

Report of an Investigation in terms of Section 430 of the Local Government Act 1993 into Warringah Council

EXECUTIVE SUMMARY

This report resulted from an investigation into aspects of Warringah Council operations. The investigation was undertaken in terms of Section 430 of the *Local Government Act 1993*.

In formally appointing a Departmental Representative to undertake the investigation, the Director General, Department of Local Government established the following terms of reference:-

- Council's effectiveness in the efficient administration of its local area, including but not limited to, meetings procedures, conduct of councillors including conflicts of interest and pecuniary interest as well as planning related processes, but not the merits of particular applications or proposals.
- Whether the Council's administration and management is such that it engenders community confidence and support and it is able to meet its Charter under the *Local Government Act 1993* and to otherwise fulfil its statutory functions.
- Any other matter, which warrants mention, particularly where it may impact upon the effective administration of the area and/or the working relationship between the Council, Councillors and its administration.

The investigation concluded:-

1. There are aspects of the administration of the Warringah Council where opportunities exist to enhance effectiveness and efficiency, especially in the areas of development consents and council meeting procedures.
2. Examples of inappropriate behaviour by Councillors have had a deleterious effect on the level of confidence placed by constituents in Warringah Council and its decision-making processes.
3. Aspects of the approval process for some development applications are appropriate for referral and review by the Independent Commission against Corruption.

In association with this investigation, recommendations made are included in the report. These recommendations include suggestions for consideration by Warringah Council aimed at improving the level of confidence currently held of Warringah Council by members of the Warringah community.

Recommendations are made to the Director General, Department of Local Government for aspects of this report to be referred for consideration by the Independent Commission Against Corruption.

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PART 1

INTRODUCTION

1. INTRODUCTION

This is my report as Departmental Representative concerning an investigation under section 430 of the *Local Government Act 1993* (the Act) into the Warringah Council. This report is presented to the Minister for Local Government and the Director General of the Department of Local Government, and copied to Council, pursuant to the terms of section 433 (1) of the Act.

This investigation was not a public inquiry process and, as a result, there was no public invitation or calling for witnesses or submissions, nor were there any public hearings at which witnesses gave evidence to me. This was not appropriate for an investigation undertaken in terms of Section 430 of the Act.

The procedures followed by me in conducting this investigation and in finalising this report are more fully described in Part 2 of this report.

1.1 Request and Authorisation of the Investigation

The Minister for Local Government and the Director General of the Department of Local Government received a significant number of complaints regarding the operation of Warringah Council. Summarised details of these complaints are provided later in this Report. In addition, Warringah Council, by resolution at its meeting of 6 February 2001, requested the Minister for Local Government to commission an investigation in terms of section 430 of the Act.

On 23 January 2002 the Director-General, Department of Local Government, approved and authorised an investigation pursuant to Section 430 of the Act in respect of Warringah Council.

On 4 February 2002 I, James Reginald Mitchell, Assistant Director General of the Department of Local Government, was appointed and authorised as Departmental representative to conduct the investigation and to report to the Minister and the Director General on the results of the investigation.

1.2 Terms of Reference

My investigation was not a general investigation into Council or even a general investigation into planning and development matters and consents granted or applications rejected by Council, but was limited by specific Terms of Reference approved by the Director General for the purposes of the investigation. These Terms of Reference were as follows:

- Council's effectiveness in the efficient administration of its local area, including but not limited to, meetings procedures, conduct of councillors including conflicts of interest and pecuniary interest as well as planning related processes, but not the merits of particular applications or proposals.
- Whether the Council's administration and management is such that it engenders community confidence and support and it is able to meet its Charter under the *Local Government Act 1993* and to otherwise fulfil its statutory functions.
- Any other matter, which warrants mention, particularly where it may impact upon the effective administration of the area and/or the working relationship between the Council, Councillors and its administration.

The assistance provided to the Departmental Representative by Ms M Drinan, Mr R Bulford and Mr A Macindoe of the Department of Local Government and that of officers and staff of Warringah Council is greatly appreciated.

During the course of my investigation, also, a number of persons sought to draw my attention to a range of issues and concerns. Many of these issues were assiduously put before me, but I have concluded that some were plainly outside the Terms of Reference and I advised those persons accordingly.

While these issues were, strictly speaking, outside the Terms of Reference for the Investigation, I nonetheless regarded them as background material.

As has been the case with recent investigations undertaken in terms of Section 430 of the Act, I allowed the witnesses some latitude to speak to these issues.

In some cases issues and concerns were put before me that on one view fell within the Terms of Reference, but which on further examination and consideration were determined to relate to issues or matters, which did not warrant further investigation. I am not obliged to investigate and deal in my report with every issue, concern or allegation that came to my attention and that technically may fall within the Terms of Reference.

1.3 What This Investigation Is Not About

As prescribed in the Terms of Reference, this investigation was about local government administration, including planning and development practices and procedures.

It was not about, and I had no power to examine or express views as to, the merits or content of any particular decision or recommendations or approval or rejection of an application granted or made by either the elected Council or any member of Council staff. Nor would it be appropriate for me to express any views on such matters.

I therefore express no views as to whether or not projects should be allowed to proceed and, if so, in what form, manner or configuration. Any comments, endorsement or criticism of the processes and procedures taken by Council, whether through staff or the elected Councillors, in respect of any project contained in this report should not, therefore, be taken as being a comment, endorsement or criticism of the project themselves.

Such matters are for others, having due power and responsibilities under the law to do so, to determine.

1.4 Past Investigations and Inquiries

Warringah Council and its predecessor organisation has, albeit some 10 or more years ago now, been the subject of a number of investigations by the Department of Local Government.

Some of these have been in relation to the exercise by Council of its planning powers and the practices and procedures, including Council's organisational structure and arrangements, in the planning and development area.

1.5 Warringah Council Area and 1999 Elections

In commencing the investigation I was advised that the Local Government area of Warringah is centrally located on Sydney's northern beaches and is reported to be home to around 135,000 residents. The area covers 153 square kilometres and provides support to a diverse range of businesses and light industry. I am informed that its unique environment contributes to a distinctive sense of place and quality of life for residents.

Following the election of Councillors for Warringah Council in September 1999, voting by Council on the majority of issues of substance has concluded with a result of 5 votes to 4 votes. Councillor Peter Moxham was elected Mayor in 1999. Councillor Darren Jones was elected Mayor in September 2001.

The majority of councillors have referred to a hard fought campaign in September 1999 and that some of the electoral results were unexpected. I was informed that the major issues in the campaign were the various responses to local environmental issues and to the increase in high-rise and multi occupancy developments within the Warringah Council area.

1.6 Post Report Action/Responsibilities

At the conclusion of my report (see Part 4) I set out a number of findings and recommendations made by me, having regard to the issues examined, the concerns expressed and detailed by me in my report. Most of these call for action and response by Council in relation to the matters raised.

I note that this report is required to be tabled by Council at its next meeting after it is received from me, and once so tabled becomes a public document in accordance with Section 12(1) of the Local Government Act 1993. Council is also required, under the Act, to provide notice to the Minister for Local Government within 40 days after presentation of the report, of the things done, or proposed to be done, to give effect to the recommendations made by me.

1.7 Acknowledgements

I would like to express my appreciation and thanks to former Mayor Jones, other Councillors and Council's incoming General Manager, Mr Blackadder, and his staff for their co-operation and assistance to me in the course of my investigation. When widespread allegations of the sort that have been made in respect to the conduct and role of Council, there is understandably a great deal of stress and pressure placed on staff.

For the purposes of the orderly conduct of my investigation, Council's Public Officer, Mr R Symons, was appointed and delegated to act as liaison between myself and Council. The assistance and co-operation afforded to me by Mr Symons and other staff is greatly appreciated.

PART 2
THE INVESTIGATION PROCESS

2. THE INVESTIGATION PROCESS

2.1 General

Section 430 of the *Local Government Act 1993* (the Act) provides:

- (2) The Director General may, at the request of the Minister or on the Director General's own initiative, authorise any person (referred to in this Part as a "Departmental representative") to investigate any aspect of a council or of its work and activities.
- (3) An authority may be given generally or in respect of a particular matter.
- (4) The functions of a Departmental representative are as set out in the authority. ...

Section 431 provides:

- (1) For the purpose of exercising his or her functions, a Departmental representative may direct a person to do any one or more of the following:
 - (a) to appear personally before the Departmental representative at a time and place specified in the direction,
 - (b) to give evidence (including evidence on oath),
 - (c) to produce to the Departmental representative any document that is in that person's custody or under that person's control,
 - (d) to grant to the Departmental representative such authorities as may be necessary to enable the Departmental representative to gain access to any document that is in the custody or under the control of any bank, building society, credit union or other person.
- (2) For the purposes of this section, a Departmental representative may administer an oath.
- (3) A Departmental representative may take copies of or extracts from any document to which the Departmental representative gains access to this section.

2.2 Procedures followed in the Investigation

An investigation in terms of Section 430 of the Act is not a public inquiry process. Such a formal process is provided for in Section 740 of the Act. An investigation in terms of Section 430 therefore does not entail a public calling for submissions or public hearings. The investigator pursues an investigative process quietly, behind the scenes, as it were, and out of the media glare.

The investigator decides for him or herself, having regard to the Terms of Reference of the investigation, what issues to examine and to what extent, how the relevant evidence is to be obtained, and which persons might be able to assist the investigation by giving evidence. The issues and what is examined in the course of the investigation do not become a matter of public knowledge and debate until the section 430 investigation process is completed by the publication of the Departmental Representative's report.

As noted in Part 1 of this report, the Departmental Representative conducting a section 430 investigation has a number of discretionary powers as to how the investigation is conducted.

My investigation in this case commenced with various visits to Council starting on 15 February 2002. Those visits continued over the next thirteen weeks.

In undertaking the investigation, I was mindful of the responsibilities imposed upon the Director General, Department of Local Government by Section 11 of the *Independent Commission Against Corruption Act 1988*. Under this section, the Director General is under a duty to report to the Independent Commission Against Corruption any matter that he suspects on reasonable grounds concerns or may concern corrupt conduct. The definition of corrupt conduct contained within that legislation is extensive.

PART 3
DETAILED REPORT

3. DETAILED REPORT

3.1 Complaints Received By The Department Of Local Government

During the period 1 May 2001 to 30 April 2002, the Minister for Local Government and the Director General, Department of Local Government received 188 letters of complaint from 110 individuals regarding aspects of operation of Warringah Council. These items of correspondence, on analysis, relate to 262 specific allegations or complaints. Major areas of concern to complainants included:

- Planning Issues
- Building and Development Approval
- Poor Complaints Handling Processes
- Conduct of Councillors
- Conflicts of Interest by Councillors
- Waste or Misuse of Council and Other Resources
- Maladministration and Mismanagement
- Allegations of Pecuniary Interest by Councillors.

In conducting my investigation, I have examined these items of correspondence and related issues in some depth. In addition, Council staff, elected Councillors and members of the Warringah community provided insight into the general issues raised in the correspondence.

I consider that the high quantity, content and extent of complaints by members of the Warringah community is a useful indicator of the low level of confidence in which the Council is held. This view was supported by many of the local residents who were interviewed by me in the investigation process.

3.2 Building and Development Approval Process

In late 1999 Warringah Council commissioned the Hunter Valley Research Foundation to undertake the *Biennial Customer Satisfaction Research Program*. Using a structured questionnaire for telephone interviews with 900 randomly selected Warringah residents, the survey sought to capture community attitudes on six issues, including Council customer satisfaction.

A second phase used 176 respondents in the initial process in a series of facilitated discussion groups to explore areas of high priority in greater depth. The final phase using a mail-based survey of local business was used to assist in identifying future economic initiatives.

This research program found that the Building and Development Approval process had one of the lowest satisfaction levels amongst a range of Council services. Council staff have advised me that they believed that Council obtained benefit from this research.

I note that the projected follow up research scheduled for late 2001 has been held over to 2002 and is currently being conducted.

Although other measures may be available which indicate the efficiency of Council's operations, this research will enable Council to ensure that it has a structured base for the views of a widespread section of the Warringah local government area.

3.3 Strategic And Operational Planning

In 2000, Warringah Council undertook, for the third time, the preparation of strategic, three year rolling and operating plans. This process would appear to be sound and involves reporting of achievement against plan.

The Strategic Plan concerns long term issues facing Council and provides a clear statement of the kind of community Council is working to build. It is Council's intention to revisit the Strategic Plan following each Council election. This plan contains goals, stretch targets and milestones that are related to Council programs.

The Three Year Rolling Plan was developed around Council's eight principal activities (programs) and identifies objectives, actions and performance targets for each program. Budget overview and forward estimates are also included.

The Council's Operating Plan was co-developed with the Three Year Rolling Plan and contains the detailed annual budget on a functional basis. Its format, including predetermined key performance indicators, are used as the basis of internal monthly and external quarterly reporting.

In accordance with the Local Government (Meetings) Regulation 1999, the Council has established standing committees comprising all members of Council. These are:

Government Committee
Strategy Committee
Local Approvals Committee
Services Committee.

In addition to the General Manager, the Council is administratively organised into three functional areas, each headed by a Director. These areas are:

Strategy Division
Services Division
Public Office Division.

Performance reporting to the General Manager, to Council and externally is based on these functional areas.

3.4 Allegations of Pecuniary Interest of Councillors

I noted from Council records that Councillor D Jones and Councillor J Caputo had excluded themselves from Council deliberation and voting on many occasions due to declared pecuniary interests. As would be expected, some other Councillors declared similar interests but were excluded on infrequent occasions. Evidence provided showed that Councillor Jones had so excused himself on 190 occasions since September 1999, while 167 of these occasions related to the development at 701 Pittwater Road, Dee Why. Councillor Caputo is recorded as excusing himself on 140 occasions since September 1999, with 65 being recorded as relating to his own home or other developments nearby.

Some witnesses, including elected Councillors and members of the Warringah community expressed the view that these absences were clear evidence that these Councillors were unable to fulfil their responsibilities to their constituents.

Councillor Caputo's legal representatives have advised that the number of properties (rather than occasions) in which Councillor Caputo declared a pecuniary interest would be in the vicinity of twenty-one properties plus four other matters, which had come before Council. Councillor Jones similarly provided satisfactory reasons for his declarations of pecuniary interest.

I have found no reliable evidence to establish that these Councillors were not declaring a pecuniary interest and being excused from associated debate and voting. The Councillors were democratically elected and, from the evidence available to me, appeared to act in conformity with Warringah Council's Code of Conduct and the requirements of the Act.

3.5 Managing Conflicts of Interest

Prior to my investigation, many constituents of Warringah Council have raised perceptions regarding Councillor behaviour and have expressed views concerning conflicts of interest. These perceptions were raised in correspondence to the Minister for Local Government and to the Director General of the Department of Local Government.

In addition, similar perceptions were expressed to me by persons providing evidence for the investigation. Some of these were expressed in writing and some were included in oral presentations to me.

The possibility of conflict between public duty and private interest has been the subject of review by many, including the Department of Local Government and the Independent Commission Against Corruption (ICAC).

For elected Councillors, a conflict of interest arises if it is likely that the Councillor, with a private or personal interest, could be prejudicially influenced in the performance of his or her public duties by that interest, or that a reasonable person would believe that the person could be so influenced. Consequently, Councillors should avoid or appropriately resolve any conflict or incompatibility that exists, or is perceived to exist, between his or her private or personal interests and the impartial performance of his or her public duty.

In local government areas such as Warringah Council, when some conflicts of interest may be unavoidable, it is often difficult to resolve such conflicts in a manner that is fair, reasonable and workable.

The Act provides some guidance on pecuniary (or money-related) conflict of interest matters. Chapter 14 of the Act places obligations on Councillors, Council delegates and Council staff to act honestly and responsibly in carrying out their functions.

It requires that the pecuniary interests of Councillors, Council delegates and other people involved in making decisions or giving advice on Council matters be publicly recorded. The Act also requires Councillors and staff to refrain from dealing with matters in which they have a pecuniary interest.

In addition, Section 440 of the Act requires that all councils adopt a code of conduct. A model Code of Conduct was prepared by the Department of Local Government in conjunction with ICAC. This model requires that a councillor avoid and resolve "any conflict or incompatibility between his or her private or personal interests and the impartial performance of his or her public or professional duties".

Warringah Council has adopted such a code of conduct, which would appear to be based on the model code. Council's code draws attention to the legislative requirements concerning pecuniary conflicts of interest and defines a "non-pecuniary interest" as any private interest that does not relate to money (for example, arising out of kinship, friendship, membership of an association, society or trade union, or involvement or interest in an activity).

Warringah Council's Code places the onus on the individual to decide whether a conflict of interest exists (real or perceived) and where practicable, to declare it in writing to the council mayor or general manager as appropriate. However, if a conflict arises during a meeting, such as a council or committee meeting, the councillor or staff member should inform the meeting of the interest.

The Warringah Council Code of Conduct states that it is important, when deciding how conflicts will be handled, that matters are assessed against established criteria by someone experienced and objective. For councillors, this role should be filled by the General Manager and the Mayor. Whilst providing criteria for assessment of conflicts of interest and requirements regarding record keeping, no guidance is contained regarding other action to be taken by Councillors.

For pecuniary interest issues, the councillor concerned should then decide whether or not they will be participating in consideration of or voting on the matter. Where a councillor decides not to take part in the debate or a vote on an issue because they have a pecuniary interest, it is necessary for the councillor to leave the room at the time the vote is taken. Otherwise, the councillor will be taken to have voted in the negative.

I have examined a series of the minutes of the meetings of Warringah Council and note that these minutes record such disclosures and abstentions by councillors during any period the council is meeting.

When left to an individual to decide on conflict of interest matters, it is essential that the issue of public perception be considered. When conflict of interest matters are left to an individual to decide, members of the public are likely to suspect the worst. I am advised that it is Warringah Council's view that it is appropriate for an individual councillor to decide whether or not a non-pecuniary conflict of interest applies to their individual situation. This viewpoint is not shared with a large number of constituents who provided evidence to this investigation.

(See Recommendation No. 4.1).

Conflicts of interest, whether real or perceived, can also be used politically. This has been the case at Warringah Council where the Council and its elected representatives have had accusations that has cast doubt on the impartiality of individuals and processes. These accusations have arisen from objectors and political opponents and have been canvassed widely in the local media.

3.6 Experience and Qualifications of Councillors

A range of constituents interviewed during the investigation expressed the view that real estate agents and property developers should be excluded by law from representing the community on Local Councils.

In terms of the Act, persons may agree to offer themselves for election as a candidate at local government elections, no matter what the background or current or previous business interests of that person may be.

It is my view that if the community does not desire persons of particular backgrounds or experiences to represent them as elected Councillors, then that view should be clearly expressed in a democratic manner at the ballot box.

3.7 Order Within Council Meetings

A major issue contained in complaints received by the Minister for Local Government and the Department of Local Government was the perceived failure of Councillors to comply with Warringah Council's Code of Conduct. This was especially so in regard to meeting procedure. A mayor's responsibility includes conducting council meetings in an orderly and constructive manner.

During the process of the investigation, I was advised by Councillors, and others who had attended Council meetings, that derogatory comments, interjections, inferences and other disruptive actions are not only common between Councillors, but are frequently directed at those in attendance in the Council Gallery. This is refuted by Councillor Jones regarding his term as Mayor.

Warringah Council have advised that Councillor behaviour, whilst robust on occasions, is generally respectful of the Code of Conduct and the Code of Meeting Practice. I have also been advised that in the two year period to 9 October 2002, censure motions have been used on occasions and that there has only been one censure motion carried by Council due specifically to the conduct of an individual Councillor at Council meetings.

I am also advised that it is usual practice for reaction by members of the public present in the Council Gallery to perceived provocation from Councillors when misleading, inaccurate or biased remarks are made by Councillors. In addition, on occasions, those present in the Council Gallery have also acted in a disruptive manner. Whilst having listened to a sample of recordings of Warringah Council meetings, these are of lesser value, as they do not record comments made by people within the Council Gallery.

Following the Warringah Council meeting on 20 March 2002, allegations were made that Mayor Darren Jones advised members of the public that, if they continued to act in a disruptive manner while in the Council Gallery, they would be subject to expulsion and/or fines. This followed an incident at the Council meeting of 19 February 2002, where a member of the public who was in attendance in the Council Gallery was yelled at in an abusive manner by Mayor Jones. Warringah Council advises that authority exists for fines to be imposed by a Council in these circumstances.

The Mayor has informed me that on advice from Council's legal advisers concerning disorder at Council meetings and expulsion powers, he followed correct practice and procedure. This included reminding members of the Council Gallery that they were obliged to refrain from any interjections during Council meetings.

The Mayor also advised that there had been occasions when the members of the Council Gallery were asked, in a civil way, to refrain from calling out and interjecting and that the offenders had continued. He had then asked those members to vacate the Council Gallery. The Mayor stated that they refused, had tried to talk over him and he then had no alternative than to adjourn the meeting and ask for assistance of members of the NSW Police Service to clear the offenders from the Council Gallery.

The Act provides councils with the autonomy to conduct their own affairs. The legislation establishes an environment, which allows councils the freedom to determine their own direction and to succeed without interference. With this autonomy and freedom there is a corresponding responsibility to increase performance, accept greater public accountability and act in a way, which enhances public confidence in the system of local government.

Under section 439 of the Act, councillors have a statutory duty to act honestly and to exercise a reasonable degree of care and diligence in carrying out their civic functions. Section 440 requires councils to prepare and adopt a code of conduct to be observed by councillors. The observance by councillors of their responsibilities under the code is essentially a matter for individual councils, as autonomous bodies, to monitor.

Warringah Council has adopted a Code of Conduct based on the model code provided by the Department of Local Government.

While the Act does not have provisions prescribing offences for a breach of the code, it is nevertheless appropriate for a council, having satisfied itself that there has been a breach of its code, to counsel or reprimand the councillor by way of resolution. Other practical courses of action are for the council to resolve to pass a censure motion, issue a public statement or request a formal apology. The power to take such action is to be found in section 23 of the Act which provides that a council may do all such things as are supplemental or incidental to, or consequential on, the exercise of its functions.

It is expected that sanctions will only be imposed after consideration has been given to all issues and points of view. Further, a decision to sanction a councillor should reflect the concern of the overwhelming majority of councillors about the conduct of the councillor and the impact on the council's operations.

It should be understood that any sanction, which is imposed, should not interfere with a councillor's common law right to conduct his or her civic duties. Whilst this is agreed, any sanction imposed should send a clear message that breach of the Code of Conduct is unacceptable. This view is in conformity with the position adopted by the Department of Local Government and the Independent Commission Against Corruption in the joint publication entitled "Under Careful Consideration: Key Issues for Local Government".

Section 10(2) of the Act also authorises a council or the chairperson (if authorised by the council) to expel a councillor or another person from a council or committee meeting.

Clause 29 of the *Local Government (Meetings) Regulation 1999* defines acts of disorder at council and committee meetings. The acts of disorder include contravening the Act or any regulation, a councillor insulting or making personal reflections on or imputing improper motives to any other councillor.

Clause 29 also authorises the chairperson to require a councillor to retract or apologise for an act of disorder. The council or chairperson (if authorised) can expel a councillor who fails to retract or apologise for an act of disorder.

Additional techniques that may be used to deal with inappropriate behaviour by councillors include counselling and mediation.

It is essential that councillors realise that individually and corporately, they have a responsibility to conduct orderly council meetings and behave in a professional manner. In addition, they should work diligently to maintain a constructive working association without letting personal feelings influence their relationships with other councillors and their decision making process.

Breaches of Warringah Council's Code of Conduct and disruptive behaviour reflect adversely on the Council as a whole and cause it to be distracted from its charter of providing for the current and future needs of the Warringah community.

Such actions, in my view, have a deleterious effect on the level of confidence placed by constituents in the Council and its decision making process.

From the information contained in the complaints received by the Minister and the Department, I have concluded that the level of confidence in Council is at a very low level. Consequently, the need to enhance public confidence in the performance of the Council is paramount.

(See Recommendation No. 4.2 and 4.3).

3.8 Attendance of Public at Council Meetings

Members of the Warringah community raised with me their perceptions of action taken during Warringah Council meetings to expel members of the public. They also raised issues regarding refusal by Warringah Council of members of the public from addressing Council meetings. Others also claimed intimidation by Councillors during meetings and some had reported that they had been advised that they would be excluded from future Council meetings.

In examining this issue in relation to Warringah Council, I am reminded that the NSW Social Justice Directions Statement commits the Government to ensuring that people have better opportunities for genuine participation and consultation about decisions affecting their lives.

In turn, the NSW Government's Social Justice Strategy is based on the principles of equity, access, participation and rights. To achieve these outcomes, in the Warringah context, it is important for Council's decision-making processes to be as open, responsive and effective as possible. In addition, members of the public attending Council meetings owe a corresponding duty to behave in an orderly fashion.

To this end, the Act reflects these goals, containing a charter, which includes obligations on the part of Councils to facilitate the involvement of members of the public, amongst others, in the development, improvement and coordination of local government; and further, to keep the local community informed about its activities.

Amongst the ways that these aspects of Council's charter are to be achieved, the Act makes express provision for the conduct of "open meetings".

The various provisions in the Act and in the Local Government (Meetings) Regulation 1999, make it clear that there is no general power to exclude members of the public from meetings of Council.

The Open Meetings provisions contained in Chapter 4, Part 1 of the Act provide that everyone is entitled to attend a meeting of the Council, and that Council must ensure that all meetings are open to the public.

Section 10 of the Act provides:

- (1) "Except as provided by this Part:
 - (a) **everyone is entitled to attend a meeting of the council...**
 - (b) **Council must ensure that all meetings of the council...are open to the public"** [emphasis added]

Section 10A of the Act limits the circumstances in which, relevantly, Council can close parts of its meeting to the public and also makes provision to enable Council to allow members of the public to make representations to or at a meeting as to whether that part of the meeting should be closed.

Importantly, there is no right to close the entirety of a meeting to the public. The limited right to close parts of meetings is reinforced by the provisions of Section 10B of the Act, which emphasise the restrictions on the nature of business then being discussed, considered or received, in closed session.

Section 10 (2), of the Act provides that a person is not entitled to be present at a meeting, relevantly, of the Council, if expelled from the meeting.

Expulsion may occur in either of two ways:

1. by resolution of the meeting; or
2. by direction of the person presiding (if such person is expressly empowered to do so).

The Local Government (Meetings) Regulation 1999 provides, in clauses 30 and 44, for the expulsion of certain persons from Council and committee meetings.

Clause 30 (2) provides:

"A member of the public may, as provided by section 10 (2) (a) or (b) of the Act, be expelled from a meeting of a council for engaging in or having engaged in disorderly conduct at the meeting. [emphasis added]."

Clause 44 of the Regulations provides, in respect of committee meetings:

- (1) **"If a meeting or part of a meeting of a committee of a council is closed to the public in accordance with section 10A of the Act, any person who is not a councillor may be expelled from the meeting as provided by section 10 (2) (a) or (b) of the Act." [emphasis added].**

The wording adopted in section 10 of the Act, and in clauses 30 and 44 of the Regulation, is in the singular tense, referring to expulsion from "the" or "a" meeting. It is not couched in a general form, or in the plural, such as "from meetings".

Section 10 (2) of the Act makes clear that the power is limited to expulsion, [sic.] not exclusion.

Section 10 (3) of the Act provides that a person may be expelled from a meeting only on the grounds specified or prescribed by the Regulations.

Clause 30 (2) of the Regulations provides a general power to expel a member of the public from a meeting, if the pre-condition, that there firstly be disorderly conduct on the part of the member of the public, "at the meeting" is met.

Clearly, for the power to be validly exercised, it would require the requisite disorderly conduct, at the particular meeting, in order that the power to expel such person, be "triggered".

Disorderly conduct whether at a previous meeting, or which may be anticipated, would not invoke the power under Regulation 30.

As an alternative, regard may be had to the provisions of section 660 of the Act, which may be effective if continued disruptions occur, which obstruct the Council, its elected members and staff from the orderly conduct of meetings.

This section makes it an offence for a person to wilfully obstruct, among other things:

- a council
- a councillor
- an employee of the council
- a police officer; or
- a person duly authorised to perform the function for the purposes of the Act or regulation concerned.

It is the primary responsibility of the police to enforce offences of this nature under the Act. Section 691 of the Act provides that, proceedings for an offence against the Act or the Regulations, may be dealt with summarily, by a Local Court, constituted by a Magistrate sitting alone. Accordingly, Warringah Council would need to pursue its concerns with the Police with a view to effective action being taken.

Warringah Council may also seek and be guided by its own legal advice with regard to the availability of alternative or additional remedies such as protection orders, injunctive relief, and the common law action of breach of the peace if the response of the Police is unsatisfactory.

3.9 Rescission Motions

Views were expressed to me regarding the widespread use of the rescission motion process by Warringah Councillors. In expressing these views, differing opinions were also offered regarding the perceived benefit and motivation in using rescission motions.

Particular views were expressed to me that the continued and repeated use of the rescission motion process was in contravention of the principle that Councillors should use Council resources effectively and economically in the course of their public duties. The use of rescission motions was seen as wasting staff time and therefore Council resources.

I have examined a range of instances where rescission motions were used at Warringah Council. These instances contain motions moved by Councillors who would normally be within the majority grouping and those within the minority grouping of Councillors.

In the instances examined, I could find no case where a rescission motion had been used inappropriately.

3.10 Assessment of Development Applications of a Councillor and His Wife

Included in Appendix 3 are details of a development application in which Councillor John Caputo and his wife, were the applicants. This application relates to a development proposed at 20, 20A, 20B and 22 Ryrle Avenue, Cromer.

An examination of Warringah Council files relating to this application disclosed that the original application was lodged on 10 September 1998. A file note records that all Warringah Councillors were advised seven days earlier of the Minister for Urban Affairs and Planning's decision to exclude Warringah Local Government area from the operation of State Environmental Planning Policy No 53 entitled Metropolitan Residential Development (SEPP 53).

Council staff determined that the development application submitted on 10 September 1998 was deficient in a range of areas. The required remedial information was advised to the applicants on 24 September 1998, together with advice that if Council had not received this information to its satisfaction within 21 days, the development applications will be determined on the basis of information presently before Council. It is evident that this may have led to the decline of the applications by Council.

On 20 October 1998, Council officers repeated the request for the outstanding information. Again, on 8 December 1998, the applicants were informed of the need for the previously requested information. Independent consultant planners had been appointed by Council and were to undertake the review on behalf of Council in late January 1999.

Council papers revealed further written and oral reminders to the applicants. On 24 March 2000, the applicant, Councillor John Caputo, wrote to the General Manager advising that the information requested would be supplied within 21 days.

Amended plans and supporting information to support the development applications was received by Council on 12 October 2000 (more than 24 months after Council's original request for the additional information.)

In this regard, Councillor Caputo advised that he acted on information which was generally available. Councillor Caputo strenuously denies any proposition that the application was based on the 3 September 1998 advising. Through his legal representatives, Councillor Caputo has advised that he and his family had commenced preparation of plans with a view to development of the Ryrie Avenue properties in 1995. He lodged the development application for dual occupancy seven days after Council records indicate that he was officially notified, as a Councillor, of the Minister for Urban Affairs and Planning's intent to make Warringah Local Government Area (LGA) exempt from SEPP No. 53.

I find it significant that there is a possibility that individuals at Warringah Council may have intentionally misled the Department of Local Government in their enquiries into this matter. The Department and the public were lead to believe that Councillor Caputo was not notified of Warringah LGA's exemption from SEPP No. 53 until the date of gazettal. At no point during an enquiry into this matter by the Department of Local Government in March 2001 was the Department informed of the Minister for Urban Affairs and Planning's correspondence of 3 September 1998. It was not until this investigation that the Department of Local Government was aware of these circumstances.

I find that the omission of two important items of information when reporting to the Department of Local Government is either a case of administrative mismanagement or a deliberate attempt to mislead the Department and, in turn, the community. The evidence that this investigation has revealed is that individuals of Warringah Council were aware of Councillor Caputo's actions and they chose not to inform the Department of Local Government during the course of the initial inquires and this investigation.

As a parallel issue, the unduly lenient approach taken by Warringah Council and its staff in repeatedly extending the period for provision of additional information, is considered to be appropriate for referral and review by the Independent Commission Against Corruption. Details of this lenient approach are contained in Appendix 3.

Other Councillors and some Warringah Council residents had referred this whole matter for my review as part of the Investigation. In doing so, they expressed the viewpoint that the alleged use of insider information by a Councillor and the apparent lenient treatment of the development application by the Council were causes for concern.

They also expressed the view that this instance was also a cause of the low esteem held by Warringah Council ratepayers for their elected officials. The views expressed to me concerning allegations of the use of insider information were unable to be substantiated as fact.

(See Recommendation No. 4.4).

3.11 Resident Dissatisfaction

From evidence provided to me, various aspects of the operation of Warringah Council have been of concern to its residents for many years. I have, in the course of my investigation, been presented with many complaints and allegations about individual councillors and the organisation as a whole.

The extent, the content and the tone of these complaints and the associated widespread publicity has led to high levels of distrust of Council decision making processes. Some constituents of Warringah Council also expressed strong feelings of disempowerment when personally interacting with Councillors and Council staff.

Complainants to the Minister for Local Government and to the Director General, Department of Local Government have raised the perception of special consideration being provided to Development Applications submitted by a few Councillors. While Councillors are keen to ensure that issues and especially potential pecuniary interest issues are dealt with appropriately, the perception that some personal benefit may have arisen is strongly held by some ratepayers.

An example of this would be the Council's process in approving dual occupancy for properties at 20, 20A, 20B and 22 Ryrie Avenue Cromer. These properties are owned by Councillor Caputo or his close relatives. These were discussed at item 3.10 above and details are contained in Appendix 3.

It is instances like this that is believed to have led to the cynicism within the community about the conduct and processes of Warringah Council. There is a widespread perception that Council mechanisms and resources are being used to protect and enhance the position of individuals, rather than the good of the community.

There is also a strongly held view within the Warringah community that some Councillors do not have an appropriate appreciation of their role and responsibilities. In addition, a commonly held view is that Council is run by and for the benefit of Councillors, their families and their business associates.

(See Recommendations Nos. 4.1 and 4.9).

3.12 Financial Management

A series of complainants to the Minister for Local Government and the Director General of the Department of Local Government have raised serious issues reflecting on the financial management of Warringah Council.

On 10 November 2000, the Director General, Department of Local Government advised Warringah Council that the Department remained concerned with Council's relatively weak financial position. Council's operating result of a \$4.2 million deficit for the 1999-2000 year was a significant deterioration on the previous year's surplus of \$2.56 million. The Director General also noted that, despite Council's relatively weak financial position in recent years, Council had been unable to control costs.

Adding emphasis to these opinions were the comments of Council's auditors (Spencer Steer) in their 1999-2000 audit report. The auditors commented that:

"No unrestricted cash and investments were available to fund day-to-day operations."

"Cash reserves held to fund future payments (ELE) amounted to \$650k, representing 7.56% of the liability and in our opinion are insufficient to cover unbudgeted and unanticipated retirements."

In answer on 24 November 2000 to another Question Without Notice from the Legislative Council, the Minister for Local Government replied that he had put the Warringah Council on notice that it must take remedial measures to restore the Council's finances.

In addition, on 23 November 2000, the Minister for Local Government included Warringah Council within a group of nine which had failed the test of financial responsibility. In naming the Council in a response to a Question without Notice in the Legislative Assembly, the Minister referred to the emphasis he had consistently placed, that Councillors must understand the financial position of their Council and their associated responsibilities, including the communication of a true position to their ratepayers.

The Minister also stated that Councillors must realise that they are using ratepayer funds and that they must use them well. He emphasised that the Councillors were elected to manage public funds and it was therefore essential to ensure that they have a firm hand on their Council's financial position.

For the year ended 30 June 2000, Warringah Council's operations resulted in a decrease of \$4.203 million in net assets. In 2001, this had been turned around to an increase in net assets of \$6.178 million. The turnaround has been attributed almost entirely to a reduction in operating costs including reduced consultancy costs, lower materials and contract expenditure following a reduction in works.

This improvement has continued into 2002, where the recently reported financial performance shows an increase in the net assets for the year of \$16.955 million. The major portion of this improvement resulted from gains from asset disposals.

3.13 Councillor Misbehaviour and Failure of Duty

There is increasing community concern within the Warringah Council local government area regarding incidents of alleged misbehaviour by Councillors. Incidents of reported misbehaviour by Warringah Councillors have taken many forms. There are perceptions that such actions are trivial and certainly less serious than maladministration and corruption. Whilst I agree with this, I strongly believe that the level of misbehaviour and the repetitive nature has led to disrupt the Council in the exercise of its business and consequently imposes a hidden cost on the community.

The incidents of highly public displays of misbehaviour by Councillors, such as abuse and interruption of Council meetings referred to in item 3.7, not only has a negative effect on the efficiency of Warringah Council operations, but has led members of the Warringah community to lose confidence in the elected Councillors and in local government as a legitimate level of government.

(See Recommendation No. 4.3).

A further dimension of allegations of Councillor misbehaviour at Warringah is the issue of whether Councillors have fulfilled their duties of corporate governance.

In determining plans, programs and associated budgets, Councillors have a duty to make decisions based on the merits of the matter before Council, in consideration of all relevant material and after a proper assessment of the risks involved.

Warringah Council, in fulfilling its corporate planning process, has established statements of vision and values and associated guiding principles to enable achievement of corporate programs and goals.

Council's vision is:

Warringah is a Community, which values its quality of life and strives to care for its special bush and beach environment.

Its stated values and associated guiding principles are:

Values	Guiding Principles
Openness	<ul style="list-style-type: none"> ▪ We communicate what services are available. ▪ We value community and staff participation in decision-making.
Equity	<ul style="list-style-type: none"> ▪ We provide equity of opportunity to community members and staff. ▪ We provide a right of review, where possible, with regard to our decisions and practices.
Integrity	<ul style="list-style-type: none"> ▪ We value consistency in decision-making ▪ We promote ethical practice ▪ We are mindful of our role of acting in the public interest.
Efficiency	<ul style="list-style-type: none"> ▪ We value innovation and creativity. ▪ We aim for value for money, recognising the full costs of providing services.
Service	<ul style="list-style-type: none"> ▪ We are customer focused. ▪ We are flexible and receptive to change. ▪ We anticipate needs and future trends. ▪ We provide services in partnership with other organisations and the community.
Respect	<ul style="list-style-type: none"> ▪ We welcome the opinions of all. ▪ We conduct all our dealings in an atmosphere of mutual respect.

These values and associated guiding principles are seen by me as not only appropriate, but as a minimum standard for Councillor behaviour. Incidents of perceived non-compliance are seen as a major contributor to the lack of acceptance voiced to me by constituents interviewed and by many complainants to the Minister and the Director-General.

Whilst it is not easy to change the perceptions of others, actions by Councillors and staff which are seen as contrary to agreed values and principles only act to entrench these beliefs. From interviews I have held, there appears to be a public perception in the Warringah area that councillors take a belligerent approach to criticism and are recalcitrant in making amends. This perception serves to exacerbate the existing problems with ratepayer confidence.

In forming a view as to the cultural tone of Warringah Council, I have seen little evidence to indicate a willingness to change, or a capacity to acknowledge any legitimacy in complaints by constituents.

It would appear that the attitudes and practices applied by Council have been in place for many years. The Council Election in September 1999 saw the election of some new Councillors, bringing what has been expressed to me as a hope for higher standards of openness and accountability within Council operations. I believe that drastic measures are necessary if the current culture of Warringah Council is to be improved.

Many complainants to the Minister for Local Government and Director General, Department of Local Government have raised issues where reported action by Councillors and Council staff would be in conflict with the stated values of the Council.

Evidence of Councillors being involved in discussion and voting on Council issues where they have a non-pecuniary conflict of interest would appear to be contrary to the guiding principles associated with the value of integrity included in Council's Statement of Values. Examples of such conflicts include:-

645-647 Pittwater Road, Dee Why
352 Pittwater Road, North Manly

and are detailed in Appendix 1.

(See Recommendation No. 4.1).

It appears to me, on balance, that having considered all the issues, Councillors have failed to fulfil their duties of corporate governance.

3.14 Inappropriate Use of Funds – Sportsfield Rectification Levy

In 1998 a Special Rate Variation of 2 per cent was approved for Warringah Council by the Minister for Local Government. This variation was aimed at addressing problems related to subsidence of Sportsfields constructed on former landfill sites. This Special Rate Variation is known as the Sportsfield Rectification Levy.

There has been ongoing confusion within Council and the Warringah community regarding the funds raised by the levy, their expenditure and the balances remaining. This has been raised on many occasions in complaints to the Director-General, Department of Local Government and to the Minister for Local Government.

Despite the original terms of the approval, funds from the levy have been applied to developing new sporting infrastructure such as lighting, fencing and other works, rather than rectification. Examples include:

- (a) in a recent decision, expenditure of \$107,000 for subsoil drainage for the rehabilitation of Abbott Road soccer fields was omitted, creating a budgetary saving, but \$129,750 was spent on large-scale fencing structures and sporting installations;
- (b) in the recommendations made by the Sportsfield Rectification Advisory Committee in December 2001, some \$40,000 was allocated to new works including hard surfacing of netball courts.

(See Recommendation No. 4.5).

3.15 Independent Assessment of Development Applications

During interviews, ratepayers brought to my attention examples of Warringah Council projects where they believed that there had been insufficient community consultation. This had contributed to ratepayer dissatisfaction.

An innovative approach to this issue of obtaining greater participation in Council decision-making has been the joint project of Waverly Council and the Stormwater Trust regarding the Bronte Catchment. The project sought to involve a representative 15-member jury to deliberate on a range of stormwater strategies. This deliberation process resulted in the identification and agreement of practical instances to address the initial objective. Recommendations and the consultative process received the support of Council and the local ratepayers.

The use by Liverpool, Burwood, Strathfield and Fairfield Councils of an Independent Hearing and Assessment Panel to consider development applications is worthy of consideration by Warringah Council.

The panel consists of an independent legally qualified chairperson, an urban designer and an environmental expert. A local expert is also added to the panel.

On examination, a small number of the complaints referred to the Minister and Director General lacked substance or were trivial. Whilst read and understood, these did not directly form the basis of my findings. But because of the importance to the local community of Council decisions, the complaints were treated as genuinely motivated by the Department of Local Government and were certainly considered as important by the complainants.

The concern in the Warringah community is, I believe, genuine especially in relation to conflicts, which arise or are perceived to arise between a Councillor's public duty and any personal interest they may have. The resolution of these conflicts is essential to maintain the confidence of the electorate.

In my investigation, suggestions for improving the operations of Warringah Council were made to me regarding these perceived conflicts of interest. These suggestions included the implementation of an Independent Hearing and Assessment Panel.

Under this model Warringah Council would still be responsible for the final decision but, I believe, a far more objective assessment is made by the independent Panel. This would assist in the public's perception of clear and independent evaluation of development applications. The opportunities for corruption would be reduced by the adoption of such a system.

Others have raised with me the lack within Warringah Council and within other Councils of the separation of powers which is provided within a Westminster style of government. In Warringah Council and some other Local Government Areas within New South Wales, councillors are involved in establishing high level policy. The current system also allows the Mayor, acting in an Executive role, to negotiate with developers, objectors and other interested parties. There is then the exercise of the Regulatory role or function where the Mayor and Councillors combine to approve or reject a development application.

This lack of separation of functions and powers within the Local Government system in New South Wales is a most serious issue.

I totally support this suggestion as a means of enhancing the openness of Warringah Council operations and possibly improving the perceptions held by many Warringah residents.

(See Recommendation No. 4.6).

3.16 Non-Complying Development Applications

The approval of applications for development activities within the Council area is subject to a range of internal and external control features. One such control is the availability of information to ratepayers and others concerning applications approved which are not within the standards contained within the Local Environment Plan.

Details of the process involved in the establishment of Warringah Local Environmental Plan 2000 are contained in Appendix 2.

Warringah Local Environmental Plan 2000 provides at Clause 20:

- (3) Where consent is granted for development that does not comply with one or more development standards, the Council is to ensure that the circumstances of the case and reasons for granting consent are included in a public register of such consents.

This provision within the LEP and its satisfactory operation is seen as a major control aspect within the LEP. By providing a public record of all non-complying applications, it aids in assisting public and ratepayer confidence in the Planning and Development Services of the Council.

On request, Council staff provided me a printed copy of the computer based "Warringah Council LEP 2000 Clause 20(3) Register". On examination, this Register would appear to be incomplete. Numerous examples of non-complying applications were discovered which were not contained in the publicly available register.

Whilst I am unable to ascertain the reason(s) for this failure, it is of concern as the availability of this information to the public and ratepayers would aid in ensuring confidence in Council operations.

(See Recommendation No. 4.7).

3.17 Planning and Development Services - Internal Monitoring Processes

A major activity of Council, subject to my investigation, was the operation of the Planning and Development Services.

The regular assessment and measurement by Council of the productive efficiency of the local approvals system is regarded as a basic tenant in ensuring appropriate levels of customer service, and in improving planning to ensure achievement of planning and economic, social and environmental outcomes.

It is basic that the approvals process should be undertaken in a manner which protects the rights of ratepayers, the community and the environment. The Warringah Local Environmental Plan 2000 and its predecessors are used to guide the development and land use within Warringah to achieve outcomes that reflect the values and aspirations of the community.

The Department of Local Government has stated that good practices which assist operational performance include:

- front-end planning, and simple and clear development parameters
- a clear policy on the roles and responsibilities of councillors and staff
- a focus on some of the operational features of the application and assessment process, including fast-track mechanisms, pre-lodgement meetings, alternative dispute resolution, and improved tracking and reporting on individual applications
- improved communication and consultation with applicants and the broader community, and
- council itself measuring and monitoring its performance.

Measurement and monitoring processes undertaken by Warringah Council planning and development staff would appear to be operating satisfactorily.

3.18 Planning and Development Services - External Monitoring Processes

Since 1990 the Department of Local Government has published annually Comparative Information on NSW Local Government Councils. The 1999-2000 information was published on 4 December 2001, while the 2000-2001 information was published by the Department on 5 September 2002.

This comparative information on the performance of all Local Government Councils allows the Department and residents and ratepayers to make informed assessments of the performance of individual councils.

In addition, the key indicators provide a means of benchmarking of performance against that of councils similar in size and function. Judgment on whether councils are performing well or not and whether they are improving their performance or not is enabled by the indicators. Significant variation or change in performance should be questioned and examined in detail.

Councils have been encouraged by the Minister for Local Government to evaluate the information for comparative purposes.

For Warringah Council, of concern is the poor comparison within a like grouping of fourteen other councils, of the percentage of legal expense costs to total planning and development costs. The comparison since 1994-95, is shown below:

	<u>Warringah Council</u>	<u>Group Average</u>
1994-95	15.19%	7.56%
1995-96	20.82%	11.2%
1996-97	19.28%	10.72%
1997-98	15.23%	8.37%
1998-99	19.65%	8.45%
1999-2000	52.46%	12.77%
2000-2001	27.09%	14.67%

In this seven-year period, Warringah Council legal expense percentage comparisons remain consistently and considerably higher than the group average.

Factors contributing to this abnormal result could be varied. Warringah Council staff was aware of these comparisons, but could not show where the elected Councillors had been informed and provided with appropriately researched explanations.

I believe that this ongoing distortion is worthy of further investigation by Council staff and associated reporting to Council.

(See Recommendation No. 4.8)

3.19 Alleged Breach of Pecuniary Interest Requirements

In the course of the Investigation I was provided with copies of complaints made to the Director General, Department of Local Government concerning Warringah Council. Some of these complaints alleged that two councillors breached the pecuniary interest provisions of the *Local Government Act 1993* at Council's meeting of 6 March 2001.

These complainants allege that the breach occurred when the Council was considering item 5.3 on the agenda for that meeting. It was specifically argued that the breach had occurred in relation to an unsuccessful amendment moved by another councillor.

The issues raised by the complainants have been carefully examined and assessed by the Department. I have reviewed these assessments to form my own view. In forming this view, the Department and I have been provided with a considerable body of material by Council.

The Director General, Department of Local Government, concluded that, on the basis of all the information and evidence available, no further action would be taken concerning the allegations and complaints. Having separately examined the available evidence I support this conclusion.

The Department of Local Government has noted the complainants' advice as to what the then Mayor told the meeting about the nature and impact of the motion under consideration. I consider that this advice had some credibility, having regard to the events and resolutions at Council's meeting in February to which the complainants referred.

The Department was also provided, on a confidential basis, with advices obtained by Council relevant to the matter. These were apparently available to some of the Councillors at the time,. One of those opinions, from Mr Murray Tobias QC, quite clearly advises that in his view, on the basis of the facts about each Councillor as known to him, neither had a pecuniary interest in the "in globo" censure motion of 27 February 2001 nor in the then proposed rescission motion of that motion, dealt with at Council's 6 March 2001 meeting.

In its assessment of the complaint, the Department and I agree that the evidence indicated that this opinion was available to and known by at least some of the Councillors, namely Councillors Moxham, Caputo and Jones, when it came to Council's meeting of 6 March 2001.

The Department of Local Government also noted in its assessment of the complaint that one of the Councillors' own solicitors had provided an opinion of 1 March 2001, but addressed to Council's General Manager, on the question of "in globo" motions. The Department again concluded and I agree that this opinion also was at least known to Councillor Caputo, if not also to Councillor Jones.

In its assessment, the Department noted in particular the advice from the complainant, that the then Mayor at the meeting of 6 March 2001 kept on advising the meeting that the motion was merely one to do with censure of the General Manager and Council processes. The then Mayor also indicated that this is why, in his opinion, the two councillors could vote on the item.

I note that the advice from the complainant accorded with the second legal opinion of Mr Tobias QC and the advice of the complainant was one of the factors leading the Department to its conclusion that the councillors were clearly aware of the opinion when they came to decide whether or not to declare a pecuniary interest.

3.20 Development Denying Other Residents' Access to Their Properties

Some residents of Harbord provided detailed evidence of an unresolved issue with Warringah Council. The issue concerned access to residential properties. This matter had been raised with a former Minister for Local Government, who suggested that Warringah Council undertake priority action to register the dedication of a public lane to overcome a situation partly due to Council's omission to register the dedication.

A former General Manager, Warringah Council, Mr F L Thompson in a letter dated 26 June 1997, advised the complainants that:

Although you may have enjoyed the approval of the previous owners to use their land under an informal arrangement, this was not legally binding and not continued by the new owner,who subsequently developed this site.

He also stated that:

Council approved garages in the rear yards.....does not give rise to any guarantee of continued access.

Failure by Warringah Council to action the Minister's suggestions and landowners' requests has had an effect on the perceptions held by some residents concerning the Council's ability to meet its charter under the Act and to fulfil its other statutory responsibilities.

(See Recommendation No.4.10).

3.21 Inconsistent Process in Examining Development Applications

Some Councillors and constituents have alleged to me that the community has lost confidence in the decision-making capacity of Warringah Council in respect to environmental planning matters. This allegation is based on the perception that Council is regularly inconsistent in their application of planning policies, and on occasions, have treated prominent individuals differently than the general public.

In undertaking my investigation, I reviewed a sample of development applications to determine the extent of any irregularities within the planning process applied by the Council. Specifically, attention was focused on whether the requirements of the *Environmental Planning and Assessment Act 1979* and the *Local Government Act 1993* were complied with and the application of the planning process was administered in an equitable manner. Details of the process involved in the establishment of Warringah Local Environmental Plan 2000 are contained in Appendix 2.

Prior to the approval of Warringah Local Environmental Plan 2000 (LEP 2000), Warringah Council had consistently used the draft of this LEP in the process for assessment of development applications. This process has been undertaken in a manner that is inconsistent with the *Environmental Planning and Assessment Act 1979*.

At the Council Meeting on 15 June 1999, Council approved Mayoral Minute No 13/99 which stipulated *"that Council shall require all development applications lodged after 11 May 1999 to comply with the provisions of the draft LEP"*. This Resolution would appear to be in breach of Section 79C(1) of the *Environmental Planning and Assessment Act 1979*.

Mr Michael Ryan has advised me of his view that Council's actions were not in breach of Section 79C. He states that under Section 79C Council is required, in its consideration of development applications, to take into account current LEPs and draft LEPs. He also states that the extent or weight to be given to the draft LEP is a discretionary matter for the Council.

It is my view that the approved Mayoral Minute removed elements of discretion for Council by only requiring compliance with the provisions of the draft LEP and not the other matters contained in Section 79C.

From my investigation and review of Council files, I believe that Warringah Council was aware of problems of requiring all development applications lodged after 11 May 1999 to comply with the draft LEP, yet chose to continue to enforce the Mayoral Minute.

In a letter to Ms Petula Samios, Regional Manager – Sydney Region East, Department of Urban Affairs and Planning (DUAP) on 25 November 1999 concerning DUAP's requirement to include a savings provision in the final LEP, Mr Peter Lawrence, Manager – Strategic Land Use Planning states:

A Mayoral minute [sic.] was adopted by Council on 15 June 1999 directing Council to consider all applications under the draft LEP. Since May 1999, Council has approved over 1000 applications, refused over 20 applications and about 500 applications are pending. All these applications have sought to comply with the provisions of the draft LEP given the Mayoral Minute. The refusals have been largely based on the provisions of the draft LEP. Council would be exposed to enormous criticism if now, after consistent application of the draft LEP to all applications for over six months, a standard savings clause protecting all developments were included in the gazetted version of the Plan.

Even after this admission by senior Council staff and confirmation from DUAP that a standard savings clause should be included in the new LEP, Warringah Council continued to endeavour to require development applications comply with the provisions of the Draft LEP, ignoring the provisions of the gazetted LEP 1985.

A prime example of the inconsistent use of LEPs by Warringah Council occurred on 10 December 1999.

On this day, Warringah Council was defending two appeals in the Land and Environment Court. The appeal referred to in Case Study Two argued that the provisions of the draft LEP, and other issues, should take precedence in the assessment of the development application, while the appeal discussed in Case Study One argued that the provisions of LEP 1985, and other issues, should take precedence. The two contradicting arguments highlight the confusion and ambiguity within the planning process of Warringah.

The Mayoral Minute 13/99 placed considerable ambiguity over the legality of planning decisions of Council. The following two case studies are examples taken from Warringah Council records where planning approval was provided using varying criteria. Further details are provided in Appendix 4.

Case Study 1 – Australian Broadcasting Corporation (2178DA)

This application is a typical example of how the planning process was distorted during the period prior to gazettal of LEP 2000.

Council staff were adamant that all new development applications must comply with the draft Local Environmental Plan (LEP). The Assessment Report used to evaluate the proposed development made no reference to either the LEP 1985 or Development Control Plan No. 15. The report showed no evidence that the gazetted LEP was used in the evaluation of the development application. It was not clear until the applicant forwarded to Council a letter that they received from Department of Urban Affairs and Planning (DUAP), which stated that the development application should be evaluated under the LEP 1985. DUAP insisted that a savings clause be included in the new LEP for all development applications lodged prior to the draft LEPs gazettal. Council received this letter after the development application had been assessed and as a result, a late file note was placed on file that claimed that LEP 1985 was used in the development application's evaluation. The development application was refused by Council and was the subject of an appeal in the Land and Environment Court where Commissioner Bly was critical of Council in its application of the draft LEP. Commissioner Bly assessed the development application in reference to LEP 1985 and DCP No. 15. Commissioner Bly stated in his judgement:

“The Department [DUAP] has advised (25 November 1999) that there are some significant drafting issues to be resolved, especially in relation to savings and transitional provisions and it could be some time before the draft LEP can be finalised.”

Case Study 2 - S & I Investments NSW Pty Ltd (1250 DA)

This application is also an example of how the planning process was distorted during the period prior to gazettal of LEP 2000. The development application involves the demolition of a single storey dwelling house and the construction of a three storey mixed commercial/residential building. The Assessment Report prepared by Council staff included an evaluation of the project against LEP 1985 and the draft LEP. The Report recommended the development application be approved as it complied, in general, with the Draft LEP. However, Council refused the development application, as it did not comply with LEP 1985. The development application was the subject of an appeal in the Land and Environment Court where Council's decision was upheld. During the appeal before the Land and Environment Court, Council mainly based its written arguments on adherence to the requirements of LEP 1985.

Commissioner Hoffman stated in his Judgement that:

"It was noted the Council's draft Local Environmental Plan 1999 had to be re-exhibited and was certainly not imminent or certain at this time and could carry little weight in this appeal."

Both of these Council approvals, as detailed in Case Study One and Two, were subject to appeal and were being considered by the Land and Environment Court on the very same days, yet Council argued two opposing cases. One, suggesting that the provisions of the draft LEP and other issues should take precedence and the other arguing that the provisions of LEP 1985 and other issues should take precedence when evaluating development applications.

Council was fully aware of the predicament it found itself in respect to its application of the Mayoral Minute 13/99. This was included in the Manager, Strategic Land Use Planning's letter to Ms Petula Samios, Regional Manager - Sydney Region East DUAP on 22 November 1999 concerning DUAP's requirement to include a savings provision in the final LEP. Details of this letter have been referred to earlier in this report.

Warringah Council inconsistently applied the provisions of the draft LEP 2000 prior to its gazettal as Warringah LEP 2000. More significantly, Warringah Council improperly applied greater status to the draft LEP than legally allowed under section 79C of the *Environmental Planning and Assessment Act 1979*.

It is clear that during this period development applications were refused by Council which should not have been refused and that the only forum available for some applicants to feel confident that a fair and equitable assessment of their application was conducted was in the Land and Environment Court. The disproportionate amount of legal expenses incurred by Warringah Council is referred to earlier at item 3.18.

It is also clear that during the period of the approval on 15 June 1999 of Mayoral Minuted 13/99 and the gazettal of LEP 2000 in December 2000, Warringah Council refused development applications which should not have been refused. The Council did this, contrary to the advice of DUAP and the continued findings of the Land and Environment Court.

It is my finding that Warringah Council was inconsistent in the criteria applied and the methods used in examining and approving development applications during the period as defined above. This inconsistent approach has led to the widely held belief that Warringah Council has lost the confidence of its community regarding this aspect of its operations.

(See Recommendation No. 4.11)

3.22 External Perceptions of Warringah Council

As was required of the terms of reference associated with my appointment as Departmental Representative, this investigation has examined a range of operational issues and external perceptions of Warringah Council. As a result of the extent and gravity of the preceding findings, I believe that a further, more extensive review should be undertaken. I am also mindful of the perception maintained by many Warringah residents concerning the level of openness and accountability of Warringah Council.

I have already recommended that certain issues be forwarded to the Independent Commission Against Corruption.

PART 4
FINDINGS AND
RECOMMENDATIONS

4. FINDINGS AND RECOMMENDATIONS

FINDINGS

Having completed the investigation approved and authorised on 4 February 2002, I have detailed my findings in this report.

In summary, I have concluded that:

1. There are aspects of the administration of the Warringah Council where opportunities exist to enhance effectiveness and efficiency, especially in the areas of development approvals and council meeting procedures.
2. Examples of inappropriate behaviour by Councillors have had a deleterious effect on the level of confidence placed by constituents in Warringah Council and its decision-making processes.
3. Aspects of the approval process for a development application may be appropriate for referral and review by the Independent Commission Against Corruption.

RECOMMENDATIONS.

- 4.1 Warringah Council re-examine its current Code of Conduct to ensure appropriate measures are contained therein to assist elected Councillors in managing conflicts of interest.
- 4.2 In an endeavour to earn the confidence of the Warringah community, elected Councillors should ensure that Council and Committee meetings are held in an orderly and efficient manner, displaying open government and maximising access and participation by the community.
- 4.3 Warringah Council re-examine its current Code of Conduct to ensure appropriate measures are contained therein to assist Councillors' understanding of appropriate forms of behaviour in their representational role.

- 4.4 The Director General, Department of Local Government, refer a copy of this report to the Independent Commission Against Corruption to enable the Commissioner to examine issues regarding Warringah Council staff actions in submitting, examining and approving development applications.
- 4.5 Warringah Council re-examine expenditure made from funds obtained from the 1998 Special Rate Variation to ensure that such expenditure is aligned with the purpose approved by the Minister for Local Government.
- 4.6 Warringah Council should consider the benefits of introducing an Independent Hearing and Assessment Panel to consider development applications.
- 4.7 Warringah Council maintain the register required by Clause 20(3) of the Warringah Local Environmental Plan 2000 in an accurate and up to date manner.
- 4.8 The General Manager, Warringah Council, arrange for a review of legal and associated expenses and report to Council the reasons for any abnormal or excessive costs, when compared to other Councils.
- 4.9 Warringah Council should re-examine its current Code of Conduct to ensure that appropriate measures are contained therein to assist staff and Councillors in forming opinions without perceived bias.
- 4.10 Warringah Council should re-examine the suggestion made by the former Minister for Local Government concerning residents' right to access their residences.
- 4.11 Warringah Council should undertake a review by the Local Approved Service Unit to determine if controls are adequate to ensure compliance with relevant legislation.

APPENDICES

Appendix 1

Perceived Conflicts of Interest

(a) Perceived Conflict of Interest by Councillor Darren Jones in Development at 645-647 Pittwater Road, Dee Why.

Councillor John Caputo holds an interest in 'The Nautilus' apartments and commercial development at 645-647 Pittwater Road, Dee Why through his family company Benchmark Pty Ltd and Nautilus Pacific Investments Pty Ltd. Councillor Jones holds an interest, through family company Songkal Pty Ltd, in a development known as "Centrepoin" at 701 Pittwater Road, Dee Why. These two developments are on the same side of the same street in reasonable close proximity to each other.

On 24 July 2001 Councillor Jones moved a motion to approve the Development Application relating to 645-647 Pittwater Road, Dee Why for an additional floor. This was described as 'awnings' but classified as an additional level in the Council report. If permitted, the development would exceed the height restrictions of the Warringah LEP 2000.

Councillor Jones' family company, Songkal Pty Ltd, was at that time before the Land & Environment Court appealing Council's decision to refuse a development application relating to 701 Pittwater Road, Dee Why.

On 25 July 2001 the Land and Environment Court admitted into evidence Council's decision of 24 July 2001, which had been moved by Councillor Jones. Approval of the non-complying Nautilus extension was cited as a precedent in support of Songkal's non-complying development at 701 Pittwater Road.

The appeal was successful, the Judge in the appeal cited the approved development at 645-647 Pittwater Road as a supporting element in his statement of decision.

(b) Perceived Conflict of Interest by Councillor Darren Jones in Development at 352 Pittwater Road, North Manly.

On 15 December 1998 Councillor Darren Jones moved a motion for Council to implement the necessary procedures to validate a medium density zoning for the Hayman & Ellis site at 352 Pittwater Road, North Manly. The rezoning allowed this property to be developed for medium density accommodation in what had previously been zoned for light industrial use.

Councillor Jones owns a property at 366 Pittwater Road, North Manly, which adjoins the Hayman & Ellis site and falls within the spot rezoning. Councillor Jones' property was therefore rezoned from Light Industrial 4(b) to medium density. This created a perception within the Warringah area of a potential increase in value.

(c) Perceived Conflict of Interest by Councillor Darren Jones in Flood Prevention - Manly Lagoon

On 25 July 2000, Councillor Darren Jones moved a motion in Council for approving an allocation of \$1.4 million for flood prevention works at Manly Lagoon.

As stated above, Councillor Jones owns a property at 366 Pittwater Road, North Manly, which is close to the foreshore of Manly Lagoon. This property could be affected by severe flooding of the Lagoon. Councillor Jones' involvement in this Motion has created a perception in the Warringah area that a conflict of interest existed.

Appendix 2

Process in the Establishment of Warringah Local Environmental Plan 2000

The planning decisions of Warringah Council can be divided into two (2) distinct periods. The first being the period prior to the gazettal of the Warringah Local Environmental Plan 2000 (LEP 2000) in December 2000 and the second being the period after the gazettal of Warringah LEP 2000. The first period appeared strained by the constant distraction of attempting to prepare a new LEP for Warringah. The process commenced in May 1994 and was not finalised until December 2000.

The new LEP represented a significant shift from the traditional planning methodologies used in New South Wales and required constant negotiation with the Minister for Urban Affairs and Planning and his Department. The development of an innovative plan in itself was not a problem, rather, the recalcitrant stance the Council adopted on a number of issues placed considerable ambiguity over the legitimacy of their planning decisions and elongated the process of the gazettal of the LEP.

Nineteen (19) months prior to the gazettal of the Warringah LEP 2000, Council passed a resolution that required all development within the Warringah local government area to comply with the new draft LEP, despite the Department of Urban and Regional Planning (DUAP) expressing concerns about core features of the plan. In essence, Warringah Council required applicants to comply with a draft plan that did not have the support of the Minister, his Department or sections of the community. On 13 July 2000 the Minister directed the Council to re-exhibit the draft LEP for a third time, adopt the plan and refer it to the Department by 31 August 2000, or it would lose its exemptions from SEPP No. 53 and SEPP No. 60.

At its meeting of 19 May 1994 Warringah Council resolved to commence drafting a new Local Environmental Plan (LEP). The new LEP was to replace Council's existing Plan which was approved by the Minister for Planning, gazetted in 1985 (LEP 1985). However, on 25 November 1995, Council resolved to abandon their initial attempt on the new plan. On 11 June 1996 Warringah Council ¹adopted new objectives for a new LEP based on a process led by 'strong community participation'.

¹ Memorandum to all Councillors from General Manager, 30 June 1998

The new LEP used a different methodology than those traditionally used in the state of New South Wales. The new LEP was designed to be location specific with *Desired Future Character* statements specifying the nature of future development for 73 different locations within the local government area. The LEP replaced the traditional zoning method and provided the opportunity for the implementation of place-based development controls. Under the new LEP very few activities were prohibited and all other activities were classified into three (3) categories that were potentially permissible depending on how they satisfied the various *Desired Future Character* statements. Category One development — development that is generally presumed to be consistent with the desired future character of the location, Category Two development — development that may be consistent with the desired future character of the location, and Category Three development — development that is generally presumed to be inconsistent with the desired future character of the location.²

The new LEP challenged the assumption that the development control system must comprise a hierarchy of separate documents ranging from State Environmental Planning Policies (SEPPs) through to Development Control Plans (DCPs). It aimed to integrate the effect of all of these documents into one comprehensive Local Environmental Plan. The implication of such an approach is that it would leave no room for generic planning policies, whether implemented by the Minister for Urban Affairs and Planning or by Council. It was the intention that once the plan was finalised, Council would ask the State Government to exempt Warringah Council from the various State Environmental Planning Policies and Regional Environmental Plans (REPs) that applied to the local government area. It was believed that such actions would reduce the uncertainty and the complexity of the existing development control system as well as increase its efficiency.

At its meeting on 25 February 1997, Warringah Council adopted the *LEP Position Paper*, which set out the *Warringah Residential Development Strategy*, its relationship to the proposed LEP, and how the proposed LEP would be designed. The *Warringah Residential Development Strategy* was a critical element in Council's intent to become exempt from SEPP 53 - Metropolitan Residential Development.

The actual legality of the proposed LEP was a matter that had not yet been formally tested and, as a result, on 19 March 1997 a meeting was held between Council staff, the Regional Manager of Department of Urban Affairs and Planning (DUAP) and the Manager of the Legal Branch of DUAP, to discuss the proposed LEP.

² Warringah Local Environmental Plan 2000, page 10

To gain clarification, comments from the Parliamentary Counsel on the legality of the proposed LEP were sought and on 14 May 1997 the Parliamentary Council stated, "the general approach taken by the Draft Plan is not contrary to the scheme of the Act."³

Although the advice from the Parliamentary Counsel indicated that the proposed LEP was possible under the existing legislation, the gazettal of the LEP was still a matter for the Minister for Urban Affairs and Planning to determine. Section 69(a) of the *Environmental Planning and Assessment Act 1979* (EPAA 1979) specifically states that the Director General of the Department of Planning must furnish a report to the Minister stating whether the draft LEP submitted is inconsistent with a SEPP, REP, or direction under section 117 of the Act. In a unique case such as this, the Minister, in his assessment of the LEP, must be satisfied that the LEP addresses each and every issue contained in State Environmental Planning Policies and Regional Environmental Plans. Ultimately, the success of the proposed plan relies not on Council resolution but on the Council's ability to successfully accommodate the NSW Government's SEPPs and REPs into the new Plan.

One of the specific SEPPs that Warringah Council was seeking exemption from was State Environmental Planning Policy 53 - Metropolitan Residential Development. SEPP 53 applies to Councils in the Greater Metropolitan Region, that have not prepared a suitable residential development strategy addressing local housing needs while contributing to the metropolitan objective of more compact cities. The Policy contains development controls for integrated housing and dual occupancy. Under Part 4 of that Policy, the Minister has the power to alter local planning provisions to facilitate multi-unit redevelopment of site that are well located in relation to transport, work and services.

In accordance with section 64 of the EPAA 1979, Council submitted a copy of the draft LEP to DUAP on 5 December 1997. The purpose of which was to obtain a Section 65 Certificate to allow the Council to publicly exhibit the Draft LEP.

On 3 February 1998, Warringah Council wrote to the Director General of DUAP requesting that Warringah Council be exempt from SEPP 53, due to work the Council had done in preparing the Draft LEP and, in particular, the *Residential Development Strategy*. On 6 May 1998, the Minister wrote to the Mayor of Warringah, stating that "Warringah Council's Strategy is still not considered acceptable" and that Warringah Council would not be "exempt from SEPP 53 until it had further advanced planning for the Dee Why Town Centre".

³ Memorandum to all Councillors from General Manager, 30 June 1998

He also added, "Council needs to make considerably more progress before exemption from the SEPP could be considered". The Minister also indicated that he would not act on Part 4 of the SEPP for a further three (3) months.

After considerable consultation with DUAP, the Director General wrote to Council on 4 August 1998 indicating that the Department was prepared to allow Council to proceed with the preparation of its comprehensive draft LEP. This advice was given on the basis that the inclusion of provisions from relevant SEPPs and REPs into the draft LEP was to be clearly seen as a 'pilot project'. The letter stated that the LEP was to have a definite "life" of 24 months after gazettal and that all SEPPs and REPs which apply to Warringah local government area, with the exception of SEPP 53 and REP 7, may be incorporated into the draft LEP. SEPP 53 and REP 7 were exempted from being included in the draft LEP as the Director General concluded that the Council was making satisfactory progress in refining its Residential Development Strategy.

On 3 September 1998 the Minister for Urban Affairs and Planning advised the Mayor of Warringah Council that on the basis of the revised *Residential Development Strategy*, Warringah Local Government Area (LGA) would be made exempt from SEPP No. 53. A file note on the letter shows that all Councillors were advised on 8 September 1998. On 9 October 1998 Amendment No. 4 to SEPP No. 53 formally exempted Warringah Local Government Area from SEPP No. 53.

In October 1998 the Director General of DUAP issued a Certificate, in terms of Section 65 of EPAA 1979, which allowed the draft LEP to be exhibited. This Certificate was issued ten (10) months after the draft Plan was originally lodged with DUAP. The time taken in obtaining this approval is an indication of the complexity of the reform being proposed.

The public exhibition of the draft Plan was conducted between 19 October and 12 December 1998. As a result of the exhibition, over 200 submissions were received by Warringah Council from members of the public as well as submissions from public authorities. Over the next five (5) months, significant changes to the draft LEP were made in an endeavour to make it more practical, workable and tighter.⁴

At the Warringah Council meeting of 11 May 1999 a report from Council officers, *Warringah LEP— Final Draft*, was presented. The purpose of the report was to provide summarised details of public submissions, recommend amendments to the draft LEP and seek Council's adoption of the amended Plan.

⁴ Warringah Council Meeting 11 May 1999, item 3.2 Warringah LEP - Final Draft, Officers report

The Report included five (5) attachments, all of which were required to be forwarded to DUAP under section 68 of the EPAA 1979 for consideration by the Director General, prior to gazettal. The report was a lengthy and complex document, with attachments exceeding 145 pages.

When a draft LEP is forwarded to DUAP, in accordance with section 68 (4), the draft LEP assumes a greater status within the planning framework. Section 79C (1) (a) of the EPAA 1979 states that:

In determining a development application, a consent authority is to take into consideration matters that are of relevance to the development including:

- (a) the provision 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,

Consequently, the advice and recommendations that Council received at this stage in the drafting process is crucial, as Council's decisions set in train actions and expectations that affect the planning process.

In the previously mentioned report presented to Council on the 11 May 1999, it is clear that the advice and recommendations of staff was deficient. Although the report identified issues, which could potentially cause problems with the gazettal of the draft LEP, it regarded them as insignificant. Council officers noted that the LEP had undergone considerable changes. However it was the advice that was given to Council in the report and the actions Council took that caused considerable problems in the application of an effective planning process in Warringah. Issues identified in the report which were of error include:

- Third Party Appeal Rights
- Timing

The issue of Third Party Appeal Rights, this was to become a challenge in the final gazettal of the LEP. Council adopted a very hard line on this matter and this position was in clear opposition to DUAP. The extract below from the Report of 11 May 1999 clearly shows that Council was aware of DUAPs position:

Officers of DUAP have verbally indicated that third party appeal rights associated with category 3 uses may be unacceptable to the Department. The draft LEP puts in place a process that allows those uses to be considered in much the same way as a rezoning application is considered now, but with safeguards to ensure that the process is open and transparent. One of those safeguards is third party appeal rights.

DUAP has clearly stated that the Warringah LEP is a pilot LEP and its performance will be reviewed after two years. Officers of DUAP have stated that the designated development process proposed in the draft LEP (the only way of allowing third party appeal rights for development) to allow category three uses to have third party appeal rights would undermine the integrity of the notion of EIS' [sic.] and designated development. Whilst this would certainly be understandable if a large number of Councils in NSW were proposing such a process, it is difficult to imagine how this is possible given that Council would only consider a current LEP, both hotels and clubs in residential zones are designated development. The Act also allows Council to deem certain development to be designated development.

In respect to Timing and the Gazettal of the LEP, the advice provided to Council by officers in the report was incorrect. The unique nature of the LEP and the lengthy history in drafting the LEP provided no reference for Council staff to estimate the time that DUAP was likely to take. The report states:

If Council adopts the draft LEP, Council officers would then need to refer the plan to DUAP for the Minister's approval. It is difficult to estimate the time that the Department is likely to take with the draft LEP. It may be in the order of 3-4 months before the plan is gazetted.

The changes and reforms being proposed by Warringah Council in the draft LEP were significant. For this and associated reasons it took DUAP ten (10) months to issue the section 65 certificate, which is a certificate authorising Council to exhibit the LEP for public comment only. Also the summary of changes was 15 pages in length and it took Council five (5) months to assess and revise the LEP.

The advice provided to Council that indicated that the draft LEP could be gazetted in 3-4 months was in error. In fact the final gazettal was not completed for a further nineteen (19) months. By stating in the report to Council that the Draft LEP was only 3 - 4 months away from gazettal essentially gives the Plan more status in the planning framework as it implies the gazettal of the Plan is imminent.

A Draft LEP should not take precedence over the existing LEP 1985 until its gazettal is imminent or certain and the Director General of DUAP has satisfied all aspects of section 69 of EPAA 1979. The proposed time frame of 3-4 months, the issues identified in the report and the complexity of drafting a new and unique instrument made the draft LEP neither imminent or certain.

Attached to the Report presented to Council on 11 May 1999 were the following recommendations that were adopted by Council:

1. That Council adopt the draft LEP and refer it to the Department of Urban Affairs and Planning for approval by the Minister.
2. That Council adopt the "Policy on the Operations of Public Hearings into Category Three Uses".
3. That Council commission independent traffic consultants to investigate the traffic circulation ramifications of the removal of the road reservations in the Dee Why town centre in relation to the development potential of the centre.
4. That Council make representation to DUAP seeking to ensure that category 3 third party appeal rights, are included in the final LEP and that Council is prepared to allow some uses in this category to be exempt from EIS requirements.
5. That No 12 Frenchs Forest Road East, Frenchs Forest, be included in the adjacent Local Retail Centre under the adopted draft LEP.
6. That the proposal to "rezone" Nos 10 and 22 Frenchs Forest Road East be refused.
7. That Council, in determining development applications both pending and lodged prior to the gazettal of the LEP shall apply the provisions of the draft LEP in the circumstances of each application.
8. That Council advise applicants of, and advertise to the community, point 7 above.

At the Warringah Council Meeting of 15 June 1999, Council considered the Mayoral Minute No. 13/99 – Draft LEP and adopted the recommendations. Mayoral Minute No. 13/99 is shown below:

Council at its meeting of 11 May 1999 considered a comprehensive report from the Director of Strategy regarding the draft Local Environmental Plan (LEP).

Council formally adopted the draft LEP and referred to the Department of Urban Affairs & Planning for approval by the Minister. A number of other resolutions were also passed by Council on 11 May 1999 and there is a necessity for clarification on one specific issue relating to the determination of development applications that were lodged prior to 11 May 1999.

The staff have determined that all applications lodged after 11 May 1999 shall comply with the provisions of the draft LEP. However, a number of applications are still waiting determination that was lodged between January 1999 and May 1999. In some instances Council staff have been negotiating with applicants to amend their applications to overcome issues such as height, views and the aesthetics of buildings. There is an urgent need to seek clarification from Council on the manner in which these applications should be determined. The staff consider the most appropriate course of action to be for all applications lodged prior to 11 May 1999 to be considered on their merits, notwithstanding strict compliance of the draft LEP.

It is recommended accordingly:

1. That Council shall require all development applications lodged after 11 May 1999 to comply with the provisions of the draft LEP.
2. Any application received by Council prior to 11 May 1999, and not determined, should be considered on their merit and have regard to the draft LEP provisions.

In adopting Recommendation No. 7 of the Meeting of 11 May 1999 and the Mayoral Minute No 13/99 – Draft LEP, significantly affected the ability of Council to adhere to Section 79C of the EPAA 1979.

Under this section of the Act, the Consent Authority must also consider, amongst other things, the gazetted LEP and any Development Control Plan that applies to the land. Council does not have within its power the authority to require all development applications lodged prior to gazettal of a draft LEP to comply with the provisions of the draft LEP.

The Land and Environment Court generally upholds assessments in respect to draft planning provisions only when it is convinced that its gazettal is considered imminent or certain. In practice, this has commenced when the Director General of the Department of Planning has furnished the Minister for Urban Affairs and Planning with a Section 69 Report recommending the Plan's gazettal.

Appendix 3

Process of Assessment of Development Application for a Councillor and his Relatives

Development Application No. 411DA	
Development Application Details	J & L Caputo 5 Cooper Close Beacon Hill 2100
Address of Land Developed	No.(s) 20, 20A, 20B, 22 Ryrie Avenue Cromer
Date Development Application was submitted	10 September 1998
Date Development Application was Determined:	20 March 2001 Approved by Council, subject to conditions

Description of Development

The proposed development involved the construction of eight dual occupancy dwellings on lots 35, 36, 37 and 40, DP 774979.

The site, as described in Warringah Council's Assessment Report, "has two (2) older dwellings constructed on it in reasonable repair. Council had previously approved the subdivision of 2 lots fronting Ryrie Avenue to create the above Lots 35, 36, 37 and 40, DP774979 with central access way to rear lots".

At the time of lodgement of the Development Application on 10 September 1998, the subject site was zoned 2(a) Residential 'A' under the provisions of the Warringah Local Environmental Plan 1985 (LEP 1985).

Under the provisions of the then draft Warringah Local Environmental Plan, this site has been identified within the B7 "Narrabeen Lake Suburb Locality".

The provision of State Environmental Planning Policy No. 53 - Metropolitan Residential Development (SEPP No. 53) applied to Warringah Council area at the time the DA was lodged. However, on 9 October 1998 the Warringah Local Government Area (LGA) was formally exempted from SEPP No. 53 when the SEPP was amended by Amendment No. 4.

Under Clauses 33 and 40 of SEPP No. 53 any application lodged prior to Amendment No. 4, should be determined in regard to SEPP No. 53, as it operated at the time of lodgement. This Development Application should also be determined as if LEP 1985 continued to have effect and as if Warringah LEP 2000 had been exhibited but had not been made at the time of lodgement.

Background

On 11 June 1996 Warringah Council began drafting a new comprehensive Local Environmental Plan (LEP) aimed to integrate the effect of all the separate planning documents ranging from SEPPs through to Development Control Plans (DCPs) into one instrument. It was the stated intention of Council that once the plan was finalised, or particular components were, Council would ask the State Government to exempt Warringah Council from the various State Environmental Planning Policies and Regional Environmental Plans (REPs) that applied to the local government area. One of the specific SEPPs that Warringah Council was seeking exemption from was State Environmental Planning Policy No. 53 - Metropolitan Residential Development. SEPP No. 53 applies to Councils in the Greater Metropolitan Region that have not prepared a suitable residential development strategy addressing local housing needs while contributing to the metropolitan objective of more compact cities. The Policy contains development controls for integrated housing and dual occupancy.

The Minister for Urban Affairs and Planning wrote to the Mayor of Warringah Council on 3 September 1998 informing him that Warringah Local Government Area (LGA) will be made exempt from SEPP No. 53 and that this change "will be prepared for gazettal shortly". A faxed copy of the letter was recorded as being received by Council on 3 September 1998. A file note on the faxed copy by the then General Manager records that all Councillors were advised on 3 September 1998. The former General Manager, Mr Denis Smith, has confirmed that it was standard practice and good governance that copies of letters from a Minister be distributed to all Councillors. Gazettal and public notification of this change occurred on 9 October 1998, with public proclamation of Amendment No. 4.

The applicants, J & L Caputo, were Councillor John Caputo and his wife Letizia Caputo. Councillor John Caputo had been a Councillor on Warringah Council since 1987, serving as Shire President for two terms from 1989 to 1991 and again as Mayor in 1998.

The original application was lodged on 10 September 1998, seven days after all Councillors were notified of the Minister's intent to exclude Warringah LGA from SEPP No. 53. The Minister's intent was generally known as it was included in a report in the Manly Daily newspaper on 5 September 1998.

The application submitted by Councillor Caputo was not complete. Ms Karla Healy, Acting Senior Development Officer at Warringah Council, was appointed as the assessment officer and after a preliminary assessment, Council's Planning Co-ordinator wrote to the applicants on 24 September 1998 requesting the following information to enable the application to be assessed:

1. Drainage plan including on-site detention details
2. Landscape plan
3. Full elevation of all proposed dwellings
4. A site analysis addressing all items listed in Schedule 5 of SEPP No 33.

The correspondence of 24 September 1998 states:

If Council has not received this information to its satisfaction, within 21 days, your Development Application will be determined on the basis of information presently before Council.

Council has adopted this procedure in the interest of streamlining the processing of all DA. Your co-operation in this matter would be appreciated.

On 29 September 1998 Ms Healy notified adjoining neighbours of the proposed development and required that any submissions they intended to lodge be forwarded to Council by 14 October 1998. In total, nine (9) addressees were notified and one submission was subsequently received.

On 20 October 1998 Ms Healy wrote to the applicants, requesting that the four items requested earlier (24 September 1998) be forwarded to Council to allow the assessment to be conducted. Ms Healy also requested that a schedule indicating proposed materials and colours to be used in the construction of the dwellings be forwarded to Council to be considered in the assessment process. The letter also states:

As you would be aware, this application will be assessed by independent Town Planners. Letters have been sent calling for tenders to assess the application. It is expected a decision will be made as to the successful tender within two (2) weeks.

This application cannot be determined without the information listed above. The process would therefore be expedited if this information is received before the application is forwarded to the successful tender.

Furthermore, you are advised that Clause 48 of the Environmental Planning and Assessment Regulation has the effect of "stopping the clock" for calculation of the period of time taken to assess the application, where additional information or details are sought.

The above statement is a confirmation of Warringah Council's policy that all applications involving a councillor as either an owner or applicant should be assessed by external planning consultants and then be determined by full Council. The policy is designed to increase the independence of the assessment process.

On 20 November 1998 Ms Healy wrote to Pittenrigh, Shingfield & Bruce Pty Ltd confirming their appointment to undertake the assessment of the DA. Ms Healy informed the consultants that Council was still waiting for additional information from the applicants and that this information was anticipated in January 1999.

On 8 December 1998 Ms Healy wrote to the applicants informing them that Consultant Planners had been appointed and the five (5) items previously requested was needed to make an assessment. The letter makes the following statement.

The Consultants will have time and resources available to carry out the work in late January 1999. You are therefore requested to submit the information within the next 21 days, to avoid having to call for tenders again.

Eleven months after the lodgement of the development application on 9 August 1999, Mr Norm Fletcher - Manager Local Approvals Service Unit, wrote to the applicants requesting the information previously requested to be forwarded to Council to allow the application to be assessed. A handwritten footnote on the file copy of this letter states:

Karla - hold for 30 days and if no response refer back to me and I will report to GM possible refusal.

Norm

The former General Manager, Warringah Council, has advised that he had no recollection or knowledge of the matter referred to in this file note being reported to the General Manager. He also informed me that the Manager of Local Approvals was responsible to the Director, Strategic Planning and, as General Manager, he did not get involved in the day-to-day processing of development applications.

It was Mr Smith's opinion that if the matter had been reported to the General Manager, a file note would have reflected such action, together with any direction given. My examination of the relevant file revealed no such file note.

On 21 February 2000 Norm Fletcher e-mailed Ms Healy:

Karla

Spoke to applicant and advised that we were still awaiting submissions.

The applicant indicated they will submit a report prepared by consultants for each application back to Council in next couple of weeks. I advised if nothing received at end of Feb applications will be determined. Can you hold off on determining applications until end Feb.

Thanks

Norm

On 14 March 2000, Mr Phillip Gatenby - Manager, Development Assessment e-mailed Mr Michael Ryan. (This action occurred seventeen (17) months after the lodgement of the development application).

As discussed with you there are two DA's currently outstanding - 385 DA for dual occupancy at 23 Lady Penhyrn Avenue (Clr Caputo's current home) and 411 DA for dual occupancy subdivision of lots 20, 20A, 20B and 22 Rylie Avenue Cromer. I spoke to Clr Caputo this morning and he advised that he will be getting a consultant's report to local approvals by end of next week to address all the matters raised in council letters for the two DA's. I said ok but we must have this information by then. I will place copy of this email on the two files.

On 24 March 2000 Councillor Caputo wrote to Warringah Council advising that the information would be supplied to Council within 21 days.

On 25 May 2000 Mr Gatenby, made a file note indicating that Mr Fletcher spoke to Councillor Caputo on 25 May 2000 and advised him that if the information was not received within two weeks, i.e. 8 June 2000, then the application would be refused.

On 14 July 2000 Mr Gatenby made a further file note indicating that he spoke to Councillor Caputo on 14 July 2000. He wrote, *"amended/better plans would definitely be submitted ASAP"* and a letter would be forwarded to Council by Councillor Caputo on Monday 17 July 2000 to confirm this.

On 24 July 2000 the consultants appointed by Councillor Caputo to manage the application, Mr Leo Stancy of Residential Lifestyle Pty Ltd, wrote to Council indicating that he had taken over the management of the Development Application and would respond to Council's request. A meeting was held with Mr Leo Stancy on 11 August 2000 with Council's officers to discuss the outstanding items.

On 1 September 2000 Mr Fletcher wrote a memorandum to the General Manager in response to a request for information by Councillor Peter Forrest concerning the development application. Mr Fletcher gave a brief history of the application and made the following statement:

The issues relating to the application and a lack of information have placed Council staff in a difficult situation as the policy requires all applications which have a Councillor involvement as owner or applicant must be assessed by an external consultant and then determined by full Council. The difficulty with this application is the information has not been forthcoming as what would be reasonably expected and therefore the staff have not been able to carry out an assessment it would be in breach of Council's policies and if the application was refused by full Council there would need to be reasons for refusal and this would be difficult to determine until a full assessment has been completed.

Council received the amended plans and supporting information requested on the 12 October 2000. This was more than twenty four (24) months after Council's initial request for additional material of 24 September 1998.

On 13 October 2000 neighbours were re-notified of the amended Development Application and were invited to make submissions to Council no later than 27 October 2000. Hunter Development Brokerage Pty Ltd was also appointed to conduct the independent assessment of the Development Application.

On 24 January 2001 the applicant was informed that Council would consider and determine the Development Application at the Council meeting on 6 February 2001.

The matter was debated at the Council meeting of 6 February 2001 and was deferred as a result of Council Resolution No.5 (of that same meeting) Item 4A Matter of Urgency – Development Application for 20, 20A, 20B and 22 Rylie Avenue and 701 Pittwater Road, Dee Why.

A Motion, brought forward as a matter of urgency by Councillor Forrest at the Council Meeting of 6 February 2001, which contained eight different parts, connected this development application with a different development application pertaining to a proposed development at 701 Pittwater Road lodged by Councillor Darren Jones. The two applications were similar in the sense that they both involved a Councillor and information requested by Council was not immediately forthcoming. The Motion passed by Council requested the General Manager to furnish a report to Council by the next meeting on the assessment process of both applications. The effect of this Motion was, when Council discussed and voted on either matter, both Councillor Caputo and Councillor Jones needed to leave the chamber due to their declared pecuniary interest in their respective development applications.

Mr Fletcher drafted a second memorandum to the General Manager on 12 February 2001 concerning a request for information on the development application by Councillor Forrest. The memorandum contained the following statements:

- 1. There is no policy of Council that indicates applications will be determined by Council if additional information has not been submitted within twenty-one (21) days of Council officially requiring such to be submitted.*

Local Approvals normally review all applications once they have been submitted as quickly as possible so as to ensure that if additional information is required the appropriate letter is sent to the applicant requesting such information. The necessity of sending this letter is to ensure that Clause 48 of the Environmental Planning and Assessment Regulation is put in place as this enables Council to bring into what is commonly called "stop the clock provision". The request must be made of the applicant within twenty-one (21) days after receipt of the development application and until such information is submitted to the satisfaction of Council the matter cannot be appealed to the Land and Environment Court as a deemed refusal.

Council's letter which is a standard format that requires this additional information does identify Clause 48 of the Environmental Planning and Assessment Regulation, however, it does indicate that if Council has not received this information to its satisfaction within twenty-one days the development application will be determined on the basis of the information presently before Council.

The letter does not indicate a time limit of when the application will be determined, it is simply a request to the applicant, identifying that Council will determine the application on the information provided.

- 2. In regards to the determination of the application this, in my view, could not be carried out by the staff, as the policies of Local Approvals require all applications that involve Councillors to be referred to an external consultant to carry out the assessment. The information to carry out this assessment was not forthcoming until early October 2000 and, furthermore, I did advise Councillor Peter Forrest by memorandum on 1 September 2000 of the difficulties for Council staff in arranging for the Consultant to commence the assessment and I did suggest that if he wished the matter to be presented to full Council it would be done, however, this request was not forthcoming.*

I do not feel that Local Approvals staff failed to have the application determined on the basis of the information held by Council as this matter can only be done by Council and also Councillor Peter Forrest did not call the matter up to full Council even though the option was provided to him by myself on the abovementioned date.

During this process, Warringah Council became aware that the existing development application might not be valid, as it has been "significantly" amended and could be interpreted as a separate or new development application. In response to this Council sought legal advice concerning the Assessment Report conducted by Hunter Development Brokerage Pty Ltd. Council's solicitors advised Council on 21 February 2001 and drafted a letter to be referred to Hunter Development Brokerage Pty Ltd. The Council was keen to ensure that Hunter Development Brokerage Pty Ltd assessed the validity of the development application in their report to eliminate any possible ambiguity or challenge.

On 21 February 2001, Council's solicitors also advised Council on how to deal with the Rescission Motion of Council, which linked the two development applications together (701 Pittwater Road and DA411). They advised Council that they must deal with the two items separately.

Mr Fletcher forwarded the letter drafted by Council's solicitors to Hunter Development Brokerage Pty Ltd on 28 February 2001. The letter states:

Your report does not expressly address the question as to whether the development proposed is, or is not, so substantially different to that proposed in the development application as to amount to and original development application. Decisions of the Land and Environment Court emphasise that this is a question of fact and degree but that the extent of the amendments should be assessed to determine whether a new development has been substituted for the original one.

In advising the Council on this question regard should be had to the development for each of the allotments Lots 35, 36, 37 & 40 DP 774979 for the purpose of two dwellings on each allotment. The provision of Part 3 - Dual Occupancy in SEPP53, particularly the objective in clause 15(a), permissible development referred to in clause 17, and the development standards for allotment size in clause 19 should be addresses.

On 1 March 2001 the solicitor acting for the applicant wrote to Council requesting that the two development applications, 701 Pittwater Road and 411DA, be dealt with by Council as two separate items on the business paper. The Solicitor indicated that an application would be made to the Supreme Court seeking declaratory relief.

On 16 March 2001, in a memo to Mr Ross Symons, Director Public Office, Councillor Forrest stated that Councillor Caputo had disclosed a pecuniary interest in the development application of 701 Pittwater Road on 21 April 1998. Council Minutes disclose that this statement is accurate and that Councillor Caputo was absent from the Chamber during consideration and discussion of, and voting upon this item. Councillor Forrest also stated his opinion that consequently, if the two items were dealt with as separate resolutions, Councillor Caputo would still not be eligible to vote on this matter. The obligation and responsibility of declaring a pecuniary interest is that of the Councillor and there is no requirement for any Council officer to respond to another Councillor's statement or observation about possible pecuniary interests of another Councillor.

On 13 March 2001, Council's solicitor wrote to the General Manager advising Council on the amendment made by Hunter Development Brokerage Pty Ltd to the Assessment Report. Listed below is the advice provided to Council from Wilshire Webb Solicitors.

The development application and SEPP 53.

The development application was lodged with Council on 10 September 1998 accompanied by 2 sheets of plans numbers 9523-DA-01 Rev A and 9523-DA-02 Rev A dated May 1995 ("the original plans").

As at the date of lodgement of the development application SEPP 53 – Metropolitan Residential Development as to Part 3 Dual Occupancy applied to the subject lands of the development application (Lots 35, 36, 37 and 40 DP 774979) being land within the Warringah Local Government Area zoned Residential under Warringah LEP 1985.

On 9 October 1998 Amendment No 4 to SEPP 53 exempted the Warringah Local Government Area from the operation of the SEPP subject to Clause 40 which was introduced into SEPP 53 as a savings provision.

Clause 40 provides that a development application that related to land within the Warringah Local Government Area to which the policy applied immediately before 9 October 1998 when it was amended by Amendment No. 4 and that had not been finally determined before that date is to be determined as if the policy had not been so amended.

Clause 17 of Part 3 – Dual Occupancy in SEPP 53 allows development that results in two dwellings being located on the one allotment of land if another Environmental Planning Instrument permits a dwelling house to be erected on that allotment and the development is carried out in accordance with Part 3 and Par 5 of SEPP 53.

Under Clause 5 of WLEP 2000 the development application having been submitted before 5 December 2000 when WLEP 2000 took effect, the development application is to be determined as if WLEP 1985 continues to have effect and as if WLEP continues to have effect and as if WLEP 2000 has been exhibited but has not been made.

Under WLEP 1985 a dwelling house is permitted on each of the allotments Lots 35, 36, 37 and 40 for the purposes of Clause 17.

Under WLEP 2000 the subject land is located within Locality B7 – Narrabeen Lake Suburbs. Each of the allotments Lots 35, 36, 37 and 40 has an area of 600 square metres or greater and one dwelling on each of the allotments is permissible under the housing density development standard for that locality for the purposes of Clause 17.

The amended development application

Council received amendment plans numbers 1 - 32 dated 28 September 2000 on 11 October 2000 ("the amended plans"). In an amended report to Council Hunter Development Brokerage Pty Limited, the independent Consultant Town Planners, advised that the amended plans submitted on 12 October 2000 are substantially the same as the original plans with the only amendments relating to improvements in design to meet concerns of Council and adjoining owners.

The amended report for each of the allotments Lots 35, 36, 37 and 40 describes the changes in design to support the conclusion that the amended plans are substantially the same as the original plans.

The Council may conclude from that report that the changes in the amended plans did not constitute in substance a fresh development application.

Advice

On the expert advice in the amended report from Hunter Development Brokerage Pty Limited, it is reasonably open to the Council to determine that the proposed development is permissible with consent under Part 3 – Dual Occupancy of SEPP 53 on the basis that the development application lodged with Council on 10 September 1998 (as later amended by the amended plans received on 12 October 2000) had not been finally determined before 9 October 1998 when the Warringah Local Government Area was exempted from SEPP 53. The development application may now be determined as if the SEPP had not been amended by Amendment No 4 on 9 October 1998.

At the Warringah Council meeting on 20 March 2001, Council approved the development application, subject to conditions. The Manager, Development Assessment, Mr Phil Gatenby, wrote to the applicants on 22 March 2001 and informed them of this approval.

This approval by Council was 922 days after receipt by Council of the development application. Legal representatives of Councillor Caputo have provided details of some examples of other development applications, which took up to 740 days for an approved application and up to 734 days for a refused application. On the other hand, Council staff have advised the Department of Local Government that the mean days for Warringah Council to determine dual occupancy applications was 192.7 days. I am less concerned that the documents were not provided in an expeditious manner but rather, the unduly lenient approach taken by Warringah Council and its staff in repeatedly extending the period for provision of additional information.

On 9 March 2001 a meeting was attended by the then Mayor, Councillor Peter Moxham, Council General Manager Mr Denis Smith, the Director, Public Office Mr Ross Symons and the Deputy Director General of the Department of Local Government, Mr Tim Rogers. This meeting examined Council's assessment of this application. Warringah Council provided the Deputy Director General at the meeting with 61 pages of information pertaining to this matter. The Deputy Director General requested additional information including a complete chronology of the issue.

The then General Manager provided a further 118 pages of information on 16 March 2001. The then General Manager advised that he had requested the Acting Service Unit Manager to carry out a thorough appraisal of the application from the time of lodgement until the present date. He also advised that he had previously asked for a report to be prepared on all development applications pertaining to dual occupancy that had been received by Council in accordance with the State Environment Planning Policy 53 Issue.

The then General Manager's letter of 16 March 2001 to Mr Rogers stated that he had attached a report from the Acting Service Unit Manager of Local Approval Service Unit which sets out details of every Development Application for dual occupancy that falls within the provisions of SEPP53 together with a comprehensive chronological order of events relating to the application by J & L Caputo. The attached report stated, "As you are aware Warringah Council received an exemption to the provisions of SEPP 53 on 9th October 1998".

Although this statement is correct the chronology of five pages omits the vital information as to when Councillor Caputo become aware of the likely exemption of Warringah LGA. The "comprehensive chronology" also omits listing another important item, correspondence from Ms Healy to the applicant on 8 December 1998 requesting additional information to be submitted within 21 days to avoid calling for new consultants to assess the application.

I find that the omission of two important items of information when reporting to the Department of Local Government as part of an official enquiry is either a case of administrative mismanagement or a deliberate attempt to mislead the Department and, in turn, the community. The omission of Minister for Urban Affairs and Planning's letter of 3 September 1998 from the "comprehensive chronology and order of events" and the other 179 pages is significant.

The evidence revealed that some individuals of Warringah Council were aware of Councillor Caputo's actions and they failed to inform the Department of Local Government of that fact during the course of the initial enquiry.

The review of Council's file on this matter revealed other references to the then General Manager, Mr Dennis Smith. The first is a handwritten file note by Mr Norm Fletcher on the bottom of a letter he signed to Councillor Caputo dated 9 August 1999. Mr Fletcher writes:

Karla - hold for 30 days and if no response refer back to me and I will report to GM possible refusal.

Norm

Yet the next file note was not made to file until 21 February 2000, when Mr Fletcher e-mailed Ms Healy

Karla

Spoke to applicant and advised that we were still awaiting submissions.

The applicant indicated they will submit a report prepared by consultants for each application back to Council in next couple of weeks. I advised if nothing received at end of Feb applications will be determined. Can you hold off on determining applications until end Feb.

Thanks

Norm

The above information shows that the Ms Healy was working under instructions from Mr Fletcher and he in turn considered it prudent to consult the General Manger on this matter before making any final decision. The instruction Mr Fletcher gave to Ms Healy was specific, *"hold for 30 days and if no response refer back to me"*.

The former General Manager, Mr Denis Smith, has informed me that it is important to understand that the processing of development applications and the delegation for approval and refusal were vested in the Manager of Local Approvals, who reported to the Director of Strategy. The Manager of Local Approvals, Mr Norm Fletcher, did not report directly to the General Manager. He also advised that he always followed protocol and respected the roles of staff.

While it may be reasonable to assume that Ms Healy did refer the matter back to Mr Fletcher and who may in turn have discussed the matter with the then General Manager, this is a question unanswered. I have been unable to establish from Council records if such discussions were undertaken. If considered necessary the answers to this and other questions should be obtainable by seeking evidence at a subsequent enquiry.

The effect of a refusal of the application at that stage is clear. Refusal could have stopped Councillor Caputo's plans for dual occupancy on the site, as a new development application could not have been approved as SEPP No. 53 no longer applied to the Warringah LGA. If the development application had been refused by Council on the grounds relating to insufficiency of information, appeal rights to the Land and Environment Court existed. Clearly it was not in Councillor's Caputo's interests for the application to be refused.

The next file note occurred on 25 May 2000, where Mr Gatenby indicated that Mr Fletcher spoke to the applicant that day and advised him that if the information was not forthcoming within two weeks the application would be refused. A subsequent file note was made on 14 July 2000 where Mr Gatenby indicated that the applicant would forward "amended/better plans ... ASAP".

A further possible question is whether Mr Fletcher discussed the possibility of refusing the application with the then General Manager prior to taking any final actions as a further two requests by Council officers were not acted on.

It would appear from the frequency of the requests to the applicants for information and the time lapsed that Mr Fletcher believed that he was within his rights as the Service Unit Manager, Local Approvals Service Unit to refuse the application, however he did not. Given the political sensitivity of the application, it is reasonable to assume that it would be highly unlikely for an officer of Council to make a final decision on a matter such as this without discussing the matter with the then General Manager.

This conclusion is based on Mr Fletcher's statements in the memorandum to the General Manager on 12 February 2001. This was in response to a *Request for Update on Development Application Status/Request for Application to be called to Council* by Councillor Peter Forrest. Mr Fletcher made the following remarks:

In regards to the determination of the application this, in my view, could not be carried out by the staff, as the policies of Local Approvals require all applications that involve Councillors to be referred to an external consultant to carry out the assessment. The information to carry out this assessment was not forthcoming until early October 2000 and, furthermore, I did advise Councillor Peter Forrest by memorandum on 1 September 2000 of the difficulties for Council staff in arranging for the Consultant to commence the assessment and I did suggest that if he wished the matter to be presented to full Council it would be done, however, this request was not forthcoming.

I do not feel that Local Approvals staff failed to have the application determined on the basis of the information held by Council as this matter can only be done by Council and also Councillor Peter Forrest did not call the matter up to full Council even though the option was provided to him by myself on the abovementioned date."

The above statement implies that in compliance with Council's policies, Mr Fletcher was powerless in his position as the Service Unit Manager, Local Approvals Service Unit to intervene in the assessment of the application and that no one else within the Council had any power to act on this matter. He also criticised Councillor Forrest for not *"calling the matter up to full Council"*. Thereby inferring again that staff did not have the authority to refer matters to Council or act in any way. In fact, he infers it was Councillor Forrest's responsibility to refer the application to Council. The above statement is in contrast to the requests to the applicants for information and the approval Mr Fletcher was seeking from the General Manager to refuse the application only twelve (12) months earlier.

Councillor Peter Forrest has advised that he made enquiries regarding this application with the full knowledge that it is not an individual Councillor's role to "call up to full Council" an application in which another Councillor has an interest. Council's policy requires such applications to be assessed by an external independent consultant, and reported to full Council with the consultant's recommendation. Councillor Forrest also advised that he did not regard it as his role to interfere with the process regarding the external consultant.

In the same memorandum, Mr Fletcher argued that the Council did not have a policy that required Council to determine an application if additional information had not been submitted within twenty-one (21) days after the request. He stated that Council sent out a standard letter, which requested additional information. This letter made reference to Clause 48 of the Environmental Planning and Assessment Regulation, which allows Council to bring into effect what is commonly referred to as "stop the clock provision". This provision states that if a consent authority requests additional information within twenty-one (21) days of receipt of the development application, and the information is not submitted to the satisfaction of the consent authority then the matter cannot be appealed, by the applicant, to the Land and Environment Court as a deemed refusal. This is not to say, however, that Council has not the power to refuse the application if the information is not forthcoming.

In fact the standard letter used by Warringah Council to seek additional information states:

If Council has not received this information to its satisfaction, within 21 days, your Development Application will be determined on the basis of information presently before Council. Should you require additional time in which to provide this information, you are required to seek an extension in writing.

Council has adopted this procedure in the interest of streamlining the processing of all DA. Your co-operation in this matter would be appreciated.

In his memorandum of the 12 February 2001, Mr Fletcher states:

The letter does not indicate a time limit of when the application will be determined, it is simply a request to the applicant, identifying that Council will determine the application on the information provided.

The issue in some doubt is the point in time that it is appropriate for Council to determine a development application when information Council has requested is not forthcoming.

The aforementioned file notes of Mr Fletcher would indicate the he considered it was appropriate for Council to refuse the application on three occasions, 9 August 1999 (11 months after the date of lodgement), 21 February 2000 (17 months after the date of lodgement) and 25 May 2000 (19 months after the date of lodgement).

A review of a sample of refused development applications at Warringah Council has identified many examples where the Local Approvals Service Unit has assessed applications and refused approval on the grounds of insufficient information. Development Application 1998/42DA was similar to the application by Councillor Caputo in the sense that it was an application to create a dual occupancy compliant within the context of SEPP No. 53. That application was lodged on 3 February 1998 and Council requested additional information to conduct an assessment. Additional information was requested on 18 March 1998, and repeated on 6 May 1998, 17 August 1998, 18 September 1998 and 24 May 1999. The matter was reported to Council on 20 July 1999 with a recommendation from Council's Local Approvals Service Unit staff for refusal. However Council resolved to defer the matter and allow the applicant to submit the necessary information so the matter could be properly assessed.

The matter was referred to Council again on 15 February 2000. The report prepared by Local Approvals Service Unit states:

The applicant subsequently submitted a site analysis, which is required by State Environmental Planning Policy No. 53 (SEPP 53). A letter from the applicant's Solicitor, dated 7 July 1999 was also forwarded indicating that the applicant was pursuing a drainage easement over the down stream property. Such an easement has still not been created. Consequently, all outstanding issues have been addressed and the information before Council is inadequate to give the application a proper assessment.

The Council adopted the recommendation of the Local Approvals Service Unit Manager, Mr Fletcher to refuse the application. The recommendation of Mr Fletcher included the following reason.

- 1. Pursuant to 79C(1)(i) of the Environmental Planning and Assessment Act, 1979 and clause 32(d) of State Environmental Planning Policy No.53, the application has failed to adequately demonstrate the stormwater can be adequately disposed from the site. An easement has not been created over downstream properties and no commitment has been received from owners of downstream properties indicating an in principle approval to the granting of an easement.*

The above example shows that the Manager, Local Approvals Service Unit has within his delegated authority the ability to recommend the refusal of an application when the applicant fails to supply the necessary information to properly assess an application. In fact in this instance, Mr Fletcher acknowledges that, *"the information before Council is inadequate to give the application a proper assessment"*. Council refused this application on Mr Fletcher's recommendation even though a letter from the applicant's Solicitor indicated that the creation of an easement was being prepared.

Likewise, Development Application 2976DA, which was for the occupation of industrial commercial site by an air conditioning business, was assessed and refused by Warringah Council staff under delegation due to a lack of information. This application was lodged on 18 October 1999 and Mr David Campbell was appointed the assessment officer. On 5 November 1999, Mr Campbell wrote the "standard" letter to the applicant asking for additional. This was followed by a second letter on 26 November 1999 which again requested a reply within 21 days. On 29 November 1999, Mr Campbell e-mailed Ms Healy with the following question:

I am just wondering what sort of time frame I should give someone before I refuse an application. Even though I am reluctant to refuse it. I have been waiting on information for about 1½ months now and not heard from the applicant.

The reply from Ms Healy to Mr Campbell on 30 November 1999 is as follows;

If you have requested information which hasn't been received, then you should refuse the application.

Mr Campbell sent a third letter on 7 December 1999 requesting the information within 14 days or the application would be determined on the information presently before Council.

Subsequently, Warringah Council assessed the application and it was refused under delegated authority of the Local Approvals Service Unit. The applicant was informed in writing on 22 March 2000 that their application was refused and the attached *Notice of Determination of Development Application* lists the following reason for refusal:

Pursuant to Section 48A of the Environmental Planning and Assessment Regulations (1979), inadequate information has been submitted to properly assess the application.

The two examples listed above clearly demonstrates that Warringah Council and its Local Approvals Service Unit are able to refuse applications on the grounds of inadequate information.

In relation to the Caputo development application, regardless of whether an independent consultant was required to assess the application, the matter could have been independently assessed by the first consultant appointed and assessed on the information available at that time.

Warringah Council had the capacity, as demonstrated by the approval process adopted for the development application 1998/42DA, to defer the determination pending the supply of additional information. Instead, the assessment of the application was deferred without appropriate and uniform reasoning. This deferral by Warringah Council provided Councillor Caputo with advantages not afforded to other applicants.

It is this particular exercise of decision-making that should form the basis of further review by the Independent Commission Against Corruption.

I find it significant that there is a distinct possibility that individuals at Warringah Council may have intentionally misled the Department of Local Government in earlier inquiries into this matter. The Department and the public were lead to believe that Councillor Caputo was not notified of Warringah LGA's exemption from SEPP No. 53 until the date of gazettal. At no point during an initial enquiry into this matter by the Department of Local Government in March 2001 was the Department informed of the Minister for Urban Affairs and Planning's correspondence of 3 September 1998. It was not till this investigation that the Department of Local Government was aware of these circumstances.

APPENDIX 4

INCONSISTENCIES IN THE PROCESS OF EXAMINING DEVELOPMENT APPLICATIONS

Case Study One - Australian Broadcasting Corporation (2178 DA)

Development Application No. 2178	
Development Application Details	Australian Broadcasting Corporation GPO Box 9994 SYDNEY NSW 2001
Address of Land Developed	Lot 141 DP 614427 141 Aquatic Drive Frenchs Forest
Date Development Application was submitted	23 June 1999
Date Development Application was Determined:	22 December 1999 Approved by Council, subject to conditions

Description of Development.

The proposed development involved the demolition of a number of buildings that have been used as administration buildings for the ABC. Subsequent to the clearing of the site, the proposal involved the community title subdivision of land into 13 Lots, 12 Lots for development, and an additional lot for the community access cul de sac to provide individual access to each of the proposed subdivision sites. The proposed allotments range in area from the 1013 sqm to 4064 sqm.

This site is 2.476 hectares in area and is oriented north - south. The site is located between Warringah Road and Aquatic Drive, with access proposed from Aquatic Drive. The subdivision is designed to accommodate a combination of high quality office/warehousing/industrial uses.

The subject site is zoned Special Industrial 4(c) under Warringah Local Environmental Plan 1985 (LEP1985) and is permissible with consent. In respect to the Draft Warringah Local Environmental Plan 1999 (Draft LEP 1999), the site is proposed within the G4 Rodborough Road locality. This proposal is contrary to the minimum allotment size under the Draft LEP1999.

Issues

The applicant initially met with Council officers on 5 April 1997 to discuss the proposal. A number of items of correspondence on Council's file from the applicant (including Minutes of the Meeting) indicate that Council officers supported the proposal as it complied with LEP1985. The applicant proceeded with the preparation of the development application and submitted the development application on 23 June 1999.

Prior to the lodgement of the development application, the *Mayoral Minute No 13/99 - Draft LEP* was passed by Warringah Council. This formal Council approval of the Mayoral Minute required all development applications lodged after 11 May 1999 to comply with the provisions of the Draft LEP. The impact of the Council approval on this development application meant that the development application complied with the gazetted LEP 1985, however it did not comply with the Draft LEP 1999 as it was contrary to the minimum allotment size.

On 19 August 1999 the Development Unit of Warringah Council acting under delegation, refused development consent for the application. The refusal of the application was based on the Assessment Report, prepared by Ms Karla Healy.

Section 79C of the *Environmental Planning and Assessment Act 1979* (EP&A Act 1979) lists the matters which a Consent Authority must consider when evaluating a development application. Amongst the matters listed are; any environmental planning instruments, any Development Control Plan (DCP) and any draft environmental planning instrument that is or has been placed on public exhibition.

Contrary to a memo written on 24 August 1999 by Ms Healy to the Manager - Local Approvals Service Unit, Mr Norm Fletcher, there is no evidence in the Assessment Report that suggests that the gazetted LEP and any relevant DCP were used in assessing the development application. The Gazetted LEP is referred to only once in the Assessment Report, where the zone of the land is described:

The subject site is zoned Special Industrial 4(c) under Warringah Local Environmental Plan 1985. The proposal is permissible with consent.

The site is proposed within the G4 Rodborough Road locality under Draft Warringah Local Environmental Plan, 1999. The proposal is contrary to the minimum allotment size under this instrument.

The main body of the report in which the proposed development is assessed, *Development & Environmental Assessment* fails to disclose any consideration of the gazetted LEP and DCP No 15. In fact, the *Legislation and Policy Compliance* section of the Assessment Report indicated only the Draft LEP had been considered. The following statement is made:

The application is assessed under the provisions of Draft Warringah Local Environmental Plan, 1999, which was endorsed by Council on 11 May, 1999 and forwarded to the Department of Urban Affairs and Planning for gazettal. At that meeting Council resolved that all applications lodged after that date are subject to the provisions contained within that legislation.

In the *Built Form Controls* section of that Report, DCP 15 should have again been considered, along with the current LEP and the Draft LEP. However, the following extract from the Assessment Report shows that the proposed development is assessed against the Draft LEP only.

The built form controls contained within the Draft LEP, 1999 indicate a minimum subdivision size of 4000sq. The proposal is inconsistent with this minimum requirement in that the minimum allotment size proposed is 1013 sqm and the majority of the lots have a proposed area of between 1000sqm and 2000sqm.

In assessing an application for subdivision, the potential for development of the proposed lot should be considered. The applicant has not submitted any information to indicate that the proposed lots could be developed in accordance with the provisions of the Draft LEP, 1999.

In particular, the locality statement indicates a minimum setback to Warringah Road of 30m and to all other roads of 10m. There is a reasonable argument that the 10m setback to all other roads would also include the proposed community access road. This would have the effect of reducing the area on the allotment, which could be built upon. In particular, it would be expected that this setback requirement would effect the lots also effected by the easement for a transmission line.

The 30m setback from Warringah Road would also effect the area, which could reasonably be built upon on proposed lot 8 and 9. Furthermore, should the road reservation be retained by the RTA, it would be a reasonable argument that any buildings be setback 30m from the reservation. This would effect the development potential of proposed lots 8, 7 and possibly 6.

The draft LEP, 1999 further specifies that buildings must not cover more than one third of the site, that one third of the site must be landscaped and that front buildings setback should be generally free of all structures other than driveways. Such controls potentially impact upon the development potential of the proposed lots.

It is unlikely that the proposed lots can be developed in accordance with the Draft LEP, 1999 and contribute to the desired future character of the area. The proposal warrants refusal in this regard.

Again, in the conclusion of the report, no reference is made to any consideration of the Gazetted LEP.

The application has been assessed considering the provisions of Draft Warringah Local Environmental Plan, 1999. The proposal is inconsistent with the desired future character for the Rodborough Road locality and does not meet the minimum subdivision requirement contained within the built form controls for this locality. Considering other built form controls, it is considered unlikely that the proposed lots could be developed in accordance with the provisions of the Draft LEP. In this regard, the proposed subdivision represents overdevelopment of the site and it is recommended for refusal.

On 28 July 1999 Mr Brian O'Dowd of O'Dowd Planning & Design (acting on behalf of the applicant) wrote to Ms Petula Samios, Director, Sydney Region East Office of Department of Urban Affairs and Planning (DUAP), seeking clarification as to what LEP Warringah Council should consider, when assessing development applications.

I act as a planning consultant for a number of clients within the Warringah area. I am concerned that the Council is acting ultra vires the EPA Act [Environmental Planning and Assessment Act 1979] in advising that all applications are being processed under the provisions of the draft LEP. Could you please confirm in writing, as a matter of urgency, that Council is obliged to deal with applications under the prevailing legislation of Warringah LEP 1985. Council of course is entitled to consider the provision of any draft document under Cl. 79(C)(a)(ii). However, these provisions do not have the force of gazetted planning law.

Further, could you please advise of the status of the Draft LEP 1999.

On 10 August 1999 Mr O'Dowd wrote to Warringah Council stating that Council must, according to DUAP, consider applications under the current legal planning provisions. The content of the letter is provided below:

I act for Tilly Lane, owners of the above site. Development application 2178 was lodged with Council on 22.6.99 under the provisions of Warringah LEP 1985. The application complies in all respects with those provisions and Councils relevant codes.

I have attached a copy of my correspondence to the Director of Urban Affairs and Planning (East) of 28 July 1999. I subsequently met with the Director, Petula Samios on 4 August 1999. She confirmed that Council is required to consider the application under the current legal planning provisions. In any event, the Director indicated that savings provisions would apply upon Gazettal of the Draft LEP, possibly in September 1999. Accordingly, I would appreciate if Council could process this application expeditiously under the current provisions. Should you have any problems with this request please contact me immediately.

A footnote written by hand shows that Mr Norm Fletcher received this letter on 19 August 1999 and that he referred it to Ms Karla Healy. In response to the content of the letter, Ms Karla Healy prepared a memo to Mr Norm Fletcher on 24 August 1999, where she makes the following statements:

In considering the application, the provisions under the current and the proposed LEP's were assessed. The application was considered inappropriate with regard to Warringah LEP 1985 in that the proposed subdivision would be inconsistent with the existing subdivision pattern of the immediate area.

Due consideration was given to Warringah LEP 1985 and Draft Warringah LEP, 1999. Refusal of the application is an appropriate professional outcome when considering the legislation, Planning, philosophy and the desired outcomes for the Warringah area.

The memo provides no evidence, other than the above statements, which indicate that the development application was assessed in accordance with Section 79C of the EP&A Act. A hand written note has been made on the memo. The handwritten attachment to the memo states:

Norm,

Is this what you're looking for?

Karla

The applicant requested a review the determination by Council, pursuant to Section 82A of the EP&A Act. Prior to the development application being reviewed the applicant lodged a Class 1 appeal in the Land & Environment Court against the refusal issued by Council. The hearing was held before Commissioner T Bly on 8, 9 and 10 December 1999.

The Commissioner made judgement on 22 December 1999. During the appeal and in the Judgement Commissioner Bly evaluated the assessment by referring to the Warringah LEP 1985, Development Control Plan No 15 and the Draft Warringah LEP 1999. In respect to the Draft LEP 1999, Commissioner Bly made the following statement:

The Department [Department of Urban Affairs & Planning] has advised (25 Nov 1999) that there are some significant drafting issues to be resolved, especially in relation to savings and transition provisions and it could be some time before the draft LEP can be finalised.

Consequently, the Commission assessed the development application with regard to the gazetted LEP, the draft LEP and Development Control Plan No. 15 and approved the application with conditions.

In correspondence from Council's Solicitors *Wilshire Webb* on 24 January 2000 to Council regarding the hearing, Council's Solicitors made the following statement:

Commissioner Bly was critical in the manner in which the 4000sqm standard had been introduced and he perceived that its inclusion in the draft LEP was uncertain and should be given little weight.

Findings

The review of this application revealed that Council had an inappropriate level of regard to their requirement to comply with the provisions of the EP&A Act. The enforcement of the Mayoral Minute 13/99 placed considerable ambiguity over the legitimacy of Council's decisions as a Consent Authority. Warringah Council was aware for some time that the Draft LEP required considerable amendments prior to DUAP recommending its approval to the Minister for Urban Affairs and Planning and as such, Council should have considered revoking its approval to Mayoral Minute 13/99.

Council's resolution that staff ensure that development applications comply with the Draft LEP, knowing that the content of the draft Plan was under considerable review was contrary to the EP & A Act.

It would also appear from the letter written from Mr Peter Lawrence, Manager Strategic Land Use Planning on 25 November 1999 to Ms Petula Samios of DUAP that the continued assessment of development applications in this manner was primarily undertaken at Warringah Council to avoid criticism. This letter contained the following:

A Mayoral Minute was adopted by Council on 15 June 1999 directing Council to consider all applications under the draft LEP. Since May 1999, Council has approved over 1000 applications and about 500 applications are pending. All these applications have sought to comply with the provisions of the draft LEP given the Mayoral Minute. The refusals have been largely based on the provisions of the draft LEP.

Council would be exposed to enormous criticism if now, after consistent application of the draft LEP to all applications for over six months, a standard savings clause protecting all development were included in the gazetted version of the Plan.

CASE STUDY TWO - S & I INVESTMENTS NSW PTY LTD (1250DA)

Development Application No. 1250	
Development Application Details	S & I Investments NSW Pty Ltd P O Box 511 Narrabeen NSW
Address of Land Developed	Lot 3 DP 314645 26 Ocean Grove Collaroy NSW 2101
Date Development Application was submitted	22 January 1999
Date Development Application was Determined:	27 March 2000 Refused in Land & Environment Court

Description of Development

The proposed development involves the demolition of the existing single storey dwelling house and the construction of a three storey mixed commercial/residential building with a basement car park for twelve (12) vehicles.

The building was proposed to contain two shops of 32 square metres each and two, 1-bedroom units at ground floor level. The first floor is proposed to contain two 2-bedroom units whilst the second floor is proposed to consist of one 3-bedroom unit with an attached office.

The building was proposed to be serviced by a lift from the basement car park, with each dwelling having open space in the form of balconies located on the eastern side of the building. The proposed development is located on a nil building line to Ocean Grove, with setbacks from the front and eastern boundaries progressively increasing as the wall height increases. Landscaping has also been included along the eastern boundary of the site to provide further privacy and screen the proposed development.

The subject site is zoned General Business 3(a) under Warringah Local Environmental Plan 1985 (LEP 1985). The proposal is permissible with consent.

The site is within the Long Reef (D5) locality under the provisions of Draft Warringah Local Environmental Plan, 1999 (LEP 1999).

Issues

The site is located at 26 Ocean Grove Collaroy, with an area of 464.5m². To the west of the site, it abuts an existing 3-storey commercial/residential strip which faces Pittwater Road. To the east of the site exists a single storey residence. The rear of the site to the south is zoned General Business 3(a).

The Warringah Council Development Assessment Officer, Mr David Kerr, notified nine adjoining property owners of the proposal by letter dated 1 February 1999.

In accordance with Council requirements, the application was also notified to the wider community through an advertisement in the *Manly Daily* on Saturday 6 February 1999. The plans and details of the development application were placed on exhibition for a fourteen-day period and in this period a total of twenty objecting submissions were received by Warringah Council. These were addressed by Council, as detailed below.

On 9 March 1999 Mr David Kerr wrote a note to file explaining that:

*Meeting held at Council
BD, DK - Council
Donald McKenzie - applicants
Mark Humphrey.*

Issues with respect to the proposed development being overdevelopment of the site, bulk, scale, privacy, overlooking.

All issues were discussed with the applicant and it was advised that the proposal was not in a form that was likely to be approved.

The applicant took these issues on board and will advise as to the course of action in the near future. Nfa on assessment until advice received.

(I have been informed that BD refers to Senior Planning Officer, Brett Dwyer while DK refers to David Kerr, Development Assessment Officer).

A further file note stated:

Called 23/3 - awaiting their advice from a town planner - will keep informed of progress.

Following the meeting, the Applicant made a number of modifications to the development application and submitted additional supporting information from Don Fox Planning Consultants. The amended plans for this development application were lodged on 28 June 1999 with the further additional information being provided to Council on 23 July 1999. Mr Kerr advised that at that time he was supervised by Brett Dwyer and in turn Norm Fletcher (Service Unit Manager).

Prior to the assessment of the development application, the *Mayoral Minute No 13/99 - Draft LEP* was passed by Warringah Council. This Mayoral Minute contained two recommendations.

That Council shall require all development applications lodged after 11 May 1999 to comply with the provisions of the Draft LEP.

Any application received by Council prior to 11 May 1999, and not determined, should be considered on their merits and have regard to the draft LEP provisions.

At the Meeting of Council's Development Unit on 5 August 1999 the Assessment Report prepared by David Kerr was considered and the Unit recommended the approval of the development application subject to conditions. The Assessment found the application largely complied with the relevant legislation and regulations, including the provisions of the Draft Local Environment Plan 1999. The Assessment Report stated that the following items complied:

Building Codes/Local Government Act; Building lines/Building setback; Public Road & Drainage Infrastructure; Legislation & Policy Compliance; the Draft Warringah Local Environment Plan 1999; Building Height, Front Setback in local Retail Centre; G2 Local Retail Centre, G13 Safety & Security; G25 Access to Sunlight; G27 Private Open Space; G28 Privacy; G29 Building Bulk; G30 Roofs; G34 Parking Facilities (visual impact); G35 Traffic Access & Safety; G37 Provision of Car Parking; G38 Design of Car Parking Area; G39 Management of Stormwater; Character & Streetscape; Privacy/Overshadowing; Height/Bulk & Scale; and Car Parking and Traffic Generation.

The only section of the Report which identified areas of non-compliance was the section titled *"Development Statistics"*. This section compared the requirements of the relevant Development Control Plan (DCP) with the specifications of the proposed development.

Listed below is the section of the Assessment Report. Although none of the standards comply with the provisions of the Development Control Plan No 9 – Residential Flat Buildings and Group Buildings, Mr Kerr, in his Assessment Report indicated that non-compliance *“is not seen as sufficient reason to warrant refusal of the application”* as the DCP No. 9 would not apply to the application if the provisions of LEP 1999 were adhered to.

Development Statistics

The proposed development is assessed, having regard to the provisions of Development Control Plan No. 9 – Residential Flat Buildings and Group Buildings where relevant. The proposed development is assessed against the standards for the erection of three storey residential flat buildings as shown in the following table:

Standard	Required	Proposed	<u>Compliance</u>
Allotment Size	1200 sqm	464.5 sqm	No
Density	1 bedroom/75 sqm	1 bedroom/52 sqm	No
Floor Space Ratio	0.9:1 (residential)	1.118:1	No
Persons/Ha	180 persons	207 persons	No
Balconies	Max 1m projection	Average 2 metres	No
Site Landscaping	50%	10%	No
Childrens Play Area	30 sqm min	none	No

The proposed development does not comply with any of the guidelines contained in Development Control Plan No 9 – Residential Flat Buildings and Group Buildings. However, it is noted that this is used as a guideline to assess this type of mixed commercial/residential development within the General Business 3(a) zone. Thus non-compliance with the majority of the development standards of this policy is not seen as sufficient reason to warrant refusal of the application. The site constraints, including area and zoning, reduce the effectiveness of applying Development Control Plan in a strict sense.

The Development Application was referred by staff to Warringah Council and was considered at the Council Meeting of 24 August 1999. The Council refused the application on the content of the above table. Council resolved:

That the application for mixed commercial/residential building with basement carparking at Lot 314645 No 26 Ocean Grove Collaroy be refused because it does not comply with Council's Code for allotment size, density, floor space ratio, person per hectare, over looking balconies, site landscaping and childrens playground provisions nor the matter for consideration in relation to Section 90(1)(c), (e), (h), (m) and (o) of the EP&A Act [Environmental Planning and Assessment Act 1979].

As a result of Council's decision to refuse consent, the applicant appealed the Council's decision to the Land and Environment Court. The matter was heard by Commissioner K.G. Hoffman on the 10 and 13 December 1999, 25 January 2000 and 24 and 27 March 2000. Commissioner Hoffman dismissed the appeal and made the following statements in his Judgment:

There was considerable evidence from the respondent on the small size of the allotment and that it should not be redeveloped unless it was in conjunction with adjoining lots, especially nos. 1012 and 1014 Pittwater Road.

The Respondent cited Appeal No. 10064/97, "Dennis Leech and Associates v Warringah Council" in which Lloyd J found that "Development Control Plan No.9" did apply to any proposal for mixed uses where residential flats comprised part of the proposal.

It was noted the Council's draft "Local Environmental Plan 1999" had to be re-exhibited and was certainly not imminent or certain at this time and could carry little weight in this appeal.

Council's solicitors *Wilshire Webb*, wrote to the General Manager of Warringah Council on 13 April 2000 to provide a summary of the hearing. The letter contained the following concerning the Judgement.

The Commissioner adopted the argument that the proposal should comply with Council's "Development Control Plan No.9", in particular the statements in relation to sandwich allotment setback requirements.

Findings

The Land and Environment Court assessed the appeal in reference to statutory controls, those being *Warringah Local Environmental Plan 1985* and *Warringah Development Control Plan No. 9 - Residential Flat Buildings and Group Buildings*.

The Commissioner clearly stated the Draft LEP 1999 "... [*carries*] little weight in this appeal" as it was neither ... "*imminent or certain*".

I find that this application highlights the confusion within the Warringah area surrounding the planning process at Warringah Council at that time. The applicant submitted a development application. Council staff attempted to comply with a resolution of Council (Mayoral Minute 13/99) in the assessment of this development application, only to have the matter determined by the Land and Environment Court which disregarded the Draft LEP and Council's approval of Mayoral Minute 13/99.

I note that an important part of the Council's case was the argument that the site should not be "*redeveloped unless it was in conjunction with adjoining lots*".

