also just like to talk about - in an article in the Tweed Daily News dated 13 January 2005 you were quoted as saying - and this is in relation to staff:*

If they -

the staff -

have a problem with a Councillor, they go to the General Manager. If they have a problem with staff issues, they come and talk to me.

We have received a number of phone calls from staff during the Inquiry with concerns about making submissions and appearing, in fact, at the Inquiry, and I am just wondering why that may be.

MAYOR POLGLASE: *Well, as requested by the Commissioner, we gave assurance to our staff that there would be no retributions after this – after the Inquiry. We also requested a second time to do that, and I believe that that second reassurance actually put staff not at ease because the staff were concerned who or who may not be putting forward a submission amongst themselves because I was asked why are we reassuring a second time to give this to the staff when we reassured it the first time, isn't our – our word good enough as elected members, and the General Manager gave that some assurance, so that second issue created an opinion amongst staff of well, who has and who hasn't put forward evidence to the Commission. They would not know but that sort of thing should be managed in a manner where the staff are at ease and we've tried to assure them that if they have a general concern, they can come and talk to us.*

MS ANNIS-BROWN: *So are you suggesting that the Commissioner's request was, in fact, the catalyst for creating that fear within staff?*

MAYOR POLGLASE: *Well, I'm suggesting that it could have been handled in a manner where the staff knew that because of being the Mayor, that my word was my bond. I believe that that was good enough. The Commissioner has every right to put a second - a request forward to us, which we did. We reassured them, but the staff point of view, where they sit, they then sort of were provoked a bit in concerns of well, why are we doing this a second time, and I'm just being open and frank in this statement.*

MS ANNIS-BROWN: *I guess, just to take it a little bit further, how can you explain, then, that the Inquiry did receive those phone calls before that request was made by the Commissioner. So, clearly, to our mind the fear factor was already there.*

MAYOR POLGLASE: *Well, I'm not aware of what phone calls or correspondence the Commission received, and to what extent you received that information. So all I can offer you is that we gave reassurances that we - we were there to - to offer assistance. We weren't there to be vindictive to anybody, regardless of whether they put forward*

submissions or not. They have every right to do so. In matter of fact, we encouraged it to be done so. But you've got to understand people working in an organisation are always concerned about who's talking about them or who's saying something about what they may or may not be doing. We're not aware of that, and they may have expressed that - that to the Commission, and they have every right to do that.

MS ANNIS-BROWN: *I guess I just want to take it a little bit further to going back to the quote that was made in the Tweed Daily News by you. Just talking about the fact that if staff have a problem they can come and talk to you about it, I guess I just want to explore that in the terms of the separation of powers issue. For example, in the Local Government Act it specifically says that the General Manager is responsible for staffing issues. So can you explain why staff would be coming to you to talk about those issues?*

MAYOR POLGLASE: *Well, I - I - look, I understand the Local Government Act. I understand how - how it completely works. But sometimes staff may have a problem that they want to talk to the General Manager about an issue and be - be concerned about it. Who else have they got to talk to? It's either myself or the General Manager. The General Manager in Tweed Shire has complete control of - of - of the staff on those issues, but there are times when they may have a concern that they wish to talk to someone else about an issue relating to the General Manager. Well, I'm there to - to accept that - that - listen to what they say.*

MS ANNIS-BROWN: *Has that been the case in your term as a Mayor and Councillor?*

MAYOR POLGLASE: *No, it's never - never come before me once at all but I have that open door policy, that I think it's important to - for the good management of Tweed Shire.*

MS ANNIS-BROWN: *So you have never had any staff approach you - - -*

MAYOR POLGLASE: *No.*

MS ANNIS-BROWN: *- - - about a matter they have?*

MAYOR POLGLASE: *No.*

T. 16/2/05 p. 78-80

The General Manager was also asked to provide an explanation of why staff and community members were reluctant to give open evidence. The General Manager proposed that the reluctance of the staff was related to the Bulford section 430 investigation. He did not expand on why there would be a connection between that investigation and the reluctance of staff to give evidence at the Inquiry (where, unlike the section 430 investigation they were afforded strong protection).

The General Manager offered no thoughts on why a number of people in the community were reluctant to come forward with evidence, and neither did the Mayor. Both the General Manager and the Mayor gave the impression that if people had not expressed their fears to them, they possibly didn't exist. An alternative view is that the General Manager and the Mayor did not have people approaching them about their views because

they were related to the source of the people's concerns. In a council where the majority councillors were loudly and aggressively pro-development, who were practiced at denigrating and dismissing any opposition, and where threats of defamation were in the air, it is not surprising to find that individuals were reluctant to expose themselves to abuse or threats. Some were concerned that the council might retaliate when the critics had to deal with the council on ordinary service issues.

The lack of a council complaint management system over so many years is a serious neglect. It betrays an attitude of council towards the community. In a situation where the community was equally divided on issues of development levels and environmental management, the cavalier and negligent approach to complaints effectively lessened the opportunity of around half of the community to express their concerns and opinions. As the data from letters and references made to the Minister's office, the Department of Local Government, ICAC, and the Ombudsman show, planning, development and other property matters dominated the concerns of a large part of the community. Ignoring those voices meant that the council was not fulfilling its charter as defined by section 8 of the Act.

PROF DALY: *It's been mentioned already but I want to come back to it, we received a very large number of phone calls and e-mails anonymous from members of staff saying, "We would like to put in a submission but we're frightened to", and subsequently, as you know, I sought your assistance and the Mayor's assistance just to try and waylay any problems they might have. But why do you think they were doing that? Why do you think they were contacting the office and expressing these sorts of fears?*

DR GRIFFIN: *That I'm not sure. I could only suggest that there was some staff members who were - that were quite perturbed over the Bulford Inquiry and I think those people are probably still disturbed today. I've had recent discussions with them, very uncomfortable with issues that have been brought out in submissions in the Inquiry that they were involved with in the Bulford Inquiry. So, that may be part of it. I can't gather why others would have views unless they're related to those sort of things.*

I also made the offer to staff if they didn't want to put submissions in themselves, I'd be quite happy to put them - include them in my submission, and in fact one staff member who did put in a submission I've made reference to some of the same things that they've put in their submission. So, you know, I would have been quite comfortable in assisting in those processes.

PROF DALY: *As well as communications from the staff worried about these issues, there were also communications from the general public expressing similar sorts of fears about putting in a submission and so forth. I know the general public is not your domain in a sense, but do you have any feelings about why they would express the same sorts of fears?*

DR GRIFFIN: *No, I would be very much guessing to do that and I don't think that would add substantively to attempting to resolve the question.*

T. 16/2/05 p. 124

4.4.2 Corruption Allegations

Throughout the Public Hearings, and at other times through letters, e-mails and phone calls from the Inquiry office, it was made clear that the Inquiry was not investigating corruption issues. The Terms of Reference do not direct the Inquiry in that direction. Rather, the Terms of Reference raise a number of issues that affect the governance of the council.

The Terms of Reference, however, make specific reference to conflicts of interest, the processing of significant applications for development, and the appropriateness of the relationship between elected representatives and proponents of development. A number of submissions, whilst giving evidence related directly to the Terms of Reference, also extended that evidence to infer that some practices have been dubious if not corrupt. There is no doubt that such sentiments coloured the perceptions of some in the community and affected their views on the governance of the council.

The Inquiry has no capacity to investigate such issues. They may be referred to other bodies if there seems to be enough evidence and concern to warrant such referrals. The issues include the following:

- Bilambil Sports Ground
- Murwillumbah Industrial Land
- Cabarita Land Sales
- Greenview Estate
- Flame Tree Estate
- Caravan Park sales and management
- Lot 490
- Northern Area Consultation Committee
- General Manger's contract extensions
- Use of council's logo in election advertising
- Approval of development applications whilst council was in caretaker mode before the 2004 elections
- Senior staff appointments
- Staff restructuring
- Use of credit cards and council vehicles
- Land allocations to councillors and staff
- Senior staff handling of staff development applications
- Attempts by councillors to sack staff
- Family connections of councillors with proponents of development
- Collusion of councillors with proponents of development
- section 94 variations made by councillors
- Public threats made by councillors

4.5 *Case Studies of Governance Issues*

4.5.1 Resort Corporations Dealings at Cabarita Beach

On 12 November 2001 Resort Corporation wrote to the Council advising that it had rights to acquire the Cabarita Beach Hotel site.

At that time the council was dealing with an application to re-develop the site and ultimately, in June 2002, granted consent for a development comprising hotel, retail, commercial and tourist accommodation facilities.

In September 2002 Resort Corporation's representatives met with Mr Broyd and Mr Smith from Council's staff to discuss alternatives for developing the site.

Resort Corporation's agenda for the meeting raised the following additional topics:

8. **The Council Foreshore**

Issues to be discussed include:-

- Improvements in landscaping to the Council beachfront foreshore by the developer at the developer's cost.
- Improvements to be included in the public reserve. These may include:-
  - Stairs in the reserve for the development;
  - Boardwalk;
  - Showers;
  - Fences;
  - Water features;
  - Other.
- Improvements to the entry to the beach by the developer at its cost.

- Ability for restaurants and shops to place tables and chairs spilling into the reserve.

9. **Pedestrian Side Walks in Pandanus Parade**

Issues to be discussed here include:-

- Utilisation of the footpaths for restaurant dining.

10. **Closing of Pandanus Parade and the Creation of a Pedestrian Mall**

The developer would like to discuss with Council the possibility of extending the basement car parking under Pandanus Parade. That car parking would be made available to the public and constructed at the developer's cost.

The developer at its cost and in conjunction with Council will construct on the street level of Pandanus Parade a pedestrian mall or piazza incorporating extensive landscaping, water features and improvements in public open space.

The intention is to facilitate in Pandanus Parade a recreation facility and gathering place in the heart of Cabarita. This would also facilitate the development of a second stage complimentary development on the northern side of Pandanus Parade.

11. **Council's Attitude to Any Proposed Development on the Northern Side of Pandanus Parade**

This area incorporates some Council land and the Surf Club as well as a private residence. The developer would like to discuss potential development of that corner as a second stage project.

12. **Status of Covenants for Car Parking Over the Council Land, Northern Side of Pandanus Parade**

What is the status of these covenants?

Does the developer get the benefit or the credit in relation to car parking areas where the covenants exist?

This appears to be the first instance that Resort Corporation had indicated an interest in developing the Council owned land in Pandanus Parade and developing land to the north.

In the following period, proposals would be fleshed out for this land, the existing surf club site and other land owned by the surf club.

In order to give context to the proposal, it is necessary to give a potted history of the area. This is largely drawn from a submission provided by Mr Stuart Reid, who owns an adjoining property (**submission 298**).

- The Cabarita Beach Surf Lifesaving Club was founded in the 1960's and operated from a garage at the rear of the Cabarita Beach Hotel;
- the hotel's owners also owned another property on the northern side of Pandanus Parade (lot 6) on which a 2 storey building existed;
- this land (lot 6) was bought by the surf club, with assistance from the council;
- the land adjoining lot 6 was owned by a Mrs Bugler. This land, lot 7, was subsequently purchased by the surf club;
- later, faced by a decline in membership and dwindling finances, the club arranged the sale of lot 6 to the council, upon proviso that until it could provide a new clubhouse on lot 7, it would continue to operate from the existing building in the interim period;
- in the 1970's and 80's, due to the unsuitability of the building materials and a lack of maintenance, the surf club building fell into disrepair;
- in 1974 the council purchased lots 4, 5, 10 and 11 in Pandanus Parade from the then owner of the Hotel, who was incidentally a councillor;
- each of the lots was to become burdened by a covenant that restricted their use to public car parking;
- the owner of the Hotel could at any time vary the terms of or agree to the removal of the covenants;
- in 1994 the council introduced a section 94 plan that imposed development levies to assist the provision of lifesaving facilities in the area;
- in the late 90's the surf club had recognised that the condition of the existing premises was terminal and it set about fund raising efforts to construct a clubhouse on its land, lot 7;
- by August 2000 the council had recognised that the surf club building should be demolished;
- in March 2001 the Minister for Sport and Recreation announced a $200,000 grant for the club. This would augment the $500,000 set aside by the council under its section 94 plan;
- in November 2001 the council wrote to residents advising that it was investigating options for the re-development of the surf club and the adjoining car park;
- a week later an options paper was sent out to a limited number of stakeholders;
- in March 2002 the surf club was reported to be in "building mode" and that plans would be submitted to the council in the near future.

The following table sets out the ownership and uses of the various lots.

Lot Description	Zoning	Present Use	Ownership	Classification
Lot 4 DP29748	5(a) Special Uses (car park)	Car Park	Council/Public Land	Operational
Lot 5 DP29748	5(a) Special Uses (car park)	Approx. 60% car park, 40% green space	Council/Public Land	Operational
Lot 6 DP29748	5(a) Special Uses (SLSC)	100% green spece (former SLSC site)	Council/Public Land	Operational
Lot 7 DP29748	5(a) Special Uses (SLSC)	Temporary Surf Club compound	Private Land (SLSC)	N/A
Lot 10 DP31209	5(a) Special Uses (car park)	Car parking	Council/Public Land	Operational
Lot 11 DP31209	5(a) Special Uses (car park)	Approx. 60% car park, 40% green space	Council/Public Land	Operational

The blocks abut the beachfront reserve between Pandanus Parade and Palm Avenue, with the surf club land (lot 7) fronting the reserve and Pandanus Parade. The site of the existing surf club building lies immediately behind, again fronting Pandanus Parade.

Following the meeting on 9 September 2002, Resort Corporation prepared and submitted minutes to the council. Relevantly, the minutes contain the following:

8. The Council Foreshore

Peter Madrers advised that the developer would like to improve the landscaping and improvements located in the public open space and foreshore areas. Peter Madrers advised that the landscaping in these areas should be substantially upgraded. It may be necessary to put in place some paving and walkways, picnic areas, new fencing, stairs from the development into the public open space, boardwalks to the beach, showers, extensive new landscaping and general other improvements. Peter Madrers noted that it was important that this area remains as open space to be utilised by the public, but it must integrate generally into the development. Peter Madrers advised that it was important

that the developer have the ability to substantially upgrade this area.

David Broyd agreed that it would be appropriate for the developer to upgrade this area. David Broyd emphasised, however, that this area must remain as public open space as the continued availability of public open space is an important sensitive public issue.

David Broyd advised that it may be appropriate to prepare as part of a development application a dune management plan. That dune management plan will need to be approved by the Department of Lands. David Broyd advised that it was not mandatory that this be lodged as part of the development approval, but it is preferable that it is done together.

David Broyd also noted that there may be some issues in relation to Pandanus Parade, particularly in relation to vehicle movements and turn around and the like that may need to be addressed.

9. Pedestrian Sidewalks in Pandanus Parade

Peter Madrers noted that the developer may intend to obtain licences for use of the sidewalk for alfresco dining. It was agreed that while all of this could be considered at the relevant time, that an application was made for this.

10. Closing of Pandanus Parade and Creation of a Pedestrian Mall

Peter Madrers advised that the developer believes that both parcels of land on both sides of Pandanus Parade should be developed as Stage 1 and Stage 2 compatible developments. Peter Madrers discussed the developer's vision for this area. The developer believes that Pandanus Parade should be closed. Public parking should be available under Pandanus Parade in the basement. Pandanus Parade should be turned into a pedestrian mall and Piazza. This would involve new landscaping, water features, public seating, shading and other appropriate improvements. This would

upgrade public useable space and would make Pandanus Parade a focal point for the whole of Cabarita.

David Broyd advised that the concept for Pandanus Parade appeared to be an extremely interesting concept that deserved support.

Peter Madrers advised that the developer would like to be in a position to acquire the Council land on the northern side of Pandanus Parade. The developer would then negotiate with the Cabarita Surf Club and the other owner to acquire that site.

David Broyd advised that it may be a requirement that any Council land that is sold is in fact tendered.

Peter Madrers pointed out that the Council land had registered over it covenants in favour of the developer.

David Broyd advised that if the developer wished to proceed with this, then it would be appropriate that:-

- The developer negotiates an outcome with the Cabarita Surf Club.

- That the developer meets with and gains support from the Mayor and the Deputy Mayor and may be as appropriate lobbies other Councillors for support.

- That generally the developer consult with the community to gain support.

Generally, David Broyd agreed that the proposal of a second stage development and utilisation of Pandanus Parade is something that should also be looked at as part of the finalisation of the Cabarita strategy. David Broyd agreed that the developer would have the ability to consult with the consultant in finalising the draft Cabarita strategy and provide appropriate input into this.

11. Council's Attitude on any Proposed Development on the Northern Side of Pandanus Parade

See comments above.

12. Status of Covenants for Car Parking over the Council Land, Northern Side of Pandanus Parade

David Broyd advised that the covenants appeared to be restrictions as to user.

David Broyd advised that he was unsure as to the legal status and legal opinions may be sought as to the binding effect of these.

David Broyd also advised that the covenants were to restrict the land's use to that of car parking.

This appears to be the first time that Resort Corporation had signalled its desire to acquire the council owned land.

Council's staff appear to have given guarded support for the proposal.

Mr Reid reports that as far back as 2000 Mr Brinsmead had contacted his mother to inquire about purchasing the property now owned by him. He also reports that in late September 2002 he was contacted by the then owner of Cabarita Beach Hotel who expressed an interest in acquiring his property.

In November 2002 Mr Reid was to meet with Mr Brinsmead and Mr Madrers, the principals of Resort Corporation. Mr Reid reports:

38. **18 November 2002 –** Stuart Reid met with **Mr Paul Brinsmead** and **Mr Peter Madrers** at his property in Cabarita. These gentlemen stated that they were owners of Resort Corp [although Peter Madrers supplied a business card for Pacific Projects P/L and Paul Brinsmead supplied a business card from Hickey Lawyers]. The main topic of the meeting was their desire to acquire Mr Reid's property within the context of their plans for redevelopment of the entire precinct (including the Cabarita Hotel as well as Lots 4, 5, 6, 7 on DP29748 and Lots 8, 9, 10 and 11 on DP31209). They stated that they had discussed their plans with Tweed Shire councillors and senior planning staff, all of whom had expressed support for their concept [a copy of which was supplied to Mr Reid]. Peter Madrers stated that Tweed Shire Council was **'desperate to sell'** the public lands comprising the former Cabarita SLSC building and the parcels comprising the car park as council was 'short of money'. He also stated that as they now had the Cabarita Hotel/Motel this also gave them control of the car park land (via covenants attached to the Hotel) so they were the 'only ones who could develop these sites'. Peter Madrers further stated that if Stuart Reid did not wish to sell his property, they would 'just go ahead and do the rest of the development anyway and he would have a 3 storey building right behind his property and wouldn't like that'.

The discussions between Mr Reid and Resort Corporation representatives would continue until April 2003.

On November 2002 Mr Reid sent an email to Mr Brinsmead requesting proof that Resort Corporation had council support, writing:

> *'To ensure that my understanding of the overall situation is correct, I will first summarise my interpretation of our discussions and the materials presented by you and Peter: Your overall vision is that, if developed properly, the Cabarita precinct has the potential to be the premier residential area on the eastern seaboard of Australia. You have developed some preliminary plans for this vision. It seems clear from your plans that the construction of the proposed Cabarita SLSC building would undermine the attainment of your vision for the area. Your plans indicate that your ability to alter this outcome depends on the acquisition of my property and the relocation of the proposed Cabarita SLSC building. As you already own the Cabarita Hotel/Motel, to achieve your vision you need to acquire the new Surf Club site, my property and 3 lots of Council land (2 in the car park plus the old surf club site). You have held discussions with Councillors and senior planning officers at Council about the overall vision and they have expressed enthusiastic support for your plans. Although you are yet to discuss your vision and the relocation of the new SLSC building directly with representatives of the Cabarita SLSC, you anticipate that you can make them a very attractive offer to which they will be highly receptive. In this regard, as long as the new Surf Club building has not commenced, there remains a 'window of opportunity' for you enter into negotiations with the Cabarita SLSC for relocation of their proposed club building to a site on my property.'*

On the same day Mr Reid wrote to the council asking whether it had entertained the possibility of selling the lots to Resort Corporation.

Mr Brinsmead responded on 29 November 2002, in an email to Mr Reid. Mr Reid quotes it as saying:

*'**Your summary of our client's overall situation and our client's vision is very accurate**. Our client believes that the Cabarita precinct will be an icon residential and commercial development.....In regard to planning of the remainder of the site, our client has only prepared some layout planning and copies of these have been provided to you. This layout planning shows some ideas as to how Pandanus Parade could be closed and turned into public open space with boardwalks linked across the beachfront. Our client has also simply identified the site containing your land, the Surf Club and Council's land as the second stage of the proposed development of the whole precinct....The development will basically contain a basement level allowing for car parking and public car parking, commercial/retail to be placed on the ground level and two levels of residential/resort units. The developer will obviously also incorporate a Surf Life Saving Club and associated facilities. Our client would see the ground floor commercial, particularly that fronting the beach and Pandanus Parade as being appropriate commercial space for restaurants, upmarket bars, cafes, delicatessens, etc. The balance of the commercial space will be appropriate for other commercial and retail purposes, including boutique shops, medical and health facilities, offices and other such uses....Our clients have shared their vision with **Senior Council Officers and Councillors who have, as you put it, "expressed enthusiastic support for our client's vision"**. Our client also believes that in order to secure agreement of the Surf Club to a relocation, the earlier that our client can achieve that agreement, the more likely that arrangement can be locked in.'* And further...*'You have requested that our client obtain some confirmation that the council will support the relocation of the proposed Surf Life Saving Club building and will entertain the acquisition of the remaining lands. **Our client will supply us with a letter from the Mayor's office confirming this**. We will provide this to you **within a couple of days**.'* In terms of discussing contractual arrangements the letter goes on to state: *'our client would propose that any Contract....will in all respects be conditional upon our client being able to acquire all of the other land to complete the second stage project. We would suggest that the Contracts **allow for a period of say, 180 days to put in place all of these arrangements** and enter into Contracts.'* [The speed with which Resort Corp was able to obtain a letter of support from Council is impressive. The fact that Resort Corp believed it could secure the remaining lands within 180 days of Mr Reid accepting an offer to sell his property suggests a high degree of confidence by Resort Corp in their ability to obtain the surrounding public land – all the more so given the potential loss of a substantial deposit in the event that they failed to achieve the acquisition of the public land in question before the expiry of 180 days].

Council's files do not record councillors as having met with Mr Brinsmead or Mr Madrers at this time. There may be a number of reasons for this, including a failure to keep any records of meetings.

MR BROAD: *When you have meetings with developers, whether with Council staff developers, whether with Council staff developers and representatives of government bodies, is it your usual practice to keep minutes or some record of your meetings?*

MAYOR POLGLASE: *I personally don't keep those records or files on those meetings at all. Council staff, if they're attending, normally take notes on various issues. My role is probably there, listening to the debate going on between the various people that are involved and listening to the debate and what they're talking about so that I'm better informed in the decision process I'm about to make.*

T. 16/2/05 p. 42

This evidence was subsequently confirmed by his secretary:

MR BROAD: *I have got a couple of questions, if I may. As you will be aware, Ms Katrina Annis-Brown and I have spent a lot of time in Council's chambers looking at various developments which have been dealt with by Council. One of the things we have*

noted is that there are indications that a number of meetings had taken place. Is there any process that is adopted for Council to record the outcomes of meetings, either by way of some minute - - -

MS GREEN: *No.*

MR BROAD: *There is no formal process?*

MS GREEN: *No.*

MR BROAD: *Is it usual for a member of staff to attend a meeting, say, between the Mayor or a Councillor and a developer or a resident to record - - -*

MS GREEN: *It is normally the case, and if they're not included originally, it will be - quite often the Mayor will ring and ask somebody to come up and be in on the meeting to give answers to questions that obviously he isn't able to answer.*

MR BROAD: *So that is to provide assistance?*

MS GREEN: *Mm.*

MR BROAD: *But is there any role adopted where someone attends the meeting as a note-taker?*

MS GREEN: *No.*

MR BROAD: *As someone independent who, should the need arise, is able to provide confirmation of what is said?*

MS GREEN: *Not that I'm aware of. I haven't been involved sitting in on any of those meetings, but I have never been aware that that procedure has taken place.*

MR BROAD: *How long have you worked in your role at the Council?*

MS GREEN: *5 years.*

MR BROAD: *Now, in respect of the Mayor's - sorry - is your role solely related to the Mayor or does it also - - -*

MS GREEN: *No. I give administrative assistance to the Mayor and the Councillors when called upon to do so.*

MR BROAD: *So it is a wider role.*

MS GREEN: *Yes.*

MR BROAD: *And it affects all Councillors.*

MS GREEN: *Yes.*

MR BROAD: *In respect of that wider role, when meetings have taken place, have you been provided with meeting notes to be placed on files?*

MS GREEN: *No.*

MR BROAD: *On any occasion?*

MS GREEN: *No.*

MR BROAD: *So there is no system of recording by any Mayor in the period you have worked there?*

MS GREEN: *No, not at all.*

MR BROAD: *There is no system of recording by any of the Councillors?*

MS GREEN: *No.*

MR BROAD: *And in respect of any notes where staff have attended those sort of meetings, is there a usual procedure where staff have come up to provide advice, record their - - -*

MS GREEN: *No.*

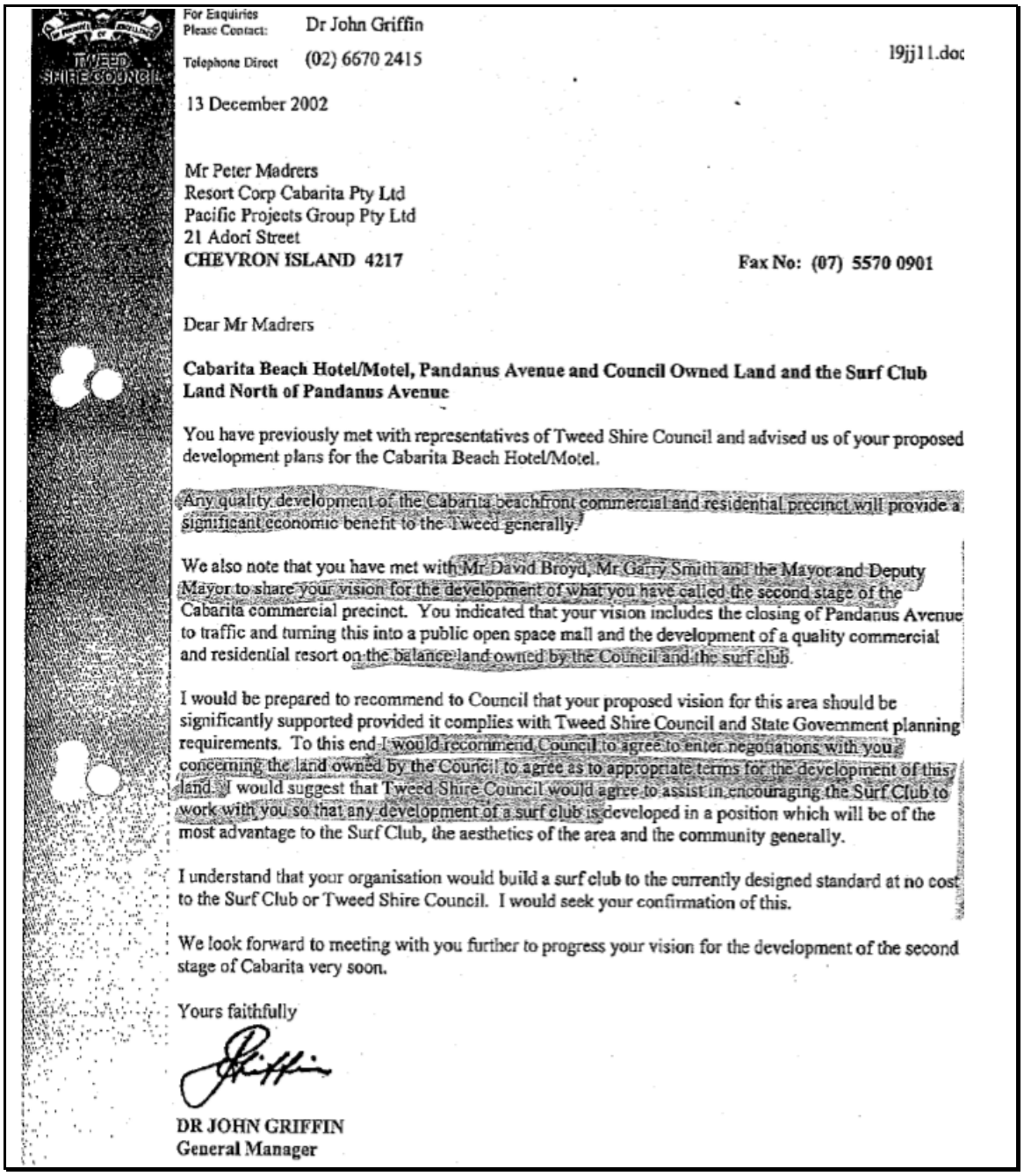
MR BROAD: *So those meetings take place with any record?*

MS GREEN: *Yes.*

T. 11/3/05 p. 1319-1321

On 13 December 2002 Mr Brinsmead was able to provide the letter anticipated in his email of 26 November, although, contrary to his anticipation, the letter was not signed by the Mayor, but the General Manager.

Council's files contain the attached letter. Its wording does not clearly indicate whether Resort Corporation's principals had met with the Mayor and Deputy Mayor, but most certainly each was aware of the proposal.



For Enquiries Please Contact: Dr John Griffin

Telephone Direct (02) 6670 2415

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13 December 2002

Mr Peter Madrers
Resort Corp Cabarita Pty Ltd
Pacific Projects Group Pty Ltd
21 Adori Street
CHEVRON ISLAND 4217

Fax No: (07) 5570 0901

Dear Mr Madrers

Cabarita Beach Hotel/Motel, Pandanus Avenue and Council Owned Land and the Surf Club Land North of Pandanus Avenue

You have previously met with representatives of Tweed Shire Council and advised us of your proposed development plans for the Cabarita Beach Hotel/Motel.

Any quality development of the Cabarita beachfront commercial and residential precinct will provide a significant economic benefit to the Tweed generally.

We also note that you have met with Mr David Broyd, Mr Garry Smith and the Mayor and Deputy Mayor to share your vision for the development of what you have called the second stage of the Cabarita commercial precinct. You indicated that your vision includes the closing of Pandanus Avenue to traffic and turning this into a public open space mall and the development of a quality commercial and residential resort on the balance land owned by the Council and the surf club.

I would be prepared to recommend to Council that your proposed vision for this area should be significantly supported provided it complies with Tweed Shire Council and State Government planning requirements. To this end I would recommend Council to agree to enter negotiations with you concerning the land owned by the Council to agree as to appropriate terms for the development of this land. I would suggest that Tweed Shire Council would agree to assist in encouraging the Surf Club to work with you so that any development of a surf club is developed in a position which will be of the most advantage to the Surf Club, the aesthetics of the area and the community generally.

I understand that your organisation would build a surf club to the currently designed standard at no cost to the Surf Club or Tweed Shire Council. I would seek your confirmation of this.

We look forward to meeting with you further to progress your vision for the development of the second stage of Cabarita very soon.

Yours faithfully

DR JOHN GRIFFIN
General Manager

It signals the start of manoeuvres clearly intended to promote Resort Corporation's proposals and to force the surf club to join in the development.

Mr Aldridge who was a member of the surf club and had become involved to assist to assist the club's construction of its new building was clear in his view:

Cabarita Beach Surf Club
There is no doubt that certain Councillors have been running a separate agenda in relation to the future development of the Surf Club. The funding has been in place for many years, yet the original Committee had substantial difficulty in making progress to commence the building. Since the sale of the old Cabarita Hotel site, there has been undue influence by the developers on Councillors to encourage the Surf Club to not build their own building but to do a joint venture with the developers. Clearly, certain Councillors were heavily influenced by the developers and this has frustrated the progress of the Surf Club.

and supporting it in evidence to the Inquiry:

MR BROAD: *Yes. Now, in your submission, you say:*

There is no doubt that certain councillors have been running a separate agenda in relation to the future development of the surf club.

Can you give an indication of what you say that agenda was?

MR ALDRIDGE: *Certainly. I think there's two pieces. I think that some councillors have been clear of their personal agenda in their personal opinion.*

MR BROAD: *And, what do you mean by that?*

MR ALDRIDGE: *What I mean is that in discussions with certain councillors, particularly on the majority, that their personal opinion is quite clearly that the site is best used with a development with Resort Corp encompassing Pandanus Avenue. That's their personal opinion. I believe that some of those councillors have actually taken that opinion and actually used it in their role as councillor.*

MR BROAD: *Yes. You spoke about another facet to that? What's the other facet?*

MR ALDRIDGE: *In relation to their agenda?*

MR BROAD: *Yes.*

MR ALDRIDGE: *Yes. Well, if you really look at the whole scenario, what's occurred is that the majority of councillors quite clearly believe they're running a business and there's a big distinction between being businesslike and running a business. What's occurred is that it is important for councillors to be prudent with the financial decisions they make as councillors yet what's occurring is that they see the Tweed Coast as a business that they're running. What's occurred with Pandanus and the surf club and Resort Corp at Cabarita is quite clearly that negotiations have taken place which we - quite normal business negotiations which are absolutely inappropriate for councillors. In those negotiations, the agenda that's been put forward by the majority of councillors is that there is an asset that can be realised for approximately $5 million, there's figures there.*

MR BROAD: *You're talking about the car parks and the land on which the club would build and the adjoining Council land.*

MR ALDRIDGE: *Exactly, yes, that's correct. From a business point of view what they see is that they're actually raising capital to spend on the Tweed. What they forget is that they're not running a business; that they need to be businesslike and they need to take into account community interest so the agenda they've been running is clearly not representing the community.*

MR BROAD: *Yes. Now, there was an alternative proposal which was put forward by Mr Ryan. Mr Ryan has given evidence this morning. There's been two proposals I should probably make clear. There's been the Resort Corp proposal and there's also, at one stage, the Ryan proposal if I can put it that way or the JR proposal.*

MR ALDRIDGE: *Yes.*

MR BROAD: *What dealings did the surf club have with Mr Ryan in respect of his proposal?*

MR ALDRIDGE: *My understanding of the proposal of Mr Ryan was that he put a proposal to the club that he actually presented to the board parts of his proposal. When I got involved in the building committee the building committee put forward certain options to the board which at the time Mr Ryan had just started to put his proposal together. The board reviewed his proposal. They had discussions with him and ultimately the board made their decision which was to go alone.*

MR BROAD: *Yes. You've also had the other proposal put forward by Resort Corporation?*

MR ALDRIDGE: *Yes, that's correct.*

MR BROAD: *It is the subject - well, it was the subject of substantial community involvement.*

MR ALDRIDGE: *The proposal or since the proposal?*

MR BROAD: *Not the proposal itself.*

MR ALDRIDGE: *Yes.*

MR BROAD: *The community certainly came out and expressed a view in respect of that proposal.*

MR ALDRIDGE: *Absolutely, yes.*

MR BROAD: *That proposal anticipated that the Council carparks would be made available to the development and there would be public carparking within the basement of their building. If that proposal had gone ahead, would it have affected access by the surf club to the beach?*

MR ALDRIDGE: *And, again, Patrick Raftery can give you more detail yet I believe that what would have occurred is there would have been some access yet it would have been restricted access and the whole proposal for underground carparking wasn't ideal for the surf club. It wouldn't have been as functional as what we can put in place otherwise.*

MR BROAD: *There's a suggestion that the club was placed under pressure to accept the course proposed by Resort Corp. Did that occur in your view?*

MR ALDRIDGE: *One of the reasons that I got involved on the building committee - I've been a member of the club for some time and actively involved at the last annual general meeting because what I got to see was that there was undue pressure being put on the board members and my personal opinion is that the board members at the time - they're volunteers; they're doing their best for the membership. A lot of the them don't have particular business skills, for example. What was occurring is that there was clearly obstacles being put in their way to proceed forward with the building of the club.*

MR BROAD: *Who was putting the obstacles?*

MR ALDRIDGE: *I believe that what was occurring was, it was a combination of internal workings within Council and also the negotiations which were happening by certain councillors. The process was bogged down. It was very slow. Because of the skill set of the board, they were having difficulty getting the answers they wanted. They didn't know how to work their way through the minefield which it is to get any application through a local authority and that was one of the reasons that I got involved, to support them, to find out (1), the status quo at the time and, secondly, there has to be an outcome here, how can we get the outcome?*

T. 10/3/05 p. 1217-1219

Mr Raftery, the club's President was clearly reluctant to criticise the council:

MR BROAD: *Now, have you been personally involved in the negotiations with Council in respect of the Cabarita Beach surf club proposals?*

MR RAFTERY: *Yes.*

MR BROAD: *And, can you give an indication of how you regard those negotiations have gone?*

MR RAFTERY: *I would say in the first four-and-a-half years to five years, weren't going very well at all but in the last year I would say we've been proceeding quite well.*

MR BROAD: *Yes. To what result? To the result that you would have your own separate building?*

MR RAFTERY: *Yes.*

MR BROAD: *As distinct from a building within the Resort Corp proposal?*

MR RAFTERY: *Well, I mean, the Resort Corp proposal was laid out at a couple of meetings between myself and other members of the club in Council but, you know, it was never really pushed on us by councillors at this meeting. It was always put forward as an option. Nobody could understand why we didn't take that option but, you know, we just respond as a board to the club membership and they make the decisions.*

MR BROAD: *You published details of the proposal by Resort Corp on your website?*

MR RAFTERY: *Yes.*

MR BROAD: *Amongst your members, what was the response?*

MR RAFTERY: *I would say at the start there was a lot of interest in it. You know, this sounds great, looks good but, of course, as soon as they found out some of the details which were - that was then when the concerns started arising. You know, more or less the forfeiture of our freehold land.*

MR BROAD: *The current building which you're proposing, would that be built on your freehold land?*

MR RAFTERY: *Yes.*

MR BROAD: *And, does it rely in any way on access across the Council land?*

MR RAFTERY: *It definitely relies on access across the Crown Reserve rather than - so it's Crown Reserve held in trust by Council.*

MR BROAD: *By the Council?*

MR RAFTERY: *Yes. Council are the trustees, yes.*

MR BROAD: *And, access physically to the beach adjacent to your surf club, what does that rely on? Does that rely on Pandanus Parade? Does it rely on other access?*

MR RAFTERY: *Well, there is an access straight off Pandanus Parade straight down to the beach which is a combined vehicle and pedestrian access. That is a concern to us. We've always put forward the idea that the two should be separated and, you know, we look forward to possibly working with Council on trying to do that in the future.*

MR BROAD: *Whereabouts is emergency access obtained?*

MR RAFTERY: *On that same access point as the independents - - -*

MR BROAD: *So, if someone was in need of an ambulance to support them it would proceed down Pandanus?*

MR RAFTERY: *Yes.*

MR BROAD: *Was the Resort Corp proposal in any way going to limit that sort of access?*

MR RAFTERY: *There were two sections to the Resort Corp proposal in which one, they said, "Well, maybe there should be a mall section here but there would be a driveway access" and another time they would mention, "Well, we don't need to really mall that". You know, "We can just have limited parking with some plant buffers or something or other" so whatever you put there, of course, will limit the access as to what it is compared to now.*

MR BROAD: *Yes. You recently obtained an approval from the Council which potentially enables you to build. What process, in your view, has brought about that result?*

MR RAFTERY: *The rejection of any offer from either of the two developers that we had and the decision by the club to, "No, we just want to build our own building".*

MR BROAD: *How long ago did you communicate that decision to the Council?*

MR RAFTERY: *As soon as the club had made the decision.*

MR BROAD: *When was that?*

MR RAFTERY: *From memory, it was July or August last year.*

MR BROAD: *Last year?*

MR RAFTERY: *Yes.*

MR BROAD: *So, we're talking about eight or nine months ago.*

MR RAFTERY: *Yes. Well, at last year's club's AGM, Resort Corp put a presentation on for all club members previous to the AGM and members were asked to kind of, you know, bring their feedback from that to the board and then the board were about to make a decision on that in the next couple of months.*

MR BROAD: *And when was it that the Council gave an indication that was amenable to the club proceeding on its proposal?*

MR RAFTERY: *Verbally, Rosemary Fisher and Secretary of the club and myself then, and Nick Aldridge, we spoke to Warren Polglase about that and said, "Warren, if we go down this path, we would like your full support" and Warren committed at that time. He said, "Look, if you make that decision, if you want to go by yourself, I'll be behind your decision".*

MR BROAD: *When?*

MR RAFTERY: *Sorry?*

MR BROAD: *When? When was this statement made?*

MR RAFTERY: *This was around about the same time as the club was coming to that final decision to be made.*

MR BROAD: *About July-August last year?*

MR RAFTERY: *Yes.*

MR BROAD: *So, if the Council records weren't recording that approach but were recording an intent to proceed with the Resort Corp proposal and to sell their land, why were you being told what you were being told?*

MR RAFTERY: *Oh, I'm sorry, I'm just not following what your question is - - -*

MR BROAD: *What I'm trying to find out is that the internal documents within the Council don't seem to record what you've just been telling us. In fact, in September last year, the manager of Strategic Planning was still talking about the sale of the land to Resort Corporation.*

MR RAFTERY: *Oh, I believe there were still quite a number of people in Council, quite a number of people in the community and quite a number of people all around the Tweed Shire that couldn't understand why we wouldn't take Resort Corp's offer.*

MR BROAD: *Oh, no, I'm not asking that.*

MR RAFTERY: *Yes?*

MR BROAD: *What I'm asking you is this: that you've just told me that in about August or July last year, the Mayor had told you that if you wished to build your club house as a stand-alone without being involved with Resort Corporation - what I'm trying to find out - if that commitment had been made to you back as far as July or August last year, why Council staff weren't recognising that commitment? Do you know why that could have occurred?*

MR RAFTERY: *Well, that would be a question for Warren Polglase I would imagine and, you know, who he spoke to about that discussion with us. I mean, I can't give you any answer on that.*

MR BROAD: *Council subsequently went about the process of appointing a probity auditor to decide or to advise it whether their processes had been appropriate in respect to the proposed sale. That doesn't sit with what was being told to you.*

MR RAFTERY: *Well, I think there was a lot of things in six years that didn't sit with what we were being told. We just managed to wade our way through.*

T. 10/3/05 p. 1223-1227

Councillor Dale provided the following email and commentary, which may explain Mr Raftery's reluctance:

—— Original Message ——
From: JULIE A YOUNG
To: Patrick Raftery ; 'Joanne Howes' ; 'Nick Brabham' ; 'Rosemary' ; 'Shaun and Lorain Dramen' 'Tony & Shirley Clarke'
Sent: Saturday, January 22, 2005 1:48 PM
Subject: Re: non responses

I think the submission to the inquiry needs looking at but will this mean we may be victimised more in regards to our funding for the new club. If we are assured that it has no bearing on our relationship with present TSC , we should ask some questions
regards John

14/3/05

Dot / Commission of Inquiry: Tweed Shire

This is the e-mail from the club's ordinary Director John Young — says it all I suppose.

The other Board members had the same concerns but spoke about their fears over the Council money when I saw them at the club.

As ordinary Director John's role is to represent the interests of ordinary members and it seems that a few expressed this same concern.

Cheers — Elaine
Dale
Mob: 0428762565

On 4 December 2002 the council had considered its section 94 contributions plan to review its ability to provide funding contributions.

The report acknowledged the club's proposals and its funding:

> Community facilities provided under Section 94 are usually located on Council owned land (normally through dedication or acquisition). However the proposed clubhouse will be located on private land (see below) and to safeguard the continuation of this public facility into the future the following has been agreed between the Cabarita Surf Lifesaving Club and Council:
>
> - Cabarita Beach Surf Life Saving Club (the Club) will provide to Council a registered first mortgage over the subject site to secure Council's advance of $500,000, with the mortgage containing the standard covenants and provide for:
>
> o the advance of $500,000 plus interest until repaid, with the interest to be set at and varied according to the Local Government borrowing rate;
>
> o provision for repayment of part or the whole at any time;
>
> o provision for repayment of outstanding monies, plus interest, either upon any sale of the land or should the Club become insolvent or unable to pay its debts, in which event the Council could sell the premises as Mortgagee.
>
> In addition to the above $500,00 to be funded through Section 94 there will also be total funds of $300,000, being from the NSW State Government grant and funds raised by the Club.
>
> Advice from Cabarita Surf Lifesaving Club is that funding for the building will be used to directly contribute to a community-based facility. In addition to being used by the Club for emergency facilities, the building will also be used outside the core hours by other community-based organisations.
>
> In addition to providing the club with a strip of land 3 metres wide on the north side of the boundary (Part Lot 6 Section 5 DP 29748 and subject to the boundary adjustment), Council is also foregoing some economic opportunity in that it has agreed to provide car parking for the surf club when it develops the remainder of Lot 6 Section 5 DP 29748 at a future date. This is likely to be provided as ground floor car accommodation.

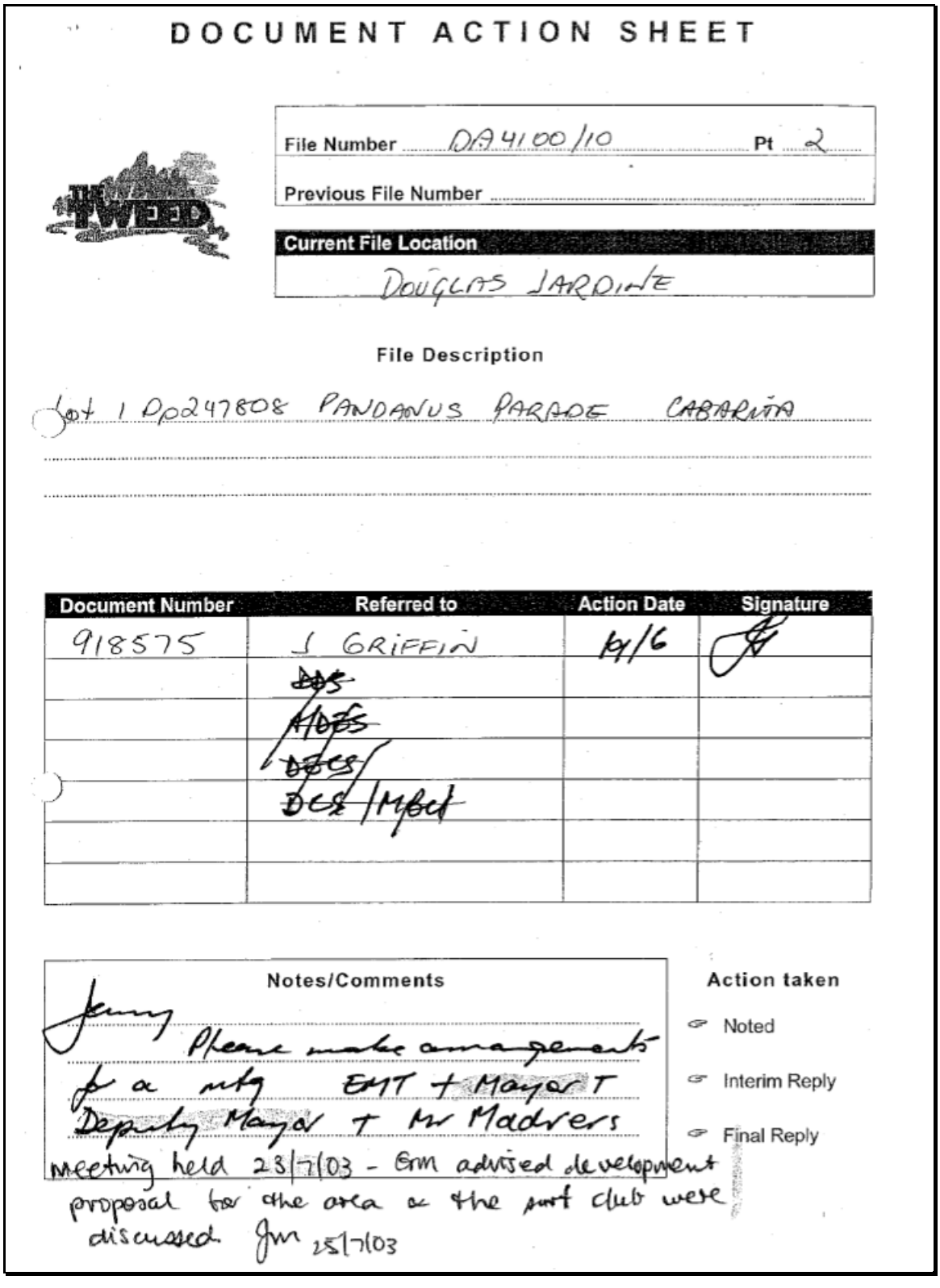
Mr Reid reports receiving an email from Mr Brinsmead that included the following statement:

> ***Councillor George Davidson and the Mayor have been assisting our cause by speaking to members of the Committee and preparing them for the likely alternatives that they will be offered.*** *We believe that* ***we have such strong support politically that it will be very difficult for the Surf Life Saving Club to oppose our plans****...We have also been informed that Council will not be considering the Surf Life Saving Club's plans [re their DA] immediately, although we do not know the precise timing on this. However, it is our view that the sooner we can meet with the Surf Life Saving Club, the more easy the process of proceeding with alternative plans for them will be.'*

On 16 June 2003 Resort Corporation wrote to Mayor Polglase putting forward its proposal for the "land on the northern side of Pandanus Parade". By implication this would include the land owned by the surf club. The proposal anticipated the inclusion of the surf club. The letter continued:

> A large portion of the land on the northern side of Pandanus Parade is owned by the Tweed Shire Council. We **enclose** a plan that highlights the lots owned by Tweed Shire Council. These are, in fact, 5 lots.
>
> 4 of those lots on the western side have registered covenants in favour of The Beach land. These covenants restrict the development or use of that land for any purpose other than a car park.
>
> We are extremely keen to enter into negotiations with Tweed Shire Council for the acquisition of the Council land to carry into effect our development vision for this area. We would also be interested in the joint venturing of the development of this precinct. Obviously, our vision for this area is significant and will involve extensive co-operation between us, Tweed Shire Council and other Government Departments, together with public consultation. We would also appreciate that any negotiations for acquisition or joint venture would need to be carried out in a manner that is open and transparent and that is in the best interests of the owners of the land as well as in our interests.
>
> Please confirm that you can convene a meeting of the necessary Tweed Shire stakeholders, so that we can progress this further.

On 23 July 2003 Resort Corporation's representatives, Mr Madrers and Mr Brinsmead met with the Mayor and Deputy Mayor and discussed the Resort Corporations proposals for the area and the surf club.



DOCUMENT ACTION SHEET

File Number DA4100/10 Pt 2

Previous File Number

Current File Location

DOUGLAS JARDINE

File Description

Lot 1 DP247808 PANDANUS PARADE CABARITA

Document Number	Referred to	Action Date	Signature
918575	J GRIFFIN	6/8/6	
	~~DDS~~		
	~~MDES~~		
	~~DDCS~~		
	~~DCS/MBCI~~		

Notes/Comments

Jenny Please make arrangements for a mtg EMT + Mayor T Deputy Mayor T Mr Madrers meeting held 23/7/03 - Gm advised development proposal for the area & the surf club were discussed. Jm 25/7/03

Action taken

- Noted
- Interim Reply
- Final Reply

Resort Corporation's suggestion that it and the council enter into a joint venture was taken up by the council. On 20 August 2003 council sought advice from its solicitors indicating its preference.

I refer to your letter dated 5 August 2003 requesting further information pertaining to the abovementioned matter.

I wish to advise that Council has had preliminary contact from a developer with a view to having to formal discussions for either the sale of or entering into a joint venture arrangement for the development of council car parking land at the abovementioned site.

The purpose of the discussions is that the developer has prepared a concept plan for the site which includes a mixed commercial/residential and car parking development. The proposal could also involve the construction of the Cabarita Beach Surf Lifesaving Club

I consider that Council should not sell the land, but rather enter into a joint venture arrangement. Council could consider entering into the proposal based for a joint venture arrangement based on the following conditions.

- Council provides the land.
- Developer constructs a car park with the current equivalent car parking spaces.
- Developer constructs the surf lifesaving club based on an approved plan at no cost to the club or Council.
- Use of Pandanus Parade to be determined by Council.

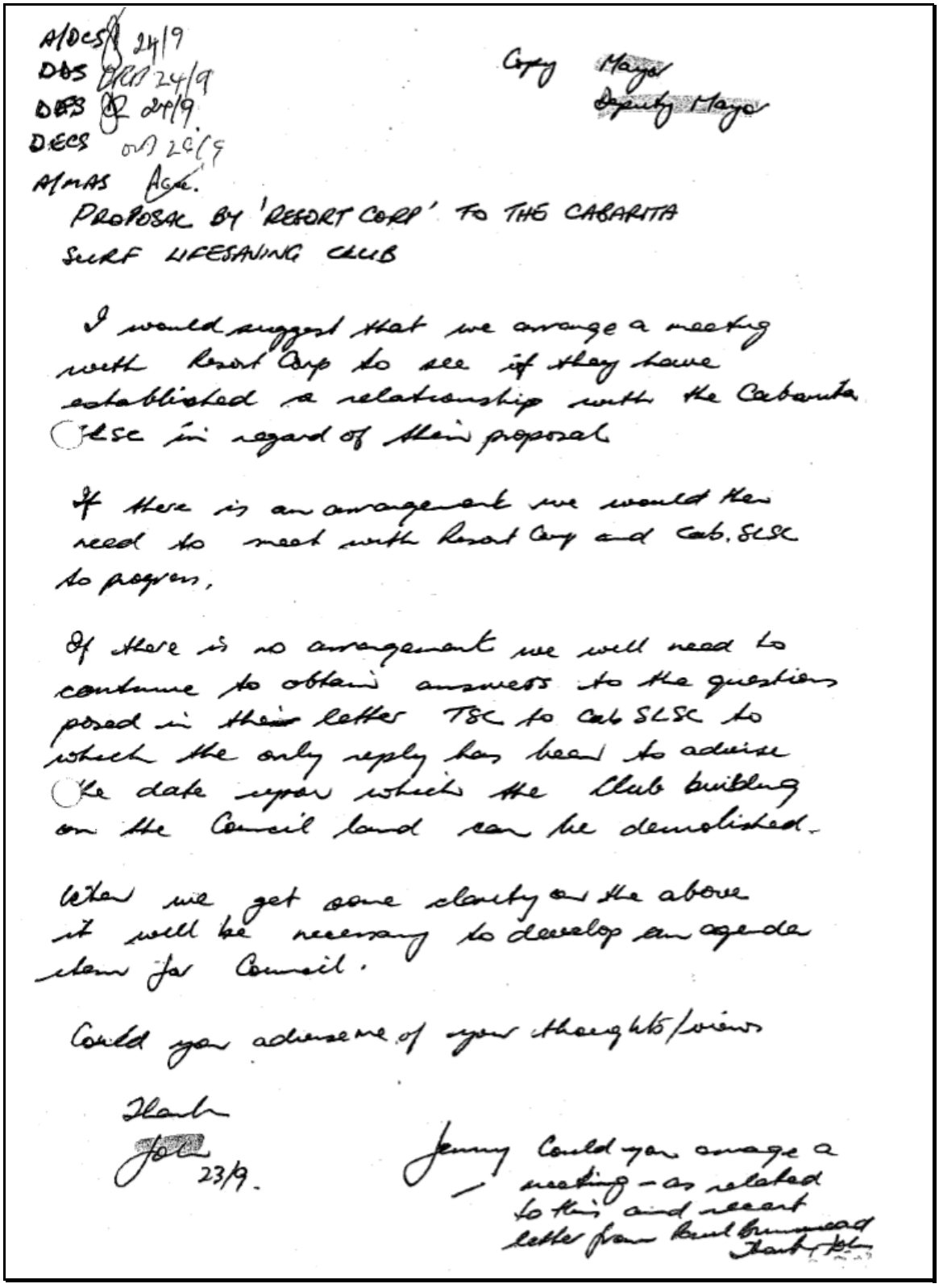
A copy of the concept plan is attached.

Your advice on probity issues dealing with the above obligations would be appreciated.

There is no doubt that following its acquisition of the Cabarita Beach Hotel site, Resort Corporation held the keys to the development of the land between Pandanus Parade and Palm Avenue. It could determine whether it would release or vary the covenant on 4 o the 6 lots to permit any development.

By 28 August Resort Corporation was pressing for a response. Council responded in a letter dated 2 September, clearly attempting to buy time to consider the matter.

On 23 September 2003, Dr Griffin wrote the following memo:



A/DCS 24/9
DDS 24/9
DES 24/9
DECS 24/9
A/MAS Agd.

Copy Mayor
Deputy Mayor

PROPOSAL BY 'RESORT CORP' TO THE CABARITA SURF LIFESAVING CLUB

I would suggest that we arrange a meeting with Resort Corp to see if they have established a relationship with the Cabarita SLSC in regard of their proposal

If there is an arrangement we would then need to meet with Resort Corp and Cab. SLSC to progress.

If there is no arrangement we will need to continue to obtain answers to the questions posed in their letter TSC to Cab SLSC to which the only reply has been to advise the date upon which the Club building on the Council land can be demolished.

When we get some clarity on the above it will be necessary to develop an agenda item for Council.

Could you advise me of your thoughts/views

Thanks
Joe
23/9.

Jenny Could you arrange a meeting - as related to this and recent letter from Resort Corp
Thanks Bob

Councillor Brinsmead denied that he had any involvement in the Cabarita Beach proposal despite contrary evidence from others, notably Dr Jenkins MLC. Despite this, Councillor

Brinsmead suggested that he had refrained from his involvement, when giving evidence at the Public Hearings on 18 February and 17 March:

MR BROAD: *Now, I know that on a great number of occasions you have indicated that you have a pecuniary interest and that you have left the Chamber. I think that's a common thing and I think it was referred to, I think, by the Mayor as being commonly occurring and perhaps the most common declarations of any councillor. I'm not suggesting that there's anything wrong with that. I simply indicate that is a comment; so I'm not seeking to attack you on that. Does it, in your view, the relationship between yourself, your son and son-in-law, put pressure on other councillors?*

CR BRINSMEAD: *They never indicated to me that it does. They would have to speak - you should put that question to them. I have no indication from them that they've ever suggested as such, no.*

MR BROAD: *Do you ever advocate their developments with other councillors?*

CR BRINSMEAD: *No. I'm not saying that it has never on any occasion been discussed. But I've never felt obliged to go out and lobby for a particular line through any relationship with family, no.*

MR BROAD: *Do you ever meet staff in respect of their applications?*

CR BRINSMEAD: *I can't recall. The only time - - -*

MR BROAD: *To the best of your recollection, had you - - -*

CR BRINSMEAD: *No, no. The best of my recollection, no – certainly it's not - the only time, if something has ever come up, is a casual comment maybe at - you know, waiting for dinner or something else. Just some casual remark. But, no, not to the resort-caused developments, no.*

T. 18/2/05 p. 256

PROF DALY: *We had evidence from Mr Jenkins, who is a member of the Parliament, suggesting that he had attended meetings where you were also attending and that you appeared to him to have an advocacy role for the developer in relation to certain issues in that Cabarita Beach area.*

CR BRINSMEAD: *That's not true.*

PROF DALY: *Well, can you expand on that.*

CR BRINSMEAD: *Well, there was a public meeting. I don't know where he would have - he's got no basis to claim that I have - I've never had an advocacy role. I've never had an advocacy role even personally. I've never taken a final view or the final disposition of what should happen at that area. The only thing I remember - I've got the correspondence here I had with Cath Lynch who sent me a picture of her vision of what should happen at Cabarita, and I congratulated her for that because she was*

putting forward a constructive view. And I said, I will take no position on this, and at the end of the day I may not support - you may be surprised to know that at the end of the day I may not even support the Resort Corp position. But in my discussion, if people privately wanted to engage me on it, it was to encourage people to understand the debate, and not misrepresent what this group want, this group want and was proposing and so on. And then it might be an intelligent discussion and arrive at a better point.

PROF DALY: *Two points in that. One is, where does the line between advocacy and explanation end, is the first point. What's your comment on that?*

CR BRINSMEAD: *Well, an advocacy is a position where you, without qualification - without qualification at all you unconditionally support something. I haven't taken that position. I haven't taken that position either privately or publicly. Publicly I've never said a thing. Publicly I don't - I haven't taken a position on it, except that I did attend one – and that was the only time. It was Kingscliff Tweed Coast Business Association. The proponents of Resort Corp were invited to come and to answer questions. I believe the only comment I made wasn't - if I can remember that, vaguely, pretty vaguely, I think if I made any comments that evening the only comments that would have been made would have been maybe a discussion on some issue of surf club, but not on the offer itself. I wasn't an advocate.*

T. 17/3/05 p. 1658-1659

Resort Corporation provided its outline for the joint venture. This anticipated that lot 7, which is owned by the surf club would be included. It also proposed to develop the car park lots that were bound by the covenant in favour of the Cabarita Beach Hotel as well as lot 6 on which the surf club building had been built.

The proposal incorporated the surf club within the building that would also house basement car parking replacing the existing car parking, a tavern or hotel, a shopping arcade and residential apartments on the remainder of the first and second levels.

There is no doubt that the council became wedded to this proposal.

Council's internal auditor Mr Brack sought advice from the council's solicitors and prepared a discussion paper "For managing a Joint Venture Project of Council owned land at Cabarita". This was confirmed by Mr Brack during the Public Hearings (**T. 16/3/05 p. 1450**).

The discussion paper indicated the discussions that had occurred with Resort Corporation and continued:

1 BACKGROUND

Council has had discussions with Resort Corp Cabarita Pty Ltd to redevelop Council Land and Surf Lifesaving Land in Pandanus Parade Cabarita Beach for the purposes of commercial and residential resort, together with the construction of a new surf club, on Council and Surf Lifesaving Land at Cabarita.

Public confidence in Council can be eroded if the manner in which Councillors and Council Officers negotiate, assess and approve this joint venture arrangement, if it is not conducted in a manner which delivers good governance, through best practice and complies with the highest level of public accountability.

There are other significant expressions in this document that support the view that the council had married itself to the proposal including:

5 OPENNESS OF OPPORTUNITY

The ideal situation for Council in considering a joint venture arrangement for development of its land, would involve the calling for expression of interests, thus enabling all persons being given an equal opportunity to participate in such an arrangement.

However, as Lots 4,5 & 10 have a covenant on them which restricts Council dealing with any other person other than the owner of the Cabarita Beach Hotel, if it wishes to redevelop the land other than for car parking purposes.

It is highly unlikely that the owner of the Cabarita Beach Hotel would alter the conditions of the covenant, unless it was to their advantage to do so.

Accordingly, if Council wishes for the proposal to proceed, then openness of opportunity for this proposal is not an issue, but Council should address the probity issues of transparency including community consultation and financial benefits as the main criteria for approving the proposal.

6 TRANSPARENCY

It is important that actions by Councillors and Council Officers in considering this joint venture proposal should ensure that they act with integrity and in a way that shows proper concern for the public interest.

The major problem likely to be encountered by Council pertaining to this proposal is that it can be "judge and jury" of all the processes involved in approving the development application for this proposal.

The benefits of transparency will improve, if there is a real opportunity for the community to participate in the joint venture decision-making process. The timing of community consultation should be addressed by Council prior to commencing the formal decision making processes.

It is suggested that: -

Council Officers conduct all the processes prior to finalisation of the joint venture arrangement. Councillors should only be officially involved in the decision making process to enter into the agreement, however the Mayor and area Councillor could be involved unofficially at negotiation meetings.

Prior to finalisation of the joint venture arrangement, an independent business analysis be appointed to assess the financial benefits of the project to Council and its residents.

Community consultation would occur prior to Council signing off on the joint venture arrangement.

In regard to development application approval process, its is suggested that the application should be referred to the Minister for Infrastructure Planning and Natural Resources as Council is involved in the application.

Mr Brack denied these suggestions when giving evidence.

MR BROAD: *Mr Brack, have you been involved in any way in respect of council's consideration of whether it should sell land to Resort Corporation at Cabarita Beach?*

MR BRACK: *I was involved for a period of about three months in 2003, from September 2003.*

MR BROAD: *Was that at the time when council was considering a joint venture with Resort Corporation?*

MR BRACK: *That is correct.*

MR BROAD: *Did you prepare a discussion paper for managing that project?*

MR BRACK: *I did, yes.*

MR BROAD: That discussion paper records in the first part under the heading Background:

Councils had discussions with Resort Corp Cabarita Pty Ltd to redevelop council land and surf lifesaving land in Pandanus Parade, Cabarita Beach, for the purpose of commercial residential resort together with the construction of a new surf club on council and surf lifesaving land at Cabarita.

It goes on to say:

Public confidence in council can be eroded if the manner in which councillors and council officers negotiate, assess and approve this joint venture arrangement if it is not conducted in a manner which delivers good governance through best practice and complies with the highest level of public accountability.

The wording of that paragraph would suggest that council had already made its decision and it was then embarking upon a process of consultation. Is that a correct interpretation?

MR BRACK: *No, that's not correct at all, no. The interpretation was that council had received a proposal. It at that stage hadn't even been discussed by council or hadn't even been to a workshop with council, and a discussion paper was to put out the council's involvement - what we received and how we should process it.*

MR BROAD: *The discussion paper deals with a number of topics and suggests that:*

Council officers conduct all the processes prior to finalisation of the joint venture project. Councillors should only be officially involved in the decision-making process to enter into the agreement. However, the Mayor and the area councillor could be involved unofficially at negotiation meetings.

Who would be the area councillor?

MR BRACK: *The area councillor back then was the previous deputy Mayor. It was George Davidson.*

MR BROAD: *Right. In respect of the proposals that went forward, was that proposal adopted by council?*

MR BRACK: *No, it hasn't been adopted by council at all, no.*

MR BROAD: *Not in the formal sense of going before a meeting, but that proposal being put in that paper, has that been taken up and has it been operated on?*

MR BRACK: *The proposal was discussed at a workshop of council on 10 December 2003, and that was the last of my involvement with it.*

MR BROAD: *But from your involvement in council and your knowledge of what's happened in respect of this proposal, had councillors refrained from not being officially involved in the matter?*

MR BRACK: *I'm not exactly sure what council have been involved in after 10 December. All the councillors were involved in the informal workshop.*

MR BROAD: No, no, but their involvement - have they been involved in discussions with the developer?

MR BRACK: *I'm not quite sure.*

T. 16/3/05 p. 1450-1452

The view that council had become wedded initially to the joint venture, then subsequently to the sale of lots 4, 5, 6, 10 and 11 is supported by a later internal memo from Mr Jardine to Dr Griffin and Mr Rayner, where he wrote:

In reaching those conclusions I am not commenting on the merits of redeveloping the land. My only concern is the process for achieving Council's intended outcome. Indeed the Strategic Planning Unit has already come to similar conclusions in respect of the future of this land in the drafting of the draft DCP 50 - Bogangar/Cabarita Beach Locality Plan. We have been preparing the DCP in conjunction with a Steering Committee made up of local residents.

Again when presented with this evidence, Mr Jardine sought to play down the effect of his memo.

MR BROAD: *Yes. And when it came to the proposed sale of land at Cabarita Beach to Resort Corp, you wrote such a memo on 21 September 2004, and you wrote in that:*

It's my opinion that the land that council was proposing to sell should be re-zoned to permit the development nominated by Resort Corp.

So you're looking at it as a strategic planner and saying, "Look, if you're going to do this, you've got to put your house in order".

MR JARDINE: Not only from a strategic planner's point of view, but from the perspective of SEPP 71.

MR BROAD: *Right, because it was SEPP 71 land.*

MR JARDINE: *That's - well, actually - - -*

MR BROAD: *Or as a SEPP 71 development, potentially.*

MR JARDINE: *It - no the SEPP 71 take - we have - sorry, I'll start again. The land is zoned special purposes. We have a clause in the LEP which allows any use which is permissible on adjoining land. SEPP 71 paragraph 13, I think, takes away the right of*

Council to use such a clause in a planning instrument. So in order to allow for any other development that wasn't already permissible on the site, a re-zoning is required.

MR BROAD: *And you indicated in the memo that I just mentioned that your only concern in respect of this was the process - sorry, was the process for achieving the intended outcome. In other words, in writing that memo, Council had said, "We want to achieve this outcome". You were saying, "Hold back, we need to undertake a process before you can achieve that outcome"?*

MR JARDINE: *That's correct.*

MR BROAD: *Yes. In your view at that time, was that Council's intended outcome, that the property should be sold to Resort Corp?*

MR JARDINE: *I have no idea what Council's intention was with regard to the disposal of the land. I was just simply looking on the facts of the case before me, which was there seemed to be an indication for alternate uses and a disposal of the land.*

MR BROAD: *It seemed to be more solidly put in your memo than you're saying now.*

MR JARDINE: *I haven't read it for some time, you have the advantage of the words in front of me.*

MR BROAD: *I've got no qualms of not showing you. I don't want - - -*

MR JARDINE: *It's a long time since I've read it. Yes, you've highlighted the area in yellow:*

It's my opinion that the land will need to be re-zoned to permit the development nominated by Resort Corp.

MR BROAD: *Yes.*

MR JARDINE: *I was really suggesting that, if that's the case, you have to re-zone.*

MR BROAD: *And yet, it was suggested that advice was inconsistent with previous advice, if you look at the - - -*

MR JARDINE: *Yes, that's correct, that's correct, yes.*

MR BROAD: *But you were saying - - -*

MR JARDINE: *Yes, the suggestion there was the acting General Manager indicated that previous advice from David Broyd had been that the land would not require re-zoning. And I was saying it would need re-zoning. But if my memory serves me correctly, advice from him predated SEPP71.*

MR BROAD: *Yes. So SEPP 71 had changed the game.*

MR JARDINE: *Oh, yes, significantly.*

MR BROAD: *Yes.*

MR JARDINE: *Although there were other issues in that memo than just the re-zoning.*

MR BROAD: *Oh, yes. And it was your view at the time that Council had resolved to sell that land.*

MR JARDINE: *It seemed to be the indication. There was no Council resolution of course, no formal resolution. But - - -*

MR BROAD: *And certainly your wording didn't indicate any form of diffidence about that?*

MR JARDINE: *No, that was the impression I had.*

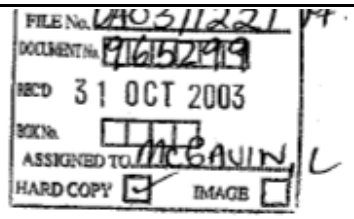
T. 18/3/05 p. 1766-1768

There is a substantial body of evidence that supports this view.

In June 2003 the council had moved to prepare a development control plan for Cabarita Beach. A draft DCP was prepared, then subsequently put on hold. The draft DCP had proposed development of the precinct as the village square, in conflict with the Resort Corporation proposal.

On 10 December 2003 the councillors received a confidential briefing from Resort Corporation's representatives. On 30 October Resort Corporation wrote to Dr Griffin acknowledging its earlier meetings in general terms, and suggesting:

30 October 2003



The General Manager
Tweed Shire Council
PO Box 816
MURWILLUMBAH NSW 2484

Dear Sir,

RE: RE-DEVELOPMENT OF CABARITA SURF CLUB & COUNCIL LAND

We are the developers of The Beach, Cabarita. This is the proposed re-development of the Cabarita Beach Hotel.

We have approached you, and held some early discussions regarding a proposal by us to re-develop the land owned by the Cabarita Surf Club and the land owned by the Tweed Shire Council on the northern side of Pandanus Avenue. We have recognised at the outset that the first step in any such proposal is to obtain agreement from the land owners (Cabarita Surf Club and Tweed Shire Council), to either the sale or joint venture of their land.

There have been some suggestions by some Councillors that they are not aware of our proposals and that they should have been briefed on these matters.

We point out that it was necessary in undertaking preliminary due diligence investigations of our proposal for us to approach the land owners and the relevant authority. It seemed logical and appropriate that the first approach was made to the General Manager and the Mayor. It was always our intention that once we had some understanding on what the likely issues with our proposal may be and the protocols, that you would be required to take our full proposal and brief all of the Councillors in a general meeting on this. We are also of the view that it may be appropriate at the relevant time that the Councillors may require us to make a full presentation on our proposal to the Council.

We are only now in a position to, in fact, make a formal proposal to Council for the purchase and/or joint venture of the Council land. We are forwarding this proposal to you separately.

In the meantime, we ask that you distribute to each of the Councillors a copy of this letter, together with some early development concept plans that we have prepared.

We have always intended proceeding in this matter in an open and transparent way. We hope this letter helps to allay any concerns that some of the Councillors may have.

Yours faithfully
RESORT CORP CABARITA PTY LTD

Peter Madrers
Director

Its excuse was simply spurious, it had not merely undertaken a due diligence process, but had ventured as far as presenting a joint venture proposal.

Councillors, in all probability the minority councillors, were apparently not aware of the proposals that lay within the council. This despite all the file records held within the Council:

- Resort Corporation floated its proposal for acquiring the car park land as far back as 9 September 2002;
- by 13 December 2002 Resort Corporation's proposals had obtained the blessing of the Mayor and Deputy Mayor;
- on 16 June 2003 Resort Corporation had written to the Mayor suggesting development of the car parking lots in a similar manner to the Cabarita Beach Hotel re-development, anticipating the closure of Pandanus Parade and advising: " We are extremely keen to enter into negotiations with Tweed Shire Council for the acquisition of the council land to carry into effect our development vision for this are. We would also be interested in the joint venturing of the development of this precinct";
- on 23 July 2003 the Mayor and Deputy Mayor had met with Mr Madrers and Mr Brinsmead;
- the council had sought legal advice on the proposal in August 2003;
- the Mayor and Deputy Mayor had been sent a minute from Dr Griffin querying the progress that Resort Corporation had made in its dealings with the surf club;
- Resort Corporation had put forward its joint venture proposal;
- council staff had prepared a discussion paper for managing the project.

This is a serious concern as the Mayor, Deputy Mayor and senior staff had charted a course to develop the precinct, to ignore the surf club and to provide for Resort Corporations "vision" for the land.

This had no relationship to a "due diligence" process, and any such suggestion obscured the facts.

Mr Brack indicated that the briefing took place on 10 December 2003.

As suggested earlier in this part, the council had married itself to the Resort Corporation proposal. Only eight days after the briefing on the Resort Corporation proposal, a competitor arrived.

Jay – Are Projects wrote to Dr Griffin putting an alternative proposal to provide for the surf club as part of a development over lot 6 and the surf club land.

On the following day, Resort Corporation wrote indicating that it would submit a new offer within 7 days. It pressed its own credentials, criticised the surf club's proposal and reminded the council that, as a result of the covenants on the car park lots, it held the whip hand:

> Registered over the Council land are covenants in favour of Resort Corp Cabarita Pty Ltd These covenants restrict the use of Council land to a car park. Council cannot use the land for any other purpose Accordingly, the commercial value of this land is very low (in so far as Council's ability to sell this land to anyone else is extremely limited) The land only has significant value in terms of any proposed selling arrangements with Resort Corp Cabarita Pty Ltd.

Copies of the letter were circulated to all councillors.

On the same day, Resort Corporation put its proposal to purchase the car park lots and lot 6, as an alternative it put forward a joint venture proposal.

Mr Ryan's (Jay – Are Projects) proposal was much more limited than the Resort Corporation proposal as, so far as the council would be concerned, only affected lot 6. Importantly, it would facilitate the "village green" envisaged by the draft DCP and would not restrict public access to the beach and the area through the closure of Pandanus Parade.

The Jay – Are and Resort Corporation proposals were as apples and pears, they were not directly comparable. There was a fundamental decision to be made by the council, whether it should contribute the car park land to the bargain.

This threshold question does not appear to have been considered by the council. Rather, the council appears to have been driven by the potential of the financial return.

On 14 April 2004 council's property and conveyance officer forwarded the following report to Mr Rayner:

INTER-DIVISIONAL MEMO

Registered: ☑ Not Registered: ☐

TO : DES

FROM : Property & Conveyance Officer

SUBJECT : **Pandanus Pde**

FILE : DA03/1221 Pt 4

DATE : 14 April 2004

C:\documents~1\judith\locals~1\temp\Memo to DES from NT_040413.doc

MKC

Here is a summary of the valuations from DTZ engaged by Resort Corp, and Herron Todd White (HTW) engaged by Council. Both valuations are for the total area of Lots 4, 5 & 6 Section 5 DP 29748, fronting Pandanus Parade, Cabarita Beach, and Lots 10 & 11 DP 31209, fronting Palm Avenue at Cabarita Beach. These parcels have a total area of 2,810 m^2.

However, HTW provided a further valuation for part of Lot 6 Section 5 DP 29748, pursuant to Council's instructions in January 2004, which included a brief description of the proposals made to Council in relation to the land at Pandanus Parade. Council's brief to HTW included a copy of a proposal from John Ryan to acquire the residue (following a boundary adjustment with Lot 7 to the east) of Lot 6, hence the separate valuation.

Below is a table showing a comparison between the valuations:

	DTZ	HERRON TODD WHITE
LAND & AREA VALUED	Lots 4, 5 & 6 Section 5 DP 29748 and Lots 10 & 11 DP 31209 having an area of 2,810m^2	Lots 4, 5 & 6 Section 5 DP 29748 and Lots 10 & 11 DP 31209 having an area of 2,810m^2
VALUATION	**$5,275,000.00 (GST exclusive) -** This sum was made up as follows: **$6,603,500.00** (calculated at $2,350 per m^2) less car parking contribution of **$1,330,000.00**	**$6,000,000.00 (GST exclusive)**– calculated at $2,132 per m^2
LAND & AREA VALUED		Part Lot 6 Section 5 DP 29748 which would have an area of 463m^2 following the boundary adjustment with Lot 7 to the east held by the Surf Club

1 []

VALUATION		**$700,000.00 (GST exclusive)**
SALES EVIDENCE	Sales Evidence has been based on residential sales in Pottsville, Kingscliff, Fingal Heads & Bilinga; mixed use site sales at Cabarita & Kingscliff; and commercial sites at Cabarita	Sales evidence has been based on sales four mixed use properties at Bogangar & Hastings Point and six mixed use properties at Kingscliff
METHODOLOGY	Direct comparison method – where the property is compared to recent sales or similar properties	Direct comparison method - where the property is compared to recent sales or similar properties

At first glance, the analysis and methodology used by both DTZ and HTW are very similar, with there being no strong argument to rely on either valuation in preference to the other.

The minor differences between the valuations refer to a car parking component included in the DTZ valuation and a separate valuation of Lot 6 with a decreased area following a boundary adjustment in favour of Lot 7, held by the Cabarita Beach Surf Club.

The boundary adjustment forms part of an application by the Club for road widening and the erection of a surf life saving facility. The area of the boundary adjustment will be a 2m wide strip of land within Lot 6 on the western boundary, the road widening, on the south boundary of Lot 7 fronting Pandanus Parade, will form the compensation for the area to be incorporated in the boundary adjustment. This application was approved on 19 March, 2003, (DA02/1646) a search of Council's records reveal that no plan for the road widening/boundary adjustment has been lodged as yet. No construction has begun on the facility.

The DTZ valuation does not provide any reference to the boundary adjustment, hence there is no separate valuation for the residue of Lot 6 by DTZ.

The proposals from both Resort Corp and John Ryan, are briefly described below. The Resort Corp proposals indicate that they are negotiating with the Club to utilise the Club land into their development, this may negate the requirement for the boundary adjustment should the Club agree to sell their land to Resort Corp.

THE PROPOSALS

Jay-Are Projects – Mr John Ryan

Mr Ryan has submitted a proposal whereby he purchases the residue of Lot 6 Section 5 DP 29748 following the boundary adjustment with Lot 7 Section 5 DP 29748, and together with the land owned by the Surf Club constructs a three (3) storey mixed development comprising basement car park; club facilities/retail & commercial on the ground floor; club facilities/residential units on the first floor and second floor to be total residential. This development would require the re-zoning of the subject parcels (Lots 6 & 7) to 3(b) General Business.

Resort Corp Cabarita Pty Ltd
Resort Corp Cabarita Pty Ltd ("Resort Corp"), have detailed two transactional proposals to Council in a letter dated 19 December, 2003. One proposal is to acquire some or all of the subject parcels and the other is for Council to enter into a joint venture with them to develop all of the subject parcels in a combined development with their land, Lot 1 DP 247808, immediately opposite Pandanus Parade to the south.

Proposal 1: Proposal to Acquire Council Land.
Resort Corp proposes to produce a conceptual development proposal following a development analysis of the land. The development analysis will assess the development in two ways:

(a) The purchase and use of all Council land at this location, these are all of the Lots referred to above; and
(b) The purchase and use of those parcels fronting Pandanus Avenue, that is, Lots 4, 5 & 6 Section 5 DP 29748.

The developments to be assessed will incorporate the land owned by the Surf Club, should the Club agree to the sale of their land to Resort Corp. However, Resort Corp have advised that they will pursue development of their land, together with Council's parcels, should the Surf Club not agree to sell their land to Resort Corp.

Proposal 2: Joint Venture of the Land
Resort Corp proposes a joint venture between it and Council whereby Council brings only the land to the project, with various degrees of risk and profit to be gained by Council.

DISCUSSION

John Ryan
John Ryan's proposal provides a clear intention to develop the land in a specific fashion, that is, a mixed development comprising a basement car park, club facilities/retail and residential components. There will be a requirement to re-zone the subject parcels to allow such a development.

Resort Corp
The letter from Resort Corp (dated 19 December, 2003) detailing the proposals advises that Resort Corp will undertake development analyses which will proceed on assumptions regarding applicable new re-zonings to the land, and that these analyses would be available to Council. These analyses will proceed after Council enters into a Contract for Sale.

Resort Corp are seeking to enter into a Contract for Sale with a 2 year Contract period for either all of the lots or just the Lots facing Pandanus Parade (Lot 4, 5 & 6). The following conditions are being sought by Resort Corp, these will give Resort Corp avenues of termination of the Contract :

1. That the Contract for Sale be subject to and conditional upon Resort Corp entering into an agreement with the Surf Club to acquire their land prior to or concurrently settling the agreement with Council;

2. The design of the development being acceptable to Resort Corp, the community, Council and the consent authority (Dept of Planning & Infrastructure);
3. Obtaining the necessary re-zonings and development approval;
4. The project being feasible.

Subsequent correspondence from Resort Corp is seeking a reply to their letter of offer. A response has been sent advising that until the results of the Council election are completed and when the new Council sits for its first meeting, no response can be made.

Prior to making any recommendations, I would like to discuss the conditions sought to be imposed:

1. As Resort Corp are seeking to make the Contract conditional upon the sale of the Club land, it is imperative that Council consider whether it has any obligations to the Club and to the public for continued public access to the foreshore, particularly if the Surf Club does not agree to sell their land to Resort Corp. Any agreement by Council with Resort Corp may narrow the opportunities for the Club to develop its site independently should it refuse to sell to Resort Corp as RC have indicated that they will proceed with their development without the Club land. It is suggested that this condition not be imposed in the Contract, and that it be clarified prior to entering into any Contract with Resort Corp whether the Club will sell or not, as this may colour public support for the development.
2. Resort Corp are seeking a long term Contract over 2 years, with a price agreed on today's property market. Council should consider the inclusion of a mechanism in the Contract to re-visit the value of the property prior to settling the Contract, this should take place a year after the date of the Contract.
3. The location of the proposed development is a prominent coastal location which has already attracted a lot of public interest and it is vital to ensure that the ultimate development obtains and retains community approval. Council will not be the consent authority for this development, as the area is within the parameters of SEPP 71 where the Department of Planning and Infrastructure will assess the development proposal.
4. The feasibility of the Contract should be a determination by both parties to the Contract, not just Resort Corp. The Contract should reflect this by detailing the parameters to be considered when assessing whether project is feasible.

RECOMMENDATIONS

It is acknowledged that the sale of the subject parcels would provide Council with a substantial amount of money to utilise for community purposes within the coastal area in and around Cabarita.

However, should Council resolve to sell the land to Resort Corp, it should consider entering into an Option to Sell rather than a Contract of Sale. The development analysis should take place in the option period and thus provide Council with a discretion as to whether it will accept the development analysis by Resort Corp of the potential development of the whole area. This would provide Council with a voice in relation to the development prior to any lodgement of applications for consent.

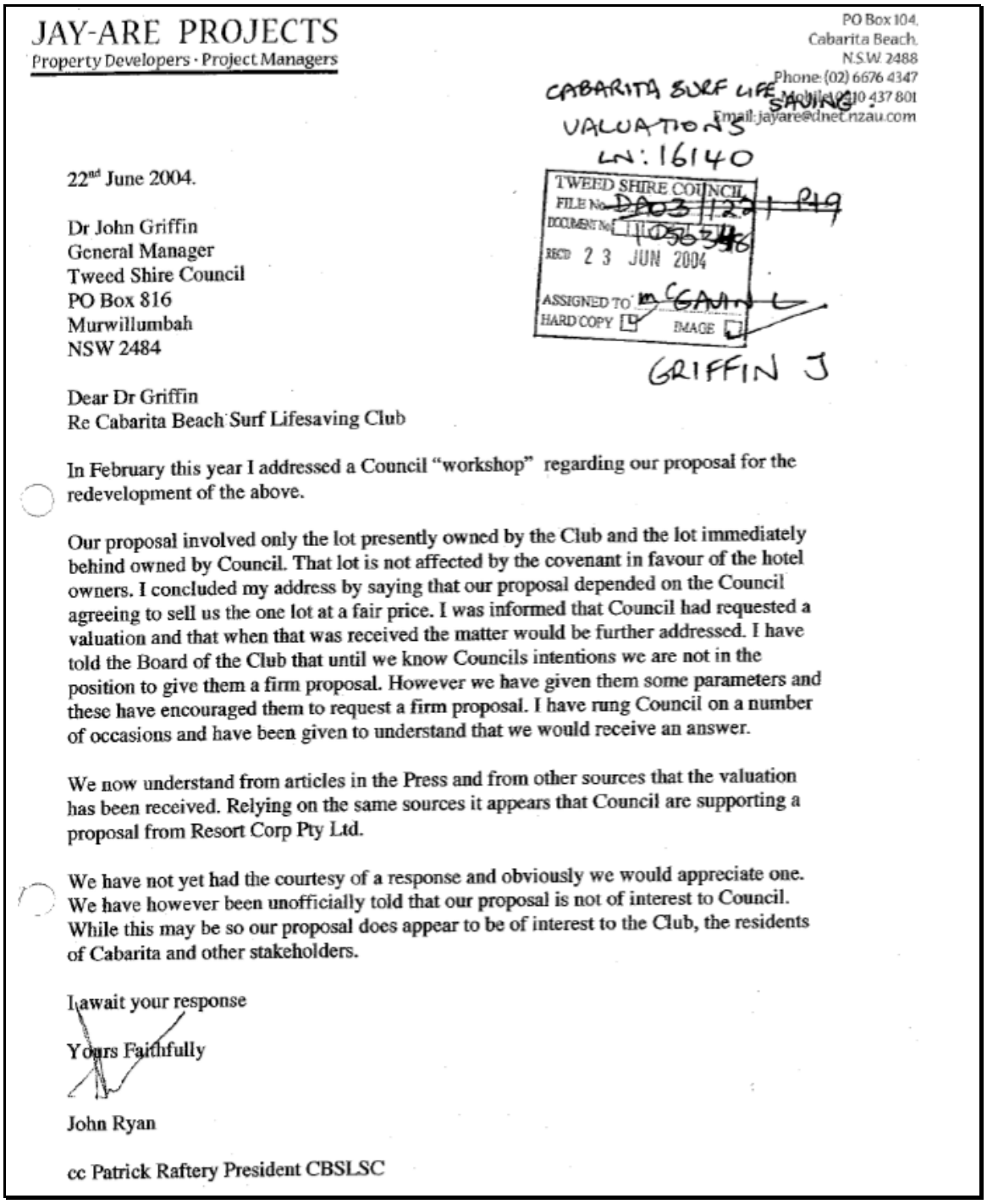
Council needs to ensure that it has a voice in the development, an option to sell, rather than a Contract will provide Council with leverage, rather than being obliged to sell once the Contract has been exchanged.

As Council was the owner of the land when GST was introduced, the land should be sold with the margin scheme imposed to alleviate an increase of 10% to the Contract price and the payment of that 10% as GST at settlement.

Nela Turnbull
Property & Conveyance Officer

Jay – Are Projects was attempting to negotiate, while in a position of weakness. It was not sure what council's attitude towards the sale of lot 6 was. Conversely, Resort Corporation was clearly aware of its position.

On 22 June 2004, Jay – Are wrote the following letter:



JAY-ARE PROJECTS
Property Developers · Project Managers

PO Box 104,
Cabarita Beach,
N.S.W. 2488
Phone: (02) 6676 4347
Mobile: 0410 437 801
Email: jayare@dnet.nzau.com

CABARITA SURF LIFE SAVING
VALUATIONS
LN: 16140

TWEED SHIRE COUNCIL
FILE No DA03/122 Pt9
DOCUMENT No 105634
RECD 23 JUN 2004
ASSIGNED TO McGANN
HARD COPY ☐ IMAGE ☐
GRIFFIN J

22nd June 2004.

Dr John Griffin
General Manager
Tweed Shire Council
PO Box 816
Murwillumbah
NSW 2484

Dear Dr Griffin
Re Cabarita Beach Surf Lifesaving Club

In February this year I addressed a Council "workshop" regarding our proposal for the redevelopment of the above.

Our proposal involved only the lot presently owned by the Club and the lot immediately behind owned by Council. That lot is not affected by the covenant in favour of the hotel owners. I concluded my address by saying that our proposal depended on the Council agreeing to sell us the one lot at a fair price. I was informed that Council had requested a valuation and that when that was received the matter would be further addressed. I have told the Board of the Club that until we know Councils intentions we are not in the position to give them a firm proposal. However we have given them some parameters and these have encouraged them to request a firm proposal. I have rung Council on a number of occasions and have been given to understand that we would receive an answer.

We now understand from articles in the Press and from other sources that the valuation has been received. Relying on the same sources it appears that Council are supporting a proposal from Resort Corp Pty Ltd.

We have not yet had the courtesy of a response and obviously we would appreciate one. We have however been unofficially told that our proposal is not of interest to Council. While this may be so our proposal does appear to be of interest to the Club, the residents of Cabarita and other stakeholders.

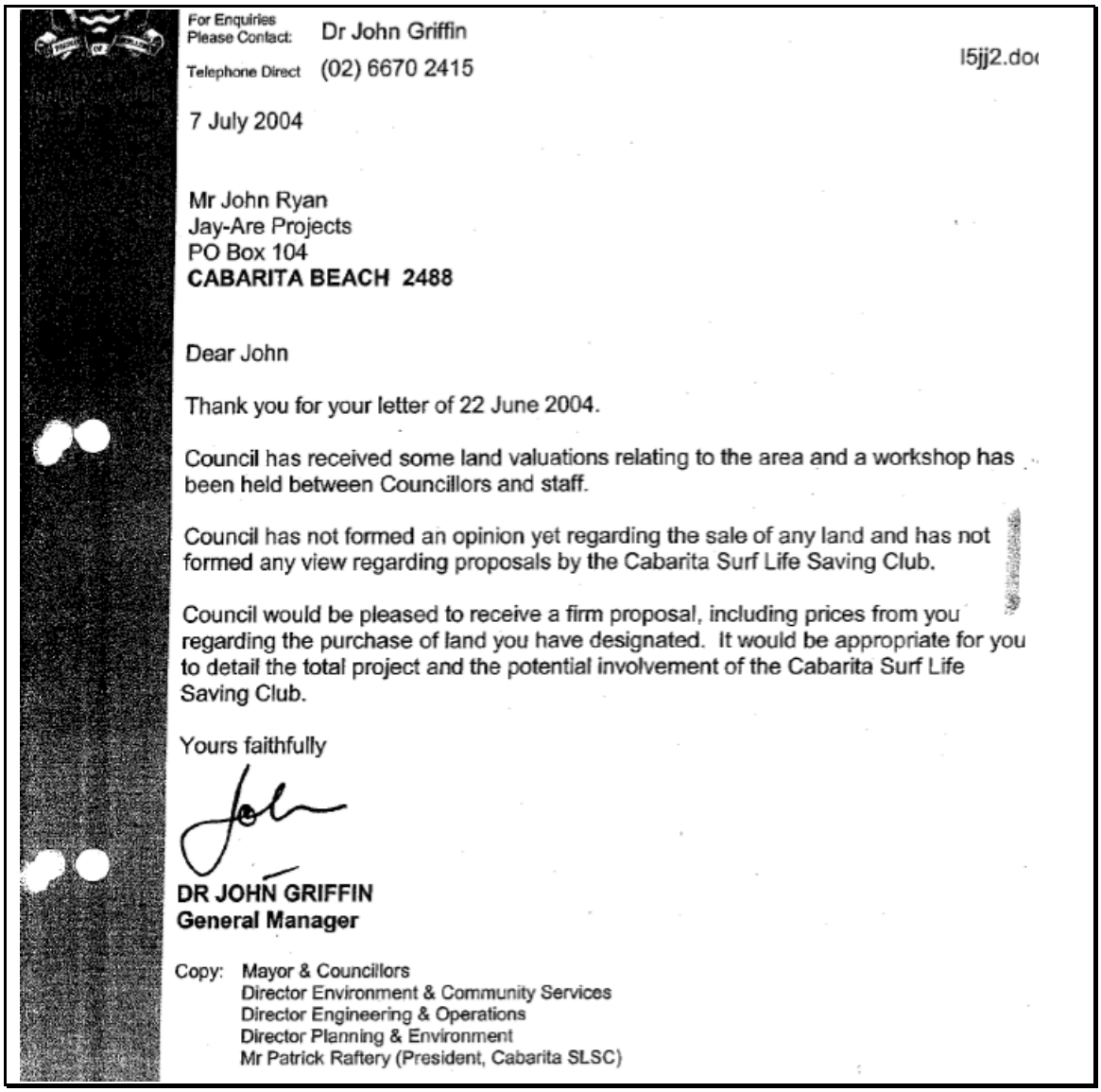
I await your response

Yours Faithfully

John Ryan

cc Patrick Raftery President CBSLSC

The council was to provide a cursory response, in its letter of 7 July 2004:



For Enquiries Please Contact: Dr John Griffin

Telephone Direct (02) 6670 2415

l5jj2.doc

7 July 2004

Mr John Ryan
Jay-Are Projects
PO Box 104
CABARITA BEACH 2488

Dear John

Thank you for your letter of 22 June 2004.

Council has received some land valuations relating to the area and a workshop has been held between Councillors and staff.

Council has not formed an opinion yet regarding the sale of any land and has not formed any view regarding proposals by the Cabarita Surf Life Saving Club.

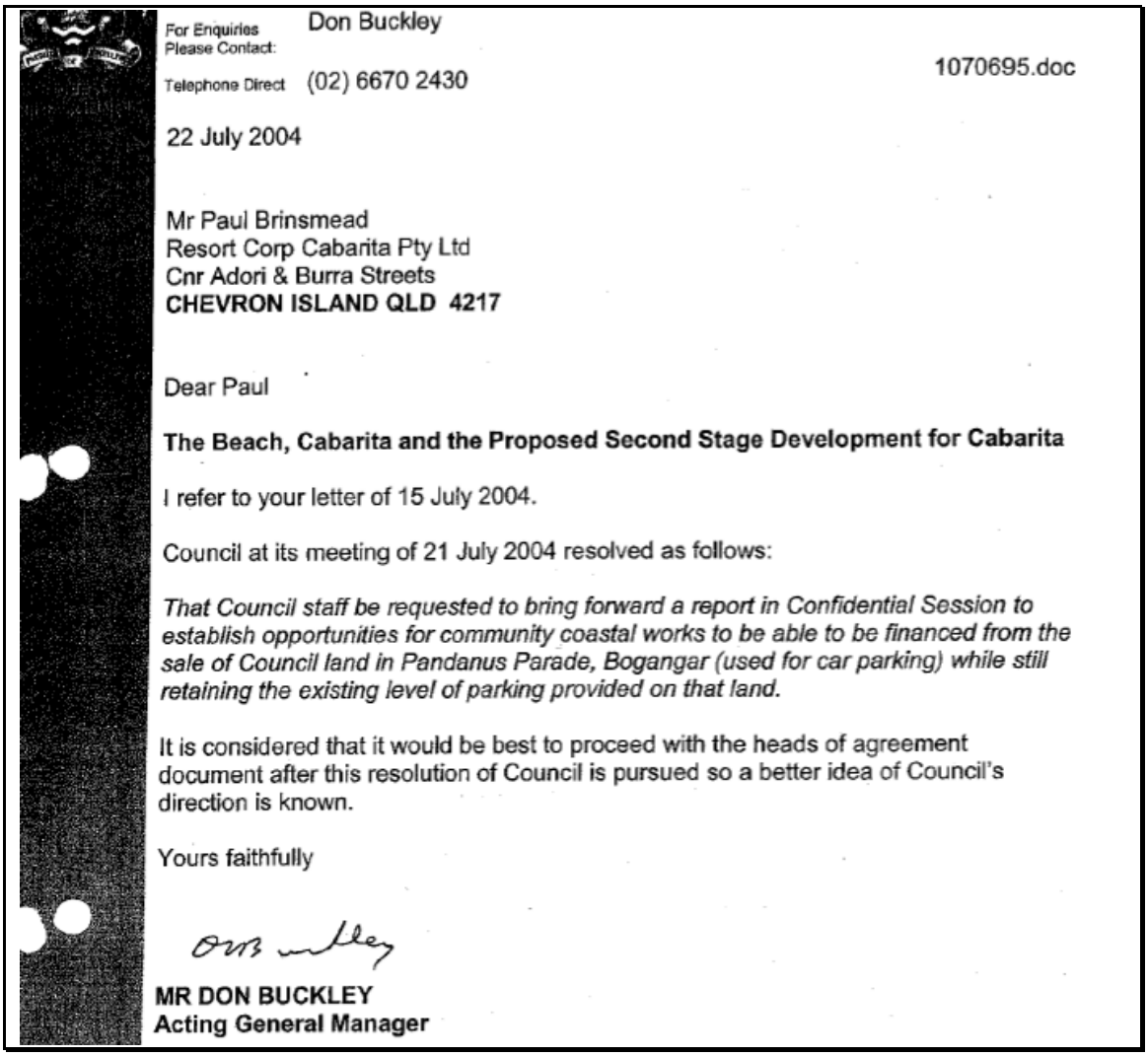
Council would be pleased to receive a firm proposal, including prices from you regarding the purchase of land you have designated. It would be appropriate for you to detail the total project and the potential involvement of the Cabarita Surf Life Saving Club.

Yours faithfully

DR JOHN GRIFFIN
General Manager

Copy: Mayor & Councillors
Director Environment & Community Services
Director Engineering & Operations
Director Planning & Environment
Mr Patrick Raftery (President, Cabarita SLSC)

Conversely, on 22 July 2004, the council wrote the following letter to Resort Corporation:



For Enquiries Please Contact: Don Buckley

Telephone Direct (02) 6670 2430

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22 July 2004

Mr Paul Brinsmead
Resort Corp Cabarita Pty Ltd
Cnr Adori & Burra Streets
CHEVRON ISLAND QLD 4217

Dear Paul

The Beach, Cabarita and the Proposed Second Stage Development for Cabarita

I refer to your letter of 15 July 2004.

Council at its meeting of 21 July 2004 resolved as follows:

That Council staff be requested to bring forward a report in Confidential Session to establish opportunities for community coastal works to be able to be financed from the sale of Council land in Pandanus Parade, Bogangar (used for car parking) while still retaining the existing level of parking provided on that land.

It is considered that it would be best to proceed with the heads of agreement document after this resolution of Council is pursued so a better idea of Council's direction is known.

Yours faithfully

MR DON BUCKLEY
Acting General Manager

The disparity is clear, the council was proposing that it enter into heads of agreement with Resort Corporation, it was merely toying with Mr Ryan. Mr Ryan gave the following evidence of his dealings with the council:

MR BROAD: *I want to deal with some aspects relating to that. I think you put an offer for redevelopment of the council land in the Surf Club in or around December 2003; is that correct?*

MR RYAN: *That's when I opened the discussions with the Council and the Surf Club, yes.*

MR BROAD: *Had you approached the Surf Club before?*

MR RYAN: *The Surf Club more or less came to me. I was approached by a third party, saying that the Surf Club desired to build a new clubhouse there; they had an approval but they were short of funds. They had a proposal from another developer which they weren't quite comfortable about; was I interested in discussing things with them. I met*

with a part of the board around about November of that year, 2003. They explained to me what the situation was. I said that, on the face of it, I thought I might be able to help but I would need to do a fair bit of work on it. I entered into a three-month period, I think it was, where they gave me that period to that work, yes.

MR BROAD: *And you put a proposal together which involved a redevelopment of their club house and a development on adjoining land.*

MR RYAN: *Yes. Only the two lots eventually, the surf club land and the land behind which the surf club did own at one stage but which was - - -*

MR BROAD: *So it was the council owned lot and the surf club lot?*

MR RYAN: *Yes.*

MR BROAD: *Now, the proposal, did that meet with the acceptance of the surf club?*

MR RYAN: *It met with a friendly reception by members of the surf club, but they always maintained that it would have to be - the decision would be of the full club, and until such time as I had gained the Council's attitude to my offer, there wasn't much point in taking it to the full board, or the full membership.*

MR BROAD: *Now, you put that proposition to the Council, I think it was on about 18 December 2003?*

MR RYAN: *I had a meeting with the manager, General Manager, John Griffin. I think Mike Rayner was there and there might have been somebody else there at that stage. I gave the broad sort of concept of my proposal that I felt that for anything to succeed in the vicinity of the surf club it would have to have the support of all the stakeholders, being the surf club themselves, the residents, the community in general and the adjacent owners. Yes.*

MR BROAD: *At that stage, were you aware of the proposals being put forward by the other developer that you refer to?*

MR RYAN: *That was public knowledge at that stage. It had appeared in the shop windows of - - -*

MR BROAD: *And what was that proposals being put by the other developer?*

MR RYAN: *Well, in broad terms, they were proposing that they would incorporate the surf club re-development into a much larger development using the lot behind and the other four lots which are deemed as public car park or open space.*

MR BROAD: *Now, when you met with Council, what was the response that you got from the GM - I think it was Mr Hodges, you said?*

MR RYAN: *No, I don't think Mr Hodges was there.*

MR BROAD: *Sorry, Mr Rayner.*

MR RYAN: *No, no. John Griffin was there. Mike Rayner was there. And there might have been somebody else. I can't quite recall. I've got my notes here if you want it.*

MR BROAD: *What was their response?*

MR RYAN: *I left the meeting feeling encouraged. I thought there was an acceptance by the people from the Council's side that there was problem with the scale of the development and the opposition to development, and that my proposal was a compromise which might suit everybody. That was an opinion that I formed. It wasn't stated to me.*

MR BROAD: *All right. Did they give you any path the walk down?*

MR RYAN: *They asked me to put a - put what I said in writing to them, which I did, the next day, I think.*

MR BROAD: *Right. So that was the 18 December letter.*

MR RYAN: *Yes.*

MR BROAD: *Now, did Council ever disclose the extent of the offer being put by the alternative developer?*

MR RYAN: *No, no, not in any detail.*

MR BROAD: *Did Council ever disclose that it had considered a joint venture for development of its land with the other developer?*

MR RYAN: *No.*

MR BROAD: *Did Council ever suggest to you that it might be interested in a joint venture - - -*

MR RYAN: *No.*

MR BROAD: *- - - development of its land?*

MR RYAN: *No.*

MR BROAD: *So it was purely and simply your proposal as it stood.*

MR RYAN: *Yes.*

MR BROAD: *I think you've given an outline for making your offer. Was it altruistic to benefit the surf club, or - - -*

MR RYAN: *I did make the comment that if I was looking at it as a cold property deal, I would have walked away at that stage, but I did have a community interest because I, you know, live there. I'd holidayed here for 40 years and I felt that if I could make a, what I terms a legitimate development profit, give the surf club what they wanted, the community what they wanted, it was a win/win for everybody.*

MR BROAD: *In your view, was it a better proposal?*

MR RYAN: *Oh, I might have been biased, I'd say.*

MR BROAD: *You put your formal offer to the Council. Where did the process go from there?*

MR RYAN: *No, the next stage was that I was invited to attend a workshop at the Council to address the Councillors and the heads of the various departments - it's a process that the Tweed Council goes through - and I think that was in around about February.*

MR BROAD: *Were you the only person to attend that workshop, or were the developers - or the proponents of Resort Corporation - - -*

MR RYAN: *No, not that I saw. No, no. It was only the Councillors. There was a few independent observers, I think, the heads of department.*

MR BROAD: *Were you ever asked to provide a valuation - - -*

MR RYAN: *No.*

MR BROAD: *- - - for the Council land?*

MR RYAN: *No. There was throw away line by the Mayor saying what did I think the land was worth, and as a throw away back line, I said $200,000, which was an ambit sort of a claim which we both laughed about, and that was that.*

MR BROAD: *So were you just - - -*

MR RYAN: *I think - if I could just qualify that?*

MR BROAD: *Yes, sorry.*

MR RYAN: *What he might have said to me, "What do you think – what would you like to pay for the land?" And I think I said, "200,000."*

MR BROAD: So that was a jest.

MR RYAN: *Yes.*

MR BROAD: *Now, what was the process after the meeting?*

MR RYAN: *I was told at that meeting that the Council would be commissioning a valuation, and when that was received they would then consider their position.*

MR BROAD: *Did you ever get notice of their valuation?*

MR RYAN: *No. I got a - after some time, and you've got to remember this was during the election sort of time, so I gave them some indulgence on this, I rang a few times and I then got a letter, I think in March or – late March, from Mike Rayner, I think it was, saying that the valuation was about to be received and they would be in contact in due course.*

MR BROAD: *Did you ever receive the valuation?*

MR RYAN: *No.*

MR BROAD: *Were you ever asked if you were willing to enter into an agreement based on a valuation?*

MR RYAN: *I received a subsequent notice from the Council inviting me to put a formal offer in for the land that I was seeking.*

MR BROAD: *Did you put a formal offer in?*

MR RYAN: *I replied that I would - that I was meeting with the surf club board for them to consider my situation. I didn't think there was any purpose in me putting an offer to the Council itself unless I knew I had the support of the surf club and the community in what I was doing, and I was going through that consultative process at that stage. I wrote that, I think in a letter to the Mayor, explaining that I wouldn't be back to them, you know, very quickly.*

MR BROAD: *Did you then get back to the Council with a solid offer saying - - -*

MR RYAN: *No. It never arose. I was going through the process. I had a meeting with the full board of the Council - of the surf club. I presented them with three options for them to look at. They said they'd get back to me within 10 or 15 days and, during the course of that, I got a letter from the Council saying that they had considered the situation and they were – I forget what the words - oh, basically, they were supporting a concept of a memorandum of understanding between the surf club, the Council and Resort Corp.*

MR BROAD: *So you'd been dealt out of the equation.*

MR RYAN: *Mm.*

MR BROAD: *The offer put by you was dependent upon coming to terms with the surf club.*

MR RYAN: *It was dependent on coming to terms with the surf club, it was dependent on the Council selling me that one block at a reasonable price, and dependent on the Council giving me an approval to do basically a 3B development on the site.*

MR BROAD: *Did the surf club express - you said they expressed a favourable approach towards your proposition.*

MR RYAN: *Initially, that was the case, but in further meeting with them I got the strong opinion that, if they could possibly do it, they wanted to be the master of their own fate and didn't want to enter into an agreement, but they were aware of the financial realities of the thing and I got the impression, if it came to a situation where they needed assistance, that they would have preferred my offer than Resort Corp's.*

MR BROAD: *Yesterday, Dr Jenkins gave evidence in respect of his involvement in the processes at Cabarita Beach and put a view forward which raised concerns about Council's processes. Do you yourself have any concerns in respect of the processes, as they affected you?*

MR RYAN: *I - yes, I had a number a concerns. I thought that - let's say this, I gained the impression that the - a decision had already been made to support the Resort Corp proposal. I felt that I was - it was just window dressing to see what I had to say, at the end of the day, for right reasons or for reasons known to themselves, that they were hell bent on assisting Resort Corp.*

MR BROAD: *Did you have any positive input when you met with the Councillors, either at the workshop or before, in respect of your proposal?*

MR RYAN: *No, no. The only discussions I had were in a formal situation at the workshop and at meetings, and, you know, I've got to say that they put their cards on the table. They said, you know, that they had this offer there, they would make the decision in the best interests of what - well, what they saw the best interests.*

MR BROAD: *Did they ever suggest to you that before they'd consider selling their land they'd go through a tendering process?*

MR RYAN: *No. That was never - never.*

MR BROAD: *Did they ever suggest that they would have to test the market to see what the land was worth?*

MR RYAN: *Well, they didn't say they'd test the market. They were - they said they would rely on the valuation.*

MR BROAD: *You said that your view is that they had already decided where they would go.*

MR RYAN: *Well, I felt it was reasonable for me to assume that, quite frankly.*

MR BROAD: *When was that?*

MR RYAN: *Oh, I think when I wasn't allowed the full time to put in the response.*

MR BROAD: *So they cut you short.*

MR RYAN: *Well, that's what I think. Yes.*

MR BROAD: *When had that occurred exactly, to your recollection? What month? You said it was - - -*

MR RYAN: *July, I think.*

MR BROAD: *July 2004.*

MR RYAN: *I've got the letters there. You've probably got the letters there too.*

MR BROAD: *So you were stopped short.*

MR RYAN: *Yes. I wrote a letter to complaint.*

MR BROAD: *Have you had regard to any of Council's file? Have you ever sought to have access to the file?*

MR RYAN: *No. Only, you know, what appears in the - sometimes in the public library I go through the minutes.*

MR BROAD: *On 21 September 2004 the Manager of Strategic Planning wrote to the General Manager and Director of Planning and Environment in respect of the DCP for Cabarita. The development control plan for Cabarita Beach had been proposed at some stage. You're aware of that?*

MR RYAN: *There had been a consultative committee within Cabarita itself which had made draft recommendations on the DCP, but I wasn't party to that. I wasn't a member then.*

MR BROAD: *But it had been stopped.*

MR RYAN: *Yes. It had been stopped, but - Council came out publicly and said they weren't going to consider that until after - they weren't going to consider the DCP until after resolution of the Pandanus precinct.*

MR BROAD: *The proposal that you put to Council would have required that the Council owned land and the surf club land be re-zoned, as I understand it.*

MR RYAN: *Yes. Yes.*

MR BROAD: *Now, in respect of this internal memo, the Manager of Strategic Planning talks about, in his opinion, the need for the land to be re-zoned to permit the development nominated by Resort Corp. You'd gone out of the equation by that stage.*

MR RYAN: *Mm.*

MR BROAD: *It reports:*

As a consequence of this, it is necessary for Council to separate its responsibilities as a planning authority from those as a land owner.

And it goes further:

In reaching those conclusions, I'm not commenting on the merits of re-developing the land. My only concern is the process achieving Council's intended income.

You've already indicated that, in your view, Council had a preordained outcome which favoured Resort Corp. Is that the sort of outcome that you gleaned when you dealt with Council?

MR RYAN: *Oh, well, that's in the realms of supposition. I don't think I'd want to do there. I will say, not so much in defence of Council but to explain some of their actions, they were convinced that the covenants that Resort Corp held over the land were binding, and they really saw Resort Corp as the only possible - - -*

MR BROAD: *But they didn't affect the land that you intending to develop.*

MR RYAN: *No, not the land that I - no. I - - -*

MR BROAD: *They were irrelevant.*

MR RYAN: *Yes. I purposely steered clear of the covenanted land.*

MR BROAD: *Because that was the car park land further up the road.*

MR RYAN: *Although I did obtain some very preliminary legal advice that was to the effect that the covenants could be tested.*

MR BROAD: *But your proposal - - -*

MR RYAN: *Nothing to do with the covenant land, no.*

MR BROAD: *In fact, if your proposal had gone ahead the public ownership of that land would not have been a precursor - sorry, the change in public ownership of that land would not have been a precursor to development?*

MR RYAN: *No.*

MR BROAD: *And you also proposed underground car parking, as I recall?*

MR RYAN: *Yes. Only for my development.*

MR BROAD: *Yes.*

MR RYAN: *And the surf club. Not public car parking for - - -*

MR BROAD: *The proposal that you put forward, did that anticipate the car parking needs would be met on site?*

MR RYAN: *To a large extent it did on the ratio of, you know, car park for development, but there is a provision whereby a contribution can be made to public car parking in - there's a car park that was, you know, supposed to be developed on the Hastings Road which had been discussed as an alternative sort of site and I would have factored in an amount – we would have, I think, only been four or five car parks short and we would have factored in the normal contributions to the public car park.*

T. 10/3/05 p. 1196-1205

It is clear that the council was attempting to undermine Mr Ryan's proposal. Equally it was moving to isolate the surf club.

At this stage the surf club had obtained approval to construct its own premises. The club had pared back its proposal to a building that it could fund. It was, however, faced with additional costs, those for the construction drawings.

On 3 August 2004 the surf club's president, who naively thought he had the support of the Mayor, sent an email to the Mayor, councillors and the responsible senior managers asking for assistance from the council.

The assistance that the club was seeking was limited, as will be seen from the following email:

Warren Polglase
Tweed Shire Councillors
Don Buckley
Mike Rayner
John Griffin

At a recent workshop with council the offer was put to the surf club that council is willing to assist with the progress of building a surf club through the use of the professional expertise of council employees.
Cabarita Beach SLSC are seeking the assistance of council for the following.
The surf club would like to commence construction of a staged development as soon as possible. We believe that we currently have enough funds (club, NSW Gov, TSC) to construct the ground floor of the current design including the radio tower.
This would mean that we would have all the storage and emergency infrastructure in place to support our role as a life saving body.
To proceed with this we would require the following assistance from council
1. Advice and assistance to design a staged development
2. Assistance with construction drawings for the staged development - currently we have an estimate of app $15,000 for these drawings. Two possibilities for this assistance are
   a) Council professional staff in the engineering department assist with drawings etc.
   b) Council commit to pay the cost of these drawings - perhaps by deducting the amount off the $500,000 section 94 contribution.
3. Advice on and collaboration with Cabarita Beach SLSC Board of directors in regards to council's tender process relevant to the construction
4. Assist with the building application process to ensure a minimum timeline
5. Possibly provide a staff member from the planning department as a project officer to ensure the construction of this facility starts as soon as possible.

Cabarita Beach SLSC is of the opinion that if we work together on this project we could have the first stage completed by February 2005.

Please contact me if there are any questions.

Patrick Raftery
President
Cabarita Beach SLSC

Received 0 A.

The Mayor was dismissive.

Jenny Morgan

From: Mayor
Sent: Tuesday, 3 August 2004 3:57 PM
To: John Griffin
Subject: FW: Surf Club staged building

Council would not consent to this. Advise please.
Regards Warren

Its intent is obvious, council would not assist.

Despite this, the Mayor would later attempt to promote a different and less venomous meaning:

MR BROAD: *Now, earlier, when answering a question from Ms Annis Brown in respect of the role of Councillors and their decision-making, you said:*

I can't speak on behalf of Council how they will deal with that application before it comes before Council.

Is that how you operate?

MAYOR POLGLASE: *Every Council has an independent opinion of how they assess an application that comes before Council.*

MR BROAD: *And their decisions are made in Council meetings?*

MAYOR POLGLASE: *Decisions are made on reports that are prepared and put forward to Council, yes.*

MR BROAD: In Council meetings?

MAYOR POLGLASE: *In Council meetings.*

MR BROAD: *And you, yourself, wouldn't pre-empt a decision of a Council meeting?*

MAYOR POLGLASE: *No. I have discussions with various Councillors and staff sometimes on a report - that way, yes.*

MR BROAD: *Now, on 3 August 2004, Mr Patrick Raftery sent an email addressed to you, Tweed Shire Council, Don Buckley, Mike Rayner and John Griffin. The email read*:

At a recent workshop with Council the offer was put to the Surf Club that Council is willing to assist with the progress of building a surf club through the use of the professional expertise of Council employees. Cabarita Beach SLSC are seeking the assistance of Council for the following.

It then put a proposal that the Surf Club would like to commence construction of a staged development as soon as possible, indicating its belief that it had enough funds to construct the ground floor of the current design, including the radio tower, and that it would seek assistance to design a staged development, assistance with construction drawings, advice on collaboration with its board of directors regarding Council's tender processes, assist with the building application process to ensure a minimal time line, and raise the possibility that Council would provide a staff member from the planning department as a project officer to ensure that the construction started as soon as possible. The document which I have says - also contains an email from yourself to Dr Griffin, dated 3 August 2004, 3.57 pm, and simply reads:

Council would not consent to this. Advise please.

MAYOR POLGLASE: *Well, some of the requests they were making was - Council could not consent to all of it. But I was asking the General Manager what assistance we could give to the Surf Club to proceed with their application because they had been quite a number of years trying to proceed with it and I wanted advice.*

MR BROAD: *Perhaps I can show you the document. At the top part with the pink highlighting is your response.*

MAYOR POLGLASE: *That's my response.*

MR BROAD: *Where in that do you suggest that Council was giving some sort of indication of what it can do?*

MAYOR POLGLASE: *I'm asking here, "Advise please"; that's asking the General Manager to give me advice on that and, in my opinion, Council could not consent to this.*

MR BROAD: *Aren't you suggesting that the Surf Club be advised of the response?*

MAYOR POLGLASE: *I'm suggesting that - I was seeking what we could or what we could not do, then we would give a response.*

MR BROAD: *The question I originally asked you was in respect of your earlier statement that you couldn't speak on behalf of the Council because the Council would determine these sort of matters at its meetings.*

MAYOR POLGLASE: *That's right.*

MR BROAD: *Aren't you talking on behalf of the Council?*

MAYOR POLGLASE: *No, I'm asking the General Manager to give me advice and I'm saying what my opinion was.*

MR BROAD: *The word "advice" is spelt a-d-v-i-c-e, isn't it?*

MAYOR POLGLASE: *Yes.*

MR BROAD: *It's not spelt a-d-v-i-s-e, is it?*

MAYOR POLGLASE: *No.*

MR BROAD: *There's a significant difference between the meaning of those two words, isn't there?*

MAYOR POLGLASE: *Well - - -*

MR BROAD: *One suggests, if it's spelt a-d-v-i-s-e, that this is an action that should be taken, isn't it?*

MAYOR POLGLASE: T*hat may be your opinion.*

MR BROAD: *You say that's not how you spell a direction to give advice?*

MAYOR POLGLASE: *I agree with your spelling, yes.*

T. 17/3/05 p. 1557-1560

The Mayor's response was both to refuse what was either a request for assistance or for a temporary advance, as well as a signal that the Mayor would stand in the way of the surf club's attempt to go it alone.

The memo provided by council's Property and Conveyance Officer fails to recognise that the Resort Corporation and Jay – Are proposals were not comparable.

While the council was toying with Mr Ryan it was separately moving to gerrymander public consultation on the Resort Corporation by floating a "wish list" of projects, to form the "carrots" in the Tweed Link's call for submission.

On 21 July council resolved

> ***RESOLVED*** *that Council staff be requested to bring forward a report in Confidential Session to establish opportunities for community coastal works to be able to be financed from the sale of Council land in Pandanus Parade, Bogangar (used for car parking) while still retaining the existing level of parking provided on that land.*

The subsequent report detailed possible projects ("for discussion only"), including repaying its advance to the club.

The text of the report follows. It is appropriate to emphasise:

- It summarily dismisses the Jay – Are proposal;
- there is no underlying consideration of whether the council should sell its land, rather the proposal is seen as nothing more than a commercial opportunity;
- the other reasons (2 – 4) are at best spurious;
- the last of the reasons, that the land "has never been part of the open space strategy" flies in the face of the draft DCP that had been prepared for the land.

REPORT:

Council at its meeting of 21 July 2004 resolved as follows:-

> ***RESOLVED*** *that Council staff be requested to bring forward a report in Confidential Session to establish opportunities for community coastal works to be able to be financed from the sale of Council land in Pandanus Parade, Bogangar (used for car parking) while still retaining the existing level of parking provided on that land.*

The land owned by Council is Lots 4, 5 & 6, Section 5, DP 29748 Pandanus Parade, Bogangar and Lots 10 & 11, Section 5, DP 21209 Palm Avenue, Bogangar.

Lot 6 has previously been the site of the building used by the Cabarita Beach Surf Life Saving Club.

The remaining allotments are used for car parking with Lots 4, 5 & 10 being transferred to Council in 1974 from the owners of the Cabarita Country Club Hotel being Derek & Edna Mary Skeats.

These lots have the following covenant attached:-

"AND the Transferees for itself and its successors and assigns hereby COVENANTS AND DELCARES with the Transferors and their respective successors and assigns that the within lands hereby transferred shall not be used for any purpose other than as a public car parking area for the parking of vehicles by the general members of the public thereon and for pedestrian use PROVIDED ALWAYS that nothing herein contained or implied shall prohibit or restrict the transferee from erecting and constructing a public car parking complex by the addition of layers of underground and/or overhead parking space on the lands hereby transferred as the necessity therefore may be determined by the Transferee from time to time in its absolute discretion AND IT IS HEREBY AGREED DECLARED AND COVENANTED for the purposes of Section 88 of the Conveyancing Act, 1919 (as amended) as follows:-

(a) The benefit of the foregoing restrictive covenants shall be appurtenant to Lot 1 in Deposited Plan No. 247808.

(b) The burden of the foregoing restrictive covenant shall be upon the lands hereby transferred.

(c) The foregoing restrictive covenant may be released varied or modified by one with the consent of the registered proprietor for the time being and from time to time of Lot 1 in Deposited Plan No. 247808.

Lot 1 DP 247808 which is the beneficiary of the covenants is the site of the former Cabarita Beach Hotel and is owned by Resort Corp Cabarita Pty Ltd who are thus the current beneficiaries of the covenant.

Resort Corp Cabarita Pty Ltd has made an offer to purchase the land for $5,275,000 plus providing 38 basement public car parking spaces. Each space is equated in value to $35,000 or $1,330,000. The price would thus compare favourably with a valuation of $6,000,000 received by Council from Herron Todd White.

This offer is for the whole of the five lots owned by Council.

It is unclear at this stage what impact there would be once Council transfers part of Lot 6 to the Cabarita Beach Surf Life Saving Club as per the agreement and development consent with the club but this would not be expected to be significant.

Resort Corp Cabarita Pty Ltd has made an additional offer to the surf club but has advised the offer to Council is not dependant upon any agreement being made with the surf club. Representatives of the Club, Resort Corp Cabarita Pty Ltd and Council have had a meeting and a draft agreement for community consultation has been prepared for consideration by the three bodies. (This agreement is the subject of a separate report to Council.)

Council has received advice from Mr John Ryan that he is interested in purchasing the residue of Lot 6 after the proposed boundary adjustment to the surf club. Attempts to get a purchase figure from Mr Ryan have been unsuccessful. Consequently if a sale were to be made to Mr Ryan, its value would need to consider any reduction in value of the remainder of Council's land as one parcel.

It is understood Mr Ryan has also had discussions with the surf club with a view to providing a club building if he were successful in receiving Council's land.

Should a role be made to Resort Corp Cabarita Pty Ltd the funds would be available to facilitate a number of projects including several items identified in the Coastal Management Plan.

Possible projects are as below. This list exceeds the funds and is for discussion only and other projects could be included.

1.	Black Rocks Bridge Car Park and Beach Access	$100K
2.	Ambrose Brown Park Upgrading	$100K
3.	Hastings Point Headland Redevelopment	$300K
4.	Norries Headland Coastal Management Plan of Works	$700K
5.	Cabarita Beach Sub Office (as part of parking station development)	$400K
6.	Cudgen Creek Pedestrian Link from Kingscliff CBD to Sutherland Point	$300K
7.	Sutherland Point Development	$500K
8.	Kingscliff Amenities Refurbishment of Hall and Drop In Centre (Youth)	$500K
9.	Respite Centre Kingscliff	$500K
10.	Kingscliff Foreshore and Including Toilets Upgrade	$300K
11.	Tweed River Foreshore and Fingal Boat Harbour	$400K
12.	Fingal Surf Club	$500K
13.	Surf Life Saving Sinking Fund for Services	$500K
14.	Section 94 Works Brought Forward and Repay to Reinstate Capital	$500K

This proposal is supported as:-

1. It provides an opportunity for Council to bring forward a number of community benefit capital items.

2. Four of the current allotments are used for car parking with three having a covenant which cannot be lifted without the consent of the owners of Lot 1 DP 247808 (currently Resort Corp Cabarita Pty Ltd).

3. The community will not loose the current car parking availability.

4. The fifth allotment has, until recently, been occupied by a building.

5. This land has never been part of an open space strategy.

Options:

There are at least three options for Council on considering this report:-

1. Receive and note the report.

2. Commence a community consultation program to present the opportunities outlined in the report to the broad community.

3. Pursue the option for sale of the land to Resort Corp Cabarita Pty Ltd.

LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:

Nil.

POLICY IMPLICATIONS:

Nil.

UNDER SEPARATE COVER:

Nil.

Council's file does not contain evidence that suggests that, when presented with an indication that Resort Corporation held a desire to develop lot 6 and the car park lots, any consideration was given to the fundamental and threshold question whether it was appropriate to either develop or to sell the lots.

In his submission to the Inquiry (**submission 312**) Dr Griffin referred to the earlier consideration of the sale of lot 6 by the council. The submission reads:

Pandanus Parade - Council Owned Land

Prior to (1991) Council operated in the 1980s a Land Development Committee consisting of the Shire President
Deputy Shire President
Shire Clerk
Senior Engineer

One of the lots in Pandanus Parade, Bogangar/Cabarita unencumbered by a covenant was one of a number to which Council was to give consideration to its sale.

At its meeting of 1 February 1989 Council requested a list of Council owned property that could be disposed of and its estimated value.

The Finance Committee of 15 February 1989 developed a list of properties that appeared to be marketable properties at that time. The Committee resolved to recommend to Council that this matter be referred to the Land Development Committee in the first instance and if any properties are proposed to be listed for sale a valuation be obtained.

Lot 6 Section 5 DP29748 (562.8m^2) Pandanus Parade was listed (Appendix 9^{ix}).

The submission attaches a copy of a minute dated 5 April 1989, which contains the following:

7. Council Properties

Item F27 - Item 13 Shire Clerk's Report to Finance Committee - Ordinary Meeting 15/2/89. GL2/1

Decided that this Item be referred to the Land Development Committee in the first instance and if any properties are proposed to be listed for sale, a valuation be obtained.

* List attached hereto.

1.	1192 - 41 Boyd Street - Day Care -	Being held for possible exchange with Board of Fire Commissioners
2.	1631 - 209 Byangum Road -	Staff Residence.
3.	3674 - Lot 507 Ducat Street -	These lots could be sold profitably if titles are clear. Lot 507 has frontage to Canal and consideration should be given to its retention as public open space.
4.	3676 - Lot 509 Ducat Street -	
5.	3755 - Lot 704 Dulguigan Road -	Ex Ferrymaster. Property can be sold if title clear.
6.	Part Portion 286 -	Fingal Quarry - Defer any action pending decision on Ocean Blue development.
7.	5231.52 - 5 Hayley Place }	Vacant industrial land currently for sale.
8.	5231.54 - 9 Hayley Place }	
9.	7032 - Lot 17 Lundberg Drive }	
10.	8451 - Nullum Street -	C.Y.S.S.
11.	10025 - Pandanus Parade -	Shops adjacent to parking area. Surf Club?

The list of proportion continued onto the following page.

Elsewhere the minutes record:

13. COUNCIL PROPERTIES

At its Meeting of 1 February, 1989 Council requested a list of Council owned property that could be disposed of and its estimated value.

A computer listing of 403 assessments has been prepared and reviewed, those shown on the attached list following appear to be the only marketable properties at this stage.

RECOMMENDATION
That this matter be referred to the Land Development Committee. In the first instance and if any properties are proposed to be listed for sale a valuation be obtained.

GL2/1

F27
Cr.Hogan
Cr.Prichard

13. Council Properties

RESOLVED to recommend to Council that this matter be referred to the Land Development Committee in the first instance and if any properties are proposed to be listed for sale a valuation be obtained.

GL2/1

F27

13. Council Properties
That this matter be referred to the Land Development Committee in the first instance and if any properties are proposed to be listed for sale a valuation be obtained.

Assessment No.	Land Value 1.7.1983 $	Description	Location	Improvements
1192	100,000	Lot 7 DP 2379 1011.83sq metres	41 Boyd Street, Tweed Heads	Cottage-Day Care Centre
1631	24,000	Lot 11 DP 520017 733.5sq metres	209 Byangum Road, Murwillumbah	Residence
3674	42,000	Lot 507 DP 251298 809.3 sq metres	24 Ducat Street, Tweed Heads West	Vacant
3676	30,000	Lot 509 DP 251298 735.7 sq metres	30 Ducat Street, Tweed Heads West	Vacant
3755	18,000	Lot 704 DP 721311 2029 sq metres	Dulguigan Road	Residence-Ex Ferryman's Cottage
4511	20,000	Pt. Por 286 Ph Terranora 2004 sq metres	Fingal Road, Fingal	Vacant-Ex Quarry
5231.52	-	Lot 18-20 DP 774059 2970 sq metres	5 Hayley Place, Murwillumbah	Vacant
5231.54	26,000	Lot 22 DP 774059 1900 sq metres	9 Hayley Place, Murwillumbah	Vacant
7032	-	Lot 17 DP 774059	25-37 Lundberg Drive, Murwillumbah	Vacant
8451	45,000	Lot A DP 174482 947.78 sq metres	1 Nullum Street, Murwillumbah	Cottage-CYSS
10025	80,000	Lot 6 Sec 5 DP 29748 562.8 m²	5 Pandanus Parade, Bogangar	Former shops

THIS IS PAGE NO. OF THE MINUTES OF THE FINANCE COMMITTEE MEETING OF THE TWEED SHIRE COUNCIL HELD 15 FEBRUARY, 1989.

SHIRE CLERK _____ CHAIRMAN

The council has suggested that it held a view that the lots might be disposed of. It supports this suggestion by referring to, what is at best an ancient document. This document fails to go further than consider the inclusion of lot 6 for inclusion in a list of possible properties that might be disposed of.

The council fails to provide any document that suggests:

- a view that, after obtaining its valuation, the council had then resolved to sell lot 6,
- any evidence that suggests that, if it had resolved to sell lot 6, such resolution had carried forward until 2002 and beyond;
- any evidence that lot 6 was ever listed for sale.

Mr Reid reports that lot 6 had been sold by the surf club to the council on the proviso that it occupied the building on lot 6 until it could build a new clubhouse on the land owned by it, lot 7.

Mr Reid reports the circumstances of the club and of the building in the period leading up to and following 1989 as follows:

> **1980s** - During the 1980's the deterioration of the Cabarita SLSC building accelerated as exposure to the harsh coastal environment coupled with the materials and method of its construction (not sufficiently resistant to corrosion) saw 'concrete cancer' take hold. The Cabarita SLSC, increasingly concerned about state of the building, and council's continuing lack of maintenance, initiated a fund for construction of a replacement building.

> **1990** - In 1990 the Cabarita SLSC again attempted to encourage Tweed Shire Council to undertake maintenance and remediation work on the building. The Cabarita SLSC compiled a dossier of the increasingly serious problems of the building (including compelling photographic evidence). The dossier was presented to council at a Community Access Session of Council, the presentation culminating in a plea for council to repair the building. However no action was taken by council.

This is far short of a current intent to dispose of lot 6, let alone the other lots.

A review of council's files leads to the inexorable conclusion that the council had, at the time Resort Corporation first put in the proposal:

- accepted that Resort Corporation should develop the land and;
- incorporate the surf club within its building.

Later when Resort Corporation put its proposal to purchase the land the council bound itself to sell the land to Resort Corporation.

While the council would go about the processes that it believed would meet the needs of the probity, there was neither integrity nor probity in its actions.

The Mayor emphatically denied this.

> MR BROAD: *Can I turn away from that topic and come to the issue of the proposal to transfer Council's land in respect of the car-parks and its property in Cabarita Beach. I asked you some questions on the last occasion in respect of your meetings with the proponents and that's the principals of Resort Corp back in September 2002. Do you recall that?*
>
> MAYOR POLGLASE: *Yes.*

MR BROAD: *Now, is it fair to say that you had a number of meetings with the proponents of the Resort Corp proposal?*

MAYOR POLGLASE: *Maybe two or three.*

MR BROAD: *Two or three is the best you can recall?*

MAYOR POLGLASE: *Mm.*

MR BROAD: *There has been a suggestion that Council placed pressure on the surf club to join with the Resort Corp proposal. So far as it affects yourself do you believe - sorry, did you have any discussions with representatives of the surf lifesaving club?*

MAYOR POLGLASE: *There were discussions with the surf club a couple of times, I believe. Yes, there were.*

MR BROAD: *Did you ever suggest that the surf club should align itself with the proposal being put forward by Resort Corporation?*

MAYOR POLGLASE: *No, I didn't suggest they should align themselves, I suggested they should give it serious consideration.*

MR BROAD: *In your view would anyone come to a view that the Council or the Councillors placed pressure on the surf club to align itself with the Resort Corp proposal?*

MAYOR POLGLASE: *Not that I'm aware, no.*

MR BROAD: *Do you believe that anyone was placing pressure on the surf club to align itself with the Resort Corp proposal?*

MAYOR POLGLASE: *Well, you would have to ask the surf club that.*

MR BROAD: *But you don't have an opinion?*

MAYOR POLGLASE: *No.*

MR BROAD: *Mayor Polglase, in the course of asking some questions of Council staff over the last few weeks I've referred to, firstly, a discussion paper for managing a proposed joint venture with Resort Corp in respect of the Council-owned land at Cabarita and also an internal memo from Mr Jardine in respect of a subsequent proposal which was the straight-out sale of the land. The issue that appears to float from those documents is a suggestion that the Council had aligned itself firstly to join with Resort Corporation and to proceed with the joint venture.*

MAYOR POLGLASE: *Well, no, I don't - I - that's - you may suggest that. I would suggest that maybe - you may be - you may have read the probe Councillor's report on this issue, which has been forwarded, I believe, to the Commission to read. No, there's - -*

MR BROAD: *There was no pre-determined course of conduct?*

MAYOR POLGLASE: *Beg your pardon?*

MR BROAD: *There was no pre-determined course of conduct - - -*

MAYOR POLGLASE: *No.*

MR BROAD: *- - - by the Council, intended to promote the Resort Corp proposal?*

MAYOR POLGLASE: *All Council did was - as you would be aware, an offer was made. We put it in the local Tweed Link. It was advertised. The Council General Manager put forward a proposal, what benefits would be received if Council did consider the offer. Council has not considered the offer at this stage and probably will not consider the offer.*

MR BROAD: *The documents that I've referred to certainly suggest the view by members of staff that it was a done deal.*

MAYOR POLGLASE: *The staff have a right to form an opinion; there's nothing wrong with that whatsoever. There has been no done deal whatsoever. I think if you read the progress report, he mentioned that about six or seven times in the report that there was no evidence whatsoever - whatsoever - of any of done deal being done by anybody. It's quite - - -*

MR BROAD: *Is that what he says in his report?*

MAYOR POLGLASE: *It says six or seven times.*

MR BROAD: *That there was no done deal?*

MAYOR POLGLASE: *Yes.*

MR BROAD: *That there's no evidence of a done deal?*

MAYOR POLGLASE: *I don't know about the evidence. He said there was no done deal. Have a look at the probity officer's report.*

T. 17/3/05 p. 1555-1557

MR BROAD: *... What I'm suggesting to you: the review of the entire Council file in respect of the Cabarita Beach proposal suggests that Council has not been even-handed in its dealings with either the Surf Club, with JR Investments and with Resort Corp, nor with the public. Would you accept that?*

MAYOR POLGLASE: *No, I would not.*

T. 17/3/05 p. 1560

At the time of writing this report the proposed sale of the council's land had not proceeded and the surf club has moved to construct its own premises.

There is little doubt that if the Inquiry had not been called, the council would have moved down its pre-determined course to promote the Resort Corporation's project and to facilitate it through the sale of its land and the isolation and undermining of the surf club. As John Young had written, the club would be victimised even more.

Section 4 Addendum 4.2.1.1

27 January 2005

Office of the Commissioner
Tweed Shire Council Public Inquiry
Locked Bag A5045 SYDNEY SOUTH NSW 1235

Dear Sir,

The Fingal Head Community Association wishes to document the following concerns with regard to the behaviours of Tweed Shire Council.

Association members have raised the following items:

- Councilors having family members who are engaged in development activities in the area, raising issues of possible corruption and lack of impartiality. As an example, there was the approval of a 4 storey building in Kingscliff that contravened local planning rules (3 storey limit) where the developer was related to one of the Councilors

- A councilor trying to buy Crown Land in Fingal Head for private use, where the Council clearly should have rejected the application as being inappropriate and against the interests of the wider community. Instead the council referred the decision to the State Government for consideration wasting considerable amounts of tax payer money.

- Lack of response to letters from our community association, and an apparent unwillingness to be open and honest in some responses. Instead Council appears to be dodging issues by providing motherhood statements or vague generalities in response to specific queries.

If you require further detail on any of the above items please do not hesitate to contact us.

We do not intend to make any oral submission to the inquiry.

Yours faithfully,

Trevor Lynn
Fingal Head Community Association

Submissions 300 & 374

28 January, 2005

Dear Commissioner

Back in April 1997 our family was involved in a Land and Environment Court case where the Anglican Church was appealing the Tweed Shire Council's refusal to allow it to build a primary school on farmland at Cudgen. We supported the Tweed Shire Council.
We farm on the eastern side of the land owned by the Anglican Church and at the time of the court case. Councillor Lynne Beck's widowed mother owned the farm on the western side.
The church was not successful in it's appeal.
Since then Councillor Beck's mother's land has produced less and less until it no longer produces anything and the farm tractors, implements etc have recently been sold off at an auction.
It's reportedly sold for in excess of $9million.
Councillor Beck involved herself even though she had a conflict of interest and a pecuniary interest.
During the court case Councillor Beck and Councillor Nowland joined those opposing the Tweed Shire Council in the court room. Many people commented about it at the time.
I include some paper clippings to support my submission.

Catherine Prichard
C.A. Prichard

Submission 216

Daily News 8.5.97 8.5.97

Your VIEW

etting the cord straight

ITOR: Regarding Jim kin's comments about the epy Hollow piggery (DN 1/97) we should set the record ight with the following facts.

Regarding water quality, the have never done any testing Sheens Creek at Sleepy low.

We the taxpayers are footing EPA's bills, not the piggery. e should welcome Jim's sug ion of genuine water tests to aken upstream of the pig-

We have advised Tweed Shire ncil (13/3/97) that their ream testing control point apparently contaminated by off from the piggery proper-

cording to NSW Agri-cul- (AGFACT A4.7.9,p2), "a sow gery containing 1000 pigs ld have the same BOD load- as a town of 60,000 people." BOD Biological Oxygen and — a way of measuring ution in te water).

Tom ert's claim 500 pigs' en equat- 270,000 ple (DN 97) is not at all "rubbish" as claims.

me other facts:

Tweed Shire Council asked piggery to submit a retro- tive Development Applica- on 8/12/95 for a large illegal er shed they erected 10 s ago. That's over 15 months nd the matter is still yet to termined.

Despite requests from the to do so, the piggery have ed to apply for a pollution rol licence for water dis- e. Why?

The piggery wants to se a 2km buffer zone over ne neighbouring landhold- some who predate the pig- s existence by 20 years).

In 1979 the State Pollution Control Commission acknowledged "that evidence has been found which shows that Spear's Creek (aka Sheens Creek) had been polluted by wastes originating from "Sleepy Hollow Hoggery" (SPCC letter to Mr F Trueman 1/2/79).

In 1994 the EPA insisted that the effluent dispersal area available to the piggery was totally inadequate for the large amount produced.

The above are hardly actions to promote neighbourhood goodwill by the piggery owners. How would Jim Larkin react living in like circumstances?

In closing, why should the surrounding community of farmers and landholders, who only want a fair go, be called to account for a situation entirely created by the piggery ignoring its environmental responsibilities and requirements for the past 26 years.

SHANE MARSHALL
Secretary

BECK–BOYD FEUD FLARES

Sickened to hear of MP's conduct

EDITOR: It was sickening to read Don Beck's attack on Mayor Boyd on the day of the opening of the new cemetery (DN 1/5197)
This attack contained misinformation which should have been corrected or at least balanced by your reporter who I know was present at the Land and Environment Court hearing; I was present too.
To put the record straight, the court hearing was no "joke".
A Department of Agriculture soil expert did give evidence about the classification of soil in the Cudgen area - evidence that the assessor believed to be vital in the Council's case and which was supported by an on site inspection.
Just because the soil classification process for the whole Tweed Valley was not complete at the time of the court hearing, does not mean that the Department of Agriculture and the Tweed Shire Council have no idea of the soil value of the Cudgen farms concerned.
What's more, with the Council dragged into court by the Anglican Church's appeal it was very disconcerting to see elected Councillors Lynne Beck and Barbara Nowland sitting in support of the appellants in the public gallery.
Weren't they elected to represent all Tweed ratepayers?
I suggest Mr Beck keep his personal feuds off the front page of our local daily newspaper.

L. GODDARD
Cudgen

People in glass houses

EDITOR: If Councillor Ron Cooper wishes to accuse others of the sin of omission (DN 5/5/97), then he should be very careful to make sure that he is not guilty of the same sin.

He has omitted to mention to the public that the Combined Tweed Rural Industries Association (which represents the land owners of the Shire that he so zealously wishes to "protect") did not have a single point from their written or verbal submission included in the strategic plan.

Was this an oversight by Cr Cooper or a deliberate misrepresentation?

To say the Rural Industries had no objections, is, to use Cr Cooper's own words, "simply not the truth".

At no time did Cr Luff with her original motion, or Cr Cooper with his amended motion on protection of farm land, consult with the Rural Industries despite the fact that a public protest rally on the steps of the Civic Centre indicated that there was a great deal of concern.

Cr Cooper's public consultation is a complete sham.

Cr Cooper omits to tell the public that the Shire has not been accurately mapped as to agricultural suitability, yet he continues to quote percentages of affected land which are "simply not the truth".

Yes, Cr Cooper, to misrepresent the facts to support your own ideology is certainly "todays politics at its sleaziest".

C. R. BROOKS
President
Combined Tweed Rural Industries

Submission 216 – Attachment

Office of the Commissioner,
Tweed Shire Council Inquiry,
Locked Bag A5045,
Sydney South. N.S.W. 1235.

RECEIVED
25 JAN 2005

Professor Maurice Daly,

I would suggest the Inquiry of Tweed Shire Councillors include what councillors obtained land in new developments over the last 5 or 6 years, how they came by them, and if bought did they pay market value at the time they were purchased? I have heard one developer gave his father a block of beachfront land at the Salt development at South Kingscliff, his father being a councillor.

A nother question is where the Mayor's wife works?-for another privileged developer.

The way council approved several amendments for Salt and their handling of lot 490 land?

Nor Nor East step one was to be a residential building. Then was amended to a Tourist building which allowed construction right up to the boundaries and less car parking. They are now wanting to use it as residential and council has refused conditions which will keep it residential. They are now advertising for restaurants facilities for the ground floor for which has been refused.(not applied for in original DA.)

The residents of Kingscliff had a public meeting over the part fourth storey of this development and a unanimous vote against the four storey section was taken approximately 182 attended. Mayor Polglase attended also and the next day passed this development in council against the wishes of the 182 residents of the shire.

He has on nearly all occasions completely ignored the resident and ratepayers of the shire in favour of his developer mates, what the developers want they get.

The residents were called a mob of 'rabble rousers' over the Lot 490 being taken from the control of the council but these councillors and our so called 'Pillars of strength' of our community found it fit to demonstrate at Nevelle Newell's office, Murwillumbah railway station, oppose the Morton Bay bug farm and other developments which they don't want, Beck, Brinsmead, Polglase and the rest of the 6 pack insist on having their own way at all times.

Another concern is Pandanus Parade at Cabarita which they still want to sell to their developer friends and relations against over 1700 objections. I could go on forever at what is happening in the Tweed but I won't and I can be contacted if more information is needed.

Yours Resident and Ratepayer of TSC
Norm Mulley,

Submission 157

25 January 2005

Tweed Shire Council Public Inquiry

Dear Sir,

As a resident of the Tweed who feels the council has behaved unethically on a number occasions I welcome your commission.

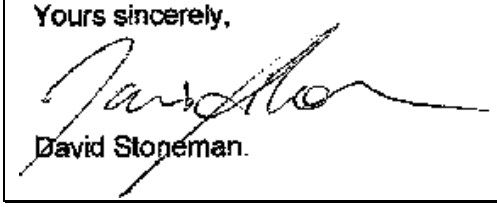
My particular complaint is in reference to the sale of public land at Pandanus Pde, Bogangar. I read with some regret in the Tweed Link (councils publication) of their proposal to sell the land, a "hotline" was provided to call regarding the proposal.

When calling the number to state my opposition I encountered a "sell job" on the other end of the line under the pretext of explaining the council (and the developers) aims. The operator read points from a prepared statement, I assume from her superiors. I insisted that my opposition be registered and presented a number of points. I never received any acknowledgement of this opposition. I then wrote to the council to consolidate my opposition for which an acknowledgement was received.

As well as the pro-development councillors eagerness to sell this land, to one of the councillors relatives without any tender process or community consultation, I feel senior management has sought to influence the opinion of council staff and the community on this issue.

I feel Dr Griffin's outright support for this proposal before community consultation presents a conflict of interest and the need for further investigation on his relationship to developers.

Yours sincerely,



David Stoneman.

Submission 229

23 January 2005

Office of the Commissioner
Tweed Shire Council Inquiry
Locked Bag 5045
SYDNEY NSW 1235

Dear Sir,

Submission

I hereby set out a number of matters for consideration, grouped in general accordance with the terms of reference of the inquiry.

1. **The elected representatives have not carried out their responsibilities in an environment free from conflict of interest. Some examples are:**

(a) Preservation of Public Assets.
The Community Hall at Kingscliff has been allowed to deteriorate to a very poor state, despite repeated calls by ratepayers for proper maintenance to be undertaken. Funds have only belatedly been promised for the work and Councillor Lynne Back has recently called publicly for the removal of the Hall. The conflict of interest arises because the Hall stands opposite a new development (Paradiso) and there is a widely held belief amongst local residents that there has been a 'hidden agenda' to allow the Hall to deteriorate to a point where it could be condemned and demolished to improve the beach view for new developments.

Similarly, the open space at Cabarita (now the subject of an attempt by Council to sell to a developer) has been allowed to deteriorate to a shabby condition (e.g. the old stucco toilet block) which allows the developers to claim they can enhance a derelict area.

(b) Preservation of Native Vegetation.
When natural vegetation (trees etc) has been cleared illegally in front of new developments, the Councillors have refused to install signs as a deterrent, instead leaving it to the State Government (e.g. as happened at Casuarina).

(c) Disposal of Public Land.
Perhaps the most serious conflict of interest is the aforementioned attempt to sell public land at Cabarita to a development company whose directors are the son and son-in-law of one of the Councillors (R Brinsmead). Even if Councillor Brinsmead were to absent himself from voting on the matter, it is clear that the remaining majority block councillors and the Mayor (with his casting vote) can steer the outcome in accordance with their pro-development bias.

ROBERT L HARVEY

Submission 236

I had been intending to visit council's public gallery for several months and did eventually attend, wide-eyed, for the first time on 23rd April 2003. I was shocked by what I witnessed.
That evening I wrote a summary which became a 'letter to the editor' and was published by the Daily News on 26th April 2003.
That letter to the editor follows:

Dear Editor
It's a Wednesday evening (April 23). Outside of Murwillumbah's council offices a row of luxury European cars are parked. Inside and waiting to enter the public gallery of council chambers are a 'smart set', the hanging gold is showing.
On the agenda is Salt and the Outrigger Resort. Development Services director David Broyd presents the proposal with the recommendation for approval (an approval that is never in doubt). Independent and greener councillors James, Luff and Boyd work hard at representing community concerns about public access and parking and trees and dunes and so forth, but not without repeated, abusive and interruptive attacks from the National Party squad (with the 'smart set' in the public gallery suitably amused). An interesting question is why these majority councillors seemed so compelled to rubbish their colleges who, after all, were only scrutinising the proposal !
Councillor James presented (on a large screen) a cross section diagram of the dunes from beach to resort showing the now dunes with trees and the proposed dunes with trees. The question was then put to David Broyd (who, it seems, is the person approving this $220 million development) why dunes with trees should be bulldozed to be replaced with dunes and trees - particularly as replacement trees rarely succeed when ocean, beach and surf views are so prized. Well, this observer listened and waited, and did hear a fudge or two, but nothing convincing, $250,000 for re-vegetation and a $50,000 bond - which is really just pocket money for these players.

Submission 200

So the proposal was put, voted on and passed, the public gallery emptied, Council adjourned. The concluding scene in the foyer resembled a Hollywood party with long rounds of oh so many congratulations and hand shaking and back-slapping and double cheek kisses.

3

And then these rather overfriendly frivolities were taking place between our elected community representatives of the National Party persuasion and the 'Ray Group' developers.
Richard Hann
Murwillumbah

On 2nd March 2004 for the Tweed Monitor I added the following:

"The public gallery for the council meeting of 23/4/03 was unusually well attended, Salt was controversial. The Ray Group (Brian and entourage) were very distinguishable in there fine evening wear. It was councillors Polglase, Lawrie and Beck (there may also have been others) who I saw enter the foyer for their 'embracing'.....".

I would now add, again, that there is no doubt in my mind that I saw Cr Polglase, Lawrie and Beck engaged in acts of excessive, joyful back-slapping, familiarity with members of the Ray Group that went far beyond the usual neutral politeness that I would have expected of civic officers who should, we can naively suppose, have been at arm's length from those who would profit from their decisions. The first councillors to enter the foyer were Polglase, Lawrie and Beck, their scene of amoral cosiness was offensive, I left the building.

I returned to sit in the public gallery for most of the meetings that took place from May 2003 to August 2003, and since then less frequently.
I will summarise those many hours of observation and also recall a few sharp moments. I will not make any particular mention of certain high profile Kingscliff developments as these would be best covered by Kingscliff residents who were also present at the time.

WHAT I have seen at council meetings is something rotten.

Submission 200 - Continued

DEVELOPMENT APPROVAL

Things that I see as being not done by the Tweed Shire Council in relation to Form 4 – Notice of Determination of a Development Application. APPENDIX 11.5

6d Final inspection prior the Occupation of the building

7 All retaining work shall be completed to the satisfaction of the Principal Certifying Authority prior to the start of work.

8 All necessary on site boundary retaining shall be carried out prior to the start of work on the building proper, with details of the retaining wall being submitted to Council for approval prior to the start of work.
The first retaining wall build 18 months after the house was built.
The retaining wall behind the main house has never been built.
Only a Rubble Garden wall 5 metres high, constructed by the residents of number 16 at the same time as illegal driveway was poured. The wall was described by the Geotech Engineer as "a accident waiting to happen" and he could not believe that Council would allow it on safety grounds.

16 How was an Occupation Certificate obtained without relevant Compliance Certificates?

18 Property at No 16 had an illegal dirt driveway for three years before an illegal concrete driveway was constructed which did not comply with Council's own Access Rules.

20 Surface water drainage has not been addressed. The rock walls have no aggregate, drainage gravel or filter cloth installed.

22 On windy days, the dirt from the illegal driveway blows into my pool and house and the noise of the four wheeled drive scrambling up the drive is a nuisance. Also the mud builds up in front of my house when it rains.

24 After five years the TSC says that the driveway at number 16 is still under construction yet mud pours onto the street and no sedimentary control devises are installed or asked for by Council.

38 There are no pipes to take surface water out to the street and no dish drains at the top and base of all embankments.

39 No retaining walls were built prior to the construction of the house. Only one was built and that was 18 months after the construction of the house. This wall had no agpipe, drainage stone, filter membrane, and I suspect no Engineers Certificate either.

Tabled Document 44

April 1999

Excavator cut access track to 16 Murraba Cres. Tweed Heads, next to my residence. To do this they excavated ten metres of the council nature strip that was supporting my back yard and swimming pool. The embankment had already been cut by Council to form part of its road reserve some years prior. However on this occasion the excavator cut it at an even steeper angle. Sometime later I spoke to one of the owners of number 16. She informed me her partner worked away and would sort out the retaining wall when he returned.

In brief, they made a number of excuses i.e. they overspent on the house construction and the local concreters are too busy to complete the job. Some months later they purchased a four-wheel drive vehicle and told me it (the 4x4) has solved all their problems. There was no need to concrete the drive because that can now drive up the their house.

After three years I was becoming more concerned with the excavation in front of me pool. The following is a detailed summary of events that have occurred since the 18th of March 2002.

18.3.02

Letter to Tweed Shire Council from my Solicitor Joe O'Neill asking for an urgent on site inspection of the excavated area in front of my pool. ***SEE APPENDIX 1***

19.4.02

The Council made no contact with me in relation to an inspection. Instead they sent a letter informing me the owners of number 16 had been advised the access designed has yet to be concreted and the approved retaining wall are also to be constructed in accordance with the drawings and that the engineering design of the driveway and retaining structures were certified by Ian Hill and Associates a subsidiary of Cardno-MBK of the Isle of Capri on plan number MJ2133. If I were to have any further inquires I was to contact Trevor Harris of the Councils Engineering Division. ***SEE APPENDIX 2***

24.4.02

I rang Trevor Harris and requested copies of the Engineering Drawings. He informed me that I could go to Mullwillimbah, which is 40 kilometres from my residence, and I could only view the documents. I was not able to obtain the documents or a copy of it. I asked him the reason and he informed me that is was private information of the residents of number 16. I told him I only wanted the retaining wall diagrams to deal with my property and the council's nature strip, which had been excavated. Harris became agitated and informed me that it was not his department and that I should be dealing with Building Services. I then rang Ross Cameron of that department. He informed me that it was not his department either and that I should contact the engineers. I informed him that the engineering department informed me to contact his department. Cameron then agreed to look for the plan. Later I contacted him by telephone him to ascertain if he had located the plans. H appeared to be in a bad mood and he informed me he didn't have time to look for the plans in his normal work time and he would have to look for them in his own time. He then told me not to ring him again and that he would ring me when he located them. He never contacted me.

9.5.02

I contacted my solicitor and informed him I had not been able to obtain the plans. He advised me to complete Freedom Of Information forms and submit them. I completed the form ***SEE APPENDIX 3*** as far as I could and contacted Brian Donaghy who in the Manager of Administration Services /Public Officer for the Tweed Shire Council for assistance with the completion of the form. After he assisted me with the information I needed to complete the form and he asked me what I was looking for. I informed him that I required some Engineering plans of a retaining wall previously described. He informed that this would not be a problem.

15.5.02

After four working days I received a letter from Donaghy informing me a comprehensive search had failed to locate the plans that I had requested. He suggested I contact Cardno-MBK who was the company that drew the plans. ***SEE APPENDIX 4.*** From information received it appears that Cardno-MBK were no longer in business.

16.5.02

I attempted to contact Donaghy however I was informed he was not at work. I spoke to a female employee and I informed her I was ringing for the above mentioned plans and that I had been informed that the plans did not exist to which she agreed. I then informed her that I was in possession of a letter from Don McAllister the manager of Planning and Design at the Tweed Shire Council (TSC) referring to the plans and also that I had a telephone conversation the Trevor Harris that I could view the plans at the TSC. I then asked her if the plans were possibly with the Engineers or Building Services. She appeared to become annoyed at my suggestion and informed me to read the letter ***(APPENDIX 4)*** that if the TSC stated that a comprehensive search had been carried out for the plans and they were not located then the TSC didn't have them.

21.5.02

I employed consulting engineers to complete inspection of excavated batter. Their findings were that a bolder retaining wall must be constructed as soon as possible. Just as the Development Consent would later say. ***APPENDIX 5***

Prior to engineers inspection a small rock edging was put in place at the bottom of the batter. After the inspection the owners of Number 16 filled in the collapsed area with dirt and mulch. Two weeks later 8.6.02 they pour the concrete driveway. This was done on a Saturday when council officers weren't working. No inspections were carried out prior and it was not constructed in accordance with the development consent or in accordance with council's driveway access to property design specifications. Also knowing full well the whole matter was being dealt with by the solicitors for both parties and the fact that council had informed them to construct the driveway and retaining walls in accordance with their development consent. The approved driveway had a three-degree slope from the outside to the middle so as to channel the large volume of water coming down their steep property out to the gutter. The illegal driveway now slopes all the water to the already fragile embankment in front of my pool. It also has a gradient steeper than council's maximum of one in four. The approved driveway allowed for a footpath in front of the property. The illegal one blocks it off. After five years the top half of the driveway is still dirt and can only be used by a four-wheeled drive vehicle. Dirt driveways are also against council specifications.

20.6.02

I received a letter from number 16 solicitors informing me that they have at all times complied with councils requirements and had sought council approval in relation to all works effected by them. ***APPENDIX 5.5***

22.6.02

I received a letter from council informing me that no objection had been raised to the concrete driveway as completed and they could not see any scouring or slumping on the batter. They inspected it after number 16 has covered the area with soil and mulch. ***APPENDIX 6***

25.7.02

Number 16 applied to modify consent. ***APPENDIX 6.5***

9.9.02

Council wrote to Number 16 to say consent cannot be modified as the work has already been done. But Council sent them a building certificate application to formalize the bottom half of the driveway. ***APPENDIX 10.5***

23.7.02

My Solicitor writes to TSC and inquires as to what action Council is contemplating in relation to the excavated area. Council reply is that there has been no change from the first letter dated 16/4/02 ***See APPENDIX 2.*** They will carry out all necessary inspections when construction of wall commences.

July 02

I spoke to Trevor Harris. He informed me that my engineers report meant nothing. It was just someone's opinion. I then spoke to my solicitor and he informed me to get a Geo Tech report

19/8/02

I then employed a Soil-Surveys Specialists in Applied Geotechnics. Their recommendation was bolder retaining wall be built across excavated area to give the batter a one vertical by two horizontal grade which would give the batter face an angle of about 26 degrees. Not 45 degrees as Council say if standard.

28.8.02

Despite photographs of excavations and two engineers reports, Council then sent me a letter saying there had been no excavation of the nature strip in front of my pool, the forty-five degree slope did not require retaining, the illegal driveway complies with Council specifications and Council will now amend the consent. This is despite the fact that they had already informed number 16 that it cannot amend consent after work has been completed. ***SEE APPENDIX 10.5***

6.9.02

After the Council's continual reference to the DA and engineers drawings, I submitted a second FOI report to obtain a copy of the documents. ***SEE APPENDIX 9.6***

9.9.02

Two weeks after the letter (9.5) that stated the driveway complied with Council specifications and there had been no excavation, I received a letter from the same Manager of Building Services Rick Patterson that indicated there had been an excavation and that the constructed driveway only generally complied with specifications. ***APPENDIX 10***

11.9.02

Spoke to Trevor Harris who informed me there had been no excavation in front of my pool. I asked him about the photographs and engineers report sent to him by my solicitor. He informed me he knew nothing about them, but stated the council may have them but he didn't know. He then asked my why I was dragging council into all this as it was a civil matter between myself and the residents at number 16. I informed that the council was involved because of the excavation of council land, which was retaining my pool. He again appeared to become agitated and informed me he couldn't help me and he hung up the phone.

12.9.02

I took the photographs described above to Murrwillumbah, forty kilometers away in an attempt to hand them to Harris personally and attempt to collect the DA and drawings. I handed Mark Cosworth the photographs and reports and requested a copy of the DA and drawings. He informed me the person in charge of FOI was on leave and the second in charge was off sick. I informed him how far I had traveled and he stated he would out the back and make some inquiries. A short time latter he returned and informed me that the engineers had the documents and would need them for another week of two. I then requested a photocopy of the documents and he informed me I would have to wait until the engineers had finished with them.

19.9.02

Six months after my solicitor requested on site inspection, Bob Missingham agreed to a meeting. I arranged for Tim Phillips of Geotech to be there to explain his report and inform Missingham what was required to be done to the excavated area. Prior to Tim Phillips arriving Missingham told me it was a good thing we were in a draught because if we got a "Gutter Raker" meaning a heavy rains I could be in trouble. When Phillips arrived Missingham asked him what needed to be done to the area and Phillips told him a retaining wall should be constructed. Missingham agreed and informed us that he would go to the owner of number 16 and informer her of the decision straight away.

29.9.02

I received a letter from Missingham. The letter contradicted what he said to both myself and Tim Phillips and stated that the recommendations were based on visual inspections only and that no physical tests had been carried out. He stated that the residents at number 16 were getting their own tests done. As always there was no mention of the DA.

APPENDIX 12

12.9.02

Rang Peter Brack in relation to the FOI documents and he informed me - that he sent them off on the previous Monday and he was sure I would get them within the twenty-one days allowed. The documents were hand delivered to my home later that afternoon, over four months after I had requested them and even then they only sent the documents that they believed I would need. All I received were the drawings to the front of the site plan with all the specifications missing. Also on the plan the illegal driveway had been hand drawn in. ***APPENDIX 6.5 AND 11***

2.10.02

Received a letter from Council stating the residents of number 16 had submitted their Geo report that stated the bank was stable and that they, the Council could not make a decision. No mention of the DA. ***SEE APPENDIX 14***

4.10.02

My solicitor requested the following documents from TSC. ***APPENDIX 15***

- Certificate of Retaining Work
- Information of all necessary retaining work carried out prior to the start of work
- Copy of Occupation Certificate
- Copy of Vehicular Access Specifications
- Certificate of Adequacy pursuant to Clause 39 of the Development Application.

The only document from the above list provided was the copy of the Vehicular Access Specifications and this took five weeks to obtain.

30.10.02

My Solicitor sent a copy of the subsurface soil tests carried out on the 22.10.02 to the TSC. This report supported the first two engineers reports and further stated that the engineers have serious concerns about the long-term stability of the bank. ***APPENDIX 18***

8.11.02

Letter from TSC indicating they had received my invasive Geotech Report. ***APPENDIX 20***

5.12.02

Bob Missingham from TSC wrote to me stating that the report provided does indicate that the embankment needs some form of stabilization however the council is unsure of who has the responsibility to stabilize it. According to the letter the owners of number 16 had shown council documents which indicated that the contractor who had constructed the access did not over excavate the embankment and also that it was stable for many years prior to an allegation that I removed vegetation from it. The letter continued that Council was not prepared to force the owner of number 16 to make any correction action to the embankment until the reason for its instability are clearly established. As always there was no mention of the DA and it was eight months after council told the residents at number 16 they had to construct the wall in accordance with the DA. ***APPENDIX 22.***

9.12.02

My solicitor requested for a copy of documents. On the 18.12.02 a letter from the TSC stated that the council do not have them. They were only shown them by the residents at number 16. ***APPENDIX 23***
On January 3, 2003 legal advice given to me was I should take the matter to the full Council. I contacted the Mayor Warren Polglaise on 24.1.03 and he agreed to have a site inspection. He inspected the excavated area and agreed it should have been retained. He came into my home and I showed him the DA and the Engineers Reports. I told him that Council had been shown documents by the residents at number 16 that indicated t the contractor who constructed their access did not over excavate the area and also told Council what the friends of the residents at number 16 had stated about me removing vegetation. The Mayor informed me the he was a Builder and Developer and that my engineers reports and what some neighbor or excavator driver said was not worth a pinch of shit. The only thing that counted is that Development Consent. He further stated that it was too late to change it and that it had to be obeyed as it was the law. He further stated that the TSC Engineers and Building Services had stuffed it up and they were going to have to fix it. He further stated that they will try hard not to be proven wrong but the last thing they want is the big boys coming from Sydney investigating them.

By the big boys I believe he was referring the staff to the Ombudsman's Office.

14.2.03

I received a letter from the Mayor. ***APPENDIX 24.*** The letter indicated the driveway to number 16 was not constructed on any of my property and the batter has been assessed as satisfactory. There was no mention of the DA which he had previously told me was the law and had to be obeyed.

27.2.03

I again wrote to Rick Patterson, Manager of Building Services and repeat all the facts and informed him of the Mayors beliefs and his view of the DA. ***APPENDIX 25***

8.4.03

Paterson replied that Council did not propose to take any further action. As always no mention of the DA. He also encloses copies of letters from Council to me however he neglected to send me the most important one of all. The letter that says the residents at number 16 have been advised to constructed a retaining wall in accordance with the DA. ***APPENDIX 27***

4.6.03

Employed B and P Surveys to investigate the matter. They produced a report for council asking specific questions about the DA. The letter also explains the whole situation and asks that if it is in the public interest the council have the power to enforce the condition of the DA. ***APPENDIX 29***

12.6.03

I received a letter from the General Manager of the TSC stating he had received the report and had passed it to David BIYD, Director of development Services to pursue the matter. ***APPENDIX 30***

8.8.03

B and P Surveys wrote to Council requesting a formal response to their 4.6.03 letter. ***APPENDIX 31***

26.8.03

B and P Surveys received a response from Council. Finally a reference is made to the approval and that the driveway had not been constructed exactly as approved, but the driveway was acceptable in terms of Councils Access to Property Policy and Design Requirements, and that the batter was stable and the retaining wall was not required. The letter also stated that there had been consistent professional opinion by Council Engineers that the embankment was sufficiently stable and did not require further retaining measures.
This appears to contradict the very first Council report when they originally looked at the situation. ***SEE APPENDIX 2.*** This letter-dated 16.4.02 informed the residents of number 16 in no uncertain words that they had to construct the approved retaining wall in accordance with the drawing. Furthermore in a subsequent letter SEE APPENDIX 7 the Council state they will carry out standard inspections of the retaining wall.

The letter ***APPENDIX 9.5*** from the Manager Building Services states there has been no excavation.

The letter ***APPENDIX 10*** states there has been excavation but no wall is necessary.

19.9.02

The Works Manager informed myself and the Soil Survey Engineer that the residents at number 16 have got to put up a retaining wall.

5.12.02

Bob Missingham, Works Manager stated the bank needed some form of stabilization. After three Engineers reports that stated a bolder retaining wall was needed. ***APPENDIX 22***
Mayor Polglaise's report stated the batter had the appearance of being unstable. ***APPENDIX 24***

22.10.03

Eight months after Mayor Polglaise informed me that the DA was the law and had to be abided by, I formally requested the matter be brought before the full Council for determination. The item in question, condition 7, 8 and 39 of Development Consent K99/027 required the construction of retaining walls as per approved plans. I enclosed a Geotechnical report to support my claim. ***APPENDIX 33.5***

11.2.04

Spoke to a sitting of the full Council at public access and provided all members of Council with copy of DA Engineers report and photographs of collapsed embankment. ***APPENDIX 34.*** Brian Donaghy Manager Administration handed out the material and seemed to think there was something funny about the whole episode.
When the matter was before Council, it was made confidential. The reason given was the "personal hardship of any resident or ratepayer" ***APPENDIX 34.5***

9.7.04

I received a Resolution from Council stating that while the driveway was not constructed exactly as approved, the driveway as constructed is acceptable in terms of Council Access to Property Policy and Design Requirements and the batter was considered stable.
After reading the letter I contacted Councilor Browynne Luff a Solicitor and asked her some questions. She informed me that the matter was confidential however she told me that she stood up and asked why the Council was sticking its neck out for the people at number 16 because if Mr. Rouse takes the matter to the Land and Environment Court the TSC was going to the liable.

27/3/04

Shortly after the councils resolution the residents at-number 16 constructed a garden across part of the area that was excavated in front of my home, planted shrubs and covered the area with mulch. I can only presume that Council advised them to do this as Bob Missingham had indicated in a letter SEE APPENDIX 22 the invasive tests did indicate that the embankment needed some form of stabilization. All three reports did not say SOME form of stabilization. The ALL recommended a bolder wall be constructed as did the Development Consent. This wall was to be constructed as soon as possible.

Section 4 Addendum 4.3.2.1

VOLUME 1
07/07/99
Terranora Village Shopping Centre - Payment of Development Consent Contributions
14/07/99
Halliday and Stainlay - Tony Smith addressed meeting in relation to recent press reports concerning the firm.
21/07/99
National Native Title Claim by the Kombumerri
Tumbulgum Drainage Scheme
Building without Approval - Lot 15 DP 778624 - 61 Kirbys Rd, Limpinwood
04/08/99
Cabarita Gardens Estate - Completion of Bonded Works
Unauthorised use of Land as Depot - Lot 4 DP 260418 - Urlip Rd, Bilambil
Alleged Unauthorised Disposal of Fill (mixed waste) - Lot 5 DP 848717 - Piggabeen Rd
Contract No. EC99070 - Supply & Laying of Asphaltic Concrete at Various Locations
Management of Biosolids from Banora Point Sewage Treatment Plant
Supply of Tandem Axle Tipping Truck - Tender No. EC 99057
Southern Cross University Campus at Tweed Heads
Community Health Building, Kingscliff
18/08/99
Proposed Re-development of Kingscliff Beach Holiday Park
Building without the prior approval of Council - Lot 3 DP 739810 - 18 Scenic Drive, Bilambil Heights
Fire Control Centre
Alleged Unauthorised Disposal of Fill (mixed waste) - Lot 5 DP 848717 - Piggabeen Rd
01/09/99
Terranora Resort/McAllisters Rd - Drainage Works
Overdue Rates - Pamela Beecheno (Love) - Assessment No 1-9330/5
Kingscliff Library Construction Tenders
Selection of a Program Manager for the Tweed Shire Town Centres Committee
22/09/99
Forest Hill Development - Duranbah
Tweed Shire Council v Marshall and Bertoli - Costs
Piggabeen Sports Complex - Land Development
Floodplain Management Program - Voluntary Purchase 1999/2000
Contract EC 99060 - Slashing of Roadside Verge Areas
Licence to Operate Commercial Canoe activities on Clarrie Hall Dam
Building without Approval - Lot 2 DP 846104 - Tyalgum Rd, Eungella
Community Health Building, Kingscliff
06/10/99
Dwelling Built without Approval - Lot 6 DP 790822 - Smiths Creek Rd, Uki
Tender EC99075 - Supply and Delivery of One Tonne Excavator
EQ99093 Supply of Ready Mix Concrete
Contract EC98143 - 23 Lot Residential Subdivision at Piggabeen Road Sports Complex, West Tweed Heads
Besef Properties Development Application Eastern Drainage Scheme - Drainage Easement across Lake 'Kimberley'
Cabarita Seaside Village Estate - Ownership of Dogs Contrary to Development Consent S94/129
Building without Approval - Lot 31 DP 835754 - 144 North Arm Road, Murwillumbah
Building without Approval - Lot 31 DP 34198 - Ingram Place, Murwillumbah
03/11/99
Stormwater Drainage Defects to Stages 1 & 2 - Black Rocks Estate Lots 179 & 180 DP 755721 Overall Dr, Pottsville
Pottsville Waters Estate - Open Space
Kings Forest Review
Alleged Unauthorised Use of Premises for Purpose of a Brothel
Sale of Land for Overdue Rates
EQ99099 - Re-roofing of Hillcrest Avenue and Marana Street Water Supply Reservoirs, Tweed Heads
EQ98163 - Supply of Butterfly Valves and Plug Drain Valves for Council's Bray Park Water Treatment Plant
Unhealthy Living Conditions - Tumbulgum
Bilambil Sports Grounds/Complex
Forest Hill Development - Duranbah
17/11/99
Unauthorised Filling at Lot 1 DP 779976 - Gray Street, Tweed Heads
Southern Cross University Campus at Tweed Heads
Unauthorised use of Land as Depot - Lot 4 DP 260418 - Urlip Rd, Bilambil
01/12/99
Purchase of Part of Lot 2 DP 749336 - Creeks St, Hastings Point, for Creek St Sewage Pumping Station Augmentation
Expressions of Interest for the Design and Construct of Uki Sewage Scheme
Tweed River Entrance Sand Bypass Project
Continuing Noise Matter - Mr Malcolm Jackson, Tweed Valley Boarding Kennels
15/12/99
Pottsville Quarries Pty Ltd - Lot 6 DP 840977 - Pottsville Rd, Pottsville
Clearing and Building Works within Lot 3 DP 865049 and Lot 500 DP 727420 - Kings Beach
Public Wharf, River Terrace, Southern Boatharbour
Unauthorised Building Work - Lot 37 DP 869853 - 6 Environmental Dr, Pottsville
Unauthorised Building Work - Lot 38 DP 869853 - 4 Environmental Dr, Pottsville

Sale of Property Zoned 1(b2) Agricultural Protection Being Part of Lot 26 DP 615931 - Bartletts Rd, Eviron
Pottsville Waters Estate - Open Space
Bilambil Sports Grounds/Complex
19/01/00
Payment of Rural Road Development Contribution - Woodhelvin Pty Ltd
CSR Quarry - Terranora
Payment of Council Rates and Water Accounts at Australia Post Office - "Postbillpay"
Proposed Lease of Murwillumbah Saleyards to Private Operators
Council Newspaper - Tweed Link
Notice of Motion - Cr Carroll
Supply and Delivery of a Road Sweeper - EC99113
Lot 2 DP 877100 Lone Pine Road, Doon Doon - Electricity Supply
Trade Waste Effluent - Hastings Point Sewage Treatment Plant
Proposed use of Council Building for Permanent Function Licence - Cabarita Beach Surf Life Saving Club
Unauthorised use of Land as Depot - Lot 4 DP 260418 - Urlip Rd, Bilambil
Overdue Rates - Pamela Beecheno (Love) - Assessment No 1-9330/5
Floodplain Management Program - Voluntary Purchase 1999/2000
Unauthorised Filling at Lot 1 DP 779976 - Gray Street, Tweed Heads
02/02/00
Review of Payment/Collection Options
Business System Consultancy Project
Defective Roof Water Disposal
Notice of Rescission - Tweed Link
Notice of Motion - Tweed Link
16/02/00
Road Relocation - Crookes Valley Road
Mobile Telephone Installations - Banora Point & Kingscliff Reservoirs
Compulsory Acquistion - Land Eviron Cemetery and Quirks Quarry Site
Request to Purchase Property at Lot 2 DP 705781 Hawkens Lane, Condong
VOLUME 2
01/03/00
Roadside Stall at Lot 1 DP 592650, Pacific Highway, Fernvale
Overdue Rates - Pamela Beecheno (Love) - Assessment No 1-9330/5
Correspondence from Halliday and Stainlay
Building Works Without Prior Council Approval - Lot 3 DP 875663 Mt Burrell Rd, Mount Burrell
15/03/00
Road Relocation - Crookes Valley Road
Unauthorised Use of Land as a Depot at Lot DP 260418 Urlip Rd, Bilambil
Letter from Mr J Webster
Supply of Three (3) only Crew Cab Tipping Trucks with Rear Lifter and Tow Bar
Tender EC99126 - Linemarking
Questions Submitted by J Duyker
Roadside Stall at Lot 1 DP 592650, Pacific Highway, Fernvale
05/04/00
Pottsville Quarry
Modification of Development Consent S96/135 - Kings Beach Stage 1 - Lenen Pty Ltd
Interpretation of Clause 31 of the Tweed Local Environmental Plan 1987
Contract No. EC - 24 Lot Subdivision Piggabeen spots Complex
Mobile Telephone Installations - Kingscliff Reservoir
Pottsville Waters Open Space
Roadside Stall at Lot 1 DP 592650, Pacific Highway, Fernvale
19/04/00
Marana Park estate - Stormwater Discharge into RE and B Garbetts Property
Possible Acquisition of Land Surrounding Lake Kimberley - DA K99/1682 - Bradshaw Development Pty Ltd
Breach of Development Consent 88/372 - CSR Readymix Quarry, Terranora
Request of Purchase Property Owned by JT & LB Duyer, Lot 3 DP 705781, 158 Hawkens Lane, Environ
Request of Purchase Property Owned by F & D Moller, Lot 2 DP 705781, 157 Hawkens Lane, Condong
Erection of Tepees and Associated Structures - Lot 3 DP 878542 Hopkins Creek Rd, Chillingham
03/05/00
EC200012 - Re-roofing of Marana, Walmsley and Country Club Reservoirs
17/05/00
Possible Acquisition of Land Surrounding Lake Kimberley - DA K99/1682 - Bradshaw Development Pty Ltd
Chinderah Bay Marina Proposed Road Closure
07/06/00
Sale of Land for Overdue Rates
Submission of Interest for Use of Council's Wardrop Valley Land - AQ2000/41
EC200026 - Supply and Delivery of Fuels
EC200036 - Supply of Lubricating Oils
EC200031 - Supply of Readymix concrete
Land Acquisition - Crooks Valley Road
EC200035 - Supply of Tyres and Tubes
EC99145 - Duffy Street Wetland Construction
Consultancy for the Design and Documentation of a Bridge over Rous River at Boat Harbour
EQ200027 - Supply of Selected materials

EC200038 - Electricity Supply Contract
Dilapidated Dwelling - Tumbulgum
Building works Without Council Approval - Lot 3 DP 875663 Mt Burrell Rd, Mount Burrell - Owner: Mr D Harris
Unauthorised Building Work - Lot 37 DP 869853, 6 Environmental Drive, Pottsville
Call for Expressions of Interest to Operate Markets - Kingscliff, Pottsville, Knox Park, Murwillumbah & Recreation Reserve
21/06/00
Sale of Land for Overdue Rates
Tender EC200057 Manufacture, Supply and Delivery of 450 dia Pressure Pipe
EQ200030: Licence to Operate Water Based activities on Waterways in the Tweed Shire Area
Coastline Hazard Definition Study (tenders)
EC200026: Supply and Delivery of Fuels
05/07/00
Tweed Sporting Shooters Association - Use of Council's Duroby Quarry
EC200038 Electricity Supply Contract
EC200038 - Electricity Supply Contract
19/07/00
General Managers Review
Loan Program
Tweed Town Centres Committee
Tender EC200040 - Supply of Bitumen Patching truck
Call for Expressions of Interest to Operate Markets - Kingscliff, Pottsville, Knox Park, Murwillumbah & Recreation Reserve
02/08/00
Cattle Dip Site Matters
16/08/00
Proposed Depot at Lot 4 DP 260418 Urlip Road, Bilambil
Arkinda Garden Centre - Unlawful Commencement of Use of Lot 7 DP 614298, Wollumbin Street, Murwillumbah
Write Off Sundry Debtor Account No 38.05890
Tweed River Agricultural Society - Proposed Museum Building
Public Roads - Risk Management
Liverpool City Council - Visit 16 May 2000
Liverpool City Council - Independent Hearing and Assessment Panel
EC200062 - Supply of Traffic Control Teams for Council Roadworks
Kingscliff Sewage Treatment Plant
Tender EC200039 - Supply of Asphalt Patching Truck
Swim Coaching and Teaching Licence - D Day
Coaching and Learn to Swim Rights and Aqua-Aerobic Rights for the Murwillumbah and Tweed Indoor Pool Complexes
Building Works Without Prior Council Approval at Lot 1 DP 101294, 1402 Numinbah Rd, Chillingham - Owner Ms Dianne Boyle
06/09/00
Chillingham and Tyalgum Community Pre School
Legal Services Tender
Council's Contribution to Construction Costs of Regional Pumping Station 3027 Shallow Bay Dr & Works & Water Supply Augmentation
EC200088 - Supply of Ready Mixed Concrete to Areas 3, 4 & 5
EC200026 - Supply and Delivery of Fuels
20/09/00
Request to Enter into a Lease at the Bob Whittle Murwillumbah Airfield
New South Wales Department of State and Regional Development - Industry Briefing Forum for Aquaculture
Application for Hardship Under Section 601 of the 1993 Local Government Act
EC200095 - Pavement Line Marking
Tender EC200087 - Supply of 14 Tonne All Terrain Crane
Contract No. EC200064 - Termite Treatment for Timber Bridges and Various Buildings
Tender EC200062 - Supply of Traffic Control Teams for Council Roadworks
Contract HC200090 - Stotts Creek Landfill - Construction of Artificial Wetlands
Contract HC200091 - Stotts Creek Landfill - Construction of Environmental Controls
Demolition of Dilapidated Dairy Bails Structure, Lot 14 DP 859811 Kyogle Road, Mt Burrell
04/10/00
Licence to Operate Water Based Activities - Jack Evans Boat Harbour
Tender EC200099 - Supply & Laying of Asphaltic Concrete at Various Locations
Tender EC200062 - Supply of All Terrain Crane
Public Jetty/Pontoon - Southern Boat Harbour
Contract No. EC2000100 - Construction of Rock Revetment along Chinderah Bay Foreshore
Kingscliff Sewage Treatment Plant
Dilapidated Dwelling - Tumbulgum
18/10/00
Illegal Helipad at Lot 13 DP 868985 Bilambil Road, (Crofters Way), Bilambil
Illegal Earthworks at Lot 4 DP 864317 Bilambil Road, Bilambil
Tyalgum Water Supply Reservoir Site
Construction of Pedestrian/Cycleway - Coast Road
Tender EC2000108 - Manufacture, Supply and Delivery of 1030mm Nominal Internal Diameter Pressure Pipe
VOLUME 3
01/11/00
Section 96 Application to Amend Consent 96/301 for the establishment of a Brothel/Escort Agency at Lot 9 DP 964880
Contaminated Land - Clean Up
15/11/00
Dumping of Waste Material on Lot 1 DP 735658, 477 Urlip Road, Bilambil

Robson v Tweed Shire Council
Development Application K99/957 for Earthworks at Lot 9 and 10 DP 822280 Kirkwood Road, Tweed Heads South
Tender EC 2000107 - Supply and Delivery of Bitumen Emulsion
Lots 63 and 64 Carraboi Terrace, Tyalgum
Commencement of Building Work Prior to Issue of a Construction Certificate - 32 Federation Drive, Terranora
Proposed New Gallery Site
06/12/00
Banora Point & Kingscliff Reservoirs - Mobile Telephone Facilities
Additions to Twin Towers Services Club Tweed Road Contribution Plan Contributions
Contaminated Land - Clean Up
Lots 63 and 64 Carraboi Terrace, Tyalgum
20/12/00
Excavation of a Dam in Acid Sulfate Soils at Lot 2 DP 612314 Pacific Highway, Chinderah
Tender AC2000125 for the Supply, Installation and Commissioning of Hewlett Packard Server and Rack
Operating Lease: Information Technology Equipment
Guarantee & Security for Road Contribution Lot 2 DP 874346 Piggabeen Road
Outstanding Rates - Assessment No. 1-9330/5 - Pamela Beecheno (Love)
Request for Naming of Road or Lookout - Hasting Points
Naming of Park - Fingal Road - "Everson Park"
24/01/01
Fruit Stall & Packing Shed at Lot 3 DP 828298 Cudgen Road, Cudgen
Legal Action by Hopkins and the Palms Village Pty Ltd
Tweed River Art Gallery
Letter from Richtech Pty Limited
Complaints - Keeping of Roosters
Contract HC200091 Construction of Environmental Control Stotts Creek Landfill
07/02/01
Arkinda Garden Centre and Café Application
Tender AC 20016 for the Supply of Compaq Deskpro Personal Computers and Compaq Armada Notebooks
Stokers Siding Dunbible Mermorial Hall
21/02/01
Roadside Stall at Lot 1 DP 567745, Lots 2 & 3 DP 208563 and Adjacent Road Reserve, Pacific Highway, Fernvale
Southern Boat Harbour - Tweed Heads - Tweed Endeavor Cruises
Bilambil Sports Ground
07/03/01
Land and Environment Court Hearing - Continued use of a Premises at 13 Wharf St, Tweed Heads, as a Brothel
Proposed Motorcycle Events - Five (5) Events per Year until 2005 at Murwillumbah Showground, Queensland Rd, Murwillumbah
Engagement of Design Consultant for Augmentation of Hastings Point Sewage Treatment Plant
Naming of Reserve at Hastings Point as "George Williams Reserve"
21/03/01
Filling of Land Undertaken without Development Consent at Lot 55 DP 5879, 25 Boomerang Street, Kingscliff
Outstanding Rates Report
Kingscliff Sewage Treatment Works
Tumbulgum Drainage Open Drain Upgrades
Screen Structure - Complaint
Dilapidated Structures - Tumbulgum
Non-compliance with Order to Fence Land
04/04/01
Unauthorised Use of Land as a Depot at Lot 4 DP 260418 Urlip Road, Bilambil
Investigation into Back Burning - Littoral Rainforest, Hasting Point
Seaside City Local Environment Study - Selection of Consultants
Purchase of New Business System
Contract Truck Haulage
Acquisition of Lots 10 to 14 DP 772294 from Est. V A Walls, Bilambil Rd, Terranora
Byrrill Creek Property: Lease and Caretaking Agreement
Bilambil Sportsground
Filling of Land Undertaken without Development Consent at Lot 55 DP 5879, 25 Boomerang Street, Kingscliff
Screen Structure Amendment to Property Description
18/04/01
Seaside City Local Environmental Study - Selection of Consultants
Audit Tender
Tender AC200118 for the Supply and Installation of Five (5) Hewlett Packard Netservers and Associated Equipment
Gales Holding
Houses on Road Reserve - Reserve Creek Road
Keeping of Roosters - Consideration of Representation
Options Cabarita Beach SLSC New Clubhouse
Seaside City Local Environment Study - Selection of Consultants
Bilambil Sportsground
02/05/01
Councillor Expenses
Legal Action - Tweed Head Endeavour Cruises - Proposed Pontoons Adjacent Public Jetty, River Terrace, Tweed Heads
Extension of Time for Building Application B1714/97 for Lot 117 DP 852450 Vail Court, Bilambil Heights
Bilambil Sportsground
16/05/01

Request to Enter into a Lease at the Bob Whittle Murwillumbah Airfield
Back Tender 2001
Investigation/Review of draft Local Environmental Study - Kings Forest
Proposed Change to Garbage Contract
25/05/01
Tweed Valley Regional Art Gallery Foundation Ltd - Current Status
VOLUME 4
6/6/01 & 13/6/01
Validity of DC96/519 for Integrated Tourist Resort at Lot 5 DP 822786, Lot 31 DP 850230 & Lot 5 DP 789875, Bilambil Heights
Piggabeen Sports Complex Sub-division
Street Parking
Contract No. EC2001-12 - Annual Supply of Chemicals for Water and Sewage Treatment Plants and Pools
EC200120 - Contract Truck Haulage
EC200119 - Contract Plant Hire
Tweed Endeavour Cruises
Contract HC 200090 Construction of Artificial Wetlands - Stotts Creek Landfill
Building without Consent Below Flood Level
Naming of Park Known as Recreation Ground - Tweed Heads
Centenary of Federation Peoplescape Project Nominations
20/06/01
Development Application 1038/2000DA for a Five (5) Lot Subdivision at Lot 1 DP1049 Clothiers Creek Road, Tanglewood
Investigation - Conduct of Council Officers in Relation to the Rezoning of land East of Old Bogangar Road
Tender EC2001-43 Manufacture, Supply and Delivery of 1030mm Nominal Internal Diameter Pressure Pipe
Access Provisions for Local Government Water Services (Power of Entry)
EC200136 Supply of Pressure Pipe and Various Water Service Fittings
EQ200149 Licence to Operate Water Based Activities on Waterways in the Tweed Shire Area
Proposed Share Farming Licence of Lot 602 DP 1001049 Environ Road to R Quirk
Commemorative Plaque
Validity of DC96/519 for Integrated Tourist Resort at Lot 5 DP 822786, Lot 31 DP 850230 & Lot 5 DP 789875, Bilambil Heights
04/07/01
Tweed Local Environmental Plan 2000, Amendment No 3 (Seaside City)
Draft Tweed Local Environmental Plan 2000, Amendment No 2 (Cobaki Lakes) - Assessment of Tenders
Tweed River Art Gallery Foundation Limited
EC2001-51 Supply of Ready Mixed Concrete
Tender EC2001-44 - Sprayed Bituminous Surfacing
EQ2001-46 - Supply of Selected Materials
18/07/01
Boulders on Foot Path in Front of 45 Lalina Ave & Building Works Not in Accordance with DA at 47 Lalina Ave, Tweed Heads
Use of Sites 13 & 15, Lot B DP 309747 Byrrill Creek Hamlet, for the Purpose of a 'Junkyard' without Development Consent
Purchase of 15-16 Philip Parade, Tweed Heads South
Loan Program
Far North Coast Weeds
Contract No. EQ2001-61 Provision of In House Consultancy Services for Investigations & Options Report for Water & Sewage Project
Chinderah Turf Farm
Southern Boatharbour - Commercial Boating Jetty
Blocked Public Access - Caroline Street, Pottsville
Bilambil Sports Complex
Commemorative Plaque
Tweed River Art Gallery Foundation Limited
01/08/01
Unauthorised Earthworks and Clearing of Lot 1 DP 1009372 Piggabeen Road, Tweed Heads West
EQ2001-47 - Quotation for Licence to Operate Commercial Fishing Chargers/Guides on Clarrie Hall Dam from 1/7/2001 - 30/6/2002
EQ2001-46 - Supply of Selected Materials: Leather Work Boots
Tender EC2001-63 Drilling & Blasting Services
Bilambil Sports Fields
15/08/01
Consultant Selection for Tweed Local Environmental Plan 2000 Amendment No 9, Fernvale/Wardrop Valley
Complaint - Rezoning of Area E plus Bolster and Abernethy Properties
Storage of Doug Moran Artworks
Use of Sites 13 & 15, Lot B DP 309747 Byrrill Creek Hamlet, for the Purpose of a 'Junkyard' without Development Consent
05/09/01
Consultant Selection for Tweed Local Environmental Plan 2000 Amendment No 9, Fernvale/Wardrop Valley
Engagement of Consultants - Preparation of Pandanus Parade/Palm Avenue Precinct Plan
Legal Advice in Response to Hickey Lawyers Letter - Contamination of 80 Marine Parade, Kingscliff ("Paradiso Development")
Excavation of Dam in Acid Sulfate Soils at Lot 2 DP 612314 Pacific Highway, Chinderah
Tweed Local Environmental Plan (LEP) 2000, Amendment No 9 - Industrial Land, Wardrop Valley
Bob Whittle Murwillumbah Airfield
Tweed Valley Regional Art Gallery Foundation Limited
Bilambil Sports Complex - 2001/2002 Rates
Microsoft Licence Fees
Tender EC2001-79 - Supply of Tray Body Truck with Crane
Proposed Bridge over Rous River - MR399 Numinbah Road, Boat Harbour
History of the New Gallery and the Selection of an Architect

19/09/01
Unauthorised Works - Kings Forest
Former Pottsville School Land - Expanded Use for Community Purposes
Banora Point Community Centre - Community Survey
Tweed Local Environmental Plan 1998
Shires Association - Paid Maternity Leave
EC2001-86 Supply and Lay Asphaltic Concrete
Biosolids - Banora Point Sewage Treatment Plant
Excavation of Dam in Acid Sulfate Soils at Lot 2 DP 612314 Pacific Highway, Chinderah
03/10/01
Building Works without Prior Council Approval at Lot 2 DP 839857 18 Gray St, Tumbulgum
Recovery - Penalty Infringement Notice Amount
Erection of Structure without Council Prior Approval - Annexe
Casuarina Beach - Notification to Purchases
17/10/01
Planning Consultancy - Draft Tweed Local Environmental Plan 2000, Amendment No 9 - Lot 6, DP 619717, Fernvale Road
Lapsing of Subdivision Consent S95/68 - Lot 1 DP 386862 & Lot 79 DP 755715 Campbells Lane, Dungay
Banora Point Community Centre
Tweed Heads Central Area Planning
Fencing of Land - Lot 7 DP 617266
Banora Point Community Centre - Community Survey
Casuarina Beach - Notification to Purchases
VOLUME 5
07/11/01
Unauthorised Works - Kings Forest
Banora Point Community Centre - Community Survey
Banora Point Community Centre
Seaside City Local Environmental Study and Draft Local Environmental Plan - Consultants Submission and Fees
Illegal Clearing of Vegetation at Lots 5 DP830660 and Lot 167 DP755701 Ozone Street, Chinderah
Seaside City - Local Environmental Study
Building without Development Consent - Lot 2 DP 634164 53 Tatyewan Avenue, Uki
Casuarina Beach - Excavations
21/11/01
Draft Development Control Plan No 46 and Plan Management - South Kingscliff Gateway
Approval of 46 Weeks Leave Without Pay - Mr Greg Newland
Unauthorised Works - Kings Forest
Illegal Clearing of Vegetation at Lots 5 DP830660 and Lot 167 DP755701 Ozone Street, Chinderah
Casuarina Beach - Excavations
05/12/01
Prohibited Use of Land for the Purpose of a Brothel, Known as Lot 24 DP4043, No 40 Enid Street, Tweed Heads
Contractual Conditions of Senior Staff
Bilambil Sports Fields
Marine Parade Kingscliff Pedestrian/Cycleway - EC2001-107
Contract No EC2001-109 - Preferred Minor Works Contractor for Water and Works Unit Construction Activities
Billinudgel Nature Reserve - Closure of Jones Road
Contract No EC2001-117 Design and Installation of a Surface Mixer for Destratification of Clarrie Hall Dam
19/12/01
Review of Consultant Submissions to Prepare Draft Tweed Local Environmental Plan 2000 & Environmental Study (Black Rocks Estate)
Aboriginal Land Claim - Kombumerri
Draft Cabarita Precinct Plan and Redevelopment of Cabarita Surf Life Saving Club
Purchase of Bilambil Sports Complex
Industrial Land Development - Wardrop Valley
Kingscliff Sewage Treatment Plant Relocation/Augmentation EQ2001-105
23/01/02
Complaint - Approval Process - Murwillumbah Central Rotary Club Application, 24 Tumbulgum Road, Murwillumbah
Correspondence - Department of Local Government
EC2001-129 Supply and Delivery of Liquid Environmental Oxygen to Gollan Drive, West Tweed Heads SPS
EC2001-112 Supply of Centrifugal Air Blower - Banora Point Sewage Treatment Plant
The Anchorage - Harbour Lease
Purchase of Lot 2 DP4043, 21 Beryl Street, Tweed Heads for Beryl Street Sewage Pumping Station Relocation
Purchase of Part of Lot 2 DP 537490 Walmsleys Road, Bilambil Heights
Burringbar Sewage - Land Acquisition
06/02/02
Illegal Clearing of Vegetation at Lot 5 DP 830660 & Lot 167 DP 755701 Ozone Street, Chinderah
Illegal Clearing - Lot 156 DP 628026, Creek Street, Hasting Point
Erection and Operation of a Roadside Stall at Lot 2 DP616751 Cudgen Road, Cudgen
Tweed Local Environmental Plan 1998
Extraction and Utilisation of Landfill Gas, Stotts Creek Landfill
20/02/02
Clearing of Vegetation within Lot 500 DP 727420 (Crown Land) - Casuarina Beach
Removal and Disposal/Reuse of Biosolids from Banora Point Sewage Treatment Plant
Commercial Operations on Clarrie Hall Dam: 2001/2002
Bilambil Sports Complex
Illegal Clearing - Lot 156 DP 628026, Creek Street, Hasting Point

06/03/02
Bilambil Sports Club
Bilambil Sports Field
EC2002-3 Supply and Laying Asphaltic Concrete to Terranora Road
Legal Action - Dangerous Dogs
20/03/02
Lizzio Subdivision - Settlement of Land in Carmen Place and Marina Court, Condong
Vehicles Associated with Motor Showroom at Lot 2 DP 829670 Boyd Street, Tweed Heads Parked/Displayed in Brett & Boyd Streets
EC2002-12 Manufacture, Supply & Delivery of 450mm Pressure Pipe
Outstanding Water Account
EQ2001-61 Provision of In-House Consultancy Services for the Water and Sewage Projects
Sale of Proposed Lots 1, 3, 5 & 7 Lease of Proposed Lots 2, 4, 6 & 8 Created by Road Closure Plan at Chinderah Bay Road, Chinderah
Illegal Clearing - Lot 156 DP 628026, Creek Street, Hasting Point
VOLUME 6
03/04/02
Illegal Clearing - Lot 156 DP 628026, Creek Street, Hastings Point
Legal Action
Public Liability Insurance Claims
Canvas and Kettle Restaurant Lease
Banora Point Caravan Park - Illegal Activities
17/04/02
Sale of Proposed Lots 1, 3, 5 & 7 Lease of Proposed lots 2, 4, 6 & 8 Created by Road Closure Paln at Chinderah Bay Road, Chinderah
Review of Determination of Section 96 Application to Amend DC 0473/2001DA for Erection & Operation of Roadside Stall, DP616751
Far North Coast Weeds
Unauthorised Works in Nullum Street Road Reserve in Murwillumbah
Acquisition of Lot 17 Lakeview Parade, Tweed Heads South
Compulsory Acquisition by RTA of Lot 4 in DP412404, 4 Parkes Drive, Tweed Heads
Dilapidated Veranda - 47-49 Bawden Street, Tumbulgum
Tweed Valley Art Gallery Foundation Ltd
01/05/02
Turning Bay - Orient Lane Kingscliff
EC2002-29 Manufacture, Supply & Delivery of 250mm x 300mm Pressure Pipe
Proposed Footpath & Associated Works at Chillingham EC2002-11 & Construction of Proposed Footpath at Village of Chillingham
Illegal Operation of Garage/Carport Structure - 31 Creek Street, Hasting Point
New Art Gallery Budget
15/05/02
Tweed and Coolangatta Tourism Incorporated (TACTIC)
EQ2002-39 - Supply and Delivery of Ready Mixed Concrete
Industrial Land Development
Alternate Waste Technology
Unauthorised Building - Lot 38 DP 869853, 4 Environmental Drive, Pottsville - Owners: Young, Young, Young and Payne.
Unauthorised Building Work - Lot 37 DP869853, 6 Environmental Drive, Pottsville - Owners: R&B Lowe
Future Management - Murwillumbah Auditorium/Canvs & Kettle Restaurant
Sale of Proposed Lots 1, 3, 5 & 7 Lease of Proposed lots 2, 4, 6 & 8 Created by Road Closure Paln at Chinderah Bay Road, Chinderah
Tweed Valley Art Gallery Foundation Ltd
29/05/02
Council Response to the Draft Bulford Report Part 2
Tweed Valley Regional Art Gallery Foundation - Loan
Possible Court Action - Tweed River Regional Art Gallery Foundation Limited
05/06/02
DA 1338/2001DA for the Erection of a Rural Workers Dwelling at Lot 1 DP772338, 68 Simpson Drive, Bilambil
Casuarina Beach Dune Management Plan
EC2002-42 - Tenders for the Supply of Concrete Truck Haulage
Tenders - Building Works, Cabarita/Bogangar Community Centre
Illegal Building Work
19/06/02
Tweed Shire Community Based Heritage Study
Industrial Land Development
EC2002-36 Supply of Pressure Pipe and Various Water Service Fittings
EC2002-50 Annual Supply of Chemicals for Water and Sewerage Treatment Plants & Pools
EQ2002-48: Supply of Selected Materials
EC2002-35 Supply of Tyres and Tubes
EC2002-45 Supply of Lubricating Oils
Contract No. 0100690 Design and Construction of Uki Sewage Treatment Plant
Contract EC2002-66 - Supply of Retail Electricity
EQ2002-59 - Quotations for Licence to Operate Water Based Activities on Waterways in Tweed Shire for the Period 1/7/02 - 30/6/03
Murwillumbah Civic & Cultural Centre Auditorium Tender for Caretaker/Manager
VOLUME 7
03/07/02
Unauthorised Works at Lot 1 DP 121377 No. 363 Carool Road, Carool - Penny Ridge Resort
EQ2001-61 Provision of In House Consultancy Services for Water and Sewerage Projects
Contract No. 0100689 Construction of Sewerage Reticulation Network, Pump Stations and Rising Mains for the Village of Uki
Houses on Road Reserve - Reserve Creek Road

Unauthorised Building - Lot 38 DP 869853, 4 Environmental Drive, Pottsville - Owners: Young, Young, Young and Payne.
Cabarita Beach Surf Life Saving Club Section 94 Contributions - New Clubhouse
Public Access Restriction - Dilapidated Structure
17/07/02
Works Illegally Commenced for Deferred Commencement Consent 0635/2001DA Installation of Pontoon, Lot 20 SP63869 Gollan Drive
Class 1 Appeal in Land & Environment Court of NSW, in matter of Council's determination of DA02/0474 for a brothel at Lot 1 DP610969
Seaside City - Planning Processes and Finalisation of Contract with the McInnes Group
EC2002-49: Supply of Pavement Linemaking Services
EQ2002-69 Maintenance Services to Council's Crams Farm and Clarrie Hall Dam Picnic Areas
Tenders for Bulk Earthworks - New Art Gallery
Expressions of Interest - Tenders for New Tweed River Art Gallery
07/08/02
Unauthorised Door/Rave Parties at Lot 5 DP 785565, Kirbys Road, Limpinwood
Unauthorised Works - Kings Forest
Development Consent S97/54 - Cobaki Lakes
Kings Forest and Narui Noran Pty Limited
Contract EC2002-71 - Provision of In-House Consultancy Services for Various Investigations & Option Reports for Water & Sewage
Augmentation of Hastings Point Sewage Treatment Plant - Variations
EC2002-53 Supply of Traffic Control Teams for Council Roadworks
EC2002:86 Manufacture, Supply and Delivery of 2500m of 300mm Diameter Pressure Pipe
Development Application 1338/2001 for the Erection of a Rural Workers Dwelling at Lot 1 DP772338, 68 Simpson Drive, Bilambil Heights
Building Works without Prior Approval of Council at Lot 84 DP32024, 62 Lalina Avenue, Tweed Heads West
Lizzio Subdivision - Receipt and Processing of Application for Dwelling on Allotments
21/08/02
Appointment of Consultants to Prepare Draft Tweed Local Environmental Plan 2000, Amendment No 14 (Kingscliff STP)
Casuarina Beach Approvals and the Environmental Protection 7(f) Coastal Zone Lands
Notice of Intention to Demolish Rural Worker's Dwelling at Lot 1 DP 772338, 68 Simpson Drive, Bilambil Heights (Mr B Garbet)
Cabarita Community Building - Contract Caretaker
Further Information to Confidential Item 3 - Cabarita Community Centre - Contract Caretaker
Development Application 1338/2001 for the Erection of a Rural Workers Dwelling at Lot 1 DP772338, 68 Simpson Drive, Bilambil Heights
04/09/02
Illegal Clearing of Lot 14 section 5 DP 14895 Seaside City, South Kingscliff
EQ2002-93 Grazing Licence Uki Sewage Treatment Works Lot 2 DP 550508 Smiths Creek Road, Uki
Supply and Delivery of Pre-stressed Concrete Piles and Planks for Boatharbour Bridge
EQ2002-58 Quotations for the Licence to Operate Commercial Fishing Charters/Guides on Clarrie Hall Dam from 1/7/02 - 30/6/03
EQ2002-58 Quotations for the Licence to Operate Commercial Sight Seeing Charters on Clarrie Hall Dam from 1/7/02 - 30/6/03
Contract EC2002-82 - Tweed Shire Coastline Management Study and Management Plan
Illegal Building Work - Lot 3 DP 598204 Wooyung Road, Wooyung
Unauthorised Building at Lot 38 DP 869859, 4 Environmental Drive, Pottsville (Owners: RW, GM, DR Young & KN Payne)
11/09/02
Establishment of Residential Subdivision Comprising Nineteen (19) Lots & Remediation Works at Lot 70 DP1031933, Tweed Coast Road
Residential Subdiv. Comprising 19 Lots & Remediation Works Lot 70 DP1031933 & Tweed LEP2000 Provisions on Subdiv. in 7(f) EPZ
18/09/02
Illegal Clearing at Lot 156 DP 628026 Creek Street, Hastings Point
Vehicles ass. with Motor Showroom at Lot 5&6 Sect 7 DP27264 Prospero St, Murwillumbah Stored/Repaired in Prospero St Rd Reserve
EC2002-110 Manufacture, Supply and Delivery of 1030mm Nominal Internal Diameter Pressure Pipe
Illegal Clearing at Lot 14 Section 5 DP 14895 Seaside City, South Kingscliff
02/10/02
EC2002-89 Manufacture, Supply and Delivery of 450mm Pressure Pipe
EC2002-101 Supply and Laying of Asphaltic Concrete at Various Locations
Sale of Proposed Lots 1,3,5&7 & Lease of Proposed Lots 2,4,6&8 to be Created by Road Closure Plan at Chinderah Bay Rd, Chinderah
16/10/02
EQ2002-61 - Termite Treatment for Timber Bridges and Various Buildings
Banora Point Caravan Park - 2 Pacific Highway, Banora Point
Installation of Unregistrable Moveable Dwelling - Homestead Caravan Park - Site 93
Installation of Unregistrable Moveable Dwelling - Site 129, North Star Holiday Resort
30/10/02
Termination of Agreement with McInnes Group for the Preparation of a LES and Draft LEP - Seaside City, South Kingscliff
06/11/02
Draft LEP2000 Amendment - Kingscliff Sewerage Treatment Plant
Lavender Creek Proposed Wetland and Rehabilitation Program - EC2002-123
EC2002-127 Manufacture, Supply and Delivery of 450mm Diameter Pressure Pipe, Valve and Fittings
EC2002-87 Construction of a Six Span 96m Long Prestressed Concrete Bridge Over Mooball Creek at Black Rocks Estate, Pottsville
Shang Versus Tweed Shire Council
Naming of Old Border Caravan Park
Illegal Clearing at Lot 156 DP 628026 Creek Street, Hastings Point
20/11/02
Contract No. 0200621 - Banora Point STP - Supply and Installation of Ultra Violet Disinfection Equipment
Notice of Intention to Demolish Building Work (Dwelling Addition) at Lot 84 DP32024, 62 Lalina Avenue, Tweed Heads West
Building Works without Approval
Compensation for Acquisition of Easement for Sewer Purposes through Pottsville Environmental Centre (Res:140037 Lot 501 DP728234)
27/11/02
Land & Environmental Court Matter-TSC ats Ray Group-Declaration Regarding Legal Questions in Relation to DA02/1422 (SALT Subdiv.)
04/12/02

EQ2002-125 Tweed Heads/Banora Point Effluent Disposal Strategy Stage 2 - Appointment of Facilitator
Industrial Land Development
Purchase of Land - Chillingham
18/12/02
Tender - Comprehensive Planning Framework for Area A - Terranora Road, Terranora
Proposed Acquisition of Lot 1 DP 209800 - Walmsley Road, Bilambil Heights for Reservoir
EC2002-141 Construction of Concrete Footpaths at Various Locations within the Tweed Shire
Contract No. 0101990 Section E Only - Supply of Low Pressure Pump Station Units
Contract EC2002-146 Construction of Concrete Cycleway Coast Road Casuarina to Cabarita
Biosolids Removal from Disused Effluent Lagoons at the Murwillumbah STP
EC2002-162 Manufacture, Supply, Delivery & Unloading, 300mm Dia Pressure Pipe & Fittings, Hastings Point STW Effluent Rising Main
Naming of Area Adjacent to Rouse River Bridge, Chillingham "The Jack Connolly and Johnny Brims Park"
Smart House Sale
VOLUME 8
22/01/03
Draft Tweed LEP 2000, Amendment No23, Highway Service Centre, Melaleuca Station - Assess Tenders - Prepare Environmental Study
Proposed Subdivision and Rezoning of Lot 2, DP 589967, Gray Street, Tweed Heads West
Strategic Asset and Service Management Program and Policy
Lease of Linmill Pty Limited
Advance/Grant - Tweed District Rescue Squad Inc.
Contract 0202380 (EC2002-107) Construction of Kingscliff Sewage Treatment Plant Interim Upgrade Works - Awarding of Tender
Commencement of Development without the Prior Consent of Council at Lot 17 DP878567, 4 Carmen Place, Condong - G & J Tapp
Building without Approval - Lot 16 Section 5 DP8568, 43 Charles Street, Tweed Heads
Tenders - Tweed Regional Art Gallery Contract
05/02/03
Kings Forest Development
Smart House Sale - 1 Glebe Place, Tweed Heads South
EC2002-171 Manufacture, Supply, Delivery and Unloading of 375mm Pressure Pipe, DICL Fittings and Valves
Tender EC2002-172 - Supply & Delivery of One (1) Mobile Elevated Work Platform (EWP)
19/02/03
Appointment of Consultants - Draft Tweed Local Environmental Plan 2000, Amendment No 14 - Kingscliff Sewerage Treatment Plant
Replacement Bridge over Tweed River at Byangum - Land Acquisition
05/03/03
Settlement of Legal Action - Unauthorised Doof Rave Parties at Lot 5 DP 785565 Kirkby's Road, Limpinwood
Compulsory Acquisition of Easement to Drain Water 1.8m wide within 14, and within 44 & 46 Main Road, Fingal Head
Proposed Purchase of Pollards Quarry
19/03/03
Unauthorised Landfill at Lot 2 DP 1032820 - 76 Scenic Drive, Bilambil Heights
Unauthorised Advertising Sign at Lot 1 DP 779842, 158 Kennedy Drive, Tweed Heads West
Notification of Class 1 Appeal for Refusal of DA02/2087 for Erection of Bed & Breakfast at Lot 4 Section 1 DP14895 Lorna St, Kingscliff
EC2003-08 Bray Park Water Pump Station 1A - Supply & Installation of Variable Speed Drives
Tender EC2003-11 - Supply and Delivery of One(1) 24000 GVM 6 x 4 Cab Chassis Truck with a Slide Back Tilt Tray and Crane
EQ2003-07 - Bray Park Water Treatment Plant Upgrade - Consultancy Services
EC2002-153 Supply and Installation of Gas Chromatograph - Mass Spectrometer (GCMS)
Termination of Fungi Gulp Licence Agreement
Emergency Purchase of Replacement Screening System
Quotation EQ2003-40 - Supply and Delivery of Reinforcing Steel & Mesh - 2 * 5MI Reservoirs, Pottsville Road, West Pottsville
Proposed Purchase/Lease of Land - Byangum Road, Murwillumbah
Legal Action - Dangerous Dogs
16/04/03
Unauthorised Activity - Earthworks on Lot 113 DP1031933, Tweed Coast Road, Kingscliff
Master Operating Lease Agreement
EQ2003-22 Expression of Interest for the Supply of Hardware, Electrical and Plumbing Materials as a Preferred Supplier
Industrial Land Development - Wardrop Valley
Banora Point STP - Supply and Installation of Raw Sewage Screening Equipment
Smart House Sale - 1 Glebe Place, Tweed Heads South
07/05/03
Review of Water Based Activities and Clarrie Hall Dam Fishing and Sightseeing Charter Licenses
Quotes EQ2003-48 (Supply & Erection of Structural Steel & Metalwork) & EQ2003-49 (Supply & Erection of Roof Sheeting), Pottsville Road
Agreement for the Supply of Effluent to Coolangatta/Tweed Heads Golf Club
Quotations - Removal of Abandoned Motor Vehicles
21/05/03
DA02/1693 for a Subdivision to Create 16 Residential Allotments & a Residual Lot at Lot 113 DP 1031933, Tweed Coast Road, Kingscliff
Draft Tweed LEP 2000, Amendment No 37 - Tweed Heads West Industrial Area
Sale of Council Property - 16 Irving Street, Tumbulgum
Licence over Lots 10 & 11 in DP 262383 Duroby Creek, Bilambil
EC2003-56 Water Treatment Plant No. 2 - Consultancy Services for Detailed Design
Land Acquisition - Bridges - Byangum
EC2003-54 Contract Plant Hire
EC2003-67 Supply and Delivery of Fuels
Settlement of Legal Action - Unauthorised Doof Rave Parties at Lot 5 DP 785565 Kirkby's Road, Limpinwood
04/06/03
EQ2003-71 Supply and Delivery of Selected Materials
Approvals to Operate Markets - Kingscliff, Pottsville, Knox Park Murwillumbah and Recreation Reserve Tweed Heads

Appointment of Architect - Tweed Valley Respite Centre
Proposed Site for the Tyalgum Preschool
18/06/03
Unauthorised Advertising Sign at Lot 4 DP 585719, Pacific Highway, Chinderah - Tropical Fruit World
Quarry Works at Lot 2 DP 576855 McAuleys Road, Terranora
DA03/0179.05 for Amendment to Dev Consent DA03/0179 for Dwelling Additions, Swimming Pool & Boat Ramp at Lot 162, DP246854
Property Purchase - Tweed District Rescue Squad Inc.
World Heritage Rainforest Centre - Lease Options
Development Consent Conditions - Bush Fire Issues
Loan Program
Condong Mill Cogeneration Project
Acquisition of Lot 2 in DP1013916 Being Land at Round Mountain where Council Reservoir is Located
EC2003-74 Supply and Delivery of Ready Mixed Concrete
Banora Point Biosolids Contract EC2003-68
EC2003-75 Supply and Delivery of Bitumen Emulsion
Quotations - Supply of Security Services
VOLUME 9
02/07/03
Contract EC2003-55 Supply & Installation of Bus Shelters
Land Acquisition for Road Widening - Fraser Drive and Leisure Drive, Tweed Heads
HQ2003-72 - Parks Maintenance Contracts
Park Naming - Jack Evans Boatharbour
16/07/03
Water Meter Reading Contract
Tender - Proposed Improvements at Machinery Drive/Minjunbal Drive Intersection - EC2003-3
06/08/03
DA D88/0526.01 for Amendment to DC D88/0526 for Erection of 14 Home Units at Lot 14 DP23576, Lot 27 DP253910, 14 Elanora Ave
Land & Environment Court Appeal - Development Consent Murphys Road
EQ2003-102 Quotation for Licence to Operate Water Based Activities on Waterways in the Tweed Shire Area
03/09/03
Unauthorised Earthworks on Lot 113 DP1031933, Tweed Coast Road, Kingscliff
TSC & Gales Holding Court Proceedings: Appeal against Concil's Dev. Consent for the DA for Shopping Centre, Turnock St, Kingscliff
Provision of Legal Services for Council
Sale & Lease of Council Owned Land at Chinderah Bay
17/09/03
Unauthorised Activity & Non Compliance with DC K99/1450 Being Construction of Tourist Resort at Lot 1 DP1043885 Carool Rd Carool
Tender EC2003-135,136,137,138 - Supply and Delivery of One(1) Road Grader, One Front End Loader, Two (2) Backhoes
Licence to Operate Water Based Activities on Waterways in the Tweed Shire Area
01/10/03
EC2003-144 Supply and Laying of Asphaltic Concrete at Various Locations
EQ2003-22(B) Level of Discount to be Applied for the Supply of Materials to Council as a Preferred Supplier
Tender EC2003-132 - Upgrading of Leisure Drive, Tweed Heads South to Four Lanes between Fraser Drive & Eucalyptus Drive
Southern Boat Harbour Commercial Operators Wharf
Proposals to Operate the Tweed Shire Council Animal Impounding Facility
Additional Information - Proposal to Operate the Tweed Shire Council Animal Impounding Facility
Tweed Valley Regional Art Gallery Foundation Limited
08/10/03
Tweed Strategic Plan
Tweed Futures - Engagement of Independent Facilitator
15/10/03
ES Tender EC2003-145 - Supply and Delivery of One (1) Prime Mover
Proposed Sale of Lot 1 DP578307 - Pollards Quarry, Dulguigan Road, Dulguigan
HQ2003-158 Stotts Creek Inert Landfill Facility: Stage 1 Development - Construction of Leachate Pond, Roadwork & Associated Drainage
Proposals to Operate the Tweed Shire Council Animal Impounding Facility
Tweed Futures - Engagement of Independent Facilitator
05/11/03
Terranora Shopping Centre
Further Report on DA03/0273- Multi Dwelling Housing Comprising of 127 Units- Lot 119&142 DP29195, 35 Panorama Drive Tweed Heads
Water Pumping Station 13A - EC2003-139, Pumping Station Building & Associated Works & EC2003-152 Mechanical & Elect. Works
Tender - Hastings Point Sewage Treatment Plant - Augmentation - EC2003-107
Acquisition of Land for the Purpose of a Reservoir at Duranbah
Unauthorised Enclosure of Ground Floor of Dwelling in a Flood Liable Area
Naming of an Open Space at Banora Point - Tuckeroo Springs
Naming of a Park in Jack Evans Boat Harbour, off Coral Street (Old Water World Site) Tweed Heads As "John Follent Park"
Regulatory Action - Tweed Heritage Caravan Park
19/11/03
Banora Point Caravan Park
Annual Agreement for Surf Life Saving Services
03/12/03
Hastings Point STP Augmentation - Design and Construction of Tertiary Filters
Tender EC2003-185 Pile Driving - Byangum Bridge
Tender EC2003-186 Supply and Delivery of Prestressed Concrete Bridge Planks - Byangum Bridge
Telstra Relocations for Fraser Drive Upgrade
EQ2003-101 Quotation for the Licence to Operate Commercial Sight Seeing Charters on Clarrie Hall Dam

EQ2003-100 Licence to Operate Commercial Fishing Charters on Clarrie Hall Dam
17/12/03
Settlement of Legal Action - Unauthorised Doof Rave Party at Lot 5 DP785565 Kirkby's Road, Limpinwood
Enclosure of Buildings Contrary to the Provisions of Development Control Plan No. 5 - Development of Flood Liable Land
21/01/04
Wardrop Valley Quarry
Kingscliff STP Concept Design Consultancy - EQ2003-195
Settlement of Claim Tweed Valley Regional Art Gallery Foundation Limited
Legal Action - Dangerous Dogs
Naming of Park - Tuckeroo Springs
Waste Collection & Disposal Contract
04/02/04
Tweed Shire Community Based Heritage Study
Construction of Concrete Footpaths Various Locations within Tweed Shire
EQ2003-204 Eel Trapping Licence
Acquisition of Land for the Purpose of Relocation of Sewer Rising Main at Goonal Place, Banora Point
Tenders - Management of Councils Cat and Dog Impounding Facility
18/02/04
Quotations of Falsework - Byangum Bridge
EC2003-215 Manufacture, Supply and Delivery of 634 metres of 600mm Diameter Pressure Pipe, Valves and Fittings
Quotations for Supply and Delivery of Wall Formwork - West Pottsville Reservoirs
Bellevue Heights Estate - Breach of Protection of the Environment Operations Act 1997
Use of Part of Banora Point Community Centre Site for Community Preschool
VOLUME 10
03/03/04
Consultant Brief - Ecologist/Conservation Planner for Kings Forest
Surf Life Saving Strategy
Tweed Futures
Hospital Hill Reservoir - Design and Construction
Quotations for Supply, Fabrication and Erection of Structural Steel and Roofing - West Pottsville Reservoirs
EQ2004-007 Manufacture, Supply, Delivery and Unloading of 200mm and 375mm Pressure Pipe and Fittings
Tender - Construction of a Skate Facility at Cabarita
RTA Depot No. 204 Byangum Road Murwillumbah - Proposed Purchase of an SES/RFS Depot
Contract to Construct the New Art Gallery
Construction of Driveway at Lot 2 DP 807725, 16 Murraba Crescent Tweed Heads
Bellevue Heights Estate - Breach of the Protection of the Environment Operations Act 1997
17/03/04
Construction of Office Block Extensions to Buchanan Street Depot, Murwillumbah
Tender - Upgrading of Leisure Drive, Tweed Heads South to Four Lanes between Fraser Drive and Eucalyptus Drive EC2002-132
Banora Point Community Centre Tender
Avondale Drive, Banora Waters
28/04/04
Terranora Village Shopping Centre
Complaints - 82 Avondale Drive, Banora Point
EC2003-209 Dredging and Reuse of Biosolids - Tweed Heads Sewage Treatment Plant
EC2003-142 Construction of Boat Ramps - Chinderah Bay and Tweed Heads South (Dry Dock Road)
Tweed Heads / Banora Point STP Effluent Disposal EIS Consultancy
EQ2004-54 and EQ2004-55 for the Relining of Stormwater Pipes at Botany Crescent and Wyuna Road, Tweed Heads
EC2003-218 Rehabilitation of Sewer Reticulation
Sale & Lease of Council Owned Land at Chinderah Bay
Tweed Regional Botanic Gardens Logo Competition
HC2004-056 Proposed Earthworks for the Capping of the Cudgen Landfill Site - Depot Road, Cudgen
05/05/04
Naming of Park in Dulguigan
19/05/04
Draft Tweed LEP 2000, Amendment No 5-Reclassification of Land from Community Land to Operational Land, Lot 3 DP842350,Bogangar
Consultant Brief - Land Use Planner for Kings Forest
Provision of Water Pipeline Cleaning Services and Valve and Hydrant Maintenance
Construction of Sewage Pump Station, Beryl Street, Tweed Heads
Supply and Erection of Reservoir Roofing, West Pottsville Reservoirs (re-advertised) - Contract No. EC2004-081
EQ2004-068 Supply and Delivery of Selected Materials
EC2004-074 Supply of Ready Mixed Concrete
EC2004-066 Tenders for the Supply of Contract Truck Haulage
26/05/04
Acquisition of Land at Riverview Street, Murwillumbah
02/06/04
Pavlos Café Outdoor Dining Lease Fees
EQ2004-083 Clarrie Hall Dam Hydro Generation Feasibility Study and Business Plan Consultancy
EC2004-051 Banora Point Sewage Treatment Plant - Inlet Building Refurbishment
EC2004-048 Design and Construction of Odour Control Facility at Banora Point Sewage Treatment Plant
EC2003-214 Construction of a Rock Revetment Wall at Chinderah Bay and Oxley Cove
EC2004-070 Supply of Tyres and Tubes, Recapping, Relugging and Retreading of Tyres and Repair of Tyres and Tubes
16/06/04
Application to Modify Development Consent 98/79 Involving Unauthorised Enclosing of Ground Floor of Dwelling in a Flood Prone Area

EC2004-073 Supply and Delivery of Pressure Pipe and Various Water Service Fittings
Industrial Relations Commission Claim - Tweed Shire Council Vs Shang
EC2004-085 - Expressions of Interest - Wetland Restoration Works and Environmental Monitoring for the Piggabeen Road Deviation
EC2004-080 Concept Road Design of Kirkwood Road, Tweed Heads South
EC2004-091 Supply and Spray of Bituminous Surfacing at Various Locations
EC2004-072 Supply of Pavement Linemarking Services
07/07/04
DC DA02/1136 for Mixed Commercial/Tourist Accom. Dev: 8 Units at Lot 2 DP979921 & Lot 3 DP964996, 32-34 Marine Drive Kingscliff
Tree Preservation Order
Renewal of Council's Insurance Portfolio for the Period 1 July 2004 to 30 June 2005
Contract EC2002-071 - Provision of In-House Consultancy Services for Various Investigations & Option Reports for Water Sewerage
EC2002-086 Manufacture, Supply & Delivery of 750mm&960mm Pressure Pipe, Valves & Fittings -Bray Park WTP Clear Water Reservoir
Contract EC2003-105 Design of Bridges & Supply of Precast Bridge Components for Two Bridges on Tweed Valley Way, Crabbes Creek
21/07/04
Unauthorised Vegetation Clearance - Various Lots DP14895 - Seaside City
Draft Development Control Plan No 53 - Uki Locality Plan
2003/2004 Loan Borrowing Program
Deed of Agreement - Consolidation of Land at Reserve Creek
EC2004-086 Manufacture, Supply, Delivery & Unloading - 750mm&960mm Pressure Pipe, Valves & Fittings, Bray Park WTP Clear Water Reservoir
EC2004-013 Banora Point Sewage Treatment Plant - Screenings and Grit Handling
EC2002-086 Manufacture, Supply & Delivery of 750mm&960mm Pressure Pipe, Valves & Fittings -Bray Park WTP Clear Water Reservoir
VOLUME 11
04/08/04
Minutes of Steering Committee - Lot 490 South Kingscliff
EC2004-051 Banora Point Sewage Treatment Plant - Inlet Works Building Refurbishment
Naming of Road Created by RTA between Clothiers Creek Rd & the Round Mountain Overpass of the Motorway, Tanglewood
HQ2003-158A Stotts Creek Landfill Facility - Solid Waste Landfill Expansion
18/08/04
Sale of Lot 22 DP617126, 26 Wollumbin Street, Tyalgum
Acquisition of Land for Road Purposes - Lot 21 in DP858801 - Kirkwood Road, Tweed Heads
Tweed Shire Council ats Shang
Appointment of Consultant to Undertake Wetland Restoration & Environmental Monitoring of the Piggabeen Road Deviation
Cabarita Beach Surf Life Saving Club/Council Land Bogangar
Coaching Rights - Tweed Heads and Murwillumbah Pools
New Waste Infrastructure
Council Owned Land at Bogangar used for Parking and Opportunities for Community Coastal Improvements
01/09/04
DA D95/0442.01 for an Amendment to D D95/0442 for Manufactured Home Estate at Lot 180 DP850476, 173 Chinderah Rd, Chinderah
Contract EC2003-132 Leisure Drive/Eucalyptus Drive Upgrade
08/09/04
Proposed Development of Australia Bay Lobster Producers Pty Ltd
15/09/04
Tweed Heads Ministerial Task Force
EC2004-132 Supply and Layering of Asphaltic Concrete at Various Locations
Outdoor Dining Licence Agreement - "Shell's on Broadway" previously "Pavlo's Café" Wharf Street, Murwillumbah
Licence Agreement - Boyd's Bay Bridge - Tweed River Boat Hire
EC2004-126 Kingscliff STP: Consultancy for Design, Documentation and Associated Services
06/10/04
Kings Forest Existing/Continuing Use of Rights for Tree Removal
Retail Development Strategy
Section 356 of the Local Government Act 1993 - Donations
Transfer of Eel Trapping Licence
EC2004-49 Low Pressure Immersed Membrane Equipment Supply & Design Services, Bray Park Water Treatment Plant, Murwillumbah
Kingscliff Sewage Treatment Plant
EC2004-117 Supply of Manual Traffic Control Teams for Council Works
EC2004-133 - Supply and Delivery of One (1) Road Maintenance Unit
EC2004-016 EIS for Banora Point and Tweed Heads West STP Reclaimed Water Release - Variation
Chinderah Bay Drive - Sale of Land
HQ2003-158a Stotts Creek Inert Landfill Facility - Additional Landfill Containment Cell
Former Councillor the Late Bruce Graham
20/10/04
Draft Tweed Local Environmental Plan 2000, Amendment No. 57 Koala Beach Stage 7
Draft Tweed Local Environmental Plan 2000, Amendment No. 37
Bray Park WTP Augmentation Design and Project Management
EC2004-013 Supply and Installation of Grit and Screening Handling Equipment, Banora Point STP - Variation
Unauthorised Clearing of Land - Hastings Point
03/11/04
Terranora Village Shopping Centre
Draft Tweed Local Environmental Plan 2000, Amendment No. 3 - Seaside City Engagement of Consultants
EC2004-058 Supply of Pump and Variable Speed Drives for Water Pump Station No. 2
Lakeside Christian College Acacia Street, South Tweed
17/11/04
EC2004-117 Supply of Manual Traffic Control Teams for Council Works
Condong Cogeneration Facility Water Supply Agreement

Naming of Right of Carriageway (ROC) at Bilambil Heights
Land Acquisition for Road Purposes - Lot 21 in DP 858801 - Kirkwood Road, Tweed Heads
HQ2003-158a Stotts Creek Inert Landfill Facility - Containment Cell
Submission of Tender for Kangia Steiner School Premises
01/12/04
DA D95/0320 for the Construction of a Shopping village in Six (6) Stages at Lot 1 DP848875, Henry Lawson Drive, Terranora
Unauthorised Clearing at Wooyung, Hastings Point, Kings Forest and West Kingscliff
Contract EC2004-119 Proposed Change Room Amenities Building, John Rabjones Oval, Murwillumbah
EQ2004-164 Supply and Delivery of Reinforcing Steel and Accessories for Bray Park Clear Water Tank
15/12/04
Construction of Cycleway, Cudgen Creek Bridge at SALT Development
EC2004-162 Supply of Ready Mixed Concrete
Land Acquisition - Lots 15 & 16 Section in DP28266 - Philp Parade, Tweed Heads South
Tender EC2004-152 - Supply and Delivery of One (1) 13,000 Litre Water Tank Unit
Tender EC2004-153 - Supply and Delivery of One (1) 24,000 Kg's GVM 50,000 GCM Tipper Unit
Tender EC2004-154 - Supply and Delivery of One (1) 24,000 Kg's GVM Tipper Unit
Tender EC2004-155 - Supply and Delivery of One (1) 15,000 Kg's GVM Tipper Unit
Sale & Lease of Council Owned Land at Chinderah Bay
Electricity Supply for the Proposed Upgrade of Water Pump Station No. 2
Lifeguards Casuarina Beach
Progress Report for the Section 96 Application DA02/1422.18 for an Amendment to Development Consent DA02/1422 - SALT Development
Tweed Shire Council Public Inquiry

Natural Justice and the Inquiry

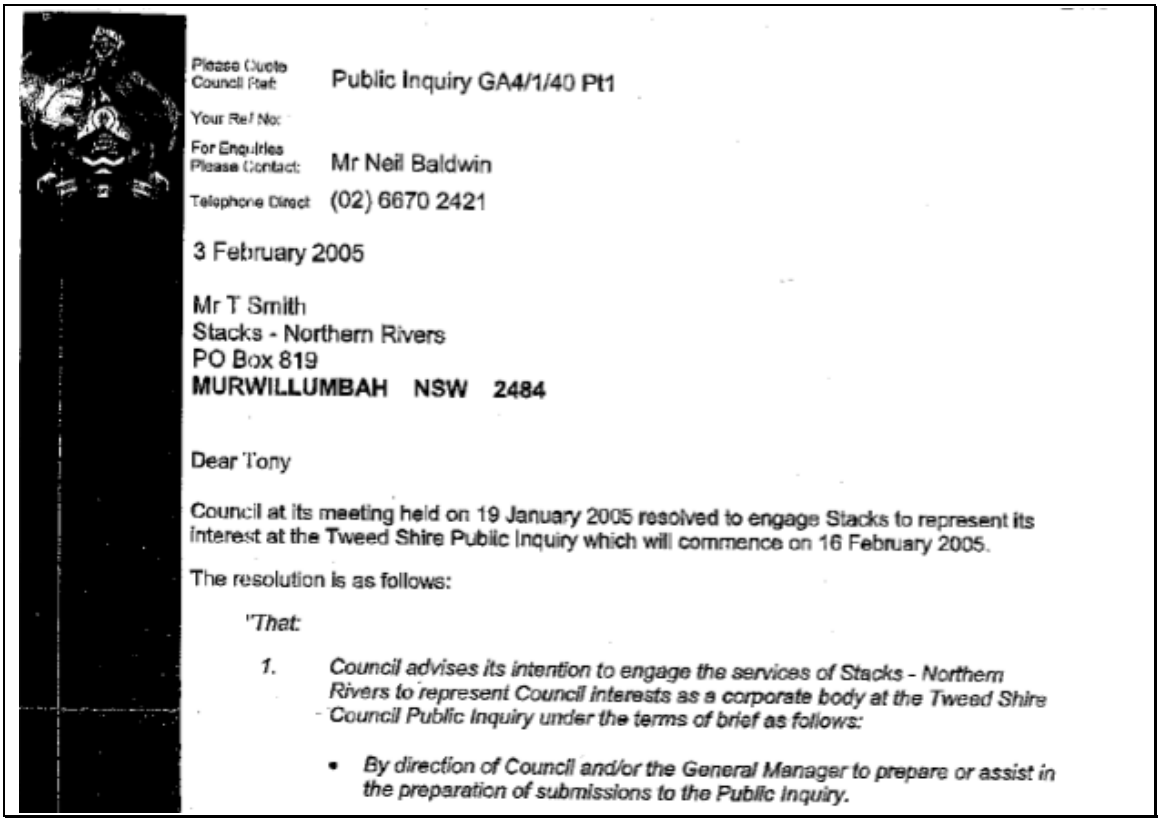
Natural Justice and the Inquiry

5.1 *Natural Justice, Bias and the Role of Legal Representatives at the Public Hearings*

5.1.1 Representation

Prior to the resumption of the Public Hearings the Inquiry received a letter, dated 3 February 2005, regarding a resolution of council on 19 January 2005 to engage Stacks – Northern Rivers to represent "its interest" at the Public Hearings. The resolution stated that Stacks would act for the body corporate to prepare or assist with the preparation of submissions, to review transcripts and suggest courses of action, to represent the Council at proceedings, and to report on matters related to councillors or staff that might require further attention. In relation to all of these things Stacks would work under the direction of the Council or the General Manager.

In practical terms this meant the engagement of Mr Tony Smith, the managing director of Stacks-Northern Rivers. Mr Smith had acted as the Council's solicitor for 14 years.



Please Quote Council Ref: Public Inquiry GA4/1/40 Pt1

Your Ref No:

For Enquiries Please Contact: Mr Neil Baldwin

Telephone Direct (02) 6670 2421

3 February 2005

Mr T Smith
Stacks - Northern Rivers
PO Box 819
MURWILLUMBAH NSW 2484

Dear Tony

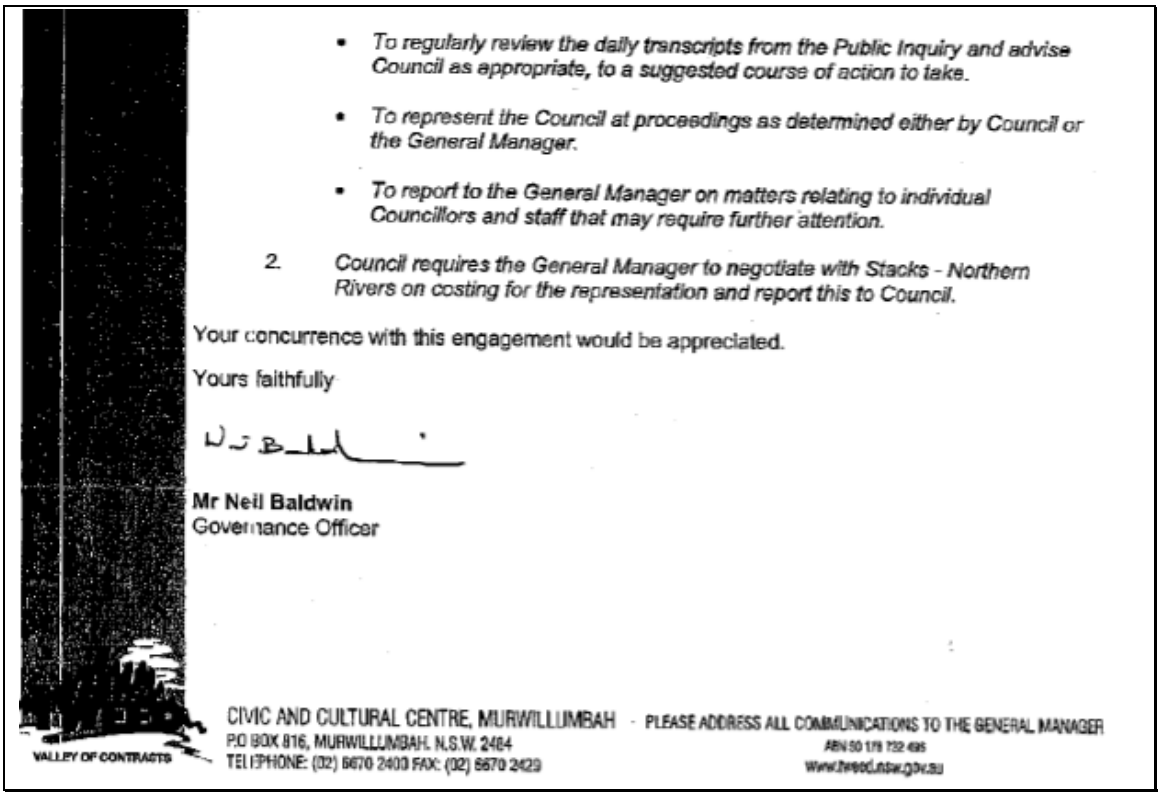
Council at its meeting held on 19 January 2005 resolved to engage Stacks to represent its interest at the Tweed Shire Public Inquiry which will commence on 16 February 2005.

The resolution is as follows:

"That:

1. *Council advises its intention to engage the services of Stacks - Northern Rivers to represent Council interests as a corporate body at the Tweed Shire Council Public Inquiry under the terms of brief as follows:*

   - *By direction of Council and/or the General Manager to prepare or assist in the preparation of submissions to the Public Inquiry.*



- *To regularly review the daily transcripts from the Public Inquiry and advise Council as appropriate, to a suggested course of action to take.*
- *To represent the Council at proceedings as determined either by Council or the General Manager.*
- *To report to the General Manager on matters relating to individual Councillors and staff that may require further attention.*

2. *Council requires the General Manager to negotiate with Stacks - Northern Rivers on costing for the representation and report this to Council.*

Your concurrence with this engagement would be appreciated.

Yours faithfully

Mr Neil Baldwin
Governance Officer

VALLEY OF CONTRACTS

CIVIC AND CULTURAL CENTRE, MURWILLUMBAH
P.O BOX 816, MURWILLUMBAH. N.S.W. 2484
TELEPHONE: (02) 6670 2400 FAX: (02) 6670 2429

PLEASE ADDRESS ALL COMMUNICATIONS TO THE GENERAL MANAGER
ABN 90 178 732 496
www.tweed.nsw.gov.au

The engagement of Mr Smith to appear for the body corporate immediately raised problems for Mr Smith. The Terms of Reference of the Inquiry focussed strongly on the efficiency and effectiveness of the governance of the council, making specific reference to the actions of the elected representatives. The brief given to him by the Council engaged him to operate in the interest of the body corporate: apparently the entire body, made up of elected representatives and staff. Mr Smith, as an experienced solicitor, should have been aware of the position he was placed in by the brief. It was well known within the community, and certainly by Mr Smith, that the elected representatives were strongly divided on a number of major issues. The separation of powers, spelt out in the Act, further complicated Mr Smith's role. The activities of the staff were not identified within the Terms of Reference of the Inquiry, and it was possible that some staff may have conflicting opinions of actions of the elected representatives, or differing recollections of certain events or actions. Mr Smith by accepting the brief declared that he was representing the entire body corporate. In the event Mr Smith did not honour the terms of the Stacks' contract and was in breach of that contract.

Mr Smith demonstrated little attempt to fulfil his brief. In a 72 Submission in reply (**submission in reply 104**) Mr Smith attacked many aspects of the conduct of the Inquiry, but he did so in support of the six Majority councillors only. He declared, in the first page of his Submission in reply, that the opposition "constituted the elected minority and simply represent the opposition in the Council". At no stage through his long, rambling, vitriolic, and generally misdirected attack did Mr Smith attempt to honour his brief by representing the whole Council, the body corporate. He was, at substantial public expense, appearing for six councillors.

In Mr Smith's mind the Inquiry was a kind of court case with six people in the dock, instead of an Inquiry into aspects of the governance of the elected representatives. He defined an opposition (or, perhaps, prosecution) and set about attacking the Minority councillors' views, and them personally. His target was not just the 5 Minority councillors, but anyone from the community (or beyond) who might suggest that there were, or even could be, any shortcomings in the actions and attitudes of the Majority councillors.

In his misplaced, and self-appointed, role as the defender of the Majority councillors (who were not paying his fees of $59,508.73) Mr Smith became quite puerile in his attempts to create a conspiracy against his "clients". His remarks on page 16 of submission in reply 104 illustrate this.

*It is also worth noting that a number of witnesses that gave oral evidence and provided detailed submissions, sat together throughout the course of the Commissions hearings and clearly knew each other and were part of a "click" (*sic) *or group and had been responsible for many of the similar allegations made against the council*."

Conversely the Majority councillors, and friends and relatives and people who had made written submissions or were to give oral evidence in support of the Majority also sat together in the Court Room.

Mr Smith divided those who appeared at the Public Hearings into two groups: those who supported the Majority councillors and the way the council operated under them, and those who did not. The latter were deemed by Mr Smith to be unworthy of presenting their views. The example of Ms Luff, a former councillor (and a lawyer) is a good example (**submission in reply 104 p. 17**).

"It is simply in our view, another example of bias and whilst we accept Ms Luff believes what she says is true, it is simply one persons version of events in the Council and certainly, should be seen as having that political colour apart from the fact that Ms Luff failed to get re-elected at the last Council election. Her remarks therefore are largely historical and not current".

Mr Smith was quick to run to the defence of those who supported the Majority councillors. For example, he wrote of Mr Robertson's appearance (**submission in reply 104 p. 18**):

*"…if one reviews the type of questions asked and the argumentative way in which they were asked, it is in total contrast to those witnesses who have come before the Commission seeking to attack and criticise the Council and when seem (*sic*)to be giving evidence in accord with a pre-conceived notion and destination that the Commission wishes to arrive at."*

Mr Robertson is an editor, and owner of a local paper, and a person that stood for election as part of the Tweed Directions team. He was quizzed about his association with Tweed Directions and other matters (see Section 4). Mr Robertson made repeated attacks on the Inquiry and its purposes, prior to the Public Hearings beginning, all of which

misrepresented the Inquiry and deliberately misled his readers. Mr Robertson, at the time he wrote these attacks, had not bothered to read the Terms of Reference of the Inquiry.

The ALP ran a group of candidates in the 2004 election, the first time that the Party had done this. One candidate was elected. Mr Smith, in his demonising of the opponents of the Majority councillors, sought to interpret any criticism as evidence of a political plot (**submission in reply 104 p. 27**).

*"No doubt, if you asked a question of someone who supported the majority of Councillors, they would regard the other Councillors as the "five-pack" who are green and oppose development and many have close relationships with the Labour (*sic*)Party Councillors. It is precisely because of these relationships this enquiry has probably been called, in view of a large section of the Tweed population".*

The person being attacked here is a Ms Lynch (who referred to the Majority councillors as "the six pack"). Ms Lynch is a member of the Liberal Party who produced a hand-written personal letter from Mr Howard praising her for her work on behalf of the Liberal Party and the community. Connecting her to some Labor Party "plot" is indicative of how desperately Mr Smith had taken on his self-anointed role as the defender of the Majority councillors. Ms Luff, also attacked by Mr Smith for 'political colour', is also a member of the Liberal Party.

Mr Ganter (**submission in reply 104 p. 29**) was also attacked for his evidence because he belonged to a group that opposed the Majority councillors.

Mr Ganter is associated with Tweed Monitor which are direct opponents of the majority Councillor group that was elected. The generalised nature of Mr Ganter's submission which deals with key topics accepted by the Commission is the view of one certain group of people who are generally represented by the opponents of the Council and have made submissions criticising the Council on much the same issues.

Submission in Reply 104 p. 29

Mrs Smart was another person attacked by Mr Smith in his defence of the Majority councillors because she criticised some of their decisions. Mr Smith decided that if Mrs Smart, or any other critic, should be dissatisfied with the Council they should take them to Court; a distinctly strange view amidst an Inquiry into governance issues of the Council (**submission in reply 104 p. 30**). In fact, it is most peculiar advice to be giving whether an Inquiry was running or not.

"If in fact, Mrs. Smart or any other member of the community had thought the Council had acted improperly or ultra vires there are legal procedures provided for both in the Local Government Act and the Environment Planning and Assessment Act to take the Council to the Court and have the matter aired".

In summary Mr Smith persistently attacked and dismissed any person who criticised the Majority councillors and their actions during the Public Hearings, and the examples provided above illustrate his approach.

At times Mr Smith appears to be unsure of just what his position was in relation to the Council. In two successive sentences (**submission in reply 104 p. 17**) uses the word *we.*

"*We rely on our knowledge of having acted for the Council in a number of legal matters against Dr. Segal".*

In this case he is using *we* in the sense of Stacks.

"*We are on record as supporting the Bulford findings in particular, in relation to planning issues, and therefore, we do not have any comments to make about Mr Bulford's evidence."*

Here Mr Smith writes as if he were the Council.

On page 23 of **submission in reply 104** Mr Smith writes:

"We were already harbouring grave concerns as to the conduct of the questioning at the hearing at this time, and the fact that it appeared to us, even at this stage of the Commission's hearings, that witnesses were not properly qualified…".

The *we* in this case might have been either Stacks (Smith) or the Council.

At another point (**submission in reply 104 p. 47**) Mr Smith observed:

"We must say that the suggestion by Ms Murray about placing notices in relation to developments, not just in the Council chambers but in libraries is in our view an eminently practical and sensible suggestion and we shall be pressing this matter with council".

Here Mr Smith is setting about telling the Council how it should administer its affairs.

Mr Smith seems to see himself as part of the Council (or at least that part inhabited by the Majority councillors) rather than an independent legal practitioner offering independent advice to his client. Mr Smith is wrong to carry out his brief in this way, and even more wrong to regard his duties as acting wholly, in the case of the Public Hearings, on behalf of the group of councillors that held a Majority. His role should be to provide unfettered advice to the Council as a whole, rather than act as a part of ruling group. Mr Smith's long period as a legal consultant to the Council appears to have coloured his judgement and compromised his role.

5.1.2 The Section 430 Investigation

On March 24 2005 the Director General of the Local Government Department wrote to the Council's General Manager advising him that he had authorised an investigation under s 430 of the Act to report on the following:

- Council's processes for performing its environmental planning and assessment functions, including the processing, assessment and determination of significant

development applications, the determination of contributions under *s.94 of the Environmental Planning Assessment Act* and applications to modify development consent conditions under *s.96 of the Environmental Planning Assessment Act*;

- Whether there has been any failure by the Council to comply with the carrying into effect or to enforce the provisions of the *Environmental Planning Assessment Act* and/or any environmental planning instrument;

- Whether sufficient grounds exist to recommend the appointment of an environment planning administrator pursuant to *s.118 of the Environmental Planning Assessment Act 1979*; and

- Any other matter that warrants mention.

Submission in Reply 104 p. 10

Mr Smith responded to this letter by declaring in **submission in reply 104 p. 11-12** that the s 430 Investigation was called because the Inquiry had come to conclusions about certain matters related to the Council's environmental planning responsibilities without affording the Council an opportunity to refute various allegations made to the Inquiry. As he was wont to do Mr Smith leapt to the conclusion that this illustrated bias and a lack of procedural fairness and natural justice by the Inquiry (see 513 and 514). As with many of Mr Smith's conclusions he was wrong.

It is not only a denial of procedural fairness if the Commissioner has arrived at this point of accepting the untested evidence of many, some of whom get their information from newspapers before Council has had a chance to respond but also much of the evidence given by Councillors and Council Officers was "on the run" so to speak, being given no warning of questions to be asked and at times to the most complicated and complex matters.

The Council being unable to test or cross-examine on any evidence given, has now been placed in the position where such a letter can apparently be written by the Commissioner to the Minister and the Minister then appoint a departmental officer to inquire into whether the Council should be stripped of its planning powers. We make no bones about the fact that we believe there has been a gross denial of natural justice and procedural fairness to the Council in this matter and this extraordinary action dramatically supports we say this view.

Submission in Reply 104 p. 11-12

The fact was that the Commissioner wrote to Craig Knowles, the Minister for Planning, Infrastructure, and Natural Resources on 15 March 2005 requesting that the Minister exercise his powers under s 118 of the EP&A Act and appoint a Planning Administrator for the period 1 April to 31 July 2005.

At that point the Inquiry had come to **no** conclusions about the appropriateness of the procedures and processes adopted by Council in relation to its environmental planning responsibilities (Item 2 of the Terms of Reference). The indications before the Inquiry, however, were that there were irregularities in the electoral process. The structure of the

Tweed Directions' campaign was apparent. The councillors who had been elected on the basis of receiving Tweed Directions' funds, and had been boosted by the Tweed Directions' expensive parallel campaign, were compromised. Increasingly the evidence showed that these councillors had not sought to ask what was expected of them from the munificence thrust upon them. They had no need to ask because they very well understood their implicit obligations to the donors: to continue the operational and policy domain established by the pro-development councillors on the 1999-2004 Council. Whether they knew who the individual donors were, or how much each contributed, was irrelevant. When they accepted the Tweed Directions' funds they were immediately compromised.

As soon as the details of the Tweed Directions' funding, and the source of the funds, were known, these councillors faced repeated conflicts of interest. These did not just emanate from possible development applications or amendments put forward by the actual donors. The Tweed Directions councillors (the Majority councillors) were subject to a broader obligation: to assure the continuing growth of investment and development in the property and tourism industries.

Ignorant of the Terms of Reference of the Inquiry, or the processes attached to a s 740 Inquiry, the supporters of the Majority councillors (that is the Tweed Directions team) mounted a campaign based on a conviction that an Inquiry meant that the Council would inevitably lead to the sacking of the Council. Amongst the most vocal in suggesting that the Council might be sacked was Mr Smith.

As the Public Hearings came to an end it became apparent that at least some of the Majority councillors might consider that the Inquiry report might recommend that the civic offices be declared vacant.

The evidence before the Inquiry on the appropriateness of the procedures and processes adopted by the Council had not been fully evaluated. Some of the evidence suggested that there may have been irregularities in these areas and that some councillors might have made decisions that materially benefited some developers. There were a number of highly controversial property development issues unresolved, and a number of very substantial development projects that had not been processed by the Council.

The Inquiry determined that it would be wrong for any of these matters to be resolved by the Council until the evidence related to the second of the Terms of Reference had been properly analysed and some findings had been made. The only way to ensure that this did not take place until the current evidence, and any further evidence that the Inquiry might acquire, could be assessed was to install temporarily a Planning Administrator until a report on the evidence could be prepared and recommendations be made. Prospectively such a report might take some four months to complete.

The letter sent by the Commissioner to Minister Knowles on 15 March did ***not*** suggest that the Inquiry had reached any findings on the matters raised.

Tweed Shire Council Public Inquiry

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The Hon C J Knowles MP
Minister for Infrastructure and Planning,
and Minister for Natural Resources
Level 33 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

15 March 2005

Dear Minister,

The Tweed Shire Council Public Inquiry has received a great body of evidence that suggests that the council has not given effect to and has not enforced various provisions of the Environmental Planning and Assessment Act.

This information has come from:

- submissions to the Inquiry
- evidence, both sworn and affirmed, given at the public hearings conducted by the Inquiry, including expert evidence from individuals and representatives of State Government Departments
- review of a number of council's development application files

The information affects not only the elected representatives but council's staff as well.

The evidence suggests that the failures have occurred in the past and that these failures are likely to continue into the future. They include:

- development consents being granted contrary to staff recommendations
- undue councillor interference with processes
- flawed processes within staff responsibilities
- failure to put in place a resilient planning regime
- breaches of pecuniary interest & conflict of interest requirements
- breaches of planning & administrative law (eg irrelevant considerations & inappropriate use of Section 96 modifications)
- failure to instigate enforcement actions
- concessional benefits to developers in terms of Section 94 contributions
- processing a major development application while the council was in caretaker mode, prior to the 2004 election

While the council was asked to defer the processing of any sensitive or controversial applications for development during the period of the public inquiry, given the demeanour of the controlling majority of the elected representatives I do not expect that this request will be respected during the period after the hearings have concluded and pending my report to Parliament.

Despite contrary suggestions, the council's role as a consent authority, while diminished by the operation of SEPP 71, still applies to larger developments falling outside the area constrained by SEPP 71. Additionally, the council exercises residual powers to determine significant coastal developments under SEPP 71.

At this time there are matters that have not been finally determined by the council where, given the concerns previously outlined, further contraventions of the Environmental Planning and Assessment Act may occur.

In view of my concerns I recommend the interim appointment of a planning administrator under Section 118 of the Environmental Planning and Assessment Act to commence immediately to July 31 2005 with an extension to be considered if required.

I have today written in the same terms to your colleague, The Hon A B Kelly MLC, Minister for Local Government.

Yours sincerely,

Emeritus Professor Maurice Daly BA PhD MIMC
Inquiry Commissioner

S 118 of the EP&A Act required the Minister to consult with the Minister of Local Government in making a decision on the appointment of a Planning Administrator. The results of the deliberations of the two Ministers were: (1) not to appoint a Planning Administrator, and (2) to request the Director General of Local Government to institute a s 430 inquiry into planning matters.

The reluctance of the two Ministers to appoint a Planning Administrator was based on the fact that the Inquiry had not analysed the evidence to the point where it could make findings on the matters raised. It was also shaped by the need for the Council to respond to the matters that might have led to the appointment of a Planning Administrator.

The request of the two Ministers to institute a s 430 Investigation was to enable the Ministers to have information explicit to the matters raised, and in a manner that would allow the Council and its officers to provide input and explanation of its actions. Contrary to Mr Smith's assertions the Council was gaining the advantage of being able to put its case in a context specifically restricted to planning process matters. Rather than not being afforded procedural fairness or natural justice the Council was being treated with the utmost fairness. The principal product of the s 430 Investigation was to be advice to the Minister on whether grounds existed to recommend the appointment of a Planning Administrator.

Some confusion arose because of the wording used by the Minister when he advised Parliament on the decision to hold a s 430 Investigation. He stated that the Commissioner had "advised that he has formed his conclusions from various submissions and evidence…". This did not mean that conclusions had been made in respect of Item 2 of the Terms of Reference (as Mr Smith assumed). The letter to the Minister did not indicate that any such conclusions had been made. What the Minister was referring to was the conclusions that it was prudent to temporarily appoint a Planning Administrator to remove any immediate danger of due process not being followed in the period between the Public Hearings being concluded and a report dealing with Item 2 of the Terms of Reference being completed.

Mr Smith, having misinterpreted the Minister, proceeded to conclude that the Inquiry had pre-judged the Council's position by accepting as reliable, evidence to which the Council had not yet responded. Mr Smith was wrong in his interpretation.

We find this an extraordinary appointment and we have been advised that the Minister made the following statement to the House prior to the appointment, and we quote:-

> *"I can advise the House that as a consequence of his inquiries [sic. inquiry] thus far, Commissioner Daly wrote to me on 15th [sic. 15] March 2005 advising that his inquiry has ([sic. ~~(~~] "received a great body of evidence that suggests that the council has not given effect to and has not enforced various provisions of the Environmental Planning and Assessment Act") ([sic.~~)~~].*
>
> *Commissioner Daly advised [sic. advises] that he has formed his conclusions [sic. conclusion] from the various submissions and evidence into[sic. to] the inquiry as well as reveal the[sic. from a review of a] number of [sic. the] council's development applications [sic. application] file [sic. files].*
>
> *He advised [sic. The commissioner advises] that the information may affect not only the elected representatives by [sic. but] Council's [sic. council] staff as well." (The underlining is ours).*

We are astonished if this is in fact true as it means that the Commissioner has arrived at a conclusion before Council has even had an opportunity to put its responses in detail and in writing to the Commissioner. The time for oral or written submissions in reply had not begun let alone expired when this recommendation was made.

It pre-judges Council's position by simply accepting as reliable evidence from others evidence, to which Council is yet to respond. So much for the right of reply.

Submission in Reply 104 p. 11

5.1.3 Allegations of Bias

If the Inquiry was cautious about coming to conclusions, Mr Smith was not. In writing his Submission in Reply he concluded that the instituting of the s 430 Investigation confirmed his previous conclusion that the Inquiry had demonstrated a general bias against the Council throughout the Inquiry (**submission in reply 104 p. 1**) (when Mr

Smith refers to the "Council" he is referring primarily to the Majority councillors whom he decided he was defending).

On page 39 of **submission in reply 104** Mr Smith referred to what he meant by bias.

"At this stage of the hearing, we had accepted the fact that whenever a witness in sympathy with the cause of criticising the Council appeared they were, we might say, with great respect, greeted with highly loaded and suggestive questions, seeking conclusions to the most general propositions, they could be expected to agree to."

There are a number of explanations of why Mr Smith has claimed bias in the proceedings. One is the simple fact that he did not understand the processes that underlie S 740 Inquiries. This is discussed in 5.2.1.

Another is his self-ordained role of defending the Majority councillors, rather than assisting the wider elected body and the body corporate in relation to the processes of the Inquiry. A combination of both of these things led Mr Smith to misinterpret the direction of certain lines of questioning. A good example is his interpretation of questions put to Mr M.W. Allen (**submission in reply 104 p. 55-56**).

Mr Allen was the leader of one of the groups (Tweed Community Vision) that made up part of the Tweed Directions' team but misrepresented that status by presenting themselves as independent community organisations (see First Report). The third item of the Terms of Reference enjoined the Inquiry to inquire into the appropriateness of the relationship between elected representatives and proponents of development. As the evidence mounted on the role of Tweed Directions it became clear that very serious issues concerning the conduct of the 2004 election emerged. Each of the people who appeared before the Inquiry and who had connections with Tweed Directions was quizzed about the nature of their relationships with Tweed Directions, and what they knew of the structure and purpose of Tweed Directions itself.

In relation to Item 3 of the Terms of Reference it was imperative that this line of questioning be followed.

In the event, the Inquiry amassed a large amount of information concerning Tweed Directions and formed the view that this group was central and vital to understanding relationships between elected representatives and proponents of development. In report 1, the Inquiry concluded that in relation to the 2004 election these relationships had been the cause of a wilful misleading of the voting public about the bona fides of certain candidates, and had effectively distorted the democratic processes attached that election.

The information that came to the Inquiry about these connections of the Majority councillors and Tweed Directions owed very little to those connected with Tweed Directions who made appearances at the Public Hearings. These people prevaricated, dissembled, and in a number of cases lied about their associations or roles, or their knowledge of the Tweed Directions organisation and operations.

What appeared to Mr Smith, from his misguided position as the defender of any group or person associated with the Majority councillors, was not biased questioning but simply the Inquiry pursuing issues defined in the Terms of Reference.

It is clear in the questioning of Mr Allen that the Commission was keen to ascertain a background to his group and who were parties to it. Contrast this to a number of other community groups who have not received the same kind of questioning or probing to suggest some sort of commitment or bias to a philosophy.

For example, the fact that members of Monitor may also be card carrying members of the labour party was never investigated in any questioning but because the Tweed Directions Group were supportive of the Council, they received an intense grilling from the Commission, we assume to make the point that their evidence was biased and tainted and therefore, should not be accepted. It is exactly this kind of questioning that points to the bias of the Commission itself.

That is, the Commission, in our view, would not just be perceived as being biased, but in fact, there are examples of actual bias throughout the transcript.

This bias of the Commission is exemplified at page 1369, and we quote:-

"Ms Annis-Brown: *We have had several submissions from the community and members of the public generally. Are you suggesting that they are running some sort of orchestrated litany of lies? Is that what you are suggesting?*

Mr Allen: *I am suggesting that the campaign was orchestrated largely by a group called Tweed Monitor and its affiliates…."*

This questioning is clearly aggressive and completely at odds with the suggestions when the Commission came into being that witnesses should not be the subject to cross-examination or harassment.

It is not a legal representative of a party at the Commission cross-examining in this way, it is the Commission members themselves that appear to be at odds with the Commissions stated objectives to us.

There is further aggressive questioning and interruptions by the Commission in relation to Mr Allen's evidence, and we instance, page 1370 in respect of Mr Allen making what is a reasonably sustainable argument in respect of the propositions by the Minister that lot 490 was one reason why a Commission should be called.

We refer to Mr Broad's questioning on page 1371, Mr Allen was attempting to answer a question and Mr Broad intervened. We quote:-

Mr Broad: *Well no, hold on, you were the Vice-President of Tweed Community Vision?*

Mr Allen: *Yes.*

Mr Broad: *Let's not deal in the realms of imagination. You had a particular role. Where did its environmental expertise come from? (A good question that should have been asked of many speakers before).*

Mr Allen: *There were quite a number of reports prepared by the Council prior to any rezoning of the application."*

This bias is demonstrated time and time again and whilst those criticising the Council are not subject to any kind of cross-examination or testing of their evidence, this is not the case with a witness who appears before the Commission and has a supportive position for the Council.

We reiterate, in our opinion, there is a gross denial of natural justice and procedural fairness in this repetitive behaviour, that the Commission has kept exclusively to itself the ability to inquire and test evidence and which witnesses to target.

Submission in Reply 104 p. 55-56

Submission in reply 104 contained a number of alleged instances of biased questioning. Mr Smith displayed a great deal of bias in his choice of examples. In many instances where he provides a sample from the transcripts in which he cites bias, there are other parts of the evidence of the person cited where a quite contrary line of questioning is pursued. Mr Smith is less than honest in his selective choice of evidence that he claimed was biased.

In fact in some instances he has incompletely recorded the transcript, leaving out words or even sentences within the passages he quotes. These words or sentences often put the substance of the questions and replies in quite a different light.

The Inquiry considered the so-called instances of bias cited by Mr Smith, and demonstrated the counter-evidence in each example. Addendum 5.1.3.1 provides the results of that survey.

More serious, but linked, are the allegations of Mr Smith that the calling of the Inquiry itself was the exercise of political bias by the Minister of Local Government (**submission in reply 104 p. 19-20, 61**).

It becomes even more ridiculous if for political purposes, a State Government wishes to dismiss an unfavourable Council because of its own political bias, uses this device of a s.740 Inquiry coupled with the questionable methodology of "perceptions" to achieve a political end which it could not achieve at a popular election for its side of the political fence.

…

There is strong feeling throughout the community that the appointment of the Commission of Inquiry was a political act by the labour Minister.

This is a view that members of the community are entitled to hold in a democratic

society.

Submission in Reply 104 p. 19-20 and p. 61

Mr Smith had clearly set about his self-appointed task of defending the Majority councillors carrying a good deal of political prejudice himself. He alludes to card-carrying members of the Labor Party (or Labour Party as Mr Smith persistently misspells it) as if they are then, by definition, enemies of the council. They were part of the Body of Elected Representatives that had retained Mr Smith, using public funds, to act for interests of the entire Council. In this context, his behaviour is nothing less than a misappropriation of public money. He also attacks members of the Liberal Party (such as Ms Lynch, Hoskisson, and Luff). It is not difficult to deduce where Mr Smith's political affiliations might lie.

He raises the issue of political motivations triggering the Inquiry quite early in his Submission in reply (**submission in reply 104 p. 2**). He quotes an article by Robert Stokes and provides an extract from it as providing evidence of political bias in establishing previous s 740 Inquiries (Warringah and Liverpool Councils). Mr Smith provides the extract as if Mr Stokes were arguing that there was political motivation in having a s 740 Inquiry into the two Councils. In fact Mr Stokes was not doing that at all.

The title of Mr Stokes' article[11] (omitted by Mr Smith) was "Councillors' conflicts of interest in Development Assessment: Lessons from Warringah". Mr Stokes explained the focus of his article in his introduction (p. 165): "Corruption and the perception of corruption in the assessment of development applications (DAs) by local government councillors is an enduring area of concern in public administration". His interest was on how the persistent public perception of corruption in this area might be remedied. He discussed the role of ICAC in this regard, and then moved on to discuss the role of the Department of Local Government and the Minister's office. The points he made in regard to both entities was that the Department had limited resources to tackle the problem (p. 175) and that if the Minister called a s 740 Inquiry those who were subjects of the Inquiry could tarnish the process by alleging that the Inquiries were politically motivated. This is precisely what Mr Smith, and the Majority councillors and their supporters in the Tweed, have attempted to do.

Mr Smith provides his extract from Mr Stokes' article in an attempt to make out that there had been political motives in both the Warringah and Liverpool Inquiries. Mr Stokes was merely pointing to how perceptions of political motivations could so easily be established.

The allegations of political motivation in the case of Warringah and Liverpool City Councils are easily dismissed.

First, the views expressed by people in Mr Stokes' article were made to reporters by disaffected sacked councillors and published in newspapers. Mr Smith in his 72 page submission consistently attempts to deride members of the community who spoke at the Public Hearings because they had heard about some happening connected to the Council

[11] Published in volume 9 of the LGLJ in 2004

through a newspaper (see 5.5.3). It is a very easy, and very predictable, ploy of sacked councillors to try to save face by alleging that an Inquiry was biased against them. In the case of the Warringah Inquiry the findings and recommendations were based on evidence contained in a three volume report totalling 868 pages where a very large quantity of evidence was reviewed and assessed. Any assessment of the alleged bias would have to be made by a careful assessment of the very large quantity of evidence presented. It is highly unlikely that the newspaper reporters of the articles quoted had done this, and almost certainly the readers of those articles had not done so. It is, therefore, easy, and cheap, to produce an image of bias where none exists. Mr Smith has attempted to do just that.

Second, the allegations of political intent on calling the two previous Inquiries just do not make any sense in terms of the political make-up of the councillors. In the case of Warringah three councillors were members of the Liberal Party but that meant that six councillors were not. Relevantly, the Mayor was a long-term member of the ALP, and had contested a State election as the representative of the Labor Party. In the case of Liverpool City seven of the eleven councillors were ALP members, two were Liberal and one had formerly been a Labor councillor. In what way could an Inquiry into that Council be interpreted as being politically motivated.

Mr Smith provided a distorted and misleading interpretation of Mr Stokes' article for political reasons. He had aligned himself to the Majority councillors. It is clear from evidence gained from certain public statements of Mr Smith, and other documents, that the Majority councillors had determined that the best chance that they had of avoiding dismissal (a fate that they had predetermined from the start) was to cast doubts on the integrity of the Inquiry. It was a grubby, and somewhat nonsensical, ploy and Mr Smith emerged as a chief proponent.

5.1.4 Natural Justice

Mr Smith is a solicitor. He sought to derail the Inquiry by raising issues that might have some substance in the law. He chose the issues of natural justice and procedural fairness as his battleground.

On page 2 of **submission in reply 104** Mr Smith avers:

"In our opinion, Council was not only denied natural justice and procedural fairness in respect of the processes and conduct of the inquiry, there was also actual examples of bias against the Council and those supporting the continuation of the elected representatives to serve their full term. In our view, this adopted procedure has set a dangerous and unwelcomed precedent in the affairs of Local Councils in this State in particular and has serious consequences for our democratic election processes in general".

Further on page 6 Mr Smith states that:

A Commission is not strictly bound by the rules of evidence, but this does not mean that they 'may be ignored as of no account'…We believe because of the method of inquiry adopted in this case the Council and its Councillors were greatly disadvantaged".

On page 9 Mr Smith warms to his task.

> For example, the question of procedural fairness does not just depend upon one or two matters, it is really an assessment of the overall conduct of the hearing, looking at various questions that were asked, the way the questions were asked, the fact that none of the evidence could be tested at the time it was given and whether in fact the right of reply is a real right reply or just simply a mechanism to avoid the criticism that no opportunity for a reply was provided.
>
> What we mean is this, if you have not had the benefit in the first place of being able to test the reliability of statements, have no idea what weight is being placed upon hearsay and unsubstantiated opinion then what is the value of a right of reply? What is it you are replying to? The delay in providing the written responses to the State Government Departments is in itself a disgrace.
>
> This is further exacerbated by the fact that while most submissions were made public, many were not. We have no idea of their contents or how they will affect the ultimate outcome.

Submission in Reply 104 p. 9

Mr Smith makes the following points as justification for his argument that the Council (read Majority councillors) were denied natural justice and procedural fairness:

1. In terms of the questions asked
2. In terms of their being no immediate right of reply
3. In terms of whether the right of reply provided was genuine
4. In terms of not being provided with certain letters from State Agencies
5. In terms of certain written submissions not being made public
6. In terms of opinions expressed in various legal cases (these are scattered throughout **submission in reply 104**).

Each of these issues will now be addressed.

1. The matter of biased or leading questions has been dealt with in 5.1.3. Effectively it is a non-issue because there was no bias, and the evidence of such that Mr Smith submitted was either wilfully distorted by Mr Smith's partial selection of extracts from transcripts, or because Mr Smith failed to recognise the matters that were being explored or their gravity.

2. The procedures that were adopted for the Public Hearings were in fact based on various legal precedents and were carefully and fully explained when the Public Hearings were opened on 16 December 2005. That session of the Hearings was devoted solely to explaining the processes that were to be adopted. The opening address is given in full in Addendum 5.1.4.1. Pertinent extracts are provided in this part. The Hearings, which

opened at 10.00 am on 16 December, closed at 12.06 pm. They were then suspended until 10.00 am on 16 February 2005. This was done to allow interested parties, which included Mr Smith, to raise any objections to the processes that were to be adopted. There were no substantive issues raised by anyone, including Mr Smith. Post hoc, when Mr Smith and his clients decided that their best strategy was to attack the credibility of the Inquiry, Mr Smith has come forward with his complaints about process.

The purpose of an Inquiry, unsurprisingly, is to inquire. This ought not to be a difficult concept to grasp, but it apparently escaped Mr Smith. The topics that are to be inquired into are defined by the Terms of Reference. If an Inquiry were to stray into topics beyond those terms there would indeed be grounds for it to be judged to have failed in its tasks. The Inquiry has been meticulous in keeping to its Terms of Reference.

The most satisfactory way of inquiring is to hear the thoughts, opinions, and evidence of as large a number of relevant people as possible. The Inquiry sought to do just that. Since the Inquiry was directed to consider the efficiency and effectiveness of the governance of the council, it was imperative that those most affected by that governance, the members of the Tweed Shire community, were heard at the Inquiry. It is in the nature of things that some members of the community will have good things to say about the Council, and that others will have criticisms. It is the task of the Inquiry to hear all views, including those who might be criticised, the councillors and staff of the Council. This is what was done.

Mr Smith, if his views in **submission in reply 104** are to be believed, passionately wanted to cross-examine any person who criticised the Council and staff. Curiously this passion to cross-examine was not evident in the two months that Mr Smith had to express it before oral evidence began to be taken on 16 February 2005. Had Mr Smith raised the issue he would not have been granted permission to conduct an unlimited cross-examination of witnesses. As expressed in the opening address on 16 December 2005, and many times beyond, individuals appearing at the Public Hearings were not on trial. The Hearings were for the Inquiry to ask questions and to listen to answers given. It would have been intolerable and wrong to submit members of the community to cross-examination. In **submission in reply 104** Mr Smith displayed an alarming tendency to vilify, denigrate and belittle any person who made a criticism of the Council (5.3.1). The Inquiry's purposes would not be served by submitting the public to such humiliation. Lawyers who were granted leave to appear at the Inquiry were able to ask questions but it was suggested that they should attempt to clarify issues upon the basis that contrary views could be put as oral evidence in reply or as written submissions in reply.

At the heart of Mr Smith's misguided desire to cross-examine people was a misconception about what the Inquiry would do with the evidence. He believed that if the information given was not challenged by the Inquiry, or more to Mr Smith's liking by Mr Smith himself, then the Inquiry had accepted that what it heard was accepted as fact. The intention of the Inquiry was to receive as many opinions and versions of events as possible, and then to match all of this with the evidence that it had collected itself (and there is a great deal of that; see 5.2.5) to reach some conclusions. The Inquiry does not seek to draw conclusions on the run, as it were. Instead it adopts the much more fruitful approach of allowing as many opinions as possible to be brought out into the open; this makes for an essentially transparent process. The Inquiry only sought to challenge or

develop a theme raised if it were viewed as critical to one of the Terms of Reference; the example of uncovering the role of Tweed Directions is a good example. Generally, however, the Inquiry found (and has found in other Inquiries) that a "softly, softly" approach was much more fruitful than an adversarial approach.

None of this was understood by Mr Smith. This was because it did not suit Mr Smith's political purposes, but equally it was because Mr Smith displayed an intellectual incapacity to understand.

Mr Smith, in his misguided and unknowing fashion, believed that any critical remark was open to scrutiny on the grounds of denial of procedural fairness. He was completely wrong in this belief, and the reasons were explained in the opening address.

PROF DALY: *The mere fact that a critical remark is made during the hearings or contained in written submissions is not of itself sufficient to open up that comment to scrutiny on the grounds of denial of procedural fairness. The matters are no more than conclusions on disputed facts that are ancillary or collateral to the major findings called for in the terms of reference. The finding cannot be impugned for want of procedural fairness no matter how distressing the criticism or condemnation might be to the individual concerned, and I will repeat that: the matters are no more than conclusions on disputed facts that are ancillary or collateral to the major findings called for in the terms of reference.*

The finding cannot be impugned for want of procedural fairness no matter how distressing the criticism or condemnation might be to the individual concerned. When a person appears at the public hearings I do not intend to go over all the details that might have already been covered in their written submission. I may on occasions ask the speaker to provide a brief summary of the contents of the written submissions or I may ask the speaker to elucidate or amplify certain items contained within the submission. Or I may address other issues that are relevant and that Ms Annis-Brown or myself may raise from time to time.

T. 16/12/04 p. 8

Quite apart from the fundamental reasons for not allowing Mr Smith, or any other person, the licence to interrogate people, there was a practical aspect. If Mr Smith were allowed to have free rein, the Hearings would take an impossible period of time.

The appropriateness of having lawyers engaged in an Inquiry that is focussed on such a qualitative issue as the efficiency and effectiveness of governance of an entity such as a council has to be debated. As noted above such an Inquiry is not a trial. It is an assessment of concerns about aspects of public administration. If a lawyer happened to have a particular expertise in some aspect of those concerns, then that person might be useful in reaching an assessment of the concerns. Beyond that, it is difficult to see why a lawyer should have any particular rights in relation to an Inquiry. A lawyer is just one of many professionals that might assist an assessment of a public administration matter. In the Tweed Shire Inquiry, for example, planning consultants and a lawyer were asked to appear to assist the Inquiry in its tasks of evaluating how certain things worked.

Notwithstanding, lawyers could and did seek leave to represent individuals or entities at the Public Hearings. They could do so only under prescribed conditions, and these were spelt out in the opening address. The conditions had been established by a solicitor from the Crown Solicitors Office.

PROF DALY: *Under Section 7 of the Royal Commissions Act, I have the power to allow certain people to be represented by a lawyer. People who may seek to be represented are those who are directly and substantially interested in this Inquiry or those whose conduct may be challenged to their detriment. I will set out for you the way in which I envisage legal representatives may participate in the Inquiry. Anyone who has been asked by me to attend and give evidence before the Inquiry may seek leave to have a lawyer present while they are giving their evidence. If granted leave to appear, the lawyer may object to questions being asked of their client.*

At the end of a witness's evidence, the lawyer may ask their own client questions. This next comment is very important. Those questions should be limited to clarifying or elaborating on the evidence that the witness has already given. They will not be allowed to raise other things. What I have in mind is restricting questions to the type of question asked in re examination. I expect that speakers will have different recollections of the same events. Ultimately it will be up to me to decide if necessary which version of the events I prefer. I propose to deal with differing recollections in this way.

First, if person A is aware that his or her recollection of events differs from the evidence given by person B then person A can give his or her version of the events once he or she is called as a witness. Having heard the evidence of person A, I may then decide to call person B. If person A has already given evidence then person A can write and tell me about his or her recollection of events. If I decide that I would like to hear more about what person A has to say then I will recall person A to the hearings. Therefore generally speaking I will not give a lawyer leave to ask questions of speakers in general.

Because having decided to approach the taking of evidence in this way, the rule in Browne v Dunn will not apply. To avoid recalling persons unnecessarily, I invite those seeking to respond to provide me with statements relying to assertions particularly if they are aware of likely evidentiary conflicts. I may write to certain witnesses and ask them to provide me with a statement on particular issues in order to expedite the hearings. I ask that those statements be provided during the course of the hearings so that I can ascertain whether or not I need to hear more evidence.

T. 16/2/04 p. 9-10

3. Mr Smith cast doubts on the genuineness of the Inquiry in allowing persons to make a submission in reply. His only grounds for imagining that the Submissions in Reply would not be considered seriously were his mistaken belief that the Inquiry had reached conclusions about certain matters related to the Council's environmental planning responsibilities when a request was made to the Minister to appoint a Planning Administrator. This request was made at the end of the Hearings and before the two weeks allowed for Submissions in Reply had ended.

There were 117 submissions in reply and other material received by the Inquiry after the Public Hearings had closed. The lie to Mr Smith's assertion that they would not be considered seriously by the Inquiry is given by the number of citations of such material throughout this and the First Report.

Mr Smith argued that if there was no ability to test evidence in the first place (that is to cross-examine people), and no idea what weight was being placed on evidence then a right of reply was useless. Mr Smith is merely displaying his ignorance of the fundamental focus of the Inquiry and its processes. As has been made clear the Inquiry is not a trial. Mr Smith could not get trial procedures out of his head.

It was made clear in the opening address that the Inquiry was not interested in, and had no powers to address, any issues that might be raised in relation to an individual's development application, its outcome, or any other matters of this type. Many of the issues that Mr Smith was so anxious to cross-examine people about were of this nature. In the Inquiry's view the only value in such evidence lay in what it told about general processes; the Inquiry was essentially concerned with governance issues and public administration issues. It did not seek nor identify issues that were singular to a person's individual concerns about this or that particular development.

PROF DALY: *I emphasise, however, that this Inquiry is not called upon to reassess an individual's case in relation, for example, to a development application or any other matter that pertains to the individual rather than the specific terms of reference. I do not - and I stress this - I do not have the power to overturn or change any approval granted by the Council. Accordingly, I will consider submissions and evidence solely from the point of view of the terms of reference. I am, however, keen to receive a broad range of submissions provided that they are relevant to the terms of reference.*

T. 16/12/04 p. 6

Beyond the submissions in reply, the Inquiry encouraged people to provide it with briefing notes or other material during the course of the Public Hearings, and beyond, if they thought that it would allow the Inquiry to better understand a particular issue. In fact the Inquiry received 81 such additions to the evidence base. This allowed persons to make more immediate responses to issues that concerned them, given the impracticality and the non-necessity of allowing immediate replies or cross-examination.

4. Mr Smith complained that the Council received copies of letters provided by State Agencies. With characteristic over-statement and resentment, he declared that "the delay in providing the written responses to the State Departments is in itself a disgrace".

The Inquiry sent letters to a number of Government Departments and Agencies in December 2004. The purpose was to get information about their operations in the Tweed and about how their structures related to local government. This information was intended to make the Inquiry better informed about how the public administration system worked in the Tweed. It was not viewed by the Inquiry, or intended to be viewed by anyone, as evidence that might cast the Council in a bad light. Mr Smith, with his adversarial approach, put a completely wrong interpretation on these letters and the replies received to them.

Some of the material in reply contained some criticism of some council processes. Where this occurred representatives from those bodies were invited to appear at the Public Hearings so that their criticisms could be brought into the Council's, and the public's, view.

Because the criticisms had mentioned some particular sites Mr Smith assumed that the Agencies were providing evidence that the Inquiry wished to pursue. As explained earlier Mr Smith completely lacked an understanding of process. The Council eventually asked for copies of the replies to the original letters to the Agencies. The Inquiry agreed to their request. The Council then, quite without authority, passed the letters on to some private organisations whose properties had been cited. The focus of the Inquiry, if indeed it had any in terms of the various information contained in the letters, was on the role of the Council in relation to the issues raised, and not the private groups. The wrongful release of these documents caused unnecessary concern to those organisations, and to the Agencies. The release, however, indicated the closeness of the Council to the developers.

5. Mr Smith complained that some written submissions made to the Inquiry were not publicly released. "We have no idea of their contents or how they will affect the ultimate outcome".

At the opening of the Public Hearings the Inquiry stated that the publishing of the majority of the written submissions received was a goal intended to ensure that natural justice was afforded.

> PROF DALY: ... *In conducting this Inquiry, I propose to adopt various processes intended to ensure that natural justice is afforded. These processes will include publishing of the great majority of the submissions received, and given* [*sic. giving*] *most of the people who have sought leave to make an oral submission to the Inquiry have* [*sic.* ~~*have*~~] the *opportunity to do so.*
>
> **T. 16/12/04 p. 12**

This was done. There were some written submissions whose subject matter lay outside the Terms of Reference. These constituted the bulk of the submissions that were not put on public exhibition. The reasons for this should be obvious. Some submissions were anonymous, and the Inquiry stated on a number of occasions that anonymous submissions would not count as evidence. A very limited number of submissions contained material that might be judged defamatory of the persons named in the submission. For obvious reasons they were not put on public display.

Limited as Mr Smith's grasp of process might be, he should have recognised that there were sound reasons why certain written submissions were withheld from public viewing, and most importantly withheld from being counted as evidence. This fact was announced at various times throughout the Hearings. For Mr Smith to suggest that the non-publication of such submissions exemplified a nefarious plot to deprive him of evidence, or to withhold evidence that would be used against him in whatever case he imagined he was fighting, is ludicrous. It leaves open the question whether Mr Smith was bent on causing mischief in his goal of derailing the Inquiry as a whole.

6. The various pieces of evidence that Mr Smith provided purporting to support his case that there was a grave miscarriage of natural justice and a lack of procedural fairness in the Public Hearings, is covered in the following part.

In summary, Mr Smith's case for accusing the Inquiry of a lack of natural justice in its proceedings is absurd and wrong.

5.1.5 The Supporting Cases for Claiming a Lack of Natural Justice

In the tradition of the legal profession Mr Smith sought to prove his contention that there had been a lack of natural justice in the processes of the Inquiry by reference to various comments and judgements made in certain court cases or in reference to certain Inquiries. Some of the examples put forward by Mr Smith are given below.

We quote these paragraphs from a publication of the Lawbook Co. 2004:-

"Investigating Corruption and Misconduct in Public Office
Commissions of Inquiry –
Powers and Procedures
Peter M Hall QC BA LLB, LLM (Syd)"

Standard Proof:-

The terms of reference for an inquiry usually do not specify the standard of proof to be applied in respect of the allegations and other matters being inquired into.

In the Royal Commission into the Building and Construction Industry, Commissioner Cole QC observed that the law does not mandate any particular level of satisfaction that must be achieved before a finding of fact, which carries no legal consequence, may be made by a Royal Commission.[111] *Nevertheless, the Commissioner stated that he was conscious of the fact that a finding that a particular individual, organization or company had engaged in unlawful conduct may cause serious damage to the reputation of such an individual, organization or company. Accordingly, the Commission acted in accordance with the general principle that the standard of proof varies with the seriousness of the matter in question citing that dicta of Dixon J (as he then was) in Briginshaw v Briginshaw (1938) 60 CLR 336 at 362 (see below). Accordingly, the civil standard of "reasonable satisfaction" was applied in reaching findings. That standard varied considerably, however, depending upon the seriousness of the allegation in issue, the Commission emphasised that no finding or adverse comment was made by it without having regard to the damage that it could cause.*[112]

Although the terms of reference of a Commission of inquiry may not require findings of fact to be measured against either the criminal or civil standard of proof, the HIH Royal Commission stated that facts are to be found from the viewpoint that <u>the result must be "intellectually sustainable, tempered by restraint" and guided by the general principle that the standard varies with the seriousness of the matter in question</u> as observed by Dixon J in Briginshaw v Briginshaw at 362:

> *The seriousness of an allegations made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to*

the question whether the issue has been proved.[113]

…

Accordingly, the relevant standard to be applied generally by a Commission of inquiry is the standard applicable to a civil action, namely, proof on the balance of probabilities but applied in accordance with the gravity of the allegation being considered: Briginshaw v Briginshaw (1938) 60 CLR 336 at 362, as per Dixon J as he then was, Helton v Allen (1940) 63 CLR 691, 714 and Rejfek v McElroy (1965) 112 CLR 517, 521-522.

…

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[111] Volume 2, Conduct of the Commission – Principles and Procedures (February 2003) Ch 5, para [9] p 48.
[112] Ibid at para [12]
[113] Cited in the HIH Royal Commission, Vol 1 at para [1.2.6] at p 12.

Commissions of inquiry have observed that, while the rules of evidence do not apply to their hearings (unless the terms of reference expressly require that they are to be applied), it may, nonetheless, in some circumstances be prudent to apply them on the basis that they represent "the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth": R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228, 256. [The underlining is ours].

Where hearsay evidence may in some circumstances be used a probative material for making findings of significance, appropriate precautions will be required. Hence, the WA Inc Royal Commission adopted the following approach in its use of hearsay evidence:

> *Before the Commissioner made any determination of fact involving the assessment of hearsay evidence, it considered all the available evidence on the issue in question. Hearsay evidence was then given whatever weight such consideration suggested it deserved. If additional evidence suggested hearsay evidence about any particular matter lacked credibility, then the hearsay evidence was disregarded.*[119]

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[119] At para [1.6.21].

Submission in Reply 104 p. 6-8

The first example relates to something written by Mr Hall and published by the Lawbook Company in 2004 (**submission in reply 104 p. 7-8**). Mr Hall's piece is concerned with the investigation of corruption and misconduct in public office. Immediately, it is irrelevant to the Inquiry. The Inquiry is concerned with the governance of a council and not with corruption or misconduct of individuals.

Further, Mr Hall focuses on comments made by Commissioner Cole in relation to the Royal Commission into the Building and Construction Industry. Mr Cole stated that he was conscious of the fact that a ***finding*** that a particular individual, organization or company had engaged in unlawful conduct may cause serious damage to the reputation of

such an individual, organization or company. Later Mr Hall argues that: "the relevant standard to be applied by a Commission of inquiry is the standard applicable to a civil action, namely proof on the balance of probabilities but applied in accordance with the gravity of the allegation being considered". Further, Mr Hall states that: "where hearsay evidence may in some circumstances be used as probative material for making ***findings of significance***, appropriate precautions will be required".

Quite aside from the primary problem of Mr Smith's citation of Mr Hall's piece (that it is essentially concerned with Inquiries into corruption and not governance) there are other difficulties concerning its relevance to Mr Smith's assertion that the Inquiry was guilty of not providing procedural fairness. First, there are the references to findings, and findings of significance. When Mr Smith wrote his submission in reply no findings had been made about any of the issues that troubled Mr Smith. Without any evidence at all, Mr Smith had assumed that the Inquiry had accepted every piece of evidence that came before it, and made conclusions that were adverse to Mr Smith's clients. No findings had been made at all. Second, Mr Hall refers to standards applicable to a civil action. Mr Smith, fixated on the notion that the Inquiry was a form of a Court case, appears to believe that this comment has some relevance to the Inquiry. It does not.

The second example occurs on pages 9 and 10 of **submission in reply 104**. It concerns the case of the Minister for Immigration and Ethnic Affairs v Pochi (1980). The relevance of this to the Inquiry is not immediately apparent since it refers to a deportation case and was heard in a Court of Law. It appears that if Mr Smith can point to any reason why he has chosen to quote the extract it might be found in the observation of the court that "I respectfully agree with the conclusion of Diploc LJ that it is an ordinary requirement of natural justice that a person is bound to act judicially "base his decision" upon material that leads logically to show the existence or non-existence of facts relevant to the issue to be determined". The Inquiry has no objection to the observation. It is obvious and sensible that conclusions be based on a logical process that shows the existence or non-existence of facts relevant to the issue to be determined. The deportation case affects personal rights. The Inquiry into Tweed Shire Council held as one possibility the loss of public office. The two situations are not comparable.

We think another element in relation to the procedural fairness matter can be found in the case of the *Minister for Immigration and Ethnic Affairs v Pochi (1980) 44 FLR 41*.

Whilst this case was dealing with a deportation matter which the court considered to be a grave issue (*please read dismissal of the Council:* italics inserted) the court made the following observation:

Paragraph 24 – *"It would be both surprising and alogical if, in proceedings before a Statutory Tribunal involving an issue of the gravity of deportation of an established resident, the rules of natural justice were restricted to the procedural steps leading up to the making of the decision and were completely silent upon the basis of which the decision itself might be made. There would be little point in the requirements of natural justice aimed at ensuring a fair hearing by a tribunal if, in the outcome, the decision maker remained free to make an arbitory decision. If the*

> *decision, in such a case, were to be based on mere suspicion or speculation, the rules of procedure aimed at governing the process and making finutes of material fact would involve no more than a futile illusion of fairness. I respectfully agree with the conclusion of Diploc LJ that it is an ordinary requirement of natural justice that a person bound to act judicially "base his decision" upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined. As has been mentioned, the requirements of natural justice may vary according to the nature of the inquiry .... and that conclusion may not be of universal validity in that it may not for example apply in respect of some domestic forum. It is however, a general validity in the case of a statutory tribunal which is bound to act judicially. Indeed, that conclusion upon analysis and for the present purposes, does little more than place in a proper context of the essential duty of fairness of a statutory tribunal bound to act judicially, the well established principle of law, the decision of such a statutory tribunal must ordinarily be based on evidence which is reasonably capable of sustaining it."* [The underlining is ours].

Submission in Reply 104 p. 9-10

At a number of points in **submission in reply 104** Mr Smith either cajoles the Inquiry for "accepting" evidence given by a number of people or he claims that the Inquiry has formed conclusions from such evidence.

An example is his comments on the oral evidence supplied by Ms Fitzgibbon. Mr Smith's language is rather tortured and what he is meaning to say is unclear. The first part of his sentence might mean that he imagined that Ms Fitzgibbon's evidence had been accepted by the Inquiry as being representative of the community. The second part might mean that the Inquiry should wait until it received his comments on Ms Fitzgibbon's evidence (**submission in reply 104 p. 16**).

As explained earlier the Inquiry sought to hear the views of a number of people. These views would sit alongside all the other evidence from written submissions, oral submissions, council documents and council files, and a range of information that has been supplied from many sources. The idea that the Inquiry simply accepted each and every observation made is absurd.

The problem with Mr Smith's second contention (that the Inquiry had to wait for his submission in reply before it made any evaluation) is that he has provided almost no useful information in **submission in reply 104**. He was intellectually dishonest in his efforts to point bias. In respect of Ms Fitzgibbon, for example, all that can be deduced from the page and a quarter that Mr Smith devotes to her is that she is a critic of the Council and is, in Mr Smith's opinion, therefore wrong in whatever she says. It is all very shallow and puerile.

> It is with great care we would say that the Commission should have received such evidence as being views of the community at large and certainly could not have simply received it without on the other hand, been responsive to and receives Council's replies

that were to come and are occurring now with our written submissions in reply.

Submission in Reply 104 p. 16

One of the more troublesome issues that have faced Tweed Shire Council in recent years is the management of the tourism and residential zoning (this has been covered in Section 3). The General Manager and others testified to the difficulty of applying parts of the Council's LEP in this regard. When Mr Gary Smith, a council planner appeared, it was pertinent to ask his views on the matter. Mr Tony Smith turns the raising of this into an issue, stating that the Inquiry had suggested that the Council was delinquent (**submission in reply 104 p. 18**).

We particularly refer to page 531 of the evidence where it is quite clear that although it has been it appears some issue with the Commission concerning tourists and residential accommodation that DIPNR itself has in respect of this very development modified a consent to make it almost impossible for the Council to enforce the tourist accommodation in relation to the development and to suggest that the Council is in some way delinquent in respect of this area is to ignore the fact that the primary consent authority for the State itself has either been unwilling or unable to provide the resilience that the Commission has sought from the Council in respect of its planning affairs.

Submission in Reply 104 p. 18

Planning issues pre-occupied Mr Tony Smith's mind. He continually reverts to the theme that the Inquiry had come to conclusions about aspects of the Tweed Shire planning and assessment systems whilst the Public Hearings were proceeding. No such conclusions had been reached (**submission in reply 104 p. 33**).

It is of concern that it seems from the questioning by the Commission panel, that the Commission is looking for a criticism of Council's strategic planning and accepting that criticism from any quarter that it is able to be found without properly assessing the qualifications or in fact the credibility of such evidence. The fact such opinions are sought in our view demonstrates bias and gross unfairness in respect of the Council's planning section as a whole.

The difficulty in responding to such evidence is that the evidence having not been tested or qualified and apparently the Commission giving a great deal of credence to the opinions of people generally who do not appear to have proper qualifications, leaves the Council in the position of simply being unable to judge the value or the circumstances upon which the evidence is received. Is it just to support some general perception proposition? Is it being received as much more?

…

It is not a decision being made, it is simply matters being discussed and people being persuaded and having opinions but until a final decision is made to criticise people for having various opinions at various times during the consideration of a question is a dangerous way to judge an issue. In fact, it is a dangerous method to draw adverse conclusions from.

Submission in Reply 104 p. 33

As dangerous as Mr Smith's erroneous view that various conclusions had been made about the planning and assessment systems of council, is his equally erroneous conviction that the Council would be dismissed on the basis of comments made by members of the community that would have been accepted uncritically by the Inquiry. The Council was indeed dismissed on 25 May 2005 but the recommendation that led to the Governor dismissing the Council did not spring from uninformed findings made about planning and assessment issues. Mr Smith on a number occasions stated that he had no idea of why certain questions were put to certain people. He appeared to have understood little of the substance of the Inquiry.

In fact, because there has been no serious attempt to question or analyse the common general issues of a number of groups that have put submissions to the inquiry, one gets the feeling that they are simply accepted on the basis that they are genuine concerns and therefore, they are important issues which go to whether or not there should be a recommendation that the Council be dismissed or now as we have become aware, the basis it seems of an adverse recommendation in relation to Council's Planning Department.

Submission in Reply 104 p. 38

5.2 *The Nature of a s. 740 Inquiry*

5.2.1 The Public Hearings and the Inquiry Processes

Mr Smith struggled to make sensible observations about the processes adopted by the Inquiry largely because he had a fixation on treating the Public Hearings as a Court case. The Public Hearings are important but they represent just one part of a long and detailed set of processes that eventually lead to at least one report that may contain recommendations. Mr Smith appears to have considered that the evidence provided and the ideas put forward at the Hearings were the crux of the Inquiry. In fact the Hearings only represented a station along a long journey.

The Inquiry began on 10 November 2004. Written submissions were received through to 28 January 2005. At the same time the Inquiry requested a large number of documents be made available to the Inquiry, a process that continued through the Hearings, and extended over months after the Hearings had finished. Documents were also sourced from a range of other bodies that had relevance to the governance issues that the Inquiry was considering. Information and materials were obtained through summonsing a number of groups relevant to the themes directed by the Terms of Reference. Members of the Inquiry staff made a number of visits to Tweed Shire Council to examine a range of files and other documents prior to the Hearings. Further visits were made during and subsequent to the Hearings. Information was also gathered from a number of standard sources like the Australian Bureau of Statistics. Statistical information was also supplied by the Independent Commission Against Corruption, the Office of the Ombudsman, the Department of Planning, Infrastructure and Natural Resources, the Department of Local Government, the Electoral Funding Authority and other sources. A number of documents that explained the policy areas of various State Agencies that had relevance to Local Government were obtained and analysed. There was a large number of written submissions, submissions-in-reply, briefing notes and other material that were accumulated before, during and after the Hearings. All of these things provide the basis for the long, slow, painstaking analyses that eventually lead the Inquiry to produce one or more reports containing its findings and, where appropriate, recommendations.

Mr Smith in his ill-considered submission in reply (**104**) showed no understanding of this long, detailed process that enabled the Inquiry to reach conclusions about the governance issues, the public administration, of the Council. He tried to play the part of a defence lawyer for his clients in some kind of Court case that his imagination generated. There was no Court case. Nobody was on trial. It was an inquiry (of which the Public Hearings constituted just one portion) that allowed an assessment to be made of whether or not the Council efficiently and effectively provided governance of the Shire, with the Terms of Reference providing specific items that should be considered in making that assessment.

In one phrase, Mr Smith got it all horribly wrong.

5.2.2 Conflicts of Interest

The article by Mr Stokes, that Mr Smith attempted to use to give a context of bias in the Public Hearings, raised a number of serious issues that are worthy of noting. The Terms of Reference of the Inquiry directed attention to issues of conflicts of interest in Local Government, and that subject was the focus of Mr Stokes' article.

In the First Report of the Inquiry it was shown that the councillors in general had almost no understanding of what constituted a conflict of interest. A conflict of interest essentially refers to the illegitimacy of administrative decisions being made by persons with an interest in the outcome. This is something larger than a person having a monetary interest in an outcome. It can cover a wide canvass of situations where a councillor may have an interest in a certain outcome.

The problem becomes more complex when the interest is, in fact, a general interest in an outcome. That might imply that a councillor has a conflict when he or she supports a class of outcomes rather than a single outcome. In the area of development applications and related processes the councillor may be bent on acting consistently to support and promote developments. The Majority councillors each carried a general conflict of interest. As soon as they were given notice that they had been selected by Tweed Directions, and then followed their orders to open a bank account into which the first $10,000 was deposited, they were to face general conflicts of interest if they were elected. Tweed Directions thought that they had removed such conflicts by not revealing the names of the donors or the sums that they were donating. This ruse was all too cute. Some of the candidates must have known the general body of donors before the election (rumours and gossip pass along the grapevines of communities with small business sectors and limited economic bases quite quickly). Regardless of whether or not they were aware of the general source of their funding before the election, they knew all the details after the elections and they were aware that their funding had overwhelmingly been provided by proponents of development. They then faced both general and particular conflicts of interest.

In March 2004, the month of the Local Government elections, the NSW Ombudsman released the Public Agencies Fact Sheet No. 2 entitled *Bad Faith, Bias and Breach of Duty.* The Ombudsman observed that acting in bad faith can include acting in the knowledge of a real or perceived conflict of interest. He further states that public officials must be objective and unbiased when making decisions. The Fact Sheet continued:

> ... The *ICAC Report on Investigation into North Coast Development* in July 1990 found that no public official should ever display favour or bias toward or against any person in the course of his or her duty, even if there is no payment or return favour as a result. There must be equality of opportunity and access in the provision of all public services. The rule against bias (in particular

that of not judging a matter involving one's own interests) is also a key element in the notion of procedural fairness.

An exception to this rule is according preference to people or agencies which comply best with a government policy. Such preferences should not, if legal, give rise to an imputation of bias or its reasonable apprehension.

In the public eye there is great suspicion of donations made to political parties in general. There is even greater suspicion when donations are made to individuals, rather than a Party. The suspicions strengthen when the individuals are standing for election in Local Government, because it is common knowledge that the strongest powers that councillors possess in terms of providing material benefits are attached to their roles in overseeing planning systems, and being the consent authorities for particular projects. An editorial on these matters in the *Sydney Morning Herald* 3 February 2005 p. 16 summed up public reactions to such donations: "Forgive us our scepticism but we suspect an earthier motive, more akin to Martial's first century observation that 'whoever makes great presents expects great presents in return' ". Later, the same editorial observes, in relation to the fact that Lend Lease and AMP do not make donations: "Democracy would be stronger if the rest of the developer fraternity followed suit. If they cannot be persuaded voluntarily to keep their chequebooks locked away, political donations from this particular sector should be banned". The editorial proceeds:

This is not to say developers as a whole are any less honest than the general community. Unlike other sectors, however, they are extraordinarily dependent on councils and government to get projects started. A blind eye, steered approval or malicious rejection can make the difference between big profits and financial ruin. Some developers donate because they want to curry political favour; others because they want at least insurance against political payback. Politicians are not too fussy about why the cheques are forthcoming, just so long as they are. In the meantime, the potential for the public to think the worst – that he who pays the piper calls the tune – is often irresistible. And every instance of that further damages democracy.

Public scepticism is further fuelled by the fact that little is done to reduce or correct conflicts of interest, or to punish councillors when conflicts of interest translate into actual corruption. The Local Government Act is weak in this regard. ICAC, whether for a lack of resources or a lack of will, rarely follows up Local Government matters referred to it (despite them constituting around 40% of all referrals). There are very few instances of offending councillors being subject to fines or gaol terms.

Where suspicions of conflicts of interest have grown to the point where the governance of a council appears to be affected, the only mechanism for examining the problems of a particular council is a s 740 Inquiry. Because such Inquiries are called by the Minister it is easy for the defendants to claim that they are subjected to political bias and persecution. This is precisely the line run generally by the Majority councillors and their supporters. It is the line adopted by Mr Smith.

It was clear from the start of the Inquiry that attack was considered to be the best form of defence, and persistent attempts were made to divert attention from the governance issues to political matters. Tweed Shire is a particularly parochial place. For many decades the National Party ruled at each level of government, Federal, State and Local. That Party lost both the Federal and State seats in recent elections, which made it all the more determined to maintain a conservative base in the Council. The Inquiry is not concerned about politics. Once the Inquiry is announced and its Terms of Reference set the Minister, the Local Members, and any other political entity has no place within the Inquiry. The Inquiry runs independently, and eventually reports to the Parliament.

The Majority councillors and their supporters failed to even attempt to understand the intent and purpose of the Inquiry (to assess aspects of the public administration of the council). They, instead, tried to turn the Inquiry into a political bun-fight. The process was counter-productive, and wrong. It severely tested the patience of the Inquiry in relation to its powers for dealing with contempt. An example of the campaign is provided by a copy of notices placed in shops and other venues around the Shire.

Say "No" to sacking the Council you elected in March 2004! Speak up in defense of local democracy. Make your personal submission, even if it be two or three lines, to:

Office of the Commissioner
Tweed Shire Council Public Inquiry,
Locked Bag A5045
SYDNEY NSW 1235

Submissions close January 28, 2005. See over.

First our train. Then our Clubs. Now this Sydney government wants to sack our democratically elected Council.

Fight back. Make your voice heard with a statement in support of the Council you elected to the Commission of Inquiry into Tweed Shire Council. See over.

Sadly, Mr Smith, a solicitor hired by the Council to represent the Council as a whole, quite wrongly associated himself with just one clique within the Council, and allowed his legal role to be swamped by their, and his, political agenda. Mr Smith had succumbed to a substantial conflict of interest.

5.2.3 Statistics of the Inquiry

In Mr Smith's quest to attack and denigrate the Inquiry (**submission in reply 104**) he made a number of references to two things. First, he pointed to a larger number of written submissions made by supporters of the Council (read Majority councillors) than submissions critical of the Council. Second, he claimed that despite this fact, critics of the Council were afforded more time than supporters when making oral submissions.

Mr Smith was correct in suggesting that there were more written submissions made in support of the Council. 69% of the written submissions that took a pro- or anti-Council position were in support of the Council. This does not mean that 69% of the submissions were in favour of the Council; around 20% of the total of the written submission simply raised issues that related to the Terms of Reference without making a judgement on the

Council. Mr Smith seemed to think that the purpose of the Inquiry was to conduct some kind of a poll based on the number of submissions that supported or opposed the Council. If more people wrote in favour of the Council then whatever findings the Inquiry might make should reflect in favour of the Council.

This piece of simplistic egalitarianism breaks down when the contents of the submissions are examined. As stated many times, the Inquiry was charged by its Terms of Reference to consider the efficiency and effectiveness of the governance of the Council with respect to a number of specific issues. The Inquiry was assessing the public administration of the Council, not conducting an opinion poll. The written submissions were useful to the Inquiry only in so far as they considered matters of governance and provided views and information that might sensibly assist the Inquiry in its assessments.

68.4% of the written submissions received ran to a formula: they said "No" to the sacking of the Council, made a statement that expressed support for the Council, and made a comment about democracy. That is, they followed the script of the notices that were placed in shops, handed out on street corners, and promoted in newspapers such as Mr Robertson's. Many of the writers had also probably attended the forum called by Mr Raso to object to the Inquiry. Speaker after speaker at that meeting preached from the same book, the script of which was printed in the notices. The speakers exhorted their listeners to make sure they put in a submission to the Inquiry. The implication was that if the Inquiry received a large number of pro-Council submissions then the Inquiry reports would be in favour of the Council. The supporters of the Council obviously reacted favourably to these exhortations because the Inquiry received a large number of such submissions.

The number of such submissions showed that the organisation formed to fight the Inquiry was active and persuasive. In the sense that a majority of the written submissions were sent by their supporters they probably regarded that as a victory. Certainly Mr Smith considered it was material to the findings that the Inquiry might make. Mr Smith and those who organised the attacks on the Inquiry were wrong in their beliefs. The information in the majority of the written submissions received from pro-Council supporters did not aid the Inquiry in its quest for information about the governance of the Council. These stereotyped, short letters (sometimes sent independently by three people in a household) were ammunition in a political battle that they imagined they were fighting. For the most part they did nothing to advance the Inquiry's knowledge or understanding of governance issues.

The 31% of the critical submissions (as a proportion of the total of the pro- and anti-Council submissions) were in stark contrast because they provided a great deal of information and evidence to support their contentions that there were governance problems in the Council's administration. The fact that they did supply evidence and drew conclusions in the light of such evidence did not mean, as Mr Smith ignorantly assumed, that the Inquiry accepted their evidence and conclusions. The written submissions and the Public Hearings were only two parts of a long and detailed search for material that would inform the Inquiry's ultimate findings.

The second prong to Mr Smith's politically inspired attack on the Inquiry was based on numbers referring to the number of pro- and anti-Council people who were given leave to appear at the Public Hearings, and the time given to various speakers.

Despite the unhelpful nature of the formatted written submissions a number of their writers was given leave to appear in the hope that they might advance their cause by providing the Inquiry with actual evidence that pertained to the Terms of Reference, or at least advance their ideas of why they supported the Council. Unfortunately little was gained from this because these speakers did not generally go beyond the very little that they had offered in their written submissions.

The purpose of the Public Hearings is to advance the Inquiry's understanding of the issues it had to address. The selection of who might be granted leave to appear at the Hearings was not based on the split of feelings about the Council (that is pro- and anti-sentiments). To do so would not advance the primary duty of the Inquiry, and would simply turn the Inquiry into a kind of political contest, based on a phoney, politically engineered campaign run along the lines that those desperate to destroy the Inquiry, including Mr Smith, would wish. The actual break-up of the speakers was: 35.6% were supporters of the Council, 32.6% were Council staff or other professionals whose insights into governance issues were judged to be of use (that is a group of people who might be seen as being relatively neutral to the political split), and 31.8% were critics of the Council.

Tables 5.2.3.1 and 5.2.3.2 and Figures 5.2.3.1 and 5.2.3.2 provide a breakdown of the time given to various groups of speakers who appeared at the Hearings. These data correct the consistent refrain of Mr Smith that too much time was given to speakers from the public who could not, and would not, know what they were talking about in Mr Smith's estimation. In terms of the average time given to speakers, the councillors had 53.3 minutes per appearance. The Mayor was afforded the longest time at the Hearings with a total of 249 minutes (4 hours and 9 minutes). Staff and ex-staff averaged 28.6 minutes and 32.4 minutes per appearance. The aim of this was to give those people most closely related to the governance issues (councillors and staff) the most opportunity to assist the Inquiry. People associated with the property industry averaged 32.9 minutes per appearance and representatives of State Agencies 38.1 minutes: both groups had roles that might shed light on the various topics defined by the Terms of Reference. The public, a group that Mr Smith generally appeared to consider as not having a right to be speaking at the Hearings, averaged 19.8 minutes per appearance.

For reasons that are obvious, the total amount of time taken by the public at the Hearings, 1445 minutes, was the most of the groups of speakers. This meant 0.34 minutes per voter compared to the 53.3 minutes per councillor.

Table 5.2.3.1

	Average Minutes/Appearance
Councillors	54.8
Council Staff	28.6
Ex Council Staff	32.4
Consultants	27
Public	19.8
Property	32.9
State/Gov Dept	38.1
Other	31
TOTAL	27.4

Figure 5.2.3.1

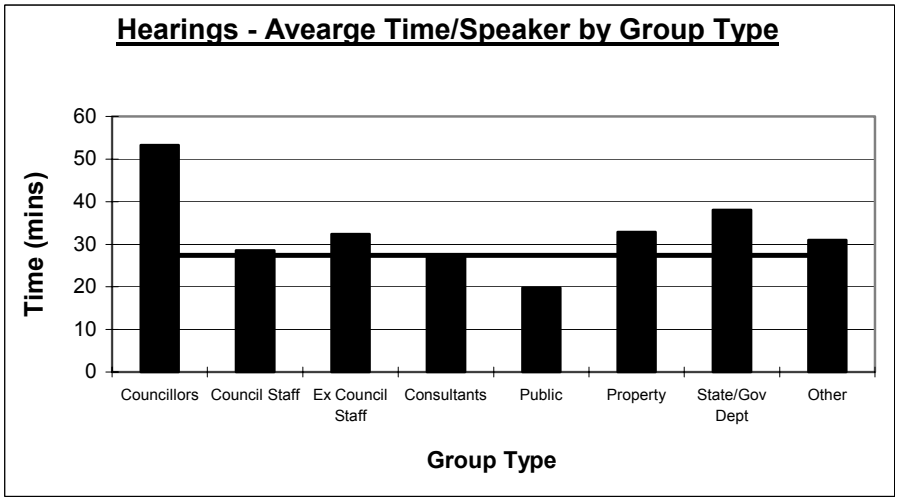

Table 5.2.3.2

	Minutes	Appearances
Councillors	713	13
Council Staff	544	19
Ex Council Staff	227	7
Consultants	54	2
Public	1445	73
Property	362	11
State/Gov Dept	267	7
Other	186	6
TOTAL	**3798**	138

Figure 5.2.3.2

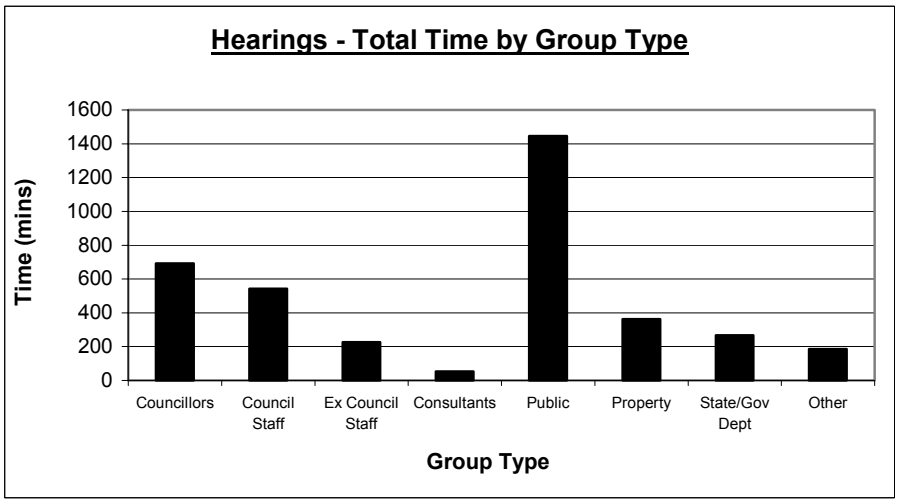

Table 5.2.3.3 provides the full details of the time taken by speakers at the Hearings. These details point to the overblown claims of Mr Smith concerning time given to different groups and to different individuals. For example, Ms Fitzgibbon's appearance lasted six minutes longer than the average of all those community members who appeared at the Hearings. "An **enormous** amount of time is given to Ms Fitzgibbon, as will occur with other witnesses who are attacking the council" blustered Mr Smith (**submission in reply 104 p. 16**). Mr Smith was seeing the world through a prism defined by the political campaign of which he was a part. This took him a long way away from reality.

Table 5.2.3.3

Name	Date	Witness sworn	Witness withdrew	Total Time (mins)
Mayor Warren Polglase	16/02/05	10.40am	12.12pm	92
	cont	2.02pm	2.54pm	52
Dr John Griffin	16/02/05	2.55pm	4.25pm	90
Clr Lynnette Beck	17/02/05	10.04am	10.55am	51
Clr Max Boyd	17/02/05	10.55am	11.56am	61
Clr Gavin Lawrie	17/02/05	2.03pm	2.43pm	40
Clr Dorothy Holdom	17/02/05	2.45pm	3.10pm	25
Clr Henry James	17/02/05	3.10pm	3.45pm	35
Clr John Murray	17/02/05	3.45pm	4.15pm	30
Clr Robert (Bob) Brinsmead	18/02/05	10.09am	10.55am	46
Mr Albert (Bill) Bedser	18/02/05	10.55am	11.20am	25
Clr Stephen Dale	18/02/05	11.21am	12.00pm	39
Mr Reginald Novill	18/02/05	12.00pm	12.32pm	32
Clr Barbara Carroll	18/02/05	2.03pm	2.43pm	40
Mr Noel Hodges	18/02/05	2.45pm	3.50pm	65
Mr Darryl Anderson	23/02/05	10.04am	10.30am	26
Mr James (Jim) Glazebrook	23/02/05	10.31am	10.59am	28
Mr Graham Staerk	23/02/05	11.00am	11.52am	52
Mr Alan Piers-Blundell	23/02/05	11.52am	12.40pm	48
Mr Alan McIntosh	23/02/05	2.05pm	2.26pm	21

Mr Mark and Mrs Alexandra Catchpole	23/02/05	2.27pm	2.46pm	19
Mr Paul Brinsmead	23/02/05	2.47pm	3.29pm	42
Mrs Barbara Fitzgibbon	23/02/05	3.29pm	3.55pm	26
Mr Philip Youngblutt	24/02/05	10.10am	10.35am	25
Ms Bronwynne Luff	24/02/05	10.35am	11.15am	40
Dr Steven Segal	24/02/05	11.15am	11.43am	28
Mr Robert Bulford	24/02/05	11.44am	12.12pm	28
Mr Brian Ray	24/02/05	2.02pm	2.32pm	30
Mr Gary Smith	24/02/05	2.32pm	3.10pm	38
Mr Donald Buckley	24/02/05	3.11pm	3.31pm	20
Mr Michael Rayner	24/02/05	3.31pm	4.00pm	29
Mr Arthur (Bob) Robertson	25/02/05	10.02am	10.31am	29
Ms Veronica Hoskisson	25/02/05	10.32am	11.00am	28
Ms Ilona Roberts	25/02/05	11.39am	12.10pm	31
Mr James Penny	25/02/05	11.02am	11.31am	29
Mr Edward Hopkins	25/02/05	2.03pm	2.38pm	35
Mr Eber Bruton	25/02/05	2.39pm	2.48pm	9
Ms Linda Kennedy	25/02/05	2.48pm	2.55pm	7
Mr Barry Longland	25/02/05	2.55pm	3.30pm	35
Ms Irene Young	25/02/05	3.30pm	3.50pm	20
Mr David Broyd	02/03/05	10.04am	11.08am	64
Ms Catherine Lynch	02/03/05	11.09am	11.40am	31
Mr Paul Bolster	02/03/05	11.40am	12noon	20
Mr Peter Ainsworth	02/03/05	12noon	12.07pm	7
Mr Raymond Tate	02/03/05	2.03pm	2.15pm	12
Dr Austin Sterne	02/03/05	2.16pm	2.39pm	23
Mr Anthony Vass	02/03/05	2.40pm	2.50pm	10
Mr John Penhaligon	02/03/05	2.51pm	3.13pm	22
Mr Vaughan Rouse	02/03/05	3.14pm	3.30pm	16
Mr Lawrence Ganter	02/03/05	3.31pm	4.05pm	34
Mrs Maria Smart	03/03/05	10.03am	10.29am	26
Mr Colin Brooks	03/03/05	10.30am	10.59am	29
Mr Gilbert May	03/03/05	11.00am	11.10am	10
Mr Stuart Reid	03/03/05	11.10am	11.46am	36
Mr Terrence Kane	03/03/05	11.46am	12.00pm	14
Mr Paul Malouf	03/03/05	12.00pm	12.31pm	31
Mr Lindsay McGavin	03/03/05	2.02pm	2.41pm	39
Mr Victor Winterflood	03/03/05	2.42pm	2.59pm	17
Mr Gary Thorpe	03/03/05	2.59pm	3.15pm	16
Ms Judith Wagner	03/03/05	3.16pm	3.35pm	19
Mr Robert Nienhuis	03/03/05	3.35pm	3.52pm	17
Mr Len Greer	03/03/05	3.52pm	4.05pm	13
Mr Steven MacRae	04/03/05	10.05am	10.57am	52
Mr David and Mrs Sylvia Wylie	04/03/05	10.58am	11.29am	31
Ms Tracey Hooper	04/03/05	11.29am	11.47am	18
Mr Richard Paterson	04/03/05	11.48am	12.11pm	23
Mr Paul Waters	04/03/05	12.11pm	12.35pm	24
Mr Brian Donaghy	04/03/05	2.03pm	2.23pm	20
Mr Robert (Bob) Missingham	04/03/05	2.24pm	2.45pm	21
Ms Robyn Lucienne	04/03/05	2.45pm	3.00pm	15

Mr Bradley Clinch	04/03/05	3.00pm	3.15pm	15
Mr Ron Cooper	04/03/05	3.15pm	3.36pm	21
Mr Rick Whitehead	04/03/05	3.36pm	4.06pm	30
Dr John Jenkins	09/03/05	10.07am	10.30am	23
Ms Julie Murray	09/03/05	10.31am	11.02am	31
Mr Carl Redman	09/03/05	11.03am	11.16am	13
Ms Rose Wright	09/03/05	11.17am	11.58am	41
Mr Robert Harvey	09/03/05	11.59am	12.20pm	21
Ms Tess Brill	09/03/05	12.20pm	12.35pm	15
Mr Grant Cooney	09/03/05	2.05pm	2.22pm	17
Mr Francis (Frank) Wilson	09/03/05	2.23pm	2.47pm	24
Mr Ray Musgrave	09/03/05	2.47pm	3.01pm	14
Mr George Connor	09/03/05	3.02pm	3.15pm	13
Ms Gretel Jones	09/03/05	3.16pm	3.39pm	23
Mr Brendan Diacono	09/03/05	3.39pm	4.20pm	39
Mr Rodney Michael Gill	10/03/05	10.02am	10.40am	38
Mr Alan Powell	10/03/05	10.40am	11.06am	26
Mr Idwal Richards	10/03/05	11.07am	11.26am	19
Mr John Ryan	10/03/05	11.27am	11.46am	19
Mr Kenneth Hansen	10/03/05	11.47am	12.01pm	14
Mr Nicholas Aldridge	10/03/05	2.04pm	2.19pm	15
Mr Patrick Raftery	10/03/05	2.19pm	2.31pm	12
Prof Bruce Thom	10/03/05	2.31pm	3.20pm	49
Mr David Papps	10/03/05	3.20pm	4.09pm	49
Ms Maggie-Anne Leybourne	10/03/05	4.10pm	4.26pm	16
Mr Jimmy Malecki	11/03/05	10.02am	10.37am	35
Mr Leonard Hogg	11/03/05	10.38am	11.00am	22
Ms Patricia Mann	11/03/05	11.00am	11.15am	15
Ms Janice Green	11/03/05	11.15am	11.30am	15
Mr Michael Carolan	11/03/05	11.30am	11.45am	15
Mr Robert Caine	11/03/05	11.45am	12 noon	15
Mr John Devonshire	11/03/05	12 noon	12.10pm	10
Ms Jude Robb	11/03/05	2.05pm	2.25pm	20
Mr Michael Allen	11/03/05	2.26pm	3.05pm	39
Dr William Wright	11/03/05	3.05pm	3.20pm	15
Dr Bruce Cuthbert	11/03/05	3.20pm	3.25pm	5
Mr John Allen	11/03/05	3.25pm	4.11pm	46
Mr Ian Stuart	11/03/05	4.12pm	4.22pm	10
Mr Stephen Murray	16/03/05	10.06am	11.05am	59
Mr Richard Attwood	16/03/05	11.06am	11.16am	10
Mr Peter Brack	16/03/05	11.16am	11.35am	19
Mr Roy Rudman	16/03/05	11.35am	11.47am	12
Mr Derek Budd	16/03/05	11.47am	11.58am	11
Mr Peter Gladwin	16/03/05	11.58am	12.10pm	12
Ms June Saville	16/03/05	12.10pm	12.30pm	20
Mr Jeremy (Jerry) Cornford	16/03/05	2.10pm	2.45pm	35
Mr Irvine Jackson	16/03/05	2.45pm	3.07pm	22
Mr Nicholas Karlos	16/03/05	3.08pm	3.16pm	8
Mr Noel Hodges	16/03/05	3.18pm	3.47pm	29
Mrs Olga Vidler	16/03/05	3.48pm	3.55pm	7

Mr Anthony (Tony) Smith	16/03/05	3.55pm	4.20pm	25
Mayor Warren Polglase	17/03/05	10.06am	11.51am	105
Dr John Griffin	17/03/05	11.51am	12.35pm	44
	cont	2.00pm	2.22pm	22
Ms Margaret Ferrier	17/03/05	2.23pm	2.31pm	8
Mr Ernest Bradshaw	17/03/05	2.31pm	2.40pm	9
Ms Bronwynne Luff	17/03/05	2.41pm	3.20pm	39
Clr Robert (Bob) Brinsmead	17/03/05	3.20pm	4.02pm	42
Mr Gary Raso	17/03/05	4.03pm	4.21pm	18
Mr Jeff Rodgers	18/03/05	10.03am	10.11am	8
Mr Terence Watson	18/03/05	10.12am	10.40am	28
Mr Malcolm Imrie	18/03/05	10.41am	11.08am	27
Mr Neville Newell	18/03/05	11.09am	11.30am	21
Clr George (Bernie) Bell	18/03/05	11.30am	12.05pm	35
Ms Lindy Smith	18/03/05	2.03pm	2.18pm	15
Dr Weston Allen	18/03/05	2.18pm	2.40pm	22
Mr Douglas Jardine	18/03/05	2.41pm	3.00pm	19
Mr Gregor Manson	18/03/05	3.00pm	3.20pm	20
Ms Stella Wheildon	18/03/05	3.20pm	3.32pm	12
Ms Jacqueline McDonald	18/03/05	3.35pm	3.55pm	20
Total speakers = 138				3798

5.2.4 Walking Down a Different Road

Mr Smith clearly cast a political gaze on the Public Hearings and attempted to interpret what he saw and heard in that perspective. Beyond that fact, there was another difficulty preventing Mr Smith from understanding and interpreting the evidence that was forthcoming in the Hearings. He simply failed to understand the focus of the Inquiry (governance issues), the nature of the Inquiry (it was not a Royal Commission but a s 740 Inquiry with certain powers derived from the Royal Commissions Act 1923), and the necessity of the Inquiry receiving relevant information from as many sources as possible within the Hearings, and from as many sources as possible without.

The focus of the Inquiry and the multiple sources of evidence that inevitably assists the Inquiry in reaching an understanding of the issues that it has to consider have been covered earlier in this Section. Mr Smith's understanding of the nature of the Inquiry did not reach any such understanding.

On 7 December 2004 Mr Smith, apparently at the Council's bidding, gave a seminar on Local Government and Planning and the NSW Government Inquiry. This was given at the Tweed Shire Council Auditorium in Murwillumbah. The audience consisted of councillors, Council staff, developers, consultants and other interested members of the public. The purpose was for Mr Smith to inform his audience on the potential ramifications of the Public Inquiry.

In the course of his presentation Mr Smith observed:

- That Council was on somewhat of a slippery slope because of the announcement of the Inquiry
- That the Inquiry was a Royal Commission
- That the extremely large sum of money donated to electoral funds merely meant that they, people in the Tweed, were better collectors than people in other places
- That members of the public would be able to libel anyone they liked
- That confidential submissions and in camera appearances would be made
- That people's phones could be bugged
- That the Council was sacked in Warringah without any references being made to the Police or to ICAC
- That the Department of Local Government and the Minister were open to accusations of a conflict of interest between best interests and political expediency
- That Mr Smith played tennis with a developer each Saturday morning and had no conflicts of interest
- That if the system were going to be suspicious of money from developers, rules have to be introduced about that
- That people making submissions to the Inquiry might not take proper regard of the truth

This talk laid out Mr Smith's understanding of the Inquiry and shaped the political campaign against the Inquiry. Mr Smith was very willing to take his messages to the public through the press (Tweed Sun, 15 December 2004). He did not shrink from putting out his ideas to the public of the Tweed, with the aim of getting them to address the threat of the Inquiry. He stated that the decision to hold the Inquiry had the potential to undermine democracy. He questioned whether the Inquiry would have sufficient evidence on which to make a judgement. He stressed that the Council could face dismissals. He observed that the law entitled developers to donate any amount they wished, and until a decision was made otherwise, the benefiting councillors should not be crucified. He urged that if people had things to say in support of the Council they should say it because the silent majority will not be very helpful.

In one way or another, Mr Smith's ideas were to form the basis of the campaign that was organised against the Inquiry in January 2005, and they certainly reflected his attitudes and actions in respect of the Public Hearings. From the very start Mr Smith showed that he saw his role as the defender of the councillors who held a majority within the Council. He adopted an adversarial position.

The various tenets of Mr Smith's observations are considered below.

<u>The slippery slope issue</u>

Mr Smith persistently emphasised that the Inquiry might lead to the Council's sacking, and so convinced the councillors, and many in the community, that this was the most likely outcome unless the supporters of the Council united to counter the threat. Speaking from his seemingly lofty height as the Council's legal adviser, it was easy to see how much influence this view would have. Mr Smith was perhaps the prime force in establishing an opposition to the Inquiry.

The Royal Commission issue

Mr Smith never seemed to understand that the Inquiry was not a Royal Commission but, rather, a 740 Inquiry. His persistence in calling the Inquiry a Royal Commission only served to mislead the community, but it also misled Mr Smith. He was consistently looking for structures within the processes of the Inquiry which were irrelevant.

Large donations issues

Mr Smith provided a comfortably legalistic view of the relevance of developer donations to candidates at the 2004 election. He was flippant about the relative size of the Tweed donations. This probably led him to not pay much attention to the issue when, in fact, it was perhaps the most fundamental single issue related to the Inquiry.

The libel issue

Given his profession Mr Smith ought to have known that the possibility of any person being libelled was: (a) unlikely to happen, and (b) the Inquiry had the authority to censor submissions that might be libellous, and that the speakers at the Public Hearings were not allowed to make statements of their own, but rather answer questions put to them. The Inquiry had a responsibility to make sure that, questions and answers were relevant to the Terms of Reference.

Confidentiality issues

Mr Smith sought to paint a picture of in camera hearings and the receipt of anonymous submissions by the Inquiry. The implication was that the processes of the Inquiry would not be open and transparent, and that part of the information presented through either written or oral submissions, would be hidden and used against the Council. None of this was true, and in the opening address of the Hearings (16 December 2004) it was made plain that in camera hearings, and anonymous submissions being used to gain evidence, would not occur. Mr Smith was either being quite fanciful, or he wanted to cast the Inquiry in a poor and dangerous light.

Phone bugging issues

This was another of Mr Smith's flights of imagination.

References from the Inquiry

By indicating that no persons or actions were referred to the police or ICAC in the Warringah Inquiry, Mr Smith inferred that unless matters of corruption were discovered no great weight could be attached to an Inquiry. Although in his presentation of 7 December 2004 he stated that he thought that issues of conflicts of interest, rather than corruption, would be pursued at the Tweed Inquiry he clearly thought that this was both an inferior path and one which it would be difficult to substantiate through the evidence trails with which Mr Smith was familiar.

Political expediency

This was to become the foundation stone of the campaign against the Inquiry, and a motivating force in Mr Smith's desire to find fault with the Inquiry's procedures. Working from this base Mr Smith was prone to imagine instances of bias and undue process across the whole of the Hearings. The root cause of this was Mr Smith's desire to fill out his self-designated role of defending the majority councillors, and his view of the Inquiry's processes were shaped by this. Had he fulfilled the purposes of his contract, that is to service the whole Council with advice and support, he may have formed a different view.

Developers and conflicts of interest

Although the Terms of Reference specifically asked the Inquiry to consider the relationships of developers and elected representatives, Mr Smith apparently dismissed the issue as a trivial one.

Developers' money

Mr Smith took a black and white view of whether there were any problems with developers funding candidates. He decided that unless there were laws against such donations, there could be no problems associated with them, no matter how large or under what circumstances the funds were given. This simplistic view led to Mr Smith's failure to understand, or particularly notice, the Inquiry's interest in the matter.

The truth issue

As a legal adviser to the Council Mr Smith seems to have regarded himself as the arbiter of what might be regarded as true evidence, and what might not. Broadly, truth was the domain of those who supported the majority councillors. Untruths would emanate from those who were critical of the Council.

The evidence shows that, from the very beginning, Mr Smith had an understanding of the purposes and processes of the Inquiry that was substantially wrong. He also saw the Inquiry as a "one event" process with the Public Hearings, as a public trial where there was a progressive and continuous case being made for or against the Council. The Inquiry was never a trial, and the processes of reaching conclusions on its many issues were to extend well beyond the Hearings.

In submission in reply 104 Mr Smith complained a multitude of times, that he could not follow the line of questioning adopted or the purpose of individual questions. The fact was that Mr Smith's grasp of what the Inquiry actually was (an assessment of council's role in relation to certain aspects of public administration), his pre-designed and distorted images of what he thought the issues were, and the processes that should be attached to them, and his strong role in leading the opposition to the Inquiry, inevitably led to his inability to follow much of the proceedings.

He makes observations such as “We have no idea what matters could be inferred from his evidence” (**submission in reply 104 p. 17**) and “We have no idea what value such evidence could possibly have to assist the Commissioner one way or the other” (p. 21) and “We have absolutely no idea of the value of such evidence” (p. 32) so often and so repetitively that he might be depicted as a “Man With No Idea”.

5.3 *Who are the Stakeholders?*

5.3.1 Community Rights

It is clear that when the supporters of the Majority councillors began their campaign against the Inquiry in January 2005 they parroted a great deal of what Mr Smith had proclaimed about the purpose and workings of the Inquiry in December 2004. Mr Smith was wrong in most of what he stated then; unfortunately many in the community at large were likely to accept its validity. After all, he was the legal adviser to the Council and would be expected to have an understanding of what would go on in the Inquiry. A combination, of ignorance, egotism and politics on Mr Smith's part, misled both the Council and the community. He holds a responsibility for the waste of time, money and effort by a number of people who believed in the inevitability of the Council being sacked if the Inquiry were allowed to proceed. Mr Smith did not organise that opposition, but he laid the background to it by stressing the likelihood of the Council being dismissed and recklessly painting a picture of an Inquiry more akin to an Inquest.

Mr Smith, having politicised the Inquiry in his own mind, defined for himself who were the enemy. Chief amongst his adversaries were those in the community who made any criticism of the Council; this amounted to half the population.

The Council's charter (s. 8 of the Act) is "to provide directly or on behalf of other levels of the government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively". The Act is very clear that the principal duty of governance is to adequately and equitably work to provide services and facilities for the whole community. The Inquiry is essentially an inquiry into whether or not the Council has fulfilled its obligations. The Inquiry was specifically directed by the Terms of Reference (Item 4) to consider whether the Council had fulfilled its charter. This clearly means that the Inquiry was bound to hear the views of the whole community on the Council's record of governance.

In **submission in reply 104** Mr Smith failed in his responsibility to his client (the Council) by ruthlessly, and often quite incorrectly, directing his attack on those members of the community who spoke out against aspects of Council's governance, rather than assessing what the criticisms might imply in terms of whether or not the Council was properly fulfilling its charter. That is, if Mr Smith were to do his duty, he would have actually considered what the evidence coming forth might suggest in relation to the ways in which the Council was fulfilling, or not fulfilling, its charter. He might have paid attention to the Terms of Reference of the Inquiry.

Instead of carrying out the task that he was being paid to perform by the Council, Mr Smith went off on a politically inspired journey of his own. One of the worst aspects of this, is the way in which he abused and ridiculed those members of the community whom he had defined as enemies.

A sample of Mr Smith's observations is provided to give the tone of his attacks.

"*We are not sure precisely what qualifications Ms Hoskisson's* (sic) *has to know or even agree to such questions"* **submission in reply 104 p. 20**.

We do not find it worthwhile dealing with any further examples in respect of this evidence as the generalised nature of the evidence simply makes it impossible without examples to be able to properly respond in any meaningful way and certainly, what qualifications Mr Hopkins, as an architect, has to comment on the approval of applications on the basis they may provide economic benefits to the community is beyond logic.

Submission in Reply 104 p. 24-25

"Mr May speaks generally about strategic planning issues. We are not sure that he holds any particular planning degrees…" **submission in reply 104 p. 32**.

" Mrs Wylie: Yes, and that is what people have said to me in the Tourist Information Centre (where she worked).

We very much doubt that people would be standing around in the Tourist Information Centre saying all those things, but more importantly we have no idea about how many people in the Tourist Information Centre may have said things like that". **Submission in reply 104 p. 39**.

It appears that there is a small section of the Tweed community who are experts and have similar opinions as to the failings of the Council on a number of large matters but which, when push comes to shove, can give little reliable detail to support general allegations of illegality and of non Council action being unable to specify what action the Council should have taken, what development approvals are actually relevant to the site and what matters have been raised with the Council and what response the Council has given.

Submission in Reply 104 p. 40

"What does it matter what she would say to that? What does she know about planning policies and planning law?" **submission in reply 104 p. 42**.

The difficulty of asking generalised planning questions to members of the community who do not have experience in that area, is once again highlighted on page 1032 of the transcript where Ms Murray was simply not able to provide a sensible answer to what was a general question about enforcement and compliance which of course, it would be difficult for her to have any knowledge of, but which was suggesting of course, that Council had not carried out its normal regulatory functions.

Submission in Reply 104 p. 47

Underlying Mr Smith's breathtaking arrogance and childish observations, there is the essential denial of the right of the community to express opinions. Councils exist for one reason only: to provide services to the community, to serve the community. The community is the final arbiter on whether the Council is performing its duties, and every member of a community has a legitimate voice in that regard. Mr Smith, whose remuneration came from community funds, and who has no position within the Council

at all (he is simply one of several contractors paid to provide a service), has no right to form any opinion on what views members of the community may, or should, hold. In relation to decisions made in respect of planning and assessment matters, the EP&A Act specifies that the public interest must be considered when making such decisions. Ultimately, it is the community itself that is in the best position to know what is in its interests and what is not.

The constant dismissal of opinions of members of the community, because they may not hold professional qualifications in certain areas, is absurd. In many instances Mr Smith did not know whether a person he was attacking had certain qualifications or not. Regardless of Mr Smith's dictatorial sentiments, members of the community must have the right to speak about any issue related to Council's services, especially if they consider the delivery of these services are inadequate of faulty in some way.

Mr Smith's focus demanded that the public had to obtain professional qualifications before they speak, particularly on planning and assessment matters. The legal aspects of these appear to be Mr Smith's primary qualification. When a speaker questioned the capacity of a councillor to overturn a professional planning officer's advice because the councillor had no planning qualifications, Mr Smith reversed his opinion on the need for qualifications. As discussed in Section 3, the conferred ability of councillors to make assessments about planning issues is one of the thorniest issues in Local Government. The fact that the Act presently allows them to do this does not gainsay the fact that this right is debateable and under scrutiny. It certainly does not, and should not, prevent members of the community from raising it. This view is akin to the demand for expertise to underlie opinion evidence as required by courts. The role of the Inquiry was not equivalent to a court.

It is of little value for one person to give evidence in her view that she did not regard a Council's decision as being correct. If Council have acted in accordance with their statutory role, it does not mean because someone does not like the final decision, that decision is wrong. However, we now have implied by the Commission panel questioning a new qualification criteria for Councillors not found in any statute or commentary on Councillors role namely, the fact that Councillors without planning or engineering backgrounds, are not entitled to make independent decisions, on any application that involves these issues.

Submission in Reply 104 p. 30

In relation to planning and assessment matters Mr Smith seems to believe that the only recourse for members of the public who disagree with the Council is to go to Court. This, at the very least, is a most curious attitude from the Council's legal adviser. In making such a statement Mr Smith has a serious conflict of interest: every court case entered into by the Council potentially brings Mr Smith and his firm more income! It ignores both the ability to bring proceedings and the ability to meet the costs of doing so.

If in fact, Mrs Smart or any other member of the community had thought the Council had acted improperly or ultra vires there are legal procedures provided for both in the *Local Government Act* and the *Environmental Planning and Assessment Act* to take the Council to the Court and have the matter aired.

Submission in Reply 104 p. 30

Beyond his political bias, and the associated outcome of Mr Smith not fulfilling the brief given to him by the Council, the most deplorable part of the 72 pages of sententious rambling in **submission in reply 104** is Mr Smith's attack on Ms Roberts.

To understand why Mr Smith's attack is so wrong, and deplorable, it is necessary to provide the following extracts from Ms Robert's oral evidence (**T. 25/02/05 p. 604-608**). To provide further context Ms Roberts, an elderly woman with disabilities, arrived at the Hearings 39 minutes late because she had had a car problem. Naturally she was disturbed by that. Many of the people who gave evidence at the Hearings were not used to public speaking, and found it an ordeal. Ms Roberts had the further frustration of contending with a car breakdown, and the accompanying embarrassment of causing the program to be rescheduled.

ILONA PAULINE ROBERTS, sworn [11.39am]

PROF DALY: *For the transcript, could you please give your full name, your address and your occupation?*

MS ROBERTS: *My full name is Ilona Pauline Roberts and I live at 3 Bawden Street, Tumbulgum. I'm on an invalid pension, disability support pension.*
…

MS ANNIS-BROWN: *Miss Roberts, if I could just and talk to you a little bit about your submission that you put forward to the inquiry. One of the issues that you raised was the rate of development that's happening in the area and I do note that we've had several speakers who have raised that issue as well and I guess the main comment that's coming out is that whilst we have don't disagree with development, we're a bit concerned about the rate and, I guess, they don't want the area to change too much. They came here for its beauty and they'd like it to stay the way it is, I suppose, regardless of the development happening so, I guess, if you could just elaborate on what your concerns are with respect to the rate of development?*

MS ROBERTS: *Yes. Well, the rate - too many things going up too quickly and when they develop an area, it seems that the area is clear-felled or just - whatever trees are there are knocked down and animals are either killed - animals, birds - killed or displaced. They've got nowhere to go because the area surrounding the various developments - I'm thinking Casuarina Beach Estate, Flame Tree Park and various other ones - they're just flattened and then houses are put up and then we've got the problem of displaced animals and trying to find homes for them and putting them into places where they're already occupied, you know. Like trying to put – if all of us suddenly were told that we had to go somewhere and we were just put into some else's house, you know, that we didn't know.*

PROF DALY: *When you say "we", who are "we"?*

MS ROBERTS: *The Tweed Valley Wildlife carers.*

PROF DALY: *And, what exactly - - -*

MS ROBERTS: *We're a volunteer group who rescue and rehabilitate animals. We try and given them a second chance. We work under the auspices of the National Parks and Wildlife Services. They give us our licence.*

PROF DALY: *Okay, thank you.*

MS ANNIS-BROWN: *You talk about the rate at which development applications pass through Council. What exactly do you mean by that? You talk about the speed at which they're put through Council?*

MS ROBERTS: *Well, I don't know if you've had a look at the Tweed Link over the past four or five years. All the development applications that go through seem to be approved and since I've been here - I've been in the area about seven years, eight years or something, and I'm just seeing around Murwillumbah, around the Tweed, places where you were walking, now there's houses and what's concerning me is that these things are coming so quickly all through the Tweed, all through Banora Point and the surrounding areas, Terranora, where I used to drive past and see cattle, now that's all been cleared and there's going to be houses, somewhere else, you know, there was bush. It's encroaching of wetlands and it's too quick, and there are no provisions for the species that live there.*

I mean, I'm only concerned with that's going to happen to the birds and animals and the trees themselves because none of the developments have any provision for recognising that an area might have some value and therefore leaving it or making a corridor to link it to a national park or to an untouched area or to into another area. You know, if the developments would do it that way, like, be really honest about having their environmental impact statements, recognising that there might be species in there that are vulnerable or endangered and then taking steps to make sure that they're not damaged even if it means that you're not going to be able to have so many housing blocks and that they're going to have to back to the drawing board but, I mean, we're just going to lose everything; that the whole world at the moment is recognising that the rate of species' extinction that's happening is unacceptable and Australia's got one of the highest rates of mammalian extinction and it just looks like they're going hell for leather to do the same.

MS ANNIS-BROWN: *When you say areas are being clear-felled, to your knowledge is Council actually putting any conditions on the developments to ensure that that doesn't occur and some of the natural environment is being preserved?*

MS ROBERTS: *Well, not as far as I know, and I have to say that I haven't been able to study every single EIS, like we're flat strap just rescuing animals and when you're up all*

hours of a night feeding babies and rescuing babies and just trying to keep up with that, it's very difficult. I was going through some of the paperwork from Casuarina Beach Estate and Lennon and they're just a couple of things, and the Tugan Bypass and the airport runway extension, the amount of paperwork that you've got to wade through on that is mind boggling. You must have had to try and do it yourself so you'd know but you don't have to change duckling water and go out and scrape something off the road and chase its baby around the place and catch it and bring it home and try and raise it.

MS ANNIS-BROWN: *Thank you, Ms Roberts.*

MR BROAD: *Ms Roberts, does the Council have an overall strategy to preserve parts of the natural environment within Tweed Council?*

MS ROBERTS: *Not as far as I know or if they do they seem to be ignoring it.*

MR BROAD: *Is the development leading to pockets of natural areas being preserved?*

MS ROBERTS: *Some pockets here and there but I there doesn't seem to be any active plan to identify areas of concern and protect those areas and I think if it does happen it's because of outside influence pushing. Like, I think they discovered a frog species in the Kings Forest Estate and so that was held up there but I don't know what they've - - -*

MR BROAD: *So, if they discover something like the frog species in Kings Forest, do they preserve a specific area associated with that?*

MS ROBERTS: *Only under great protest.*

MR BROAD: *What about things like wildlife corridors?*

MS ROBERTS: *Not that I'm aware of. I think we're losing the wildlife corridors because of the developments.*

MR BROAD: *Have you looked at Council's planning documents in respect of these sorts of matters?*

MS ROBERTS: *I have but I haven't recently, I have to say.*

MR BROAD: *Now, your group are wildlife carers and you spoke about rehabilitation of wildlife and I assume that your goal is to return wildlife. If wildlife has come into your hands as a result of a development, destruction of habitat, what do you do if you're able to rehabilitate that wildlife? Where do you return it?*

MS ROBERTS: *Well, we try and return it to the place that it was found but very often the place that it was found is a place that's being developed so it can't go back there so then we have to try and find another area that it might be able to be released into and, if we can't, then they're euthanased.*

MR BROAD: *If you release wildlife into another area, is it likely that the population of wildlife in that area is already stable?*

MS ROBERTS: *Very likely, yes.*

MR BROAD: *Is it likely that that population can tolerate the additional stress of other wildlife?*

MS ROBERTS: *It would depend on the species. Animals like mountain brushtail possums or some of the bird species are highly territorial and brushtail possums will fight to the death to defend territory so if you've got a male brushtail possum that comes into care that's from an area that it can't be returned to, its future is pretty dim but they have to be euthanased generally unless they're young enough to be able to be sneaked into another area but - and the same with a lot of bird species. They won't tolerate the intrusion of another species. Some birds aren't so territorial so you can get away with it.*

T. 25/2/05 p. 604-608

Ms Roberts devotes her life to saving and otherwise assisting, the area's native fauna. She belongs to an organisation called the Tweed Valley Wildlife carers, similar to many organisations that operate across the State, and one which works under the auspices of the National Parks and Wildlife Services. She presents as a woman with a consuming passion for her voluntary service. She belongs to an organisation of like-minded people, so her opinions are not confined to herself. The very nature of the work she does provides her with on-the-ground and repetitive experience. As a member of the community she has a perfect right to speak about a matter that she considers to be of great importance to the Shire, and to comment on council's management of wildlife corridors and the impact of development. The Inquiry sought to understand Ms Roberts' concerns. This did not mean that the Inquiry considered Ms Roberts' evidence to be correct. Her evidence, however, provides one view that can be measured against other views in due course. This process is basic to accumulating information within the Inquiry.

As the transcript shows a large range of questions were asked of Ms Roberts (based on the evidence of her written submission (**submission 84**). Mr Smith attacked the Inquiry for bias in adopting this approach. It was in relation to Ms Roberts' evidence that Mr Smith made one of his more malevolent attacks on the Inquiry (**submission in reply 104 p. 23**).

We were already harbouring grave concerns as to the conduct of the questioning at the hearing at this time, and the fact that it appeared to us, even at this stage of the Commission's hearings, that witnesses were not properly qualified but were simply being given detailed loaded questions to consent to whether or not they had either the qualifications or ability to consent to such a question. They were being asked to agree to and confirm the Commissions views, not their own.

This even then raised in our mind grave concerns of bias and a denial of natural justice and procedural fairness as far as the Council and the Councillors were concerned.

Submission in Reply 104 p. 23

Mr Smith's assertions would normally be passed of as just plain silly if they were not so serious. To refer the patient questioning of an elderly lady as evidence of some kind of plot to discredit the Council, and an element in the evidence upon which the ultimate dismissal of the Council might be based, is ludicrous. To assume that the Inquiry had a pre-considered view on the care and protection of wildlife in the Tweed, and that it used Ms Roberts as a puppet to press that view, is fanciful in the extreme. It is, of course, also very wrong. What it does show, however, is the desperate way in which Mr Smith attempted to play what he considered to be his last card in the defence of the Majority councillors: the attempt to discredit the Inquiry, and create for some future Court the means to block the report of the Inquiry this would also gain potentially Mr Smith a substantial increase in fees. Mr Smith was playing his politics dirty, and he chose to use a disabled, aged lady as the vehicle for his mischief.

Ms Roberts, despite her great experience in wildlife matters is dismissed by Mr Smith as an unqualified person whose evidence is simply worthless (**submission in reply 104 p. 20**).

> Ms Roberts is simply making the point she doesn't like the way development is going as far as she is concerned. It is a personal point of view.

Submission in Reply 104 p. 20

Mr Smith plumbs the depths when he attacks Ms Roberts for being an invalid pensioner on a disability support pension.

> Ms Roberts then waxes lyrical on environment species etc at page 608. Ms Roberts, as far as we know from the transcript, is an invalid pensioner and on a disability support pension. There is no reason why anyone should criticise her for this, we just wonder, what value the Commission would find in raising such important and complex environmental issues with someone who simply has no experience or expertise in this area.

Submission in Reply 104 p. 21-22

Not content with using Ms Roberts' disabilities as a means of discrediting her views, Mr Smith descends further by referring to her as "just anybody", inferring she is a nobody. Mr Smith's approach is despicable.

> It appears that the purpose of asking the question and attempting to get a suggested response from just anybody, proves the point of the question, even if they could never truly know the answer. This attempt to prove adverse assertions against the Council by this means is highly objectionable. It also totally lacks rigorous intellectual examination.

Submission in Reply 104 p. 22

5.3.2 Councillors as Advocates

There is a paradox in Mr Smith's scathing dismissal of any member of the community expressing any criticism of the Council unless they have some form of professional

training, and his defence of the councillors' lack of such qualifications when making significant decisions.

His explanation for this is twofold. First, that councillors have a statutory role to play, qualified or not. As discussed above there is legitimacy in challenging that statutory role.

The second explanation is that councillors may be advocates of certain outcomes, and that it is their political role to support positions that they propose.

In respect of advocacy being provided by Councillors in respect of particular issues, this is referred to at page 780. We do not understand why Councillors, as elected representatives, are not able to be advocates in respect of various developments.

Does this mean that Councillors who favour for example a development for economic reasons for the benefit as they see it of the Shire should be unemotional and non-directive about their statements in support, but for example, Councillors who feel deeply about the environment and are advocates in favour of certain environment issues, are able to be? Because they are, and very able and effective advocates we might observe.

It is a dangerous precedent to try to set parameters in relation to our elected representatives in respect of the amount of emotion or advocacy that they are able to bring to public debate.

It would be entirely ridiculous for the suggestion to go forward that someone should not be an advocate as a public representative and even if there is some suggestion that there is an ulterior motive to this advocacy until that ulterior motive is explored and proved as being against or undermining the public interest, it cannot be a general criticism of elected representatives that they should not be advocates of anything when in fact, they are elected very specifically to carry out election promises and be advocates for those in the community who support those issues.

Submission in Reply 104 p. 31

As with most of Mr Smith's arguments, this one is both simplistic and self-serving.

There is a huge difference between a councillor advocating that a new library or a baby health centre should be built, and advocating that a particular project of a developer should be built. The advocacy of the latter is even more tendentious if the advocate is known to be a friend of the developer or his/her business, or the business of his/her family, might in some way benefit from the outcome. The pecuniary interest elements of the Act are meant to deal with such situations. If the councillor is a strong and persuasive advocate for a certain development, and if the councillor belongs to a group (that need not be a formal group) with a majority in the council, then he/she might remove themselves from the Chamber when a decision is being made and still receive the benefits of a favourable decision.

If a councillor becomes an advocate for a development, such councillor has, by implication, pre-judged the development application with disregard to the issues that may arise from the input of council staff, state bodies and the community.

Objections to these forms of advocacy are fairly straight forward. Advocacy of a more general type is more controversial. If a group of councillors promotes a certain policy, such as the council "putting out a welcome mat to developers", and then receive support from developers at election time their advocacy will be seen as tainted. This, of course, was exactly what happened in Tweed Shire.

The problems with councillors acting as advocates of development(s) and acting as consent authorities ("judges") on development projects seems to be apparent to everybody but those within Local Government. John Mant[12] points to the failure of Local Government to separate councils' legislative, executive and judicial functions as a central problem with its structure.

5.3.3 Legal Privilege

Section 4 of this report pointed to the extremely large number of closed meetings that have been held by Council in the past five years. An analysis of the minutes of these meetings revealed that a large proportion of these meetings dealt with matters related to planning and assessment issues. In the same Section evidence was reviewed that suggested that many members of the community had found it difficult to obtain information from the Council on planning and assessment issues related to specific projects. Council also appears to have been less than helpful at times in releasing information either under s 12 of the Act or through Freedom of Interest processes.

All of this indicates that it would be very difficult for speakers to come to the Public Hearings armed with evidence from Council files in relation to planning and assessment matters (or other matters), in the way Mr Smith seemed to expect. In his persistent attacks on critics of the Council he savaged individuals for not presenting such supporting evidence. The fact is that Council's predilection for closing meetings and restricting access to information hindered members of the community from gaining that evidence.

Mr Smith himself acted to keep information from the Inquiry by successfully having Council rescind a motion it had passed removing the privilege on legal advice on evidence given to the Inquiry. Whilst attacking the Inquiry for the quality of the information it received in the Public Hearings, Mr Smith was a key figure in preventing the Inquiry from receiving all the information it sought.

Mr Smith was asked about his reasons for taking this action (**T. 16/03/05 p. 1533-1535**).

MR BROAD: *You raised the matter of legal professional privilege. Legal professional privilege is a rather discrete aspect affecting level [sic. legal] advice, isn't it?*

MR SMITH: *I think it's fundamental.*

MR BROAD: *It's not a blanket right is what I'm leading to.*

[12] "Like oil and water: parliamentary procedures and judicial decisions", *Law Society Journal 38 6,* 2000, p. 24-25.

MR SMITH: *No, no, it's not a blanket right, but it's fundamental to the relationship between a legal person and their client, but they - - -*

MR BROAD: *And it only operates to protect advice given in certain circumstances, doesn't it?*

MR SMITH: *I think if you look at the Evidence Act, it probably goes a bit further than that. I think that a legal adviser is placed in a certain ethical position before we talk about legislation or anything else. My view is that - - -*

MR BROAD: *The underlying principle has always been that advice is privileged if it is given for, or in contemplation of legal proceedings.*

MR SMITH: *I don't think that's the only one. I think if you - if advice is given in circumstances of solicitor client, a solicitor advising his client generally, that there is a strong argument that legal professional privilege would arise there. If it didn't, then you wouldn't have the confidence that clients can have in their legal advisers of what they say to them can be said in confidence, and only released if the client agrees to. That's an important fabric in the legal stream of things. The moment you take that away, you take two things away.*

Firstly, your legal adviser may not receive advice that they need to receive from the client and secondly, you prevent the legal adviser from giving advice to the client they may need to receive, but if looked at the world at large, could be seen as a criticism of them or even something worse. So there needs to be the frank discussion between - and that's how the legal profession works. The moment you take away - - -

MR BROAD: *That's - but hold on a minute. Isn't that confidentiality.*

MR SMITH: *Sorry?*

MR BROAD: *Aren't we talking about confidentiality?*

MR SMITH: *That is confidentiality, in my opinion.*

MR BROAD: *But that's not privilege.*

MR SMITH: *Well, I think - if it's confidential but not privileged, then I don't see how it's confidential.*

MR BROAD: *Yes.*

MR SMITH: *I mean, that's my view. I think I've written to you on it It just happens to be a philosophical position I take as a lawyer.*

MR BROAD: *It's a philosophical position that council has adopted which has restricted access by this Inquiry to certain materials of council, then.*

MR SMITH: *And therein lays the rub, Mr Broad, because if council's solicitors can be called to Commissions such as this and the legal professional privilege protection waived, then we would have to be extremely careful and cautious and when you're giving advice in the future, that when we couched our advice in certain ways, that we must be aware that at some stage, it could become public, that restricts my - in my view, that restricts my ability to give frank and full advice that I wish to give, and I think if you were asked, I do give frank and full advice, not expecting it to be made public but to assist the councillors and the council in dealing with sometimes very important matters of public interest that can only be truly dealt with behind closed doors so that the political process that normally operates in relation to councils does not operate in this case, because we need people to think very carefully about their position and act in the public interest.*

MR BROAD: *Your advice to council may be protected under the Local Government Act.*

MR SMITH: *Yes.*

MR BROAD: *The role of this Inquiry is a very different role to that experienced in council in respect of the advice which may become publicly available, isn't it?*

MR SMITH: *I think there are less protections within this Inquiry than there are within normal council meetings, and under Local Government Act.*

MR BROAD: *Section 740 of the Local Government Act anticipates that there be an open and public inquiry; to the extent that council has not made available certain legal advice, does that thwart the operation of this Inquiry?*

MR SMITH: *Not at all. The operation of this Inquiry from what I can glean from what's been said and the fact that council files are being fully accessed, should serve the purpose of the Inquiry. Trying to get council's solicitor under oath to make certain comments about legal advice that had been given at times when - - -*

T. 16/3/05 p. 1533-1535

On 30 December 2004 the Inquiry wrote to Mr Smith advising him that it would ask him to give evidence at the Public Hearings, and that there was an expectation that his evidence may be significant. There was also a query on whether Mr Smith might have a conflict in both appearing as a witness and acting as the Council's legal representative at the Hearings.

Tweed Shire Council Public Inquiry

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Mr. Tony Smith
Chairman of the Board
Stacks/Northern Rivers
PO Box 819
Murwillumbah
NSW 2484

30 December 2004

Dear Mr. Smith,

You sought, and were granted leave, to represent the Tweed Shire Council at the opening of the Public Hearings on 16 December 2004. As you would be aware the opening was purely procedural, and no evidence was taken. As explained in my opening address the role of lawyers in the Inquiry will be limited largely to re-examination of their clients *after* evidence has been given.

I am writing, however, to discuss your role when the Hearings resume on 16 February 2005. It is possible that the Council may want you to represent it on that and subsequent dates of the Hearings.

I anticipate that I will ask you to give evidence at the Public Hearings. Your evidence may be significant.

I sense a possible conflict of interests in your capacity to act as a legal representative of the Council through out the Hearings *and* to assist the Inquiry with your own evidence.

In the Inquiry into Liverpool City Council, Mr. Marsden, a council solicitor, choose of his own accord, to have another person from his office attend the Hearings on a daily basis whilst Mr. Marsden restricted his appearances to the days when he himself was giving evidence. The circumstances are different: Mr. Marsden was not engaged to represent the Council at Hearings but the general point is similar. There is, of course, no problem with your attending the Hearings daily if you so desired. I do see a real problem, however, in your ability to both represent the Council throughout the Hearings and present evidence concerning your general role as Council's solicitor.

Yours faithfully,

Maurice Daly
Commissioner

On 7 January 2005 Mr Smith replied that he was willing to assist the Inquiry in any capacity he was able, but immediately contradicted himself by raising the issue of legal privilege. He did not discuss his possible conflict of interest that was raised in the 30 December 2004 letter from the Inquiry.

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our reference: AEJS:LGN 041258
your reference:

7 January 2005

The Commissioner
Maurice Daly
Office of Commissioner
Locked Bag A5045
SYDNEY SOUTH NSW 1235

FAXED

Dear Commissioner

RE: TWEED SHIRE COUNCIL & ROYAL COMMISSION

We thank you for your letter of 30 December 2004.

We advise that having regard to the contents of that letter Mr Smith of our office will be advising the Council of your views.

We of course will assist the Commissioner in any capacity we are able.

One matter that we feel we should seek your views on is whether the powers of the Commission override our client's right to privelege and confidentiality. Obviously this is a paramount consideration to our ethical and legal capacity to represent the Council at all.

We thank you for drawing this to our attention and await your reply.

In the meantime if you have any further queries at all please do not hesitate to contact Tony Smith of our office.

Yours faithfully
STACKS/NORTHERN RIVERS

Per:

Tony Smith
Managing Director

On 13 January 2005 Mr Smith wrote again to the Inquiry. He again did not address the conflict of interest issue. He referred to Sections of the Royal Commissions Act 1923,

which, he purported, supported a view that section11 (3) of that Act indicated that legal professional opinion would override the other requirements of section11 if Mr Smith were to be called to give evidence.

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13 January 2005

The Commissioner
Maurice Daly
Office of Commissioner
Locked Bag A5045
SYDNEY SOUTH NSW 1235

Dear Commissioner

RE: TWEED SHIRE COUNCIL & ROYAL COMMISSION

We refer to our correspondence of 7 January 2005 and now forward herewith copies of what we believe are the relevant statutory sections of the Royal Commissions Act relating to legal professional privilege.

We interpret this to mean that if Mr Smith of our office was called to give evidence then, pursuant to Section 11 (3), legal professional privilege would override the other requirements of Section 11.

We would be grateful if you would confirm, if you wish to do so, that this interpretation would be correct.

In the meantime, if you have any queries, please do not hesitate to contact Tony Smith of our office.

Yours faithfully
STACKS/NORTHERN RIVERS

Per

Tony Smith
Managing Director

It is to be noted that Mr Smith's original concerns about privilege only focussed on evidence that he might give if asked to appear at the Public Hearings. In a letter dated 3

February 2005 (that is after Mr Smith was appointed to represent the Council at the Hearings) Mr Smith shifted to claiming that privilege applied to any legal opinions he might have given Council in the past, presented in another form (Minutes of meetings, reports etc).

08/02/05

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our reference: AEJS:RP 041258
your reference:

FAXED 1:10pm

3 February 2005

Mr Maurice Daly
Office of the Commissioner
Locked Bag A5045
SYDNEY SOUTH NSW 1235

BY FACSIMILE: 02 9289 4099

Dear Sir,

RE: TWEED SHIRE COUNCIL & ROYAL COMMISSION

We advise that we act for Tweed Shire Council in regards to this inquiry by resolution of the Council.

It has come to our attention that a confidential legal advice provided to the Council by this firm dated 1st August 2002 was provided with other papers in the submissions by Councillor Boyd of Tweed Shire Council to the inquiry.

On 2nd February 2005, Council rescinded a previous resolution to waive legal professional privilege and by so doing, reinstated the Council's claim for privilege of confidential legal advices, both in written and verbal form, which clearly covers the confidential legal advice letter referred to above of 1st August 2002 concerning "Nauri Gold Coast Pty Ltd".

It is therefore imperative, that the letter from this firm to the General Manager dated 1st August 2002 be withdrawn from the submissions to the inquiry as by way of the recision motion passed by the Council on 2nd February 2005 privilege and therefore exemption has been, and still is claimed by our client.

In addition, the matters discussed in that confidential legal advice are matters relating to criminal proceedings which are currently taking place with a committal hearing anticipated to be commenced in April or May 2005 involving the named person Mr Barr, charged with over 50 criminal charges.

Clearly, given those circumstances, it can be seen that the confidential legal advice dated 1st August 2002 is sub judice and its release into the public domain may endanger the criminal proceedings which are on foot.

We assume that Councillor Boyd felt it appropriate to provide the confidential legal advice given the first resolution of the Council and unaware of the stay on divulging privilege material due to the recision motion having been filed soon thereafter and thus, we do not make this request to you as a criticism in any shape or form of Councillor Boyd but merely

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Page 2

Mr Maurice Daly **3 February 2005**

place before you the situation in our submission at law and the necessity therefore for the recall of any copies of this confidential legal advice that may have been provided, together with a direction by yourself that it is not to remain in the public domain or to be used in a public forum - eg: the media.

If you should wish to discuss any of the issues arising, we ask that you contact our Mr Tony Smith on the following direct line - 02 6672 9901.

Yours faithfully
STACKS/NORTHERN RIVERS

Per:

Tony Smith
Managing Director

In a letter dated 8 February 2005 Mr Smith's position had shifted considerably. Whereas the 3 February letter had been associated with one attachment in one submission, and related to a possible upcoming court case, the 8 February letter made an ambit claim that all advice given by Mr Smith in reports and Minutes of closed council meetings would be privileged. Mr Smith effectively made an ambit claim on every piece of advice given in these ways as being out of reach of the Inquiry's scrutiny. Mr Smith had set a deliberate protocol that would remove his advice from becoming evidence. This was a serious restriction on the Inquiry in terms of its ability to accomplish its delegated tasks.

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your reference:

8 February 2005

FILED

Mr Maurice Daly
Office of the Commissioner
Locked Bag A5045
SYDNEY SOUTH NSW 1235

BY FACSIMILE: 02 9289 4099

Dear Sir,

RE: TWEED SHIRE COUNCIL PUBLIC INQUIRY

It has come to our attention that with regard to material attached to submissions which have been forwarded from your office to the Council for distribution there are documents which are:

1. Clearly in our view, documents which fall under the category of client legal professional privilege; and

2. Reports, Minutes of closed Council meetings, confidential Reports etc which fall within the ambit of Section 10 of the Local Government Act 1993.

We are therefore instructed to request that those documents, which we enclose copies of with this facsimile message, are to be withdrawn immediately from the documents attached to submissions already forwarded to the Council.

Under the Royal Commission Act, documentation and information cannot be compelled to be produced if there is a "reasonable excuse" within Section 11(2)(a) of the Act.

"Reasonable excuse" in our submission, includes:

(a) Documentation and information which is covered by client professional legal privilege; and

(b) Documentation or information which if divulged would constitute a breach of the Local Government Act. Such a breach is an offence under the Act would open the provider of the information up to a prosecution for the breach of the Act.

We note that the issue of professional privilege has already been aired in previous correspondence and feel that you would agree that the documentation which we have attached to this facsimile message would clearly fall within that category of legal professional

Page 2

Mr Maurice Daly **8 February 2005**

privilege and we note that the rescission motion of Tweed Shire Council has the effect of upholding the Council's legal professional privilege with regard to advices from this firm to the Council etc.

In terms of the breach of the Local Government Act, it is our view, that documentation provided to the Commission of Inquiry is documentation and information which stems from closed meetings of Council pursuant to Section 10 of the Act and which were not the subject of any subsequent Council open meetings and therefore still in our submission are documents which are confidential within Section 10.

Once again, we do not mean to criticise any person or persons who have provided such documentation or information to the Inquiry as we would assume that they have done so in error or without understanding the implications that by disclosing such information or providing such documentation, they are in breach of Section 664 of the Act and therefore subject to prosecution and penalty.

Obviously it is not the intention of Council, nor would we assume of the Commission of Inquiry, to have the situation where such person or persons is therefore to be prosecuted for divulging that information. Therefore, in our view, such documentation as is enclosed with this facsimile message should be withdrawn from the documentation provided to the Council's distribution immediately.

Yours faithfully
STACKS/NORTHERN RIVERS

Per: Stacks

Tony Smith
Managing Director

These letters present a potentially false view of the law.

The Inquiry sought legal advice on the matter of privilege which suggested that Mr Smith's view on the matter was incorrect. Nonetheless Mr Smith persisted with his view and substantially blocked the Inquiry from obtaining evidence that directly related to its Terms of Reference. Since the Inquiry was fundamentally involved in assessing certain matters that involved the governance of the Council, and because Mr Smith as adviser to the Council on some of these matters, it was important information that Mr Smith was withholding. Mr Smith, who had made almost hysterical attacks on members of the community for not providing sufficient evidence of a type he demanded, was himself fundamentally guilty of withholding evidence from the Inquiry.

Tweed Shire Council Public Inquiry

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12 Queen Street
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Fax: 02 66724677

8 February 2005

Dear Mr Smith,

I refer to your letter of 8 February 2005 and to Tweed Shire Council's concerns that there are documents attached to submissions that are:

> *"Clearly in our view, documents which fall under the category of client legal professional privilege; and*
>
> *Reports, Minutes of closed Council meetings, confidential Reports etc which fall within the ambit of Section 10 of the Local Government Act 1993."*

In your earlier letters of 13 January and 3 February you had asserted that legal professional privilege applied to advices given by you. Your letters have suggested that legal professional privilege applies to all communications emanating from your firm.

I have taken the opportunity of obtaining some advice on these issues. This advice suggests that legal professional privilege only arises where communications arise for the sole purpose of giving advice where litigation is either taking place or is contemplated.

When you initially raised these concerns, you sought that a letter dated 1 August 2002 be withdrawn.

Having looked at this letter, it does not appear to have been written at a time that proceedings were taking place, nor contemplated.

Your letter suggests that privilege attaches to this letter because a gentleman referred to in the letter will come before a court sometime this year, some 21/2 years after the letter was written. Again the letter does not appear to be one providing legal advice, but is in the nature of a commentary on certain events that had taken place.

The advices attached to your letter of 8 February also suggest that they were not written in response to, or in contemplation of legal proceedings.

I therefore question how the council can make its claim of legal professional privilege.

The other issue raised by you is that of the confidentiality of council reports and other material coming before meetings in closed session.

You base your argument on section 10 of the Local Government Act 1993.

Council's concerns are supported by further concerns that "by disclosing such information or providing such documentation, they (sic. the person or persons or perhaps me as Commissioner) are in breach of Section 664 of the Act and therefore subject to prosecution and penalty. "

It appears to me that section 10 permits meetings to be closed. It does not necessarily make all information before such meeting confidential.

Section 12 however enables limited claims of confidentiality to be made. Interestingly, sub-section 8 provides "… it is irrelevant that inspection of the document may:

(a) cause embarrassment to the council or to councilors or to employees of the council, or
(b) cause a loss of confidence in the council…"

My review of the material suggests that the claim may be more related to questions of embarrassment and loss of confidence, expressly excluded by sub-section 8, rather than those grounds permitted by the Act, particularly as the majority, if not all of the material relates to meetings that took place some time ago and the matters, then thought confidential, have been dealt with.

I am surprised that you raise concerns regarding section 664 of the Act, as I note that paragraphs (a) and (e) of sub-section 1 expressly exclude certain disclosures, notably in connection with the administration or execution of the Act or for other lawful excuse.

I would expect that an inquiry convened under section 740 of the Act would give rise to the exemptions contained in subsection 1.

I am also surprised and concerned that the council has adopted an adversarial stance and is adopting this course of action, through your firm. I would have expected that the council would fully co-operate with the Inquiry and ensure that all relevant material is made available, both to me, as Commissioner, and to the public generally, particularly in light of the public participation principles of the Act.

In the circumstances, I cannot see how your client's claims are correct. Accordingly, I do not propose to direct the council to delete this information from the information contained in the published submissions.

Lastly, I might remind you that councilors, council staff and members of the public in response to my call for submissions have provided this material. It has not been provided in response to any compunctive powers available to me under section 11 the Royal Commissions Act 1923.

Yours faithfully

Professor Maurice Daly
Commissioner
cc. John Griffin General Manager of Tweed Shire Council
cc. Mayor Polglase Tweed Shire Council

5.4 *The Tweed Directions Team*

5.4.1 The Myth of Independence

The First Report of the Tweed Shire Council Public Inquiry focussed primarily on the development of the Tweed Directions election fund and the ways in which the de facto political party organised a team to contest the 2004 elections. The Report showed that Tweed Directions determined the number of groups that would be formed, the leaders of each group (and assisted in finding candidates within the groups), provided the bulk of the funding for the campaigns of each group, developed the central strategies for the team's campaign and assisted their campaigns by running an expensive parallel campaign, and in some cases planned the campaigns of individual groups. The role of Tweed Directions was not spelt out to the community. The groups formed by Tweed Directions falsely presented themselves to the electorate as being independent of each other. The electoral victory that provided the six Tweed Directions' councillors with control over the 11 member council was gained by just a handful of votes. If the true structure and funding of the Tweed Directions' team had been known to the electorate at large, it may have produced a different result. Further, by accepting quite large sums of money from proponents of development through Tweed Directions the candidates immediately placed themselves in the position of having a general conflict of interest in relation to planning and assessment matters, and faced the likelihood of facing a series of conflicts in relation to particular projects. The governance of the Council was hopelessly compromised.

These factors, and others, informed the recommendation that the civic offices of the Council be declared vacant. The Governor issued a proclamation dismissing the Council on 25 May 2004.

These matters proved to be the most significant single factor in the Inquiry's search for information on the issues defined in the Terms of Reference. Mr Smith, attempting to develop a defence for the six councillors in what he imagined was a trial, failed to understand the seriousness and the significance of the role of Tweed Directions. In fact, so obtuse was his understanding of this he chose to attack the Inquiry for attempting to gauge the community's understanding and perceptions of these matters.

"Mr Broad: *The Commissioner has raised the matter of perception* (continuously, we would say) *there have been concerns or questions raised by this inquiry over the number of days about perceptions. The question of contributions to developer funding of certain Councillors campaigns is a major issue.*

Ms Fitzgibbon: *It is in the community, yes* (not a completely surprising answer)."

The evidence given by Ms Fitzgibbon is simply echoed by a number of people who have complaints against the Council and generally speaking, it would appear that the issues have a remarkable similarity.

Submission in Reply 104

In relation to evidence given by Mr and Mrs Catchpole, Mr Smith criticised the Inquiry for asking the Catchpole's whether they thought the electoral funding issue was of importance to people they spoke to prior to the election. He accuses the Inquiry of having pre-determined opinions on this matter, and that they were being foisted on the speakers. The fact was that at the very early stage of the Hearings when the Catchpoles appeared, the Inquiry had not developed an understanding of the role of Tweed Directions. Ironically, Mrs. Catchpole's answer actually worked in Mr Smith's favour in his "defence" at the "trial".

There was further evidence in the questioning of the Catchpole's that give credence to the fact that the persons constituting the commission, were seeking to obtain general evidence from people on pre-determined matters and we refer particularly to page 426:-

"Mr Broad: *To the Extent that you are able, did you get any feedback from the people you spoke to in respect of the donation to certain Councillors – or, sorry, certain candidates at the last election?*

"Mrs Catchpole: *Not really. I guess you know, you talk to people and you know the man delivering – you know, the soil for your garden or something and I think it was around election time they are making comments like, you know, you can trust this lot that are now in and all that sort of thing."*

This is a case where donations were not even of great significance in the written submissions by the Catchpoles.

Submission in Reply 104

The uncovering of the role of Tweed Directions was a slow process, and the Inquiry throughout the Hearings was simply gathering evidence, rather than reaching any conclusions. When the Inquiry sought to put a reasonable argument to a speaker that donations given by a developer to a candidate might not have any connotations that there was anything amiss with the action, Mr Smith reacted by painting the questions as part of

a conspiracy. The evidence that led to the recommendations in the First Report was certainly not based on the kind of evidence contained in the following excerpt.

The use of the Commission by what one might call "friendly witnesses', is probably no better exampled up to this point in the transcript than the questioning by Mr Broad on page 584 who asks what might be termed in political parlance a "Dorothy Dixer' seeking an answer to support what we believe is a pre-conceived opinion held by the Commission members and it is worth quoting:-

Mr Broad: *What happens if the donor was not – had no interest really in the outcome, no personal interest as a developer you know, so and so was a member of the local community. He thought he should give this candidate a leg up. He likes the candidate, thinks the candidate would be a very good Councillor, right. Hasn't got any development interest in the community. His property interests are in Northern Queensland. What would be wrong with him individually saying, 'well right, I will support your campaign' more than $20,000.00?"*

Ms Hoskisson: *If you have got a good mate who is prepared to give you $20,000.00 that's fine, as long as that's the cap. If you look at this election and you compare it to the costs of being elected in Ballina – the average campaign expenditure in Ballina for an elected Councillor was something like $3,500.00" etc.*

Is now the perception of one (1) enough to prove a point?

Submission in Reply 104

The Terms of Reference (Items 2 and 3) required the Inquiry to consider both the relationships of the councillors to proponents of development, and the ways in which the councillors adopted procedures and processes in relation to their environmental planning responsibilities. As Section 3 illustrates there is a good deal of evidence on the relation of the two issues: that is, there are grounds to question the ways in which some councillors, who had connections to developers, acted in respect of their applications of their environmental planning responsibilities. Mr Smith simply, and wrongly, assumes that developers' wishes and wants were irrelevant to the way councillors might act.

We submit that it is utterly irrelevant as to what developers wish or want or what motives prompt them to put in applications to the Council.

The Council has a statutory duty to determine applications that come before it.

The Inquiry saw conflicts of interest and the false claims of independence as important matters to be explored. Mr Smith decided that if a councillor left the chamber when he/she declared a conflict of interest then that concluded any concern any person or body, especially the Inquiry, might have on the subject. The reality was: (1) that according to the Mayor's evidence no councillor had ever left the chamber declaring a conflict of

interest, and more broadly the councillors did not understand what constituted a conflict of interest; and (2) the Code of Conduct, to which Mr Smith refers, was not in place at the time of the Hearings.

We refer in particular to page 1096 of the transcript and the discussion about a Councillor who leaves the chamber with a conflict of interest.

"Ms Annis-Brown:	*Are you suggesting that basically even if a Councillor exempts him or herself from the Council chamber it does not particularly matter because the other Councillors would still get the matter across the line. In other words, you are suggesting that this block voting does exist.*
Mr Cooney:	*Well I think the other Councillors definitely go in on his behalf you know because they are all like minded and they are all in the same boat, so they are definitely going to try and get his development across the road.*
Ms Annis-Brown:	*You're.*
Mr Cooney:	*It is not really his development, it is more to do with his family.*
Ms Annis-Brown:	*So you are quite well aware of the fact that each Councillor claims that they are independent and actually suggested that before they were elected to office.*
Mr Cooney:	*Yes.*
Ms Annis-Brown:	*It seems from what you are saying, that's not really quite true because in essence…*
Mr Cooney:	*No I don't believe that to be true at all.*
Ms Annis-Brown:	*Right. So you are saying they are going to vote for the development. So even if one Councillor may not necessarily be in the Council chamber voting on it, the matter will still get through?*
Mr Cooney:	*Pretty much.*
Ms Annis-Brown:	*Okay, that's all for me.*

The latest Code of Conduct suggests just this course, the Councillor leave the Chamber. What is the Commission suggesting by this line of questioning?

In every Council across the State, if a Councillor who declares a conflict of interest or pecuniary interest, and leaves the chamber has done what is expected and required.

In other words, it really takes the matter no-where but suggests whatever Tweed Shire Councillors do, they are doomed anyway.

Submission in Reply 104

Mr Smith finds a bias in the fact that the Inquiry sought to uncover the structure of Tweed Directions, and quizzed those connected to Tweed Directions about that structure. Other groups were not scrutinised in the same way because they did not receive the same kind of electoral funding and were not organised into a team in the ways that Tweed Directions were.

It is clear in the questioning of Mr Allen that the Commission was keen to ascertain a background to his group and who were parties to it. Contrast this to a number of other community groups who have not received the same kind of questioning or probing to suggest some sort of commitment or bias to a philosophy.

For example, the fact that members of Monitor may also be card carrying members of the labour party was never investigated in any questioning but because the Tweed Directions Group were supportive of the Council, they received an intense grilling from the Commission, we assume to make the point that their evidence was biased and tainted and therefore, should not be accepted. It is exactly this kind of questioning that points to the bias of the Commission itself.

Submission in Reply 104

5.4.2 Arguments About Democracy

Local Government has no place in the Australian Constitution. It is not technically a part of the governing structure of the country. Councils came into being in the 19th century in response to requests from communities to the colonial governments to be allowed to take certain actions in their local areas. Frequently these requests related to establishing bodies that might assist with the provision of local infrastructure, such as roads or water supplies, and local services, such as disposal of waste or the establishment of cemeteries. In its earliest form, local government came about through petitioning the government to allow the creation of such bodies.

Local Government has expanded from those earliest origins into the systems that exist today. There is, however, a link with the past in the sense that councils are essentially public administrative bodies created by the State to perform certain tasks. Having been created by the State, it is the responsibility of the State to ensure that the administrative duties of the councils are efficiently and effectively performed. The critical interest of the State in the operations of councils lies in the area of governance.

The New South Wales Local Government Act was proclaimed in 1993. The Act sought to define responsibilities within the structure of councils more clearly. The separation of powers was intended to focus the concerns of the elected representatives on policy matters, and to have the staff focus on the application of policies. There is a sense that the

concerns of the elected representatives might be somewhat analogous to those of the Board of a corporation.

There are two major differences between business corporations and councils.

First, is the level of accountability. Directors of corporations face serious penalties if they do not operate in accordance with corporations law. The worst thing that can happen to councillors who breach aspects of the laws they work under (apart from matters that involve corrupt practices) is suspension for a period, or dismissal from office in the extreme case. If shareholders have concerns with the performance of Directors of a corporation they can air them at shareholders meetings and force the Directors to defend their position. There was no opportunity for community members to question councillors, or to otherwise raise issues with councillors or the staff, in Tweed Shire. The Council's lack of concern about community concerns is shown by its failure to institute a complaints management system until late in 2004. Councillors in the Tweed appeared to regard the fact that they were elected as providing a sufficient basis for their pursuing certain policies and taking certain actions regardless of community responses. There is no sense of the Westminster system of government applying to councils. Most councils do not adopt a portfolio system of government, and so there is no individual levels of responsibility for which councillors can be held personally accountable. The indications from the Tweed Shire Council are that the code of conduct (prior to the adoption of a new and compulsory model code of conduct by the State) did not particularly shape councillors' actions. Conflicts of interest were not understood, nor really considered.

Second, are the differences in the ways people are elected to serve as Directors and councillors. Councillors are elected by members of the community who are obliged to vote. Directors may be elected by the shareholders who are not compelled to vote. Councillors are elected for a four year period, whilst directors are chosen generally on a yearly basis, and their positions may be lost if there is any change in the ownership of the corporation, or if their performance is considered unsatisfactory. Except for extraordinary circumstances, councillors will serve out their four year period.

Local Government is actually a hybrid. It is not part of the governing structure of the nation, but rather it is a body made up of corporations created by the State to serve certain public administrative functions. The Act sought to give a certain level of autonomy to the individual corporations (councils), and that coupled with the fact that the councillors are chosen by the community, has established an image of the sector as having rights similar in nature to those are accorded to the Federal and State governments.

The 2004 elections introduced a new system that was complex and not well explained to the voters. It produced a large number of informal votes, 2869 in Tweed. It might be assumed that the novelty and complexity of the new system contributed to the high number of informal votes. Since the election was decided on the basis of a miniscule number of votes, claims that the councillors who gained a majority had a mandate from the electorate are open to debate.

Mr Smith makes great play on the democratic rights of the councillors. Because of the hybrid nature of Local Government (neither fully belonging to the government sector, nor

structured as a genuine corporation) lofty arguments based on the sanctity of the democratic principles attached to the sector often limp.

In the case of Tweed Shire the strength of the democracy argument, used to protect the six majority councillors, fails because the prime reasons that the councillors were dismissed from office were because the Tweed Directions team falsely presented themselves as genuine independents at the elections, and the conflicts of interest associated with their acceptance of Tweed Directions' funds fatally affected their capacity to efficiently and effectively administer their responsibilities in the interests of the whole community. In a very real sense the Tweed Direction councillors perverted the democratic processes of the election.

Mr Smith, misrepresenting, or at least misunderstanding the direction of Mr Stokes' article[13], claimed that because there were no references concerning corruption made to ICAC or any other body at the Warringah Inquiry the dismissal of the Council was wrong. This conclusion simply points to Mr Smith's incapacity to understand the nature of a s 740 Inquiry. He went on, however, to suggest that the Council's dismissal ate at the very heart of the democratic process.

Refer to Robert Stokes article, p.169 about Warringah:

"It is significant to note that all of these problems were founded solely on perceptions of conflict of interest. Neither the investigation under s.430 of the Local Government Act, or the public inquiry under s.740 resulted in referrals of any matters…"

If our democratic processes have degenerated to this sort of level of challenge, then the purpose of bothering to have a popular election, simply ceases to have any basis at all.

Submission in Reply 104

Mr Smith makes simplistic statements about the way in which evidence would be analysed by the Inquiry, frequently inferring that any comments critical of the council would be used as a basis for its dismissal. This then gives him a platform to resort to the lofty appeal of democracy.

We wonder, that the numbers involved with the inquiry and the fact that there was numerically strong support for the Council in submissions but also at the recent elections, whether this means anything at all except that clearly, there are sections of the community that would have preferred a different Council and have been critical of the incumbents of current Council and the carrying out their duties. One would hardly expect them to think otherwise.

That does not mean that the current Councillors are not carrying out their duties according to their own conscience or advertised political platform.

That is the purpose of having an election. That is certainly not a reason to dismiss a

[13] Councillors conflicts of interest in Development Assessment: Lessons from Warringah, (2004) 9 LGLJ 165

Council because the opposition that lost the election does not agree with the policies of those that did or the way they are carrying those policies out, provided their actions are within the legal framework.

Submission in Reply 104

In a tortured and illogical set of comments Mr Smith criticises the Inquiry for questioning speakers on whether they had read the Terms of Reference of the Inquiry before sending formatted letters demanding that the Council not be sacked. His end point again is the protection of democracy.

Is it important that Mr Stuart understands the terms of reference or is it important that Mr Stuart understands that a few months ago, he attended and elected a Council and objects to anything that seeks to take away the effect of that democratic vote.

There is strong feeling throughout the community that the appointment of the Commission of Inquiry was a political act by the labour Minister.

This is a view that members of the community are entitled to hold in a democratic society.

Submission in Reply 104

Mr Smith saves his strongest expressions of democratic rights in defence of the actions of Mr Raso. Mr Raso was the figure-head of the movement to undermine the Inquiry by alleging, quite falsely, that there was a pre-determined outcome of the Inquiry: that the Council would be dismissed. Mr Raso's actions have already been discussed in this Report. When Mr Raso appeared at the Hearings the Inquiry sought to discover why Mr Raso had acted when the Inquiry was in the early stages of gathering information, and most certainly had made no decisions about its recommendations. The Inquiry wanted to know whether Mr Raso had any understanding of the nature of a s 740 Inquiry and whether he had read the defining Terms of Reference before calling public rallies. Mr Raso clearly had no understanding of the nature of section740 Inquiries, but then neither did Mr Smith. Mr Raso most certainly had not studied the Terms of Reference of the Inquiry. Mr Smith allowed himself to get apoplectic about the lack of democracy in the treatment of Mr Raso, when in fact Mr Raso had acted in ignorance, driven by political factors, and had not bothered to understand the structures he was attacking. He was also acting in contempt of the Inquiry. Somehow Mr Smith connects this errant behaviour with democracy, presenting Mr Raso as a defender of democracy. Mr Smith was so taken by his analysis that he chose to use it as his last shot against the Inquiry in **submission in reply 104**.

"Mr Raso:	*The terms of the reference were in the Tweed Link, I believe, and also in the Daily News.*
Prof. Daly:	*Yes, but had you read them before you organised your rally? (Does Mr Raso have to? Are not rallies a democratic right?)*
Mr Raso:	*The rally was organised probably only in about three or four days*

and we ended up with about 300 people there which – I was pretty surprised but prior to that we'd got together to form a group just to put a newsletter, to put some sort of balance to the – for want of a better word – to the things that were being written in the paper and other perceptions about the Council."

Prof. Daly: *That hasn't answered my question. The question was, had you read the terms of reference before you either organised your newsletter or organised the rally?*

Mr Raso: *Oh, I'd say I probably would have but I don't think I would have fully understood it. I'm a farmer not a lawyer, mate. I am a farmer not a lawyer. I don't understand a lot of that silly stuff fully.*

Prof. Daly: *Yes, but organising newsletters and organising rallies are fairly difficult, onerous and consuming tasks. I would have thought that anyone who was entering into those tasks would have taken great pains to understand what they were rallying against.*

Mr Raso: *The whole rally was based on the lack of democracy.*

Prof. Daly: *I don't see how that comes in the terms of reference?*

Mr Raso: *Well, we voted in a Council that's going to be sacked and…"*

This Inquiry is an important step that could lead, and has in the past, to the dismissal of our elected Council. The Terms of Reference are an obvious means to an end.

This banter continues, but quite clearly, there is nothing were are aware of in any democratic society that would prevent Mr Raso from calling a rally in respect of a potential sacking of the Council which was an emphasis placed on the appointment of the Commissioner by the Minister, not Mr Raso, and it was the Minister that made this very point, as do the Terms of Reference.

We do not understand why the Commission would find it even necessary to challenge Mr Raso as far as the terms of reference are concerned when all Mr Raso really needed to know was that an inquiry had been called by a Minister of a particular political persuasion against a Council that was not of the same political persuasion but that that had been democratically elected and this Inquiry could be used as a vehicle to dismiss, despite being democratically elected by the people of the Tweed of which Mr Raso is one of the electors.

The further challenge to Mr Raso was made at page 1674:-

"Mr Broad: *Do you think there was any – well put it this way: do you think you had a sufficient understanding of the processes of this inquiry when the rally was held?*

Mr Raso: *No, no, but I did have, I think, sufficient understanding of the background and – of the previous inquiries and the outcome of those."*

The harassment and cross-examination of Mr Raso continues through pages 1675 and 1676.

It is perhaps at page 1679 Mr Raso finally, after much hostile questioning, makes a point, and we quote:-

Mr Raso: *Well, I'm not sure whether its part of section 740. I wasn't aware that it was part of section 740. I just know that from media reports, the Council can be subject to inquiry and, subsequently, the Minister can sack the Council, irrespective of the outcome of that inquiry and it has been shown to happen."*

Well, is this not the case? And, is it not in a democratic society available to members of that society to demonstrate against that kind of process and outcome?

Submission in Reply 104

5.5 *Perceptions and Understanding*

5.5.1 Perceptions and Reality

Mr Smith complained that the Inquiry attempted to create perceptions of people's understanding of council matters rather than receiving direct evidence. It is not clear quite what he had in mind when he talked about "direct evidence" from witnesses. Mr Smith continually refers to witnesses when in fact none existed. Those who appeared at the Hearings were speakers; witnesses belong to Court cases where a person or body is on trial. It would appear that Mr Smith, with his essential inability to understand the nature of a s 740 Inquiry, had in mind material evidence, and that the opinions of individuals concerning the council's governance record were of no consequence.

There is also the fact that the Commission hearing itself, through its questions has attempted to create matters of perception through its own questioning rather than receiving direct evidence from witnesses

Mr Stokes' article, which formed a basis for Mr Smith's allegations of bias in the Inquiry, was actually focussed on perceptions. He states that perceptions of conflicts of interest have been an enduring problem for local government. Mr Stokes makes this reference, not with a view to claiming that the perceptions are irrelevant or without substance, but to show how significant a problem Local Government faces in removing the suspicions of the public. His article ends with a number of suggestions for reforming the system.

> *A perception of conflicts of interest in the development assessment process has been an enduring problem for local government councillors in New South Wales. Despite the operation of several statutory bodies established to deal with conflicts of interest and recent amendments to the Local Government Act 1993 (NSW), perceptions of such conflicts have contributed to the removal of the elected councils in two large local government areas in Sydney during the past year. This article investigates the extent to which perceptions of conflicts of interest by councillors in the development assessment process contributed to the recent removal of Warringah Council. An examination of the existing regime for dealing with such conflicts of interest reveals that it is unable to adequately address continuing community concerns. The article therefore proposes, and critically evaluates, six options for further reform.*

Community perceptions underlie the community's confidence in the integrity of public administration. Councils have to earn the public's confidence. Unless a council has the public's trust it cannot operate effectively as a democratic institution. The former Premier of New South Wales, Mr Greiner, spelt out the fundamental importance of this for preserving a liberal and democratic society. Nothing, he pointed out, is more destructive of democracy than a situation where people lack confidence in those administrators that stand in a position of public trust[14]. The confidence of the public in administrators is always based on their perceptions of how well or poorly administrators are performing. Those perceptions are inevitably based on limited evidence, for the community cannot be aware of the total details of what an administration might be doing. In the case of a secretive organisation such as Tweed Shire Council (closed meetings, poor flows of

[14] New South Wales, *Parliamentary Debates,* Legislative Assembly26 May 1988 p.673.

information related to s 12 and Freedom of information requests, and a lack of a complaints management system) the community had little alternative but to base their judgements on their perceptions of what the Council was doing.

> Nothing's more destructive of democracy than a situation where people lack confidence in those administrators that stand in a position of public trust. If a liberal and democratic society is to flourish we need to ensure that the credibility of public institutions is restored and safeguarded and that community confidence in the integrity of public administration is preserved and justified.[1]
>
> [1] New South Wales, *Parliamentary Debates*, Legislative Assembly, 26 May 1988, 673 (Nicholas Greiner, Member for Ku-ring-gai, Premier, Treasurer and Minister for Ethnic Affairs).

The significance of perceptions by the community of Tweed Shire is of critical importance because underlying the problems of governance of the Council were issues related to conflicts of interest, particularly in relation to planning and assessment responsibilities. The significance of this was well expressed by Mr Stokes (p.171).

> The fact that it is left to councillors to disclose non-pecuniary conflicts of interest on a voluntary basis leads to an inconsistency with the common law principles relating to bias. These principles assert that the presence of an actual prejudicial influence is immaterial – a reasonable perception is enough. Accordingly, if a community reasonably perceives a conflict of interest, then a conflict exists, regardless of the councillor's own opinion on the matter.
>
> This renders the role of councillors in development assessment problematic.

Mr Stokes points out that perceptions of conflicts of interest within councils affect the standing of these institutions generally in the public domain (p. 176-177). Perceptions were at the heart of the Inquiry's search for information that allowed some assessment to be made of the efficiency and effectiveness of the governance of Tweed Shire Council. The Inquiry attempted to understand what people's perception of governance issues were. It did not seek to "create" perceptions as Mr Smith so wrongly, and unknowingly, asserted.

> In fact, public processes by government bodies can often exacerbate community perceptions of conflicts of interest by councillors in the development assessment process. As one parliamentarian pointed out:
>
> Unfortunately, recent events cemented in the minds of many in the community that often-held perception of councillors, namely, that many of those elected to office are there to serve their own selfish interests rather than those of the community.[112]
>
> Ashton suggests that these sentiments can be extended beyond a particular council, to local government as a whole, so that there is "a ripple effect and a feeling that all councils are a bit shonky."[113]
>
> [113] New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2002, 2792, (Alan Ashton, Member for East Hills).

5.5.2 The Role of Newspapers

Mr Smith in the opening page of **submission in reply 104** dismisses much of the information provided by the community at the Public Hearings as "often groundless

criticisms based largely upon rumour, innuendo and newspaper reports". He asserts that he knows the value of the information because he is the council's legal adviser, implying that he had access to the "real" information (a curiously ironic suggestion because Mr Smith, by claiming legal privilege, prevented the Inquiry from knowing just what evidence Mr Smith might have held).

Mr Smith presses his attack on newspapers variously throughout **submission in reply 104.** He makes the silly suggestion that the Inquiry would reach its conclusions based on what people state they have learnt from newspapers.

> *"We sort of, within being, I think two (2) months we started reading the local newspapers and we just started to get this vibe about what was going on and how things were being run …"*
>
> We have no idea how 'vibes' from newspapers constitute actual events or reality as far as Council's business in concerned or provide a logical and informed basis as to conclusions.

Interestingly Mr Raso, whom Mr Smith lauds as a champion of democracy, based his campaign against the Inquiry simply on media reports.

> *Mr Raso:* *Well, I'm not sure whether its part of section 740. I wasn't aware that it was part of section 740. I just know that from media reports, the Council can be subject to inquiry and, subsequently, the Minister can sack the Council, irrespective of the outcome of that inquiry and it has been shown to happen."*

On 21 December 2004 Mr Smith wrote to the Inquiry citing a number of issues related to the Inquiry raised by councillors and council administrators (Mr Smith did not raise any issues of his own in this letter). The matters indicated included a reference to complaints against the council raised in newspaper reports. Mr Smith complains himself that the Council did not know what the nature of the complaints were, and therefore could not respond to them in the Council's written submission. Since the Council did not have a complaints system in place the community was obliged to register its dissatisfaction with the Council in other forums. The Council, as a result, was obliged to depend on newspaper reports of the number and nature of complaints.

> 2. It is also a concern of the Councillors and also Council's administration, that although there are newspaper reports of a flood of letters and complaints against both the elected representatives and the Council's administration, none of these complaints have been made public and as we write we are unaware of the content of such complaints. It is therefore impossible for the Council at this stage to either respond in writing by the 28th January to such complaints, the identity or content of which it has no knowledge, nor decide what is an appropriate level of legal representation at the hearings commencing mid February.

Whilst Mr Smith is highly critical of members of the community receiving information from newspapers he was very willing himself to air his own views in newspapers. In his interview with the Tweed Sun, on 15 December 2004, he aired his erroneous views on how the Inquiry might proceed and what its outcomes might be. As observed earlier, this appeared to lay the basis for the subsequent campaign in January 2005 against the Inquiry.

On 9 March 2005 Mr Smith sent an extraordinary letter to the Inquiry alleging that members of the public were providing false evidence to the Inquiry; he was claiming that these people were perjuring themselves. He then suggested that some submissions were derogatory and defamatory (after defaming speakers at the Hearings of committing perjury!). With no evidence whatsoever, he claimed that these "derogatory and defamatory" submissions were being taken as fact. His conclusion appears to have been based on the fact that they were discussed openly in the press.

STACKS/ NORTHERN RIVERS

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9 March 2005

Mr Maurice Daly
Office of the Commissioner
Locked Bag A5045
SYDNEY SOUTH NSW 1235

BY FACSIMILE: 02 9289 4099

Dear Sir,

RE: TWEED SHIRE COUNCIL PUBLIC INQUIRY

We express our concern that speakers are coming before the Commission expressing highly critical opinions relating to Council Officers and the Council and then receiving testimony in support of that evidence in the local press.

We forward herewith a copy of one such article printed in the Daily News yesterday the 8th March 2005.

This evidence given by Tracey Hooper is strongly rejected by the Council and we intend to respond to it, however we find it appalling that it is now the subject of discussion in the press without Council having had the opportunity to respond.

We could put out a press release each day on our views of evidence given before the Commission that is critical of the Council or Council officers in order to address what in our opinion is either false or at best half truths being treated as factual allegations against the Council.

We would ask that you make the Commission's thoughts public on this matter as it appears quite derogatory and defamatory submissions are now being taken as fact and discussed openly in the local press.

We await your ugent advice, but in the meantime, if you have any queries, please do not

Yours faithfully
STACKS/NORTHERN RIVERS

Per

Tony Smith
Managing Director

Despite the many explanations in the opening address of the Public Hearings (16 December 2004) and repeated again on 16 February 2005, at the resumption of the Hearings as well as in other places, Mr Smith refused to accept, or understand, that there

would be no immediate replies to disputed opinions or recollections of events. The processes of the Hearings suggested that any person dissatisfied with another person's evidence could supply a briefing paper on the matter, or make their own views available to the Inquiry in a submission-in-reply when the Hearings were completed and all the evidence on the matters would have been heard. Mr Smith's demand that the Inquiry should move to reject various pieces of evidence in the press was itself rejected.

Tweed Shire Council Public Inquiry

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Mr Tony Smith
Messrs Stacks
Solicitors
12 Queen Street
MURWILLUMBAH NSW 2484

10 March 2005

Dear Mr Smith,

In your letter dated 9 March 2005, you raise concerns that statements, critical of Council Officers, are being made in the Public Hearings of the Inquiry and ultimately you suggest concerns that such statements are being reported in the press.

It is not within the province of this Inquiry to venture into the field of the reporting of evidence given before it. Should Council have any concerns over the reporting of the proceedings, whether the correctness or otherwise, they should be taken up with the press directly.

Should the Council or any member of staff wish to reply to any evidence, then, as I have indicated many times previously, it is always open to the Council to provide:

- A briefing note
- A written submission in reply
- Make an application to provide an oral submission in reply

Yours sincerely,

Professor Maurice Daly
Inquiry Commissioner

Mr Smith on 7 April 2005, at the time when he presented his 72 page submission in reply to council went public in his attack on the Inquiry (Gold Coast Bulletin p. 1-2). This was

a calculated attempt to scuttle the work of the Inquiry by airing his numerous, but wrong, allegations. Mr Smith did this because he decided it was the best hope of making a successful defence of the six councillors he determined were his clients. He made ambit claims about bias and a lack of natural justice and procedural fairness. His performance suggested that Mr Smith had been watching too many US television shows; it would have been comical if his derogatory, defaming and contemptible allegations were not so serious.

Mr Smith had begun a campaign of his own (supported by his clients, but not by other councillors), which would cost the ratepayers of Tweed Shire Council a considerable sum of money. It was also futile. Mr Smith's ignorance of s 740 processes, and his continuing bias against the Inquiry, rendered him unable to understand the way in which the Inquiry might reach its conclusions. He made his own conclusions without any evidence, and he mistakenly accused the Inquiry of reaching their conclusions when none had been reached. Mr Smith never understood that the Public Hearings were just one part of a much larger process in which material was collected and assessed from a large range of sources. He envisaged the Hearings as the climax of the Inquiry wherein his clients (the six majority councillors) were placed on trial. He never understood the reality that the Inquiry was making an assessment on various matters of governance, and was not attempting to put individuals on trial.

Mr Smith's ignorance, his repeated acts of contempt of the Inquiry, his breach of contract by representing just one part of the body corporate, and his willingness to go public on issues, playing politics in the process, are a disgrace to the legal profession.

5.6 *Misleading the Inquiry*

By inserting s.740 into the Act, Parliament expressed its view that certain issues arising in local government should be investigated at the highest possible level. This is reflected within the section, which provides the Inquiry with many of the powers of a Royal Commission under the Royal Commissions Act.

Amongst the powers provided under the Royal Commissions Act are powers:

- to require evidence to be given on oath or by virtue of an affirmation,
- to issue summonses requiring the attendance of witnesses and for the production of documents,
- to inspect documents produced to it,
- to communicate information to law enforcement agencies, such as the ICAC, the Director of Public Prosecutions, the Attorney General and others,
- to deal with instances of contempt.

Collaterally,

- a failure to attend or to produce documents,
- the refusal to be sworn and to give evidence,
- giving false evidence,
- subornation,
- destruction of documents

is an offence under that Act.

The terms of Reference of the Inquiry required that it *"have particular regard to ... the appropriateness of the relationship between elected representatives and proponents of development in the council area"* and *"whether the elected representatives are in a position to adequately direct and control the affairs of council in accordance with the Local Government Act 1993, so that council may fulfill the Charter, provisions and intent of the Local Government Act 1993 and otherwise fulfill its statutory functions"*.

Amongst the issues that the Inquiry addressed was the relationship between the "Tweed Directions" councillors and developers within the Tweed and, in turn the makeup and role of Tweed Directions, which had orchestrated the campaign.

In it first report, the Inquiry dealt with these aspects in detail, ultimately recommending the civic offices of the council be declared vacant. This recommendation was drawn fro a number of conclusions underpinned by relationships between the "Tweed Directions" councillors, Tweed Directions and proponents of development in the Tweed area.

The first Report referred to an attempt by those associated with the Tweed Directions campaign to cover up it and their activities. This Report also refers to this aspect.

There is no doubt that this was a concerted campaign. It was manifested in:

- a failure to provide material in response to summonses issued by the Inquiry,
- providing incomplete material in response to summonses issued by the Inquiry,
- providing irrelevant material in response to summonses issued by the Inquiry,
- failing to provide full, frank and complete answers when giving evidence to the Inquiry,
- giving false evidence to the Inquiry.

This affected material provided by or the evidence given by:

- Mayor Polglase,
- Mr G Staerk
- Mr Blundell
- Mr P Brinsmead
- Mr McIntosh
- Mr Penhaligon
- Mr F Wilson
- Mr M Allen
- Mr W Allen
- Mr I Richards
- Zenith Media

Such was the extent of the campaign that it is difficult to conclude that it was anything but an attempt to suborn the Inquiry.

The Inquiry does not however have sufficient evidence to conclude, beyond doubt, that particular individuals, most likely within the individuals named in this group, were personally responsible for this attempt.

Accordingly, the Inquiry cannot take the appropriate action to prosecute these matters.

It is clear from evidence that has become available to the Inquiry, that certain witnesses have given false testimony to the Inquiry when appearing at the Public Hearings.

This aspect is important as so co-coordinated were the effort of members of this group that, but for the evidence provided in the Baudino files, many of the falsities would not have been discovered.

Section 9 of the Royal Commissions Act provides:

> *(1) Any of the commissioners may administer an oath to any person appearing as a witness before the commission, whether the witness has been summoned or appears without being summoned, and may examine the witness upon oath.*
>
> (2) *Where any witness to be examined before the commission conscientiously objects to take an oath the witness may make an affirmation that the witness conscientiously objects to take an oath, and that the witness will state the truth, the whole truth and nothing but the truth, to all questions that may be put to the witness.*

(3) *An affirmation so made shall be of the same force and effect, and shall entail the same liabilities as an oath.*

Each witness appearing during the Public Hearings gave their evidence by virtue of an oath or an affirmation. A number of witnesses who were associated with Tweed Directions or were candidates supported by Tweed Directions were asked to give evidence relating to:

- their involvement with Tweed Directions,
- funding provided by Tweed Directions,
- fund raising undertaken by Tweed Directions,
- the campaign mounted by Tweed Directions.

In all instances their evidence was, at best, evasive.

Coupled to this evidence was evidence given by the Tweed Directions councillors that parroted a defence based on no direct dealings with Tweed Directions, limited contact with its principals and an ostensible separation from the donors that ultimately provided their funding.

Mayor Polgalse gave the following evidence:

MR BROAD: *Documentation which has been produced in respect of a summons issued by the inquiry suggests that there was a substantially larger involvement in Tweed Directions than you may have indicated to the inquiry. There is a suggestion that you were kept informed through a number of emails of the process. Do you recall receiving emails from Mr*
Blundell, from other persons involved in Tweed Directions group?

MAYOR POLGLASE: *I think I said in my original statement that I'd met three or four times and the reason we met was to seek advice which was we did do. We may have received some emails from them. I'm - - -*

T. 17/3/05 p. 1568

Mayor Polglase was subsequently confronted with copies of documents drawn from the Baudino files, only then did he reluctantly admit the truth lay further down the path.

MR BROAD: *Now, other than your meetings with representatives of Tweed Directions, did you receive material from them from time to time?*

MAYOR POLGLASE: *If we did, it was very very little material we received.*

MR BROAD: *Very little?*

MAYOR POLGLASE: *Very little.*

MR BROAD: *Didn't have campaign strategies?*

MAYOR POLGLASE: *We did all our own campaigning ourselves.*

MR BROAD: *No suggestion of how you should conduct a campaign?*

MAYOR POLGLASE: *At those meetings I attending to, strategies were discussed.*

MR BROAD: *Yes. Did you ever receive any material from them?*

MAYOR POLGLASE: *Oh, I might have but it would be very little.*

MR BROAD: *Well, can you do a bit better than that, please?*

MAYOR POLGLASE: *Well, what sort of material?*

MR BROAD: *Well, perhaps I could attempt to clear that matter up. If you give me a minute, I'll attempt to find some of the documents. Perhaps if I can ..... some of this?*

MAYOR POLGLASE: *Sure.*

MR BROAD: *Did you ever receive this document? Have a look at that document. It's directed to all lead candidates. It's from Bob Baudino. It's dated 11 February 2004.*

MAYOR POLGLASE: *I believed I - yes, that's the election timetable on there. I remember receiving that.*

MR BROAD: *There's another document here, quite a lengthy document dated 9 January 2004. Do you recall receiving that?*

MAYOR POLGLASE: *I recall the timetable on there for sure.*

MR BROAD: *There's a document dated 9 January 2004, again addressed to all candidates from Bob Baudino. Do you recall receiving that?*

MAYOR POLGLASE: *Well, that's the information that we received - that came out of the meetings we had and they were documented and forwarded out to us.*

MR BROAD: *Yes. Do you recall receiving any other documents?*

MAYOR POLGLASE: *Well, I recall probably receiving those two but as regards a lot of others, I would say very limited.*

MR BROAD: *Very limited.*

MAYOR POLGLASE: *Yes.*

MR BROAD: *I've just picked two of them out at random. Were you giving instructions on how to vote and process work?*

MAYOR POLGLASE: *Yes, we were.*

MR BROAD: *Were you given any reports on the grouping of candidates?*

MAYOR POLGLASE: *In what manner?*

MR BROAD: *I'll show you a document.*

MAYOR POLGLASE: *We may have or may not have I can't be aware of that one.*

MR BROAD: *If you look at that letter, it's dated 30 January 2004. I suggest that you received that.*

MAYOR POLGLASE: *Yes, probably did.*

MR BROAD: *I see, thank you. Given what I've just put to you, would you agree that your involvement with Tweed Directions was substantially more than just attending a couple of meetings?*

MAYOR POLGLASE: *No, I would not.*

MR BROAD: *You don't?*

MAYOR POLGLASE: *No.*

T. 17/3/05 p. 1575-1577

Mr Staerk, who had been intrinsically involved in the process, similarly played down the makeup and role of those involved:

MR BROAD: *You've nominated Mr Blundell and Mr Richards as being fundraisers, who else was a fundraiser for Tweed Directions?*

MR STAERK: *We approached Mr Paul Brinsmead. Paul Brinsmead was born in the Tweed, knows the Tweed inside out and back to front. There were a passing parade of people involved in our group.*

MR BROAD: *Can you nominate some of the passing parade?*

MR STAERK: *Oh, look, mate, I'm not of the Tweed and I've got to be honest with you from the first meeting to the last I didn't know everyone.*

PROF DALY: *Any other names that pop up?*

MR STAERK: *Mr Baudino, Mr Bob Baudino and we had a campaign group that had a list of priorities to implement and the need to fund them and we took advantage of anyone*

- took advantage euphemistically – of anyone and everyone who might know someone interested in donating to our effort and we left no stone unturned in trying to reach out through the various local networks to people who may be interested in donating to our cause because the cause was a lost one at that time.

T. 23/2/05 p. 373-374

Mr Blundell, again a principal of Tweed Directions maintained a similar line:

MR BROAD: *Now, in respect of approaches to developers, did you approach any developers for funding?*

MR PIERS-BLUNDELL: *I approached mainly business people. I don't have a lot of contact with larger developers, but the sorts of people that I contacted really were business people in the Shire. They had small or medium businesses and - - -*

MR BROAD: *What, building firms?*

MR PIERS-BLUNDELL: *- - - unfortunately, they were not larger donors, so that's probably why I felt compelled to provide larger sums myself.*

MR BROAD: *Yes. Right. Others involved in approaching developers, could you name - we've had reference to Mr Bolster, Mr Richards. Any others that you can recall?*

MR PIERS-BLUNDELL: *Paul Brinsmead approached some on our behalf.*

MR BROAD: *Mr Richards?*

MR PIERS-BLUNDELL*: Bidwell [sic. Idwall] would have - Bidwell [sic. Idwall] Richards would have approached some, yes.*

MR BROAD: *Any other people that you can recall?*

MR PIERS-BLUNDELL: *I think the majority of it was done by myself and Bidwell [sic. Idwall] Richards. Graham did some and Paul did some. The majority of it was done by the four of us. There may have been some others that made other approaches but - - -*

T. 23/2/05 p. 402-403

And the list goes on, Mr Wilson, a consultant to Richtech:

MR BROAD: *Did you, at any stage, make any approaches on behalf of Tweed directions to Richtech for a donation to Tweed Directions?*

MR WILSON: *I passed on a request that was made of me to contribute a sum of money to a fund, which was intended to support pro-business candidates for the forthcoming election. And so I passed on that request for some funding.*

MR BROAD: *Who did you pass that on to?*

MR WILSON: *I passed that on to our board of directors.*

MR BROAD: *And who did that request come from?*

MR WILSON: *Well, it came from the Group. I was trying to think, just before, who made the request, and I think it was Alan Blundell, but I'm not exactly sure. It might have been Paul Brinsmead, but I think it was Alan Blundell.*

MR BROAD: *Yes, now, did you have any other involvement whatsoever in respect of the Tweed Directions campaign?*

MR WILSON: *No, I didn't. No.*

MR BROAD: *Do you recall receiving any correspondence from Tweed Directions in respect of their campaign?*

MR WILSON: *Yes, there was some correspondence. It wasn't very meaningful though. It was - you know, it was towards the end of the campaign, about something or other, that wasn't - I didn't take to be very meaningful. And after the result was declared, there was some correspondence, which again, I don't think was meaningful.*

MR BROAD: *So you can't enlighten the inquiry as to what was contained in the correspondence?*

MR WILSON: *Well, the one after the - after the result was declared - was an invitation to a celebration gathering, which I didn't intend to go to, but I understand it didn't happen anyway, but - so that was the extent of the one after the result was declared. The one before it was declared, I suspect, was a circular talking about the need for raising funds, a bit like you get from a professional fundraiser, but I don't recall that there was anything specific in it. I think it was a general, circular thing that had probably gone to lots of other people.*

T. 9/3/05 p. 1098-1099

Mr Budd:

MR BUDD: *Tweed Directions.*

PROF DALY: *You were connected with that?*

MR BUDD: *Yes.*

PROF DALY: *Yes. Well, what was your role?*

MR BUDD: *I was - took place in discussions - I've been living in the Tweed area forever pretty much and I've got a background in local matters and I went along because of the fact that my input from that experience might be useful.*

PROF DALY: *Who organised the discussions?*

MR BUDD: *The discussions - I was invited to join by Mr Richards. The meetings were very often about 10 or 15 people, depending on who was there would organise the discussions; sometimes it'd be Mr Blundell. Sometimes it would be Mr Paul Brinsmead if he was there. There was no sort of formal structure about it as far as the meetings went.*

PROF DALY: *Were those discussions primarily about developing themes that might pertain to the elections?*

MR BUDD: *The chief purpose I guess was to bring as far as could be done some broad approval - assistance to people who had the view that they should be, if they got elected, would be interested in economic activity and economic prosperity if you like. The people were - all of us had in mind - the financing side was organised in such a way that it could be available to people who might seek it as candidates. The structure was such that there was a direct attempt to make sure that there was no connection between anybody that received funds and the funds had actually - the people that actually gave the funds. I had nothing to do with any of the divisions or the fundraising or anything of that sort. I was sort of on the periphery, if you like.*

PROF DALY: *Tweed Directions, as we've been informed at the Inquiry, ran what might be called a parallel campaign, parallel to individual candidates' campaigns. Were you involved in that parallel campaign?*

MR BUDD: *Not directly. In fact, I wouldn't necessarily agree with what you said. There were consultants there whose job was to run campaigns and I understand the Commission's already heard from them but I had no part in that.*

PROF DALY: *And, you said that you had no part in the fundraising itself?*

MR BUDD: *No.*

T. 16/3/05 p. 1461-462

Mr Powell:

MR BROAD: *Could I change topics a little bit and could I go to the elections of the Council in 2004? Were you involved in respect of the campaign run by any of the councillors?*

MR POWELL: *No.*

MR BROAD: *Were you involved in any respect, in respect of the involvement of Tweed Directions?*

MR POWELL: *I was approached by Tweed Directions - a representative, to - and they put to us what their philosophy and mission was and asked us for financial support, which we gave after we looked at what their mission statement, for want of a better word, was.*

MR BROAD: *And was that the extent of your involvement with Tweed Directions as such?*

MR POWELL: *Yes.*

MR BROAD: *Did you have any involvement, to that limited extent, with Mr Staerk?*

MR POWELL: *Sorry, what's the question?*

MR BROAD: *Mr Staerk - a gentleman by the name of Graham Staerk?*

MR POWELL: *Yes, I know Graham well.*

MR BROAD: *Sorry?*

MR POWELL: *I know Graham Staerk well. What is the question?*

MR BROAD: *Did you have any involvement?*

MR POWELL: *I had absolutely no involvement with Graham Staerk. My involvement came via Paul Brinsmead.*

MR BROAD: *And can you indicate to the inquiry exactly the involvement of Paul Brinsmead?*

MR POWELL: *Paul Brinsmead simply, as I previously stated, put to us what Tweed Directions were about, and whether or not we would financially contribute to what they were about.*

MR BROAD: *And that was the sole involvement?*

MR POWELL: *It's as simple as that. Sorry?*

MR BROAD: *The sole involvement. That was your sole involvement?*

MR POWELL: *That's correct, yes.*

T. 10/3/05 p. 1177/1178

Mr Richards, who had a substantial involvement in the process, was asked about his involvement, the campaign and the involvement of others. In his evidence he sought to portray innocence, a lack of detailed knowledge and poor recollection to obscure his involvement and the detail and direction of the campaign:

PROF DALY: *Thank you. I'd like to ask you about a group called Tweed Community Vision. Could you explain what that group is and when it was formed and who was related to it?*

MR RICHARDS: *Well, I can't really, because I'm not prepared. Tweed Community Vision was formed about - well, prior to the Council election - to, as I understand it, present the facts associated with activities in the Shire.*

PROF DALY: *Were you a member?*

MR RICHARDS: *Well, it was loosely grouped. I suppose anyone attending a meeting was a member, perhaps.*

PROF DALY: *I have a document which lists - it is entitled "Tweed Community Vision List of First Members", and I'll mention the names on that list: Alan Blundell, Paul Brinsmead, Derek Budd, Neil Sutherland, your own name, Graham Stark, Tony Redonovic, John Murray, David Weston Allen, Mike Allen, Nicholas Carlos.*

MR RICHARDS: *Yes. Well, I was confusing that with Tweed Directions.*

PROF DALY: *Can you explain what Tweed Community Vision was then, if you were confusing them?*

MR RICHARDS: *Well, as far as I know, Tweed Community Vision was formed, as I said, to promulgate information relative to activities in the Tweed Shire, and I know there were several documents printed which I don't have any with me, but all they did was print the facts of what transpired in the Tweed Shire over the last several years and perhaps may have referred to what could happen in the next few years. But it was an information document as I remember it.*

PROF DALY: *You're listed, as I say, as one of the first members.*

MR RICHARDS: *Yes.*

PROF DALY: *What role did you play, and who organised the group? I've mentioned the names of the group.*

MR RICHARDS: *Well, I think the people that you've named there would be the organisers.*

PROF DALY: *Who? Someone must have - there's a number of names; there's about 10 or a dozen names. Who organised the group to get together?*

MR RICHARDS: *Well, we're basically friends, I guess. We'd meet – we had met on other occasions, and we probably thought that that was a good idea to promote what we started there.*

PROF DALY: *But someone must have taken the lead. Was it Mr Blundell, for example, or someone else?*

MR RICHARDS: *Well, I really can't answer that definitely, but we all had our input about the Tweed Community Vision because we felt the need to counter the*

misinformation that had been spread throughout the Tweed Shire by the media over the last several years - like four or five years – and that was why concerned people such as you've named there got together and said "We have to do something to let the people know the truth".

PROF DALY: *You said that you were a little confused by my first question - confused Twee Community Vision with Tweed Directions.*

MR RICHARDS: *Yes.*

PROF DALY: *Could you tell me what the difference was? Tweed Directions, what role did that play as opposed to the role that Tweed Community Vision played?*

MR RICHARDS: *You're asking me something I can't answer definitely because I'm not sure where one - I know Tweed Directions was a separate entity, and I was part of Tweed Directions, and that's listed as well. Tweed Community Vision was a more loosely framed organisation to do those things, and I just can't separate - I can't draw a line as you're requesting me to how - where one started and the other finished.*

PROF DALY: *Tweed Community Vision produced like a small newspaper.*

MR RICHARDS: *Exactly, yes.*

PROF DALY: *Would that be a description of what they produced?*

MR RICHARDS: *Correct.*

PROF DALY: *I've been sent several copies of that to do with the Inquiry. When did they start to produce those newspapers?*

MR RICHARDS: *Well, they'd be dated, I'd gather. I mean, if I'd have known I was going to be questioned along these lines I could have brought several, because I have several on - - -*

PROF DALY: *You can give me information - I'm quite happy for you to later forward that information.*

MR RICHARDS: *Well, I'd be happy to, yes. The express purpose - if I may just add, the express purpose of that was to promulgate the facts; no other ulterior motives.*

PROF DALY: *Who funded it? Who funded the newspaper?*

MR RICHARDS: *I presume Tweed Directions funded it.*

PROF DALY: *But you said they're separate.*

MR RICHARDS: *Yes, they're separate. Yes, of course they're separate. They're two separate entities.*

PROF DALY: *But they funded this newspaper.*

MR RICHARDS: *Yes.*

PROF DALY: *All right. In the 2004 election, did you play a role in terms of the campaign?*

MR RICHARDS: *2004 election - which one are we referring - that's the Council election?*

PROF DALY: *Last year - the Council election, yes.*

MR RICHARDS: *Did I play a role?*

PROF DALY: *Yes.*

MR RICHARDS: *Well, I was a member of Tweed Directions. I played a role to that extent, I guess.*

PROF DALY: *What role did you play?*

MR RICHARDS*: Just a member of a committee. I mean, I didn't know more than that.*

PROF DALY: *No more than that. Did you have an association with Weston Allen and his group?*

MR RICHARDS: *Yes.*

PROF DALY: *What was that association?*

MR RICHARDS: *Well, Weston Allen, he was part of the group, I suppose. He may not have been formally a member; he was part of the group.*

PROF DALY: *Part of the Tweed Directions Group?*

MR RICHARDS: *No, part of the Tweed Futures Group. That's the people that printed the magazines you're talking about. What was my association with him?*

PROF DALY: *Yes.*

MR RICHARDS: *I didn't have a personal association. He was one of the people that sat round the table and consulted, I suppose, on information.*

PROF DALY: *I have an email which was sent on 27 February 2004, sent to Weston Allen.*

MR RICHARDS: *Yes.*

PROF DALY: *I will just read the first part of that:*

Weston: I want to set out a few thoughts in regard to how you need to run your campaign. These are as follows: (1) Idwall Richards has agreed to play a day-to-day role and assist you in any aspects of the campaign. I suggest to pass as many issues onto Idwall Richards to follow up or run around about, as necessary.

Did you pay a role with Weston Allen?

MR RICHARDS: *Yes, we consulted widely.*

PROF DALY: *You just said you had nothing to do with the election.*

MR RICHARDS: *Well, the election campaign. You've confused me a little bit about elections and Weston Allen. Now, I did have an association with Weston Allen but I - and on a consultative basis.*

PROF DALY: *He paid you to do this?*

MR RICHARDS: *No, no - - -*

PROF DALY: *What's the consultative arrangement? What was the consultative arrangement?*

MR RICHARDS: *What was it? Well, he was - I suppose, well, he worked out of town, for starters; he had a practice in Brisbane and I was his local ear. I mean, he asked me what was going on in the town many times. But that was before he decided to nominate for Council, as I understand it.*

PROF DALY: *This is dated 27 February 2004.*

MR RICHARDS: *Yes, well, I can't remember when nominations closed. I can't remember whether it was before or after.*

MR BROAD: *May I interrupt? The first edition of the Tweed Community Vision newspaper, or whatever you care to call it, talks about Weston Allen as now residing in the Tweed and practises medicine in Coolangatta.*

MR RICHARDS: *He also practised in Brisbane.*

MR BROAD: *It doesn't mention that.*

MR RICHARDS: *Well, I'm sorry but he did. He was in Brisbane, I think, three or four days a week.*

MR BROAD: *So it's because he wasn't present in the Tweed that you acted in the way you did?*

MR RICHARDS: *Well, that's one of the reasons.*

MR BROAD: *Other reasons?*

MR RICHARDS: *Well, I just wanted to help him.*

MR BROAD: *Why was that?*

MR RICHARDS: *I wanted to help him.*

MR BROAD: *Was it simply out of friendship or what?*

MR RICHARDS: *Well, the answer to that would be yes.*

MR BROAD: *No other reason?*

MR RICHARDS: *No other - well, there was no ulterior motives.*

MR BROAD: I'm not suggesting ulterior motives; I'm asking for reasons.

MR RICHARDS: *Well, do you have to have a reason?*

MR BROAD: *I'm asking you whether you had any reasons for doing it. Now, you and I can sit here opposite each other and we can pull each other's teeth. I would like you to answer my question.*

MR RICHARDS: *Well, I'm trying to think of a reason why you would help someone to - - -*

MR BROAD: *I'm asking you your reasons of why you helped Mr Allen.*

MR RICHARDS: *Why I helped Mr Allen? Well, I believed him to be a good prospective candidate, I suppose.*

MR BROAD: *Thank you.*

PROF DALY: *Did Mr Allen run an independent campaign?*

MR RICHARDS: *Yes, as I understand it, he did, yes.*

PROF DALY: *No connections to any other groups?*

MR RICHARDS: *No connections to any other groups? What does that mean?*

PROF DALY: *Well, there was several groups that stood for election. Was he connected with any of the people in some of those other groups?*

MR RICHARDS: *I think most of them were inter-connected; most groups were inter-connected, weren't they? One way or another.*

PROF DALY: *What were the inter-connections? Give me some examples.*

MR RICHARDS: *Groups that were of like minds naturally speak to each other so you must say they are interconnected. And whether they be progressive groups or anti-progressive groups, they're still inter-connected, I guess.*

PROF DALY: *Was there a formal connection with other groups?*

MR RICHARDS: *Not that - - -*

PROF DALY: *Or with any outside body, such as Tweed Directions?*

MR RICHARDS: *Well, Weston Allen would have received funding from Tweed Directions, I presume; although I haven't seen anything – any factual information to that extent. But I presume that he would have been - he would have asked for funding and received it, as other groups did.*

PROF DALY: *Yes, he did. What I'm talking about though is not the funding itself but the shaping of a campaign, the development of policy issues and so forth. Was there outside influence on Mr Allen's campaign?*

MR RICHARDS: *Outside influence? No, I wouldn't think so. Weston Allen is a very independent person and he has wide-ranging and strong views, is a very well-educated and knowledgeable man. And he doesn't need too much of that sort of assistance.*

PROF DALY: *In the email, to which I've already referred, of Friday, 27 February 2004, as I have already quoted:*

I want to set out a few thoughts in regard to how you need to run your campaign. The first of those, as I've already referred to, is that you had agreed to play a day-to-day role and assist you in any aspect of the campaign.

Now, surely that means that whoever is writing this - and I will come to that later - was putting you in as their representative in terms of assisting the campaign.

MR RICHARDS: *Yes. Well, I don't resile from the fact that I assisted Weston Allen.*

PROF DALY: *No. What I'm asking you - the person who wrote this email has, number one, said that you had agreed to run the day-to-day aspects of the campaign. Now, that would suggest to me that that person, effectively, was shaping Mr Allen's campaign and that you were the person who was going to provide that shape and assist Mr Allen in that.*

MR RICHARDS: *Well, I certainly assisted Mr Allen but I didn't run his campaign because I wouldn't know how to for starters. And Weston Allen's knowledge of campaign matters would be quadruple my personal knowledge.*

PROF DALY: *In this email, after the first point which refers directly to you, there are seven other points - a total of eight points - basically telling Mr Allen what he should do and how he should do it in his campaign. This email was signed by Paul Brinsmead. What's your relationship to Mr Brinsmead in relation to the campaign and your role in it?*

MR RICHARDS: *Well, I've known Paul Brinsmead for a few years. We've consulted with him on business matters from time to time. I have no personal relationship with him.*

PROF DALY: This email suggests to me that Mr Allen's campaign was being very strongly shaped by Mr Paul Brinsmead and you were his representative in making whatever that shape was happen.

MR RICHARDS: *Well, I think the reason that I would be nominated is because I was local and because I lived in the district for 74 years and - whereas Weston was a comparatively newcomer in that he worked mainly in Brisbane, had a property in Cudgen and he was in Brisbane, I think, three days or four days every week and he was using my local knowledge.*
But as for shaping his campaign, I mean, I just wouldn't have the ability to do it.

PROF DALY: *No, I'm not saying you were shaping his campaign. I'm saying Mr Paul Brinsmead was and that you were a person that was helping to achieve what Mr Brinsmead was trying to achieve.*

MR RICHARDS: *Well, I think that's drawing a long bow. I think if you knew Weston Allen, you would know that he would be able to run his own campaign. He's a very knowledgeable man.*

MR BROAD: *Mr Richards, you have given some indication that Mr Allen was not really a local. Is that your suggestion?*

MR RICHARDS: *Well, he had a property and lived in Cudgen but worked in Brisbane.*

MR BROAD: *Is that the basis?*

MR RICHARDS: *Beg yours?*

MR BROAD: *Is that the basis you say that?*

MR RICHARDS: *Yes.*

MR BROAD: *Mr Allen portrayed himself in the following terms: he met his wife at Fingal and honeymooned at Banora Point. He purchased a property at Cudgen in 1974, taught his children to windsurf on Cudgen Lake in the 1980s - leaving aside references to his son - it also suggests that Weston has had a close association with the Tweed for nearly 40 years. Now that seems to fly in the face of what you're saying, doesn't it?*

MR RICHARDS: *Well, I can only tell you what I know; I can't make anything up.*

MR BROAD: *So, to your knowledge, he hasn't had a close association with the Tweed?*

MR RICHARDS: *To my knowledge? Well, you can work in Brisbane and still have a close association with the Tweed. I did the same thing for a few years myself.*

T. 10/3/05 p. 1185-1195

Mr Weston Allen had been a candidate in the elections. He had received campaign funds from Tweed Directions. He stood, backed by Tweed Community Vision, a body that had come into existence for a purely political purpose, to support the Tweed Directions campaign, especially by running a negative campaign against its opponents.

Mr Allen sought to obscure the involvement of Tweed Directions in his campaign as well as the role undertaken by Tweed Community Vision:

MR BROAD: *You indicated that you were a candidate for the 2004 Council elections. The actual group as I understand it which was headed by you had some alignment to the Tweed Directions group. Can you indicate the extent of the alignment of your group to Tweed Directions?*

DR ALLEN: *It was purely a funding relationship.*

MR BROAD: *Did anyone from Tweed Directions give you anything more than funding? Did they give you direction, policy statements, anything like that?*

DR ALLEN: *I had some help from Jeff Egan in terms of policy statements and preparation of issue number four in Tweed Community Vision. I had help from Winning Directions which had a connection with Tweed Directions in terms of layout and publication but in terms of the actual material that was essentially my own and included the help of some other members in Tweed Community Vision. None of the members of the Tweed Community Vision were from Tweed Directions.*

MR BROAD: *None of them were associated with Tweed Directions? None of the members of Tweed Community Vision were associated with Tweed Directions.*

DR ALLEN: *Were active members of the Tweed - or executive members of Tweed Directions.*

MR BROAD: *Who were the executive members of Tweed Directions, to your knowledge?*

DR ALLEN: *I couldn't give you that information. I know that, well, at least it appeared that Alan Blundell and Graham Staerk were involved. Apart from that I couldn't say.*

MR BROAD: *Did you attend any meetings with Tweed Directions?*

DR ALLEN: *No, not at all.*

MR BROAD: *None at all?*

DR ALLEN: *No. As I say, those two people were present at some meetings that Tweed Community Vision was involved in but I never attended any meetings of Tweed Directions.*

MR BROAD: *Was Mr Paul Brinsmead a member of your group?*

DR ALLEN: *He was not a member of Tweed Community Vision. I couldn't tell you on the other.*

MR BROAD: *Was he providing any direction to your group?*

DR ALLEN: *Of course being my wife's cousin, I would talk with Paul and discuss things with Paul. He would give me some input. That was the extent of it.*

MR BROAD: *To your recollection did he give Tweed Community Vision any direction as to the way it should go about it's business.*

DR ALLEN: *Did he give Tweed Community Vision?*

MR BROAD: *Mm.*

DR ALLEN: *He would have given me some personal advice, some opinions but no directives, no.*

MR BROAD: *Did he give you any indication of when you should declare your candidacy for elections?*

DR ALLEN: *I was not influenced by Paul Brinsmead - - -*

MR BROAD: *No, no. I didn't ask you that question. I asked you if he gave you any direction in respect to when you should announce your candidacy.*

DR ALLEN: *Of when I should announce it? No, I didn't get that directive from him.*

MR BROAD: *Now, do you recall him giving you any directions as to how your campaign for election should be run?*

DR ALLEN: *No. It was Jeff Egan who gave me the advice on that.*

MR BROAD: *Did he circularise any advice from Paul Brinsmead to you?*

DR ALLEN: *Did Jeff Egan?*

MR BROAD: *Yes.*

DR ALLEN: *I may have received some - - -*

MR BROAD: *You've got no recollection.*

DR ALLEN: *I have recollection of seeing some information that was from Paul Brinsmead but not in the way of a directive.*

MR BROAD: *There are two emails which the inquiry has. One of them reads as follows:*

Weston, I want to set out a few thoughts in regard to how you need to run your campaign. These are as follows: (1) Idwall Richards has agreed to play a day to day role and assist you in any aspect of the campaign. I suggest you pass as many issues on to Idwall Richards to follow up or run around about as necessary.

The email also goes on, amongst other things, it says in paragraph four:

I have asked for $10,000 to be paid to your account and that should be paid this week.

Paragraph five of the email reads as follows:

I have had a look at some of your draft policies and I think they're looking great. I think you need to aim your campaign in two broad areas. The first one, you should not forget that the last three newsletters have spoken about sensible plan development moving forward in a very responsible way. This should certainly remain as one of your cornerstone policies; and (b) you should aim the balance of the policies along the health angle that you are pursuing and I think that you should aim these very hard at the over 65 market. I think you need to prepare a brochure and a number of newsletters to be distributed to this electorate. I have asked Jeff Egan to come back and advise how he can obtain details of a mailing list or distribution list for the over 65 so that he can squarely target them.

Do you recall receiving that sort of advice from Mr Brinsmead?

DR ALLEN: *I remember receiving that sort of email, yes.*

MR BROAD: *You don't say that was advice on how to run your campaign?*

DR ALLEN: *It's advice. It's advice; it's not a directive. It's not an order.*

MR BROAD: *No, it's advice on how to run your campaign, isn't it?*

DR ALLEN: *It's advice but so what. What's the issue you're making about it.*

MR BROAD: *No, no. I won't debate issues with you. Now, in any way was Tweed Community Vision incorporated as an arm of Tweed Directions to do its bidding?*

DR ALLEN: *No, I'm not sure of this, but I would think it would be correct to say that Tweed Community Vision actually preceded Tweed Directions.*

MR BROAD: *Did it become an arm of the Tweed Directions campaign?*

DR ALLEN: *What do you mean by an arm?*

MR BROAD: *Was it utilised as part of the Tweed Directions campaign to elect a group of candidates?*

DR ALLEN: *Not directly, no. I was the one who - - -*

MR BROAD: *Was it in part, directly used by the Tweed Directions group to further it's campaign?*

DR ALLEN: *I'm not sure what you're driving at there really.*

MR BROAD*: I'll try again. Did Tweed Community Vision come to any arrangement with Tweed Directions that it would handle all negative responses, and would fire a few shots of its own?*

DR ALLEN: *Really?*

MR BROAD: *No, no. I'm asking you if that occurred.*

DR ALLEN: *That did not occur.*

T. 18/3/05 p. 1751-1755

Like many other witnesses who were asked questions regarding matters associated with the campaign orchestrated by Tweed Directions, Mr Allen thought that bluff would carry the day.

Mr Michael Allen, who had been the Vice President of Tweed Community Vision likewise sought to obscure his evidence by a lack of understanding, vagary, ignorance a lack of recollection:

MR BROAD: *Mr Allen, as I understand it, you were one of the first members of Tweed Community Vision, is that correct?*

MR ALLEN: *I understand I was one of the earlier members, yes. I was invited to a meeting. It wasn't called Tweed Community Vision at that stage. There was no specific name allocated to it. It was a meeting of like minded people. I put my name forward gladly to provide basically information to that committee and it was at an early date. I can't recall.*

MR BROAD: *It was subsequently, I assume, incorporated as an association under the Associations Incorporation Act?*

MR ALLEN: *I'm not sure whether that was incorporated. Tweed Directions which was formed after that event was incorporated. I personally am unaware whether in fact it was incorporated.*

MR BROAD: *Or not?*

MR ALLEN: *Tweed Community Vision was the vehicle by which we tried to disseminate factual information to residents of Tweed Shire. In previous years a lot of misinformation had been presented by various groups and it was our desire to get out there to the public as much fact as we could and separate it from the fiction. And we were confronted with a lot of different - what should I call it, different notions or publications from - by other councils or council groups or groups seeking to be councillors, and I'd like to present this, sir, just to show you the sort of information which was being disseminated. This was disseminated at - prior to the 1999 - - -*

MR BROAD: *I have here - just so that you're aware, I have here a number of the newsletters that it put out. I'm certainly aware of that and I also have looked at some of its material. So certainly it doesn't have - - -*

MR ALLEN: *No, this is not Tweed Community - Tweed Visions, this is a publication put out by the opposition group and this is the sort of information, the sort of misinformation we were trying to correct.*

MR BROAD: *Effectively answered. Well, if you table that, I'll certainly make myself available on that later.*

MR ALLEN: *I would appreciate if you did.*

MR BROAD: *Now, Tweed Community Vision had as its objects a number of things. Amongst other things, its objects included that it gather information that represents the true facts relevant to the state of the natural and built environment of the Tweed and the state of commerce and business and community issues generally, and to provide a - sorry, a forum – the forum of timely accurate information that the local community and other interested parties can rely on. Do you recall ever seeing the objects of the Association?*

MR ALLEN: *Yes, I did.*

MR BROAD: *It was to engage in and provide balance in a public debate?*

MR ALLEN: *That is correct.*

MR BROAD: *It was to oppose entities disseminating information that is misleading or deceptive. It had other objects which were akin to a role of disseminating factual information - - -*

MR ALLEN: *That's correct, and one of the - - -*

MR BROAD: *- - - and in seeking to respond to misinformation, and that's - - -*

MR ALLEN: *That's correct, and if you'd care to view this, Mr Broad, you will see the sort of misinformation - - -*

MR BROAD: *Yes.*

MR ALLEN: *- - - that we were endeavouring to correct.*

MR BROAD: *Yes, yes. Now, what was its role with Tweed Directions? What was its relationship?*

MR ALLEN: *It was the first organisation, if we can use that word loosely. The meeting initially were between, as I say, like minded people who supported the views that you've just read out. The purpose of Tweed Community Vision was to disseminate information and they did. I think they distributed something like four articles, press - not press articles but brochures. I have one here. This is the sort of information that Tweed Community Vision disseminated, all factual information and that was to promote A, Wes Allen as a potential councillor and, B, to give credibility to other councillors who were seen to be seeking to promote those ideals that you have there.*

MR BROAD: *Could I now come back to the question I just asked you and that is, what was its relationship with Tweed Directions?*

MR ALLEN: *Some of the - a lot of the members were similar members of Tweed Directions. The actual break-up between the two organisations was indistinct. The Tweed Directions was the, if I can call it this way, the financial arm of the organisation. It was the - or its executive were. They were the ones who controlled the donations that came in and the allocation of donations.*

MR BROAD: *So that particular newsletter that you've shown me, was that funded by Tweed Directions?*

MR ALLEN: *Yes.*

MR BROAD: *And was that the extent of its role in respect of Tweed Directions?*

MR ALLEN: *I don't understand what you're saying.*

MR BROAD: *I'm sorry. Tweed Community Vision, you've just given indication that it had some relationship to Tweed Directions. I'm asking you whether what you've just said to me is the full extent of that relationship.*

MR ALLEN: *I'm sorry I still don't understand you. What I - - -*

MR BROAD: *I'm sorry. It's my fault no doubt. I had asked you whether Tweed Community Vision had a relationship to Tweed Directions. You've just answered by giving some information, yes, that they provided some funding and I think I've confirmed that that newsletter, for instance, was funded by Tweed Directions and that Tweed*

Directions was also a fundraiser in respect of Tweed community futures. I'm asking you whether that was the sole extent of the relationship between Tweed Community Vision and Tweed Directions.

MR ALLEN: *Well, I'm sorry but I still can't see the nexus that you're trying to create, but I can say this - - -*

MR BROAD: *Perhaps rather than looking - - -*

MR ALLEN: *- - - that some of the members were members of both organisations and it was a fairly loose organisation.*

MR BROAD: *What I'm trying to find out in a physical sense what assistance, if any, Tweed Directions gave to Tweed Community Vision?*

MR ALLEN: *Tweed Directions, as the - was really the body, as I said, who handled the financial situation. They also had expertise or they hired expertise in the way that these things were put together. They had the organisation which Mr Staerk was a representative of. They assisted in the preparation of these documents here. Mr Staerk's organisation I think was Winning Directions, I think it was. He had an office at Burleigh Heads. They assisted with the preparation of the layout and the format of those documents. Tweed - - -*

MR BROAD: *Tweed Directions was undertaking a significantly larger task wasn't it? It was directing the campaign of a number of candidates standing for election wasn't it?*

MR ALLEN: *Tweed Directions was, yes.*

MR BROAD: *Yes. Now, was Tweed Community Vision any part of the campaign that was being run by Tweed Directions?*

MR ALLEN: *Well, like I've said to you, many of the members were in both organisations.*

MR BROAD: *I've heard that but that's not the answer to my question. Now, I am asking you whether Tweed Community Forum - - -*

MR ALLEN: *Teed [sic. Tweed] Community Vision.*

MR BROAD: *- - - Tweed Community Vision was used by Tweed Directions for its campaign purposes.*

MR ALLEN: *Well, my understanding of the situation was that Tweed Community Vision stood alone. It got assistance from Tweed Directions and it produced this sort of information.*

MR BROAD: *You were the Vice-President.*

MR ALLEN: *That's correct.*

MR BROAD: *Are you saying that Tweed Community Vision prepared its own material, yes or no?*

MR ALLEN: *We were given the expertise of the other members - - -*

MR BROAD: *Can you answer my question?*

MR ALLEN: *It can't be answered yes or no.*

MR BROAD: *Did it prepare its own material, yes or no?*

MR ALLEN: *It can't be answered yes or no. There's no discrete answer to that question. What I'm saying to you is that Tweed Community Vision relied upon the expertise of outside people who were hired by Tweed Directions to provide expertise and input. I was one of them.*

MR BROAD: *Did they provide input into that newsletter? Did they provide input into that newsletter that you have on the table next to you, yes or no?*

MR ALLEN: *You seem to misunderstand me. I have said - - -*

MR BROAD: *I am trying to get my question answered and you seem to be ignoring it. Would you answer either yes or no?*

MR ALLEN: *Mr Broad, there is no yes or no answer to your question. I have told you that Tweed Community Vision and Tweed Directions had a number of similar employees - not employees, but members. Now, they worked together to prepare documents like this. Does that answer your question?*

MR BROAD: *Do I take it that some of the wording within that document was provided by either a member of or someone retained by Tweed Directions?*

MR ALLEN: *I have tried to tell you, sir, that there was common membership with Tweed Community Vision and with Tweed Directions. All had input into a publication such as that.*

MR BROAD: *So are you saying that they did?*

MR ALLEN: *I'm telling you the situation.*

MR BROAD: *Yes. Well, did Tweed Community Vision fulfil a support role for Tweed Directions in disseminating information?*

MR ALLEN: *That's probably a good way to put it, sir.*

MR BROAD: *Did it do so at the direction of Mr Staerk, Mr Blundell or any other person associated with Tweed Directions?*

MR ALLEN: *It did it at the consensus view of the members of Tweed Community Vision.*

T. 11/3/05 p. 1354-1359

MR BROAD: *You talk about these meetings. Was there any separation in the meetings between Tweed Community Vision and the Tweed Directions?*

MR ALLEN: *No, not - no, there wasn't except they had Executive meetings of Tweed Directions and that's where the - - -*

MR BROAD: *Who was on the Executive of Tweed Directions?*

MR ALLEN: *To the best of my knowledge it was Alan Blundell, Graham Staerk and one other which I can't recall his name at this stage.*

MR BROAD: *Might it have been Mr Paul Brinsmead?*

MR ALLEN: *It could have been. I can't recall.*

MR BROAD: *That's your best, you can't recall?*

MR ALLEN: *Mm.*

T. 11/3/05 p. 1361-1362

MR BROAD: *The Tweed Directions proceeded with a very precise campaign strategy didn't it?*

MR ALLEN: *They did.*

MR BROAD: *And the campaign had certain defined areas of responsibility didn't it?*

MR ALLEN: *I suppose you could say that. I just don't quite follow. If you could be more specific.*

MR BROAD: *Well, it divided its campaign over the longer term, the shorter term, it gave instructions to its candidates didn't it?*

MR ALLEN: *Well, it didn't have candidates per se. It supported candidates but it didn't have candidates.*

MR BROAD: *They were arm's length and separated from it were they?*

MR ALLEN: *They were at arm's length and separated from the financial side of it, absolutely. They were called in to have - - -*

MR BROAD: *What about their strategies?*

MR ALLEN: *They were asked to appear at the meetings occasionally and that was just to basically test the water as to their responses.*

MR BROAD: *To your knowledge was there any interplay between the candidates and Tweed Directions in respect of campaign strategies?*

MR ALLEN: *No, the candidates were basically left to run their own campaigns. They were assisted - - -*

MR BROAD: *To your knowledge did they receive any direction or advice from Tweed Directions?*

MR ALLEN: *Not to my knowledge but Tweed Directions was free there to advise them if they sought advice on various matters. But I can't speak for the candidates, no.*

MR BROAD: *Tweed Community Vision was part of a support group for the Tweed Directions campaign wasn't it?*

MR ALLEN: *Yes.*

MR BROAD: *It was a major tool in the support campaign wasn't it?*

MR ALLEN: *Well, I'm not sure about that. I think there were only four publications put out. I'd hardly call that a major tool.*

MR BROAD: *It had major circulation within the Tweed community this newsletter?*

MR ALLEN: *It was a newsletter put out. I'm not sure, I think it may have been one of these letterbox style drops. I just forget how - some of them I think were in the appendices to the local papers but it was quite a normal circularisation.*

MR BROAD: *Was it ever backed by advertising?*

MR ALLEN: *Look, I don't know. I can't - - -*

MR BROAD: *It was a tool, wasn't it, to be used to attack other candidates?*

MR ALLEN: *No, it was there primarily to disseminate factual information to make sure that information such as this presented by other candidates was not taken seriously.*

MR BROAD: *It was there to run a negative campaign on behalf of Tweed Directions wasn't it?*

MR ALLEN: *Absolutely not.*

MR BROAD: *Did it run a negative campaign?*

MR ALLEN: *In the final stages the Executive, I think, sought fit to run a negative campaign. That was not - - -*

MR BROAD: *Sorry, the Executive of?*

MR ALLEN: *That was not universally adopted.*

MR BROAD: *The Executive of what group?*

MR ALLEN: *Tweed Directions.*

MR BROAD: *And who were they?*

MR ALLEN: *I have - I've told you the three I know of it was Alan Blundell, a Mr Staerk, and a third person I'd have to check his name. I have it on record but I don't know who it was.*

MR BROAD: *Were you ever asked to prepare material for the Tweed Community Vision publication?*

MR ALLEN: *Yes, I was.*

MR BROAD: *And what was that material?*

MR ALLEN: *It was in relation to the extent of development that was occurring. I think it's partly or maybe a subsequent one, the amount of land which was actually available in Tweed Shire. How much was zoned, how much was being taken up. It was technical, purely technical advice that was sought.*

MR BROAD: *It wasn't a profile in respect of yourself - sorry, a profile in respect of yourself, yes?*

MR ALLEN: *Would you repeat that please?*

MR BROAD: *It wasn't a profile in respect of your own personal experience? Did you ever prepare - were you ever requested to prepare, as it were, a CV for yourself?*

MR ALLEN: *I was, yes. I was asked but I don't think it was ever published.*

T. 11/3/05 p. 1362-1365

The reliability of Mr M Allen's evidence is put in doubt by evidence that was subsequently given by Mr Bradshaw. Mr Allen gave the following evidence of his fundraising endeavours:

MR BROAD: *The meetings you went to - you said there was a meeting of the Executive. In your attendance at the meetings, was funding ever discussed?*

MR ALLEN: *Only in the context of that they were seeking as much funding as possible and they would like any members who had contacts to seek funding from those contacts.*

MR BROAD: *What sort of contacts?*

MR ALLEN: *Big business contacts.*

MR BROAD: *Big business?*

MR ALLEN: *Not big business, business contacts.*

MR BROAD: *Any business contacts?*

MR ALLEN: *Any.*

MR BROAD: *Did you nominate anyone who might be approached?*

MR ALLEN: *Yes, I did.*

MR BROAD: *And who was that?*

MR ALLEN: *I nominated the Bradshaw Group. That was one of the – if you'll note, one of the - our terms or our ideals was in fact to seek finances*
- - -

MR BROAD: *Did you nominate anyone - - -*

MR ALLEN: *- - - inside and outside the Tweed Shire.*

MR BROAD: *Did you nominate anyone else?*

MR ALLEN: *No.*

MR BROAD: *Did you approach anyone?*

MR ALLEN: *No, no one else.*

MR BROAD: So you never rang anyone up?

MR ALLEN: *No one else. They were my main client and I suggested to them it would be appropriate.*

MR BROAD: *You suggested to who it would be appropriate?*

MR ALLEN: *I suggested to the Secretary of Bradshaw Developments.*

MR BROAD: *So you approached Bradshaw Development?*

MR ALLEN: *It was in conversation that I was having with Bradshaw Developments at the time. The elections were imminent and I suggested that it would be appropriate to fund.*

MR BROAD: *To the best of your recollection, what words did you use?*

MR ALLEN: *Look, I really wouldn't have the faintest idea at this stage but - - -*

MR BROAD: *Well, do your best.*

MR ALLEN: *I would have probably indicated that as he would be aware, the election was nigh and that the good governance of Tweed Shire would be best served by the election of astute councillors and I would have indicated to him that Tweed Directions was a vehicle by which election funding in an anonymous way could be made.*

MR BROAD: *What business was Bradshaw conducting at that stage in Tweed?*

MR ALLEN: *They were in the business of land development. They were - they had a holding in Tweed Shire since about - or the early '80s I think.*

T. 11/3/05 p. 1365-1366

Mr Bradshaw presented a different version:

MR BROAD: *The Inquiry has heard evidence that you were approached to provide funding to the Tweed Directions Group in the last Council elections.*

MR BRADSHAW: *That's correct. I was approached - - -*

MR BROAD: *I think Mr Michael Allen approached you; is that correct?*

MR BRADSHAW: *Mr?*

MR BROAD: *Mike Allen.*

MR BRADSHAW: *Well, no. He did - we had discussions. I received a letter in December - 21 December - from Mr Alan Blundell, asking us to - would we continue to Tweed Directions. I did give a donation on 21 January. I did post it up to Mr Allen to lodge it on my behalf to Tweed Direction. In our discussions I know he said he had been to a couple of meetings and that's all I know that Mr Allen had dealings with Tweed Directions.*

Now, we didn't talk about it but why I supported there - I was looking - the previous - after reading a thingy about it, the previous Council '99 2003 - I felt they looked - you could see the growth - as I said, I have been here 30 years and within that 30 years we would look at the '99-2003 – I could see employment lifting, growth and prosperity and that's why I did support the pro-development in there with a donation and why I still support them today.

T. 17/3/05 p. 1633-1634

MR BROAD: *Did you ever speak to Mr Blundell in respect of his letter?*

MR BRADSHAW: *No.*

MR BROAD: *You never had any phone contact from Mr Blundell?*

MR BRADSHAW: *Never had a phone conversation with Mr Blundell. I had a letter from him, as I said, in late December.*

MR BROAD: *You just received a letter?*

MR BRADSHAW: *I received a letter and I did talk, as I said, with Mr Allen. I gave it to him and had discussions and just - we do talk - and I don't come up to Tweed. In the last couple of years since I've lost my wife I haven't been visiting there. I've slowed down, real slowed down. As I said, in the last four years that she had been sick and that's the way I've gone on. And I did support them because what I've seen - - -*

MR BROAD: *In speaking to Mr Allen, did he at any stage put forward reasons why you might wish to contribute to the Tweed Directions campaign?*

MR BRADSHAW: *No.*

MR BROAD: *None at all?*

MR BRADSHAW: *I did it out of my own heart. I just thought, like what has happened previously because I go back to '99.*

MR BROAD: *So he was absolutely mute about why you should donate?*

MR BRADSHAW: *No. Mr Allen is not that type of person. He's not a pushing man at all.*

T. 17/3/05 p. 1635-1636

Mr Penhaligon pursued the "company line". In doing so, like Mr Budd, he averted to the involvement of Mr Paul Brinsmead.

MR BROAD: *Did you ever undertake a role on behalf of the balance team or the Tweed Directions team to point out deficiencies in the Greens, the Labour candidates and other candidates?*

MR PENHALIGON: *No, I didn't take on any specific role in that. As I pointed out, I only endorsed the first advertisement that came out.*

MR BROAD: *Did you put any other ideas for advertisements that Tweed Directions might run?*

MR PENHALIGON: *No.*

MR BROAD: *So if someone suggested that about you, that would be wrong?*

MR PENHALIGON: *That would be definitely wrong.*

MR BROAD: *Did you ever suggest an advertisement in the form of a job application?*

MR PENHALIGON: *That I did suggest.*

MR BROAD: *And that isn't something that occurred to you when I asked you the previous question?*

MR PENHALIGON: *No, it didn't, because I never wrote anything for any Tweed Directions to print. At one particular discussion I said that it would be a good idea to have the people who are going to fill positions in council, just as if it's a proper job elsewhere, for them to actually put a CV in and a job application to see if they're qualified to be able to carry out the task of administering a hundred plus million dollar budget, and to know what it's like to employ people and to pay people, and what obstacles come in the path of a person in business. That is what I said. And I said it would be a great idea - - -*

MR BROAD: *When did you put that proposition forward?*

MR PENHALIGON: *I can't recall where I put it forward. There was general discussions of business people saying, "Well, what" - you know, "Have you got any ideas". And I said, "Yes, there's an idea, the council should have a proper CV and job application". And I don't apologise for that, I think it's a brilliant idea.*

MR BROAD: *Did you ever meet with Mr Staerk from - - -*

MR PENHALIGON: *Mr who?*

MR BROAD: *Mr Staerk?*

MR PENHALIGON: *Staerk. I've met Graham Staerk once, yes.*

MR BROAD: *Yes. Any other persons associated with the Tweed Directions?*

MR PENHALIGON: *No.*

MR BROAD: *None at all?*

MR PENHALIGON: *Not since - I've met, I know one that's on there. I've met him previously. But it had nothing to do with Tweed Directions.*

MR BROAD: *Did you ever go to any meetings with Tweed Directions?*

MR PENHALIGON: *Never attended a Tweed Directions meeting, ever.*

MR BROAD: *Were you contacted by anyone from Tweed Directions?*

MR PENHALIGON: *Yes.*

MR BROAD: *Who was that?*

MR PENHALIGON: *I was contacted by Graham Staerk.*

MR BROAD: *Were you ever contacted - - -*

MR PENHALIGON: *Would I be a spokesperson and endorse this advertisement.*

MR BROAD: *Were you ever contacted by any other person that you know of?*

MR PENHALIGON: *Not that I recall.*

MR BROAD: *Did Mr Paul Brinsmead contact you?*

MR PENHALIGON: *I've spoken to Paul Brinsmead.*

MR BROAD: *In respect of the campaign being run by Tweed Directions?*

MR PENHALIGON: *I found out that Paul was behind - was part of Tweed Directions, yes.*

MR BROAD: *Did you ever speak to him in respect of the campaign being run by Tweed Directions?*

MR PENHALIGON: *I don't think so. I had contact with Graham Staerk.*

MR BROAD: *Did you have contact on more than one occasion?*

MR PENHALIGON: *Graham Staerk, I would have had a couple of e mails from him. And I met him publicly for the first time when we were interviewed by the Daily News. That was the first time I've met him.*

MR BROAD: *Did you ever correspond with Mr Staerk by e-mails?*

MR PENHALIGON: *I may have sent a return e-mail to him. There'd be no more than one or two transactions in the whole period.*

MR BROAD: *Did you ever correspond with Mr Brinsmead?*

MR PENHALIGON: *I may have sent him an e-mail. I can't recall. I may have sent him an e-mail.*

MR BROAD: *Did you ever have any discussions with Mr Baudino from Tweed Directions?*

MR PENHALIGON: *Who is Baudino?*

MR BROAD: *He's a gentleman retained by Tweed Directions.*

MR PENHALIGON: *No, never heard of him.*

MR BROAD: *Did you have any discussions with Mr Egan, who was another gentleman retained by - - -*

MR PENHALIGON: *Never heard of him, no.*

T. 2/3/05 p. 741-744

Mr Brinsmead had given evidence earlier in the hearings. He had been asked about his role in the campaign. In giving his evidence, he misrepresented his role.

Mr Brinsmead is one of the principals of Resort Corporation, a company that has and continues to have development interests in the Tweed. He is the son of councilor Brinsmead. In his professional role as a solicitor he has acted for a number of developers operating in the Tweed, not the least of which are:

- The Ray Group
- Leda Developments
- Usher Powell;

all of which are major developers in the Tweed.

Having been sworn, Mr Brinsmead gave the following account of his involvement:

MR BROAD: *This morning we've heard that you had a role with Tweed Directions. Can you indicate the nature and extent of your role?*

MR BRINSMEAD: *Tweed Directions soon - well, reasonably soon after it was formed approached me on a number of things, as they did a number of people. As I understand it, there were 20-30 people providing input to Tweed Directions in terms of things within their experience, some commercial advice, knowledge. And they approached me and asked me to be a sounding board I suppose, to bounce things off. Which I was only too pleased to do.*

And secondly, they asked for assistance in raising funds for the objects of their association. Now, I did have a long history as I have explained, as a lawyer. And acting for a lot of high end businesses and developers. And I was prepared to assist in fundraising.

MR BROAD: *The involvement as a sounding board, did that also include legal advice?*

MR BRINSMEAD: *No, no.*

MR BROAD: *Now, in respect of developers, did you approach any developers on behalf?*

MR BRINSMEAD: *Yes, I did.*

MR BROAD: *Who were the developers you approached?*

MR BRINSMEAD: *I - look, I can't remember every single one. But some of the larger developers would have been the Leda Group, the Barclay Group, which is Lennon Properties, Usher Powell. They were probably the bigger - - -*

MR BROAD: *Did you know any of the principals of those firms personally? For instance, do you know Bob Earls [sic. Ells] personally?*

MR BRINSMEAD: *I had acted for Bob over many years on different things, as I had acted for Usher Powell. I hadn't acted for the Lennon Goup, but I had come across them in a number of circumstances. I had in fact made an offer to buy some land that they had owned, so I knew they well - or reasonably well.*

T. 23/2/05 p.430-431

MR BROAD: *Right. Did you have any role in the governance as it were of Tweed Directions, the way that they ensured that candidates did not know who the prospective donors were?*

MR BRINSMEAD: *No.*

MR BROAD: *You had no involvement in that?*

MR BRINSMEAD: *No.*

MR BROAD: *Were you kept generally aware of where Tweed Directions was going?*

MR BRINSMEAD: *Well, I provided commercial input, and as I said, a sounding board. So at various stages, I mean, I attended a number of meetings. I had numerous discussions with Graham Staerk and Alan Blundell and others, where they would say to me, "Hey, we're thinking of going this direction or that direction", and I would give my opinion. Whether it had been in a meeting when I had been asked to go and have a talk to them, or on the telephone.*

MR BROAD: *Were you provided material by them?*

MR BRINSMEAD: *I probably was.*

MR BROAD: *Were you involved directly with any of the companies who were retained to provide media services to Tweed Directions?*

MR BRINSMEAD: *What do you mean involved? What do you mean?*

MR BROAD: *Well, there were a number of companies who were retained to provide discrete services. Whether they be Flagship Communications, Baudino and Associates.*

MR BRINSMEAD: *Mm.*

MR BROAD: *Directions Media, etcetera. Were you involved in any of the discussions with them?*

MR BRINSMEAD: *I had no ownership. I had no ownership of any of the companies, but one of the entities that did some work on production of some advertisements was my wife's photography company. That was UB Photo.*

MR BROAD: *Were you an adviser to any of those companies?*

MR BRINSMEAD: *A legal adviser?*

MR BROAD: *A legal adviser.*

MR BRINSMEAD: *I don't think so. Well, I provide legal advice to my wife's company.*

MR BROAD: *No, no. I'm excluding that. That's UB Photo.*

MR BRINSMEAD: *That's UB Photo. Look, I've - of the entities that I know that were involved, no. No, I'm not discounting the fact that they may have provided some legal advice to some of them, I'm not aware of any.*

T. 23/2/05 p. 433-435

Mr Brinsmead's assertions that he

- was approached by Tweed Directions
- was to be or fulfilled the role of a "sounding board"
- did not provide legal advice
- had no role in the governance of Tweed Directions
- had only a limited role in Tweed Directions
- had a subservient role
- had a limited role only as a recipient of material from Tweed Directions

are patently incorrect.

He simply set about an attempt to mislead the Inquiry by offering a series of lies.

Mr Brinsmead was the prime mover of Tweed Directions. There is little doubt that he put together the "package" that was to become Tweed Directions. He had made the effort to understand the nuances of the electoral provisions and had understood how the underlying propositions of the funding model could be put in place. As Mr Staerk acknowledged:

MR STAERK: ... *Paul Brinsmead was born in the Tweed, knows the Tweed inside out and back to front.*

T. 23/2/05 p. 373

During the hearings he and those also involved in Tweed Directions was comfortable that the inquiry did not have the material to point the finger.

Mr Penhaligon almost let the cat out of the bag when he gave evidence, quickly attempting to cover his faux pas:

MR PENHALIGON: *I found out that Paul was behind - was part of Tweed Directions, yes*

T. 2/3/05 p. 743

Mr Budd just gave a hint:

MR BUDD: *...The meetings were very often about 10 or 15 people, depending on who was there would organise the discussions; sometimes it'd be Mr Blundell. Sometimes it would be Mr Paul Brinsmead if he was there.*

T. 16/3/05 p. 1461

In the lead up to the Public Hearings the Inquiry had issued and served a number of summonses addressed to individuals and companies associated with Tweed Directions requiring production of material associated with its campaign and governance.

While much material was produced, in all but one instance, it failed to provide an insight into the machinations and governance of Tweed Directions. In all much of the material was simply the proofs of the various promotional material and information associated with its airing in the media.

Only two recipients genuinely responded. Flagship communications provided the results of its surveys. Baudino & Associates provided the material that it retained.

When it became apparent that Directions Media had not complied with the terms of the summons served on it, the inquiry wrote to Mr Staerk indicating its concerns and referring to its powers to deal with contempt.

Tweed Shire Council Public Inquiry

Office of the Commissioner
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TEL (02) 9289 4020 **FAX** (02) 9289 4099
EMAIL InquiryCommissioner@dlg.nsw.gov.au **WEB** www.dlg.nsw.gov.au/tweed

Directions Media
30 James Street
Burleigh Heads
QLD 4220

10 March 2005

Dear Mr Staerk,

I ask that you review your records and that you produce any other material falling within the description of material sought in the schedule of the summons.

I am particularly concerned that you may not have produced this material and I take this opportunity to draw to your attention the provisions contained in Section 19 of the Royal Commissions Act which provides:

Section 19 (1) **Failure to attend or produce documents or other things**
If any person served with a summons to attend a commission, whether the summons is served personally or by being left at the person's usual place of abode, fails without reasonable excuse to attend the commission or to produce any documents or other things in the person's custody or control which the person was required by the summons to produce, the person shall be guilty of an offence, and shall be liable to a penalty not exceeding 4 penalty units.

I will allow until Wednesday 16 March 2005 for you to produce any further documents to the Inquiry's office at Level 9, 323 Castlereagh Street, Sydney, 2000. Or alternatively you may post the material to the Locked Bag address above but the material must arrive by 16 March 2005.

Yours sincerely,

Professor Maurice Daly
Inquiry Commissioner

Unperturbed, Mr Staerk replied providing more but limited information. Mr Staerk proffered a dubious excuse.

Graham Staerk
CEO
Directions Media
Directions Graphics

16 March 2005-03-15

Dear Commissioner,

I acknowledge your letter of 10 March seeking more documentation or material in relation to the Tweed Shire Council Public Inquiry in relation to my role as CEO of Directions Media and Directions Graphics during the Tweed Shire elections.

Please note that I have at all times sought to cooperate with the Inquiry in the provision of material to date.

This includes the electoral and campaign advertising material supplied so far; the clippings of the editorial campaign conducted; and the cd of election tvc commercials.

Following your further request, the additional material I have been able to discover includes:

- Directions Graphics invoices paid by Tweed Directions.
- Directions Media invoices paid by Tweed Directions.
- Files relating to Directions Graphics activity on behalf on Tweed Directions.

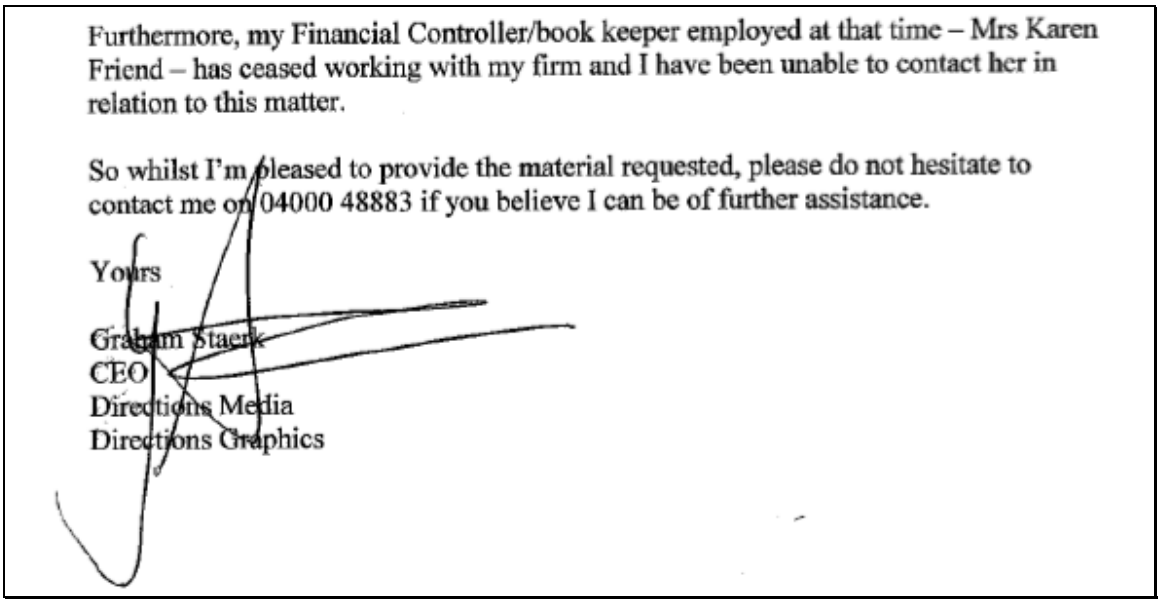
Please note that any other daily records, emails, conversations, directions, contracts and notes in relation to the campaign were all (and only) compiled by the following persons:

- Ms Kimberley Hrastovec (Directions Media)
- Ms Nicole King (Directions Media)
- Ms Abbey Trueman (Directions Graphics)

None of these persons are currently employed by myself.

Ms Hrastovec and Ms King are currently living and working in the United Kingdom and their files (computer and otherwise were either cleared or lost prior to their departure) are unavailable.

Ms Trueman is currently employed by Delfin, however her campaign files are presented in full.



Furthermore, my Financial Controller/book keeper employed at that time – Mrs Karen Friend – has ceased working with my firm and I have been unable to contact her in relation to this matter.

So whilst I'm pleased to provide the material requested, please do not hesitate to contact me on 04000 48883 if you believe I can be of further assistance.

Yours

Graham Staerk
CEO
Directions Media
Directions Graphics

It is clear that Mr G Staerk, Mr Blundell, Mr P Brinsmead, Mr McIntosh, Mr Penhaligon, Mr F Wilson, Mr M Allen, Mr W Allen and Mr I Richards gave their evidence believing that the inquiry had no evidence that would contradict their evidence. It provided comfort and the base for a litany of lies, oversights, misinformation and deception.

There is no doubt that their evidence was founded on this misbelief. Similarly it was founded on an ordained commonality in their responses.

While the inquiry has no direct evidence that provides proof of the source, the totality of the evidence and the demeanour of most of the witnesses leads to a sustainable view that the responses were ordained and fashioned by Mr Brinsmead and/or Mr Staerk.

As has just been acknowledged, the inquiry maintains this view. It does not have the requisite proof that would underlie proceedings for subornation. Hence the matter must be left in the air.

The evidence is however clear that Mr Brinsmead lied to the Inquiry when giving evidence under oath. This was not limited to one occasion. Mr Brinsmead took the opportunity, when thinking that no contrary evidence would come to light to provide a string of lies.

His evidence was calculated to deceive the Inquiry, both regarding his role as well as the roles of others.

At the time that he gave his evidence he was on solid ground, the Inquiry had not received and reviewed the Baudino files. The Baudino files tell an entirely different story to Mr Brinsmead. Their effect and their weight as representing the truth is indisputable.

The seriousness of the matter mandates a response from the Inquiry.

Mr Brinsmead is a solicitor admitted by the Supreme Courts of Queensland and New South Wales to practice law in each state. Solicitors occupy a particular role that draws upon an expectation that they be honest and have integrity. Mr Brinsmead's evidence supports a view that he lacks these attributes. Rather he has demonstrated that he is opportunistic and deceitful.

On 27 February 2004 Mr Brinsmead sent the following email outlining legal aspects associated with local government elections:

From: Katrina Kerkow [KerkowK@hickeylawyers.com.au]
Sent: Friday, 27 February 2004 12:52 PM
To: Bob Baudino; 'Graham Staerk'; 'Kimberley Hrastovec'; Jeff Egan
Subject: Tweed Shire Council Elections
I **enclose** the following:-

1. Letter of summary of the funding laws; and

2. The Electoral Funding Handbook for Local Authority Elections *(link only)*

http://www.seo.nsw.gov.au/files/Election%20Funding%20Handbook%20LG%202004.pdf
3. Letter of summary on advertising.

If you are all are ok with this, I intend to email to each of the lead candidates in our 8 supported groups, a copy of the summary and the handbook. I think it is important that they understand their electoral funding obligations.

Also **enclosed** is a summary of some general advertising regulations under the Act of which you all should be aware.

Please provide to me a complete list of contact details for all lead candidates.

Regards

Paul Brinsmead

Direct Email: brinsmeadp@hickeylawyers.com.au
Direct Line: 07 5556 7401

(27.02.04)

This was followed later in the day by a more fulsome analysis:

From: Katrina Kerkow [KerkowK@hickeylawyers.com.au]
Sent: Friday, 27 February 2004 12:48 PM
To: Bob Baudino; 'Graham Staerk'; 'Kimberley Hrastovec'; Jeff Egan
Subject: Tweed Elections

I have spent some time looking at the State Electoral Office website and obtaining some relevant information. I am sure each of you are familiar with most of the issues, particularly, Jeff Egan.

However, I **attach** for the sake of thoroughness, the links to the following documents:-

1. A document headed Information for Candidates and Scrutineers in Local Government Elections;
http://www.seo.nsw.gov.au/files/LG%20Candidate%20Info%20Book.pdf

2. The Funding Handbook for Local Authority Elections; and
http://www.seo.nsw.gov.au/files/Election%20Funding%20Handbook%20LG%202004.pdf

3. A list of registered political parties for Local Authority Elections.
http://www.seo.nsw.gov.au/files/LG%20Party%20List.pdf

In regard to the Information for Candidates and Scrutineers, I would like to emphasise a few points and these are as follows:-

1. The ballot paper draw is to be held Friday, 27 February, 2004 and all lead candidates should be advised to be at the ballot draw.

2. How to vote cards are to be registered 8 days after nomination day. Nomination day is 27 February, 2004. Accordingly, how to vote cards must be registered by Friday, 5 March, 2004. Can we please make sure, particularly with Jeff Egan and Bob Baudino, that you are organising all of the groups to prepare their how to vote cards. Jeff needs to particularly work on flows of preferences, which will happen after the research has been obtained. It is very **urgent** that this research is obtained quickly.

3. In regard to the method of voting, I note the following:-

(a) Candidates can vote 1 above the line only, or number as many numbers above the line as they wish; and

(b) If an elector wishes to vote below the line, they must vote 1 to a minimum of 11.

4. Generally, we need to make sure:-

(a) We agree on the appropriate wording for voting 1 to 6 and we need to do this **urgently**; and

(b) All how to vote cards need to provide an option that if people want to vote below the line, we must say that they must vote a minimum of 1 to 12. This will enable preferences to flow down one group and then across a number of other groups.

5. There is some very detailed material relating to campaign advertising and registration of electoral material. The key points are as follows:-

(a) Posters regarding electoral matters cannot be placed on any building, vehicle, vessel, hoarding or fence, unless:-

- It is of a size no greater than 8,000 square centimetres (eg. 80 cm x 100 cm)
- Legal posters cannot be joined together to make a larger sign, however, they can be acceptable if a clear gap exists between each poster
- Posters of any size are not to be displayed on any property belonging to the Crown
- Loud speakers do not infringe the Act, although they could infringe the Local Government Nuisance By-Laws

(b) Any advertisement, how to vote card, pamphlet, poster, notice, etc. showing electoral material must show both:-

- the name and address of the person authorising the material; and
- the name and address of the printer of the material

(c) In relation to an advertisement appearing in a newspaper, only the name and address of the person authorising the advertisement is required.

(d) There is no media blackout in respect of radio or tv advertising in Local Government Elections, like there is in State Government Elections. Accordingly, you can advertise on the Friday and the Saturday of the Election. I presume there is a blackout on print? Perhaps Jeff Egan can confirm this.

(e) The only material that is required to be registered with the Electoral Office is any material to be handed out on polling day. This will generally only be the how to vote cards. If it is intended to hand out any brochures, these need to be registered as well. I suggest it may be worth lodging for registration the pamphlet and the how to vote card, so that both can be handed out on polling day or pamphlets can be left at polling booths, if necessary.

Accordingly, based on the above, please make sure that all advertising and Election material complies with these requirements.

In relation to proposed billboards to be placed on moving vehicles, I suggest that we could have 5 or 6 core flute type posters separated. Each of those posters could have the name of the party or group and photograph of each of the lead 3 candidates on a separate core flute poster. There may be one further core flute poster that then has some details or a number of these. They will need to be appropriately separated so that they do not constitute one poster. We will need to be very careful with this.

Please make sure that all of the above are closely complied with.

In regard to the Electoral Funding Handbook, I have forwarded a separate email. That email, together with a copy of the handbook, I believe, must be distributed to each of the lead candidates in our 8 support groups.

Regards

Paul Brinsmead

Direct Email: brinsmeadp@hickeylawyers.com.au
Direct Line: 07 5556 7401

(27.02.04)

On the same day he sent other information to be used against the campaign being run by Mr Dale:

From: Katrina Kerkow [KerkowK@hickeylawyers.com.au]
Sent: Friday, 27 February 2004 5:01 PM
To: 'Graham Staerk'
Cc: 'Kimberley Hrastovec'; Bob Baudino; Jeff Egan; 'jegan@bmcc.nsw.gov.au'
Subject: Steve Dale
Graham

Enclosed is some information I have obtained regarding Steve Dale.

The information is not as strong as I would have liked. I also have not been provided with any of the documents proving what happened. However, I think that there is enough in there to certainly flush Steve Dale out and to cause him some difficulties. Please let me know what you think and give me a phone call to discuss how we proceed with this.

There are 3 other parties, including Surf Life Saving NSW, who I am speaking to to obtain further information and fill in some of the gaps.

Regards

Paul Brinsmead

Direct Email: brinsmeadp@hickeylawyers.com.au
Direct Line: 07 5556 7401

(27.02.04)

On the same day he sent 2 further emails, 1 to Mr Allen who was standing as a candidate and another circulating this letter to those guiding Tweed Directions.

From: Katrina Kerkow [KerkowK@hickeylawyers.com.au]
Sent: Friday, 27 February 2004 11:37 AM
To: Jeff Egan
Cc: 'Graham Staerk'; 'Kimberley Hrastovec'; Bob Baudino
Subject: Tweed Shire Council Elections - Weston Allen

Enclosed is an email I have sent to Weston Allen.

Can you please advise how we might be able to get access to a mailing list or a contact list for the over 65 electorate. I think for Weston's campaign it is particularly important that he targets this electorate.

Regards

Paul Brinsmead

Direct Email: brinsmeadp@hickeylawyers.com.au
Direct Line: 07 5556 7401

(26.02.04)

Email to Weston Allen:

Weston

I want to set out a few thoughts in regard to how you need to run your campaign. These are as follows:-

1. Idwall Richards has agreed to play a day to day role and assist you in any aspect of the campaign. I suggest you pass as many issues onto Idwall Richards to follow up or run around about as necessary.

2. Generally, once you have got information together, or when you want to organise a launch or when you need advertising, just pass it over to Winning Directions (Kimberley or Graham). In regard to the launch, I suggest you just advise them that you would like to do it within the next week and let them organise it, etc.

3. Just remember that Jeff Egan is there for you to contact him whenever you need to. He can work on any documents, you just give him the basic ideas.

4. I have asked for $10,000.00 to be paid to your account and that should be paid this week.

5. I have had a look at some of your draft policies and I think they are looking great. I think you need to aim your campaign in 2 broad areas:-

(a) You should not forget that the last 3 newsletters have spoken about sensible planned development moving forward in a very responsible way. This should certainly remain as one of your cornerstone policies; and

(b) You should aim the balance of the policies along the health angle that you are pursuing and I think you should aim these very hard at the over 65 market. I think you need to prepare a brochure and a number of newsletters to be distributed to this electorate. I have asked Jeff Egan to come back and advise how he can obtain details of a mailing list or a distribution list for the over 65's, so that he can squarely target them.

6. You should make sure that you allocate some responsibilities to other people in your group, particularly your number 2 candidate. You should work out to which segment of the market he will appeal to. A letter should go out from him addressed to the electorate.

7. The next edition of Tweed Community Vision will basically be a re-print of your brochure. Your brochure will have a dot point summary of your key policies. I think it is then important that this newsletter also contains some more in-depth articles on each of your policies. For instance, you might have 2 articles addressing in more detail 2 of your policies. The next edition can then emphasise again your policies and have photos of all of your team members. It can then have further articles on more details of some of your other policies. Accordingly, you need to work on articles expanding on each of your key policy areas.

8. It is important that the next newsletter contains references to the website and refers people back to the earlier newsletters to look at the issues discussing and concerning development on the Tweed Coast. I don't think you need to address those issues too much more in any major detail, except for maybe re-emphasising it in a facts so far column. Generally, in relation to this newsletter, it will be produced by Winning Directions. All you need to provide is some draft material and they will put it all together, edit it and the like.

Contact details for each of the relevant parties if you don't already have them are as follows:-

Winning Directions:
Ph: (07) 5535-3900
Fax: (07) 5535-3911

Graham Staerk:
Ph: 0419 712 833
Email: graham@directionsmedia.com.au

Kimberley Hrastovec:
Ph: 0423 577 899
Email: kimberley@directionsmedia.com.au

Bob Baudino
Ph: (07) 3398-3736
Ph: 0414 509 076
Email: baudinob@pacific.net.au

Jeff Egan

Ph: (02) 4739-0796
Ph: 0425 340 044
Fax: (02) 4739-0716
Email: jeff.egan@flagship-communications.com

9. You need to arrange photos of your candidates. Please get Kimberley to arrange.

Regards

Paul Brinsmead

Direct Email: brinsmeadp@hickeylawyers.com.au
Direct Line: 07 5556 7401

(26.02.04)

Any suggestion that Mr Brinsmead had no role in the governance of Tweed Directions is cast aside by his email to Mr Allen. Similarly, so were his claims that he was fulfilled the role of a "sounding board", had only a limited role in Tweed Directions or had a subservient role, or that he had a limited role only as a recipient of material from Tweed Directions, as is clearly demonstrated by the preceding and following emails.

From: Kimberley Hrastovec [kimberley@directionsmedia.com.au]
Sent: Thursday, 12 February 2004 2:54 PM
To: 'Graham Staerk'; 'Abbey Trueman'; 'Bob Baudino'
Cc: 'Melissa Rowley'
Subject: Daily Meetings to commence 8.03.04
Please note that the strategy meetings will commence on the 8th March, 2004 at 8:30am.

The meetings will be daily until the end of March and will be held at Paul Brinsmead's office – Corporate Centre, Bundall.

The attendees will be:

Paul Brinsmead
Graham Staerk
Bob Baudino
Abbey Trueman
Kimberley Hrastovec.

Kimberley

Kimberley Hrastovec
Public Relations Consultant
DIRECTIONS MEDIA
T 07 5535 3900
F 07 5535 3911

M 0423 577 899
E kimberley@winningdirections.com.au

These emails represent but a small sample from the Baudino files.

The New South Wales Solicitors Manual contains the following introductory statements:

> **The true profession of law is based on an ideal of honourable service. It is distinguished by unique responsibilities. The function of the lawyer is to serve the community in the regulation of its social structures, in the conduct of its commerce and in the administration of justice.**
>
> *If society is to be served honestly and reliably by its lawyers they should profess a code of behaviour that is predictable and well founded. The community's best interests will not be served if lawyers can be bought and their principles compromised. The preservation of the "good name" of the profession is the concern of all its practitioners and an encouragement to them to support a system of self-regulation.*

When dealing with the responsibilities, the manual states:

> *While solicitors stand, as officers of the Supreme Court, in a special relationship to the court and undertake special responsibilities in the administration of justice, they have been traditionally recognised (see judgment of Rich J: Kennedy v Council of Incorporated Law institute of New South Wales (1939) 13 ALJ 563) as having three-fold responsibilities to their clients, to the courts and to the public. In all their dealings it is expected of them that they will conduct themselves honestly and with fairness. Solicitors Rules, made by the Council of the Law Society pursuant to s 57B of the Legal Profession Act, are founded on the principles of honesty and fair dealing which should characterise solicitors' relationships with their clients, the courts, and the general community including other lawyers.*

The manual deals with particular aspects of the role of solicitors. It contains the following statement under the heading "**Submitting false or misleading evidence**":

Fairness and honesty must mark a solicitor's relations with the court and other lawyers. In Myers v Elman [1940] AC 282 the house of Lords considered allegations that a solicitor by himself or his clerk had filed false affidavits of discovery sworn by his clients. Viscount Maughan said (at 293):

> *However guilty they (the clients accused of fraud) may be, an honourable solicitor is perfectly justified in acting and doing his very best in their interests, with, however, this important qualification, that he is not entitled to assist them in any way in dishonourable conduct in the course of the proceedings. The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise the client as to the latter's bounden duty in that matter; and if the client should persist in*

> *omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the court, prepare and place a perjured affidavit upon the file.*

At 294 he further stated:

> *A solicitor who has innocently put on file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the court to put the matter right at the earliest date if he continues to act as solicitor on the record.*

He held at 300-301) that the solicitor was guilty of professional misconduct "in not insisting on his clients disclosing the relevant documents as soon as he knew that they were or had been in their possession, custody or power, and in preparing and putting on the file affidavits of documents which he knew to be very inadequate".

This statement does not directly equate to the position of Mr Brinsmead, who, himself set about and provided false testimony. A significantly more serious matter.

Section 5 Addendum 5.1.3.1

Below are sections from the Public Hearing transcripts related to Tony Smith's submission in reply to the Inquiry on behalf of Tweed Shire Council. The sections in plain text are those omitted by Mr Smith that relate to the portions of transcript he had in his submission in reply (these are shown in *italics*).

Mr Darryl Anderson

MR BROAD: Yes. You had indicated earlier today that there was fairly substantial work involved in assessing yields and things like this as background, before lodging a development application.

MR ANDERSON: Yes.

MR BROAD: One of the things that seems to arise in matters before council is that there have been substantial alterations sought under section 96 of matters which you would assume to be matters of principle.

MR ANDERSON: Sorry, matters of?

MR BROAD: Matters of principle. That there are instances where there are substantial modification to density. You wrote in one such section 96 application, there was a process of refinement. Can you indicate how there is a process of refinement after a DA is granted, and in respect of issues such as density?

MR ANDERSON: To some extent it reflects the fact that at the DA stage you haven't got down to the level of detailed design. Okay, that occurs as the next step when you're preparing the construction certificate, when you may well have more data. And you have to actually make the development layout, if you like, fit the detailed engineering standards. That in itself may require some tweaking of the design, if you like.

MR BROAD: If you're moving from a known density of 15 lots per hectare, I assume you'd probably work to that at the early stage and say, "Well, look, our notional yield on this site is X number of hectares at 15 lots", etcetera etcetera. How is it that one can get substantial increases in density in those circumstances?

MR ANDERSON: Well, again, the other factor that may well lead to a proposal to vary the density or the yield or the layout is indeed market demand - consumer demand. And of course, the real test of that of course is when the land is actually released to the market for sale. And that generally doesn't happen until at least the development application is lodged, and in many cases until it's approved. And the feedback that the marketing people get often leads to feedback to the developer, and indeed ourselves, that perhaps there is a better commercial outcome, a better
planning outcome, and a better environmental outcome, if lot sizes and shapes are changed, densities are changed, and so on.

So that can then lead to requests from developers to either modify a consent to change the yields. Or if it doesn't come within the scope of a modification, it may well be a fresh development application.

MR BROAD: *So you could have, as was recently applied for in the Salt development, an increase of about 37 per cent in the density?*

MR ANDERSON: *Well, there was an application lodged which I hasten to add was amended to delete that requirement or that proposal.*

MR BROAD: *Yes, but that's not the point. The situation is that potentially there can be a supportable increase of 37 per cent whether or not it was dealt with on those issues or separate issues, that particular application as a matter of principle.*
MR ANDERSON: At a master planning level, yes.

T. 23/2/05 p. 351-352

Mr Jim Glazebrook

PROF DALY: - - - that planning systems should be flexible. In a lot of the submissions that have come to us people complain about flexibility and it seems to me that the problem is the general public see a DCP or an LEP, whatever the instrument is, as something that tells them - gives them some assurety about what could or should happen within a development system. You must have run into those sorts of concerns of the general public as opposed to professional people. This must be a very difficult area for Councils to manage.

MR GLAZEBROOK: It's a difficult area of Councils to manage. It's a difficult area for us to provide advice in and if you're sitting down with a client and you're looking at a particular development - it might be just a two or three storey residential flat building, for instance, and they want to do certain things with it but don't - where there may be a non-compliance with the standard in the development control plan. You have to make a judgment about firstly whether the outcome is what the development control plan wants. Right? And is that a good thing? Is that a good
planning outcome?

And then you have to make a judgment about, well, what will the Council think about it and should I tell the client, "Yes, look, we will push this application with this non-compliance in it because we've got every justification in the world for it". Even though you feel that way you've got to try and guess what the Council - how the Council might receive it, because they might not think the same way as you do and they might refuse it. So you're in the situation there where you've not only got to make a professional judgement about the quality of the outcome but also the likelihood of the outcome as it goes through Council. And that's a very difficult position to be in.

But I think that's a good thing, because I think that flexibility in planning controls leads people to think more closely about what they are doing and what they are trying to achieve. And many development control plans in recent times are - have become objective-based plans. That is they set out objectives that clearly - in terms of what they are trying to achieve by these standards. And you can elect to do one of two things. You can elect to say, "All right, well, we will achieve that objective by complying strictly with these standards" or "We will elect to achieve that objective by

complying with 99 per cent of these standards but we might move away from that one because we feel we can achieve the objective the same way and get a better outcome".

That's from my point of view. I can understand the point of view of the people in the community who see a - let's say a development control plan. It has prescriptive numbers in it on the one hand and then on the other hand they see a development application that's up for decision that doesn't comply with those numbers. It may be a simplistic view but nonetheless it's there. They start asking the types of questions that you have raised here with me just now. And I can understand that. Indeed, I have many people who wish to object to development applications raise the same issue
with me.

PROF DALY: Is most of your work in the Tweed area?

MR GLAZEBROOK: Yes, it would be.

PROF DALY: *Right. And how long have you been working in this area - in Tweed?*

MR GLAZEBROOK: *20 years.*

PROF DALY: *20 years. Has that always been in the private sector?*

MR GLAZEBROOK: *No, no, no. I was about seven or eight years at Council, Tweed Shire Council and I've been a consultant now for 14 years, 13 years.*

PROF DALY: *Okay. Do you think Tweed Shire Council handles this problem, that is levels of flexibility in the planning system versus the public seeking some assurance about what outcomes they can expect from the planning system - do you think that the Council manages that well?*

MR GLAZEBROOK: *Yes, I think the Council does quite a reasonable job.*

PROF DALY: *Do you think there has been any change in the way that they have managed it over recent times?*

MR GLAZEBROOK: *Not that I've noticed.*

T. 23/2/05 p. 363-364

Mr Mark and Mrs Alexandra Catchpole

MR CATCHPOLE: …. It *has now happened again at Kingscliff and I believe - the thing is we only get our information from the newspapers too*. I did hear one of the councillors mentioning it last week, but again no sign would be put up. So, I guess, we get our information from the papers. We don't agree with it and we don't know why they won't do, for example, something simple like that. There's no real - there's no real reasons given usually. But the one that we mentioned in the submission, the clearing by

– the developments up at Kings Forest Place - *we read - I guess I should say we get most of our information from the newspapers so we only know what we read.*

T. 23/2/05 p. 420

MS ANNIS-BROWN: Have you had the opportunity to raise the issue with certain councillors in an attempt to, I suppose, ensure that this matter is dealt with in an appropriate manner?

MR CATCHPOLE: I suppose in a small way. We've spoken to council, the idea being that you get the impression that because the councillors that are likely to vote for - or at least looking into prosecution or going further with it are on the side that will never get the numbers; the other side, the extreme Green side as it's called. And I might add that we are not extreme Greens, we're just a couple of people that live at Pottsville. We're not members of any association or any Green groups, anything to do with it; just a couple of residents who get annoyed when we see this sort of thing happening.

MS ANNIS-BROWN: *So from your perception I guess you feel that you would like to do something but it may well get knocked down by the time it gets to a council - - -*

MR CATCHPOLE: Yes. Yes.

T. 23/2/05 p. 421

MS ANNIS-BROWN: *So your perception is that people feel that if someone has done it and got away with it basically, someone - - -*

MRS CATCHPOLE: Yes, it gives a green light to others to do it. Yes.

MS ANNIS-BROWN: A green light to other people to do that.

MRS CATCHPOLE: Yes, definitely.

T. 23/2/05 p. 422

MR BROAD: *To the extent that you're able to did you get any feedback from people that you spoke to in respect of the donations to certain councillors - or, sorry, certain candidates at the last election?*

MR CATCHPOLE: *Not really. I guess, you know, you talk to people and, you know, the man delivering the - you know, the soil for your garden or something and I think it was around election time and they are making comments like, you know, "You can trust this lot that are in now" and all that sort of thing,* but - there's a few comments like that around then. You don't - and I must admit - you know, I'm not trying to be one side or the other, but I must admit the people I've spoken to they didn't speak favourably about the council that was in. And that's like old residents and some newer ones, but then the newer ones often come from Sydney too or Brisbane - you know, Brisbane, there's quite a few people from Brisbane. And I think they start to, you know, look at what's going on

and maybe they are all city people and they think, you know, it's a bit of an unusual way of doing things here when they start to see what's happening.

T. 23/2/05 p. 426

Mrs Barbara Fitzgibbon

MR BROAD: *The Commissioner has raised the matter of perception. There have been concerns or questions raised by this Inquiry over a number of days about perceptions. The question of the contributions to developer funding of certain councillors' campaigns is a major issue.*

MRS FITZGIBBON: *It is in the community, yes.*

MR BROAD: It is something that's specifically within the terms of reference of this Inquiry...

T. 23/2/05 p. 448

Ms Bronwynne Luff – Solicitor

MR BROAD: Can I - - -

MS LUFF: - - - in order to get rid of people like myself.

MR BROAD: I cut you a bit short. There's been a suggestion that Council's decision-making powers in respect of developments has been severely reduced by the operation of State Environmental Planning Policy Number 71. Is that the case?

MS LUFF: Well, 71 came in later in the time that I was in Council, and I think it was reviewed shortly after it was introduced, and I understand that there are some developments that are being considered by it, but things like Salt at the time weren't subject to it and Casuarina Beach, although the Minister did take up one of those matters and - - -

MR BROAD: Can I - - -

MS LUFF: Sorry?

MR BROAD: Could I stop you a little bit short to try and curtail it. Has there been - was there in your period - I know there were some substantial developments that went across to DIPNR, but as an overall situation did Council still have a role considering other developments?

T. 25/2/05 p. 477-478

Mr Robert Bullford

PROF DALY: The council with whom you were dealing in terms of your investigation was elected in 1999 with a strong program of encouraging development in the Tweed

Shire. One of the problems, apparently, that the council found was that the current planning system, the DCPs and the LEP and so forth, were obstacles to their achieving what they'd set out to achieve; that is, to encourage and develop the economy of the Tweed and to facilitate its growth. Now, do you consider it in any way surprising that inevitably at certain points maybe the council's had to find ways to overcome what they saw as obstacles? Do you think - - -

MR BULFORD: Well, provided that it's within the law and not against the law to do so, fine. But you can't act in disregard of the law, which is what was happening in some - at least in those instances that I was looking at. And the constraints to which you referred, Commissioner, were of course not just in the council planning instruments - the LEPs, the DCPs and so on - it was also in such provisions as the Endangered Species Act and the Environmental Planning and Assessment Act, where, for example, effectively the Department of Agriculture has vetos over a development of prime agricultural land, where the National Parks and Wildlife Service, whatever it happens to be called this week, has vetos over development that might result in the loss of habitat or endangered species and so on.

The developer, supported by the pro-development councillors, was – in particular, in the Kings Forest Estate example - seeking to overcome that. And, more particularly, where the planning staff quite correctly pointed out that, sorry, you can't do that because of the constraints of the planning instruments and the constraints of the law, the director in concern was hounded for being anti-development, hounded by both the developer and its representative and certain of the - in particular, of the balanced team majority councillors.

T. 24/2/05 p. 502

Ms Veronica N Hoskisson

MR BROAD: *What happens if the donor was not a - had no interest really in the outcome, no personal interest as a developer. You know, so and so was a member of the local community. He thought that he should give this candidate a leg up. He likes the candidate, thinks the candidate would be a very very good councillor, right. Hasn't got any development interest in the community, his property interests are in northern Queensland. What would be wrong with him individually saying, "Well, right, I will support your campaign", more than $20,000?*

MS HOSKISSON: *If you've got a good mate that is prepared to give you $20,000, that's fine. As long as that's the cap. If you look at this election and you compare it to the cost of being elected in Ballina - the average campaign expenditure in Ballina for an elected council was something like $3500.* And we're looking here at - what is it - $90,000 per elected candidate. And when you go through where these donations come from, it's two dollar proprietary limited companies. We don't know the faces behind them; we don't know their interests. And I believe that it should come back to individual donations. I really do; that the individual is responsible.

T. 25/23/05 p. 584-585

Ms Ilona Roberts

MR BROAD: Ms Roberts, does the Council have an overall strategy to preserve parts of the natural environment within Tweed Council?

MS ROBERTS: Not as far as I know or if they do they seem to be ignoring it.

MR BROAD: Is the development leading to pockets of natural areas being preserved?

MS ROBERTS: Some pockets here and there but I there doesn't seem to be any active plan to identify areas of concern and protect those areas and I think if it does happen it's because of outside influence pushing. Like, I think they discovered a frog species in the Kings Forest Estate and so that was held up there but I don't know what they've - - -

MR BROAD: *So, if they discover something like the frog species in Kings Forest, do they preserve a specific area associated with that?*

MS ROBERTS: *Only under great protest.*

MR BROAD: *What about things like wildlife corridors?*

MS ROBERTS: *Not that I'm aware of. I think we're losing the wildlife corridors because of the developments.*

MR BROAD: *Have you looked at Council's planning documents in respect of these sorts of matters?*

MS ROBERTS: *I have but I haven't recently, I have to say.*

T. 25/2/05 p. 607

PROF DALY: *The second thing which I wanted to refer to coming out of that 1997 amendment to the Act was the strong and very clear intention of amendment was to bring issues of ecologically sustainable matters to the heart of development processes. Now, from what you've been saying, you'd suggest that that isn't so, that various environmental issues don't come to the core, don't come to the heart, don't come to be part of the fabric of the development application process. Am I right in understanding that's what you're saying?*

MS ROBERTS: Well, if they did, they wouldn't be considering the C4 route for the Tugun bypass. If they did, they wouldn't be considering extending the airport runway into the wetlands or, you know, some of these developments in ecologically sensitive areas just wouldn't have got off the ground.

T. 25/2/05 p. 614

Mr Edward Hopkins

PROF DALY: *Well, in some submissions, which we've received, people have accused the Council - or certain people think of the Council as being serial amenders, that is, a development application goes through, which has got some conditions attached to it. After it has been approved - the consent given - amendments then come in in the form of section 96 - that's the relevant part the Act allows for amendments. I'm just wondering if, in your watchdog capacity, as you've described it, you've noticed that happening.*

MR HOPKINS: *Well, I think it happens all the time and developments often start off in quite a small way and they escalate into something which is, sometimes, twice as big as what was originally foreshadowed. Yes, I think it's an abuse and it does make it difficult - it consumes a lot of man hours of council's time and our time, and everybody's time. Where if the developers were more up front with what they really intended in the first instance - - -*

...

PROF DALY: Do you believe that the intention of section 96, possibility of amending things. You think the intention of that was to create shifts in scale of the type you're talking about?

MR HOPKINS: Well, I think there's - on the coast there's a very – the government had their policy of encouraging development for tourism, for example. So you might get something starting off as a tourist resort and then developers will say, "Well, it's not working financially, so we'll have to have condominiums". And then there's argy-bargy about whether they're owner-occupied, or whether they're - you know, individually owned, or whether they'll be time share leasing arrangements. And so in that way, often the standards become whittled away.

I mean, there's the argument about flexibility in planning compared to firm guidelines. But I think unless you have guidelines which are applied evenly across the board, then there's always a perception that people are being favoured, and it's not a level playing field and it becomes very – a slippery slope.

T. 25/2/05 p. 620-621

Mr Eber Butron

MS ANNIS-BROWN: *Okay. I just also was interested in knowing – you said that the steering committee was set up. I mean, what was the general purpose of the steering committee? What does it do?*

MR [sic. BUTRON]: *I guess it's two-fold. To gauge community opinion at the outset of preparing a document as opposed to relying on community opinion during the public submission. That way we are preparing a document that hopefully reflects some of the community views or majority community views and I guess it's a transparency process as well.*

MS ANNIS-BROWN: *Transparency process. Do you believe, in your opinion, that the steering committee achieved those purposes?*

MR [sic. BUTRON]: *Yes.*

MS ANNIS-BROWN: Yes. The next issue I'd just like to ask you is did council take the committee's views on board when it actually came to look at the development application?

MR [sic. BUTRON]: Yes, we did. The recommendation that actually was put to council at the end of the day was to adopt the majority of the DCP prepared by the committee except for two amendments; one relating to Pandanus Parade precinct and the other relating to tourist accommodation.

MS ANNIS-BROWN: Could you just elaborate on what those amendments involved?

MR [sic. BUTRON]: Concerning the Pandanus Parade precinct the committee resolved - it wasn't unanimous - but it resolved to keep that as a village green for car parking and for open space purposes. The recommendation that went to council recommended that that could have a higher order use in terms of possibly mixed use development, retail activities as well as residential tourist accommodation above, with still the potential to actually have a village green as such or a village square. The second amendment to the DCP that was recommended related to tourist accommodation.

Speaking to development control planners downstairs they don't have too many guidelines relating to tourist accommodation and so when applications come in they sometimes rely on DCP6, which is multiple dwelling units, or, basically, they use a merit assessment village application. What I was trying to do is to basically apply multiple dwelling units or some multiple dwelling units design guidelines and apply them to tourist accommodation.

MS ANNIS-BROWN: Where is the matter up to now?

MR [sic. BUTRON]: The matter was put on hold by the director pending Council's deliberations with Pandanus Parade Land.

T. 25/2/05 p. 632-633

<u>Ms Catherine Lynch</u>

MS ANNIS-BROWN: Yes, Ms Lynch, if I could just bring you to another point in your submission. We spoke earlier with Mr Broyd regarding relationships between councillors and developers. I note that you've raised that issue as well in your submission and, in fact, you've stated apparent close relationships between council and some developers. Could you perhaps justify those comments and perhaps elaborate on what you, in fact, mean and what evidence you have with respect to that comment.

MS LYNCH: When you refer to evidence I think it is more a perception, although the appointment of Mr Brian Ray to the Tweed Futures Committee - whilst Mr Ray does do

developments in our shire he is a Queensland developer and we felt it inappropriate that he take up a place which should be occupied by perhaps someone less contentious. In relation to other developers we cannot help but think that given the preparation of the Draft Precinct Plan the deferment of our Development Control Plan and the subsequent proposal to sell public beach-front land has been on the agenda of certain councillors and a certain developer for some considerable time. I mean, it's just too coincidental not to have some weight.

MS ANNIS-BROWN: *That perception that you talk about of the close relationships, do you believe that's damaging to council?*

MS LYNCH: *I think it's unfortunate that all councillors have to be tarred with the same brush.*

MS ANNIS-BROWN: *So from what you're saying it's not all councillors that you believe have close relationships between developers?*

MS LYNCH: *No, certainly not.*

MS ANNIS-BROWN: *It's some rather than all?*

MS LYNCH: *I think the current is the six-pack. That's sort of the remnants of the balance team.*

T. 2/3/05 p. 693-694

Dr Austin Sterne

MS ANNIS-BROWN: Can I just quote to you - and you have included this in your submission - the report to Council which occurred on 24 September 2003. It talks about:

The proposed density of the development is considered an appropriate response to the site characteristics, its context and it is considered to be an orderly and economic use of the land, particularly in considering the restricted two-storey height limit that applies to the land.

It then goes on to talk about clause 16: Height of Buildings, and it says:

The proposed development is three storey in height and complies with the Tweed LEP height of building maps.

I mean, to me, that's a contradiction.

DR STERNE: *Yes, I know. Exactly. That's exactly how we see it.* And to try and clarify that with anybody - and we were trying to clarify after and it's just, "Look, we passed it. That's it." We have no redress after this has been passed, which we find equally frustrating. So we brought all these issues up and Council's response to all of the different issues that you were going through there was that, "We have thought about them and this is just the way it is."

T. 2/3/05 p. 724

MS ANNIS-BROWN: One of the other issues, too, that you mentioned is the site density of the neighbouring property and you say the floor space ratio should have been a maximum of 475 square metres as opposed to the 770 square metres passed. And then you go on to say:

Council described this as not particularly large.

I've done a rough calculation on that and from my calculations it appears that that's a 67 per cent increase.

DR STERNE: Again - - -

MS ANNIS-BROWN: Any comment?

DR STERNE: And we made this clear to - we made this very clear in our objections to Council. So all the points that I make here were in our submissions to Council for each one of the - I can't remember them off the top of my head.

MS ANNIS-BROWN: Sure.

DR STERNE: But for each one, we made this perfectly clear. But Council had deemed that they were all okay.

MS ANNIS-BROWN: So to your mind, you made as best argument as possible to Council on all those separate issues. And, I mean, there are several of them. You talk about setbacks and shadowing, fence heights, and it appears to be quite a detailed submission. It's just - - -

DR STERNE: And - - -

MS ANNIS-BROWN: - - - quite interesting that the report basically doesn't appear to refer to those submissions.

DR STERNE: It doesn't, it just ignores them. And so the frustration sort of underestimates our feeling in terms of how we've been treated by Council in this.

T. 2/3/05 p. 725

PROF DALY: Just one final question. Were you aware that Planning New South Wales, which is now subsumed into the Department of Infrastructure, Planning and Natural Resources - Planning New South Wales had set a goal of 40 days for councils to approve development applications? Were you aware of that?

DR STERNE: I had no idea.

PROF DALY: Your application took something like three times as long as that.

DR STERNE: Yes, it did.

PROF DALY: Was there any sense of mediation in the process at all or was it - - -

DR STERNE: *No, it struck me as this is just the way it is and we're in charge, sorry, you're going to have to take it on the chin, that's how Council here works, it's just tough, you've got no redress. They were a law unto themselves. That's how I see that they've been working.*

T. 2/3/05 p. 729-730

Mrs Maria Smart

MS ANNIS-BROWN: *I note in particular in your submission you say what planning and engineering backgrounds do those six councillors have to override professional reports?*

MRS SMART: *Absolutely.*

MS ANNIS-BROWN: *So it appears to me that you're quite concerned I guess about councillors in fact - - -*

MRS SMART: *Yes. Riding roughshod basically.*

MS ANNIS-BROWN: *- - - being able to do that*.

MRS SMART: Yes, I am because why do we have planners and engineers and all that sorts - why are they there in the first place? The morale in there I can imagine is quite low when they put so much effort into these reports on our behalf - on the shire's behalf. I can understand there would be situations at times where it would be borderline and decisions have to be made. But with our issue, with so much controversy, so many things against it, so many things pointing to maybe this isn't the
right place and what we suffer now is a consequence of this being allowed which is exactly what we knew we would suffer and we are which is totally - the councillors - the balanced team just move on.

T. 3/3/05 p. 778

MS ANNIS-BROWN: The amendments and the modifications: were you provided with any notification regarding those?

MRS SMART: No, no. That was a word-of-mouth thing that started coming around.

MS ANNIS-BROWN: To your best recollection - I understand you don't have the documentation - but how many amendments were there? And, I guess, were they fairly major or some were minor - what was the mix like in terms of - - -

MRS SMART: I think there might have been two or three. It is hard to recollect because you try to erase it from your memory.

MS ANNIS-BROWN: No, I appreciate that. But, to your best recollection.

MRS SMART: Maybe two or three, yes, changing this - a bit of a change there; an LPG tank, more housing, more this - and somehow the facility doesn't look anything like what the original plan was.

MS ANNIS-BROWN: *I was going to ask you: in your opinion, do you believe the building and the development is ostensibly the same as it was originally?*

MRS SMART: *No, absolutely not. And that's what astounds me – is what gets passed through Council and then what you actually get is something totally different. And that's astounding. And the thing is once it's passed through Council, they're off to the next venture. They're not concerned about what we're left with. And DAs ultimately - changes to DAs ultimately get approved; they don't seem to be held up in any which way.*

MS ANNIS-BROWN: *So you're aware of other developments where modifications have been made and similar circumstances have occurred?*

MRS SMART: *From what I've read in papers, yes. I read the paper a bit to - and then I close it up because I've had enough of reading what everyone is up to.*

T. 3/3/05 p. 786-787

Mr Gilbert May

MR BROAD: *And do you say it's inadequate?*

MR MAY: Well, it's too late. We don't have - it's not clear enough.

T. 3/3/05 p. 803

Mr Lindsay McGavin

"We take this opportunity to quote from page 678 of the transcript:-" Smith quotes "Mr McGavin" when in fact the quote is from Mr Broyd.

MR BROAD: *The Salt development proceeded upon the basis that there was a master plan which formed the basis of its approval. In your view, what emphasis should be placed on a master plan?*

MR BROYD: *A master plan, as such, does not have legal status to be adhered to unless it is embodied in a condition of consent in a certain way.* But that - a master plan outcome should have embodiment in a development control plan to give it legal weight as an ultimate desired outcome, if you like, given you've got a staged development occurring over a number of years. *So whilst the master plan may not have any legal right in its own entity, it really should have some legal basis as that expression of design outcome long-term for the staging of the development to be consistent with.*

T. 2/3/05 p. 678

Mr Brian Donaghy

PROF DALY: Well, thank you for that. We just wanted to cover those few issues, but thank you for your attendance.

MR DONAGHY: Can I make any other comments.

PROF DALY: No.

MR BROAD: If there's a matter that requires a briefing note, that may be something.

PROF DALY: Yes, if you would provide a briefing note. I made it very clear - you possible were not here when I made the opening address. I made it very clear that the inquiry is an inquiry and I don't want people making statements or personal comments. We ask questions that are relevant to the terms of reference of the inquiry. If you have a matter that you would like raise, please write it down and send it to us.

MR DONAGHY: Thank you.

MR SMITH: Sorry, Mr Commissioner, my question was on the basis of the evidence that was given. I wasn't going to ask for Mr Donaghy to - - -

PROF DALY: Again, you understand, Mr Smith, that the terms of re examination are very clear also? Mr Donaghy is not body corporate.

MR SMITH: But he was part of the body corporate when the commission was announced and his evidence goes directly to the governance question of the body corporate. It was only question I wanted to ask, anyway.

PROF DALY: Thank you

T. 4/3/05 p. 973-974

Ms Robyn Lucienne

MS LUCIENNE: *Well, I think that the local residents are going to be competing with the influx of profit-frenzied people that have come from other areas that are drawn to here. I mean, they are the people that are going to be getting those jobs. They are the people that are going to be affording those premises. It may - to me it just seems to be - the rug has been pulled out from underneath the local community. And as far as I'm concerned they are the people that have paid the price for all of this. This is taxpayer funded, this inquiry. They are the people that have lost their frontal coast.* They are the people that may have well propped up the funds that have been used to get people elected. So the community has paid an immeasurable cost here.

T. 4/3/05 p. 986

Dr John Jenkins

MR JENKINS: *In terms of Council employees, a few - less than five;* in terms of Residents and Ratepayers' Associations, as a group, several groups - the Kingscliff and both the Cabarita and Kingscliff groups; and in terms of general people, 20 to 30 people have approached me on the street or spoken to me at various times either by email or by electronic – other electronic means.

T. 9/3/05 p. 1018

MR JENKINS: *Look, to me, that's the most worrying of all the allegations. I understand that people will want to, if necessary, defend their positions, their political or their financial positions, but there is absolutely and without doubt an overt culture of fear within Tweed Shire Council, and the number of people who have come to see me* and said - afterwards said, "Look, I don't want you to say anything. I don't want you to say anything, I'm not going to put it in to the Inquiry and I'm not going to put in a submission, and I don't want you to say anything about what I have told you." Subsequently to them initially speaking to me, almost all of them have taken the same stance.

T. 9/3/05 p. 1020

MR JENKINS: They're afraid of, I suppose, people who they perceive to be supporting things that are happening in Council that they feel are inappropriate. And particular names, yes. *They're afraid of the councillors.* Are they afraid of particular groups of councillors? Yes, they are, and they're afraid of retribution from that. Look, I'm not saying it exists. This may be a perception rather than reality, but, nevertheless, there is that facet there that is within the Council and it shouldn't be there.

T. 9/3/05 p. 1021

Mr David Papps

MR BROAD: *Probably the better question is this; is the operation of SEPP71 so large in respect of a coastal council that the effective decision making of councillors on larger developments has now gone?*

MR PAPPS: *I'd agree with that statement. I think that was one of the aims of the SEPP for those significant important major coastal developments.*

MR BROAD: Developments within that zone.

MR PAPPS: Within that zone they would come to State Government. Long-term the policy was more about getting the regional strategies in place of sufficient quality that there would need to be less and less intervention by the State providing Local Government reflected the regional strategy.

MR BROAD: But it's confined to each particular zone and doesn't affect decision-making outside that particular zone?

MR PAPPS: That's true.

T. 10/3/05 p. 1264

Dr William Wright

MR BROAD: *So did that appear to be work that was being carried out without an application having been made to council?*

DR WRIGHT: *Well, I was not aware of an application. We had not been notified.*

MR BROAD: But when you came back a week later you said that nobody knew about it.

DR WRIGHT: Yes. Well, I wasn't sure whether the staff really didn't know or whether they were disinterested or there was some other explanation. I then went back on a third occasion and asked to look at a map of the area and picked out the site and said and said, "This place has been clear bulldozed. Can you please explain to me what's happening?" And I still received no reply.

PROF DALY: Right, could I just interpose there? How large was this site?

DR WRIGHT: This was the entire property, 100 acres or 30 - - -

PROF DALY: 100 acres had been cleared?

DR WRIGHT: Yes.

PROF DALY: And the council didn't know anything about it?

DR WRIGHT: Well, they said they - the council officer said they didn't know.

T. 11/3/05 p. 1374

Mr Gregor Manson - Musician

MS ANNIS-BROWN: *Can you perhaps hazard a guess at where that perception came from or where that impression, to use your word, came from?*

MR MANSON: *Well, because that's what people said to us, you know, we need this, it's going through and that's the end of it.* And if you look at the press coverage there was - the Tweed Economic Development Corporation were very strongly pushing it. They - I found it particularly interesting that in the paper of Thursday, April 24th of 2003, Tom Senty, who's the head of Tedco has virtually an entire page to himself.

Now, he doesn't actually work for that paper and I rang them up and I said, "Is he a journalist?" and they said, "No." I said, "Well, how come he gets a page of your newspaper to express his views on the economic development of the Tweed? Is that not propaganda?" And they said, "No, no, no, he's entitled to say this, that and the other," but

it wasn't a letter to the editor, it wasn't - it was presented as news. It was on page 7 but to the casual eye it's a news article.

So it was generally agreed that, you know, the Chamber of Commerce had sort of - were making - public statements that, you know, "We need this and it's not going to be stopped by a small number of disgruntled residents." And we were verbally told by, you know, various people that, you know, "Look, mate, you're not going to stop this, why waste your time?"

T. 18/3/05 p. 1780

Mr Gary Raso

MR RASO: *The terms of reference were in the Tweed Link, I believe, and also in the daily news.*

PROF DALY: *Yes, but had you read them before you organised your rally?*

MR RASO: *The rally was organised probably only in about three or four days and we ended up with about 300 people there which - I was pretty surprised but prior to that we'd got together to form a group just to put a newsletter, to put some sort of balance to the - for want of a better word - to the things that were being written in the paper and other perceptions about the Council.*

PROF DALY: *That hasn't answered my question. The question was, had you read the terms of reference before you either organised your newsletter or organised the rally?*

MR RASO: *Oh, I'd say I probably would have but I don't think I would have fully understood it. I'm a farmer not a lawyer, mate. I'm a farmer not a lawyer. I don't understand a lot of that stuff fully.*

PROF DALY: *Yes, but organising newsletters and organising rallies are fairly difficult, onerous and consuming tasks. I would have thought that anyone who was entering into those tasks would have taken great pains to understand what they were rallying against.*

MR RASO: *The whole rally was based on the lack of democracy.*

PROF DALY: *I don't see how that comes in the terms of reference?*

MR RASO: *Well, we voted in a Council that's going to be sacked and - -*

PROF DALY: Is it? I wouldn't have - - -

MR RASO: Well, Tony Kelly himself said in the paper that over the last ten years the Councils that they have investigated have been sacked, all of them. Warringah, which had no - the finding there was that, to my understanding, was that they shouldn't be sacked; Walgett - Mr Bob Bulford actually was the commissioner there - he said that they shouldn't be sacked either and they were.

PROF DALY: I was the Commissioner for the Warringah Inquiry. The report that I wrote on that was 868 pages long and I did recommend that the Council, that the Civic offices be vacated. That, in your parlance, is that the Council might be sacked but there was 868 pages of evidence that led me to that conclusion.

MR RASO: And the grounds were that there was perceived conflict of interest or perceived developer contribution, was there?

PROF DALY: I'm not going to try and summarise 868 pages, indeed, a sentence. If you're interested it's on the website of the Department of Local Government and you can read it. The point is that somehow you've assumed one possible outcome of the Inquiry ignored, apparently, the terms of reference or not understood them and then set about some sort of attack on the whole process.

MR RASO: I'm definitely not attacking the process, definitely not attacking the process. I fully support any inquiry that's based on facts or evidence.

T. 17/3/05 p. 1671-1673

Section 5 Addendum 5.1.4.1

PROF DALY: Good morning, ladies and gentlemen. My name is Maurice Daly. I was appointed by the Minister for Local Government, the Honourable Tony Kelly, on 10 November 2004 to hold a Public Inquiry under Section 740 of the Local Government Act (1993) into Tweed Shire Council. Public notice of the Inquiry was published in the Tweed Border Mail, the Tweed Daily News and the Tweed Sun. I'll now read the instrument of appointment:

I, the Honourable Tony Kelly MLC, Minister for Local Government in pursuance of the powers granted to me in Section 740 of the Local Government Act (1993) hereby appoint Emeritus Professor Maurice Daly to hold a Public Inquiry to inquire, report and provide recommendations to me on the efficiency and effectiveness of the governance of Tweed Shire Council. The terms of reference of the Inquiry are the Inquiry will have particular regard to: (1) Whether the elected representatives have adequately, appropriately and reasonably carried out their responsibilities in the best interests of all rate payers and residents in an environment free from conflicts of interest.

Second, the appropriateness of the procedures and processes adopted by council in relation to its environmental planning responsibilities including the processing of applications for development particularly those of a significant nature. (3) The appropriateness of the relationship between elected representatives and proponents of development in the council area. (4) Whether the elected representatives are in a position to adequately direct and control the affairs of council in accordance with the Local Government Act (1993) so that the council may fulfil the charter provisions and intent of the Local Government Act 1993 and otherwise fulfil its statutory functions.

(5) Any other matter that warrants mention particularly where it may impact on the effective administration of the area and/or the working relationships between the council, council laws and its administration. The Commissioner -

it goes on to say -

may make other recommendations as he sees fit including whether all civic officers in relation to the council should be declared vacant.

A copy of the instrument is on display at the notice board which I believe is just outside the entry door. I might add that through the hearings we will be placing a number of notices on that notice board to keep you abreast of various matters related to the Inquiry. I now declare the public hearings of the Inquiry open. The Inquiry will be conducted in terms of section 740 of the Local Government Act (1993) which provides for a number of things. It confers the powers, authorities, protections and immunities which are conferred on a Commissioner by Division 1 Part 2 of the Royal Commission Act of 1923.

It also invokes the provisions of Sections 27A and 27B of the Local Courts Act (1982) in relation to contempt. And it brings into play other provisions of the Royal Commission Act of 1993 about the conduct of the Inquiry. The Commissioner is given wide discretion as to the procedures to be adopted in managing an Inquiry of this nature. I propose to spend a few minutes outlining the procedures that I intend to adopt. First, I have

authorised Ms Katrina Annis-Brown to assist in the conduct of the Inquiry under Section 12 of the Royal Commission Act (1923). Ms Annis-Brown is sitting on my left.

Should there be any issues which people need to raise you should see Ms Annis-Brown either at an adjournment or leave a message with the usher who is located I think near the door. I've also authorised Mr Angus Broad and Ms Sally Sanders to assist me during the Inquiry. Ms Sanders is attending the hearings today. I'd now like to move on to some points about the way in which I intend to manage the Inquiry. The first thing, I propose to manage the Inquiry on as informal a basis as possible. Procedures will be presented and replied to in as simple and expeditious way as possible while at the same time recognising the rights of all those people who are involved.

Beyond today and through to 28 January 2005, the emphasis of the Inquiry will be on written submissions that have been and will be forwarded to the Inquiry. I would stress the importance of the written submissions and would invite people to put those into the Inquiry between now and 28 January. As well as the written submissions, we have the public hearings. Some persons may seek leave to appear at the public hearings today, but the opportunity to seek such leave will be open until 28 January 2005. At the public hearings, evidence will be taken orally on oath or affirmation and importantly there is a protection against defamation.

The Inquiry has already received a number of submissions. Copies of most of the written submissions will be made available for inspection at the council's administration centre at Tumbulgum Road, Murwillumbah and at the Tweed Shire Council's office in Tweed Heads. The written submissions will be made available progressively leading up to the resumption of the public hearings. I would now like to make some comments on the terms of reference of the Inquiry. In conducting this Inquiry I've been called upon to form an opinion regarding governance issues affecting Tweed Shire Council.

It is my view that the terms of reference extend both to the role of councillors forming an elected body but also to the conduct of the corporate body principally represented by the staff. The terms of reference for other Section 430 inquiries often focus on issues that tend to be very precise. There is a certain something that has happened that is built around a particular issue and the terms of reference relate to that something. Certain aspects of the terms of reference of this Inquiry might be seen as possessing this form. Importantly, however, the terms of reference of this Inquiry are not confined to just one or few happenings.

The context concerns a broader domain: the governance of Tweed Shire Council, with some emphasis on conflicts of interest, environmental planning responsibilities, the relationships of elected representatives and proponents of development, and finally, it is focused on the charter of the Local Government Act. These issues are specifically related to the first four terms of reference. It is important to note item 5 of the terms of reference in this context. I will just repeat item 5 for those who might not have heard it the first time. Item 5 says:

Any other matter that warrants mention, particularly where it may impact on the affected administration of the area and/or working relationships between the Council, councillors and its administration.

It will therefore be my duty to make determinations on what other matters might be relevant to the effective administration of the area and/or working relationships between the Council, councillors and the administration. During the hearings I will not allow persons to make statements or to enter into questioning about matters that they determine to represent the broad intentions of item 5 of the terms of reference. If a person wishes to make such statements, they should do so by a written submission which will then be evaluated. In some cases such persons may then be invited to make an oral submission on the issues they raise.

I will now move on to talk about appearances at the public hearings. I have indicated previously a number of written submissions have already been received. Generally, I have decided that where submissions do not fall within the terms of reference they will be excluded from display and, necessarily, excluded from providing evidence to the Inquiry. I have received indications that certain persons or entities may wish to appear at these public hearings. Appearances at the Inquiry will either be by way of application for and the granting of leave to appear; or by my invitation to appear.

I should note that under the powers bestowed on me I may summons persons or representatives of entities to appear at the hearings. I ask that persons or bodies seeking leave today to appear at the public hearings approach Ms Annis-Brown immediately after my introduction. After Ms Annis-Brown has gathered any such requests to appear or to seek to have legal representation at the hearings I will convene later to deal with the applications. So at the end of my introductory remarks I will call and adjournment during which Ms Annis-Brown will receive any of these requests. We will consider them.

We will reassemble and we will give our decision. Persons who want to appear at the public hearings, as I have said, may seek leave subsequent to today. Today is not the only opportunity to seek leave for either of these things. However, people seeking leave to appear subsequently to today must do so in writing. The closing date for receipt of such requests is 28 January 2005. Anyone making such a request should provide a short summary of the issues that they would seek to raise, when they make their application. I anticipate that some of the evidence that may be given during the course of this Inquiry will be contentious and that the Council and individuals who are part of that process may want the right of reply.

I have decided to put aside some time towards the end of the hearings to allow some people to make oral replies. I emphasise, however, that it is my strong preference for people who wish to make replies to certain evidence that may come forward during the inquiries that they do so by means of a written reply rather than an oral reply. Such written submissions in reply may be forwarded to me care of my office within a period of up to 14 days after the conclusion of the final day of the public hearings. The schedule of persons called to address the Inquiry each day will be advertised on the noticeboard at the entrance to the hearing rooms.

It is proposed that the list for each day will also appear early every morning and for the next day. They will also be posted on the Inquiry's web site every morning. Whilst every effort will be made to keep to the scheduled timetable and order of speakers, it is possible that in some instances unforeseen events may lead to some changes. In advance, I would seek your co-operation and patience if this happens. People who are scheduled as speakers will be provided with an abbreviated form of the information paper outlining the general procedures of the Inquiry, together with a letter confirming the time and date of their attendance.

Anyone who has questions about those issues or who will require a copy should see the usher at one of the adjournments; that is, Ms Sanders. I would stress that evidence before this Inquiry can only be given in accordance with the terms of reference. It is my responsibility as Commissioner not to admit evidence that goes beyond the terms of reference. In the light of the issues raised by the terms of reference I have agreed to allow a number of people to make submissions and appear before the Inquiry to talk about specific issues.

I emphasise, however, that this Inquiry is not called upon to reassess an individual's case in relation, for example, to a development application or any other matter that pertains to the individual rather than the specific terms of reference. I do not - and I stress this - I do not have the power to overturn or change any approval granted by the Council. Accordingly, I will consider submissions and evidence solely from the point of view of the terms of reference. I am, however, keen to receive a broad range of submissions provided that they are relevant to the terms of reference.

I do not wish to exclude people from having their submissions published where they appear to fall within the terms of reference; or to refuse to allow them to appear. If I were to do so, there would be justifiable concern that the Inquiry may be less than open. At this point I should correct some information that I saw in the local press this morning. First, I do not intend to have any closed sessions at the public hearings. I believe that the hearings are public; they have to be transparent and that whatever evidence is presented has to be available to anyone who is interested in the carriage on the Inquiry.

So there will be no - I repeat - no closed sessions of this Inquiry. Second, I noticed in the local press this morning it was claimed that we may be tapping phones. I can give you total assurance that there will be no phone tapping. It also suggested that there will be covert operations by the Inquiry. I give you water-tight guarantee that there are no covert operations either under way or likely to happen in the future. I repeat: this is a Public Inquiry and its operations must be transparent and the information must be there for the public to share. As I've said before, all evidence will be given on oath or affirmation.

Now, this provides some protection for persons wishing to make an oral submissions. I emphasise that evidence on oath or affirmation and the protection requires the Inquiry be kept within the terms of reference. I would also recommend that those who are intending to submit a written submission should obtain a copy of the information paper, which is available at the Council offices, because it details the protection that you are given against defamation or harassment as a result of your making a submission.

The powers of protection are broad and strong and I encourage anyone who is submitting a written submission to read the information paper that we have distributed to the Council. I should also point out again that this is an Inquiry into aspects involving the governance of the Council. It is not a trial of individuals. The basis of the submissions and the presentation of evidence and other matters should therefore be dictated by this and not by the rules that ordinarily would apply in a legal action or formal court case between parties to those proceedings. Simply, this is an Inquiry.

The proceedings will be tape-recorded, and are being tape-recorded at this moment, in order to provide me with a transcript after the close of the Inquiry in order to prepare a report. I will now move on to some of the procedures that we will follow during the hearings. Where speakers have already submitted a written document to the Inquiry and will then be appearing to present oral evidence it will be generally assumed that I have read the written material. I believe that the public access to written submissions and the public nature of these hearings allow affected parties to obtain sufficient particulars of contentious matters.

The mere fact that a critical remark is made during the hearings or contained in written submissions is not of itself sufficient to open up that comment to scrutiny on the grounds of denial of procedural fairness. The matters are no more than conclusions on disputed facts that are ancillary or collateral to the major findings called for in the terms of reference. The finding cannot be impugned for want of procedural fairness no matter how distressing the criticism or condemnation might be to the individual concerned, and I will repeat that: the matters are no more than conclusions on disputed facts that are ancillary or collateral to the major findings called for in the terms of reference.

The finding cannot be impugned for want of procedural fairness no matter how distressing the criticism or condemnation might be to the individual concerned. When a person appears at the public hearings I do not intend to go over all the details that might have already been covered in their written submission. I may on occasions ask the speaker to provide a brief summary of the contents of the written submissions or I may ask the speaker to elucidate or amplify certain items contained within the submission. Or I may address other issues that are relevant and that Ms Annis-Brown or myself may raise from time to time.

I do not intend to allow a person to give an oral version of his or her written submission. In keeping with other inquiries that I have conducted, I propose to ask questions of the speakers, directed to the issues that I see as beneficial to my understanding of the issues rather than seeking that each speaker address the Inquiry on matters that they perceive to be relevant to my consideration. I would again like to emphasise that the Inquiry is conducted in terms of section 740 of the Local Government Act of 1993. It confers the powers, authorities, protection and immunities, which are conferred on the commissioner by Division 1 of the Royal Commissions Act.

I want to emphasise that, in relation to that, this is a Public Inquiry incorporating those powers. For people to speak at it, they have to seek leave. Leave may or may not be given. It is only those who might wish to be allowed to participate in the Inquiry process who will need to seek leave. I've said earlier, and I'll repeat that at the end of my opening

words, any person who wishes to be legally represented at the Inquiry should give notice to Ms Annis-Brown and that will be fairly soon. I propose to take applications for leave to speak before the Inquiry from persons who have not lodged a written submission; so it is not necessary to have a written submission to be able to appear and give oral information at the Inquiry.

Again if there are any such persons here today who may wish to appear - give oral submissions rather than a written submission again they could speak to Ms Annis-Brown as I conclude these remarks. I will say now that I intend to invite each of the elected representatives of the council to give oral submissions. I have already written to each of the elected representatives of the council inviting them to give a written submission as well. I will also invite the general manager to give an oral submission. I've also written to the general manager inviting him to give a written submission.

I also intend to invite some senior staff to give oral submissions to the Inquiry and they also would be welcome to give a written submission should they choose to do so. There will also be a number of other people that I am likely to invite to appear. In this context I should note that I have the power to summons people to appear at the public hearings. Any affected person who does not seek leave to appear at this stage is free to do so during the course of the Inquiry should they feel the need. So in terms of appearance, this is not the final opportunity for people to seek leave.

There have been instances in previous inquiries where people who were not speakers have interjected and have tried to reply to what the speaker was saying. This is contrary to the way in which I believe this Inquiry should be conducted: accordingly I will not accept interjections of that type or any type. I will require that speakers be given an uninterrupted opportunity to reply to questions put to them. If necessary I will take steps and if necessary exercise the powers available to me under the Royal Commissions Act to ensure that this opportunity is extended to all speakers. I will return to the theme which I have already raised: that is the capacity of people to have legal representation at the hearing.

Under Section 7 of the Royal Commissions Act, I have the power to allow certain people to be represented by a lawyer. People who may seek to be represented are those who are directly and substantially interested in this Inquiry or those whose conduct may be challenged to their detriment. I will set out for you the way in which I envisage legal representatives may participate in the Inquiry. Anyone who has been asked by me to attend and give evidence before the Inquiry may seek leave to have a lawyer present while they are giving their evidence. If granted leave to appear, the lawyer may object to questions being asked of their client.

At the end of a witness's evidence, the lawyer may ask their own client questions. This next comment is very important. Those questions should be limited to clarifying or elaborating on the evidence that the witness has already given. They will not be allowed to raise other things. What I have in mind is restricting questions to the type of question asked in re examination. I expect that speakers will have different recollections of the same events. Ultimately it will be up to me to decide if necessary which version of the events I prefer. I propose to deal with differing recollections in this way.

First, if person A is aware that his or her recollection of events differs from the evidence given by person B then person A can give his or her version of the events once he or she is called as a witness. Having heard the evidence of person A, I may then decide to call person B. If person A has already given evidence then person A can write and tell me about his or her recollection of events. If I decide that I would like to hear more about what person A has to say then I will recall person A to the hearings. Therefore generally speaking I will not give a lawyer leave to ask questions of speakers in general.

Because having decided to approach the taking of evidence in this way, the rule in Browne v Dunn will not apply. To avoid recalling persons unnecessarily, I invite those seeking to respond to provide me with statements relying to assertions particularly if they are aware of likely evidentiary conflicts. I may write to certain witnesses and ask them to provide me with a statement on particular issues in order to expedite the hearings. I ask that those statements be provided during the course of the hearings so that I can ascertain whether or not I need to hear more evidence.

I should point out that I have not made a final decision to exclude other types of questions from being asked in particular circumstances. If a person wishes their legal representative to ask questions of a particular type, the legal representative can still seek my leave to ask those questions. If possible I would prefer that lawyers indicate in advance and in writing if they seek leave to ask questions which fall outside the parameters I've just set out. In particular and this is of critical importance, I am concerned that the manner of questioning of speakers may become belligerent. This is contrary to the basis of this Inquiry which aims to encourage members of the public to come forward with information.

The outcome of belligerent questioning in my view constitutes intimidation of speakers. Whether such intimidation is intended or not, the outcome is still the same. And it is unacceptable to me and I will not tolerate it during the hearings. If the processes proposed by me are not followed, I would reluctantly withdraw the notion that all or some people can cross-examine: so I would ask for your co-operation on that front to proceed accordingly. I intend to be fairly conservative on issues related to the asking of questions. I must ensure that questions relate to the terms of reference. Questions put also need to be concise.

The length of the hearings is confined and I must ensure that I hear from as large a number of people from relevant groups as possible. My role is to inquire about various matters defined in the terms of reference. I and my associates will make inquiries about these matters. Any questioning of speakers by legal representatives or others should be for the purpose of enlarging or elucidating the information provided by the speakers. I will repeat some of the observations I have already made and which are particularly pertinent in this context. This is the third time I have repeated this.

The third fact that a critical comment is contained in evidence given at the hearings is not of itself sufficient to open up that comment to scrutiny on the grounds of denial of procedural fairness. The matters are no more than conclusions on disputed facts that are ancillary or collateral to the major findings called for in the terms of reference. The

finding cannot be impugned for want of procedural fairness, not matter how distressing the criticism or condemnation might be to the individual concerned. I think it is impractical if we are to get through the business of this public hearing and to maintain our focus on the terms of reference, to have people making statements about things at various times.

The Inquiry is not a forum for people to air their general views on the matters. It is an Inquiry into a number of issues, defined by the terms of reference. There may be isolated instances where it is appropriate to seek leave - for persons to ask questions of a speaker, providing that they are within the terms of reference. I stress however, that such occasions will be the exception rather than the rule. I repeat, the mere fact of a critical comment is not of itself sufficient to open up that comment to immediate scrutiny. I will repeat what I said earlier, that at the end of the proceedings we are reserving some time for people to reply briefly to issues that may have come up.

I may also, as I've said before, address such issues by way of a submission - a written submission in reply. And that is my preferred way of dealing with such issues. One of the inevitable realities of a Public Inquiry is that a wide variety of things will be expressed and talked about. Some of the assertions might be right. Some of them might be quite wrong. I don't think it is the job of the Public Inquiry to immediately determine the rightness or wrongness of such assertions when they appear. Judgments about the worth of what is heard will be made at the appropriate time, and in relation to all the evidence.

I don't think that there is any way practical that anybody who feels that the last speaker has said something they don't agree with, or that possibly reflected on them, has the right of an immediate reply. There may be comments made in many parts of the press and in other sources beyond the Inquiry itself, as the Inquiry proceeds. I do not think the business of the Inquiry is helped by engaging in debate or discussion on issues or ideas that the press or others might or might not pick up on. The Inquiry process is designed to get through a large number of people who want to speak and who have been invited to speak.

I would remind you once again, this is a Public Inquiry, and that people will be speaking under oath or affirmation. I repeat, at the end of the hearings there are opportunities to present submissions in reply. I'll now turn to natural justice. In conducting this Inquiry, I propose to adopt various processes intended to ensure that natural justice is afforded. These processes will include publishing of the great majority of the submissions received, and given most of the people who have sought leave to make an oral submission to the Inquiry have the opportunity to do so.

I have also offered persons directly affected by the evidence the opportunity to reply either orally towards the end of the public hearings, and/or in writing within a period of two weeks beyond the end of the hearings, for those people who wish to make such responses. The primary purpose of the right of reply is to allow persons to address any of these issues in order to provide clarification or to maintain balance. I believe that the processes I am adopting for the conduct of this Inquiry are the fairest and most efficacious means of ensuring fairness.

I emphasise that it is my view that to allow written replies is the most appropriate way to facilitate the right of reply as it will enable me to consider the merits of an argument more clearly. When conducting other inquiries, I formed a view that this process is more beneficial to the conduct of the Inquiry. And in those other inquiries I have to say that so it proved. Again, as I previously indicated, there will be a period following the end of the public hearings when these opportunities for written submissions in reply will be available. That period is two weeks and after that period has elapsed, I will commence the task of writing my report.

The final report is to be presented to the Minister for Local Government, and will be tabled in Parliament. I am bound to lodge a report. The report may contain recommendations. It is for the Minister and the Governor to consider and act upon my report. Section 740 of the Local Government Act requires that I report to the Minister for Local Government. And as I said, in doing so I may make recommendations. My recommendations may include recommendations affecting the elected body of the council, represented by the councillors, the corporate body of the councillors, represented by the staff, and the legislation under which Councils operate, principally the Local Government Act.

I emphasise that I have only the power to make recommendations. I do not have the power to implement changes directly. However, and this is important, I am empowered to refer matters that arise during the Inquiry to various departments, agencies, authorities or commissions. And these include amongst others, the police, the Independent Commission Against Corruption, the New South Wales Ombudsman, the Australian Securities and Investment Commission and the New South Wales Department of Local Government.

I'll say now that should any instance arise that in my view warrants referral to such a department, agency, authority or commission, then I propose to refer such matters during the course of this Inquiry, and not necessarily to await the end of the Inquiry before doing so. The Local Government Act embodies provisions in the Royal Commissions Act that provide for my report to be placed before Parliament. At the time that I furnish my report to the Minister for Local Government, my task is complete. It is then for the Parliament or the Minister to decide what actions may follow from any recommendations made by me.

Similarly, publication of my report is a matter for the Parliament or the Minister to decide. Having said all this in an attempt to provide a guide to the way in which the public hearings and the Inquiry in general will proceed, I will now take a short break to allow people who may wish to do so to approach Ms Annis-Brown who will meet them at the table in front here. I will reconvene the hearings after we have gathered those requests. I will determine any applications to speak or to be legally represented. Following that, I will call on Ms Annis-Brown to talk about some other matters which are relevant to the Inquiry. So at this point, I will adjourn. The length of the adjournment will depend on how many requests we have come before us. Thanking you for your patience.

T. 16/12/04 p. 2-14

Findings

Findings

2.1 Tweed Shire and the Region

1. Proponents of development have claimed that the Tweed area made remarkable progress in terms of population growth, income and employment under the stewardship of the pro-development councillors from 1999 onwards. The data do not support these contentions. Compared to other North Coast areas, Tweed Shire's population and income growth was not especially different. Compared to the State's average growth rates, particularly in terms of income rises, Tweed Shire did not perform well.

2. The Tweed Shire demographics are defined by the very high proportion of aged persons, the relatively small, and declining, proportion of youth, and, related to both features high unemployment. The data available do not suggest that the increased investment in property development since 1999 has done much to change the situation.

2.2 The Coastal Property Boom

1. Tweed Shire was within a band of coastal areas that stretched from Ballina to the Queensland Sunshine Coast. In this band a number of developers made substantial profits over the past five years. As opportunities elsewhere in this coastal stretch diminished, developers were attracted by the relatively large number of opportunities they perceived to lie in Tweed Shire. The mission of the Tweed Directions' councillors was to ensure that the conditions that might allow the opportunities to be seized were in place.

2. With encouragement from the Council, the number and value of large development projects in Tweed Shire jumped from 2000 onwards, pushing up the median price of land and housing. The large proportion of low income earners and the high proportion of aged persons in Tweed Shire were adversely affected in terms of housing affordability.

2.3 Tourism and the Economy

1. A significant proportion of the property development was devoted to providing tourism products. Supporters of proponents of development in the Tweed Shire Council believed that tourism would be a key industry in propelling forward the growth of the Shire's economy. This view was adopted despite cautionary suggestions on the future of tourism expressed by the Gold Coast City Council, and by the Australian Government. The councillors who pushed the importance of tourism to the economy appear to have been unwilling to accept the limitations of

such a single industry approach, and the Council as a whole appears to have been divided in terms of the need for it to take the lead in developing a tourism industry strategy.

2. The capacity of tourism to supply full-time, skilled employment, highly paid jobs, and career paths for an area's population if it is seen as the principal, or even the only, growth industry is not convincingly supported by the history of many areas, and there is little evidence of Tweed Shire being different in that regard.

2.4 Electoral Issues

1. The majority councillors in both the 1999-2004 and the 2004-2005 elections adopted the promotion of property development in general, and tourism in particular, as their central strategies. They did so after receiving substantial funds for their electoral campaigns from businesses that were directly and indirectly related to the property industry. The proponents of development could expect to receive material benefits, either indirectly through policies settings, or directly in the management of planning and development assessment processes.

2. The Tweed Directions' approach offers a template for any group of developers, or indeed any group from other industries or interested entities, that can see benefits in having a compliant council, and who have the capacity to raise large resources to fund candidates in elections. It would appear that the same approach was discernible in other elections in 2004, although none reached the level of sophistication of organisation, or the scale of accumulated funds, applied by Tweed Directions.

3. There is a high probability that, if the Tweed voters had understood the size and source of donations to the Tweed Directions' group, the miniscule victory gained by the group would not have taken place. This points to a failure in a system where voters find out the level and source of donations to candidates some months *after* the election.

4. The 2004 Local Government elections were organised around a voting system that was based on the New South Wales Upper House elections. The system unnecessarily produced a very large number of candidates, only a small proportion of whom could realistically expect to win a place on council. More bizarrely, a large number of the candidates who stood had no desire to gain a seat on the Council. In this regard the election process is an expensive charade. The very large number of informal votes in Tweed Shire suggests that voters were confused by a needlessly complicated system.

5. Disclosure laws are meant to preserve the integrity of the electoral process. In their current form in Local Government they do not achieve this. They lack the transparency that should allow voters to make informed decisions, and which would remove the imputation of corrupting mechanisms in the process.

3.2 The Role of the Department of Infrastructure, Planning and Natural Resources

1. From 1997 onwards the New South Wales Government through its planning agencies developed policies to protect the coastal zones from over-development, and to preserve amenity and the natural environment. These policies culminated in the proclamation of SEPP 71 in 2002. SEPP 71 effectively transferred the assessment and consent authorities of councils for projects of a certain size within one kilometre of the coast (outside of Newcastle, Sydney and Wollongong) to the State authorities.

2. The State Agencies (Planning NSW and then DIPNR) that handled the assessments were inadequate in terms of number of staff relative to the number and size of applications available.

3. The extent of the territory to be covered, and the large number of applications made, prevented staff of the agencies from spending sufficient time inspecting and understanding the in situ challenges of each development proposal.

4. The Agencies relied on their regional officers to provide certain local information, but the regional offices, like the Sydney office, did not have sufficient staff to do the job adequately.

5. The Agencies also relied on local councils to provide information or to give advice on aspects of the proposals. This presented a possible conflict. The SEPP 71 system was designed to prevent over-development along the coast. If a council, such as Tweed Shire, believed that high levels of development was desirable its advice and information to the Agency's officers would be likely to reflect the council's views.

6. The Agencies appear to have been weak in understanding the social and economic impacts of particular developments on local communities.

7. The Agencies appear to have dismissed local objections frequently, either on technical grounds (often missing the import of local considerations in the process) or on the advice of the council or consultants.

8. The Agencies were also reliant on input from a variety of other State bodies. This has produced a lengthy, complex, and sometimes ineffective process.

3.2.14 Designated Development

1. A review of the file suggests that the Council wished to dispense with the issue of whether aspects of the SALT proposal would involve designated development.

   The Council appears to have been deficient in its advice to the L&E Court.

It is likely that the borrow pits in the original application fell within the definition of "extractive industry" as defined in the EP&A Regulations.

Any suggestion that the works were "levelling" and therefore approvable could not have applied when the modifications sought to excavate and remove sand, to place it elsewhere, then, at some future time, fill the borrow pit.

2. The Council failed to properly and adequately consider (if it did at all) whether the section 96 application was an application for designated development.

3.4.1-3.4.6 Introduction; The Planning Role of Councils; The Determinative Role of Councils; Measuring the Resilience of the Council's Planning Regime; A Review of the Evidence; Obtaining Consent

1. The EP&A Act and/or the EP&A Regulations bear amendment to ensure that the information provided by applicants accords with the requirements of section 79C. Further that information provided in the Statement of Environmental Effects refers to all possible effects, indicating, if it is considered that there is no possible effect, the basis upon which such conclusion is founded.

2. There is an urgent need to ensure that all experts providing reports to be considered when determining development applications are provided by persons holding the appropriate professional qualifications and experience and who are bounded by standards of integrity. The evidence suggests that these requirements have not been met in some cases in development approvals granted by Tweed Shire Council. The problems have occurred with environmental consultants in particular. There are recurring problems in the use of consultants either hired by the Council and paid for by developers, and consultants hired directly and paid by developers.3

3.4.7 The Role of the Policy in Considering Development Applications

1. The "Balance Team" councillors and "Tweed Directions" councillors were, through their majority and through the casting vote of the Mayor (selected from one of them), able to dominate the determination of development consents coming before successive councils.

2. The "Balance Team" councillors and "Tweed Directions" councillors had sought election on a platform that was pro-development.

3. This platform was to become a de-facto policy of council, although never formally adopted nor enshrined, supporting favourable determination of development applications, often with complete disregard for legalities or the recommendations of specialist staff.

4. While councillors have a legitimate role in the review and creation of council's policies and objectives under the Act, the ad-hoc application of electoral platforms to support, legitimise or excuse determination of development applications does not form part of this role.

5. These are strong arguments supporting a view that consideration of applications under the EP&A Act is not amenable to policy considerations, except to the extent that it may be formally adopted in the nature of a DCP and directly referable to a basis of consideration under section 79, such as social and economic impact or public interest.

6. Overall, there must be significant doubt that the experience and skills of councillors, generally, adequately equips them to determine applications.

7. A decision by councillors to disregard the recommendations contained in staff reports, whether to ignore or override the recommendations or to vary, delete or all to conditions of consent, in the absence of reasons supporting such decisions, is not indicative of good governance or best practice.

3.4.8 Conditions of Consent

1. The Council has failed to prescribe conditions in its consent that are sufficient to give effect to and to ensure the legitimacy of its planning outcomes.

2. In some circumstances, the proper outcomes, as proposed by suitably qualified staff, have been abrogated by the councillors. To a large degree, this appears to have been at the behest of the applicant, in circumstances where the councillors have merely provided the mouthpiece for the proponent's aspirations.

3. In other circumstances, the conditions put forward by staff have not been sufficient and, accordingly, been ineffectual.

4. In other circumstances, as suggested by Mr Hemmings in his advices, there has not been the legal threshold to support conditions, such as those that might otherwise have enshrined the underlying basis of the consent through covenants on title.

5. The instances where conditions of consent have failed to provide efficacy to the determination are not limited to those involving the Council. Quite clearly, there has been a lack of parity in the approach taken by DIPNR, as evidenced in the variation in the conditions imposed by it affecting tourist developments.

6. While the majority of these findings affect the decisions made by the consent authority, those affecting the ability to provide for covenants rely on legislative change to provide for them.

3.4.9 Review and Repair

1. There has been a failure to adequately review weaknesses in the planning regime and to adopt measures to overcome these weaknesses.

   The majority councillors have directly stood in the path of and undermined attempts to remedy weaknesses and have actively pursued and obtained outcomes that further weaken or undermine Council's planning regime.

3.5.2 Amendments

1. There are legitimate concerns that both the councillors and the staff have failed to adequately address and consider their role when dealing with applications to modify consents under section 96 of the EP&A Act.

2. Despite the suggestions of the Council, there is strong evidence to suggest that the integrity of the planning process has been compromised.

3. The position of councillors and staff is not assisted by the wording of section 96 as it is currently drafted.

4. There needs to be more thorough guidance given to consent authorities regarding the manner and circumstances where a power to modify consents exists.

   This would be best achieved by the adoption of greater prescription in the wording of section 96. While there may be further opportunities to provide greater clarity in the EP&A Regulations, the source of power needs to be clarified and prescribed in the EP&A Act.

5. The power to amend applications prior to their determination also bears review, particularly when such applications have already been the subject of community consultation.

   In the present case, there have been substantial alterations made to proposals, potentially significantly altering their effect on, for example, adjoining owners. In other instances amendments have been permitted in order to avoid the operation of more onerous provisions, particularly SEPP 71.

   In the case of the Nor Nor East application, the amended form of the application was of the type specifically addressed by SEPP 71.

6. In the same way as section 96 bears review, so too do the EP&A Regulations regarding the powers to amend applications.

3.5.3 Master Plans

1. Faced with an application to develop the large and iconic piece of land comprised in the SALT application, the Council failed to take appropriate steps to enshrine

its vision by adopting an enforceable master plan, through the adoption of an appropriate DCP.

This failure has left the Council in the unenviable position: the proponent regards the development opportunity associated with this site being determined by its commercial opportunity to receive further interest in tourist developments. To the extent that it is successful at doing so, ultimately State Government policies affecting residential density.

Such processes do not accord with representations to and the understandings of the community.

There is urgent need to undergo a process of implementing identified and enforceable controls for this development.

3.5.4 Assuming Concurrence

1. The Government and DIPNR has, or expresses, concerns over the manner that developments are occurring in areas such as coastal zones. There must be considerable concern, however, that the department has not facilitated a capacity to exercise its powers to act as a review body.

2. The evidence suggests that this failure has come about as a result, firstly of a failure to provide sufficient suitably qualified staff to deal with matters received by the department; and secondly, through processes that either delegate the department's role or which simply avoid its involvement.

3. Whether this latter approach has been driven by a lack of staff, has not been established by this Inquiry.

   On either count, the department has failed to carry out its functions effectively. As a result, the department may be only paying lip service to its, and its Minister's, concerns over coastal development.

3.5.5 Community Involvement in Decision-Making and State Agency Input

1. There is no doubt that the community has been excluded or ignored in the Council's decision-making planning processes. While community involvement is intended to be a pillar of local government the processes adopted by the Council have eroded and undermined this pillar.

2. Collaterally the public involvement anticipated by the EP&A Act has also suffered the same fate.

3. Failures of the magnitude indicated in this part do not appear to be isolated to the instances referred to in this part. The processes put in place may yet lead to

further failures of the type documented here.

4. The community is placed in a weak position by the EP&A Act. While the EP&A Act may require that consultation take place or that objections be sought, the views expressed by the public, as evidenced in this part, may have only token value in the reports of the staff or the decisions of the Council.

   The EP&A Act provides no real opportunity for the public or for the local community to challenge the decisions of the Council.

   In the Tweed the weaknesses in both the Act and the EP&A Act are apparent and have been seized on by both the staff and the councillors to achieve their perceived outcomes.

   Similar disdain has been shown for the concerns of government departments that possess expertise that is not available within the Council.

3.5.6 Enforcement and Compliance

1. The EP&A Act is premised on the basis that approval precede works, not visa versa.

   It has become common for non-compliant or illegal or unapproved works to be undertaken, then, on discovery, for a legitimising application to be made, commonly this has been in the form of a section 96 application.

   Councils are placed in a vexed position in these circumstances, often maintaining a view that, if the work is ultimately approvable, nothing is served by instigating enforcement proceedings.

   While this view may be apparent in the Tweed, there is also strong evidence that suggests that certain developers, such as Mr Penny, Resort Corporation and others have benefited from an over willingness in the majority councillors to rubber-stamp approvals or modifications as are sought by them.

2. Further, there is strong evidence that the majority councillors used their position to prevent actions being taken against developers who have clearly, or are likely to have carried out, illegal works. In so doing they have failed to give effect to their duties and responsibilities under both the EP&A Act and the Act.

3. Again, in so doing, they have failed to provide the protection that might otherwise be available under the LEP and threatened species legislation. In doing so, they have offered opportunities to proponents to obtain wholly inappropriate results, to the detriment of the conservation values of the Tweed.

   Importantly, these failures should not be considered as having been brought about by ignorance or oversight, they have been actively pursued by these councillors.

4. The example set by the majority councillors has no doubt permeated down to the staff. Whether solely or partly attributable to the councillors or otherwise, the staff have demonstrated a lack of resolve to investigate or to pursue breaches or illegal work.

   These failures have combined with and added to the failures of the councillors.

5. The Inquiry accepts the views of the DEC and has benefited greatly from the candour of Mr Allen who gave evidence at the Public Hearings. The Inquiry is of the opinion that the Council has allowed much of the conservation value of the Kings Forest site, and lot 156, 30 Creek Street Hastings Point to be lost. It is recommended that action be considered against those members of Council and its staff who have, by their acquiescence and omission facilitated or provided this result.

3.5.7 Developer Contributions and Infrastructure

1. There is strong evidence that inappropriate concessions have been granted repeatedly to developers, particularly instigated by the majority councillors.

2. There are instances where the thrust of Council's section 94 plans has not been made clear, or where there appears to be a lack of conformity in approach.

   In those circumstances the public has perceived that this is intended to or has operated to provide benefits or concessions to developers.

3. In more recent years there appears to have been a reluctance to enshrine certainty in section 94 plans or to respond to instances where it is perceived that concessions are inappropriate.

4. Despite suggestions to the contrary, the Council appears on occasions to have been unwilling to undertake necessary maintenance and upgrading of infrastructure despite representations to the community.

5. Council appears to portray developer contributions, as a pot of gold, not realistically taking into account the infrastructure needs arising from such developments.

6. The Council appears to have adopted a mindset premised on a view that current needs, such as those associated with Seaview Street Banora Point can be solved through local development, even though such development may never occur.

3.5.8 Invalid Conditions

1. There is strong evidence that in an attempt to shore up deficiencies in its planning regime the Council (and DIPNR) have sought to impose invalid conditions of consent.

The nub of the problem lies in a failure to adopt a sound planning regime.

2. Both the Council and DIPNR have failed to adequately address these issues, with Council actively seeking to shift blame away from itself.

3. DIPNR's failure to address these issues, suggest that changes currently being mooted will remedy the situation. Its track record does not provide comfort for this view.

3.5.9 Special Treatment

1. The Terms of Reference call upon the Inquiry to have particular regard to the appropriateness of the relationship between the elected representatives and proponents of development in the area.

   The evidence leads to an inevitable conclusion: that both the councillors, as the elected representatives and other senior staff have actively favoured the outcomes sought by proponents, directly, through facilitating amendments to the planning regime, questionable acceptance of applications, through partisan support or, in the case of the Mayor, feigned ignorance.

2. Collaterally, DIPNR, or PlanningNSW has not independently and stridently exercised its role but likewise capitulated to the desires of proponents.

3.5.10 Facilitating Developments through Planning Amendments

1. The Council has actively pursued, thwarted or ignored attempts to rectify weaknesses in its planning scheme.

2. The pro-development councillors and certain senior members of staff have sought both to ignore and/or blame others for these weaknesses.

3. While these two aspects are each serious concerns, the processes adopted by the Council affecting the amendments desired by proponents that either:

   - provided the precursor for entertaining the application,
   - limited their financial and other obligations,
   - increased the development and/or financial potential of the project are more so, as they demonstrate a failure to give effect to the objects and intent of the EP&A Act.

3.5.11 Overcoming Potential Constraints

1. There is clear and absolute evidence that certain developers have systematically worked to overcome the constraints that might either undermine or reduce the development potential of their land.

   In the matters referred to the Inquiry by the DEC and by local residents and ratepayers, serious concerns are raised that the Council has been both active and complicit in endeavours by proponents to overcome the constraints.

2. Additionally, the evidence leads to the inevitable conclusion that the Council has actively pursued development of land, as a landowner, developer, consent authority and as a custodian of public land without regard to:

   - proper processes,
   - contrary to its own LEP,
   - without regard to the views of and evidence provided by residents and ratepayers,
   - with disregard to the natural and cultural values of the land,
   - with disregard to the likely effects of the development.

3. While the Ray Group may have hotly denied it, the evidence provided by the DEC leads to the inevitable conclusion that proponents to developments have actively pursued strategies and have undertaken work with the clear intent of undermining the intrinsic values of their sites.

   Such strategies and work has clearly been aimed at removing or minimising any impediment to their proposals.

   In turn, the Council's response to such actions has been reluctant and minimal.

4. While some aspects of the EP&A Act, notably section 121, bear amendment to give greater clarity to the powers exercisable by consent authorities, this Act generally provides adequate powers to ensure that the activities stop, do not continue, and that remediation measures are put in place.
   The Council has chosen not to avail itself of these powers.

   Of major concern are allegations particularly emanating from the DEC regarding the Kings Forest site. These concerns are emphasised by what appears to be an overt relationship between the present or former owner and Councillor Brinsmead evidenced at least in his attendance at a rally on the site (**T. 17/3/05 p. 1666 et. seq.**).

   The concerns parallel concerns that the Council, especially the majority councillors has failed to take effective steps to respond to illegal acts, often subsequently legitimising them.

   So far as these illegal works affect land, they must set against a background of very high biodiversity and a climate of strong developer aspirations. In these

circumstances the majority councillors, supported by a compliant staff have chosen to facilitate the developer's aspirations to the cost and detriment of the biodiversity of the area.

Such was the mindset of the majority councillors that they were reactive of any suggestion that natural values were being undermined.

3.5.12 Special Treatment

1. While it is to be congratulated on providing notification of important development proposals through the Tweed Link, the Council, at least in respect of the proposal to sell land at Cabarita Beach, misused this newsletter to provide a biased, misleading and untruthful notification of the proposal.

   In the circumstances, the article was an abuse of the Council's processes.

2. While the Council has adopted a clear notification policy, which it appears to have implemented, the policy files to provide some basic information, such as building elevation and the like in the notice provided by the Council.

3. Additionally, the policy, which anticipated that persons affected by, or interested in the application will be able to attend one or other of the Council's offices to view other relevant information.

   This approach lags behind more appropriate measures including the ability to view information and to lodge objections online.

3.5.13 Coastal Protection

1. It was intended that the Coastal Policy provide a benchmark and basis for future decision-making in coastal areas.
   It was intended that the policy be taken up by councils and by developers to chart the course of their proposals.

   In the case of the Tweed, the Council, while initially recognising the importance of the policy moved to ignore and to undermine both the intent and effect of the policy.

2. In part that was at the behest of proponents of development, in part it was also because it suited the pro-development stance of the majority councillors, and in part it arose through the failure of planning staff to perceive the importance of the policy and to enshrine its importance in their reports.

3. The failure does not rest solely with the Council. Blame may also be attributed to the State, which provided little support for the policy.

Documents provided by DIPNR in respect of SALT development, Resort Corporation proposals for Cabarita Beach and the Latitude 28 proposal suggest that the department was less than strident in its application of the policy.

3.2.14 Designated Development

1. A review of the file suggests that the council wished to dispense with the issue of whether aspects of the SALT proposal would involve designated development.

   The council appears to have been deficient in its advice to the L&E Court.

   It is likely that the borrow pits in the original application fell within the definition of "extractive industry" as defined in the EP&A Regulations.

   Any suggestion that the works were "levelling" and therefore approvable could not have applied when the modifications sought to excavate and remove sand, to place it elsewhere, then, at some future time, fill the borrow pit.

   The council failed to properly and adequately consider (if it did at all) whether the section 96 application was an application for designated development.

4.1 Councillors' Relationships with Developers

1. Whilst the number of written submissions in favour of the Council outweighed the number of submissions critical of the Council, the weight of evidence suggests that there were serious failures of governance by councillors. The number of submissions supplied by supporters of the Council was large in number but seriously short in detail. Rather than providing evidence that related to the efficiency and effectiveness of the Council, the majority of such submissions were no more than bald, and formatted, statements supporting the Council. The submissions that were critical of the Council focussed on governance issues, and provided a great deal of evidence to support their contentions.

2. The supporters of the Council, and the Tweed Directions' councillors, adopted an adversarial attitude to the Inquiry, and sought to base their opposition on political matters that had nothing to do with the focus of the Inquiry as spelt out in the Terms of Reference. Indeed, the majority of them had not read the Terms of Reference, including some councillors. Mr Raso appeared as the leader of a group formed to oppose the Inquiry. Mr Raso's ignorance of the purposes and processes of the Inquiry was breathtaking, and his claims to "educate" the community about the Inquiry were risible, malicious, and counter-productive to his cause of protecting the Tweed Directions' councillors. It was clear from Mr Raso's evidence that he had not masterminded the political attack on the Inquiry. Instead he was used as a puppet by those who had the skills and resources to mount such a campaign; skills and resources so manifestly missing in Mr Raso's case.

3. The information provided to the community by some sources was often ignorant of the Terms of Reference of the Inquiry, and ignorant of the powers and responsibilities of the Inquiry. This ignorance did not prevent them from making scurrilous, misleading and provocative attacks on the Inquiry. Mr Bob Robertson, a proprietor and editor of a weekly newspaper, was deliberate in his attempts to mislead the public, thus abusing the responsibility of the press. He had been a candidate within the Tweed Directions' team, and his group had received all its funds (but for $10) from that source. He was complicit in the Tweed Directions' perversion of the 2004 election. His printing business profited handsomely from the Tweed Directions' campaign in 2004.

4. Within the Hearings and in written submissions, the more articulate supporters of the Tweed Directions' councillors, and the councillors themselves, sought to dismiss their critics, claiming that their focus was shaped by perceptions and not by hard evidence. The fact is that at each level of government community opinion is shaped by the community's perception of how well or how poorly the government is performing. No member of the public can have access to all of the facts and the factors that shape decision-making. If the decision-makers loudly and publicly support a certain policy line (such as supporting investment and development), community perceptions of their motives and actions will be shaped in accordance with that policy line. Public perceptions sit at the heart of democracy.

5. When it became public knowledge that certain councillors not only supported property development but actually owed their place on the Council to the financial support given by developers, community scrutiny of their actions increased and perceptions of failures in certain governance areas increased. In Local Government, unlike the State or Federal Government spheres, the executive arm of government and the legislative arm are not separated. The Council both makes the rules (on zoning and development control plans, for example) and makes decisions on the application of those rules.

6. The evidence shows that many of the perceptions were grounded in fact. The pro-development councillors were too close to the proponents of development. This is shown by patterns of bloc voting on major developments, by regular meetings of councillors and developers, by pre-council meetings at which decisions would be made, by voting on or debating issues where family, or other conflicts of interest, were involved, by resorting to exaggeration and lies to sway votes, by becoming public advocates for certain developments, by putting pressure on staff and by casting slurs on staff who did not agree with the councillors, and by making inappropriate attacks on other councillors.

4.2 Community Consultation

1. The Council used its Community Access program (two hourly sessions once a month) and its newspaper, Tweed Link, to provide information to the community, and to hear from the community. Neither vehicle was adequate in terms of the community's right to know. The Council's Communication Policy stated that the

attitudes, concerns, and needs of all Shire citizens must be known and considered in all council decisions as far as possible. The Council failed in relation to its own criteria.

2. If good governance were to be afforded a divided community, the Council had to abide by the dictums of its own Communication Policy which stated that a harmonious future for the Tweed Council area depended honesty, mutual trust, cooperation, and a willingness to respect other points of view. The Council failed to honour its own goals by a large margin. Inevitably that failure led to its failures of governance.

3. The Council's own Policy Document observed that consultation is a central point in sound decision making. The consultation process had to aim to maximize opportunities for residents to be informed, and to have their concerns heard and taken into account before a decision was made by council. The Council failed to live up to its rhetoric. It did not have any area/precinct or consultative committees that would allow them to consult regularly and formally with its residents.

4. Another aspect of the failure to consult is the lack of effort made by the Council to provide adequate and understandable information, particularly on planning and development assessment matters.

5. The evidence before the Inquiry suggests that the Council did not easily make available information that should be given to the public free under s. 12 of the Act or through Freedom of Information requests.

6. A number of groups were formed in the community without the Council's support. Rate Payers Associations are an example. Many of these groups were actually vilified and abused by the pro-development councillors, and rather than any attempt being made by the Council to communicate with the community, the very reverse happened.

4.3 Council's Use of Closed Meetings

1. Section 10 of the Act makes it plain that that attendance at council meetings by the public is a right that must be ensured by councils. From the period September 1999 to the end of 2004 the Minutes of Council meetings that were closed to the public filled 11 substantial volumes. 604 items were dealt with in the closed sessions of this period. 292 of these items related to planning, property and development matters, many of them dealing with projects and locations that caused dissension in the community. It is clear that the Council used the device of closing meetings to prevent the public from hearing debate on certain contentious issues. The Council acted quite wrongly in this regard.

4.4 Managing Complaints

1. Until 15 December 2004 Council did not have a complaints management system. This fact underlies the frustration of many members of the community in their dealings with the Council. If councillors and staff have no system for knowing or adequately responding to community concerns, there is inevitably a breakdown in the governance structure.

2. The complaints management system introduced at the end of 2004 only partially rectifies the Council's previous neglect. The appeal mechanisms appear to be inadequate, and there appears to be no definition of what the council would regard as a serious complaint.

3. The volume of correspondence sent to the Minister for Local Government's office and the Department of Local Government rose by 382% from 1999 to the end of 2004. The community, deprived of a mechanism within Council for dealing with complaints, clearly looked to others with whom they might raise issues of concern. By 2004 there were almost ten times more letters dealing with development processes and associated matters than there had been in 1999. 65.8% of references made to ICAC by the community in the same period dealt with planning and development matters. Half of the matters raised by the community with the office of the Ombudsman were to do with planning and development. It is clear that the concerns of the community were dominated by planning and development issues, and the Council had no means for dealing with them. This led to an effective breakdown in communications, and pinpoints a major fault in the Council's governance of the Shire.

4. The Inquiry made it clear that, in the interests of an open and transparent inquiry, it would not accept evidence given in anonymous written submissions, and that it would not hold any in camera sessions of the Public Hearings. Despite this, the Inquiry received numerous requests from the community and from staff seeking to provide information anonymously. More disturbing were the number of phone calls and e-mails received by the Inquiry from members of the community and staff who expressed a desire to provide evidence but were too frightened of recriminations if they did. The genuine fears expressed by these people provide a damning commentary on the governance exercised by the Council.

5.1 Natural Justice, Bias and the Role of Legal Representatives at the Public Hearings

1. On 19 January 2005 Tweed Shire Council engaged a law firm, Stacks/Northern Rivers to represent council interests at the Public Inquiry. The clear intention of the Council's brief was that Stacks would represent the entire Council: that is, the body of elected representatives and the staff. Engagement of Stacks meant the engagement of Mr Tony Smith, the managing director of the firm. Mr Smith attended the Public Hearings on a substantial number of days, and wrote a 72 page Submission in reply. Mr Smith, however, did not fulfil his brief. He failed to represent the interests of the entire Council. From the very start Mr Smith decided that he would represent the majority councillors, and declared in his Submission

in reply that the elected minority represented the "opposition". Mr Smith's duties were to assist the Council and General Manager in the preparation of submissions, in the review of transcripts, in representations at proceedings (as determined by the Council or the General Manager), and in reporting on matters related to individual councillors and staff. Mr Smith wrongfully anointed himself as the representative of the majority councillors (the Tweed Directions' councillors) and in so doing removed himself from representing the whole Council, as his brief determined. Mr Smith politicised his role. The $59,805.73 that Stacks received for Mr Smith's services amounted to a misappropriation of public funds.

2. Having politicised his role, Mr Smith formed an opinion of bias within the processes of the Public Hearings. A substantial base to his opinion lay with a statement made by the then Minister for Infrastructure, Planning and Natural Resources in Parliament. The statement was made when announcing that he and the Minister for Local Government had asked that a section 430 Inquiry be constituted to investigate certain matters related to planning and assessment processes of the Council. Mr Smith wrongfully interpreted the Minister's statement as indicating that the Inquiry had made conclusions on these matters, before the period for Submissions in reply had concluded. The Inquiry had made no such conclusions. Information related to the second of the Terms of Reference (the appropriateness of the procedures and processes adopted by Council in relation to its environmental planning responsibilities) was still being processed by the Inquiry.

3. Mr Smith failed to understand the purpose and processes of the Inquiry. This failure, and his wrongful interpretation of his role, led him to allege bias where none existed.

4. Mr Smith relied heavily on an article written by a Mr Stokes of Macquarie University to substantiate his claims of bias. Mr Smith wilfully misrepresented the general argument of the article.

5. Mr Smith essentially conducted a political campaign to derail the work of the Inquiry. Springing from his legal background Mr Smith chose the issues of natural justice and procedural fairness as his battleground. Mr Smith raised six issues which he claimed justified his allegations. None could be substantiated.

6. A major plank in Mr Smith's attack on the Inquiry related to the processes adopted. These processes are standard for section 740 Inquiries. They were announced on 16 December 2004 at the opening of the Public Hearings (attended by Mr Smith), and the text of that opening address was displayed on the Inquiry's web-site. Mr Smith had a full two months between the adjournment of the Hearings on 16 December 2004, and their resumption on February 16 2005, to make representations about the processes. He made none.

7. Mr Smith claimed that he should have been able to cross-examine speakers at the Public Hearings. Processes concerning cross-examination and re-examination were spelt out in the opening address. They were drawn up by a solicitor from the

Crown Solicitor's office. Mr Smith never grasped the essential point that the Inquiry was not a trial of individuals, or indeed a trial of any sort. It was an assessment of certain concerns about public administration, as defined by the Terms of Reference. Quite naively Mr Smith assumed that every opinion or piece of evidence given in written or oral submissions would be accepted by the Inquiry. He could not grasp the fact that any person within the community had a right at a Public Inquiry to express their views on these public administration issues. It was the duty of the Inquiry to hear as much evidence from as many sources as possible, and if the weight of evidence justified it to reach appropriate conclusions. A good deal of the evidence put forward did not lead to any conclusions.

8. Mr Smith fell back on the evidence of various court cases to justify his claims of a denial of natural justice. Mr Smith frequently referred to conclusions in this context, implying that the inquiry had at that point made conclusions. How Mr Smith could reach his judgements when the Inquiry had, at the time of his comments, not reached any conclusions, and had not published any conclusions, is most puzzling. It indicates a strong bias in Mr Smith's approach stemming from his self-appointed task of defending the six majority councillors. Basically, his dependence on evidence of various court cases is misplaced because the Inquiry was not a court case. It was, simply, an inquiry. In fact, Mr Smith was intellectually dishonest in his attempts to point to bias.

5.2 The Nature of a Section 740 Inquiry

1. Mr Smith's failure to understand the essential nature of an Inquiry established under section 740 of the Act, combined with his adversarial stance, rendered him almost totally incapable of appreciating the direction and outcomes of the Inquiry. He mistakenly placed his views almost entirely on the evidence brought forward at the Public Hearings. In fact, the Public Hearings, whilst important, represent just one stage of a process that takes many months of gaining and assessing information derived from many sources, including a large number of Council's files.

2. Mr Smith was fixated on the notion that there was a pre-ordained outcome to the Inquiry: the dismissal of the elected representatives. No such outcome was held by the Inquiry. The duty of the Inquiry was to asses and report on the various governance issues defined by the Terms of Reference. It was possible for the Inquiry to make recommendations, but no decisions on recommendations could be considered until the whole body of evidence had been assessed.

3. On 25 May 2005 the Governor announced that all civic offices at Tweed Shire Council had been declared vacant. That decision followed the tabling of the First Report in Parliament, which included a recommendation that the offices be declared vacant. The basis for the recommendation was the way in which the electoral process had been distorted by the activities of Tweed Directions and the candidates supported by that body. Mr Smith had directed most of his energy to attacking councillors, individuals and community groups who had raised issues

about environmental planning processes, and missed the significance of the electoral issues. This is a measure of Mr Smith's lack of understanding.

4. Mr Smith appeared to anticipate that the conclusions of the Inquiry would be made on the basis of an elaborate opinion poll. If more submissions supporting the Council were made than those critical of the Council, then the various matters to be considered in the Terms of Reference would be decided by that count. A large, and well-funded, campaign was mounted by a group in the community to attempt to derail the Inquiry. This led to a large number of formatted submissions being sent to the Inquiry. Unfortunately very few of these contained any evidence at all, and it became clear that the authors had not read the Terms of Reference of the Inquiry. The task of the Inquiry was not to conduct an opinion poll, but to gather evidence appropriate to the Terms of Reference.

5. Mr Smith prior to the start of the Public Hearings, and after their completion, made public statements that were designed to inform people of the processes and prospective outcomes of the Inquiry, and eventually to provide a conclusion that the Inquiry was flawed. As noted above, Mr Smith at no time appeared to grasp the intention and structures of a s. 740 Inquiry, and consistently referred to the Inquiry as a Royal Commission. Certain powers and protections are afforded the Inquiry by the Royal Commissions Act 1923 but these are simply supportive mechanisms. The roles of a s. 740 Inquiry are spelt out in the Act, but appear to have not been understood by Mr Smith.

5.3 Who are the Stakeholders?

1. Mr Smith did not understand the rights of members of the community in relation to the Inquiry. With his self-appointed role as the defender of the majority councillors he felt free to vilify and abuse any person that dared to express a view with which he disagreed.

2. Mr Smith demanded professional qualifications from any member of the community who wished to comment of Council's actions. This was akin to the demand for expertise required by Courts. The Inquiry is not a Court, and its issues revolve around governance. The community has every right to form opinions about governance, and to express those views in an Inquiry about the efficiency and effectiveness of the governance of the Council. This right lies at the core of democracy.

3. In this context Mr Smith made a vicious attack on an elderly lady on a disability pension who gave her time voluntarily assisting injured native animals. This experience led her to have concerns about how well council policies related to the protection of native fauna. Mr Smith devoted the second largest amount of space in his 72 page submission in reply, focussed on a single person, to denigrating this speaker. His breath-taking arrogance (based on no particular knowledge of the management of native flora himself) and bile were deplorable.

4. Mr Smith put forward a defence of the advocacy role that some councillors might assume. This was intended to protect certain councillors who were public advocates for certain developments. The contradictions in Local Government of having elected representatives acting as both advocates of proposals and "judges" of applications related to those proposals is one of the most difficult areas of conflicts of interest in the system. Mr Smith's comments merely signified his selective role as the defender of the majority councillors.

5. Mr Smith chose to adopt an adversarial role in relation to the Inquiry. As part of this role he convinced the Council not to remove legal privilege after the Council had voted in favour of so doing. Mr Smith resorted to a faulty interpretation of sections of the Royal Commissions Act to justify his stance. In reality, he was simply putting obstacles in front of the Inquiry's task of obtaining information. This attitude was in tune with the more general resort to secrecy adopted by the Council.

5.4 The Myth of Independence

1. Mr Smith based part of his defence of the Tweed Directions' councillors on their narrow win in the 2004 election. His implication was that this win exonerated their behaviour; their election win was a manifestation of democracy in action. Mr Smith's recourse to democracy rings hollow when the subterfuge foisted on the electorate by Tweed Directions and its candidates is taken into account.

2. Mr Smith's arguments based on the democratic rights of councillors fall flat for two reasons. First, technically councils do not have a place in the Australian constitution. They are essentially public administrative bodies created by the State to perform certain tasks. Second, the 1993 Act sought to structure a separation of roles and powers within councils so that the elected representatives focussed on policy issues in much the same way that directors of business corporations do. Councils have a hybrid structure that lies somewhere between being a public administrative unit and an independent public corporation serving public needs. The unusual basis of councils means that comparisons with the parts of government in Australia that are recognised in the constitution can only be made in a restricted context.

3. Mr Smith's strongest resort to democratic rights came with his defence of Mr Raso. Mr Raso had led the Tweed Fight Back group, an organisation dedicated to stopping the Inquiry. Mr Smith, the defender of the Tweed Directions' councillors, elevated Mr Raso to being a defender of democracy. Mr Raso had acted "to educate the community" on the Inquiry. He did so without any knowledge of s. 740 processes, and without any understanding of the Terms of Reference of the Inquiry. Mr Raso certainly acted in contempt of the Inquiry. Mr Raso was equally certainly a puppet of others who wanted to reap political benefit from attacking the Inquiry.

5.5 Perceptions and Understanding

1. Mr Smith believed that community perceptions about the governance of the Council were of no use, wanting members of the community to produce only "direct evidence". Mr Stokes' article, which Mr Smith had tried to use as a basis for attacking the Inquiry, has as its central theme the fact that perceptions of conflicts of interest are an enduring theme in Local Government. Community perceptions underlie a community's confidence in the integrity of a council's public administration. Councillors stand in a position of public trust, and democracy is weakened and perhaps destroyed when people's confidence in them diminishes or evaporates.

2. Mr Smith argued that members of the community relied singularly on newspapers for information about the Council. He believed that the Inquiry would accept the views of such people as untested evidence. Given the breadth of sources available to the Inquiry this suggestion was simply nonsensical. If members of the community did rely on information from newspapers it is hardly surprising, given the lack of consultative mechanisms within the Council, the absence of a complaints management system, and the frequent resource to closed sessions of council meetings. What is ironic about Mr Smith's derogatory view of the community's use of newspapers is his own rush to go to the press on various occasions. Mr Smith's wild and ill-considered abuse of community members went further by claiming, in a newspaper, that members of the public had perjured themselves when giving evidence, and that some submissions were derogatory. With no evidence at all he claimed that the Inquiry accepted such submissions as fact.

5.6 Misleading the Inquiry

1. Many of the witnesses who were associated with the Tweed Directions campaign gave evidence was false, understated their true involvement as well as the involvement of others.

   There was a concerted campaign mounted by those associated with Tweed Directions to deny evidence to the Inquiry. Evidence suggests but does not confirm that this emanated fro Mr Staerk and/or Mr Brinsmead. This campaign sought to suborn the Inquiry and its processes.

2. When giving his evidence Mr Brinsmead deliberately gave a significantly untruthful account in an attempt to mislead the Inquiry. This approach was premised upon the belief that he and others associated with Tweed directions had effectively suborned the evidence that the Inquiry could obtain. In those circumstances he that his false evidence was unlikely to be discovered and worth the risk.

   Mr Brinsmead, being a solicitor and having wider responsibilities in that role has breached those responsibilities.

Recommendations

Recommendation 1

That the Local Government (Elections) Regulation 1998 be revised with a view to establishing an electoral process that reflects the differences between the operations and purposes of Local Government and the operations and purposes of State and Federal Government.

- Local Government Elections legislation is modelled on the New South Wales Parliamentary elections legislation.

- The problem with transferring parts of the New South Wales Parliamentary elections legislation to local government is that the structure, operations and roles of the two spheres of government differ in significant ways.

- Essentially, the concepts of Parliamentary governance and governance at the council level are quite different.

- In Parliamentary governance the actions and policies of the government are scrutinised by an identified opposition, and the legislative and executive roles are separated. In Local Government the Charter (s. 8 of the Act) intends councillors to work together in the interests of the whole council, and there is no formal opposition. In Local Government legislative and executive roles are not functionally separated.

- In local government frequently the only opposition, in the sense of scrutinising aspects of governance, is the local community and the media. The opportunity to scrutinise and debate issues afforded by the Parliament is not similarly present in local government.

- In local government political parties with detailed policy agendas that are presented at elections do not operate in the way that political parties do at the State or Federal elections. Political parties often field candidates at council elections, but the policies presented to the electorate in any one council will reflect issues that are pertinent to that council, and not necessarily to the other 151 councils in the State. Parliamentary elections legislation contemplates the presence of political parties with political agendas that apply to the whole state.

- Since the level of scrutiny of councils is weak (councils do not afford their communities much opportunity to debate policy and governance issues) it is important that there be a very high level of transparency of electoral processes. The community must have a clear understanding of what policies each candidate brings, what associations the candidates might have with interest groups, and the sources and size of monetary and other resources applied to his or her campaign. In relative terms the community places a great deal more trust in the individuals who represent them at council level than voters do in individual members of State or Federal Parliaments.

Recommendation 2

That the processes adopted in the Local Government elections of 2004 be reviewed and reformed in relation to the grouping of candidates, the order of candidates and groups on ballot-papers, the form of ballot papers, the voting procedures in relation to ballot papers, and the registration of electoral material.

- It appears that the processes adopted in the 2004 elections were based, at least in part, on the processes used in the previous State elections for the Upper House of the New South Wales Parliament. A justification for this appears to be a desire to provide voters with similar structures and so reduce any confusion that might be associated with voting in both State and Local Government elections.

- The evidence of the 2004 Tweed Shire Council election suggests that many people were confused by the voting requirements, as indicated by the high level of informal votes recorded.

- One of the unnecessary sources of confusion was caused by the very large number of candidates (106) spread across 17 groups, with six or seven candidates registered in each group. It is virtually impossible for the electorate to understand, or even know, the policies that each of the 106 candidates might espouse.

- In the 2004 Tweed Shire Council election eleven places were to be filled on the council. With 106 candidates this meant that over one in nine candidates would not be elected. Moreover in each of the groups of six or seven candidates only one or two persons per group had any chance of being elected. If each of the 17 groups had an equal chance of providing one or two councillors, then the number of candidates with a chance of being elected would be no greater than 34. In fact, factors such as the profile of candidates and their levels of recognition by the voters, their policies, and the level of resources underlying their campaigns would reduce the realistic chance of an individual being successfully elected down to around 20 candidates.

- If two or more candidates could form a group it would reduce the number of candidates required to form a group and consequently reduce the number of "dummy candidates". Presently, electors are required to vote for a least half the number of vacancies. If this was amended to provide for optional preferential voting it would make it simpler for voters. Under this arrangement voters could express a preference for one or all candidates (or groups). This would make voting simpler for electors and for candidates in advocating how to vote.

- Presently the registration requirements for those how to vote cards to be distributed on election day is at odds with the voting requirements. The result is that groups are required to recommend preferences to other groups. This is confusing to voters.

- Under the above proposal, candidates and groups could design their how to vote cards advocating allocating only one preference (to a candidate or group) or preferences to more than one candidate. This would be simpler for voters to understand.

- The evidence of the 2004 Tweed Shire Council elections shows that around 80 per cent of the "candidates" were there just to make up the numbers, knew that they had no chance of being elected, and quite bizarrely had no real desire to be elected.

- The structure of the 2004 election turned the system into a charade. The processes could only confuse and befuddle voters, and provide opportunities for entities to hide their real identities and purposes. The processes substantially increased the costs of the elections to both councils and to candidates.

Recommendation 3

That the provisions within the Regulations and the Electoral Act concerning declarations made by parties, groups and individuals be amended to:

1. **make it obligatory for each party, group or individual to provide the returning officer with details of the size and source of electoral donations (whether they be in money, in kind, in labour, in material or in services) five days before the election;**
2. **prohibit the acceptance of any donation after lodging the declaration for a period of 12 months after the election;**
3. **make a failure to provide a declaration on time, grounds for a candidate forfeiting their eligibility to be elected;**
4. **the returning officer should be required to make the declarations available at the returning officer's office and at polling places on election day;**
5. **the Electoral Commissioner should be required to advertise in the press that the declarations are made available;**
6. **provide that the costs of making the declarations public be covered by the general costs of holding the election met by the councils;**
7. **ensure that any political trust funds and the like be fully disclosed within a week of their formation;**
8. **provide the Electoral Funding Authority with the power to audit any declaration, and to develop a system of audits following each election;**
9. **to enable the Electoral Commissioner to take action on persons or entities providing misleading information in Third Party declarations that hide the fact that the "Third Party" is actually funded by an undisclosed Fourth or Fifth Party;**
10. **have the Election Funding Authority be required to publish on the SEO website the full details of donations and expenditure by candidates within 150 days of an election;**
11. **establish strong penalties for candidates that provide false declarations, including fines, gaol terms, and dismissal from council if they were elected;**
12. **allow only registered political parties and candidates to place advertisements or print and circulate electoral information;**

13. allow a sufficient period in which to commence prosecutions that will allow offences, such as those in s. 109 of the 1998 Regulations to be investigated and reported on.

- The Election Funding Authority Act was not drawn up with Local Government in mind, and some of its provisions do not reflect the possible problems that are associated with election funding and expenditure in the Local Government sphere.

- The Tweed Shire Council Public Inquiry has demonstrated that any entity with sufficient resources and compliant candidates can attempt to organise a team of candidates at a council election without the voters knowing or understanding the structure and the purpose of the team, or indeed if the team actually exists.

- The clear purpose of such entities in putting together considerable resources to fight an election is to ensure that the elected representatives would pursue policies and take actions that would benefit their interests.

- The purpose of having such entities register as political parties is to make their presence and goals transparent to the voting public; the adoption of a system of registering such groups, and the restriction of campaign advertising and the printing and circulation of electoral information to candidates and registered groups is to ensure that the voters are aware of the source and purposes of campaigns such as the Tweed Directions' parallel campaign in the 2004 election.

- The argument often put forward that electoral donations are common to elections at all three levels of government, and therefore regulations cannot restrict what happens in council elections, is false. The significance of electoral donations at council elections is much greater than at State or Federal elections because the range of policy areas in the domain of councillors is quite small, compared to other levels of government, but the fusion of legislative and executive functions within local government means that individual councillors, or associated groups of councillors, can establish policy settings or take actions that can provide immediate and substantial material benefits to those who support their campaigns.

- A further factor is that council elections generally require much less expenditure by candidates or groups. The election outcomes only affect the council area itself; is decided by a relatively small number of voters; and concerns are restricted to a relatively limited number of issues. Compared to State or Federal elections entities that contribute to an election campaign need expend limited amounts of money to advance their cause. Because the average expenditure by candidates is low, even modest donations can provide candidates with electoral advantages. If, as happened in Tweed Shire, the quantum of money raised and expended was very large ($467,238 at a minimum and possibly as great as $632,970[15]) the advantage to candidates was commensurately greater. The election, therefore, was not contested on a level playing field. The interests of Tweed Directions, predominantly the interests of proponents of

[15] Owing to irregularities in the Tweed Directions' declaration the exact amount could not be identified (see First Report). The irregularities have been referred to ICAC.

development, were able to be promoted substantially wider and more frequently and in a more sophisticatedly (in terms of media processes) than the interests of other parties in the election. The Tweed Directions' team mislead the electorate by posing as a set of individual candidates, and neither the structure or intentions of the team were made known, nor were the size and source of their monetary and other resources.

- The problem of proponents of developers gaining control over councils by assisting compliant candidates with extensive campaign resources, and then having their interests protected or advanced by those people when elected, is very real. One solution is to prevent candidates with a connection to the property industry from standing for council. Besides the democratic arguments against such actions, there are a number of practical problems associated with the idea. First, compliant candidates may not have any direct connection with the property industry (as was shown in the Tweed elections), but be satisfied to take donations offered to them and respond to the implicit obligations associated with accepting such donations. Second, the terms "connections with the property industry" or "proponents of development" are too ill-defined to be practically applied. Besides the problems of definition (is a lawyer who assists a developer or a financier who makes a loan to a property interest or an advertising agency that promotes a development to be classed as a proponent of development?), there are problems of degree (should a lawyer or financier or advertising agent be described as a proponent of development if he or she devotes 70% of their time to property work, or 50%, or 35% ….?).

- A further difficulty with creating systems that will reduce the capacity of special interest groups to influence local government election outcomes is the identification of just what interests are at stake. The major part of the funds used by Tweed Directions came from outside of the Tweed Shire. The essence of local government, as the term suggests, is concerned with governance of an identified area, for the good of the local community. The more distant the source of donations, the less likely there will be a genuine concern by the donors with the well being of the whole community, and the more likely there will be an overriding concern about the donors' special interests. As the system of donations becomes more complicated in this fashion, the best chance of providing a transparent electoral system is to introduce measures that force candidates and backing groups to reveal themselves to the community before a vote is cast.

Recommendation 4

1. **That an urgent and widespread review of the planning and determinative roles of local government to determine whether the existing role should continue be made.**

2. **That there is a similar need to review the past role previously performed by DIPNR and determine the future role of the Department of Planning in order to provide a more effective linkage of the roles of the State and councils within the planning system.**

3. **Additionally, because of the involvement of a number of State departments and bodies in the decision-making processes there is also a need to consider their role.**

- Current planning roles are split between local government and the State, with the principal planning being undertaken at a local government level.

- Notionally, the State exercises it powers at a higher level providing regional and statewide planning, principally through Regional Environment Plans and State Environmental Planning Policies. Additionally, legislation anticipates that it will provide a review mechanism for certain types of development.

- The evidence obtained by the Inquiry suggests that, at least in the case of the Tweed, that the planning and determinative roles of councils are insufficient and are unable to provide adequate resilience both in planning and the determinative roles.

- The current regime allows councillors who are likely to have little if any real expertise in planning, or the associated skills required to provide planning within their local government areas, to determine applications. Often councillors are simply opportunistic in determining applications without regard to advice provided to them and without giving reasons for their determinations.

- The Inquiry has serious concerns that the current regime is open to abuse by an elected body either pursuing policy ideals or simply ignoring processes.

- Additionally, at the state level, DIPNR demonstrated little guidance or rigour. It blindly adopted council planning regimes and has, when faced with concerns over the regime, failed to act to bring about changes that would overcome those weaknesses.

- Allied to this, though providing no excuse, was a clear lack of resources provided to DIPNR to deal with the increased workload that has arisen from a centralisation of planning issues through the implementation of SEPP 71 and the like.

- Whether to deal with a lack of resources or through abrogation of its role, DIPNR sought to divest itself of its responsibilities through the use of delegations and the ability of councils to assume its concurrence.

- DIPNR has adopted a monocular view of its role as a concurrence and review body.

- There are concerns that bodies such as DEC and DLWC, despite their expertise and the importance of their role, had a limited role as commentators on development applications. While they could provide recommendations, there was no obligation to adopt them.

Recommendation 5

That the problems that arise in councils from councillors losing public trust, because they are perceived to establish policy settings or take actions that are biased towards outcomes favouring proponents of property development, be addressed by adopting some or all of the following:

1. **Requiring councillors to provide explanations, in an open and minuted council meeting, for their decisions when they are made against the advice of their professional officers;**
2. **Having councils establish effective processes to ensure that the public demand for information is met in relation to s.12 of the Local Government Act 1993 and in accord with Freedom of Information rights;**
3. **Having councils establish mechanisms whereby effective community consultation systems can be put in place;**
4. **Revising s.10 and s.366 of the Local Government Act 1993 to ensure that councils provide open and transparent governance systems where closed meetings and extraordinary meetings are used to a minimum;**
5. **Requiring councillors to report to council on meetings with special interest groups, such as proponents of development, including written records of what was discussed at the meetings;**
6. **Requiring councils to give adequate notification of development applications, rezonings, or amendments to conditions of a development approval to all interested parties in a timely fashion;**
7. **Requiring councils to provide interested parties within the community a plain English guide to aspects of development applications or rezonings or amendments in which the community has an interest;**
8. **Encouraging councils to develop simpler, less bureaucratic, and less legalistic planning frameworks;**
9. **Through community consultation and community interaction with planning and assessment processes establishing resilient planning regimes;**
10. **Establishing effective compliance systems in relation to conditions of approvals;**
11. **Having councils establish Independent Hearing and Assessment Panels (IHAP) to process controversial or large development applications; the reference of an application to IHAP would be**

activated by a request made by three or more councillors, or by the fact that one or more councillors have a pecuniary interest or a conflict of interest in a development application;

12. **Creating planning commissions along the lines of the systems used in many areas of the United States, where an independent body appointed by the council oversees master planning for developments, and makes decisions on development applications in relation to the plans; such commissions would have to make independent and unbiased decisions and would face strong penalties if they failed in this regard;**
13. **Establishing an independent group, such as a planning commission, to provide a master planning and approval team for regions that may include a number of individual councils.**
14. **Establishing a system at the State level that is appropriately resourced to handle development approval matters where applications automatically referred to the State;**
15. **Ensuring that in any system where the State takes responsibility for making assessment decisions on applications sufficient opportunity is afforded for community concerns to be heard and taken into account, independent of the views expressed by a council;**
16. **Ensuring that where several State Agencies are involved in a decision a harmonious and non-fragmented decision be reached, and clear guidelines are established for ensuring compliance with the outcomes.**

- There is a recurring theme that affects the image of local government, and eats at the public's trust in the system: that is the perception of conflicts of interest, and perhaps corruption, stemming from the councils' roles in managing their responsibilities in relation to planning and assessment matters; until, and unless, local government can put to rest community suspicions and fears about how it manages its commitments in these areas, community doubts about its effective capacity to establish efficient and effective governance will persist.

- The blame for this situation is often sheeted home to the property development industry. Such a focus is often misdirected. Australia is a market economy, and investment in, and development of, property forms an important and significant base to the economy. Developers bring innovation, scale and resources to the task that cannot be easily replicated by the public sector. Undoubtedly there are instances where some developers have put pressure on councillors and council staff, and have found ways and means to get decision-makers to produce outcomes that support their commercial goals. The fundamental problems, however, stem from the structures of government. To provide a system that is free from images of conflicts of interest

requires two things: a robust local government system, and a resilient planning regime.

- The local government system is far from robust. It lacks recognition in the Australian constitution, and on that basis is not strictly a tier of government at all. Its main claim to being so stems from the fact that the governing board of a council is elected by the community, and its statutes, by-laws and regulations have authority afforded by the Local Government and other Acts. Since the system lacks constitutional recognition, another view suggests that councils are administrative bodies created by the State to perform certain duties of public administration. This hybrid base to the local government system weakens its authority and its ability to perform its functions in the way set out in the council's Charter, section8 of the Local Government Act.

- The effective outcome of the Tweed Directions' scheme to put in place a group of compliant councillors to administer Tweed Shire Council was to give control of a publicly funded, public administration body (the council) to a group who owed their place on council, and therefore their allegiance, to a body made up of proponents of development. In so doing they subverted the democratic base of the system, the community's right to elect councillors, and promised to subvert the administrative role through pre-determined policies and actions in relation to planning and assessment.

- The fuzzy status of local government may change. In *Government Response to the Report of the House of Representatives Standing Committee on Economics, Finance and Public Administration,* June 2005 page 6 it is stated that "The Australian Government supports a Parliamentary resolution that recognises local government as an integral level of governance in Australia and the Government will propose such a resolution in both Chambers of Parliament". Such a move would remove the fuzziness that has beset the system, but it will not guarantee a robust system. To achieve this the functions and responsibilities of local government have to be defined more clearly than they are now, and suitable resources have to be found to permit local government to fulfil its tasks effectively. There is also a need to rationalise the base of the system of 152 councils. The system in New South Wales contains councils that have a population spread from 1,414 to 278, 532, and a range of areas of 5.8 square kilometres to 53,511 square kilometres. In terms of providing a robust local government structure to overcome problems in the planning and assessment areas, the metropolitan area of Sydney is in most need of restructuring. This is because of the disparities in size and resource bases across the 43 councils, allied to the scale and value of property developments, present huge challenges to councils trying to provide robust administrative systems.

- Coastal councils in particular face strong growth pressures that magnify the problems associated with their duties to manage complex natural environments. There is evidence that the Tweed Directions' type of intervention in the electoral system of Tweed Shire can be detected, in various forms, in a number of other coastal councils. The recommendations to strengthen the transparency of electoral donations would help address some of the problems, but it would not of itself establish a resilient planning regime.

- The failure to construct a resilient planning regime is not confined to Tweed Shire. Many councils in New South Wales have similarly failed. The reasons for such failures have to be understood in terms of endemic problems across the planning and assessment systems of the State. At the heart of the problems is the immensely complex and legalistic regime that has been created. Attempts to reduce the complexity have been made but have not been greatly successful. As the levels of complexity rise so too do the levels of opaqueness, and the less transparent a system becomes the less likely it is that public trust will be forthcoming, and the more likely it is that corrupt practices will emerge. Such complexity indicates a fundamental weakness in the planning system. The New South Wales system is vastly more complicated, and opaque, than the systems in countries that have similar social, economic, and political fabrics. An inevitable result is both poor planning outcomes, and an overly frequent recourse to the Courts to determine outcomes.

- One of the most pernicious effects of over-planned systems is the impact on property values. The structure of the New South Wales system can be traced ultimately traced to British planning systems, which had their genesis in the nineteenth century. Then people like Ebeneezer Howard promoted the need to separate land uses into discrete categories so that the baleful effects of the Victorian industrial city could be ameliorated. The Victorian city is long gone, but the zones, which express the types of uses permitted, represent the modern version of the old ideas of separation. Zoning creates a property system in which the outcomes, in terms of price, are determined by planners (and councillors) and not by market forces. It is something of an heroic assumption to expect that the planners can anticipate market demands in any precise way (how much residential land is needed, how much industrial etc), and any estimating mistakes they make, such as underestimating the land and location needs for a particular use, have the effect of ratcheting up the price of land related to that use. This is not to say that zoning is of no value, but to make the point that the people making the zoning decisions can make mistakes (and do) and their mistakes can artificially push up prices and then translate into negative outcomes for communities such as problems of providing affordable housing.

- The rigid, inflexible, legalistic and sometimes counter-productive planning systems applied in many councils do not generally lead to resilient structures. An associated problem is that the number of professional planners within local government is too small, and consequently they work under great pressure. The problems extend back to institutions of higher learning in terms of the number of planners turned out, and the skills they are provided with in their training.

- A solution to the many factors that prevent the development of a robust local government system allied to a resilient planning regime is often seen to lie in the State Government taking over the powers of councils in certain areas. This has been the approach with coastal planning matters. The record, however, of State intervention is not a particularly good one. There are at least three reasons for this. First, the State simply does not have the resources to handle the many cases that might be spawned by the 152 councils in the State. Second, planners at the State level are dealing with the same kind of problems as council planners: systems that are rigid, overly

complex, extensive and legalistic. Third, it is impossible for the State Agencies to acquire the same level of expert knowledge on local situations as councils, and so councils inevitably play a significant role in a process that was initiated to exclude them from the decision-making.

- Removal of the powers of councils to make decisions on certain planning and assessment matters is a drastic, but not unreasonable, path to follow in certain circumstances. Solutions intermediate to having councils or the State managing processes, such as the use of IHAPs or the US model of planning commissions, offer the best chance of removing the perceptions of conflicts of interest that have beset the local government system in relation to their roles in managing planning and assessment matters.

- In the subsequent recommendations specific suggestions on where the problems lie within the planning and assessment area are examined.

Recommendation 6

1. **That the Environmental Planning and Assessment Act require that persons providing expert advice:**

- **in support of development proposals,**
- **in assisting councils or consent authorities determination of applications**
- **or in providing advice on behalf of objectors,**

hold appropriate and recognised qualifications and have relevant experience in the field that they profess expertise in.

2. **That they are members of a recognised professional body that requires demonstrated professional qualifications and experience as a pre-requisite to membership, and adopts and requires compliance with standards of conduct.**

- Under the current planning regime, persons providing expert advice, whether on behalf of applicants, directly to a council or consent authority, or on behalf of objectors are not required to be formally qualified, nor to have any relevant experience.

- It is imperative that consent authorities obtain material of the highest quality and independence.

- The potential lack of expertise and experience risks the quality of the council's or the consent authority's consideration of the application.

- The inquiry has heard evidence indicating a wide variation in the quality of expert reports provided to councils and to consent authorities.

- Due to the potential lack of expertise within councils or within consent authorities, there is a need to ensure that expert opinion provided to such bodies is soundly based.

- The evidence before the Inquiry pointed to serious potential conflicts of interest where the council hires a consultant who is paid for by developers, or a developer hires and pays for a consultant to provide information for the consideration of the council.

Recommendation 7

1. **That the Environmental Planning and Assessment Act both recognise and emphasise the role of expert advice in the determination of applications.**

2. **That the Environmental Planning and Assessment Regulations formally recognise the professional bodies representing the various fields from which experts are drawn, with a view to mandating membership of such a body as a pre-requisite to providing expert reports.**

3. **That the Environmental Planning and Assessment Regulations require that, as a condition of recognition, professional bodies require that their members hold appropriate and recognised qualifications and have relevant experience in the field of expertise, are bound by standards of integrity and are liable to disciplinary action and withdrawal of membership.**

- The evidence provided to the Inquiry indicated that, while many fields of expertise associated with the development process have a professional body that require professional qualifications and experience as a precursor to membership, not all fields of expertise, particularly those associated with environmental issues have a paramount representative and supervisory body.

- Additionally, the Inquiry has heard that the quality of the reports provided by experts is variable, with some reports being of inferior quality.

- There is a need to provide a solid and recognised basis for establishing the "expertise" of persons providing their opinions in reports.

- This is most appropriately and efficiently done by reference to professional bodies having oversight (through their particular knowledge) of their membership.

- Formal recognition of professional bodies will of itself engender the recognition of expertise and foster the attainment of skills. It will also remove concerns over parlous or biased advice being given to councils and other consent authorities.

Recommendation 8

1. **That the Environmental Planning and Assessment Regulations adopt a code of conduct governing the persons who provide expert reports to assist councils and consent authorities in their determination of applications.**

2. **That the code of conduct be modelled on codes adopted by various courts and tribunals in New South Wales, principally, the Supreme Court and the Land & Environment Court.**

- Experts providing reports accompanying development applications are, de-facto, agents for the proponent.

- To this extent their reports are not independent and may gainsay or espouse the ambitions of the proponent.

- Similarly, experts retained by objectors may similarly gainsay or espouse the views of the objectors.

- The role of experts retained by councils and consent authorities may, depending upon the terms of the retainer, also be clouded.

- These reports may, under the guise of expert commentary, become little more than promotional material, with no real consideration of the issues to be considered under section 79C of the Environmental Planning and Assessment Act.

- The determinative process is not assisted by the provision of such material.

- Consent authorities rely on expert reports to assist them in determining applications. Their usefulness is undermined if they are not frank, honest and independent. Advocacy does not sit with proper consideration of an application under s.79C of the Environmental Planning and Assessment Act.

- Courts and tribunals have grappled with the need to weigh and balance competing views put forward by experts called by opposing parties. In order to ensure that they receive competent, honest and independent advice, many courts and tribunals have adopted codes of conduct that require impartial assistance from experts. There is also a paramount obligation for the determining body (the court or tribunal) to ensure that the expert not adopt the role of advocate, that the expert has appropriate qualifications and experience and to obtain an acknowledgement that the expert is bound by the court or tribunal's code of conduct.

- There is a need for those persons providing expert reports to acknowledge that their reports have a higher and more important value than merely providing support for a proponent's aspirations. Adopting a code of professional conduct in similar terms to that of the Planning Institute of Australia, which requires that a development is sustainable, provides for the protection of natural and man-made resources, secures an

appropriate environment and is efficient and economic, would go a long way to achieving these goals.

Recommendation 9

1. **That the Environmental Planning and Assessment Act and Regulations be amended to provide that material accompanying a development application address such of the heads of consideration contained in section 79C as are relevant to the application.**

2. **That the Environmental Planning and Assessment Regulations require that a statement accompany the application indicating why it is suggested that those heads of consideration that are not addressed in the statement are not applicable.**

- Regulation 50 (via schedule 1) sets out the material that is currently required to support a development application.

- The material that is required does not fit with the material that will facilitate consideration of the application in accordance with the principles contained in s. 79C.

- There is currently no requirement for an applicant to provide this material.

- In the absence of this advice there are concerns that important issues may simply slip through the cracks and not be noticed nor addressed in the application or subsequently in its consideration.

- There is a need to ensure that discrete environmental issues are highlighted, rather than placing responsibility on a reviewer to glean what issues may arise during the course of reviewing the application.

- Proponents should be encouraged to provide all relevant material that will assist the consideration of their applications by the council or the consent authority. Councils and consent authorities should not have to obtain expert advice in order to ascertain if there are issues that should be addressed by applicants. Rather, in limited circumstances they may wish to obtain expert advice to assist their consideration of applications or how best to condition any consent.

Recommendation 10

1. **That consideration be given to the question whether the provisions of section 232 of the Local Government Act are adequate or appropriate. section232 provides that a councillor, as a member of the governing body of the council, plays a key role in the creation and review of the council's policies and objectives and criteria relating to the exercise of the council's function as a planning body and as a consent authority.**

2. **That if it is considered that councillors are to have a role in the creation and review of the council's policies and objectives, then it is necessary, to the extent that their policies and objectives apply to planning and development matters, that they be formally enshrined in Development Control Plans after a consultation process.**

- Election of candidates on a particular platform, whether it be pro-development or some other sentiment, should not be seen as a de-facto policy guiding and legitimising their decisions.

- While candidates may espouse the virtues of their platforms, political expressions aimed at securing election do not sit conformably with the duties of councillors in the discharge of their planning and determinative functions under the Environmental Planning and Assessment Act.

- The principles of the Local Government Act that requires openness and transparency in council's dealings can only be achieved through adoption of "policy" as contained in a Development Control Plan through consultative processes.

- The adoption of such a policy would guard against discriminatory, preferential or opportunist treatment of applications and provide an underlying base for decision-making.

Recommendation 11

1. **That if councillors, in their determination of development applications disregard the recommendations of staff, or if they alter, add to or delete conditions of consent, they provide reasons for doing so at the time of making their decision.**

2. **That such reasons be recorded in the minutes of the meeting.**

- There are widespread concerns in the community that councillors ignore the recommendations of staff, particularly where refusal is recommended.

- In the Tweed, such were the concerns of council's former Director of Planning that he put in place a processes to ensure that where councillors had expressed their intent to grant consent against recommendations, the matter would not be dealt with but await the provision of draft conditions of consent.

- Councils employ suitable qualified staff to provide expert assessment of applications in their reports.

- Collaterally, it is unlikely that many councillors hold skills in any of the fields that combine to review development applications.

- The current regime does not require that councillors give reasons for ignoring the expert advices of the staff.

- The recording of reasons for making decisions contrary to the recommendations of staff assists the Local Government Act's goals to provide openness and transparency in decision-making.

- The evidence suggests that perhaps 95% of decisions on development applications are made by professional officers under authority delegated by the council. The possibly 5% of consents handled by councillors, however, are generally the largest and most controversial applications.

Recommendation 12

That the Environmental Planning and Assessment Act more formally enshrines reference to threatened species legislation in the determination of development applications.

- The Inquiry has received a substantial body of evidence, principally provided by the Department of Environment and Conservation (DEC) that suggests that the council disregarded advice provided by the department in its decision-making.

- The evidence suggests a general disregard for or a lack of consideration of the importance of threatened species legislation.

- The concerns raised by the DEC were echoed by a number of local residents.

- It is likely that other councils have disregarded its responsibilities regarding the natural and cultural values of land. Such is the nature of these values, if they are lost, they may never recover.

- There are substantial pressures being placed on councils, particularly in coastal areas, that unless high emphasis is placed on natural and cultural issues they may be overlooked or ignored.

Recommendation 13

That section 121 of the Environmental Planning and Assessment Act be amended to expressly provide for the making of orders that secure the intent of section 5A of that Act, including specific reference to the making of orders preventing any acts that may have significant effects on threatened species, populations or ecological communities, or their habitats or which may be a threatening process and for restoration or for rehabilitation.

- The Environmental Planning and Assessment Act recognises the importance of threatened species legislation.

- The Environmental Planning and Assessment Act does not expressly enshrine this legislation in the table in section 121B that sets out the orders that may be given by a consent authority or by the Minister.

- To the extent that the Environmental Planning and Assessment Act fails to do so, it is defective.

Recommendation 14

That an urgent and widespread review be made of the council's planning regime including its strategic planning, the Local Environment Plan and the various Development Control Plans to ensure:

- **that future development occurs in areas that are appropriate to the nature of that development**
- **that council's planning regime presents a clear and understandable picture of council's vision for the future development of the area**
- **that council's planning regime is both coherent, equitable and resilient**
- **that conditions of consent are able to give effect to councils intentions and are enforceable**

❖ There are serious concerns that the council has set aside areas for large residential and other developments based either on historic assessments or inadequate review.

❖ There are other serious concerns that there has been ad hoc development within the Tweed particularly in rural, low lying or other areas that have not been suited to these developments.

❖ The Tweed is an area of high biodiversity, exceeding Kakadu and approaching the Daintree area. It is the home to a number of rare and endangered species. The DEC has raised serious concerns that the council has not given adequate consideration to:

- the natural and cultural values of land when determining developments
- the cumulative effects of developments
- has not enshrined suitable conditions in its consents.

These views have been echoed by a number of local residents

❖ The area is facing considerable pressure from developers who wish to carry out developments both in coastal and in rural areas. This pressure is emanating from outside the area and within the Tweed. So far as it concerns local developers, many of these were associated with the Tweed Directions campaign and the Tweed Directions councillors.

❖ The current planning regime does not currently have sufficient resilience to meet these pressures.

❖ The council has ignored concerns that have been raised by staff and by DIPNR over the clarity of the wording of the Local Environment Plan.

- The majority councillors have used their voting power to stand in the way of proper planning in the Tweed in order to provide preference to and to grant concessions to developers.

- The councillors have failed to reflect and to impose as conditions of consent various provisions contained in council's Development Control Plans and section 94 Contributions Plans.

Recommendation 15

1. **That section 96 of the Environmental Planning and Assessment Act be amended to provide greater prescription to the source of a consent authority's power to modify development consents.**
2. **That, in order to provide further clarity (if necessary), the Environmental Planning and Assessment Regulations be amended to further assist in providing clarity.**

- Section 96 currently operates to permit development consents to be modified.

- Sub-sections (1) and (1A) deal with incidental or minimal modifications and do not require clarification.

- Sub-section (2) provides that a consent authority may modify a consent if it is satisfied that the development is substantially the same development as the original development. The requirement that the consent as modified be "substantially the same development" lacks adequate prescription and requires review.

- The evidence provided to the Inquiry suggests that in many circumstances staff are unsure whether an application to modify a consent falls within the definition.

- The inquiry has seen conflicting legal advice regarding the operation of the section. Proper planning processes are not assisted by vague or uncertain powers contained in legislation. The Inquiry has also seen instances where staff have inappropriately recommended that modifications be granted to avoid the operation of SEPP 71 and delays associated with making applications under that policy.

- Councils and other consent authorities would benefit from a clearly worded section in the Environmental Planning and Assessment Act supported by regulations that clarify and direct councils and consent authority when exercising the powers to grant modifications to consents.

Recommendation 16

1. **That the powers to seek amendments to development applications prior to their determination be formally enshrined in the Environmental Planning and Assessment Act.**

2. **That the Environmental Planning and Assessment Regulations prescribe the circumstances in which an application may be amended prior to its determination and the extent to which amendment is permissible.**

- The Environmental Planning and Assessment Regulation, which currently acknowledges that there is power to amend an application prior to its determination.

- The circumstances in which an application may be modified are not spelt out, nor is the extent to which an application may be "amended".

- The Inquiry has also seen an instance where staff have inappropriately accepted an "amended" application to avoid the operation of SEPP 71.

- The current lack of prescription neither supports nor promotes good planning processes.

- Councils and other consent authorities would benefit from a clearly worded section in the Environmental Planning and Assessment Act supported by regulations that clarify and direct councils and consent authorities when exercising the powers to consider "amended" applications.

Recommendation 17

The council must urgently undergo a process of implementing identified and enforceable controls on the SALT development, probably through the adoption of a master plan supported by DCP.

- At the time that the Inquiry was convened the Ray Group had sought to increase the density of the SALT development by over 35%. While this application did not ultimately proceed, the developer had expressed a view that the master plan that was originally proposed by it was not binding. In those circumstances there must be serious concerns that the council does not have a sufficient and enforceable planning regime to guide this, the largest development in the Tweed.

Recommendation 18

1. **The Department of Planning must regain control of its concurrence powers.**

2. **Collaterally, the department must itself exercise the review powers granted to it.**

- Through State Environmental Policies such as SEPP 1, DIPNR has been granted powers to review and to provide input into the determination of some development applications. The Parliament has recognised the importance of this role.

- Notwithstanding Parliament's intent, DIPNR has delegated and, by permitting councils to assume concurrence, abrogated its responsibilities as the State's planning review body. In doing so, it has undermined and weakened the resilience of the planning process.

Recommendation 19

Consideration be given to strengthening public participation in the decision-making processes under the Environmental Planning and Assessment Act, by

- **amending section 79C to include the views of residents and ratepayers as a head of consideration**
- **requiring that reports refer to and consider submissions made to the council or consent authority**
- **enlarging the rights of 3rd parties to institute appeals to the Land and Environment Court**

- The Environmental Planning and Assessment act does not reflect the principles of public participation enunciated by the Local Government Act.

- Councils determine the great majority of development applications. Local communities are generally likely to be most affected by development consents, yet the Environmental Planning and Assessment Act does not specifically recognise them as separate from the "public interest" as a whole.

- The views of those who may be most affected by a proposal are not given due emphasis. Their views as those most affected may be lost in the perceptions of others who may not be directly affected by proposals.

- The current rights available to the community to challenge determinations is extremely limited, either limited to particular types of development or based on illegality. In the latter instance the community faces substantial legal costs in pursuing legal proceedings. These cases are either won or lost. There is no current ability to seek a review of the determination or to seek modification of the consent conditions.

Recommendation 20

1. **That the transcript of the evidence of Paul Wesley Brinsmead, together with the material provided by Baudino & Associates in response to the summons issued by the Inquiry, be referred to the Attorney General for consideration on whether proceedings should be commenced against him for giving false testimony when giving evidence under oath during the Public Hearings.**

2. **That the transcript of the evidence of Paul Wesley Brinsmead, together with the material provided by Baudino & Associates in response to the summons issued by the Inquiry, be referred to**

- **the Chief Justice of the Supreme Court of New South Wales**
- **the Office of the Legal Services Commission of New South Wales,**
- **the Legal Services Commission of Queensland,**
- **the Law Society of New South Wales and**
- **the Queensland Law Society**

for consideration on whether Paul Wesley Brinsmead is a fit and proper person to be admitted as a solicitor, or has breached any Act, rule or standard pertaining to the conduct of a solicitor.

- Many of the witnesses who were associated with the Tweed Directions campaign gave evidence that was false, understating their true involvement as well as the involvement of others.

- There was a concerted campaign mounted by those associated with Tweed Directions to deny evidence to the Inquiry. Evidence suggests but does not confirm that this emanated from Mr Staerk and/or Mr Brinsmead. This campaign sought to suborn the Inquiry and its processes.

- When giving his evidence Mr Brinsmead deliberately gave a significantly untruthful account in an attempt to mislead the Inquiry. This approach was premised upon the belief that he and others associated with Tweed Directions had effectively suborned the evidence that the Inquiry could obtain. In those circumstances he considered that his false evidence was unlikely to be discovered and worth the risk.

- Mr Brinsmead, being a solicitor and having wider responsibilities in that role has breached those responsibilities.

- These matters are so significant that the behaviour of Mr Brinsmead should be drawn to the attention of the Attorney General who is responsible for the administration of justice in New South Wales

- ❖ It is also appropriate that the behaviour of Mr Brinsmead, as a solicitor admitted to practice in New South Wales and Queensland be examined by those institutions that have the power to admit solicitors to practice or govern the conduct and professional standards to be observed by solicitors.

Recommendation 21

1. **That the Council's Administrators give consideration whether Stacks/Northern Rivers has carried out its retainer to represent council's interests at the Public Inquiry.**

2. **That the Council's Administrators give consideration whether Stacks/Northern Rivers has breached its retainer to represent council's interests at the Public Inquiry and, if so, whether it should seek tenders for the provision of legal services from another or other legal firms**

- Tweed Shire Council engaged a law firm, Stacks/Northern Rivers to represent council interests at the Public Inquiry. The clear intention of the Council's brief was that this firm would represent the entire Council: that is, the body of elected representatives and the staff.

- Stacks/Northern Rivers did not fulfil this brief, rather they chose to represent the majority councillors. Their duties were to assist the Council and General Manager in the preparation of submissions, in the review of transcripts, in representations at proceedings (as determined by the Council or the General Manager), and in reporting on matters related to individual councillors and staff. They did not fulfil them.

- Stacks/Northern Rivers, through Mr Smith, essentially conducted a political campaign to derail the work of the Inquiry.

- Stacks/Northern Rivers, through Mr Smith failed to understand the essential nature of an Inquiry established under section 740 of the Act and adopted an adversarial stance that rendered them almost totally incapable of appreciating the direction and outcomes of the Inquiry.

- The $59,805.73 that Stacks/Northern Rivers received for Mr Smith's services amounted to a misappropriation of public funds held by the council.

Recommendation 22

That the Local Government Act be amended to provide that councillors who have been dismissed from office by the Governor pursuant to section 255, be ineligible to stand as candidates in the next council election.

- A recommendation for dismissal of a council contained in the report of an inquiry convened under section 740 of the Local Government Act is not made lightly. It is serious step to recommend that the elected representatives of a community should be removed from their role as the community's representatives.

- Public Inquiries are not convened in the absence of substantial and widely held concerns over aspects relating to the performance of a council.

- Any recommendation for dismissal is premised on a view that the elected body, as a whole has ceased to be able to carry out their functions under the Local Government Act.

Recommendation 23

That

- **a copy of this report,**
- **the transcript of the evidence given during the Public Hearings**
- **all correspondence emanating passing between Stacks/Northern Rivers and the Inquiry**
- **all letters written by Mr Smith of Stacks/Northern Rivers and newspapers circulating in the Tweed local area**

be referred to the Office of the Legal Services Commission of New South Wales and the Law Society of New South Wales for consideration whether Anthony Eric Smith has breached any Act, rule or standard pertaining to the conduct of a solicitor.

- On 19 January 2005 Tweed Shire Council engaged a law firm, Stacks/Northern Rivers to represent council interests at the Public Inquiry. The clear intention of the Council's brief was that Stacks would represent the entire Council: that is, the body of elected representatives and the staff.

- Mr Smith attended the Public Hearings on a substantial number of days, and wrote a 72 page Submission in reply. Mr Smith, however, did not fulfil his brief. He failed to represent the interests of the entire Council. From the very start Mr Smith decided that he would represent the majority councillors, and declared in his Submission in reply that the elected minority represented the "opposition". Mr Smith's duties were to assist the Council and General Manager in the preparation of submissions, in the review of transcripts, in representations at proceedings (as determined by the Council or the General Manager), and in reporting on matters related to individual councillors and staff.

- Mr Smith wrongfully anointed himself as the representative of the majority councillors (the Tweed Directions' councillors) and in so doing removed himself from representing the whole Council, as his brief determined. Mr Smith politicised his role, and misappropriated the public funds that supported his role.

- In his submission in reply, Mr Smith relied heavily on an article written by a Mr Stokes of Macquarie University to substantiate his claims of bias. Mr Smith wilfully misrepresented the general argument of the article.

- Mr Smith essentially conducted a political campaign to derail the work of the Inquiry. Springing from his legal background Mr Smith chose the issues of natural justice and procedural fairness as his battleground. Mr Smith raised six issues which he claimed justified his allegations. None could be substantiated.

- Mr Smith prior to the start of the Public Hearings, and after their completion, made public statements that were designed to inform people of the processes and prospective outcomes of the Inquiry, and eventually to provide a conclusion that the Inquiry was flawed. These statements were wring in fact, and wrong in his understanding and interpretation of a s. 740 Inquiry. He effectively misled the public by his statements.

- With his self-appointed role as the defender of the majority councillors he felt free to vilify and abuse any person that dared to express a view with which he disagreed.

- Mr Smith made an unwarranted and vicious attack on an elderly lady on a disability pension who gave her time voluntarily assisting injured native animals.

- Mr Smith chose to adopt an adversarial role in relation to the Inquiry. As part of this role he convinced the Council not to remove legal privilege after the Council had voted in favour of so doing. Mr Smith resorted to a faulty interpretation of the law and sections of the Royal Commissions Act to justify his stance. In reality, he was simply putting obstacles in front of the Inquiry's task of obtaining information.

Recommendation 24

That Council's wishing to sell land owned by them should first offer the land for sale by public auction and if unsuccessful, either:
list the land for sale by private treaty with at least two real estate agents, or call tenders for the purchase of the property.

- The council has in at least 2 instances set about the sale of council owned properties.
- In the case council's land at Cabarita Beach it was affected by easements that clouded its value.
- In the case of council's sale of industrial land at Wardrop Valley, the valuation evidence relied on to support the sale suggested a great range in the possible value of the land and relied on a number of valuations that had been obtained, some of which were not recent and went back a number of years.
- If councils are to dispose of council owned land, then it is necessary that they obtain the best value. This can only be achieved by testing the market.
- In the absence of market testing neither the council, nor the community can be assured that council's processes are both open and transparent and meet council's obligations as the custodian and trustee of public assets, as mandated by council's charter.

Appendix A – Information Provided by Department of Environment and Conservation on Land Clearing at Kings Forest

Bren

Brendan Diacono
Manager Conservation Planning
North East Branch
Environment Protection and Regulation Division
Department of Environment and Conservation

Phone: 6659 8220
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----- Forwarded by Brendan Diacono/NORTHERN/NPWS on 02/02/2005 04:43 PM -----

Brendan Diacono
21/01/2005 01:55 PM

To: nhodges@tweed.nsw.gov.au
cc: stephen.murray@dipnr.nsw.gov.au, Gary Davey/NORTHERN/NPWS@NPWS
Subject: Removal of native vegetation & drainage works in SEPP 14 - Coastal Wetlands at Kings Forest

----- Forwarded by Brendan Diacono/NORTHERN/NPWS on 21/01/2005 12:54 PM -----

John Allen
20/01/2005 11:07 AM

To: Brendan Diacono/NORTHERN/NPWS@NPWS
cc: Gary Davey/NORTHERN/NPWS@NPWS
Subject: Removal of native vegetation & drainage works in SEPP 14 - Coastal Wetlands at Kings Forest

Noel

I refer to our conversation today regarding the above matter.

On 7 January 2005, John Allen and I inspected the Kings Forest site in the company of Leda's Property Manager Dennis Hughes. The inspection was undertaken primarily in response to concerns raised from community groups relating to Leda's property management activities on the Kings Forest site. The inspection also provided the opportunity to monitor those areas covered by the current Interim Protection Order (IPO) over the southern portion of the Kings Forest lands (imposed 1 December 2004).

Among other things, the inspection identified that Leda had removed native vegetation and undertaken drainage works in the north-south SEPP 14 - Coastal Wetland. Works were continuing at the time of the inspection. I understood from Mr Hughes that Council was aware of the works and that Council was awaiting certain outstanding information. The DEC has since approached Garry Smith from Council on this matter and has been advised that Council informed Leda to stop work in October 2004. It is also understood that Council requested that, prior to any further works, Leda submit to Council information identifying among other things, the extent and nature of the works proposed and whether the works were considered by Leda to fall under the existing and continuing use rights. Our telephone discussion on 20 January confirms Council's position on this matter.

Irrespective of whether or not the draining of the SEPP 14 wetlands at Kings Forest falls under existing or continued use rights, the drainage works are likely to adversely impact upon the habitat values of the wetlands and ecosystems therein,

by means of significantly altering the hydrology of the site.

The DEC is concerned that these above-mentioned works are resulting in the degradation of the lands natural, scientific and cultural values, including threatened species values whilst the dLEP process is in progress.

Attached are photos of the works within the SEPP 14 wetlands. I have also attached the photo sent to the DEC from Councillor Henry James. The purpose of attaching this particular photograph is to show that the photo of the excavator in the wetland is significantly further north that what appears in the photo provided by Councillor James.

Please advise of any actions proposed by Council to cease further works and rehabilitate the SEPP 14 coastal wetland.

A letter confirming the matters raised in this e-mail will follow.

As the DIPNR is also responsible for the management and administration of SEPP14 wetlands and copy of this note has gone to Stephen Murray, Deputy Director, North Coast.


Kings_Forest_Leda_clearing_0701


Kings_Forest_Leda_clearing_0701


Kings_Forest_Leda_clearing_0701


6200a.jp

Regards

Bren

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Department of Environment and Conservation

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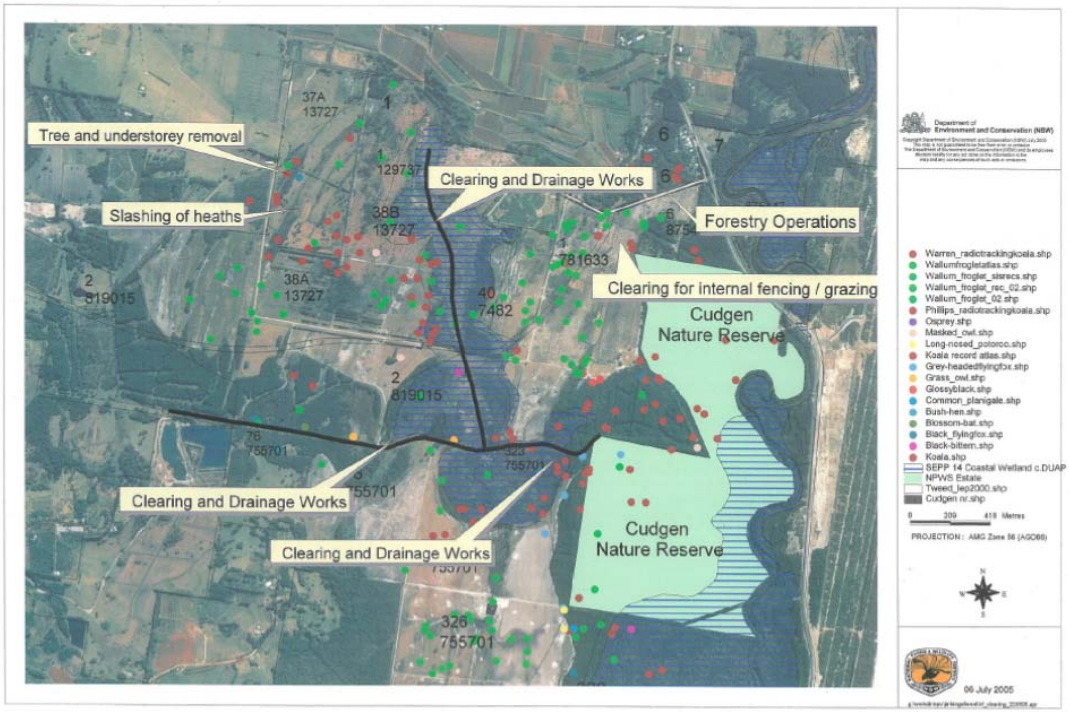
Works in high conservation value land at Kings Forest recommended for environmental protection
Works within SEPP 14 wetlands and threatened species habitat



Native tree removal in East West SEPP 14 - Coastal Wetland. Works undertaken June 2004. Leda claim existing / continuing use right. Council concurred. Regarding threatened sp. Leda claim "routine ag.". Reg Van Rij advised Pine Tree removal only. DEC no action to date.

Fallen Koala habitat trees. Swamp mahogany / Tallowwood and paperbark.

East West SEPP 14 - Coastal Wetland
between 60 to 80 mature native trees removed. Numerous other smaller trees and understorey species.

East West SEPP 14 - Coastal Wetland (cont.).

Species removed include:

Swamp Mahogany
Tallowwood
Paperbark
Tuckeroo
Swamp Box
Swamp Oak
Brushbox?
Understorey spp.?

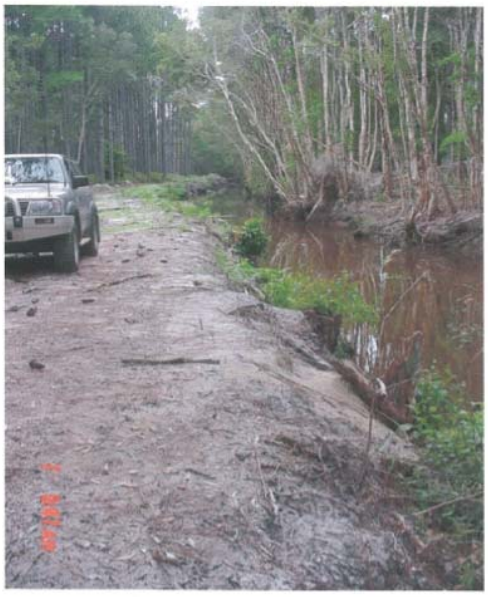
Trees removed include threatened species habitat. Koala, Black Bittern, Wallum Froglet and Litoria olongburensis.

Tallowwood - Primary Koala feed tree.

Paperbark (*Melaluca quinquenervia*) - Koala habitat.

Drainage works in East West Central

SEPP 14 - Coastal Wetlands. Drain deepened and cleared of native vegetation. "Prior to drainage works the paperbark forest was inundated with water" Per comm. Dennis Hughes Kings Forest Site Manager.

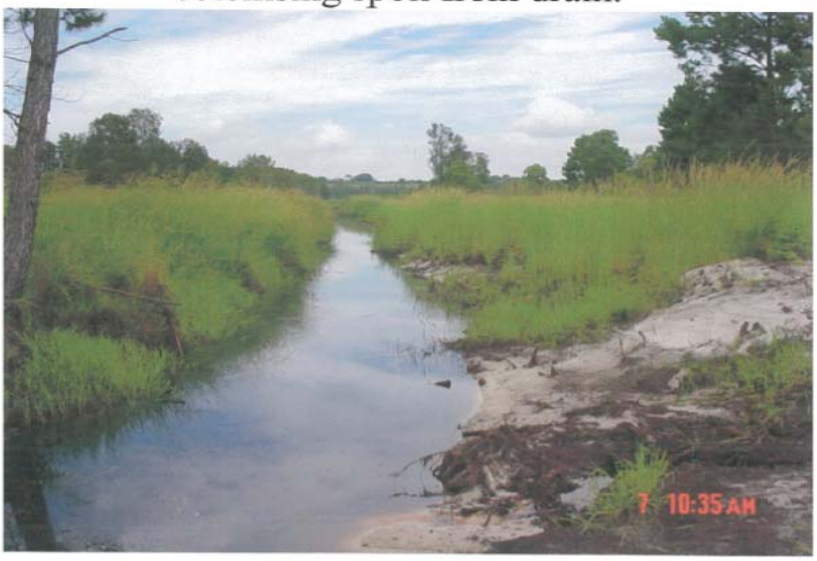


Drainage works in East West Central
SEPP 14 - Coastal Wetlands (western end). Note the exotic *Setaria* (Pigeon Grass) which has colonised the excavated spoil from the drain.

Drainage works in East West Central
SEPP 14 - Coastal Wetlands. Including piping of drain at a newly constructed road (western end).

North South SEPP 14 - Coastal Wetland. Machinery creating drainage channel (07/01/05). No Council approval granted and contrary to Council advice. Not identified on any property management plan. No threatened species S91 licence obtained. No threatened species Property Management Plan.

Completed drainage works in North South SEPP 14 - Coastal Wetlands. Upstream. No Council approval. Earlier inspections and photos by DEC show natural / informal drainage line dominated by native wetland sp. No threatened species licence obtained. *Setaria* (Pigeon Grass) colonising spoil from drain.



Completed drainage works in North South SEPP 14 - Coastal Wetlands. Downstream

Drains created from North South SEPP 14 - Coastal Wetland.
Note extent of *Setaria* (Pigeon Grass) growing in the newly disturbed areas.

Fires - Depot Road fire. Fire located in area identified by Council's independent consultant as HCV.

Fires - Depot Road fire detailing fire protection works. RFS investigating.

Depot Road regeneration. Regenerating Koala feed tree.

Now fenced and proposed for cattle grazing.

Depot Road regeneration - previously identified threatened species habitat,numerous records. Approx. 100% native vegetation. Proposed for cattle grazing.

Depot Road. Approx. 100% native vegetation.
Fence line constructed in previously identified threatened sp. Habitat, numerous records. Proposed for cattle grazing.

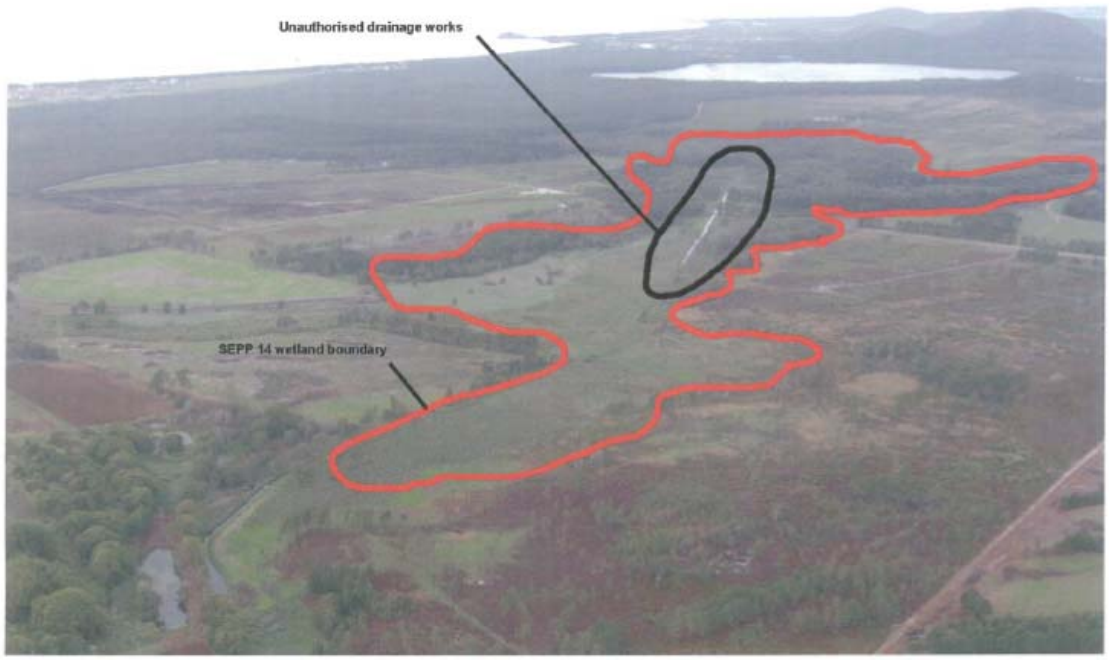
Removal of threatened species habitat in areas previously identified as threatened species habitat, numerous records. Fragmentation of habitat.

Habitat removal and habitat fragmentation
100% native vegetation. Slashed. In former "no go zone" as identified on site under the Property Management Agreement

Habitat removal and habitat fragmentation
Exotic grass species eg Rhodes Grass, introduced in areas of previously slashed native vegetation.

Tree removal in areas identified to be retained. Trees shown are felled paperbarks.

Routine Agriculture? Existing Use Right? or change of landuse during dLEP process to facilitate residential development? Currently no cattle.


Unauthorised drainage works
SEPP 14 wetland boundary

Appendix B – Information Provided by Department of Environment and Conservation on Land Clearing at Kings Forest – Further works as at July 2005

Works within high ecological value areas
proposed for environment protection in draft LEP.