Office of Local Government

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Mr Viv May PSM
Interim Administrator
Wingecarribee Shire Council

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23 March 2021

Dear Mr May

The Attorney General, the Hon. Mark Speakman MP has referred correspondence from Ms and Mr Sheehan to the Minister for Local Government, the Hon. Shelley Hancock MP, relating to the NSW Ombudsman's report that has recently been provided to Wingecarribee Shire Council. The Minister asked me to respond to the correspondence on her behalf.

The NSW Ombudsman has found that Council acted unreasonably in relation to a fee that was applied to Ms Sheehan's development. The Ombudsman also found that Council had acted unreasonably in treating all developers who received consents before 1 January 2007 in the same way. There are some additional findings in relation to a particular Council meeting.

The Ombudsman recommended, among other recommendations, that Ms Sheehan be refunded the difference between the rates listed in her initial development consent and those she was ultimately required to pay. Ms and Mr Sheehan have raised concerns about whether Council will implement the Ombudsman's recommendations.

I have advised Ms and Mr Sheehan to write directly to you in relation to their concerns but take this opportunity to bring the February 2021 Ombudsman's report, findings and recommendations to your attention for consideration.

Please do not hesitate to contact the OLG Investigations Team should you wish to discuss the matter further.

Yours sincerely

Tim Hurst
Deputy Secretary
Local Government, Planning and Policy

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Ombudsman
New South Wales

Our reference: C/2018/5774
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9 February 2021

Barry Paull
A/General Manager
Wingecarribee Shire Council
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MOSS VALE NSW 2577

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Dear Mr Paull

Investigation into Wingecarribee Shire Council – Final Report

Please find enclosed the final report concerning my office's investigation into the conduct of Wingecarribee Shire Council relating to the payment of water and sewerage charges by developers, the closure of parts of Council meetings, and Council's compliance with earlier provisional recommendations by this office.

A draft report was provided to the Minister for Local Government, the Hon Shelley Hancock, MP on 16 December 2020. The draft report was provided to the Minister to enable her to decide whether to consult with the Ombudsman under s 25 of the *Ombudsman Act 1974*.

The Minister advised my office on 1 February 2021 that she did not require a consultation.

I have now made the report final pursuant to s 26 of the Ombudsman Act. I enclose a copy of the report as required by s 26(3). I have also enclosed a redacted copy of the report to allow for ease of tabling in an open Council meeting as per my recommendation.

In accordance with s 26(5) of the Ombudsman Act, I require you to report on the progress of the implementation of the recommendations within three months of the date of this report and every two months thereafter until such date as all recommendations have been implemented.

Please contact Mr Tom Millett, Investigations Manager on 9286 1010 should you require any further information.

Yours sincerely

Paul Miller
Acting NSW Ombudsman

Sensitive: Legal

Ombudsman
New South Wales

Final report
Section 26 of the Ombudsman Act 1974

Investigation into Wingecarribee Shire Council

February 2021

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Contents

1 Executive summary

This report is issued under s 26 of the *Ombudsman Act 1974* and sets out the Ombudsman's findings and recommendations following an investigation into Wingecarribee Shire Council (**Council**).

Section 25 (2) of the Ombudsman Act provides that the Ombudsman shall inform the responsible Minister that the Ombudsman proposes to issue a report under s 26 and consult the Minister, if requested, before making the report final.

This report was provided to the Minister for Local Government on 16 December 2020. The Minister wrote to the Ombudsman on 01 February 2021 indicating that she did not wish to consult.

1.1 Complaint

In 2018, we received a complaint from a property developer, Ms Sheehan, claiming that Council required her to pay water and sewerage management fees at a rate substantially higher than that which was originally specified by the relevant condition of her development consent.

When a local council is the water supply authority, the council has the power to require developers to pay a contribution towards water and sewerage management works. Some councils choose to include a condition in development consents specifying that this contribution will be required. In Ms Sheehan's case, the condition in her development consent specified the amount payable for water and sewerage works. It did not include any statement to inform her that the fees may increase in the future.

1.2 What we considered

In this investigation we considered whether:

- Council treated Ms Sheehan reasonably
- Council treated all developers with the same conditions in their consent the same way
- Council acted lawfully in closing a meeting to consider contact with our office.

1.3 Conclusions on key issues

Council's treatment of certain developers, including Ms Sheehan, was unreasonable

At the core of this investigation is how a condition (**standard condition**) in the complainant's development consent was worded, and how this condition was applied by Council. The condition in question – which was a standard condition also present in the consents of other developers – listed the fees payable for water and sewerage works under the *Water Management Act 2000* (**WM Act**).

The standard condition did not include any notice, express or implied, that the fees could increase in the future. It also contained no reference to the Developer Contribution Plan (**DCP**) that was in place at the time the consent was issued.

This meant that developers, including Ms Sheehan, had no prior notice that the fees they would ultimately be charged could increase – and in some cases, increase substantially. The lack of notice resulted in Ms Sheehan and other developers being deprived of certainty as to the financial commitment they needed to meet.

We note that Council has subsequently amended its standard condition to include the appropriate information about the possibility of fee increases.

It was unreasonable for Council to close its meeting to discuss this matter, and it was unlawful to fail to minute the meeting as required

In May 2019, Council closed part of a meeting to the public, during which it discussed Ms Sheehan's complaint to us and the contact from our office. There are clear legislative requirements around why and how part of a Council meeting can be closed, and what information must be included on the public record when this happens. We concluded that some of these requirements were not met, and the meeting should not have been closed.

Council did not keep to an earlier undertaking it gave to the Ombudsman

Our office previously investigated Council about substantially the same issues some time ago. In April 2008, a different developer complained to us about the way Council charged him for water and sewerage fees, and we commenced an investigation.

The circumstances in both matters are very similar – Council charged both the developers higher fees than the amounts listed in their development consents.

As a consequence of the provisional findings and recommendations of our earlier investigation, in 2009 Council gave us an undertaking that it would note in its records that anyone holding a development consent dated before 2007 (as Ms Sheehan did) would not have to pay an increased fee different from that set out in the consent.

However, at a later meeting in 2009, Council determined instead to write to all those with a development consent dated before 2007 to tell them that they would have to pay water and sewerage fees in line with the Development Servicing Plan (**DSP**) in place at the time they applied for a construction certificate.

Council has now told us that, due to an oversight, it did not write to all developers, and did not write to Ms Sheehan.

We discontinued the earlier investigation in 2009 after Council agreed to accept the provisional findings and recommendations. However, as the current investigation demonstrates, Council did not implement all those recommendations as originally agreed.

1.4 Findings and recommendations

Findings

I make the following findings about Wingecarribee Shire Council's conduct under s 26 of the *Ombudsman Act 1974*:

1. Council acted unreasonably within the meaning of s 26(1)(b) by charging Ms Sheehan at a higher rate than that listed in her development consent without providing any prior notice of the increase.
2. Council acted unreasonably within the meaning of s 26(1)(b) by failing to treat all developers who received consents before 1 January 2007 in the same way.
3. Council acted unreasonably within the meaning of s 26(1)(b) in closing part of its 22 May 2019 meeting.
4. Council acted contrary to law within the meaning of s 26(1)(a) by failing to minute and publicly report on its reasons for closing part of its 22 May 2019 meeting.

Recommendations

Under s 26(2)(a)(b) and (e) of the Ombudsman Act, I recommend that Wingecarribee Shire Council:

1. Refund Ms Sheehan for the difference between the rates listed in her initial development consent and those she was ultimately required to pay.
2. Post a notice on its website, issue a media release and advertise in a local newspaper inviting developers to contact Council if their consents include the standard condition and were granted before 1 January 2007, so Council can:
   - consider whether to refund any fees these developers paid over and above the fees listed in their consents
   - if necessary, amend its records to ensure Council does not charge the relevant developers higher fees in the future.
3. Write to the developers who hold consents LUA 04/0597, LUA 04/1850 and LUA 99/1754, and advise them that any water and sewerage fees they are required to pay if they apply for a compliance certificate will be the fees listed in their consents.
4. Ensure its practice regarding closing Council meetings – and providing the required public record of why part of a meeting is closed – comply with the *Local Government Act 1993* and Office of Local Government guidelines.
5. Table the final Ombudsman report on this matter in a public Council meeting.
6. Give its Audit, Risk and Improvement Advisory Committee a copy of the final Ombudsman report.
7. Provide us with updates every six months on its progress implementing the above recommendations.

Our recommendations address a legacy issue

These recommendations largely mirror those in our 2009 provisional statement of findings and recommendations (**appendix 4**). They aim to ensure that Council:

- deals fairly and consistently with developers in the same situation
- follows legal requirements around closing meetings, including recording why it is doing so.

1.5 Council's response to our provisional findings and recommendations

We provided Council with a statement of provisional findings and recommendations on 24 June 2020.

On 21 July 2020 Council responded to the provisional findings and recommendations, raising a number of concerns. These included several legal issues which are separately addressed at pages 10-11. The Council's response is also included at **appendix 5**.

(a) Council raised issues of fairness with our proposed recommendation to provide a partial refund to Ms Sheehan.

It argued that refunding Ms Sheehan and others who may be in a similar situation, and/or only charging developers who were granted development consents before 2007 at the rate listed in their consent, would lead to inequity as it would place other developers with more recent consents at a financial disadvantage.

We agree with Council that fairness is critical. As this investigation found, and as we explain later in this report, Council did not treat Ms Sheehan fairly. She was not given any notice that the fee she would be charged could change in the future, either at the time her consent was issued or following Council's decision to contact all consent holders in November 2009. Instead, Ms Sheehan was required to pay $336,837.16 instead of the $169,705.80 she would have paid had Council acted in accordance with the original consent.

It is important to note that those developers with consents issued after our earlier investigation benefited from having certainty, as their consent conditions expressly contained notice of potential increases in water and sewer fees in line with changes to the consumer price index (CPI) and the DSP in place at the time of their application for a compliance certificate.

(b) Council noted that some developers who have been charged at higher rates would have passed these costs on to end purchasers, and as a result would profit from any refund they receive in accordance with our recommendations. This will certainly be a relevant consideration if the Council were to provide refunds to those who have paid water and sewerage servicing fees. As the Council has already acknowledged, it does not know how many developers have or had development consents containing the same standard conditions as Ms Sheehan's consent. Any consideration of applications for refunds by those who have already paid their water and sewerage contribution fees will need to include some consideration of whether they have passed these costs on to purchasers.

Council has suggested that the wording of the condition itself is 'advisory' only, and as such cannot be viewed as binding. As noted in the body of this report, Council's former General Manager had stated that the fees were originally included in the consent to provide certainty to developers around their contributions. This suggests that, at the time the condition was introduced, it was not viewed as merely advisory.

Council has a template document for staff preparing development consents that contains its standard development consent conditions. Council has always had a similar set of conditions for staff to use, and it was the source of the standard condition. The standard condition sits within a section of the template document called 'Conditions to be satisfied prior to issuing a construction certificate' and under the subheading "Contributions". This section includes several other developer contributions, including those under section 7.11 (formerly s. 94) of *the Environmental Planning and Assessment Act 1979* (EPA Act). These contributions reflect essential stages in a development process, and developers should be able to look to the conditions of their consent and easily understand their obligations. (We note that the current condition provides that certainty by explicitly stating that the amount payable will change in line with CPI and future DSPs.)

(c) Council has indicated that implementing the above recommendations would create a funding shortfall in its water and sewer funds. Funds collected for water and sewerage can only be used to provide those services to the Council area. We acknowledge that this is a genuine consideration, as it is essential that Council can plan for and provide water and sewerage services for all planned and future developments. When Council considered this issue in November 2009, the advice prepared by Council staff was that Council would be able to absorb the cost of refunds without having a detrimental impact on its water and sewer funds. A similar review of the impact of any possible refunds to Ms Sheehan and others who have been affected would be required when considering the recommendations in this report.

(d) Finally, Council highlighted a range of improvements it has made to its systems, providing it with an accurate data set of all applicants and landowners with active development consents with outstanding developer charges. Council has also implemented a range of consultative systems around future changes to its DSP, ensuring that those who are impacted are consulted appropriately and provided adequate notice of upcoming changes. These are all positive developments, and we commend Council for making these changes.

Challenges around implementation

We recognise that bushfires, flooding and COVID-19 have had a substantial impact on many Council areas, including Wingecarribee Shire Council. This may mean that it will take Council longer than usual to implement our final recommendations. Nevertheless, it is important that the issues outlined in this report are addressed.

2 Background

2.1 Summary of facts

On 27 July 2018, Sparke Helmore Lawyers (**SH Lawyers**) complained to us on behalf of Ms Eleanor Sheehan, claiming she was wrongly charged higher rates by Council for water and sewerage contributions under the WM Act for the third stage of her subdivision development. The amount she paid in January 2018 to obtain a subdivision certificate totalled $465,884.98. This amount was calculated by Council based on the rates in its Development Servicing Plan 2017 (DSP 2017), which took effect from 15 September 2017.

The rates Ms Sheehan paid were higher than the rates listed in condition 49 (later renumbered to 50) of the development consent granted to her company Rochester Estate Pty Ltd.[1] The rates listed in the condition were based on Council's Development Contributions Plan 1997 (**DCP 1997**), which was in effect when the development consent was granted on 20 April 2006. The Development Servicing Plan 2007 (**DSP 2007**) came into effect from 1 January 2007, replacing the DCP 1997. Had Ms Sheehan paid the rates listed in the condition, she would have paid $169,705.80. The relevant condition is included in full at **appendix 3**.

On 28 March 2018, Council passed a resolution which in effect imposed a six-week moratorium on increases to the rates from DSP 2007. As Ms Sheehan had paid the DSP 2017 rates during the moratorium period, she subsequently received a refund of $129,047.82. This reduced her charges to the rates in DSP 2007. However, Ms Sheehan felt she should only have to pay at the rates listed in her company's consent, which were taken from DCP 1997.

Ms Sheehan argued that the condition clearly states the applicable rates that she was required to pay. There was no provision in the condition or elsewhere in the consent stating that the applicable rates could or would increase at any future time.

[1] LUA04/0353

3 Conclusions on key issues

3.1 Council's treatment of certain developers was unreasonable

Conclusion

Wingecarribee Shire Council acted unreasonably in its treatment of Ms Sheehan and several other developers with development consents issued before 1 January 2007.

Councils can lawfully charge for water and sewerage management works

The EPA Act designates local councils as consent authorities, while section 64 of the LG Act designates them as water supply authorities:

> Division 5 of Part 2 of Chapter 6 of the *Water Management Act 2000* applies to a council exercising functions under this Division in the same way as it applies to a water supply authority exercising functions under that Act.

This means that as a consent authority, Council can:

- make decisions about development applications
- grant development consents, subject to certain conditions, such as requiring a developer to provide or improve public amenities or services in the local government area, in line with section 7.11 (formerly s 94) of the EPA Act.

The definition of public amenities or services that applies to s 7.11 of the EPA Act excludes water and sewerage services.

As a water supply authority, Council can collect payments or require certain works under s 306(2) of the WM Act. Section 306(2) of the WM Act states:

> As a precondition to granting a certificate of compliance for development, a water supply authority may, by notice in writing served on the applicant, require the applicant to do either or both of the following:
>
> a) to pay a specified amount to the water supply authority by way of contribution towards the cost of such water management works as are specified in the notice, being existing works or projected works, or both,
>
> b) to construct water management works to serve the development.

To calculate payments, s 306(3) of the WM Act allows Council to consider:

- the value of existing water management works
- the projected cost of future water management works
- any guidelines issued by the relevant Minister.

Section 283 of the WM Act defines **water management works** as 'a water supply work, drainage work, sewage work or flood work' including 'a work in the nature of a water supply work (being work that receives water from a water supply work under the control or management of a water supply authority)'.

Clause 226 of the Water Management (General) Regulation 2018 defines **development**, for the purposes of s 306 of the WM Act, as:

> a) the erection, enlargement or extension of a building or the placing or relocating of a building on land,

a) the erection, enlargement or extension of a building or the placing or relocating of a building on land,

b) the subdivision of land,

c) the change of use of land or of any building situated on the land.

In line with s 306(3) of the WM Act, Councils that are water supply authorities prepare DSPs in line with the *Developer Charges Guidelines for Water Supply, Sewerage and Stormwater*.[2] The Guidelines state that DSPs are required to ensure fair and transparent pricing for water supply and sewerage services.

Council's standard condition did not originally state that fees can change

The standard condition in the development consents at the centre of both Ms Sheehan's complaint and our earlier investigation states that the developer must pay water and sewerage fees before obtaining a construction or subdivision certificate. It also listed fees in the condition. At the time of our earlier investigation, the General Manager told us the consent was included because:

> Council considered that the conditions of the development consent provided the necessary information to the applicant in regard to what contributions applied to the development and that this information was best provided in the development consent rather than in a separate notice. Development consents are used by applicants as a blueprint for their responsibilities and from that perspective, Council believes it is preferable to include the information pertaining to the water and sewer charges on the development consent rather than within a separate notice.

Council's DCP 1997, DSP 2007 and DSP 2017 all require Council to include a note in the consent making it clear that fees are subject to change. The 1997 DCP stated that:

> Development consents requiring the payment of a Developer Contribution will contain a condition specifying the amount payable in monetary terms at the time the consent is issued. A note will be attached to the consent condition which will advise that the contribution rate charged will be that rate which applies at the time of payment. i.e. The rate may increase (through indexation or replacement of this plan with a new one) from the time the condition appears on the notice of development consent until the time the contribution is actually paid to Council.

Neither the standard condition included in Ms Sheehan's consent (at **appendix 3**) nor the consent issued to an earlier complainant to our office (at **appendix 2**) included a note with this information.

Council charged Ms Sheehan fees above those listed in her development consent

Developers such as Ms Sheehan rely on consents to understand their rights, responsibilities and financial commitments.

The wording of the standard condition included in development consents issued before 2007 has meant some developers, including Ms Sheehan, are likely to have planned to pay significantly lower fees than those they were ultimately charged.

[2] Department of Primary Industry and Environment, *Developer Charges Guidelines for Water Supply, Sewerage and Stormwater*, 2016, https://www.water.nsw.gov.au/__data/assets/pdf_file/0011/663698/2016-Developer-Charges-Guidelines.pdf.

The following table summarises the key details of Ms Sheehan's complaint.

Date	Key details
2006	Council granted Ms Sheehan's company a development consent, including (then) condition 49. The condition included a cost per equivalent tenement that would have added up to $169,705.80. This cost was based on Development Contributions Plan (DCP) 1997. The condition included in the consent did not mention the DCP or that fees were subject to change due to CPI changes and the introduction of future plans, despite DCP 1997 requiring for consent conditions to include this information.
2007, 2017	Council revised its DCP 1997, and introduced new Development Servicing Plans (DSP) in 2007 and again in 2017 – in both cases increasing the fees payable for water and sewerage fees. Ms Sheehan completed an earlier stage of her subdivision, which involved eight lots. At the time of paying her contributions, she was charged the rate for water and sewerage listed in her development consent. When she complained to Council in 2018 about being charged at a higher rate than her consent, Council informed her that 'it would appear the Council officer responsible for preparing your Notice of Payment for the first 8 lot subdivision did not take into account such indexation [under CPI and the new DSP] which was to your benefit. Council has no intention to recoup the forfeited funds in this regard.'
2018	When Ms Sheehan applied for her subdivision (compliance) certificate, Council charged her $465,884.98 in water and sewerage fees. It based this on the rates per equivalent tenement listed in DSP 2017. In January, Ms Sheehan paid Council this amount, but under protest in order to obtain the certificate. Had she paid pursuant to her original consent, she would have paid $169,705.80. Council refunded part of Ms Sheehan's payment. This was to address the difference between the DSP 2017 amount and the DSP 2007 amount. A similar refund was offered to all those in a similar position, as the Council had not contacted those with development consents to make them aware of the 2017 DSP increases. This reduced Ms Sheehan's fees to $336,837.16, an amount calculated in accordance with the 2007 DSP, and not to the level listed in the DCP 1997.

Council did not deal with Ms Sheehan's matter in line with its response to the Ombudsman

Council did not handle Ms Sheehan's case in line with either our 2009 preliminary recommendations or Council's subsequent November 2009 resolution, discussed below in section 3.3. It did not:

- mark Ms Sheehan's file to ensure she would not pay higher fees than those in her consent
- write to her about future fee increases in line with the DSP so she could plan for higher costs.

After receiving Ms Sheehan's complaint, the Deputy Ombudsman wrote to Council's Mayor, Mr Duncan Gair, and Council's General Manager, Ms Anne Prendergast, on 1 March 2019 asking Council to comply fully with the recommendations it agreed to in 2009. If Council complied with those recommendations, Ms Sheehan would have received a further refund.

Ms Prendergast replied to the Deputy Ombudsman, refusing the request to act on the recommendations. She wrote:

> This matter was reported to the Ordinary Meeting of Council held on 22 May 2019 where it was resolved:
>
> THAT Council write to the NSW Ombudsman and advise that Council will not implement its request to provide a refund to the applicant for the following reasons:
>
> a) Council has acted in accordance with the appropriate legislation, NSW Guidelines and case law in levying developer charges under the DSP applicable at the time an application for a certificate of compliance is made.
>
> b) There is no formal resolution of Council that would allow pre-2007 development consents to be levied at the rate specified in the relevant condition of consent.
>
> Accordingly, Council has determined that it is not required to give effect to the suggestions in your letter of 1 March 2019 in relation to Ms Sheehan's matter, nor necessary to address suggestions 2-6 in light of the position by Council as resolved on 22 May 2019.

Other developers may be in Ms Sheehan's position

Along with Ms Sheehan, Council has acknowledged that it has likely charged or will charge other developers (who have the same condition in their development consent) higher fees than the developers' consents set out.

Council has advised that, due to changes in its information technology systems it cannot determine the number of developers who paid higher fees for water and sewerage than the fees listed in their consents, but did not receive a refund.

Council has also acknowledged that, due to an administrative oversight, it failed to write to all developers in 2009 (including Ms Sheehan) who were yet to apply for a compliance certificate to tell them about potential increases.

Council has said that it can only identify three other developers with consents containing the standard condition who have not yet paid any water and sewerage fees (references **LUA04/0597**, **LUA04/1850** and **LUA99/1754**). As with Ms Sheehan, Council had not written to these developers to advise them the fees they will be charged will increase in line with CPI and the DSP in place at the time of their application.

Council's reliance on the Nash case and other legal arguments

Nash Bros Builders Pty Ltd v Riverina Water County Council

Council has relied on the Court of Appeal decision in *Nash Bros Builders Pty Ltd v Riverina Water County Council* [2016] NSWCA 225 to argue that:

- Council cannot use a condition of consent to require a developer to pay for water management works before they apply for a compliance certificate
- because Ms Sheehan did not apply for such a certificate before Council granted her consent and imposed the standard condition, the condition cannot be taken to have set the fees.

Council's submission relied particularly on the following comment in Nash by Ward JA:

> [t]he opening words of s 306(2) make clear in my opinion that it is only "as a precondition" to the grant of a certificate of compliance that such a contribution can be required (at [90]).

His Honour was essentially making the point that, unless or until an application was made for a compliance certificate, no developer charge could be sought under s 306(2).

Nash was a case about the time at which a payment obligation could be imposed. In that case, his Honour held that a Council cannot, through a development consent, impose a requirement on a developer to pay an amount for water management works in advance of the developer having applied for a compliance certificate.

The findings made in this report do not demur from that. We do not suggest that the development consent imposed a legal requirement on the developer to pay the stated fees in advance of the application for a compliance certificate. We also do not dispute that Council was legally authorised, under the WM Act, to impose water and sewerage fees in line with its DSP when such an application was made.

However, the finding of this investigation is that it was *unreasonable* to charge those (higher) rates in circumstances where it had set out lower rates in the development consent, while giving no notice to the consent holder that those rates may be subject to change over time.

As noted above, Council's DCP 1997, DSP 2007 and its current DSP 2017 all require that any condition of consent dealing with payments under the WM Act should include a note outlining that the amount payable will change in line with CPI, and also subject to any future DSP that Council may introduce. Ms Sheehan's development consent did not include such a note.

The suggestion that Council would be fettered

Council also submitted that to hold it to the contribution specified in the development consent would be to 'fetter' the Council's exercise of its discretionary powers, citing in support *Rederiaktiebolaget Amphitrite v The King*.[3] Council also referenced *Shi v Migration Agents Registration Authority*.[4] The principle in *Shi* is that consideration must be given to the circumstances existing at the date that a power is exercised.

On several occasions, Australian courts have criticised the breadth with which the so-called 'fettering principle' was expressed in *The Amphitrite*.[5] In any case it is unnecessary to address this particular submission here, as we do not suggest that Council acted unlawfully in charging Ms Sheehan rates above those that it had previously set out in the development consent.

We do not find that Council was *legally* bound by the rates it had set out in the development consent. However, we find it was *unreasonable* for it to later apply higher rates in circumstances where it had failed to provide any prior notice that the rates would be subject to increase.

[3] [1921] 3 KB 500 at 503

[4] (2008) 235 CLR 285; [2008] HCA 31

[5] See *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54; [1977] HCA 71 at 74-75 and 113, *A v Hayden (No 2)* (1984) 156 CLR 532; [1984] HCA 67 at 543, and *Searle v Commonwealth of Australia* [2019] NSWCA 127.

3.2 It was unreasonable for Council to close its meeting to discuss contact with the Ombudsman, and unlawful not to publicly record why it was closed

Conclusions

Wingecarribee Shire Council acted unreasonably in closing part of its meeting to discuss Ms Sheehan's matter and the involvement of our office.

Wingecarribee Shire Council acted contrary to the Local Government Act 1993 in failing to appropriately minute and publicly report on the public interest reasons for closing that part of the meeting.

The Local Government Act regulates when council meetings can be closed

The legislative framework around closing council meetings aims to balance:

- the public interest in open and transparent deliberations, and
- Council's need for confidentiality around certain discussions and decisions.

The following provisions of the *Local Government Act 1993* (LG Act) outline Council's obligations concerning council meetings.

Who	Rights and powers	Section and details
The public	To attend council or council committee meetings	**10(1)** 'Except as provided by this Part: (a) everyone is entitled to attend a meeting of the council and those of its committees of which all the members are councillors, and (b) a council must ensure that all meetings of the council and of such committees are open to the public.'
Council	To close a meeting to discuss privileged information	**10A(2)(g)** Privileged information includes 'advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege'
		10B(2) '(1) A meeting is not to be closed during the receipt and consideration of information or advice referred to in section 10A(2)(g) unless the advice concerns legal matters that: (a) are substantial issues relating to a matter in which the council or committee is involved, and (b) are clearly identified in the advice, and (c) are fully discussed in that advice.'
Council	To close a meeting to discuss information it is not in the public interest to share	**10B(1)(b)** Requires that a meeting stay open unless the council or committee concerned is satisfied that discussing the information in an open meeting would be, on balance, against the public interest.
		10B(4)

Who	Rights and powers	Section and details
		To determine whether it is contrary to the public interest, it is irrelevant that: (a) a person may misinterpret or misunderstand the discussion, or (b) the discussion of the matter may: (i) cause embarrassment to the council or committee concerned, or to councillors or to employees of the council, or (ii) cause a loss of confidence in the council or committee.

Before Council can close part of a meeting, the General Manager must ensure the following requirements under s 9A(2A) of the LG Act are met:

(a) the agenda for the meeting must indicate that the relevant item of business is of such a nature (but must not give details of that item), and

(b) the requirements of subsection (2) with respect to the availability of business papers do not apply to the business papers for that item of business.

After a meeting is partly closed, Council must record the grounds for closing it in the minutes. Section 10D(2) states the minutes must include:

(a) the relevant provision of section 10A(2)

(b) the matter that is to be discussed during the closed part of the meeting

(c) the reasons why the part of the meeting is being closed, including (if the matter concerned is a matter other than a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret) an explanation of the way in which discussion of the matter in an open meeting would be, on balance, contrary to the public interest.

It is not clear how discussing contact with the Ombudsman in an open meeting would have been contrary to the public interest

The Council considered the following documents in the closed session on 22 May 2019:

- A report from the Deputy General Manager detailing the history of our interaction with Council about water and sewerage fees.
- The 1 March 2019 letter from the Deputy Ombudsman asking Council to comply with the recommendations it agreed to accept in 2009, as part of our earlier investigation.

The Deputy General Manager's report included Council's 22 July and 11 November 2009 resolutions, Ms Sheehan's 2018 complaint, advice from Council's solicitors, and Council's response to us based on that advice.

The Deputy General Manager's report also noted that if Council did not comply with our request to implement the recommendations, we could table a special report in Parliament which would be publicly available. The Deputy General Manager's report stated:

> Under the *Ombudsman Act 1974*, the Ombudsman does not have the power to force Council to comply with its request. If Council resolves not to implement the request of the Ombudsman, as recommended in this report, the Ombudsman can either:

- Commence a further investigation; or
- Prepare a special report under the Ombudsman Act 1974.

A special report under the Ombudsman Act 1974 would be tabled in Parliament and would therefore be made public. However, it would not require Council to implement the Ombudsman's recommendations.

Lastly, the Deputy General Manager's report outlined the budget implications Council's Finance Section had said would occur if Council complied with our request. Compliance would result in:

- refunding Ms Sheehan $167,131.36
- forgoing $347,572 in potential water and sewerage revenue from the three developers affected by the standard condition who have not paid any water and sewerage fees
- consideration of the cost of refunding all pre-2007 consent holders who paid higher water and sewerage fees than their consents listed.

It was in the public interest for Council to discuss these items openly, as they directly impacted ratepayers and developers in the Council area. They also related to decisions about whether Council would adhere to the provisional recommendations we made that Council had previously agreed to accept.

The minutes from Council's closed session:

- mentioned a report by the Coordinator Strategic Land Use Planning which sought further direction from Council in relation to a request for a refund of Developer Charges levied on a subdivision approved in 2006, in which the NSW Ombudsman has become involved
- referred to s 10A(2)(g) of the LG Act (the minutes referenced s 10A(2)(c). Council has now acknowledged the section referenced was incorrect, but felt that s 10A(2)(g) was correctly applied)
- stated that 'Council considers that it would be on balance contrary to the public interest to consider this information in Open Council.'

There is no explanation in the publicly available minutes for the meeting or the recording of the meeting of how or why an open discussion of the matter was contrary to the public interest.

3.3 Council did not keep to its agreement in 2009

Conclusion

Wingecarribee Shire Council did not fully implement all the provisional recommendations from the earlier Ombudsman investigation relating to the standard condition as it had previously agreed to.

Our provisional recommendations

In April 2008, Mr Jeff Bulfin, Director of Precise Planning, complained to us that Council had charged higher fees for water and sewerage works than those listed in the development consent of his client, Mr Philip Purnell. The original fees were based on DCP 1997, but the eventual charges were based on the higher figures from DSP 2007 that had come into effect in January that year.

We started an investigation in December 2008 to consider how Council levied water and sewerage charges under the WM Act, and whether it had acted on any legal advice.

We provided Council with a statement of provisional findings and recommendations:

> 9.1 I recommend that Council immediately reviews its resolution of 12 December 2007 and reconsiders and accepts the legal advices provided by its solicitor, and reconsiders and adopts the staff report prepared for the Legal Committee meeting of 25 July 2007, namely, that the provisions of the 2007 Development Servicing Plans be applied only to development consents granted after 1 January 2007.
>
> 9.2 I recommend that Council refund to Mr Purnell the amount of the increase in contributions it required him to pay under the 2007 Development Servicing Plans prior to the issue of the Certificate of Compliance, over and above the amount specified in his 2004 development consent.
>
> 9.3 I recommend that Council also refund Mr and Mrs Loader the amount of the increase in contributions it required them to pay under the 2007 Development Servicing Plans prior to the issue of the Certificate of Compliance, over and above the amount they would reasonably have been required to pay in relation to their 2005 development consent.
>
> 9.4 I recommend that Council refund all other developers who hold consents granted prior to 1 January 2007, who have been required to pay increased contributions under the 2007 Development Servicing Plans, the amount of such increase over and above the amounts specified in their development consents.
>
> 9.5 I recommend that Council note its records so that the remaining holders of subdivision development consents granted prior to 1 January 2007 will not be required to pay the increased rate of contribution under the 2007 Development Servicing Plans.
>
> 9.6 I recommend that Council formally apologises to Mr Purnell, Mr and Mrs Loader, and all other holders of development consents granted prior to 1 January 2007 who were required to pay increased contributions under the 2007 Development Servicing Plans.

We also recommended that Council review and change its meeting practices:

> Council immediately reviews its meeting practice in relation to the conduct of the Legal Committee, the closure of meetings to the public, and reporting of the items and decisions, and that it amends it practices to comply with sections 9 and 10 of the Local Government Act, the Regulation and its own Code of Meeting Practice.

Council resolved to accept the provisional recommendations

In response to our preliminary report, Council passed a resolution in July 2009:

> THAT Council immediately inform the Ombudsman that it accepts the recommendations contained within the Statement of Preliminary Findings and Recommendations into the complaint received from Mr Purnell and indicate its willingness to action those recommendations as a matter of priority.

Council also issued the following press release announcing its resolution:

> Wingecarribee Shire Council's Deputy Mayor explained that in a Statement of Preliminary Findings and Recommendations, the Ombudsman was of the opinion that the council had calculated contribution rates based on the 2007 Developer Servicing Plan on a development application that was granted before that plan took effect, but was paid after it came into force. ...
>
> "The council accepts the recommendations contained in the Ombudsman's Statement of Preliminary Findings and Recommendations and we will be taking action on those recommendations as a matter of priority," he concluded, indicating that applicants will be contacted

> and necessary adjustments will be made to any contributions calculated on Council's 2007 plan, but paid after that plan came into effect in relation to developer consents granted prior to the date of that plan.

As a result of this resolution, we discontinued the investigation.

Council did not implement all the provisional recommendations

When we first made inquiries about Ms Sheehan's complaint, Council told us that it:

- did not implement all of our 2009 recommendations
- refunded $662,068.46 to 53 of the 124 developers who qualified.

After we discontinued the investigation in 2009, Council passed a second resolution in November that year that supplemented and changed its July 2009 resolution. The second resolution limited the scope of its implementation of our provisional recommendations:

> THAT Council confirm a refund of $306,896.45 from the Sewer Funds Section 64 contributions and a refund of $373,898.22 from the Water Funds Section 64 contributions.
>
> THAT an initial letter be sent to the payee or their representative contact for each of the 124 Development Applications eligible for a refund on paid water and sewer contributions, informing them of Council's decision and of the refund to be expected.
>
> THAT upon review of Council's Water and Sewer Development Servicing Plans, Council write to the applicants of all consents with unpaid water and sewer contributions informing them of impending price increases.
>
> THAT Council formerly adopt the condition of consent discussed in the report that requires developers to apply for Compliance Certificates when connecting to Council's Water and Sewer Services.
>
> THAT Council staff investigate and report back to Council on the costs of reviewing the current Water and Sewer Developer Servicing Plans with the intent of including infrastructure to supply water and sewer services to identified urban land release areas and the Enterprise Zone; and to adjust charges accordingly.

Council stated that while its July 2009 resolution showed it was willing to act on the recommendations, its November 2009 resolution outlined the actions it would take to implement the recommendations. Council also advised that the resolution Council passed in May 2019 further clarified its November 2009 resolution. The result of the subsequent resolutions meant that Council would:

- only authorise refunds for water and sewerage contributions paid before 11 November 2009, which Council has provided to some, but not all, affected developers
- not authorise refunds for payments made after that date.

Council did not contact some developers and gave others different advice

Council also initially agreed to the recommendations to:

- issue a public call for developers to seek a refund if their consents included the standard condition but they paid a higher fee
- contact developers who had not paid to tell them they would only pay the fee listed in their consent if it included the standard condition.

Contacting developers is important because there is often a delay between receiving the consent and applying for a compliance certificate. However, following its November 2009 meeting, Council contacted some, but not all, of the relevant developers. It did not contact Ms Sheehan.

In relation to the developers it did contact, instead of telling those developers they would only pay the fee listed in their consent, Council told them they would be charged in line with the DCP in force when they applied for a compliance certificate. This did not alter the relevant condition in their development consents, which still contained the standard condition.

Council changed the standard condition

When Council was responding to the complaint that triggered our first investigation, it recognised that the standard condition needed to be changed. The amended condition (see **appendix 1**):

- clarifies that Council will recalculate water and sewerage fees at the time of payment, based on any new DSP
- includes the time period to which the listed fees apply, along with a note that fees are subject to change.

We acknowledge that these changes:

- address some of the concerns our 2009 investigation raised
- ensure development applicants are made aware of the impact of both the CPI and new DSPs on their fees
- demonstrate that Council recognised that the relevant condition of consent needed to include these details.

Council took steps to ensure more open meetings

Our earlier investigation also looked at the issue of closed meetings, as Council's Legal Committee held all its meetings in closed session. We noted this did not comply with the LG Act, and recommended that Council review and end this practice.

Council agreed to disband its Legal Committee and issue open reports for matters requiring a Council resolution. It further agreed to only close meetings when it was necessary and lawful.

However, the closed meeting it held on 22 May 2019 to discuss Ms Sheehan's matter and this office's involvement does not appear to be consistent with this earlier agreement.

4 Findings and recommendations

4.1 Findings

I make the following findings about Wingecarribee Shire Council's conduct under s 26 of the *Ombudsman Act 1974*:

1. Council acted unreasonably within the meaning of s 26(1)(b) in charging Ms Sheehan at a higher rate than that listed in her development consent without providing any prior notice of the increase.
2. Council acted unreasonably within the meaning of s 26(1)(b) by failing to treat all developers who received consents before 1 January 2007 in the same way.
3. Council acted unreasonably within the meaning of s 26(1)(b) in closing part of its 22 May 2019 meeting.
4. Council acted contrary to law within the meaning of s 26(1)(a) by failing to minute and publicly report on its reasons for closing part of its 22 May 2019 meeting.

4.2 Recommendations

Under s 26(2)(a)(b) and (e) of the Ombudsman Act, I recommend that Wingecarribee Shire Council:

1. Refund Ms Sheehan for the difference between the rates listed in her initial development consent and those she was ultimately required to pay.
2. Post a notice on its website, issue a media release and advertise in a local newspaper inviting developers to contact Council if their consents include the standard condition and were granted before 1 January 2007, so Council can:
   - consider whether to refund any fees these developers paid over and above the fees listed in their consents
   - if necessary, amend its records to ensure Council does not charge the relevant developers higher fees in the future.
3. Write to the developers who hold consents LUA 04/0597, LUA 04/1850 and LUA 99/1754, and advise them that any water and sewerage fees they are required to pay if they apply for a compliance certificate will be the fees listed in their consents.
4. Ensure its practice regarding closing Council meetings, and also providing the required public record of why part of a meeting is closed, comply with the *Local Government Act 1993* and Office of Local Government guidelines.
5. Table the final Ombudsman report on this matter in a public Council meeting.
6. Give its Audit, Risk and Improvement Advisory Committee a copy of the final Ombudsman report.
7. Provide us with updates every six months on its progress implementing the above recommendations.

5 Supporting information

5.1 The investigation timelines

The following table sets out the key events for each of the investigations discussed in this report.

Events relating to the first investigation

1 September 2004	Council granted Mr Purnell's development consent. Condition 22 listed the fees per lot as: • $2,211 for water • $5,051 for sewerage. These fees came from Council's DCP 1997. (See the condition at **appendix 2**)
1 January 2007	Council's DSP 2007 replaced DCP 1997.
8 March 2007	Mr Bulfin, Director of Precise Planning, complained to us on behalf of his client, Mr Purnell, that Council had increased the water and sewerage fees required to develop Lot 21, DP 700002 Old Wingello Road, Bundanoon (council reference LUA 02/0678).
28 August 2007	Mr Purnell received a bill per lot of: • $4,000 for water • $5,000 for sewerage. Council calculated this using the fees in DSP 2007.
12 December 2007	Council resolved to apply the higher DSP 2007 fees to consents that included the same standard condition as Mr Purnell's consent but were issued before DSP 2007 took effect.
12 December 2008	We started an investigation into: • how Council charged for water and sewerage under the WM Act • if Council sought legal advice when it drafted standard condition • if Council acted in line with any advice it received.
2 July 2009	The Deputy Ombudsman provided Council with a 'Statement of Preliminary Findings and Recommendations' and invited Council to make a submission. (See **appendix 4**)
22 July 2009	Council met and resolved to accept all of the preliminary recommendations in the statement.
23 July 2009	Acting General Manager Mr Michael Brearley wrote to us with Council's decision. Council also issued a press release.
11 August 2009	The Deputy Ombudsman discontinued the investigation and sent notices to Mr Brearley and the Mayor confirming this and explaining why.
11 November 2009	Council resolved to implement a limited scope of our preliminary recommendations. Council has claimed that this overrode the 22 July resolution.

Events relating to the second investigation

20 April 2006	Council granted Ms Sheehan's development consent. Condition 49 listed the fees per lot as: • $2,349 for water • $5,365 for sewerage. The total fees of $169,705.80 under this condition were based on DCP 1997. (See **appendix 3**)
1 January 2007	Council's DSP 2007 replaced DCP 1997.
2016	Council renumbered consent condition 49 to 50 but did not change the wording of the consent.
15 September 2017	Council's DSP 2017 replaced DSP 2007.
January 2018	Ms Sheehan paid Council $465,884.98 under protest for a subdivision (compliance) certificate. Council calculated this using the fees in DSP 2017.
28 March 2018	Council suspended fee increases for 6 weeks following the introduction of the 2017 DSP. Because Ms Sheehan had paid the DSP 2017 fees during this period, Council refunded her $129,047.82. This reduced her fees to $336,837.16.
27 July 2018	Ms Sheehan's solicitors complained to us on her behalf that Council wrongly charged her higher water and sewerage fees for the third stage of her subdivision development (Council reference **LUA 04/0353**).
1 March 2019	The Deputy Ombudsman wrote to Council's Mayor and General Manager asking them to review Council's actions and fully comply with the recommendations it agreed to accept in 2009.
22 May 2019	Council met in a closed session (agenda item 13.5) to discuss: • the Deputy Ombudsman's letter • a report from the Deputy General Manager about the matter. It resolved that it would not grant our request, and then advised us of this.
26 June 2019	We commenced an investigation into: • what Council had done since it agreed to accept all the preliminary recommendations in 2009 • if Council had breached the LG Act by closing its 22 May 2019 meeting.

Appendix 1: Council's current standard condition of consent

Contributions under the *Water Management Act 2000*

Water Management Act – Certificate of Compliance

A Certificate of Compliance under Division 5 of Part 2 of Chapter 6 of the *Water Management Act 2000* shall be obtained prior to the issue of Construction Certificate.

Note: Section 64 of the *Local Government Act 1993* authorises Council to issue Certificates of Compliance under Section 306 of the *Water Management Act 2000*. Section 64 of the *Local Government Act 1993* also authorises Council to impose pre-conditions to the issuing of Certificates of Compliance.

As a precondition to the issuing of a Certificate of Compliance Council requires the payment of Developer Charges prior to the issue of Construction Certificate as prescribed Wingecarribee Shire Council's Development Servicing Plans:

- Development Servicing Plans for Water Supply and Sewerage
- Stormwater Development Servicing Plan.

A *Developer Charges - Notice of Payment* is attached to the back of this consent and outlines monetary contributions and unit rates applicable at the time of issue of this consent.

The water, sewer and stormwater headworks levies are indexed quarterly in accordance with upward movements in the Consumer Price Index (All Groups, Sydney) as published by the Australian Bureau of Statistics (www.abs.gov.au) and Council's Development Servicing Plans.

Copies of Development Servicing Plans are available at Wingecarribee Shire Council's Administration building Moss Vale or are available for download from Council's website http://www.wsc.nsw.gov.au.

The Water and Sewerage Development Servicing Plans (DSP's) were adopted by Council on 26 July 2017 and came into effect on 15 September 2017. The Stormwater DSP was adopted on and came into effect on 15 September 2017. The current charges under these Plans are listed as follows:

CPI Period	Water DSP	Sewer DSP	Stormwater DSP
1 November – 31 January 2019	$##	$##	$##

Note: The charges shown above are amounts applicable during the stated time period. These amounts will be subject to adjustment quarterly in accordance with upward movements in the Consumer Price Index (CPI) once they become operational. The CPI is published quarterly by the Australian Bureau of Statistics, http://www.abs.gov.au.

Should new DSP's be prepared, it is possible that the charges may increase significantly. Draft DSP's must be advertised by Council for a period of 30 days prior to adoption.

Note: Payment of the above charges is to be by BANK CHEQUE OR CASH and is to be accompanied by the attached sheet entitled "Notice of Payment - Developer Charges & Section 94". Should the Applicant pay by personal or company cheque the plans subject to this approval will not be available for collection until such time as the cheque has been honoured (i.e., a minimum of 10 days).

Compliance Certificate

Compliance Certificate fees, in accordance with Council's Revenue Policy are as follows and shall be paid prior to the issue of Construction Certificate:

Water $250 + Sewer $250 + Stormwater $250 = $750

Prior to final release, you will need to contact Council's Infrastructure Services Division for an inspection to ensure that Council will accept the infrastructure constructed. In response the Manager of Water and Sewer will specify requirements which will have to be met.

The Construction Certificate will not be issued until the *Water Management Act 2000* charges have been paid and/or secured and the approval of Council has been obtained.

Reason: To retain a level of service for the existing population and to provide the same level of service to the population resulting from new developments.

Appendix 2: Mr Purnell's development consent condition

Condition 22

Water supply authority contributions

Contribution towards Water and/or Sewer Facilities – you are advised that Council as the supply authority shall require the payment of a developer contribution towards the provision of water and/or sewer facilities required to serve the development in accordance with Division 5 Part 2 Chapter 6 of the *Water Management Act 2000* as amended.

The current rates of contribution applicable are as follows:

Water Headworks

The payment of a monetary contribution towards the augmentation of the headworks water supply system that services the development.

Contributions to existing infrastructure (Assets)

No Lots/ETs	Rate	Total
15	$2,211	$33,165

Sewer Headworks

The payment of a monetary contribution for headworks sewerage system that serves the development.

Contributions to proposed infrastructure (Works)

No Lots/ETs	Rate	Total
15	$5,051	$75,765

Compliance Certificate

Compliance Certificate fees are as follows:

Water $90 + Sewer $90 = $180

NOTE: Prior to the final release, you will need to contact Council's Technical Services Division for an inspection to ensure that Council will accept the infrastructure constructed. In response the Manager of Water and Sewer will specify requirements which will have to be met.

In the case of subdivision, the title plan of subdivision will not be certified and released by Council until the Water Management Act contributions have been paid and/or secured and the approval of the Manager of Water and Sewer has been gained for all works related to this infrastructure.

In the case of other forms of development, the Construction Certificate will not be issued until the Water Management Act contributions have been paid and/or secured and the approval of the Manager of Water & Sewer has been gained.

Appendix 3: Ms Sheehan's development consent condition

Condition 50

Water supply authority contributions

Contribution towards Water and/or Sewer Facilities – you are advised that Council as the supply authority shall require the payment of a developer contribution towards the provision of water and/or sewer facilities required to serve the development in accordance with Division 5 Part 2 Chapter 6 of the *Water Management Act 2000* as amended.

The current rates of contribution applicable are as follows:

Water Supply Contributions Plan (Effective 23/07/97)

The payment of a momentary contribution towards the augmentation of the headworks water supply system that services the development.

Contributions to existing infrastructure (Assets)

No Lots/ETs	Rate	Total
30	$2,349	$70,470

Sewerage Contributions Plan (Effective 23/07/97)

The payment of a monetary contribution for headworks sewerage system that serves the development.

Contributions to proposed infrastructure (Works)

No Lots/ETs	Rate	Total
30	$5,365	$160,950

NOTE: Payment of the above contributions is to be by BANK CHEQUE OR CASH and is to be accompanied by the attached sheet entitled "Record of Payment of Contribution". Should the Applicant pay by personal or company cheque the plans subject to this approval will not be available for collection until such time as the cheque has been honoured (ie. A minimum of 10 days).

Compliance Certificate

Compliance Certificate fees, in accordance with Council's Revenue Policy are as follows and shall be paid concurrently with developer contributions:

Water – 141901-1536 $90 + Sewer – 141901-1536 $90 = $180

NOTE: Prior to the final release, you will need to contact Council's Technical Services Division for an inspection to ensure that Council will accept the infrastructure constructed. In response the Manager of Water and Sewer will specify requirements which will have to be met.

In the case of subdivision, the title plan of subdivision will not be certified and released by Council until the Water Management Act contributions have been paid and/or secured and the approval of Council has been gained for all works related to this infrastructure.

In the case of other forms of development, the Construction Certificate will not be issued until the Water Management Act contributions have been paid and/or secured and the approval of Council has been obtained.

Appendix 4: 2009 report

Statement of Preliminary Findings and Recommendations

1. INTRODUCTION

This is a statement of preliminary findings and recommendations following an investigation of Wingecarribee Shire Council's actions (and inactions) regarding the levying of increased contributions under its Development Servicing Plan which commenced on 1 January 2007, to subdivision development consents granted prior to 1 January 2007.

The document has been prepared in confidence pursuant to section 24(2) of the *Ombudsman Act 1974* for the purpose of obtaining submissions and further evidence, which will be taken into account in the investigation. Submissions are sought on the accuracy of the matters set out in the statement and on the provisional conclusions drawn. Any general submissions on the conduct the subject of investigation are also invited.

2. THE COMPLAINT

Mr Jeff Bulfin, Director of Precise Planning, complained to Council on 8 March 2007 in relation to its verbal advice that Council had resolved to substantially increase contributions for water and sewer and that this would apply retrospectively to the development consent for DA 020678, Old Wingello Road, Bundanoon. Mr Bulfin was the consultant planner engaged by the owner of the subject property, Mr Philip Purnell.

Mr Bulfin stated in his letter:

Unlike the provisions of s94 of the Environmental Planning and Assessment Act, the Water Management Act 2000 does not empower a Water Supply Authority to increase contributions after a specified amount has been by notice in writing served on the applicant. The contribution amount was specified in writing by virtue of Condition 22 of the development consent. It is therefore our view that the Water Supply Authority, in this case the Council, has no power to alter the amount specified in the development consent.

Council did not respond formally to Mr Bulfin's letter.

On 28 August 2007 Council faxed through to Mr Purnell a statement listing the contributions Council required him to pay totalling $234,750. This total included items which appeared to be contributions payable under section 94 of the *Environmental Planning and Assessment Act 1978,* and also items listed as being Sewerage (Wastewater) – Precinct 7 and Water Supply – Precinct 7 $82,500 and $60,000 respectively, which were taken to be Council's requirements under the *Water Management Act.*

Mr Purnell paid the amount of $234,750, sought by the Council, on 29 August 2007. On the same date, he wrote to the General Manager confirming that his company had paid in full the requested developer contributions for the subject property. He also advised that the fees had been paid under duress and would be subject to legal opinion and legal action in relation to the increased sewer and water charges which in his opinion contravened the *Water Management Act.*

Mr Purnell also wrote to Councillor Murray, Chairman of Council's Legal Committee, on 30 August 2007, regarding the increase in charges. He sought a meeting with Councillor Murray to

discuss the matter. Mr Purnell forwarded a copy of his letter to Councillor Murray to all Councillors.

No response was made by Councillor Murray or any of the Councillors to Mr Purnell's letter.

Mr Purnell subsequently sent a letter to the General Manager (undated) seeking advice on which legislative provision allowed Council to substantially increase sewer and water charges once a development application had been approved. He also requested a copy of Council's legal opinion on such increases. Mr Purnell followed up this correspondence on 8 April 2008.

Council's Manager Development Control responded to Mr Purnell on 14 April 2008 advising that section 64 of the *Local Government Act 1993* and section 306 of the *Water Management Act* enabled Council to require payment as a pre-condition to the issue of a certificate of compliance. He advised he was unable to provide a copy of Council's Solicitor's advice as this would void any legal privilege.

Mr Purnell complained to the Ombudsman on 29 April 2008 about the increased charges. He stated that the development consent contained a condition requiring the payment of a Developer Servicing Plan contribution to Council for the provision of water and sewer, and that the specific amounts payable had been stated on the development consent. The condition had no statement to the effect that the amounts advised in the condition were subject to increase until paid.

It was the initial view of the Ombudsman's Office that the Court was the most appropriate authority to make determinations regarding the dispute on charges, and to interpret the law. Mr Purnell wrote again to us raising further issues for our consideration. While he had brought to our out attention the wording of the development consent, in his view, the *Water Management Act* did not empower the Council to adjust the contribution rates after it had already given him 'notice in writing' of the contributions. The Ombudsman reviewed all the material on the complaint file and directed that we make further inquiries into the matters raised.

3. THE CONDUCT THE SUBJECT OF INVESTIGATION

All of its actions and inactions which were part of any process used by the Council in its:

Handling and investigation of complaints regarding increased charges under the Development Servicing Plan which commenced on 1 January 2007.

Handling and investigation of complaints about the retrospective application of the provision for charges in the Development Servicing Plan which commenced on 1 January 2007.

Drafting and issuing of development consents for subdivisions and the notification of developer charges.

4. THE PUBLIC AUTHORITY THE SUBJECT OF INVESTIGATION

Wingecarribee Shire Council

5. THE INVESTIGATION

On 12 September 2008, written preliminary inquiries were made of the Council pursuant to section 13AA of the *Ombudsman Act 1974*. Council responded to our preliminary inquiries on 12 September 2008.

After considering the Council's response and the information provided by the complainant, we had concerns about the reasonableness of Council's handling and investigation of complaints, and its consideration of the legal advice from its solicitor. We noted that the condition of development consent relating to the payment of developer contributions for water and sewerage did not comply with the requirements set out in Council's Development Servicing Plans.

Consequently we decided to commence a formal investigation pursuant to section 13 of the *Ombudsman Act.* On 12 December 2008, under section 16 of the Act, we issued a Notice of Investigation to the Mayor of the Council, Councillor Duncan Gair, with a copy forwarded to the General Manager, Mr Mike Hyde. We also required the Council to give a statement of information, and produce particular documentation, by way of Notice under section 18 of the Act.

Council responded to the section 18 Notice on 13 February 2009. However, there were a number of instances where Council had failed to give any response at all to requirements to provide statements of information, and where it had failed to respond to requirements to provide copies of documents. There were also instances where Council had not completely responded to the requirements. On 13 March 2009 we wrote to the Mayor and to the General Manager requiring full compliance with the Notice by 26 March 2009.

Council forwarded the required information and documentation on 25 and 30 March 2009.

6. RELEVANT MATTERS

6.1 Legislative background

The legislation primarily relevant to the complaint is:

(a) Local Government Act 1993

64 Construction of works for developers

Division 5 of Part 2 of Chapter 6 of the Water Management Act 2000 applies to a council exercising functions under this Division in the same way as it applies to a water supply authority exercising functions under that Act.

and

(b) Water Management Act 2000

306 Authority may impose certain requirements before granting certificate of compliance

(2) As a precondition to granting a certificate of compliance for development, a water supply authority may, by notice in writing served on the applicant, require the applicant to do either or both of the following:

(a) to pay a specified amount to the water supply authority by way of contribution towards the cost of such water management works as are specified in the notice
(b) to construct water management works to serve the development.

6.2 Guidelines, polices and practices

6.2.1 1997 Developer Contributions Plan

At the Ordinary Meeting held on 9 July 1997 adopted a Developer Contributions Plan for Sewerage, and a Developer Contributions Plan for Water Supply, both effective from 23 July 1997. The Plans were prepared in accordance with section 64 of the *Local Government Act* and Part 3 Division 2 of the *Water Supply Authorities Act 1987.* This latter legislation was repealed and replaced in 2000 by the *Water Management Act.*

6.2.2 Method of Payment under the 1997 Plan

Both the 1997 Plans for sewerage and water supply contributions included identical clauses in relation to the payment of developer contributions, with the requirement that a notation be included in the condition of the development consent relating to sewer and water contributions to the effect that the contribution will be calculated at the rate applying at the date of payment, and that the rate may increase with the introduction of a new plan. The clause (referred to by Council as condition '5103') stated:

4.3 Payment of Contributions

The timing for payment of contributions is as follows:
(a) Subdivision: The full amount of contributions levied for sewerage must be paid prior to the release of linen plans

Contribution rates will be indexed on the basis of the Consumer Price Index (CPI), all groups produced by the Australian Bureau of Statistics, on an annual basis at the end of June each year.

Contributions must be made in the form of cash payment to Council. Development consents requiring the payment of a Developer Contribution will contain a condition specifying the amount payable in monetary terms at the time the consent is issued. A note will be attached to the consent condition which will advise that the contribution rate charged will be that rate which applies at the time of payment. i.e. The rate may increase (through indexation or replacement of this plan with a new one) from the time the condition appears on the notice of development consent until the time the contribution is actually paid to Council.

Council did not seek legal advice during the drafting and consideration of the 1997 Plans.

6.2.3 Standard text for conditions of consent - contributions under the *Water Management Act*

During the lifetime of the 1997 Developer Contributions Plans, it was the practice of the Council to use standard text in subdivision development consents in relation to the requirement of contributions under the *Water Management Act*. The text of the standard condition relating to the contributions under the Act was referred to as '5013'. The text of condition '5013' did not include the notation which was required under the Developer Contributions Plans to the effect that the rate of contribution may increase through indexation or replacement of the 1997 Plans with new ones. The text only provided for a statement as to the amount of contributions required under each of the Plans, effective from 23 November 1997.

We asked Council what independent legal advice Council obtained in or around 1997 on the standard text to be used in respect of the condition of consent for subdivision consents relating to contributions under the Developer Contributions Plans, and the standard text for the notation to be attached to the consent condition advising that the contribution rate charged would be the rate which applies at the time of payment.

Council responded that it did not consider it necessary at the time to seek legal advice on the wording contained in the consent condition.

6.2.4 Ministerial guidelines

In 2002 the Minister for Land and Water Conservation issued *Developer Charges Guidelines for Water Supply, Sewerage and Stormwater* pursuant to section 306(3) of the *Water Management Act*. The guidelines applied to non-metropolitan water utilities in NSW and over 170 general purpose local government councils. The underlying principle was that new development should meet the full cost of assets serving the development.

Under the guidelines, water utilities and councils were required to prepare Development Servicing Plans in accordance with the guidelines, and register their Plans with the (then) Department of Land and Water Conservation by 30 June 2004. Council submitted its new Plan, effective from 1 January 2007, to the (then) Department of Water and Energy on 15 November 2007.

6.3 Development consent 2004, and amended consent 2006, to DA 02/0678

On 1 September 2004 Council issued a Notice of Determination in relation to DA 02/0678, Lot 21 DP 700002 – Old Wingello Road Bundanoon NSW 2578 granting approval for a 16 Lot subdivision and new road, subject to conditions specified in the Notice. The Notice stated that Conditions Nos 1-30 were pre-conditions that must be complied with prior to the issue of an Occupation Certificate or Subdivision Certificate.

The wording of the condition of consent in relation to water and sewer developer contributions followed text '5103'. It stated:

22. Water Supply Authority Contributions

Contribution towards Water and/or Sewer Facilities – you are advised that Council as the supply authority shall require the payment of a developer contribution towards the provision of water

and/or sewer facilities required to serve the development in accordance with Division 5 Part 2 Chapter 6 of the Water Management Act 2000 as amended.

The current rates of contribution applicable are as follows:

Water Headworks
The payment of a monetary contribution towards the augmentation of the headworks water supply system that services the development.

Contributions to existing infrastructure (Assets)

No Lots/ETs	*Rate $*	*Total$*
15	*2,211*	*33,165*

Sewer Headworks
The payment of a monetary contribution for headworks sewerage system that serves the development

Contributions to proposed infrastructure (Works)

No Lots/ETs	*Rate$*	*Total$*
15	*5,051*	*75,765*

Compliance Certificate
Compliance Certificate fees are as follows;
Water $90 – Sewer $90 = $180

NOTE: Prior to the final release, you will need to contact Council's Technical Services Division for an inspection to ensure that Council will accept the infrastructure constructed. In response the Manager of Water and Sewer will specify requirements which will have to be met.

In the case of subdivision, the title plan of subdivision will not be certified and released by Council until the Water Management Act contributions have been paid and/or secured and the approval of the Manager of Water and Sewer has been gained for all works related to this infrastructure.

In the case of other forms of development, the Construction Certificate will not be issued until the Water Management Act contributions have been paid and/or secured and the approval of the Manager of Water & Sewer has been gained.

On 31 October 2006, Council approved an amendment to the development consent granted on 1 September 2004 to include the demolition of a shed. The conditions of development consent remained exactly the same as in the consent granted on 1 September 2004. The wording of the condition 22 in relation to Water Supply Authority Contributions was in the same format in terms of text '5103', stating the same rate of charges and the total amount to be paid.

6.4 Notice under section 306(2) of the Water Management Act

We asked the Council whether or not Council considered the condition attached to the development consent for DA 02/0678 relating to contributions under the Development Servicing Plan, constituted a notice in writing pursuant to section 306(2) of the Act.

Council responded:

Council considered that the conditions of the development consent provided the necessary information to the applicant in regard to what contributions applied to the development and that this information was best provided in the development consent rather than in a separate notice. Development consents are used by applicants as a blueprint for their responsibilities and from that perspective, Council believes it is preferable to include the information pertaining to the water and sewer charges on the development consent rather than within a separate notice.

6.5 Background to the new Development Servicing Plans for Water Supply and Sewerage, 1 January 2007

At the Ordinary Meeting of Council on 9 August 2006 Council considered a report by the Director Technical Services on the key elements of the proposed Water & Sewerage Strategic Plans. Council resolved that the draft Water & Sewerage Development Servicing Plans be approved in principle and that the contribution for water be $5,500 per lot and for sewerage schemes $7,000 per lot, commencing immediately upon adoption of the plans by Council.

The draft Development Servicing Plans were placed on public exhibition from 25 September to 3 November 2006, and a public invitation was extended to inspect the draft plans and make submissions. Details of the public exhibition were included in Council's advertisement in the 11 October 2006 edition of the Southern Highland News.

The Development and Planning Engineer, Mr Bill Schofield, wrote to the Urban Development Institute of Australia and the Housing Industry Association on 7 and 21 September 2006 respectively notifying them of the public exhibition, providing a copy of the draft plan.

Mr Schofield also wrote to seven independent consultants, D & M Consulting, Bowral, Drummond Parmenter P/L, Sydney South, Richard Cox and Associates, Bowral, Bureaucracy Buxters, Bowral, Allman Johnston Architects & Planners, Bowral, Byrnes and Associates, Sydney, and Campbell and Anderson, Bowral on 7 September 2006 informing them of the public exhibition of the draft plan. The Director, Environment and Planning, informed us that these consultants represented the majority of applicants in the Shire.

At the Ordinary Meeting held on 22 November 2006 Council considered a further report from the Director of Technical Services. He reported that no submissions had been received following the public exhibition of the draft plan. In relation to the levying of charges, the report stated:

In general the charge levied is that applicable at the date the payment is made.

As there were no submissions and the charges proposed represent in many cases a significant increase from those that currently apply it is considered that following formal adoption the new charges be publicly advertised advising of a date from which the new charges will apply. This

will provide those developers who have DA approval and/or have commenced works with the opportunity to assess the impacts of the increased developer charges on their projects.

Council resolved that the Water and Sewerage Development Servicing Plans be adopted by Council and that the new charges of $5,500 and $7,000 for water and sewerage works respectively be publicly advertised, advising that the new charges will come in to effect from 1 January 2007. The information was inserted in Council's public advertisement in the Southern Highland News on 6 December 2006.

At the Ordinary Meeting held on 28 February 2007 Council resolved to phase in the new charges under the 2007 Development Servicing Plans over a three year period, with the new charges commencing at $4,000 per lot for Water Supply and $5,500 per lot for sewerage increasing to $5,500 and $7,000 per lot, applying from 1 January 2007.

Method of payment under the 2007 Development Servicing Plans.

Clause 5.3.2 of each of the 2007 Development Servicing Plans (for Water Supply and Sewerage) referred to the method of payment of the developer charges, in the same form as Clause 4.3 of the preceding 1997 Plans:

5.3.2 Method of Payment

Developer charges must be made in the form of monetary payments to Wingecarribee Shire Council. Development consents requiring the payment of a DC will contain a condition specifying the amount payable in monetary terms at the time the consent is issued. A note will be attached to the consent condition which will advise that the DC will be at the rate which applies at the time of payment. That is the rate may increase through indexation or replacement of this DSP with a new one, from the time the condition appears on the notice of development consent until the time the DC is actually paid to Council.

At the commencement of the 2007 Development Servicing Plans, the text, '5103', remained standard practice in relation to the development consent for contributions under the *Water Management Act,* i.e. there was no notation included in the consent condition that the rate of contribution may increase through indexation replacement of a new DSP, (as required under clause 5.3.2 of the Plans).

6.6 Council's request for legal advice

Following the consideration of the content of Mr Bulfin's letter to Council of 8 March 2007, the Manager Water and Sewerage, Mr Selva Selvaratnam, wrote to Council's solicitor, Mr B Bilinsky, on 2 April 2007, advising that complaints had been received from developers regarding the levying of water and sewerage developer charges retrospectively, seeking legal opinion on 2 matters:

- the issue of applying the new charges retrospectively, and
- Council's proposed rewording of consent condition '5103'.

Mr Selvaratnam quoted Clause 5.3.2 of the 2007 Development Servicing Plan (requiring a notation to be included in the consent condition advising that the contribution will be at the rate which applies at the time of payment, and that the rate may increase through indexation or replacement of the plan with a new one). He advised Mr Bilinsky that the previous plan which the new plan superseded had a statement identical to the abovementioned clause.

Mr Selvaratnam attached a copy of Council's standard text, '5103', and informed Mr Bilinsky of the proposed rewording of it, including the proposed paragraph:

The exact amount of the charge will be determined at the time of payment at the rates which apply at that time. From the time development consent is granted the charges may increase through indexation or by the adoption of a new Development Servicing Plan by Council.

Mr Schofield's name and telephone number were provided to Mr Bilinsky, as the contact person

While Mr Bulfin's letter was a catalyst for Council to obtain legal advice, no response was made to Mr Bulfin. Council advised that this was an oversight by the officer to whom the letter was referred for action.

6.7 Mr Bilinsky's legal advice

Mr Bilinsky responded to the General Manager on 27 April 2007. His advising included the following points:

...There exists a basic legal presumption that, in the absence of some clear statement to the contrary, legislation will not have a retrospective operation.

...the proposal does not attempt to introduce a retrospective operation of the DSP. The DSP can only apply to those development consents granted after 1 January 2007 pursuant to which contributions are determined for the particular development. In respect to development consents granted prior to 1 January 2007, the conditions of development and any contribution plans relating to water and sewerage are determined in accordance with those plans. To say, therefore that the possible increase in the amount payable in contributions (depending upon when the payment is made) does not constitute a retrospective application.

He also advised in relation to the proposed changes to text '5103':

Paragraph 1 would read better if the word 'charges' in the three places where it appears in the paragraph, are replaced by the word 'contributions'.

He further advised that the remaining two paragraphs of the text could be amended as follows:

The amount payable by way of developer contributions is in accordance with the development consent provided such contributions are paid within the time limit stipulated in the development consent. Otherwise, the amount payable by way of developer contributions will be determined on the grant of the certificate of compliance issued under s305 of the Water Management Act 2000 and will be the amount specified in the development consent and increased either in accordance with the Consumer Price Index or in accordance with a new Development Servicing Plan, should such a new plan be adopted prior to the payment of the developer contributions.

6.8 Council's second communication with Mr Bilinsky seeking clarification

On 21 June 2007, Mr Schofield and Mr Selvaratnam had a conversation with Mr Bilinsky to clarify three points in his advising of 27 April 2007. This was followed by a faxed letter on 22 June 2007 signed by Mr Schofield.

Mr Schofield's letter stated that on clarification of the first point, Mr Bilinsky had informed them that Council should **not** (Council's emphasis) apply the new DSP's and associated developer charges where development consent (including advice of the charges determined at the time of that consent) was issued prior to 1 January 2007.

The second point for clarification related to the calculation of charges and taking into account any government subsidy or similar payment.

The third point for clarification was whether or not it would be appropriate to state in text '5103', the charges that would apply for the anticipated life of the DSP (approximately 5 years) subject to movements in the CPI, and that if not paid within that period new charges may be determined in accordance with a revised DSP.

Mr Schofield concluded that he would appreciate advice on the second and third points.

6.9 Mr Bilinsky's second advising

Mr Bilinsky wrote to the General Manager on 25 June 2007 in response to Mr Schofield's brief. Mr Bilinsky responded to the issues needing clarification, and also reiterated his previous advice regarding development consents issued prior to 1 January 2007:

With regard to your enquiry as to whether developer charges payable pursuant to development consents issued prior to 1 January 2007 can be calculated in accordance with the new Development Servicing Plan for Water and Sewerage which came into effect on 1 January 2007, we are of the view that there is nothing in the legislation which empowers the retrospective application of the new Plan. Once the consent is issued, retrospective changes cannot be made unless there is a clear intention of the legislature that a Development Servicing Plan is to operate retrospectively if payment of the water and sewerage charges had not been made at the time the new Plan came into effect.

6.10 Council's consideration of the two legal advices

A report was prepared by Council's Technical Services department for the purpose of providing advice to Councillors on Mr Bilinsky's advisings in relation to the application of the new Water & Sewerage Development Servicing Plans to developments approved prior to 1 January 2007.

The report provided the history of the new Development Servicing Plan, the new charges, the phasing in of the charges, and the two legal advisings.

The salient points in the staff report were:

Options
The options open to Council are:

. *to continue applying the charges with the resolution of Council on 28 February 2007; or*
. *to accept the advice of Mr Bilinsky and apply the new charges only to those developments approved post 1 January 2007. The charges that would apply to developments approved prior to this date would still be subject to CPI adjustments.*

Should Council choose to continue applying the new charges "retrospectively" it is highly likely that we would be challenged in the Land and Environment Court, should this happen, and the legal opinion received is confirmed, it is considered that Council would receive adverse publicity which it can ill afford in the current climate.

Financial implications
A number of developments approved prior to 1 January 2007 have been processed based on the new water and sewerage developer charges.

Should Council resolve that the new charges not apply to those developments r to 1 January 2007, this would result in refunding approximately $98,000 for water and $77,500 for sewerage.

The report continued that the Environment and Planning Department were conducting research on developments approved over the past five years, and had determined the number that have yet to commence or were currently in progress. The Department would provide further information at the Legal Committee meeting on the number of equivalent tenements of those developments that are in progress or may still proceed, the total value of charges on these developments under the new Plan and the previous Plan, and the total estimated reduction in income for water supply and sewerage.

The report also drew attention to the fact that the developer charges were based on future development over the next thirty years, and future income from developments where consents had been granted were not included in the Plans, viz:

While the resulting shortfall in projected income is not insignificant, it is to be emphasized that the water and sewerage developer charges calculated through the financial modelling process were based on the predicted future development over a thirty year period.

No allowance was made for those developments for which consent had previously been determined i.e. future income from developments approved prior to the modelling being undertaken was not included in the water and sewerage strategic plans.

In concluding, the report recommended that Council accept the advice of Mr Bilinsky and that water and sewerage developer charges previously advised to applicants (subject to CPI adjustment) remain current for those developments where consent was issued prior to 1 January 2007; and that for developments approved from 1 January 2007 the new charges be phased in accordance with Council's resolution of 28 February 2007.

The meeting of the Legal Committee

The Legal Committee met on Wednesday 25 July 2007.

Additional paper tabled

An additional paper was prepared by Council staff for consideration with the Technical Services Report. It was provided to Councillors at the meeting. The paper provided the following information:

. the estimated number of equivalent tenements that may be generated from developments approved prior to 1 January was 865

. under the new DSP, the approximate amount of income generated from these developments would be – Water Supply $3.4M, Sewerage $4.8M

. prior to adoption of the 2007 Plan, the income generated would have approximated – Water Supply $2.4M, Sewerage $3.9M

. the total estimated reduction in income – Water Supply $1M, Sewerage $0.9M.

The minutes of the Legal Committee meeting of 25 July 2009 state in relation to Item 19, *Water and Sewerage Development Servicing Plans,*

RECOMMENDATION
THAT the matter be deferred until the next Legal Committee meeting on 22 August 2007.

The Committee recommendation was adopted by Council at the Ordinary Meeting held on 8 August 2007.

6.11 Council's second deliberation on the staff reports

The Legal Committee met on 22 August 2007. Mr Bilinsky attended this particular meeting. The minutes of the meeting state:

RECOMMENDATION
THAT Council's Solicitor be requested to provide advice on rates charged under Development Servicing Plans AND THAT the matter be discussed at the next Legal Committee following receipt of this advice.

There were no records, written or tape recorded in relation to the deliberations of the Committee prior to its recommendation that a further third advising be provided by Mr Bilinsky.

The minutes of the meeting of the Legal Committee on 22 August 2007 were adopted by the Council at the Ordinary Meeting held on 12 September 2009.

6.12 Mr Bilinsky's third legal advising

On 28 August 2007 Mr Bilinsky provided the third advising to the Council on its Water & Sewerage Development Servicing Plans, in accordance with the recommendation of the Legal Committee on 22 August 2009, brought forward in his presence.

In his advising, Mr Bilinsky commenced with the following statement:

We have considered the power of Council to require the payment of developer contributions towards water and/or sewer facilities at a rate greater than those calculated at the date of a development consent. In particular, we have considered whether the contribution payable for water and sewer facilities may be made pursuant to a development servicing plan adopted after the granting of the development consent.

His advice concluded with a four point summary, two of which are particularly relevant to the matters under investigation.

Clause (b) of his summary advised that the rate of contributions for water and sewer was applicable as at the date of issue of the Certificate of Compliance, stating that the development consent makes it quite clear that contributions may increase due to regular review. Clause (d) referred to the requirement that the relevant condition of consent should specifically refer to the contributions rate payable as being the rate applicable at the date of payment, and not as at the date of consent. Mr Bilinsky advice was:

> *(b) If contributions for water and sewer determined by the development consent are not paid immediately after the granting of consent, then the rate applicable as at the date of issue of the Construction Certificate* (sic) *or any other date nominated in the development consent is payable. This is so irrespective of whether the development consent was issued during the lifetime of an earlier development servicing plan. In such circumstances, the question of retrospectivity does not arise as the development consent makes it quite clear that the contributions for water and/or sewer may increase due to their regular review. This is the prospective application of the contributions plan rather than a retrospective application of the development servicing plan.*
>
> *(d) In granting development consents, Council should ensure that the Consent clearly identifies contributions payable to Council in its capacity as a water supply authority referring to the fact that the contributions are not determined pursuant to s94 or s94A of the Environmental Planning and Assessment Act 1979 but pursuant to s64 of the Local Government Act 1993 and s306 of the Water Management Act 2000. The consent should specifically refer to the contributions rate payable as being the rate applicable at the date of payment and not at the date of consent. In addition,*

reference should be made to the fact that Council has the power to review the contributions payable for water and/or sewer either quarterly or annually, and does so regularly.

6.13 Concurrent action during Council deliberations - Council's account to Mr Purnell for all contributions payable under the condition of consent

There had been no reply from Council to Mr Bulfin's letter of 8 March 2007, and it was apparent that Mr Purnell was ready to progress the subdivision development. To do so, he would need to pay to the Council the development contributions it required, prior to the issue of a certificate of compliance.

On 28 August 2007 Council faxed to Mr Purnell a statement setting out all the individual amounts of contributions payable to Council under the conditions of consent. Though not specifically stated on the account, the statement included contributions which would have been levied under section 94 of the *Environmental Planning and Assessment Act 1974* and under section 306 of the *Water Management Act.* The statement showed the amount required for sewerage at the rate of $5,500 per lot, totalling $82,500, and Water Supply at the rate of $4,000 per lot, totalling $60,000. The amounts were considerably higher than the contributions set out in the condition of consent, viz totals of $75,765 for sewerage and $33,165 for water. This amounts to an overall increase of $33,570 in the contributions under the *Water Management Act.*

Mr Purnell paid the amount sought by the Council on 29 August 2007 and received a receipt.

6.14 Council's further letter to Mr Bilinsky seeking clarification

Following Mr Purnell's letter to the General Manager on 29 August 2007 in which Mr Purnell indicated he was seeking legal advice, Council entered into further correspondence with Mr Bilinsky.

On 4 September 2007 Mr Schofield wrote again to Mr Bilinsky regarding the Water and Sewerage Development Servicing Plans, seeking clarification of paragraphs (b) and (d) of the advising of 28 August 2007.

Mr Schofield's letter informed Mr Bilinsky of the fact that in relation to consents issued prior to 1 January 2007, the condition *Water Supply Authority Contributions* made no reference to possible increases in the monetary contributions payable and nor did it refer to the contributions rate payable as being the rate applicable at the date of payment and not at the date of consent.

Mr Schofield asked for confirmation from Mr Bilinsky that his advice that the rates adopted in the new water and sewerage development servicing plans shall apply to all developments, irrespective of when consent was issued until such time as the current plans are reviewed.

6.15 Mr Bilinsky's further advice

On 5 September 2007, Mr Bilinsky responded to the request for advice forwarded by Mr Schofield the previous day.

Mr Bilinsky's advising provided an alternative interpretation of Council's position and arguments which Council could be put forward. He referred to paragraph 5102, the standard text for the condition of consent relating to section 94 contributions under the *Environmental Planning and Assessment Act*. He advised that while the text for the condition of consent relating to water and sewer contributions for approvals prior to 1 January 2007 did not make specific reference to any increase in the rate of contribution, paragraph 5102 under the general heading, *Contributions*, made reference to the fact that contributions are calculated at the rate applicable at the time of payment. He advised that it could be argued by Council that all contribution rates determined at the date of consent were capable of being increased to reflect the rates applicable at the date of issue of the Subdivision Certificate.

He advised further on Council's position in any dispute and the difficulty facing the developer. He saw the issue as being essentially one of construction of the relevant development consent and the words used in the condition requiring payment of the contribution. He stated:

Whilst it might be possible to argue that Council should be bound by the original statement of the amount required to be paid for water/sewerage contributions and not be able to be varied, the difficulty which a person who has the benefit of a consent faces is that the water and sewerage contributions levied pursuant to section 64 of the Local Government 1993 and section 306 of the Water Management Act 2000 are not contributions against which an appeal may be brought, nor are they contributions which may be varied by a Court. Essentially, the issue is one of construction of the relevant development consent and the words in the condition requiring payment of the contributions.

He advised further in relation to possible action against the Council:

In such circumstances, unless the contributions required by Council are paid, the Construction Certificate or Plan of Subdivision would not be released and a decision would need to be made as to whether action should be commenced against Council on the ground that the payment of the original amount assessed for water/sewerage contributions amounted to a compliance with the conditions of consent. The appropriate procedure which an applicant would need to adopt is an application to the Land and Environment Court of New South Wales seeking a declaration that all conditions of development consent had been satisfied and an order that Council issue the Construction Certificate or release the Plan of Subdivision.

6.16 Further consideration of the legal advisings

The Committee met on 26 September 2007. Mr Schofield and Mr Selvaratnam were asked to attend the meeting. The minutes state:

> *RECOMMENDATION*
> *THAT the Legal Committee consider the advice from Council's Solicitor.*

Mr Schofield's recollection of this Legal Committee meeting was that there was little discussion between him and the committee members. Mr Schofield recalled the Committee discussing the issue and resolving that the new Plans would apply to those developments for which consent was granted prior to 1 January 2007. At this meeting the Legal Committee had the benefit of the latest legal advising from Mr Bilinsky dated 28 August 2007, although he wasn't in attendance.

The minutes of the Legal Committee meeting of 26 September 2007 were submitted to the Ordinary Meeting of the Council on 10 October 2007. The Ordinary Meeting minutes record:

THAT the recommendations as detailed in the minutes of the Legal Committee meeting held Wednesday 26 September 2007 be adopted.

6.17 Council's further consideration of the legal advisings

The General Manager distributed the agenda and business papers for the Legal Committee meeting to be held on 24 October 2007.

The Business Paper

Water & Sewerage Development Servicing Plans were at item 11 in the Business Paper. The report in the Business Paper stated that the matter had been discussed at the meeting of 22 September, however the recommendation of that meeting recorded in the minutes which had been adopted by Council at the Ordinary Meeting did not accurately reflect the discussion and resolution of the Committee. The recorded recommendation was *That the Legal Committee consider the advice from Council's Solicitor.*

The Business Paper went on to state that the Committee, after Council's Solicitor's advice, reconfirmed the view that the Council's current position in relation to the levying of contributions under the Water and Sewerage Development Servicing Plans was correct. The Business Paper further stated

To be clear and enable staff to properly deal with any future inquiries from developers as to contributions payable, the following recommendation is put forward for adoption.

RECOMMENDATION

THAT Council reconfirm the current monetary contributions as set out in the adopted Water and Sewerage Development Servicing Plans.

Deliberations

The minutes of the Legal Committee meeting of 24 October 2007 record the following recommendation:

THAT the Council reconfirm the current monetary contributions (amended) as set out in the adopted Water and Sewerage Development Servicing Plan.

We were informed that in reaching this decision, Council had relied specifically on the summary points (a) to (d) in Mr Bilinsky's advice of 27 August 2007.

The minutes of the Legal Committee meeting of 24 October 2007 were submitted to the Ordinary Meeting of Council on 28 November 2007 when it was resolved:

THAT the matter be deferred for consideration to the Ordinary Meeting of Council to be held on Wednesday 12 December 2007.

At the Ordinary Meeting held on 12 December 2007, Council resolved:

THAT the recommendations as detailed in the minutes of the Legal Committee meeting held Wednesday 24 October 2007 be adopted.

We asked during the investigation whether any of the Councillors had expressed concern regarding the continuing deferral of consideration of the legal advisings. We were informed:

Councillors, although conscious of the need to make a decision, were also conscious of the sensitivity of increasing contribution rates. It is Council's prerogative to defer matters until such time as they feel they are ready to make a decision and in this case the Councillors believed that it was preferable to take their time before finalising their decision.

6.18 Further legal advice on the standard text

In the meantime, the Director Environment & Planning, Mr Scott Lee, wrote to Mr Bilinsky on 18 September 2007 regarding the wording of the conditions of consent in relation to developer contributions 'both typical s94 and water and sewer'. Mr Lee attached a copy of the proposed amendments to the standard conditions of consent.

The proposed wording for the developer charges under the *Water Management Act* included a final paragraph to the effect that the amount of the charge would be determined at the time of payment at the rates applying at that time, and that the charges may increase through indexation or by the adoption of new Development Servicing Plans.

Mr Bilinsky responded to Council on 5 November 2007 providing precise wording for the paragraphs regarding Council's authority under the Act, and the exact wording for the final paragraph:

The exact amount of any charge for either water supply or sewerage will be determined in accordance with s306 of the Water Management Act 2000 at the rate applicable as at the date of payment. The charges levied as at the date of the development consent will increase through indexation in accordance with movements in the Consumer Price Index (All Groups index) for Sydney issued by the Australian Statistician or by increases due to the adoption of new Development Servicing Plans by Council.

Mr Bilinsky advised that he looked forward to discussing the proposed changes with the Council.

Council amended the standard text in October 2007, with further amendments in April and October 2008 to include notations along the lines recommended by Mr Bilinsky.

6.19 The other complaint

We asked Council for all details of other complaints it had received regarding increased charges under the 2007 Plan, and to provide all relevant documentation. We were informed that the only other complaint Council had received regarding the application of charges under the 2007 Plan to development consents granted prior to 1 January 2007 was in relation to DA05/0923, in respect of 24 Berrima Road, Moss Vale, owned by Mr T and Mrs M Loader.

The Notice of Determination for DA05/0923 included at clause 41 the condition relating to water supply authority contributions, and it followed the standard text for condition '5103', stating that the amount of contribution effective 23.7.97, and did not include any notation regarding the payment of the contribution being at the rate applicable at the date of payment.

On 22 October 2008, Mr and Mrs Loader had written to Council in relation to their 3 lot subdivision, DA05/0923. They informed Council that they were fully aware of the developer charges that were imposed by Council when the DA was approved, and the fact that this amount could be paid at any time during the subdivision process. They had chosen to delay payment until the development was ready for approval, understanding that the amount would increase in line with the CPI.

At the time of payment they were 'unpleasantly surprised' by the huge increase in the water and sewer components of the charges. The sewer contribution had increased from $2,199 to $6,343, and the water contribution from $2,074 to $4,821 per subdivision lot. They could not understand why the holders of a pending application were not formally notified in writing of the impending increase. They had made payment in full and now requested that they be refunded the amount attributed to the DSP increase.

On 9 December 2009 Council responded to Mr and Mrs Loader informing them of Council's resolution on 28 February 2007 to phase in the new charges over a 3 year period. Council refused the request for a refund but Council would review the notification process for future draft Development Servicing Plans.

6.20 Outstanding subdivision consents prior to 1 January 2007

During the investigation we sought advice from Council on the number of development consents granted between 1 January 2002 and 31 December 2006 where certificates of compliance had not been obtained and/or contributions under the Development Servicing Plans had not been paid, as at the commencement of the Plans on 1 January 2007.

On 25 March 2009 Council provided us with a schedule setting out such consents. The schedule indicated that there were 32 subdivision determinations during this period where the water and sewerage development contributions had not been paid.

Details of DA05/0923 (Mr and Mrs Loader) did not appear on the schedule, and it appears that the schedule may not be fully accurate.

6.21 2007 Development Servicing Plan contributions paid on consents granted prior to 1 January 2007

We also asked the Council to provide details of all instances where developers holding development consents granted prior to 1 January 2007 had been required to pay the increased contributions under the 2007 Development Servicing Plan when applying for certificates of compliance.

On 25 March 2009 Council provided us with a schedule indicating the development consents granted prior to 1 January 2007 where the applicants had paid the charges required by Council as set out under the 2007 Plan. The schedule listed 18 development applications on which Council had imposed the 2007 charges.

6.2.2 Matter arising – Meeting practice of the Legal Committee

The documentation gathered during the investigation has indicated that Notices of meetings of the Legal Committee were given to the appointed members of the Committee, and to all other Councillors, the General Manager and his senior staff, and Council's Solicitor. As a matter of practice, no notice is given to the public of the proposed convening of a meeting of this committee of Council.

The *Local Government Act 1993,* at Chapter 4, *How can the community influence what a Council does,* contains the following provisions regarding notice of meetings, who is entitled to attend meetings, and when meetings can be closed to the public:

9 Public notice of meetings

9(1) (Notice of time and place) A council must give notice to the public of the times and places of its meetings and meetings of those of its committees of which all the members are councillors
9(2) (Copies of agenda and business papers) A council and each such committee must have available for the public at its offices and at each meeting copies (for inspection or taking away by any person) of the agenda and the associated business papers (such has correspondence and reports) for the meeting.
9(2A) (Agendas for closed meetings) In the case of a meeting whose agenda includes the receipt of information or discussion of other matters that, in the opinion of the general manager, is likely to take place when the meeting is closed to the public:

(a) the agenda for the meeting must indicate that the relevant item of business is of such a nature (but not give details of that item), and

(b) the requirements of subsection(2) with respect to the availability of the business papers do not apply to the business papers for that item of business.

It was also noted that it was, and still is, Council's practice that Legal Committee Meetings, in their entirety, are closed meetings and never open to the public as a matter of course.

The documentation indicates or suggests that the agendas over a four month period included items concerning matters proceeding through the Court with progress reports, lodgements of development applications, unauthorised works, unauthorised parking, non-compliance with conditions of consent, issuing of penalty notices, tree removals, neighbourhood disputes and the role of the Community Justice Centre, land acquisition, and lease of council land.

Section 10A of the *Local Government* Act provides that a council, or a committee of the council of which all the members are councillors, may close to the public so much of its meeting as comprises the discussion of any of the matters listed in section 10A(2).

While the subject matter of the agenda items to be considered by the Committee, as noted above, may well fall within a number of subsections under section 10A(2), the grounds for closing the meeting under section 10A(2) have not been specified in any of the Committee's minutes pursuant to section 10D:

10D Grounds for closing part of the meeting to be specified

(1) the grounds on which part of a meeting is closed must be stated in the decision to close that part of the meeting and must be recorded in the minutes of the meeting.

(2) The grounds must specify the following:

(a) the relevant provision of section 10A(2)

(b) the matter that is to be discussed during the closed part of the meeting

(c) the reasons why the part of the meeting is being closed, including (if the matter concerned is a matter other than a personnel matter concerning particular individuals, the personal hardship of a resident or ratepayer or a trade secret) an explanation of the way in which discussion of the matter in an open meeting would be, on balance, contrary to the public interest.

The conduct of meetings in respect of the abovementioned statutory requirement is also included in the *Local Government (General) Regulation 2005* at clauses 240 and 253, and incorporated in Council's Code of Meeting Practice.

It is Council's practice that the minutes of a Legal Committee Meeting are prepared after the meeting and submitted to the next Ordinary Meeting of the Council, held the following month.

The reports from the Legal Committee, included in the business papers for the Ordinary Meetings, contain very little or no information regarding the matters which have been under consideration by the Committee, and recommendations brought forward for adoption. The Committee minutes, as a general rule, only state the recommendation from the meeting in procedural terms, e.g. that the item be adopted or deferred, or noted.

The subsequent minutes of the Ordinary Meetings usually state merely that the recommendations as detailed in the minutes of the Legal Committee meeting have been adopted, and little or no information on the item is provided in the minutes of the Ordinary Meetings.

The Department of Local Government's Circular to Councils, No 07/08, headed *Closed Council Meetings,* and issued on 11 April 2007, provides the following guidance:

While discussions during a closed meeting must remain confidential, the resolution must allow the public to know what the council has decided during the closed part of the meeting, but without revealing confidential information. A recommendation such a "Resolved as recommended in the report" does not adequately inform the public of the decision of the Council.

The circular stated that the department regularly saw minutes of closed council meetings that failed to comply with the Act. To assist councils in preparing minutes for closed meetings that comply, the circular attached examples of model council minutes for a closed council meeting.

Mr Purnell, other ratepayers, and/or any other interested person would have no knowledge that matters were being considered, and deliberated upon, at the Council or at Committee.

7. CONCLUSIONS

7.1 Council's investigation of the complaints about the application of increased charges

The fundamental flaw

The evidence gathered during our investigation highlighted that there has been a fundamental administrative flaw in Council's procedures in the application of contributions for water and sewerage under the *Water Management Act.* The standard text it used for the relevant condition of development consent did not comply with the requirements of clause 4.3 of the 1997 Developer Contributions Plan and clause 5.3.2 of the subsequent 2007 Development Servicing Plan, in that the text did not include the required notation stating that the rate of contribution payable is the rate applicable at the date of payment, and that the rate may change by a change in the Consumer Price Index or the introduction of a new plan. The text was inadequate in that it only provided a statement of the contribution rate under the plan, the number of lots applicable and the total amount of contributions payable.

A reasonable reading of these conditions is that the amount specified is and will remain the amount payable.

The administrative flaw had not come to Council's attention until Mr Bulfin's complaint in March 2007, which was one of the early and significant instances where the considerably increased rates of contributions had been imposed by Council. Prior to the 2007 Plan, any variation of the level of contributions from that quoted in the condition of consent were CPI related, and relatively minor.

Council appropriately and promptly sought legal advice from its solicitor, Mr Bilinsky, regarding the complaint that Council had applied new increased rates of contribution retrospectively.

Council appropriately also took prompt action to revise and correct its flawed standard text for the relevant condition of development consent, and submitted a revised text for Mr Bilinsky's opinion. This was the first occasion that Council had sought advice on the 1997 and 2007 Plans and related matters.

Mr Bilinsky advised Council on 27 April and 25 June 2007, in the clearest of terms, that it could not apply the rate of contributions in the 2007 Plan to development consents granted prior to 1 January 2007. Mr Bilinsky suggested minor changes be made to the wording of the standard text to comply fully with clause 5.3.2 of the Plan.

In the light of Mr Bilinsky's advisings in April and June 2007, in July 2007 Council's senior staff prepared a report for consideration by the Legal Committee, on Council's practice and procedures in relation to the Development Servicing Plan, and on the legal advices Council had received.

The staff report was comprehensive. It gave the background and history of the Plan. It advised that the calculation of new rates of contributions were based on predicted future development over a thirty year period, and that the formula for the calculation did not factor in those developments for which consent had already been granted. The report warned that if Council continued applying the new charges retrospectively, it was likely it would be challenged in the Land and Environment Court. It warned further that if this happened, and the legal advice obtained from Mr Bilinsky was confirmed by the Court, Council would receive adverse publicity which it could not afford at that particular time. Council, at the time of preparation of the staff report, had capitalised on the situation, requiring the payment of increased rates of contributions under the 2007 Plan on development consents granted prior to the introduction of the plan. The increase in the rates of contributions had netted an additional $175,500 up to that point in time.

The report was considered at the meeting of the Legal Committee on 25 July 2007. The supplementary report tabled at the meeting gave an update of the financial implications involved in the matter, viz that if Council continued to apply the rate under the 1997 Plan (as set out in the condition of consent) the overall income to Council would be Water Supply $2.4M and Sewerage $3.9M, whereas under the 2007 Plan it would be increased to $3.4M and $4.8M. In other words, if Council continued to apply the increased rate of contribution under the 2007 Plan, notwithstanding the legal advice that it should not, Council would increase its contributions income by a total of $1.9M.

The Legal Committee recommended that further legal advice be obtained from Mr Bilinsky for consideration at the next committee meeting. Mr Bilinsky was in attendance at the Committee meeting when the recommendation was made.

On 28 August 2007 Mr Bilinsky provided a third advising, and it is this advising on which Council states it has relied.

Mr Bilinsky's advice can only be read in general terms. He advised that the rate of contributions for water and sewer was applicable as at the date of the certificate of compliance, as the development consent makes it quite clear that contributions may increase due to regular review. He stressed that the relevant condition of consent should specifically refer to the contributions rate payable as being the rate applicable at the date of payment, and not as at the date of consent.

In other words, Mr Bilinsky's advice in relation to the rate of contribution applicable being the rate at the date of payment, is contingent on the development consent making it clear that contributions may increase due to their regular review.

The situation was, and the Committee and Council were well aware, that consents granted prior to 1 January 2007 did not make it clear that contributions may increase due to regular review. Council had realised that the text for the relevant condition was flawed, and in April 2007 had proposed a revised text for Mr Bilinsky's approval. Therefore the Committee and Council could not assume that Mr Bilinsky's advice could be applied to consents granted prior to 1 January 2007, or in fact to consents granted thereafter up until Council revised its standard text to comply with clause 5.3.2 of Plans.

The Legal Committee met again on 26 September 2007 by which time Council needed to address the serious situation which had arisen. Council had before it several legal advices from its solicitor – to the effect that Council could not apply the 2007 Plan to development consents it had granted prior to 1 January 2007, that development consents must include specific notations regarding the rate of contributions payable (as outlined above), and that the standard text of the relevant condition of consent be reworded (in the terms required in both the 1997 and 2007 plans).

By the date of this meeting, there were 14 subdivision developments where the developer had been required by Council to pay the increased rate of water and sewerage contribution prior to the granting of a certificate of compliance, including Mr Purnell's payment on 28 August 2007, on which he was seeking legal advice. Council was continuing to capitalise on the situation, requiring increased contributions prior to the release of the certificate of compliance.

Council had also sought and obtained another advice from Mr Bilinsky dated 5 September 2009 which outlined its position in the event of any Court action, providing an argument which Council could put to the Court. He concluded that the issue was essentially one of the construction of the development consent and the words used in the relevant consent condition.

No further staff report was prepared on the further advisings obtained from Mr Bilinsky, and the report to the committee meeting of 25 July 2007 together with the tabled supplementary paper, remained the only records of Council's deliberations. There are no records of the deliberations of the Committee. Mr Schofield's recollection is that the Committee resolved that the new Plans would apply to those developments for which consent was granted prior to 1 January 2007.

It is later recorded by means of the Legal Committee minutes that there was an error in the minutes of the Committee meeting of 26 September 2007 which stated that the Committee had recommended that it consider the advice from Council Solicitor. The Committee minutes with the aforementioned recommendation, albeit with a most significant error, were adopted at the next Ordinary Meeting on 10 October 2007.

The Legal Committee met again on 24 October 2007 when it brought forward the recommendation that Council reconfirm the current monetary contributions as set out in the adopted Development Servicing Plans. There was no elaboration of what was precisely intended by such a recommendation, but Mr Schofield recalled the Committee's intention that the new

Plans would apply to development consents granted prior to 1 January 2007. The minutes of the Committee were submitted to the Ordinary Meeting of 28 November 2007 when the matter was deferred to the meeting of 12 December 2007. Ultimately at the December meeting, the minutes of the Legal Committee were adopted.

The deliberations on this important matter regarding the application of water and sewerage developer charges were continually, and in my view unreasonably delayed by the Legal Committee. The deliberations by the Council were also delayed from July 2007 when the comprehensive staff report was submitted to the Committee, until the adoption of the Committee minutes and its recommendation, on 12 December 2007.

In my view, the Committee and ultimately the Council were unreasonable in recommending and resolving to apply the increased rate of water and sewerage contributions under the new Plans to consents granted prior to 1 January 2007, notwithstanding the advices from Council's solicitor in April, June and August 2007 that in effect it should not do so. I note in this regard the staff recommendation that Council heed the legal advice and pointing out the likely repercussions if it did not.

The advices from the solicitor were clear that the 2007 Plans should not be applied to development consents granted prior to 1 January 2007. In addition staff had reported fully and clearly on the matter, and an error in interpretation cannot be envisaged. It is therefore difficult to come to the view that the Councillors had simply made an innocent error in their interpretation of the solicitor's advices at the Committee level and at the Ordinary meeting.

It could well be argued that the Committee and the Council were influenced by financial considerations. If Council did not apply the 2007 Plan to consents granted prior to 1 January 2007, this would represent a loss of additional revenue of $1.9M, as outlined in the staff report tabled at the Committee meeting on 25 July 2007.

7.2 The drafting and issuing of development consents for subdivisions

As stated earlier, having received Mr Bulfin's complaint in March 2007, Council immediately sought to revise and reword its standard text for condition '5103' in relation to water and sewerage contributions to comply with the Development Servicing Plans. Council submitted a proposed text to Mr Bilinsky for comment in April 2007 and again in September 2007. Council amended the standard text for condition '5103' in October 2007, and again in April and October 2008.

The new standard text appears to adequately address the problem in the old standard text in that it properly and clearly states that the amount to be paid is to be calculated as at the date of payment, not the date of consent.

7.3 Meeting practice

Council has conducted all meetings of its Legal Committee in closed session without complying with the relevant mandatory requirements of section 10A of the *Local Government Act.* This is against the founding principles of the Act of openness, transparency and accountability.

Council does not give Notice of the meetings of the Legal Committee as required under section 9 of the *Local Government Act.* The only indication that a meeting has been held is by the cryptic reports on the Committee's recommendation, submitted to the Ordinary Meeting for adoption. The minutes do not record on what subsection of section 10A(2) of the Act the Committee had relied upon to close the meeting to the public.

The Department of Local Government has given clear guidance to Councils in relation to the conduct of closed meetings which have not been given any regard by the Council.

Council has not complied with the Act, the Regulation and its own Code of Meeting Practice in this matter.

8. FINDINGS

(1) **I find** that the conduct of the Wingecarribee Shire Council in deciding on 12 December 2007 to adopt the recommendation of its Legal Committee, to apply the increased rate of contributions under the Development Servicing Plans which commenced on 1 January 2007 to development consents granted prior to 1 January 2007, was unreasonable and oppressive, based wholly or partly on irrelevant considerations, and otherwise wrong, in terms of sections 26(1)(b),(d) and (g) respectively, in that

. Council failed to properly consider and accept the clear and reasonable advice of its solicitor that it should only apply the provisions of the 2007 Development Servicing Plans to development consents granted after 1 January 2007

. Council failed to properly consider the clear and reasonable advice from its senior staff that it should accept the advice of Council's solicitor and only apply the 2007 Development Servicing Plan to consents granted after 1 January 2007

. Council resolved to apply the increased contributions under the Plan notwithstanding its clear understanding that the standard condition of consent attached to all subdivision development consents granted prior to 1 January 2007 in relation to water and sewerage contributions was flawed in that they did not comply with the requirements of the 1997 Developer Contributions Plans and the subsequent 2007 Development Servicing Plans

. Council was also aware when making its decision that unless the level of contributions required by Council were paid, it would not release a Certificate of Compliance for the relevant subdivision. The only course of action would be for the developer to make an application to the Land and Environment Court seeking a declaration that all conditions of consent had been satisfied, and seeking an Order that Council issue the Certificate of Compliance. Council would be aware that developers would be reluctant to commence such action in the Court.

. Council made its decision to apply the increased rate of contributions under the 2007 Development Servicing Plan to consents granted prior to 1 January 2007 in the knowledge that it

would increase its development servicing plan funds by $1.9M. In seeking this financial gain, Council acted against the clear and reasonable advice from its solicitor that it should only apply the provisions of the 2007 Development Servicing Plans to development consents granted after 1 January 2007.

(2) I find that the conduct of the Wingecarribee Shire Council in its management of its Legal Committee has been contrary to law, and otherwise wrong, in terms of sections 26(1)(a) and (g) respectively, in that

. Council has continually breached sections 9 and 10 of the Local Government Act, and its Code of Meeting Practice, in relation to the conduct and meeting practice of the Legal Committee, in failing to give proper notice of the meetings of the Committee, in closing such meetings from the public unilaterally, in failing to record the relevant sub-sections of section 10 on which it has relied in closing the meetings, and failing to minute the decisions to close the meetings.

9. RECOMMENDATIONS

9.1 I recommend that Council immediately reviews its resolution of 12 December 2007 and reconsiders and accepts the legal advices provided by its solicitor, and reconsiders and adopts the staff report prepared for the Legal Committee meeting of 25 July 2007, namely, that the provisions of the 2007 Development Servicing Plans be applied only to development consents granted after 1 January 2007

9.2 I recommend that Council refund to Mr Purnell the amount of the increase in contributions it required him to pay under the 2007 Development Servicing Plan prior to the issue of the Certificate of Compliance, over and above the amount specified in his 2004 development consent.

9.3 I recommend that Council also refund Mr and Mrs Loader the amount of the increase in contributions it required them to pay under the 2007 Development Servicing Plans prior to the issue of the Certificate of Compliance, over and above the amount they would reasonably have been required to pay in relation to their 2005 development consent

9.4 I recommend that Council refund all other developers who hold consents granted prior to 1 January 2007, who have been required to pay increased contributions under the 2007 Development Servicing Plans, the amount of such increase over and above the amounts specified in their development consents

9.5 I recommend that Council note its records so that the remaining holders of subdivision development consents granted prior to 1 January 2007 will not be required to pay the increased rate of contribution under the 2007 Development Servicing Plans

9.6 I recommend that Council formally apologises to Mr Purnell, Mr and Mrs Loader, and all other holders of development consents granted prior to 1 January 2007 who were required to pay increased contributions under the 2007 Development Servicing Plans

9.7 I recommend that Council immediately reviews its meeting practice in relation to the conduct of the Legal Committee, the closure of meetings to the public, and reporting

of the items and decisions, and that it amends it practices to comply with sections 9 and 10 of the *Local Government Act,* the Regulation and its own Code of Meeting Practice.

I require Council to report to me on compliance with the recommendations in this report within three (3) months of the date of the report.

Appendix 5: Council response to 2020 statement of provisional findings and recommendations

lindsaytaylorlawyers

Confidential

20 July 2020

Our ref: WIN18001
Your ref: C/2008/5322;C/2018/5774

NSW Ombudsman
Level 24, 580 George Street
SYDNEY NSW 2000

Attention: Mr Tom Millett

Email

Dear Sir,

Investigation into Wingecarribee Shire Council

Introduction

1 I refer to the *Statement of provisional findings and recommendations: Investigation into Wingecarribee Shire Council* dated June 2020 (**Statement**) and the covering letter sent to Council on 26 June 2020. I act for Council and am instructed to respond to the Statement on Council's behalf.

2 Council has considered that Statement in detail, and is of the view that it contains a number of significant legal errors. There are also significant practical problems associated with the implementation of the proposed recommendations, which suggest that the recommendations should be revisited.

3 Council requests that the preliminary findings and recommendations be reconsidered in line with the issues raised in this letter.

Legal errors

4 The Statement includes a number of errors of law that impact upon the findings in relation to each of the three concerns identified in the Statement.

Amount of the DSP Charges

5 The decision of the Court of Appeal in *Nash Bros Builders Pty Ltd v Riverina Water County Council* [2016] NSWCA 225 (***Nash Bros***) clearly is to the effect that a water supply authority has ***no power*** to require a developer to pay development servicing charges (**DSP Charges**) under s64 of the *Local Government Act 1993* (**LG Act**) and s306 of the *Water Management Act 2000* (**WM Act**) before that developer applies for

a certificate of compliance under the WM Act. This is correctly accepted at page six of the Statement.

6 The Statement however states that the Court of Appeal in *Nash Bros* did not consider whether a condition of development consent could set the amount of the fees, and is distinguishable as the appellant in the case had not applied for a certificate of compliance, whereas Ms Sheehan had.

7 It is clear from the Court of Appeal judgment in *Nash Bros* that the relevant development consent contained a condition to the effect that a compliance certificate would be required, and quoted the fee to be paid (in an advisory condition). However, there was a finding that no application for a certificate of compliance under the WM Act had been made.

8 It is important to note that Ms Sheehan applied for her certificate of compliance many years after the grant of her development consent (**Consent**).

9 Ms Sheehan's circumstances are not different from the circumstances in *Nash Bros* in any way which would have lead the Court of Appeal to a different conclusion – the conclusion of the Court of Appeal would have been that the DSP Charges were to be determined when she made her application for a certificate of compliance. The Statement does not include any proper legal analysis as to why it says the fact that she applied for a certificate is distinguishing.

10 Given the form of the condition in *Nash Bros*, the Court of Appeal judgment must be read as finding that there is no power to set fees in a development consent. There was no need for the Court of Appeal to say so explicitly, given its finding that the charges cannot be required until an application for a certificate of compliance is made, as "***the power of the respondent to impose fees may be found in Div 5***" (of Part 2 of the WM Act). That conclusion is wholly inconsistent with there being a power to impose fees in a development consent.

11 In addition to the Court of Appeal finding that the source of power to require DSP Charges is the WM Act, it is also clear from other caselaw and the *Environmental Planning and Assessment Act 1979* (**EPA Act**) that there is no power to impose DSP Charges in a development consent for the following reasons:

11.1 a consent authority cannot fetter the discretion which it exercises when determining whether any DSP Charges are payable, by determining the amount of DSP Charges before it receives an application for a certificate of compliance;

11.2 that discretion must be exercised having regard to the circumstances, and the DSP that exists at the date of the determination to issue a certificate of compliance;

11.3 there is no source of power in the EPA Act for imposing such a condition; and

11.4 a condition on a development consent setting the DSP Charges would contravene the prohibition in s7.11 of the EPA Act on requiring development contributions under the EPA Act for the purposes of water infrastructure.

12 It is also not agreed that the condition imposed on the Consent is unreasonable or misleading.

Fettering of Discretion

13 It is well established that a public authority does not have power to fetter the exercise of its own discretion by binding itself to exercise that discretion in a particular way: *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

14 This stems from the principle that a government must determine how to exercise its discretion having regard to the needs of the community at the time when the need to

exercise that discretion arises: *Rederiaktiebolaget Amphitrite v. The King* (1921) 3 KB 500, at p 503.

15 Barring some express provision to the contrary, a statutory power must be exercised having regard to the situation that exists as at the date of the exercise of the power: *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; [2008] HCA 31 (***Shi***).

16 There is no express provision in the WM Act that would authorise Council to have regard to the situation existing at any earlier time than the application for the certificate of compliance, when setting DSP Charges. As stated by Ward JA in *Nash Bros* at [90]:

> *I see nothing in the text of the section, read in the context of the Act as a whole, that indicates an intention on the part of the legislature to empower a water supply authority in effect to anticipate the making of an application for a compliance certificate and call for a contribution to the costs of any water management works simply because there is a prospect of such an application.*

17 Therefore, Council cannot exercise its discretion at any time earlier than on application for a certificate of compliance. Often, as in Ms Sheehan's case, there is an extensive period of time between the grant of development consent and the application for a certificate of compliance.

18 So far as it is suggested in the Statement that a condition in a development consent could set the amount of DSP Charges, such a result would inevitably prevent Council from imposing DSP Charges that meet the needs of the community for water infrastructure when the time for the exercise of the power arises (on application for the certificate).

19 Imposition of a condition of development consent fixing the DSP Charges would therefore be an unlawful fetter on the lawful exercise of the Council's discretion to determine the amount of the DSP Charges as a precondition to the grant of the certificate. The suggested approach in the Statement is therefore contrary to law.

20 Indeed, the need to determine DSP Charges having regard to the situation after receipt of an application for a compliance certificate is even more important when it is considered that DSP Charges ought to reflect the cost to the community of the provision of infrastructure. As set out in the *2016 Developer Charges Guidelines for Water Supply, Sewerage and Stormwater* (Department of Primary Industries- Water, 2016) (**Guidelines**):

> *The underlying principle is that the new development should meet the full cost of assets serving the development…*

21 Council must take into account the circumstances, and the development servicing plan (**DSP**) that exists as at the date of its decision to require DSP Charges (at certificate of compliance stage), and determine the amount payable as at that date.

22 The approach referred to in the Statement effectively requires the Council to ignore the current DSP and merely apply the DSP Charges outlined in the Consent. Such an approach requires Council to act unlawfully by ignoring a relevant consideration.

23 Furthermore, and in Ms Sheehan's case, it requires the Council to determine the DSP Charges payable at a date some 11 years before the application for a compliance certificate. This is fundamentally inconsistent with the decision of the High Court in *Shi*, and consequently would again require the Council to act unlawfully. It is also contrary to the Guidelines as it prevents Council from recovering the full cost of assets serving the development.

No Power in the EPA Act to Impose Condition

24 Any conclusion that a Council can set the amount of DSP Charges in a development consent would be inconsistent with the EPA Act.

25 Conditions of consent must be of a kind authorised by the EPA Act. There is no power to impose a condition requiring the payment of money under the EPA Act other than:

25.1 under s7.11 in respect of monetary contributions for public amenities and services and in accordance with a contributions plan made under the EPA Act (which is not a DSP);

25.2 under s7.12 in respect of fixed levies in accordance with a contributions plan (again under the EPA Act, not a DSP);

25.3 by the Minister administering the EPA Act under s7.24 where the land is in a special infrastructure contributions area; and

25.4 in some specific circumstances set out in the EPA Act in respect of security for damage to public works and long service levy payments.

26 The caselaw is to the effect that there is **no other power** to require payment of money under the EPA Act.

27 In respect of contributions towards public amenities and services, s7.11 of the EPA Act is ***the sole source of power*** to require such contributions: *Fairfield City Council v N & S Olivieri Pty Ltd* [2003] NSWCA 41, at [22] *Australian International Academy of Education Inc v The Hills Shire Council* [2013] NSWLEC 1, at [48].

28 Relevantly, s7.11 of the EPA Act states that public amenities or public services ***do not*** include water supply or sewerage services. This creates a clear demarcation between development contributions under the EPA Act and DSP Charges under the WM Act.

29 There is therefore simply no power under the EPA Act for Council to impose a condition requiring DSP Charges to be paid, and any condition relating to DSP Charges can only be read as advisory.

Interpretation of Condition

30 In Ms Sheehan's case, the relevant condition of the Consent is expressed to be advisory. It clearly states that the recipient is '*advised*' that Council will require payment of a contribution. Furthermore, it:

30.1 is, prospective, in so far as it indicates that Council '*shall require*' a payment towards water and sewer facilities required to serve the development;

30.2 indicates that the payment is to be '*in accordance with Division 5 of Part 2 Chapter 6 of the Water Management Act 2000 (**WM Act**) as amended*'; and

30.3 indicates that the rates specified are '*current rates of contribution applicable (Effective 23/0797)*' with the obvious implication that such '*current*' rates may change.

31 To read the condition as setting in stone a particular amount would be to adopt an interpretation that is inconsistent not only with the law on unlawful fettering of discretion and the EPA Act, but also with the plain words of the condition.

32 The words in a development consent are required to be given their natural and ordinary meaning, having regard to their context and purpose: *Baulkham Hills Shire Council v Ko-veda Holiday Park Estate Ltd* [2009] NSWCA 160, at [99].

33 Reading the condition as setting the amount of the DSP Charges ignores the plain meaning of the words '*advised*' and '*shall require*'. Those words are plainly intended

to indicate that the condition is advisory and prospective, rather than binding as at the date of the grant of consent.

34 This is even more so when viewed in context. Throughout the subject Consent, Council uses markedly different language to distinguish an obligation imposed by the Consent itself from future obligations. The Consent variously says that the developer '*is to*' take certain action (as in conditions 22 and 23), and '*shall*' do something (for example condition 20, 24, and 25, 26, 27, 28, 29, 31, 32, 36, 40, 44).

35 The Statement's construction also ignores the legislative context. Given the scheme of the EPA Act and WM Act, the condition must be advisory.

36 At no other point in the Consent does Council use the language that the developer is '*advised*', or that Council '*shall require*' certain action. Such suggests, consistently with the ordinary meaning of the words, that the condition is intended to have a different effect to other binding conditions. It is advisory.

37 For these reasons, the suggestion in the Statement that despite *Nash Bros*, a consent authority can set the amount of DSP Charges in a development consent is incorrect as a matter of law.

Fairness

38 Given the scheme of the LG Act and the WM Act, and the inability of a development consent to fix DSP Charges, it is inherent that different developers who are granted development consents at the same time, may end up paying different, and in some cases, vastly different, DSP Charges, if the costs of delivering the assets varies over time, and the time at which they seek a certificate of compliance varies.

39 A developer who developed shortly after they were granted a consent pre-2007 would likely have been required to pay the DSP Charges advised in their consent. However, Ms Sheehan came to develop her land some 11 years after her Consent was granted. The difference in the amount required to be paid results from changes to DSPs over time, which reflect increased and changed costs and factual circumstances on the ground.

40 It is not unlawfully discriminatory–the difference is in respect of changed costs over time for the provision of infrastructure to service her development.

41 Council acted entirely in accordance with the law in requiring Ms Sheehan to pay a different amount to that noted in the Consent.

42 The Statement must reflect the true legal position, based on the caselaw regarding the interpretation of conditions of consent and the power to impose DSP Charges.

Closure of Council meeting

43 The Statement concludes that Council acted contrary to law in closing part of its meeting of 22 May 2019.

44 That conclusion cannot be sustained on the facts and circumstances referred to in the Statement and having regard to the LG Act.

45 Council's power to close a meeting to the public is set out in s10A of the LG Act. That section provides relevantly that:

> *(1) A council, or a committee of the council of which all the members are councillors, may close to the public so much of its meeting as comprises—*
>
> *(a) the discussion of any of the matters listed in subclause (2), or*
>
> *(b) the receipt or discussion of any of the information so listed.*
>
> ...

46 One matter listed in subclause (2) is the consideration of legal advice which would be privileged from production in legal proceedings (s10A(2)(g)). As the meeting was to consider legal advice this ground was available to Council.

47 Section 10B of the LG Act then requires a '***council ... to be satisfied***' that discussion in open council of the matter would be contrary to the public interest, in order for the meeting to remain closed for consideration of the matter.

48 The Statement acknowledges that the Council did form the requisite degree of satisfaction as it states that the minutes and recordings of the meeting note that '*Council considers that it would be on balance contrary to the public interest to consider this information in Open Council*'.

49 It is irrelevant that the authors of the Statement come to a different view as to whether it was in the public interest to close the meeting. The reference to the Council's satisfaction in s10B is an indication that it is the subjective opinion of the Council which is relevant. Had the legislature intended that third parties could determine whether a matter was in the public interest, and therefore whether the closure of the meeting was lawful, then the section would not refer to Council's satisfaction, but would simply state that a meeting must not remain closed if it is not in the public interest for it to remain closed. That it not what s10B says.

50 Council relied on s10A(2)(g) of the LG Act to close the meeting, and formed the requisite opinion under s10B. Its actions in closing the meeting were therefore completely consistent with the LG Act and lawful.

51 Whilst there may have been a breach of s10D arising from a failure by Council to properly record its explanation of why it considered closure to be in the public interest, that failure of process does not infect the decision itself to close the meeting, and does not make the closure of the meeting unlawful.

52 Section 374 of the LG Act provides that a failure to comply with the *Code of Meeting Practice* (which includes provisions which reflect s10D) does not invalidate proceedings at the meeting.

Alleged breach of agreement

53 On 22 July 2009, Council resolved in response to an earlier investigation by the NSW Ombudsman:

> '***THAT*** *Council immediately inform the Ombudsman that it accepts the recommendations contained within the Statement of Preliminary findings and Recommendations into the complaint received from Mr Philip Purnell and indicates its willingness to action those recommendations as a matter of priority*'.

54 Subsequently, on 11 November 2009, Council made a further resolution specifying the steps that it would take. That resolution stated in part:

> '***THAT*** *upon review of Council's Water and Sewer Development Servicing Plans, Council write to the applicants of all consents with unpaid water and sewer contributions informing them of impending price increases.*'

55 In this regard, it is well established that a later resolution will override a previous inconsistent resolution: *Attorney-General ex rel Goddard v North Sydney Municipal Council* [1971] 2 NSWLR 373, at 379. It is therefore the November resolution, and not the July resolution, which is the operative resolution and sets out what action Council proposed to take in response to the then Ombudsman's recommendations.

56 Council's position in respect of price increases has been clear and publicly available since November 2009. It cannot be suggested that Council has acted unreasonably by reference to what occurred in 2009.

57 Council's decision in 2019 in respect of how to deal with the latest investigation in relation to Ms Sheehan's complaint was made having regard to legal advice received by Council regarding the *Nash Bros* case and the proper interpretation of the condition making powers under the EPA Act. The legal advice Council had received when making its resolutions in 2007 and 2009 was different, and predated the decision of the Court of Appeal in *Nash Bros*.

58 It is entirely appropriate and lawful for Council to have regard to the law as clarified by the Court of Appeal in *Nash Bros* in making its later decisions.

Response to Recommendations

Recommendations 1-3

59 The key recommendations in the Statement are that Ms Sheehan should be refunded the DSP Charges she has paid in excess of those noted in her Consent, and other developers who were granted development consents pre-2007 should also only pay the DSP Charges noted in their consents, which may result in further refunds.

60 I have discussed above the legal issues regarding why Council's actions have been lawful, and why the recommendation effectively requires Council to act unlawfully.

61 These recommendations, if implemented, would also lead to inequity.

62 There would be developers who have obtained development consents in the last few years whose developments may proceed now or shortly, and are competitors in the market with Ms Sheehan and other developers with pre-2007 consents who are developing now.

63 Those developers with consents granted recently will be required to pay the full DSP Charges in the 2017 DSP. Ms Sheehan and developers with older consents will, if only required to pay the pre-2007 DSP Charges, receive a significant financial advantage over those developers with recent consents, which will give them an unfair advantage in the market.

64 In addition, developers who have already developed and paid the higher DSP Charges, would have presumably passed those charges on, as a cost of development, to end-purchasers of subdivided lots or houses. For those developers to now receive a refund will lead to a windfall for those developers.

65 Refunding Ms Sheehan and other developers in similar circumstances will also clearly create a funding shortfall for Council's water and sewer funds, given that DSPs are developed having regard to costs based on financial modelling.

66 As set out above, Council is satisfied that its process of imposing DSP Charges is consistent with the relevant legislation and the Guidelines. However, Council has and continues to make improvements to its processes and procedures in this regard, over and above its legislative requirements.

67 In addition to updating the standard conditions of development consent, Council continues to improve its systems and processes to ensure the contributions system is open and transparent. Council's 2017 DSP was prepared in accordance with the relevant legislation and the Guidelines, including notifying the relevant industry bodies and all applicants with a development consent was issued within the preceding six (6) months.

68 Council is in the process of developing a General Manager's Practice Note and Procedures, which will outline the process for Council staff when amending the DSP in the future. Under the proposed Practice Note and Procedures, Council staff will be required to write to the applicants and landowners of all active development consents (with outstanding developer charges) for a period of five (5) years, to advise them of the exhibition of a draft DSP and the impending change in developer charges. It is noted that this is significantly over and above the legislative requirements.

69 In 2014, Council updated its information and technology systems, which can now provide an accurate data set of all applicants and landowners of active development consents with outstanding developer charges. This information is critical in ensuring Council can notify all applicants and owners in accordance with the proposed General Manger's Practice Note and Procedures outlined above.

70 Given the above steps Council is taking, it is not considered that any further action is required in respect of Council's approach to DSP Charges.

Recommendation 4

71 Council will ensure it properly records its reasons when determining to close meetings to the public under the LG Act.

72 However, as noted above, the closure of the meeting of 22 May 2019 did not breach the LG Act, and was authorised by s10A(1)(g) and s10B.

73 There is no need to change Council's practice in respect of closing meetings, other than to ensure the proper recording of reasons.

Recommendation 5

74 Again, as stated above, the findings of the Statement in respect of the closure of the 22 May 2019 meeting misrepresent the law. Council was satisfied it was in the public interest to close the meeting and the fact that the authors of the Statement considered otherwise is not relevant. It is therefore not clear what would be reported to the Office of Local Government other than that on one occasion Council closed a meeting lawfully, but the Ombudsman took a different view regarding the public interest.

Reconsideration

75 Council urges you to reconsider his preliminary findings and recommendations.

76 Most significantly, the final findings must reflect the true legal position.

77 Council acted lawfully in imposing the DSP Charges it has required Ms Sheehan to pay. That is clearly the case based not only the decision of *Nash Bros*, but the general law regarding the fettering of discretion, and the proper construction of the EPA Act. The findings must be amended to reflect the true position at law, and not a position that requires Council to act contrary to law.

78 Council also acted lawfully when closing its meeting of 22 May 2019. Council had grounds to close the meeting under s10A(1)(g) of the LG Act and formed the requisite opinion regarding the public interest under s10B.

79 Proper consideration also needs to be given to the recommendations in light of the proper interpretation of the law, and the context of other development within Council's local government area and the costs of servicing that development.

80 If you would like to discuss this matter further, please contact me on 02 8235 9703.

Yours Sincerely,

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