



FINAL REPORT

SECTION 430
INVESTIGATION INTO
AUBURN COUNCIL

DEPARTMENTAL REPRESENTATIVE

Paul Terrett, Senior Investigations Officer.

Department of Local Government

AUGUST 2008

CONTENTS

EXECUTIVE SUMMARY	4
FINDINGS AND RECOMMENDATIONS	10
RECOMMENDATIONS	14
INTRODUCTION.....	16
Terms of Reference	16
The investigation process	17
Scope of the Investigation	17
Statutory requirements relating to the investigation report.....	17
Procedural fairness.....	18
The role of councillors and the General Manager	18
Background to the investigation.....	19
Council background	20
Council charter and functions	23
AUBURN CENTRAL.....	25
History of the development site	25
Auburn Central Development	28
Fire Safety	30
TERM OF REFERENCE 1	35
Development Approval of Auburn Central	35
Management of the Development Application process.....	39
Planning Division of Auburn Council.....	41
Certification Unit	46
Decision to make Council the Principal Certifying Authority (PCA).....	55
Fire Certification of Auburn Central.....	56
Fire Safety and Engineering	59
Emergency Orders.....	60
Class 4 proceedings in the Land and Environment Court.....	61
Notices of Intention and Orders on 7 strata schemes (residential towers and commercial/retail)	64
Structural integrity of Auburn Central.....	65
Role of NSW Fire Brigade	66
The Fire Brigade and Auburn Central	66
Reports of Fire Commissioner: section 109H	69
Illegal construction in Residential Units	74
Building Occupants.....	77
NSW Fire Protection	79
Floor Space Ratio	80
Pedestrian study	82
Missing Files	83
Section 96 modifications.....	86
TERM OF REFERENCE 1 – FINDINGS	88

TERM OF REFERENCE 2	90
Sale of Queen Street	90
Council Land disposal.....	117
Review and administration of Section 94 contributions.....	119
Section 94 contributions for Auburn Central	123
Section 94 payment contributions.....	128
Other payments related to Auburn Central	130
Estimated construction cost and development application fees for Auburn Central	131
TERM OF REFERENCE 2 – FINDINGS	136
Grounds for Surcharging	137
Considerations in Surcharging.....	137
Civil action against councillors for negligence or misconduct	139
TERM OF REFERENCE 3	140
Special Variation 2002/2003.....	140
Draft Town and Neighbourhood Centres DCP.....	145
Cancelled Builders’ Licences.....	149
Political Donations	149
Probity Audit of Auburn Central	154
TERM OF REFERENCE 3 – FINDINGS	160
APPENDIX 1:.....	161
FINDINGS FROM GSR BUILDING REPORTS PTY LTD – 30 May 2007	161
Regulation of Fire Protection Systems.....	179
Alternative Solutions.....	180
Fire Safety Orders	182
Role of the PCA.....	183
Ongoing maintenance of fire protection systems	183
Licensing of Builders.....	184
Council’s as Principal Certifying Authorities.....	185
EVIDENCE TABLES.....	190

EXECUTIVE SUMMARY

This report details the findings of an investigation into Auburn Council undertaken under section 430 of the *Local Government Act 1993* (the Act).

The investigation was initiated as a result of concerns held by the Minister for Local Government ('the Minister') and the Department of Local Government ('the Department') about the fire safety, planning and approval of a development known as the Auburn Central.

The terms of reference authorised for the investigation were:

To investigate and report on:

1. *Whether councillors and staff of Auburn Council have appropriately and responsibly exercised their planning and development control functions in regards to the Auburn Central development.*
2. *Whether Auburn Council fulfilled its responsibilities as custodian and trustee of public assets in relation to all financial transactions related to the Auburn Central development (including the determination, collection and application of section 94 contributions, the determination and collection of other developer fees and charges and the disposal of council land).*
3. *Any other matter that warrants mention, particularly where it may impact upon the effective administration of the area and/or Council's planning administration.*

The investigation involved the examination of *files and reports of council*, the interviewing of current and former council staff, Councillors, developers, members of the public and the ICAC, the

It should be noted that the investigation did reveal that certain Council (and other) records relating to the development were missing from files as detailed in the report.)

The investigation relied on the available documentation and account of the numerous people interviewed. *Include what impact the missing information has on reaching a conclusion*

Include a synopsis of the application process including dates and timeframes of decisions etc

It should be noted, that the investigation does being any adverse finding against any specific individual. It does highlight certain deficiencies that lead to the current state of the Auburn Central development. It is evident that a combination of inadequate procedures, failing to identify risks and a dysfunctional organisation culture were main contributing factors to the projects failings.

The investigation identified the following key points :

The Development Application

(1) Auburn Council granted development approval to construct a development comprising five separate residential strata, each owned by a separate Owners Corporation and two separate retail/commercial strata; these are owned by the developer, Holdmark Pty Ltd (the developer) and their associated company, Hiken.

The developer built the Auburn Central in accordance with the development approval and had a number of section 96 modifications.

The investigation found no evidence of any wrong doing on behalf of Sarkis Nassif or his companies, Holdmark Developer Pty Ltd – through the sale of Council owned land and the subsequent development. Holdmark Developer Pty Ltd constructed the development in accordance with the approved development application and stamped plans.

The developer benefitted through a number of concessions decided by Council, these include;

- The price at which the land comprising part of Queen Street was sold to the developer.
- The over-riding of the DCP conditions relating to floor space ratio.
- The acceptance of the developer's estimate of the cost of the development.
- Credit given to the developer as an offset against the section 94 contributions.

These should be balanced against the additional contributions made to the Auburn Town Centre, such as the Town Square, additional traffic management devices, the construction of the western overbridge.

Auburn Central has a number of fire safety concerns; these are worsened by the problems associated with vandalism, overcrowding and illegal construction done post occupancy.

Auburn Council was appointed as Principal Certification Authority by the developer; it was council's role to approve the construction of the building that they were responsible for overseeing the construction of the building in accordance with the approval.

Planning

- Auburn Council failed to implement prudent controls to ensure that the Auburn Central development was meeting Council's planning controls, in particular granting approval. Approval granted outside of Council's Development Control Plan, including a greater floor space ratio, increased height controls and overshadowing considerations.
- The Council was focussed on completing the Auburn Central development rather than controlling the development in accordance with Council's planning guidelines.
- The proposals in the discussion paper on Planning Reforms, by the Department of Planning are supported, in particular: the review of council's certification processes; the accreditation of council's certification officers and the allocation by the Building Professional Board of the certifying authority in respect of residential buildings with a value in excess of \$50,000,000.

Fire Safety

- The building has a number of fire engineering deficiencies and does not comply with the Building Code of Australia (BCA) including, lifts opening into fire stairs, and a lack of compartmentalisation of units.

- The fire safety of the residential part of the building is currently before the Land and Environment Court. The proceedings are in regards to the failure of the building to comply with the BCA and particularly in respect of satisfactory fire safety measures.
- The NSW Fire Brigade (NSWFB) has indicated that it has serious concerns for the safety of the building occupants. In response to the deficiencies the NSWFB has put in place an operational response requiring an initial turnout to the Auburn Central site of four fire crews for all fire alarms and response calls. This commitment of emergency service resources would be reduced if the required fire safety standards were compliant.
- Council has written to all owners and occupiers of the building about the fire safety concerns and Council's actions.
- There still remain concerns regarding the maintenance and vandalism of the building.

Council's Role

- As the Principal Certifying Authority for the development, the evidence indicates that Council it did not have, the capability through an appropriately resourced section within the organisation to manage the project. It was evident that staff were did not have the necessary skill, experienced and training to certify a large residential development. Without adequate controls in place there was increased risk that the certification process would failed to detect the deficiencies in construction work.
- The Certification Officers each received a 15% annual bonus from Council for the certification work despite the failure of the certification process in relation to Auburn Central.
- Records management of the Auburn Central development was poor with 10 files missing from Council. These files related to key aspects of the development certification. This hindered the investigation and these files are still missing.

- Council sold a road (Queen Street Auburn), which is now part of the Auburn Central development, to the developer for \$6,700,000 (\$1,810,000 plus section 94 contributions). However Council's valuations placed the value of the road at between \$7,000,000 to \$9,000,000 plus section 94 contributions. The proceeds of the sale with Section 94 contributions should have realised Council between \$12,000,000 and \$13,000,000. No explanation for the sale of the property for the lower amount could be provided.
- Council failed to collect an additional \$311,146 in section 94 contributions for a section 96 modification because Council failed to include section 94 contributions as part of the consent conditions for the modification.

Additional matters

- A large number of residential units have had walls constructed without approval to increase the number of bedrooms in those units. The unit owners undertook this construction. Council has issued orders against some owners.
- Council could not fully account for the Special Rate Variation approved by the Minister in 2002/2003. Council failed to comply with the conditions of the Ministerial Instrument to report on the Special Rate Variation in the annual reports.

Surcharging

The estimated total loss to Council through the failure to collect fees, contribution and a reasonable sale price for the road is approximately \$6,300,000.

Section 435 2(a) of the *Local Government Act* allows the Department to levy an amount on councillors and staff responsible for any deficiency or loss incurred by Council as a consequence of their negligence.

There appears to be grounds for surcharging Auburn Councillors and/or staff involved in the approval process. However, of the councillors and staff present when the development was approved and constructed, only four (4) councillors are still on Council and most of the staff have left.

Legal advice is that it is doubtful that former councillors and staff can be surcharged. Further, such action would not be in the public interest and could act as a deterrent to people from standing for public office.

FINDINGS AND RECOMMENDATIONS

The following lists the findings and recommendations in relation to each Term of Reference.

Term of Reference 1: Whether councillors and staff of Auburn Council have appropriately and responsibly exercised their planning and development control functions in regards to the Auburn Central development.

The investigation found significant deficiencies in Council's records management and certification process.

The investigation highlights a number of areas where the councillors and staff did not appropriately exercise their planning and development control functions in regards to the Auburn Central development. These include collection of section 94 contributions and certification of the building. The building exceeded the permissible floor space ratio and height.

Council's acceptance of construction costs and the standards set by councils in estimating construction cost appear problematic. The Auburn Central development showed some significant variations in construction cost from \$50,000,000, at the time of submitting the development application, to \$158, 000,000 estimated by Council.

The investigation was unable to conclude whether the final construction cost amount of \$95,000,000 is an accurate figure. As development application fees are derived from construction cost, this can result in a further loss of funds.

Historically, Prior during the application process the elected members had regularly demonstrated a pattern of ignoring Council staff advice with regards to development applications. Information obtained from Council planning staff indicate they felt professionally compromised in giving advice to councillors as their advice would be knew the that approval was inevitable. This brought about a situation were Council staff failed to give frank advice to councillors.

The evidence gathered indicated failures in the certification process for Auburn Central. For example, a final occupation certificate was issued notwithstanding a number of significant deficiencies in the building had not been rectified.

The investigation found that the NSW Fire Brigade (NSWFB) inspected the Auburn Central for fire safety, but fire safety concerns continued to exist despite this inspection. The NSWFB acted within its scope of its statutory powers under the Environmental Planning and Assessment Regulation.

The Wiggins Report [E21], in recommending significant changes to the Planning and Environment Department of Auburn Council, were supported by the current council.

The proposed Planning Reforms in NSW [E2], if adopted, will assist in alleviating many of the issues raised. In particular, the proposals around council certification and certification of building in excess of \$50,000,000.

Term of Reference 2: Whether Auburn Council fulfilled its responsibilities as custodian and trustee of public assets in relation to all financial transactions related to the Auburn Central development (including the determination, collection and application of section 94 contributions, the determination and collection of other developer fees and charges and the disposal of council land).

In reviewing whether Auburn Council fulfilled its responsibilities as custodian and trustee of public assets, I conclude that Council has failed to responsibly manage public assets.

The investigation revealed that Council failed in collecting funds from a number of sources, most significantly in the sale of Queen Street to Holdmark Developers Pty Ltd. In this transaction Council sold the land for \$1,810,000. This was significantly less than Council's valuations of between \$7million and \$9million. Furthermore the then General Manager, Ray Brownlee, stated in an interview *"that he believed the sale price for the land should have been \$7 million"*.

Council's failure to realise the true value of the asset resulted in a potential loss of \$5,190,000 in public funds from this sale if it was able to achieve the speculated sale price of \$7million.

A further loss of funds arose as a consequence of the failure by Council to impose conditions on the modification to the development consent for the payment of section 94 contributions of approximately \$311,146 [E60].

The evidence gathered indicates that this issue extends beyond an administrative error as a councillor specifically raised the matter of section 94 contributions for the section 96 modifications and there were assurances by the acting General Manager that this condition would be imposed.

This financial loss was compounded by the failure to collect a number of other fees and recovering consultant's cost further highlights Council's failures to protect public assets.

I concur with the findings of the *"Review and Probity Audit of the Auburn Central Development and Related Issues"* report by Robert Edwards [E38] that:

"Taken as a totality, the monetary value of the apparent "concessions" to the developer – in addition to other possible concessions not addressed by this review – stretch credulity."

Term of Reference 3: *Any other matter that warrants mention, particularly where it may impact upon the effective administration of the area and/or the working relationship between the Council, councillors and its administration.*

In considering the evidence gathered in regards to the Terms of Reference 1 and 2, there is evidence that supports the finding that with regards to the Auburn Central Development, Council failed to appropriately discharged its obligations under its Charter. This finding is also supported by the findings of the reports by Robert Edwards [E38] and Tomasetti [E52].

The investigation did highlight sufficient concern about Council's overall conduct and ability to meet the required expectations of its community under the Local Government Act. There is little doubt that Council's performance has and will impact on public confidence. Therefore, serious consideration must be given to recommending a section 740 public inquiry, pursuant to section 740 of the *Local Government Act*.

However, I take into account the following matters:

- the current Council has a new General Manager who has addressed many of the concerns raised in this report;
- only four (4) of the previous councillors who approved the development are still on Council. The ordinary Local Government elections to be held in September 2008 will allow the local community to express their satisfaction of the performance of and decisions of the previous councillors and whether they should continue in civic office;
- nearly all the staff in Council's planning department that were involved in the Auburn Central development assessment and approval have now left, including the Senior Managers;
- Council is undertaking legal action in the Land and Environment Court to rectify some of the areas of non-compliance with the BCA;

I have determined that a 740 public inquiry is not recommended in all the circumstances.

In summary, the current non compliant fire and safety standards are due to failures by Council to adequately manage and certify this significant development. Councillors failing to properly inform themselves when making decision certain decisions, and failed to adopt the professional advice of staff in the sale of land at Queens Street.

Separate to Council's actions, the Auburn Central precinct is also susceptible to continuous social and crime related issues such as vandalism and graffiti that further impact on the deficient fire safety systems. Additionally, the significant unauthorised alterations to the apartments to increase rooms is the result of individuals own actions. The current legislation does impede Council in taking prompt enforcement action in response to these unauthorised renovations, however council has been proactive in taking action against illegal construction when discovered.

RECOMMENDATIONS

In determining what recommendations to make, I have had regard to the following:

- The period of time that has elapsed since the building was constructed;
- The current General Manager inherited a number of outstanding and long standing problems;
- The changes to the organisational structure of Council;
- Current reforms proposed by the Department of Planning;
- Legal action in the Land and Environment Court.

It is recommended that:

Recommendation 1:

Council, the Strata Managers and the NSW Fire Brigade meet at least quarterly to review fire prevention and safety at Auburn Central. These meetings should examine education of tenants on fire safety, prevention of vandalism, risk management of the building.

Recommendation 2:

Auburn Council considers releasing the Kleem Report, the Edwards Report and the Wiggins Report to the public as a principal of being open and transparent to its community.

Recommendation 3:

The changes proposed in the Planning Reform discussion paper in regard to changes to council certification and an option for councils to “opt out” as a principal certifying authority be supported.

Recommendation 4:

That the Department of Local Government forward to the Fire Protection Systems Working Party a copy of this report.

Recommendation 5:

That Auburn Council conduct an internal audit of its record management system to ensure that it complies with the Records Management Act.

Recommendation 6:

The Department of Local Government issues a circular or updated practice note on the sale of public land to all councils in NSW drawing their attention to the ICAC publication *"Corruption Risks in NSW Development Approval Processes: Position Paper"* September 2007 in relation to the sale of land.

Recommendation 7:

Council should determine a policy on the granting of deferred payments for developer contributions payments and determine an appropriate rate of interest where deferred payments are granted.

Recommendation 8:

That Auburn Council establish a standard practice for estimating the cost of construction for the purpose of determining development application fees and that the Department of Local Government writes to the Department of Planning regarding the determination of a statewide standard for estimating the cost of construction.

Recommendation 9:

That the Minister for Local Government considers an amendment to the *Local Government Act 1993* to make former councillors and staff subject to the surcharging provisions under section 435.

Recommendation 10:

That this report be referred to the Independent Commission Against Corruption.

INTRODUCTION

On the 3 August 2007, I was authorised to undertake an investigation into Auburn Council under section 430 of the *Local Government Act 1993* (the Act) by the Director General of the Department of Local Government, Mr Garry Payne AM. The decision to authorise the investigation was taken following the receipt by the Department of serious concerns regarding the fire safety and planning of Auburn Central residential and retail complex. Concerns were also identified in regards to the sale of part of Queen Street, Auburn and the collection of section 94 contributions for this development.

Pursuant to section 433(1) of the Act, the report of my investigation is presented to the Minister for Local Government, the Director General of the Department of Local Government and copied for Council.

Terms of Reference

To investigate and report on:

1. *Whether councillors and staff of Auburn Council have appropriately and responsibly exercised their planning and development control functions in regards to the Auburn Central development.*
2. *Whether Auburn Council fulfilled its responsibilities as custodian and trustee of public assets in relation to all financial transactions related to the Auburn Central development (including the determination, collection and application of section 94 contributions, the determination and collection of other developer fees and charges and the disposal of council land).*
3. *Any other matter that warrants mention, particularly where it may impact upon the effective administration of the area and/or council's planning administration.*

In addition to the terms of reference, the powers of the Departmental Representative includes all surcharging powers set out in section 435(1) and (2) of the Act.

The investigation process

My report details the investigation and findings undertaken pursuant to my authorisation issued by the Director-General of the Department of Local Government under Section 430 of the Act on 3 August 2007, regarding the Auburn Central development.

Scope of the Investigation

Between September 2007 and November 2007 I attended Auburn Council administration centre to review documents and conduct interviews with certain staff and councillors. This report is based on evidence generated from:

- Information provided in direct interviews with councillors, senior managers, current and former staff members of Auburn Council and others involved with the development.
- Documents obtained from Auburn Council
- The information provided in submissions in written form.
- Written materials provided by current and former employees as submissions to the investigation.
- Information provided by Auburn Council and other agencies.

Statutory requirements relating to the investigation report

These are set out in Section 433 of the Act and clause 244 of the *Local Government (General) Regulation 2005*.

In accordance with section 434 of the Act, Council is required, within 40 days after presentation of the report, to give notice to the Minister of the things done or proposed to be done to give effect to any recommendations in the report. There are also provisions in that section that enable legal proceedings to be instigated to enforce compliance.

Procedural fairness

In accordance with the principles of procedural fairness, Council, as the subject of the investigation, received a draft of the report (excluding the executive summary and recommendations) prior to finalising the report. This provided Council with the opportunity to provide any comments and submissions in respect of the draft.

The Departmental process also involved providing draft excerpts of the report to those people potentially adversely affected by the section 430 investigation and inviting them to comment on the relevant sections of the draft report.

At the time of preparing this report, the Sydney Morning Herald published an article (28 and 29 June 2008) indicating that it had obtained a draft copy of the investigation report and referred to parts of the document. The Department and any of its representatives has no knowledge concerning its unauthorised release or disclosure.

The role of councillors and the General Manager

The Act requires that councillors as a group direct and control council's affairs, allocate resources, determine policy and monitor the council's performance. As individuals, councillors communicate council policy and decisions to the community, exercise community leadership and represent the views of residents and ratepayers to council (see section 232 of the Act).

The Act makes it clear that the general manager is responsible for the day-to-day operations of council. Under section 335(2) of the Act the general manager has the following particular functions:

- The day-to-day management of council.
- To exercise such of the functions of the council as are delegated by the council to the general manager.
- To appoint staff in accordance with an organisation structure and resources approved by the council.
- To direct and dismiss staff.

- To implement the council's equal employment opportunity management plan.

Section 439 of the Act requires that every councillor, member of staff of a council and delegate of a council must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act.

Background to the investigation

The Minister for Local Government and the Department received a number of complaints in regards to the alleged mismanagement of the planning division of Auburn Council and in particular the planning processes undertaken for the Auburn Central complex.

Concern was raised by the NSWFB about the fire safety and fire engineering of this building and the risk this poses to the occupants of the Auburn Central complex.

The Department received correspondence dated 2 March 2005 from the Acting General Manager, David Lewis, in relation to concerns about Auburn Council and Auburn Central [E.1]. In response to the draft report council has expressed *"that the issues raised by Mr Lewis remain relevant and arguably provided the justification for a review"*.

In 2005 representations were also made to the Department by the then Mayor, Councillor Chris Cassidy and the General Manager, John Burgess.

The Department continued to monitor Council and its action in regard to the Auburn Central development from 2005 onwards.

The Independent Commission Against Corruption (ICAC) had also been made aware of alleged corruption matters relating to the Auburn Central and other developments. The ICAC has advised that preliminary enquiries into this matter have been finalised. Due to the continuing representations to the Department about the ongoing concerns in relation to the fire safety of the building resulted in the decision in 2007 to undertake an investigation of Council under section 430 of the Act

Council background

Auburn Council is located approximately 17km west of the Sydney CBD and covers the suburbs of Auburn, Lidcombe, Berala, Homebush Bay, Newington, Regents Park and Silverwater. It shares boundaries with Parramatta, Bankstown, Strathfield and Canada Bay Councils.

In 2004, Council had an estimated population of 62,676. At the time of the 2001 census, 52.2% of the population was born overseas and 65% spoke a language at home other than English.

Auburn Council area has a projected population of 84,000 by 2020. This will place a greater demand for new dwellings and increased demand for medium and high-density dwellings. It is anticipated that redevelopment will occur on government-released lands, large industrial sites and along the Parramatta Road Corridor.

Auburn Council area comprises a variety of land uses. Older suburbs such as Auburn and Lidcombe are well established and have few sites that are not already developed. However, Newington and Homebush Bay are new residential areas, created in part as a result of the Sydney Olympic Games. The Auburn LGA has a mix of residential, retail and commercial/industrial uses as well as open space.

In addition to the main Olympic Park precinct, the Auburn LGA also houses distinctive features such as the Rookwood Cemetery, Silverwater Correctional Centre, Auburn Hospital and Auburn Botanical Gardens. Five CityRail stations (Auburn, Lidcombe, Berala, Regents Park and Olympic Park) also lie within Council's boundaries.

Auburn Council has twelve councillors elected across two wards. Council's General Manager, Mr John Burgess, commenced employment with the Council in March 2005. Mr Burgess was not the General Manager at the time of planning for the Auburn Central development.

Currently Council's total staffing numbers are 276 equivalent full-time staff, up from 236 in 2001. In addition to the General Manager's division, Council's organisational structure comprises three main divisions:

- Business and Finance (finance, administration, purchasing, information technology, customer services)
- Works and Services (library services, child care, roads and footpaths, drainage, assets, parks and recreation, traffic, community services, property management)
- Planning and Environment (environmental and land use planning, development assessment and compliance, regulatory control of pollution, noise, companion animals and public health).

According to Auburn Council's Annual Report 2006 - 2007, Council's vision is:

"Auburn is recognised as a vibrant, thriving and sustainable place in the heart of Sydney"

Auburn Council's Values:

- 1. A commitment to good governance and transparent and accountable practices.*
- 2. A commitment to economic, environmental and social sustainability*
- 3. A commitment to excellence, respect, integrity and to making a difference.*

At the time of approving the development application for Auburn Central in 2002 the Council consisted of the following councillors:

Councillors September 1999 to March 2004

First Ward

Kim Appleby	Independent
Chris Cassidy	Labor
Michael Ghamraoui	Liberal
Minh Hua	Unity
Robert Murray	Labor

Mohamed Saddick	Independent
-----------------	-------------

Second Ward

Bala Balendra	Independent
---------------	-------------

Patrick Curtin	Labor
----------------	-------

Le Lam	Unity
--------	-------

Barbara Perry	Labor
---------------	-------

Irene Simms	Residents Action Group for Auburn Area
-------------	--

Michael Tadros	Liberal
----------------	---------

March 2004 to Present:

First Ward

Le Lam	Unity
--------	-------

Chris Cassidy	Labor
---------------	-------

Ronnie Oueik	Liberal
--------------	---------

Semra Batik	No Dump
-------------	---------

Hicham Zraika	Labor
---------------	-------

Victor Korabelnikoff	Residents Action Group for Auburn Area
----------------------	--

Second Ward

Patrick Curtin	Labor
----------------	-------

Jack Au	Unity
---------	-------

Irene Simms	Residents Action Group for Auburn Area
-------------	--

Tom Zreika	Liberal
------------	---------

George Campbell	Labor
-----------------	-------

Malikeh Michaels	Greens
------------------	--------

List of Mayors from 2001 to 2007 are as follows:

2001 – 2002	Michael Tadros (Liberal)
2002 – 2003	Michael Tadros (Liberal)
2003 – 2004	Michael Tadros (Liberal)
2003 – 2004	Chris Cassidy (Labor)
2004 – 2005	Chris Cassidy (Labor)
2005 – 2006	Patrick Curtin (Labor)
2006 – 2007	Le Lam (Unity)
2007 – 2008	Le Lam (Unity)

Council charter and functions

Councils are guided by a charter containing a number of principles, as provided by section 8 of the Act. These principles include;

- To provide directly or on behalf of other levels of government, after due consultation adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively.
- To exercise community leadership.
- To properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development.
- To have regard to the long term and cumulative effects of its decisions
- To bear in mind that it is the custodian and trustee of public assets and effectively account for and manage the assets for which it is responsible.

- To facilitate the involvement of councillors, members of the public, users of facilities and services and council staff in the development, improvement and coordination of local government.
- To keep the local community and the State government (and through it the wider community) informed about its activities.
- To ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly when an activity of the council is affected.
- To be a responsible employer.

Sections 21 and 22 of the Act state that a council has the functions conferred or imposed on it by or under this Act or under any other Act or law.

AUBURN CENTRAL

History of the development site

Quad Site

In November 1998 Auburn Council received a development application to redevelop the land bounded by Queen Street, Harrow Road and Park Roads for a mixed retail and residential complex. The original development application was known as the “Quad Site”. It sought:

To develop the site for a retail/ residential complex comprising a single retail podium representing 14,975 square meters of floor space for a discount department store, a supermarket and approximately 39 speciality shops with residential units above involving a total of 359 residential apartments contained within eight (8) interlinked buildings ranging in height between 7 and 9 storeys. Ancillary development to include a new public open space in the form of a park containing a café and provision for 1,010 off street parking spaces and loading facilities.

The development will include the proposed closure of Queen Street between Park Road and Harrow Road.

Interviews conducted with existing and past employees showed it was clear that the a major retail development was seen to be a strategic development to counter the drain of commercial development from the Auburn shopping area to surrounding suburbs such as Parramatta and Bankstown.

As stated in the NSW Parliament by the then Member for Auburn, Peter Nagle, on 12 May 1999:

... one of the most important issues was the future development of what is known as Queen Street, Auburn.... I fully support what is now known as the Woolworths, Big W and Raad development. I support the development for the following reasons. Firstly, the Auburn shopping centre is half dead. If something is not done within the next few years it will be totally dead. All that will be left in the shopping strip will be medical centres, miscellaneous businesses, legal and accountancy practices and

some minor shops such as take-aways and fruit and grocery shops. The only major part of the town that will survive is the old Malouf Village shopping centre.

I have never supported high-rise development such as the property in Rawson Road, Auburn. Nevertheless, because of the pressing need of people living in the Sydney metropolitan basin for this type of development, it will become the norm. In the very near future, suburbs along railway lines will have this type of high-rise development and people will be moving into those areas. I do not like the trend, but the reality is that it is here to stay.

Secondly, if the Woolworths, Big W and Raad development does not go ahead at the site in Queen Street, the consequence will be an unlimited height for development, with towers being from 17 to 26 storeys high. In reality this will probably not occur, but the towers will be at least 18 storeys high and will be built with no recourse to Auburn Council. Moreover, that would result in a minimum of 1,061 homes comprising units of one, two, three and four bedrooms being built on that site. In turn, this would generate 2,000 cars upon the site and consequential movement of traffic.

Thirdly, when the Raads first approached me about this Woolworths-Big W development it was a project for a shopping centre with 17-storey units on one side and 12-storey units on the other. Since then, the height has been reduced to seven storeys and the number of units is approximately 350. I am not sure of the exact number. This is a far better proposal than the one that was initially put to me and which I rejected.

... I take this opportunity to answer some of the questions that I have been asked such as whether Queen Street should be closed or sold. I believe it should be closed off and sold to developers. The only purpose and condition for sale is that the Woolworths-Big W store with 29 specialty shops must be built. If Woolworths-Big W or some other type of shopping complex does not go ahead, in my opinion the Queen Street shopping strip should not be sold. In my opinion, the proposed retail component will benefit enormously the existing shopping centre and the shopping strip, but that is not to say that everyone will be happy about this development. However, I believe that it would bring people to the shopping area. What damage could it do to the shopping strip? The damage has already been done. The Woolworths, Coles and Venture stores that were once on the strip have all now

gone. Where will people go? They will go to the large commercial areas of Westfield Parramatta, Bankstown Square and Bass Hill, leaving Auburn with no major shopping centre... The density and the height of the residential development are not acceptable but unless the shopping complex is built the result will be an enormous development in Auburn with a token commercial base. This is permitted under the zoning of the land. I ask the leaders of Auburn Council to get real and to think seriously about the consequences of failure: the shopping centre and the people of Auburn losing a Big W retail outlet and a massive, high development in the Auburn shopping area. The council should think seriously about the consequences of its refusal." Hansard Legislative Assembly 12 May 1999 [E.3]

Following a number public meetings a development application was submitted to the Council meeting on 2 June 1999. Council refused the application. [E.4] It was refused on a number of basis, including, that it did not comply with the Auburn Planning scheme, the height was excessive and should not exceed 7 storeys, traffic concerns, the proposed development was contrary to the draft Town Centre strategy for Auburn.

At the following meeting on 21 July 1999 a rescission motion in relation to the refusal of the application was passed and an approval for the development application was granted with a deferred commencement. [E.5]

A further rescission was moved at the meeting 4 August 1999 by councillors who opposed the development on the grounds that they did not want Queen Street closed and that the development proposal did not comply with Auburn Planning Scheme or the Draft Town Centre Strategy for Auburn. The rescission motion was successful due to the absence of a number of councillors who had previously supported the Quad Site development application.

A class 4 action proceeded to the Land and Environment Court and an out of court agreement granted approval to the development. [E.6]

However, the development subsequently did not proceed and the site was sold to Yimpas Co Limited with the development application approval.

In May 2002 Holdmark Developers Pty Ltd acquired the Quad site from Yimpas Co Limited for a purchase price of \$18,500,000. At the time of purchase the property had the benefit of a development consent DA 420/98.

Auburn Central Development

Holdmark immediately obtained two development consents to carry out demolition and excavation at the site (as per DA 157/02 158/02 and 159/02). In July 2002 a construction certificate was obtained by Holdmark from Auburn Council. [E.7]

Substantial work was done by Holdmark to produce a new development design for the Quad site, which now became known as Auburn Central – DA 237/02.

Colliers International and Washington Brown Associates were employed by the developer to value and cost construction for the Auburn Central development. This estimated cost was \$84,993,443. [E.8]

On May 7 2002, the Development Application (DA 237/02) by Holdmark was lodged seeking approval for a mixed use development for the site known as Auburn Central. Council considered the application and resolved on September 4, 2002 to grant deferred commencement consent for: 13,186m² retail floor space (including 6,690m² discount department store); 3,400m² supermarket; 510m² mini major shopping centre; a range of specialty shops covering 2,660m²; 3,056m² flexible office or retail floor space; 452 apartments; and car parking for 1,266 vehicles. [E.9]

Council's Director for Planning issued a letter to Holdmark on 6 September 2002 advising them of Council's resolution.

On 6 November 2002, Council issued the "deferred commencement" consent notice and on 14 November 2002, Council granted an operational consent for the proposed development. Council has remarked in response to the draft report that *"it is commendable but somewhat questionable how a development of this magnitude could proceed from a deferred commencement consent to an operation al consent in 8 days"*.

On 2 October 2002, Council resolved to sell part of Queen Street to Holdmark for \$6,700,000. Included in the sale price were section 94 contributions for the development (refer to the details of this sale later in the report).

Council's two valuers valued the land at between \$7,000,000 and \$9,000,000 plus Section 94 contributions.

Construction works on Auburn Central commenced in 2003 and finalised in the early part of 2005.

Certification of the development came in two stages so that in June 2004 Council issued an interim occupation certificate for the retail and carparking space of the development and on 14 April 2005 Council issued a final occupation certificate.

Holdmark submitted a number of Section 96 adjustments during the period of construction. One of these modifications amended the internal configuration of the building and increased the number of units from 452 units to 471. In this section 96 modification there was no condition to collect approximately \$311,146 in section 94 contributions [E.60].

A major area of concern in relation to this matter is the paucity of documentation, particularly as it relates to discussions and decisions in relation to the determination of required payments to council and to a number of concessions granted. Council has remarked that this lack of documents results in *"questions about basic decision remain questions without answers. For example anecdotally carpark calculations suggest a further 200 car parks were required to service the development and limited details exist of any examination beyond a consultants report provided by the applicant"*.

The Auburn Central development was completed in April 2005 and extends over several sites previously known as 57-59 Queen Street and 62-72 Queen Street. These allotments were amalgamated along with the intervening section of Queen Street (known as the 'Town Square') in which ownership was transferred to Holdmark.

The main pedestrian entry to Auburn Central is via what is known as the Lower Town Square at the corner of Queen Street and Harrow Road. The development (Auburn Central) also incorporates a 4 storey free standing commercial building located at 128 South Street, Auburn.

The main building of Auburn Central comprises 2 basement carpark levels and 2 commercial levels that are below a number of residential towers of up to 13 levels, the highest of which also has a roof top plant room.

As mentioned above, an interim certificate for the retail and car parking was issued on 21 June 2004 and signed by Council's Director, Urban Design and Planning, Jan McCredie. No attachments were included with this certificate. **[E.10]**

A final occupancy certificate was issued on 14 April 2005 and signed by Judy Clark, Council's Manager, Strategic Planning, Development and Environment. **[E.11]** Attached to the final certificate was the Occupation Certificate Fire Safety Schedule. It is noted that this Occupation Certificate Fire Safety Schedule was not attached to the interim certificate.

This final occupancy certificate required that "prior to occupation the owner of the building shall provide the Principal Certifying Authority (Auburn Council) a fire safety certificate for each essential and other fire safety measure included in the Fire Safety Schedule". Council has advised in response to the draft report that it has not received annual fire certificates for the 6 residential strata buildings.

Fire Safety

In early 2007, Council became aware of concerns raised by the NSWFB about the fire safety of the Auburn Central development.

Council then engaged GRS Building Reports Pty Ltd (GRS) to provide a Building Code of Australia 2007 (BCA) Assessment. It is noted some of the issues raised in the GRS report were resolved in 2007.

The aim of this GRS report was to provide details on the nature and extent of non-compliance with the fire and life safety requirements of the BCA, by undertaking an inspection of the building and providing an assessment of the building in accordance with the relevant fire and life safety provisions of the BCA, namely Sections C, D (Parts 1 & 2) and E.

GRS conducted an assessment of limited areas of Auburn Central, together with a review of the documentation available on Council files, to determine the level of compliance with the relevant fire and life safety provisions of the BCA.

While the assessment was carried out under BCA, it was recognised that fire services within the building would have been installed and certified to meet the version of Australian Standards available at the time of construction as referenced in Building Codes of Australia 1996 Amendment 11.

The development was constructed in 2 stages being:

- a) Stage 1 – Basement Carparking, Retail, Office Levels up to Podium Floor Level.
- b) Stage 2 – Residential towers that extend above Podium Level.

The assessment undertaken by GRS, highlighted that the Auburn Central building contained significant departures and was non-compliant with several requirements within the BCA. . **[Appendix 1]**

GRS provided recommendations to Council so that the building could be brought up to fire and life safety standards commensurate with current legal requirements and the community's expectations, including the Objectives and Performance Requirements of the BCA and Section 121B Order No. 6 of the *Environmental Planning and Assessment Act 1979* which relates to the:

- Prevention of fire.
- Suppression of fire.
- Prevention of the spread of fire.
- Safety of persons in the event of fire.

Holdmark in response to the draft report states *“Highly qualified and experienced consultants to design the building and to prepare the fire engineering alternative solution, that these fire engineers are more qualified and experienced to deal with the complexity of the building than Council’s consultant Grahame Scheffer.*

In isolation, some of these deficiencies may not have been considered significant. However, GRS found that the collective group of inadequacies within the building, the level of fire safety was significantly compromised. The following

recommendations are detailed below, however the developer, Holdmark, questions the expertise of GRS to make these recommendation.

The key findings of the assessment by GRS were as follows:

- “1. It is evident that assessment of the design documentation by Council and the consultants engaged by the Owner / Developer could not have accurately identified all departures from the BCA. This has resulted in the Fire Safety Engineering Reports and documentation including architectural plans forming part of the Construction Certificate Approvals being contrary to the Deemed-to-Satisfy Provisions and/ or Performance Requirements of the BCA.*
- 2. There is a lack of architectural plans referenced in the Construction Certificate Approvals for the Base Building works. Therefore the comments within the Report are based on the assumptions and limitations as set out in Section 2.*
- 3. The Basement carpark extends below all residential towers within the development. Therefore for the purposes of the BCA the entire building development has an effective height of more than 25m as a result of the height of a number of the Residential Blocks including Tower E. Buildings with an effective height of more than 25m, due to their height, require additional fire and life safety measures to be implemented such as sprinklers, stair pressurisation, emergency lifts. Many of these items have either not been installed throughout the building or have not been addressed in the Fire Safety Engineering Reports approved by Council.*
- 4. The staged Construction Certificate approvals were not appropriately co-ordinated so that there is little or no reference to the Stage 1 works below Podium Level in the reports or approval documentation forming part of the Stage 2 works. (Residential Towers) This has implications to the Performance Standards referenced in the Fire Safety Schedule for the building so that there is no reference to the Stage 1 Fire Safety Engineering Report (FSER) in the final Occupation Certificate issued. This has the potential for deficiencies in the testing and ongoing maintenance of Fire Safety Systems installed in the Stage 1 works.*

5. The works on site were either not adequately inspected during construction or at completion to confirm that the level of compartmentation and standards of construction meet minimum BCA standards. This is likely to contribute to the spread of fire and/ or smoke throughout the building causing the onset of untenable conditions effecting occupants remote from a fire.

6. There is not a current or accurate Fire Safety Schedule to enable the fire safety measures to be certified to a suitable standard of performance. It is evident that the fire safety systems & / or measures within the building are not being adequately maintained in accordance with Clause 182 of the Environmental Planning and Assessment Regulation 2000.

7. As a result of the inadequacies in the building construction and maintenance, implications include:

- Continued isolation of the smoke detection system is evident that can result in unnecessary delays or a lack of activation of the Building Occupant Warning Systems in the event of a fire, and
- Prolonged isolation and other deficiencies in the sprinkler system can result in lack of fire suppression or control in the event of fire, and
- Inadequate maintenance, installation and signage in relation to the fire hydrant system can result in delays and effectiveness of Fire Brigade Intervention, and
- Lack of compartmentation and separation to building elements is capable of enabling the spread of fire and smoke to compartments throughout the building, and
- The effective use and operation of fire exits for their intended purpose is compromised as a result of deficiencies in construction, location of services within exits and configuration of discharge points. Also the fire doors including hardware were defective in many locations inspected. That is, there are numerous breaches of Clauses 183 to 186 of the Environmental Planning and Assessment Regulation 2000.

8. The FSER for the Stage 1 works states “Unless the systems are completely tested during commissioning, the subsequent maintenance may not be able to identify and restore non operable parts”. Evidence of such testing and commissioning having taken place could not be found on Council’s files. Therefore without a complete systems audit it would be difficult to confirm that all fire safety systems were adequately installed and the interface between systems functions correctly.” [E.12]

GRS found that the safety of occupants and the risk of fire development and spread throughout the building fell well below acceptable standards.

As a consequence of the GRS report, Emergency Orders were issued by Auburn Council on the Hiken Group Pty Ltd as the owner of the retail and carparking areas of Auburn Central. Additional orders were issued against the managers for the 6 strata residential towers [E13].

At the time of writing this report Hiken had appealed against the orders to the Land and Environment Court. This action has not yet been finalised.

It is recommended that Council, the Strata Management and the NSW Fire Brigade meet at least quarterly to review fire prevention and safety at Auburn Central. These meetings should examine community education on fire safety, prevention of vandalism in the buildings, risk management inspections of the building.

(RECOMMENDATION 1)

TERM OF REFERENCE 1

Whether councillors and staff of Auburn Council have appropriately and responsibly exercised their planning and development control functions in regards to the Auburn Central development.

Development Approval of Auburn Central

On 17 August 1999, Council issued deferred commencement consent for a retail/residential complex and associated parking and open space. That consent included a condition which required that the deferred commencement provisions be satisfied within 60 days or the application would be refused.

It is understood that the deferred commencement conditions were not satisfied, and that Council did not issue a notice of refusal in respect of the application.

Holdmark Developers Pty Ltd commenced preparation of a new development application for the site, which involved a complete redesign of the previous development.

In order to advance the development process, on 2 April 2002 the applicant submitted three development applications (DA Nos. 157/02, 158/02 and 159/02) for demolition and excavation works. **[E.14]**

DA Nos. 157/02, 158/02 and 159/02 related to 3 parcels of land that were to make up the development site. These applications were approved on 7 May 2002 subject to conditions.

DA 237/02 was submitted to Council on 7 May 2002 for the construction of a mixed retail/commercial and residential development over properties on either side of Queen Street and incorporating a section of Queen Street (known as Auburn Central).

DA 237/02 was handled by then Senior Development Officer, Mr Gordon Edgar, who was appointed to manage the development assessment process at that time. The

organisation established an assessment team to deal with the development application.

In 2002 ,Council had a high turnover of staff in its planning department, reducing council staffing resources to handle the Auburn Central development. Therefore Council engaged an independent planning consultant, APT Planning Pty Limited to assist in the DA assessment and to prepare the report to Council.

Council indicated it considered that an independent assessment by APT was considered necessary for the following reasons: -

- i) current resourcing issues in the Planning Department;
- ii) to ensure that Council met its obligations to determine the application in an efficient and timely manner; and
- iii) to maintain the highest standards of probity, given the issue of the road closure.

In further acknowledgment of the scale and complexity of the proposal, an assessment team was established.

In addition, reports were commissioned from the following consultants to address specific issues:

- Graham Brooks and Associates (heritage).
- Fowler Engineering Consultancy Pty Ltd (traffic).
- Harry Sprintz Architects Pty Limited (accessibility).

The proposed development attracted a high level of community interest. The application was advertised in the local paper, with more than 130 residents and property owners in the vicinity of the site being notified by letter. The plans and DA documentation were placed on public exhibition between 15 May and 5 June 2002. Council convened a public meeting on 29 May 2002. A total of 150 submissions were received. **[E.15]**

An independent design review panel met to consider the architectural merit of the proposal on 21 May 2002. Council raised some concerns about the design in which

Holdmark made amendments to the proposal. These amendments reduced the height of two of the buildings on the northern side of the Town Square to improve solar access to the Town Square in midwinter and created a more clearly identifiable “gap” in the building mass when viewed from Harrow Road.

The units removed to improve solar access to the town square were relocated to two buildings on the Vales Lane frontage, increasing the height of these elements from eight residential levels above a 9.0m podium to ten residential levels above the podium.

The then General Manager, Ray Brownlee, presented an Issues Paper at a councillor briefing session on 15 August 2002. **[E.17]** The purpose of the meeting was to brief the Councillors in the context of the community submissions received, the breaches of Council’s planning controls, precedents and the impact of the Auburn Central development and the section 94 contributions Plan and the upgrading of the Wester Overbridge and of the major issues associated with the proposal, including:

- The height, bulk and scale of the development (in particular the tower element);
- The general amenity of the proposed town square given the likely impact of wind and overshadowing;
- Precedent and the impact on the development potential of adjoining properties.

On 4 September 2002, Council considered development application DA237/02 to construct Auburn Central. At that time the applicant was Holdmark Developers Pty Ltd and the owners were Hiken Group Pty Ltd, a subsidiary of Holdmark. **[E.9]**

The development application as at 4 September 2002 sought approval for the following:

- i) demolition of an existing building at 128 South Parade (Art Deco style facade to be retained);

- ii) erection of a mixed use development incorporating residential (462 apartments), retail (13,186m²) and commercial (3,574m²) uses within a complex of buildings ranging in height from 4 to 15 storeys;
- iii) creation of a through-site link (retail arcade with office space above) at 128 South Parade;
- iv) closure of a section of Queen Street and creation of a Town Square;
- v) parking for 1,266 cars for the residential, retail and commercial components;
- vi) provision of 6 parking spaces for the Ambulance Station;
- vii) 6 short term parking spaces at the western end of the Queen Street closure, adjacent to the Town Square; and
- viii) widening of Vales Lane.

Concerns were raised at the Council meeting about a number of issues including the height of the buildings, the floor space ratio in excess of the DCP and the setback of the buildings.

Council resolved **[E.18]** on the motion of Councillor Curtin, seconded Councillor Saddick that Council:

- a) agrees in principle to initiate statutory requirements to implement the closure of Queen Street between Harrow Road and Park Road, Auburn.*
- b) grant owners consent for the lodgement of DA159/02 for the excavation of the land known as the section of Queen Street between Harrow Road and Park Road.*
- c) grant owners consent for the lodgement of DA237/02 for a mixed development and town square at 57-61 and 62-72 Queen Street, Auburn and the section of Queen Street between Harrow Road and Park Road.*
- d) grant deferred commencement consent for a mixed retail, commercial and residential development at 57-61 and 62-72 Queen Street, Auburn and the section of Queen Street between Harrow Road and Park Road on the day*

after the Auburn Town Centre Section 94 Contributions Plan appears in the local newspaper as coming into effect. The deferred commencement consent shall be subject to the conditions as detailed below.

e) grant delegated authority to the General Manager to negotiate with the applicant the provision by the developer of appropriate pro-rata costs for the undertaking of a study of pedestrian desire lines and movement within the Auburn Town Centre but before any final decision is made on this matter it comes back to Council for determination.

Councillor Irene Sims voted against the motion with Councillors Perry and Appleby absent from the meeting.

Management of the Development Application process

As part of the investigation of the process and procedures followed in the approval process of Auburn Central, the former Senior Development Officer, Mr Edgar was interviewed [I.1]

Mr Edgar advised that he had concerns about the Auburn Central development and felt that the development was “political” and that it clearly was going to be approved. Mr Edgar explained that if it was going to be approved he tried to ensure that the conditions of approval would be to make the building better. He felt that if he had recommended refusal of the application due to numerous numerical non-compliance, this would have been ignored and the development approved anyway.

Mr Edgar stated that he felt compromised professionally, *“If I had not had this pressure I would have recommended a site specific DCP and site controls that did not jar the scale of the town centre”*.

In responding to the draft report the former General Manager, Ray Brownlee notes *“that council employed a external planning consultant APT to prepare the report to Council on Auburn Central and that it would be inappropriate for any staff to instruct an independent consultant on what the assessment or recommendation should be.”*

Councillor Cassidy stated in his response to the draft report that he did not pressure council staff, the primary motivation was for a shopping complex of some substance.

Councillor Lam cites that the comments by Gordon Edgar are subjective as it was only his impression

Mr Edgar cited another building, built around the same time at 2 Susan Street Auburn, where a site specific Development Control Plan (DCP) was done. On the Susan Street development the floor space ratio exceeded Council's DCP.

Mr Edgar mentioned that he also had concerns about 2 Susan Street development, but again it had political support. He advised that the then General Manager had told him *"to look at the three worst things in the development and address these only"*.

Mr Edgar advised that there was a lot of pressure from the then General Manager and by Councillors to push the Auburn Central development through. Mr Edgar's impression was that the development was going to be approved no matter what.

Ray Brownlee refutes this as it was not his role to determine the Auburn Central DA (and therefore would have been futile to exert pressure to "push the development through").

In July 2002, the then Director of Planning, Mr David Ryan, left Auburn Council. Attempts were made to contact Mr Ryan for interview regarding his knowledge of the Auburn Central development. It is noted that, the development application was determined after he had left. The Director of Planning, Jan McCredie, replaced Mr Ryan. She advised in a telephone interview that she had misgivings with the Auburn Central development, as it was over the floor space ratio and had a negative impact on Auburn's town centre. Councillor Simms noted that after a meeting with the applicant she openly raised similar concerns.

Ms McCredie stated that she was so concerned about the development that she refused to sign off on the development application. The application was signed off by the then General Manager, Ray Brownlee. Mr Brownlee in response to the draft report states that Ms McCredie advised him that she was not comfortable to sign the assessment report because she had only been with the council for a few weeks and was not involved in the assessment process.

Planning Division of Auburn Council

During the period of approval and development of Auburn Central, Council's Planning Division underwent a number of changes in staffing.

Those employees engaged in the Auburn Central development included:

Ray Brownlee	General Manager (July 2001 - September 2004)
David Lewis	Acting General Manager (September 2004 – March 2005)
John Burgess	General Manager (March 2005 to present)
Jan McCredie	Director of Urban Design and Planning (October 2002 to May 2005)
Leta Webb	Manager, Planning and Assessment (October 2002 – August 2003)
Gordon Edgar	Senior Development Officer, Team leader (West) Development Assessment (2000 - April 2003)
Louise Connolly	Team leader (East), Development assessments (July 2002 – December 2003)
Stephen Pratt	Team leader (East), Development assessments (February 2004 – May 2005)
Judy Clark	Manager, Strategic Planning, Development & Environment (December 2003 to June 2005)
Manyuel Gregory	Certification Officer (2000 - Present)
Joe Malouf	Certification Officer (2000 – 2005)

Staffing turnover within Council's Planning Division was high in 2002 and again in 2005. This turnover included the Director of Planning, Ms Jan McCredie who left in 2005.

Following the appointment of Mr John Burgess as General Manager on 7 March 2005, Council commissioned John Kleem Consulting to conduct a review of the

organisational structure of Auburn Council. (Auburn Central was issued with a final occupancy certificate on 14 April 2005).

The Kleem report raised comments in relation to a number of Council activities. In particular it called for a review of Council's planning department. **[E.19]** While the report does not specifically look at the Auburn Central development, it does examine how the council exercised its planning and development control functions as at the beginning of 2005 when the final occupation certificate was issued.

As the Kleem report was critical of the performance in processing development applications, Mr Brownlee cites the Department of Local Government Comparative Report which shows the mean time in calendar days for determining DAs:

1999/00	65.87
2000/01	62.44
2001/02	68.18
2002/03	40.71
2003/04	50.07
2004/05	74.39
2005/06	52.61

The Kleem Report was prepared in July 2005, which reflects the period 2004/05.

Since the Kleem report, Auburn Council has been active in responding to the findings of the report

During the investigation, Council advised that the Kleem Report was a confidential document of Council. Latest advice from Council has advised that the matter was dealt with at an open council meeting and is now available to members of the public. It appears that the former General Managers Mr Brownlee and Mr David Lewis had not been shown this report prior to it being put to council.

The former General Manager of Auburn Council, Mr Brownlee, raised concerns about the Kleem report. In an email to the Department **[E.18]** he advised that;

“I have not and it appears will not have the opportunity to respond to the report, this report is untested and as such should not be relied on as an authoritative review of the administrative and management practices at Auburn Council at that time.

.... the Kleem Report was undertaken some 9-12 months after I had left Auburn Council as General Manager. In fact an interim General Manager, Mr David Lewis had presided over Auburn Council at that time.

During my tenure at Auburn Council as General Manager, the organisation went through a cultural change process and many administrative and management practices were updated, such as the introduction of the computerised correspondence management system (TRIM) and the customer request management system (CRMS) to name a few. At no time during my 3 years as General Manager was there any concerns raised by staff, community or Councillors regarding the administration or management of the Council. In fact the Council was consistently praised for its reform program and its management practices.”

In response to the draft report, the former General Manager, Ray Brownlee questions the independence of the Kleem Report. Regardless of any real or perceived conflict of interest that may have or not occurred. The elected council choose to accept the Kleem Report and to adopt its findings.

In July 2005, Council resolved to restructure Council's then Urban Design and Planning Department to create Council's Planning & Environment Department.

Following receipt of the Kleem report, Council resolved to engage Dr Danny Wiggins of Blinkhorn & Wiggins to review the operations of Council's Planning and Environment Department. In particular, Dr Wiggins was to review the assessment processes and the strategic planning function.

The objective of the Wiggins Review was to assess the operations of that department, identify areas of concern and make recommendations to improve the systems relating to the development process. It should be noted that the Auburn Central development was issued with a final occupancy certificate on 14 April 2005. The DA was determined in 2002. The Wiggins Report gives a context to what changes have occurred in the Planning and Environment Department since the

Auburn Central was completed. Wiggins Report also gives commentary on a number of functions in the Planning Department in 2005.

The report of the Wiggins review included a number of recommendations such as reviewing:

- the neighbour notification;
- development contribution policies;
- the exempt and complying development controls;
- and introducing a system of policy monitoring and review.

The report also recommended:

“action on fundamental system elements – improved explanatory material, databases (such as s.149 certificates) and information sources/statutory registers; a close working relationship between the new-look Customer Services Unit and with the development industry (and one-off applicants); and ongoing staff training.

*A key principle underpinning the review is **distinguishing technical from administrative** duties and promoting team work. Recommendations propose establishing Assessment Teams with a strong administrative presence and establishing clear administrative responsibilities between Planning and Environmental department and the proposed central administrative unit.*

*The **overall process** needs to be regularised by the refinement and serious use of procedural checks (a series of “gates”, from start to finish) and carefully monitored to enable ongoing identification of bottle necks and instant tracking of specific DAs. A procedures manual would be the central location for processes and procedures.*

More specifically, the following actions relating to specific steps in the DA process are recommended:

- *A “fast track” mechanism.*
- *Improved assessment tools (such as checklists).*

- *Standardised Reports, ensuring coverage of s.79C of the EP and A Act and plan/zone objectives.*
- *Improved standard conditions.*
- *Consideration of a “Development Panel” as a decision-making unit, between individual officers and Council.*
- *Formally establish a pool of “experts” available for consultation (separately or as groups).*
- *Consideration of a mediation service.*

The DA process does not end with the issue of the development consent. Construction certificates, appointment of a PCA (for issuing Occupation and Subdivision Certificates), mandatory inspections and other legal requirements must be satisfied. The Wiggins report supports Council’s action to dismantle the Building Certification Unit and re-integrate these functions into development assessment. Having said this, evidence needs to be provided of thorough assessment for certificates and PCA actions. A formal policy on Council’s PCA role (including inspections) is required”. [E.21]

The report made 27 key recommendations for the operation of Council’s planning department.

In relation to the development assessment function, the key principles of the recommendations were:

- improving the information available to customers;
- increase the use of existing technology;
- a focus on formal preliminary assessment of applications;
- increased use of procedural checks in the process;
- creation of a strong working relationship with customer service; and continued staff training.

The review also supported the recommendation of the Kleem Report that a discrete Strategic Planning team be established. It recommended that this team include expertise in areas such as: Environmental Health, Landscape Architecture, Urban Design and Communications.

On 15 February 2006, Council resolved *“That Council adopt the Wiggins report recommendations in line with the modifications as proposed by this report.”*

The former General Manager, Ray Brownlee challenges a number of conclusions of the Wiggins Report and that a number of policies, processes and procedures were already in place contrary to the Wiggins review and that there was no systemic failures of the planning systems at Auburn Council.

Auburn Council should release the Kleem Report, A Review of the Organisational; Structure of Auburn Council, the Wiggins Report, Review of the operation of the Planning and Environment Department and the Edwards Report, A Review and Probity Audit of the Auburn Central Development and Related Issues to the public. These documents should be available on Council’s website.

(RECOMMENDATION 2)

Certification Unit

Some councils have established certification business units. Where these units are established they should have clear guidelines for their operation. There should be regular reporting to council on their operation.

A key statutory function is council’s role as a certifying authority and it is important that this is not compromised for the sake of financial gains to the council.

It appears that a Certification Unit was established in May 2003 as a quasi business unit of Auburn Council. The unit appears to have operated independently of the planning area of Council being located on the ground floor away from the planning department however the staff reported to a team leader (Gordon Edgar/Steven Pratt), Manager (Judy Clark) and Director (Jan McCredie).

There is no evidence that formal Council approval was sought prior to its establishment. However the former General Manager notes that at a councillor

workshop in February 2003 there was a presentation by Ms Leta Webb on a proposed restructure of the planning department including the establishment of a Certification Unit. Councillors allegedly agreed to this new structure and Certification Unit. This was reinforced in April 2003; the 2004/05 budget included additional planning staff and the planning restructure.

In response to the draft report, Mr Brownlee obtained a letter from Leta Webb, the former Manager, Planning and Assessment; she held this position from October 2002 to August 2003. The letter dated 22 April 2008 notes that she proposed the restructure of the planning department including the formation of a Certification Unit. Mr Manyuel Gregory was appointed to the senior position and Joe Malouf the other position. Mr Joe Malouf undertook building regulations short course at the UTS.

Leta Webb states *"In relation to large scale building inspection and certification projects, it was intended that more experienced consultants would be engaged to assist Manyel and Joe, as required."*

In response to the draft report Councillors report that they were aware of the Certification Unit but were unaware at the salary bonuses based upon fees. Councillors also advised that they were unaware of the NSW Fire Brigade concerns of June 2003 and 2 December 2003.

In an interview with Mr Gregory, Council's Senior Health Surveyor, he advised that Mr Malouf, Council's former Health Surveyor, had approached the General Manager about setting up the Certification Unit. [1.2]

In response to the draft report, Mr Malouf's legal representative states *"Mr Malouf, together with Mr Gregory, approached the General Manager to establish a Certification Unit similar to that of other innovative councils. The approach was made for the purposes of career advancement and to bring the council into alignment with other councils."*

The unit operated as an in-house certification unit to provide a competitive Council based alternative to private sector certifiers.

The Certification Unit comprised of two building surveyors who issued compliance and occupation certificates.

It was indicated at the Councillors' workshop on 14 and 15 February 2003 that the Unit would: "...be required to promote and market itself as a private certifier and generate income. It is possible that if it is successful in this it will require additional staff – however these will be funded from the income stream." [E.22]

Councils are bound by the current fee structure in the *Environmental Planning & Assessment Act 1979* in terms of recovering costs associated with consultants.

While Council appears to have attracted extra business, any profit from doing this was quickly eroded by the hidden cost associated with the use of consultants to prepare advice to the Unit.

In 2003, the General Manager, Ray Brownlee and the Manager, Planning and Assessment, Leta Webb restructured the Planning and Assessment section of Council. The positions of Health and Building Surveyor (Certification) and Senior Health and Building Surveyor (Certification) were offered to Mr Malouf (Health and Building Surveyor) and Mr Manuyel Gregory (Senior Health and Building Surveyor) respectively. The new positions had the same comparable skill and accountabilities and remuneration as their previous positions with the council.

The conditions of employment were in accordance with the Local Government (State) Award plus a weekly market premium.

In addition to their previous salary a performance bonus was to be paid. The performance agreement would be paid if the Certification Unit achieved the income:

- \$160,000 annually 2% of the annual salary
- \$225,000 annually 10% of the annual salary
- \$300,000 annually 15% of the annual salary

The income was from building inspections, construction certificates, complying development and occupation certificate fees.

These new conditions were agreed in June 2003 and bonuses were paid as follows:

- 2003/04 – 15%.
- 2004/05 – 10%.

While these bonuses were lawful, there is the potential that this could compromise the quality of work at the expense of processing a greater volume of work.

One of the first projects undertaken by the Certification Unit was Auburn Central.

Mr Malouf, the junior of the two, was given a key role in the certification of the Auburn Central development. Mr Malouf denies this. A number of former employees advised me that the then General Manager, Ray Brownlee, made this appointment. Mr Brownlee, in his interview [I.14] denied this. Mr Brownlee asserts that Council's certification team did the certification of Auburn Central.

Mr Manyuel Gregory and Ms Clark raised similar concerns, as the Auburn Central development was the "largest development for Auburn Council to date."

Mr Malouf, in an interview was also concerned about his inexperience. Mr Malouf stated that he was not solely responsible for Auburn Central, rather it was the responsibility of Mr Gregory and himself. [I.3]

Mr Malouf admitted during an interview that he did not have the skills to do the Auburn Central development he stated: *"I only had a few years of experience."* It is noted that Mr Malouf was the Junior Certification Officer with less experience than Mr Gregory.

Mr Gregory advised me that while he worked with Mr Malouf, that it was made clear to him by the General Manager that Joe Malouf was in charge of the development's certification. [I.2] Mr Brownlee refutes that Mr Malouf was in charge of the Auburn Central development certification.

Other staff interviewed clearly identified that Mr Malouf was assigned the role of certifier for the building.

The Certification Unit was located away from Council's planning department. In interviews with Mr Stephen Pratt, the team leader of the Unit, Mr Pratt raised the concern that he had no knowledge of "what they were up to." [I.4]

Mr Malouf holds a certificate as Assistant Health Surveyor and Associate Diploma in Applied Science. Randwick City Council employed him for 6 months as a Health and

Building Surveyor. Auburn Council employed him for 5 years as a Senior Building Certifier.

Mr Gregory holds qualifications as a Health and Building Surveyor.

In May 2003 new position descriptions were developed for the Certification Officers in the Certification Unit. One of the challenges for the new positions was to encourage builders and developers to nominate Council as their Principal Certifying Authority (PCA) and Certifier as to expand Council's role in these functions.

In a number of interviews with me other staff expressed concerns about the operation and capability of the Certification Unit including Ms Clark, Mr Pratt and Ms McCredie. These concerns centred around working hours, signing off on applications, administration and the certification officers understanding of drawings and plans of the Auburn Central development. Mr Brownlee in response to the draft report comments that these concerns were never brought to his attention and if they had concerns why didn't they move them from those positions and the fact that they relied on their recommendations for the final sign-off of Auburn Central

It appears that at the time of entering into the new bonus arrangements in May 2003 the work required by the Auburn Central development would immediately ensure that the bonus targets were met.

Mr Gregory who admitted that the Auburn Central development would mean that he and Mr Malouf would get the bonus in the first year confirmed this. [1.2]

Mr Gregory further acknowledged the limitations of the certification unit to undertake work on the development and approached the Manager, Planning and Assessment to appoint consultants to assist.

The current fee structure prevented the costs associated with the consultants being met by the developer and Council, in many instances, paid for these consultants' assessments.

The Kleem report states that:

"The two certifiers set up to carry out building certification work quite autonomously and do not operate as a business unit. There is no day-to-day

management or monitoring of outputs and it is intended that the role be brought under an umbrella of functions in a new structure.

While there would appear to be competency associated with the role, other sections of the Department have felt that the independence is not appropriate in corporate terms, a view I support.” [E.19]

The Certification Unit was abolished in 2005 as part of an overall review of the organisational structure.

This brought the two certification officers under direct supervision Council’s planning division. It also imposed limits on the type of structures Council would certify based upon the skills and experience of staff.

The Certification officers were relocated to Council’s planning department.

Mr Malouf has left Council and is now an accredited private certifier. He is accredited as an A2 -Accredited Certifier – Building Surveyor Grade 2. This level of accreditation is insufficient to certify a development like Auburn Central.

It is clear that while Council sought expert consultants to assist in the certification of Auburn Central, the Certification Officers were not satisfactorily skilled to deal with the development. The need for consultants to assist council officers came as a direct cost to Council that under the existing fee structure is limited to passing on these costs to the developer.

It is apparent that the least qualified of Council’s building surveyors undertook the majority of the Principle Certifying Authority activities and was guided by consultants to verify building and fire matters.

On 14 April 2005 when the final occupation certificate [E.11] for the development was considered, Mr Malouf, wrote a memorandum to Ms Judy Clark:

“Works have been completed and all relevant areas of Council have signed off on the final release of the Occupation Certificate. Occupation Certificate is ready and awaiting your instruction to release.”

Joe Malouf

Environmental Health and Building Surveyor

(Hand writing notated)

“Noted – occupation certificate signed on 14/5/05. J...”

The signature of the handwritten note is not clear, however has a strong resemblance to the signature on the final occupancy certificate, Judy Clark , Manager, Strategic Planning, Development and Environment.

The handwritten note also shows the date as 14/5/05, however the Final Occupation Certificate is dated 14 April 2005.

In response to extracts from the draft report, Judy Clark comments that, *“Issuing of an Occupation Certificate is in practical sense the culmination of numerous certifications by third parties e.g. engineers, water proofers etc. PCA inspections (in this case by Council) and the assembly/checking of all documents and referrals – covering activities over a long period of time during the construction of the building. Joe Malouf and Manyuel Gregory had carriage of the Construction Certificates and progress inspections for Auburn Central right from the beginning they were not new to the project and worked together on this job in their roles as Councils PCA. (They carried out their role for all works where Council was appointed PCA not just Auburn Central). It was a core part of their role as Council Building Surveyors in the Certification Unit. I signed the Occupation Certificate relying on the written advice provided to me by Joe Malouf.”*

“Therefore I strongly disagree with the assertion I was involved in an unusually quick approval or that my part of the sign off was expedited.”

At the time of completing the final occupation certificate concern had already been raised by Auburn Council about the Auburn Central development. On 18 March 2005 a letter was sent to Robert Edwards from the General Manager, John Burgess *“that he undertake a review and probity audit of various issues relating to consideration and approval of DA 237/02 and associated applications for modification in connection with the Auburn Central development.”* Despite the concerns about Auburn Central it appears unusual that Council did not take additional care when issuing the final occupation certificate.

It is further noted in the Edwards report (page 21 Item 19.3) that on 22 April 2005 (less than a week after the final occupation certificate was issued) that he requested information which was not forthcoming. He also notes missing files at this time, which raises concern whether all information was provided to adequately assess whether the final occupancy certificate should be granted.

The GRS report on the fire safety of the Auburn Central development shows that a number of conditions of consent and requirements of the BCA had not been complied with.

It appears that Mr Malouf and Mr Gregory conducted a final review of the building when it neared completion rather than when the building had been completely finished.

Mr Gregory, when asked if he felt that a final occupancy certificate should be issued stated, *"I was on leave for five weeks at the time of the final occupancy certificate being issued. Given the number of things to be done I would have not given the certificate if there were a number of matters outstanding, as there was in Auburn Central. [1.2]"*

In response to the draft report, Joe Malouf's legal representative advised the following:

"our client confirms that he assisted Manyel Gregory on several inspections. Joint inspections were made on the development. Mr Gregory specifically inspected the common areas of the development due to the technical nature of the BCA requirements. Mr Malouf assisted and recorded a list of defects by Mr Gregory. The list was recorded for the purposes of advising the developer and for future clarification on addition inspections to ascertain rectification works. Several inspections associated with the Final Occupation certificate ensued. A number of fire related issues were settled by certificates from Fire Experts engaged by the developer. In answer to enquiries made by Judy Clark, Mr Malouf advised her that time, our client advised he was only waiting for confirmation from the experts within Council and the submission of the relevant fire certificates. The referrals were received together with the certificates. As Mr Gregory points out, he was in conveniently on leave at arguably the most critical time in the certification of the

development. Mr Malouf did not, as we have consistently stated, have delegated authority to sign an Occupation Certificate of this kind. Accordingly that fell to Judy Clark. The Act requires that the person endorsing the Occupation Certificate to satisfy themselves that the provisions of section 109H of the Act were complied with prior to issue of the Certificate.”

The submission comments that given her concerns about Joe Malouf, Judy Clark should have examined the files herself.

The submission states “ *Judy Clark drafted a short memo and demanded that Mr Malouf sign same, which he did without objection because, at that moment he believed that the application of the Final Occupation certificate met the requirements of section 109H of the Act.”*

Decision to make Council the Principal Certifying Authority (PCA)

An interview was conducted with Mr Sarkis Nassif, a director of Holdmark Developers Pty Limited, [I.6] [E.25] Mr Nassif advised that Holdmark had originally engaged DLM as the PCA for Auburn Central. He stated that *“Council approached Holdmark wishing to take on the role of PCA as they had recently established a team to undertake such work and that council was keen to do the work”*.

Holdmark originally had no intention of engaging Council as PCA, but Council was keen to do the certification work. He said that *“I took the view at the time that it may not be such a bad thing on the grounds that Council had driven the original concept for the Auburn Town Centre and seemingly understood what was involved”*.

Mr Nassif was unaware of the bonus system operating at Council for the certification unit. Holdmark were concerned with the certification process, particularly when Council requested that Holdmark redesign the stairs in the courtyard area. Prior to Council’s request, Holdmark knew that the stairs in the courtyard did comply with BCA standards. In May 2007, council advised Mr Nassif that the stairs were not compliant with BCA standards and they required rectification.

Mr Gregory advised that he thought that “the appointment of Council as the PCA was unusual”.

This Section 430 investigation highlights the need for greater accountability for councils who certify buildings. This includes:

- Ensuring that the organisation has the overall capability to delivery the PCA function.
- The assigning of appropriately trained and experienced staff to significant major projects.
- Sound internal framework with detail policies and procedures that clearly address key risks associated with PCA function.
- Sound record keeping practises; and

- Built in Quality Assurance processes as a safeguard to the decision making process, especially with large and complex projects (i.e. external review by consultant).

Currently councils are unable to opt out of certification if they do not have the skills required to be the principal certification authority (PCA) for a development.

While councils can engage consultants to assist in the certification often the cost of these consultants is not fully recovered by councils.

It is recommended that the Department of Local Government write to the Department of Planning supporting the changes proposed in the Planning Reform discussion paper in regards changes to council certification, and propose an option for councils to “opt out” as a principal certifying authority. (RECOMMENDATION 3)

Fire Certification of Auburn Central

In late December 2006, Council's General Manager, Mr Burgess, was alerted by Council staff and the NSWFB post completion that the Auburn Central development did not comply with the fire regulations of the BCA. The NSWFB has advised that members of the Silverwater fire station attended Auburn Central in response to a fire alarm and raised a complaint. The complaint noted that *“there were a number of issues including damage to fire doors, rubbish and shopping trolleys on the floors, the air-conditioning did not deactivate and the emergency warning system not resetting (after attempts by members of the Silverwater fire station).”*

Subsequent inspections by Council's Senior Building Surveyor/Fire Safety and Compliance Officer confirmed the degree of non-compliance and the risk to occupants of the commercial and residential areas of the Auburn Central development.

The Council, as the PCA, engaged throughout the construction phase a specialist fire consultancy firm Stephen Grubits and Associates to advise Council on fire issues associated with Auburn Central.

When the residential component of the building was nearing completion advice was sought from Stephen Grubits and Associates on documentation prepared by GN

Consulting and CSIRO, who had submitted fire information at the request of the applicant.

Stephen Grubits and Associates advised in a letter to Council in May 2004, referring to Council instructions to review a letter from the NSW Fire Brigade dated 13 May 2004 and the Fire Certificate from GN Consulting dated 21 March 2005.

The Stephen Grubits letter concludes with findings as follows:

“a) That the certification by GN Consulting is considered inappropriate for an Occupation Certificate.

b) The Fire Brigades letter implies a process that would have started during construction, whereby the fire-safety engineer would have been involved in site inspections, the reporting of which would have been reviewed by the Peer Reviewer. No evidence of that process has been provided.” [E.26]

Mr Stephen Grubits addressed further concerns with the legitimacy of the certification from GN Consulting and questioned CSIRO involvement, as the previous fire safety engineering firm were SSL.

Stephen Grubits concluded that:

“Under the NSW Environmental Planning and Assessment Act, no reliance can be placed by Council or yourself on the reviewed documents. As Principal Certifying Authority, with the documentation that has been submitted to you, you will need to satisfy yourself that in fact the work has been executed in strict accordance with the approved plans and specifications, and bear full responsibility. Unless, of course, you obtain a Part 4A certificate complying with the Act and signed by an Accredited Certifier.”

Council made a further request of Mr Grubits to review documentation prepared by Dr Victor Shestopal on behalf of Auburn Central and Holdmark Developers Pty Ltd.

During the course of that review it was established that Dr Shestopal's registration had expired before issuing the Compliance Certificate for Auburn Central.

Council contacted the Engineering Practices Unit (Canberra) to clarify this matter.

Mr Grubits concluded that once Council had satisfied itself that Dr Shestopal's accreditation as a Certifier in fire-safety engineering was valid, Stephen Grubits & Associates would have no further objections to relying on that certificate in regards to the Alternative Solutions affecting the building fire-safety system.

It is noted that the process of issuing an occupation certificate for the residential component appears to have been completed in short period of time given the complexity of the project and estimated time required to full examine the documents. The sign off by Ms Clark is shown on the final occupation certificate is dated as 14 April 2005. The same day as the memorandum from Mr Malouf to Ms Clark seeking that the final occupancy certificate be signed off.

It appears unusual that given the complexity of this development such a quick approval could be given.

A review of the Final Fire Safety Certificates [E.27] show that the certificates were signed by the owner of the building on 8 April 2005 by Mr Nassif and on 6 March 2006 Jean Sarkis.

Those certificates certify that:

- “ a) Each of the essential fire measures listed below has been assessed by Brett Ruddick on behalf of GN Consulting and*
- b) was found when it was assessed to have been properly implemented and to be capable of performing to a standard not less than that specified in the current fire safety schedule.”*

This certification was supported by other certification from Megoz Fire Systems Pty Ltd, Fire Essential Systems, Complete Fire Door Specialists and Dux Plumbing Services that fire safety and fire appliances.

It appeared to be in order.

A telephone interview was conducted with Phil Craig of Triple O Fire and Safety Pty Ltd of Palm Beach, Queensland. Mr Craig was engaged by Holdmark Developers Pty Ltd to carry out fire inspections of the essential services equipment and systems installed at Auburn Central and compliance with the annual fire statements.

Mr Craig's inspection involved the retail complex (including carparking and commercial tenancies).

Mr Craig advised that he found substantial defects with the building's fire safety at Auburn Central. He allegedly advised Holdmark Developers of his findings.

These concerns were echoed in the later report by Graham Scheffers (Council's Fire Safety consultant) and included such defects as the lack of compartmentalising of areas, openings between floors, the need to relocate sprinklers, lack of fire extinguishers, and many other faults.

Fire Safety and Engineering

On 29 December 2006, in an effort to address this risk, the NSWFB issued emergency order for the commercial area of Auburn Central.

Council had assessed the fire risks as high. Further emergency orders were issued by Auburn Council against the strata owners to rectify a number of fire safety concerns. This is discussed further below.

In response to the draft report, Holdmark notes that in January 2007 that Mr Nassif met with the Mayor and General Manager offering to work with Council to resolve the fire and life safety issues. Mr Nassif states, *"but to date the Council has refused to work with us."*

Council chose to retain the services of an independent certifier GRS to provide a Fire Safety Assessment report to Council on Auburn Central.

The key findings of this assessment, as a result of the inspections carried out and documentation reviewed, were delivered on 30 May 2007 and are detailed in Appendix 1 of this report.

As noted by GRS, a full review of documentation could not be completed due to a series of paper files not being available for review. These files include critical records that were unable to be located at Auburn Council.

GRS concluded that

“.....it is considered that the safety of occupants, NSW Fire Brigades, and the risk of fire development and spread throughout the building falls well below acceptable standards”.

On 15 June 2007, Auburn Council received a report from Mr John Mollenmans of Electrical Safety Solutions Pty Limited detailing numerous faults and defects in the fire safety systems at Auburn Central. The report advised that substantial parts of the fire services were not working at that time, including the direct fire brigade alarm.

An officer of the NSWFB Risk Management Directorate conducted an audit in June 2007. The NSWFB wrote to Council on 15 June 2007 and advised:

“The NSWFB holds grave concerns for the safety of the occupants of the building, and any responding emergency services personnel in the event of fire or emergency incident.Accordingly, the NSWFB supports Council’s determination in immediately serving an Order on the owners of the premises requiring rectification of all faults pertaining to the building’s currently installed essential fire safety measures, and once corrective action is completed, to maintain those essential fire safety measures in accordance with the provisions of Australian Standard (AS) 1851.

Further, the NSWFB considers that due to the present condition of the building and the installed essential fire safety measures, the compromised compartmentation, and increased population loads (due to alleged illegal occupation of SOU’s), the original Fire Safety Engineering Assessment is no longer applicable and recommends reassessment of same.” [E.28]

Emergency Orders

Following a number of inspections by Council and the NSWFB of the Auburn Central retail/commercial premises and the Fire Indicator Panel. Emergency Orders were served upon Hiken, as the owner of the commercial section of the development on 27 June, 2007.

The Orders required Hiken to:

- “1. Make the smoke detection and alarm system for the premises fully operational including undertaking repairs to rectify all alarms and faults shown on the Fire Indicator Panel and restore the system to normal operation, restoration of the Fire Brigades Alarm signalling equipment to a de-isolated state and providing certification of the smoke and alarm detection system.*
- 2. Make all fire doors within the premises (being the retail/commercial/car park) fully operational including inspection of all fire doors and upgrading or replacing doors to ensure that every door is a compliant fire-rated door and certified to conform with the Australian Standard, eliminating excessive gaps, inoperative door-closers, missing or faulty door latches and missing fire door tags.*
- 3. Make all sprinkler heads within the premises (being the retail/commercial/car park) fully operational including spacing below and around sprinkler heads and replacing defective sprinkler heads.*
- 4. Implement service and maintenance procedures for all fire safety systems and equipment within the premises.*
- 5. Provide certification of the above works and copies of service and maintenance agreements to Council.” [E.13]*

Class 4 proceedings in the Land and Environment Court

On 28 June 2007, Council's Senior Building Surveyor, Fire & Safety Compliance inspected the fire control room at the premises and found that the building's fire safety system did not comply with the emergency orders. For example, the Fire Indicator Panel still showed alarm zones in fault and isolation.

Class 4 Proceedings were commenced in the Land and Environment Court seeking a declaration that Hiken had breached the Emergency Orders and requested that orders be issued for Hiken to comply with those Orders within 24 hours.

Council's solicitors, Deacons, also served a notice of motion seeking short service and that the matter be listed for urgent hearing on 4 July 2007.

Council agreed to a timetable for Hiken to carry out investigations and undertake works in order to comply with the Emergency Orders.

On 19 July 2007 Council representatives, Graham Scheffers and representatives of the NSW Fire Brigade met on site with Hiken's consultant, Michael Wynn-Jones. Some works had been undertaken including reconnection of the Fire Indicator Panel, restoration of sprinkler heads, inspection and replacement of some fire doors with a further 23 doors more to be replaced.

The matter was heard in the Land and Environment Court before Mr Justice Lloyd on 20 July 2007, who ordered that:

- "1. The Respondent to provide the Applicant with a certificate prepared by an Accredited Certifier Grade 1 certifying that the Fire Indicator Panel has been restored and is operating normally by July 25, 2007.*
- 2. The Respondent is to carry out, in the presence of representatives of the NSW Fire Brigades and the Applicant, a full inter-systems test on the fire safety systems to confirm that the interface of the fire systems including smoke detection, sprinkler alarms, BOWS, smoke exhaust and ASE all function as intended by July 26, 2007.*
- 3. The Respondent to provide the Applicant with a certificate prepared by an Accredited Certifier Grade 1 certifying that the smoke detection and alarm system is in compliance with the Building Code of Australia ("BCA") and Australian Standard ("AS") AS1670.1- 1995 & AS1668.1-1998 as modified by SSL Reports dated May 7, 2003 No. XR0728/R1 Version V03 and dated 11 May 2004, No. XR07281R3, Version V05 by July 25, 2007.*
- 4. Doors to all fire-isolated exits and garbage rooms be inspected, upgraded and/or replaced to be compliant fire-rated doors and certified by an Accredited Certifier Grade 1 to confirm that they are in accordance with AS1905.1-1997 (existing doors) and AS1905.1-2005 (replaced doors) in order to eliminate excessive gaps, inoperative door closers, missing or faulty door latches, missing fire door tags by July 25, 2007.*

5. *Doors to all fire-isolated stair doors are to be inspected, upgraded and certified by an Accredited Certifier Grade 1 to be compliant with BOA Clause D2.21 as a single handed downward action lever device by July 25, 2007.*
6. *The Respondent is to provide access to the Applicant and its consultant to inspect the premises to ensure that Orders 4 and 5 have been carried out.*
7. *The Respondent to provide the Applicant with a certificate prepared by an Accredited Certifier Grade 1 certifying that all sprinkler heads within the premises are fully operational by July 25, 2007.*
8. *The Respondent is to provide the Applicant by July 25, 2007 with a copy of the service and maintenance agreements evidencing the maintenance, fire safety and equipment requirements in relation to the premises the subject of these proceedings together with a certificate from an Accredited Certifier Grade 1 that the fire safety systems and equipment are being appropriately maintained in accordance with such agreements.*
9. *Liberty to restore on 24 hours' notice.*
10. *Matter was listed for further directions on July 27, 2007.” [E.29]*

On 26 July 2007, a full intersystem test was carried out in the presence of representatives of council and the NSW Fire Brigade. This revealed numerous faults in the system.

On 27 July 2007, the Court was informed by Deacons that Hiken had undertaken all substantive works other than to satisfy order 2 and 3 of the consent orders.

On 3 August 2007, the Court set a timetable for exchange of evidence and listed the matter for hearing on 11 September 2007.

Notices of Intention and Orders on 7 strata schemes (residential towers and commercial/retail)

A Draft Report prepared by Mr Graham Scheffers of GRS in May 2007 revealed overwhelming issues of fire and life safety in the retail and residential towers.

The Emergency Orders issued on Lot 1 DP 1067959 (Hiken) dealt with those matters that were so urgent as to pose an immediate threat to safety.

Accordingly, Council issued Notices of Intention and Orders pursuant to Order 6 of section 12B of the *Environmental Planning & Assessment Act 1979*.

On 6 August, 2007, Council served the orders on the strata managers for the 6 residential towers and on Hiken. . The Orders required that a report be submitted to Council detailing all works which the owner considers necessary to satisfy all relevant fire and life safety requirements under the BCA, within 28 days of the Order. The Orders expired on 3 September 2007.

On 11 September 2007, Hiken appealed the Order in Class 1 proceedings in the Land and Environment Court. Council consented to adjourn the matter to 23 November 2007 in order to allow Hiken's expert, Mr Michael Wynn-Jones to undertake further investigations in response to the Order.

On 17 October 2007, Deacons wrote to the managers of the 6 residential tower strata schemes advising that time for compliance with the order had expired and no request for an extension in time had been received. They were requested to provide the report within 7 days or show cause why council should not commence proceedings in the Land and Environment Court.

On 25 October 2007, Luke Derwent of Strata Plus advised council that a draft report would be provided by 26 October 2007. No report was received.

Class 4 proceedings commenced seeking the enforcement of orders issued by Council on 6 August 2007, relating to residential blocks A – D and common property at Auburn Central. Reports prepared by Michael Wynn-Jones were received by Council on 29 November and 12 December 2007. However, council were not satisfied and determined that they did not comply with the terms of the Order issued by Council.

On 7 March 2008, matters were stood over to all the parties to engage in “without prejudice” discussions. These were held but no agreement was reached.

The Council has continued this legal action in the Land and Environment Court. In separate class 1 proceeding Hiken have appealed against Council’s Order issued. At the time of writing this report the matter continues before the Land and Environment Court.

Structural integrity of Auburn Central

The degree of alleged non-compliance with the fire safety aspects of the BCA raises questions about the structural adequacy of Auburn Central.

Detailed evaluation of the whole complex may be required to ascertain whether the final built form complies with the BCA and if not the extent of works that would be required to meet BCA standards.

During the investigation a site visit was conducted where it was observed that maintenance was required for rendering of walls, waterproofing of bathrooms and water leaks. Cracks in the balconies could be seen and one balcony appeared to have moved away from the wall.

Council as the Prescribed Certifying Authority must identify the extent of non-compliance and the appropriate work required to rectify the deficiencies in this building.

At the Council meeting on 21 November 2007 Council resolved:

“That suitably qualified structural engineers and building experts be engaged to undertake a full review of Auburn Central to identify all non compliant aspects of the building against BCA requirements.” [E.30]

On 6 May 2008 Council advised that they have engaged McCartney Engineering Consultants to conduct an inspection of the condition of the building and to provide council with a preliminary assessment of the nature and extent of defects or deficiencies that may exist in the structure, architectural finishes and external envelope of the buildings.

Role of NSW Fire Brigade

Prior to the introduction of the current regulatory system, the NSWFB was involved in approving fire protection systems in buildings over 25 metres in height under a Height of Buildings Advisory Council (HOBAC) approval framework.

The Auburn Central development exceeds 25 metres and was on such development.

There was a high-rise team tasked with the inspection of fire systems (sprinklers, smoke dampers, hydrants, smoke alarm systems, stair pressurisation and emergency warning and intercommunication systems). The role was undertaken during the final phases of the construction of the building near the time of occupancy.

This acted as a quality control on developers and councils.

At the time that private certification came in (in the mid 1990's) it was considered that the role of the NSWFB was no longer necessary.

Under the present system the NSWFB are responsible for carrying out assessments of certain fire safety Alternative Solutions under the BCA.

Clause 144 of the Environmental Planning and Assessment Regulation 2000 requires certain projects with Alternative Solutions relating to large floor areas to be referred by the certifying authority to the NSWFB Fire Commissioner for provision of an initial fire safety report.

The NSWFB also receive a copy of fire safety schedules and fire safety statements including annual fire safety statements.

The NSWFB are also involved in undertaking audits of buildings as to the compliance of essential and critical fire safety measures and investigating complaints about fire safety compliance, investigating fire events. In undertaking these roles the NSWFB may issue a fire safety order.

The Fire Brigade and Auburn Central

An interview was conducted with Mr Chris Jurgeit, Chief Superintendent, Community Safety Division, Structural Fire Safety together with David Boverman, Fire Engineer – Fire Safety Division of the NSWFB. [I.7]

The interview revealed that the NSWFB had a long history of involvement in the Auburn Central project since it was commenced in late 2002.

The role of the NSWFB is limited to those powers and functions conferred on it by the Fire Brigade Act 1989 and associated legislation including the Environmental Planning and Assessment Act 1979 and Environmental Planning and Assessment Regulation 2000.

The NSWFB provides initial and final fire safety reports is limited to powers set out in clauses 144 and 152 of the EPA Regulation.

In relation to an initial fire safety report, subclause 144 (2) sets out that a certifying authority must apply for an initial fire safety report. In doing so the NSWFB is restricted under subclause 144 (9) of the EPA regulation to:

"initial fire safety report" means a written report specifying whether or not the Fire Commissioner is satisfied, on the basis of the documents referred to in sub clause (2):

- (a) that the alternative solution will meet such of the performance requirements as it is intended to meet, and
- (b) that the fire hydrants in the proposed fire hydrant system will be accessible for use by New South Wales Fire Brigades, and
- (c) that the couplings in the system will be compatible with those of the fire appliances and equipment used by New South Wales Fire Brigades.

It does not empower the NSWFB to carry out a comprehensive fire assessment but is confined to the above matters.

In relation to the residential portion of Auburn Central, NSWFB received applications from Auburn Council for initial fire safety reports in respect of alternative solutions on 11 December 2002, 31 October 2003 and 16 April 2004.

On 22 March 2005, Council applied under clause 152 for a final fire safety report in respect of the residential portion of Auburn Central. On 8 April 2005, The Commissioner gave a final fire safety report on the residential portion of Auburn Central only.

The NSWFB was active in a series of meetings to negotiate and finalise the design of the buildings. Mr Jurgeit advised that at times the developer, Holdmark Developers Pty Ltd, strongly but unsuccessfully attempted to put forward a fire safety design for the residential portion of the buildings that would have afforded occupants a sub-standard level of fire safety when compared to other similar buildings.

In the design stage the NSWFB concerned by an attempt by Holdmark not to install a second set of stairs with pressurisation for high rise section of the building. In the NSWFB's view the stairs were essential for the building to achieve adequate safety standards. In response to the draft report, Holdmark provided a copy of a facsimile transmission which notes *"Joe Malouf of Auburn Council noted that Council would be willing to accept a single stair to the tower in lieu of 2 stairs as required under the BCA. This is on the proviso that SSL provide adequate support and examples of where it has occurred previously"*.

The NSWFB wrote to Council on 12 June 2003 raising concerns about the building design and advising that the NSWFB had assessed that the basement and retail levels did not satisfy the performance requirements of the BCA. The NSWFB issued an initial fire safety report stating that it did not support the alternative solutions proposed. The NSWFB report found that smoke/fire modelling indicated that the alternative solutions would create untenable conditions in the event of a fire, before the evacuation of occupants would be complete. However the Council chose to proceed on the basis of the SSL report.

No application has been made by the Council for a final fire safety report in respect of the commercial portion of Auburn Central.

On 2 December 2003, the NSWFB again wrote to Council about the design of the building and the advice contained in the SSL report (Holdmark's fire consultant) that stated that the podium is a place of temporary safety. The NSWFB advised that it considered this an unacceptable fire solution, as the podium was two levels above the ground. **[E.31]**

The NSWFB also expressed concern about the commercial portion of the complex in that it did not support the fire safety design.

On 8 April 2005, just prior to the issuing of the final occupation certificate, the Fire Brigade inspected the residential portion of Auburn Central in accordance with the statutory provisions of clause 152 of the EPA regulation 2000.

Reports of Fire Commissioner: section 109H

152 Reports of Fire Commissioner

- (1) This clause applies to a building to which clause 144 applies.
- (2) Unless it has already refused such an application, a certifying authority must request the Fire Commissioner to furnish it with a final fire safety report for a building as soon as practicable after receiving an application for an occupation certificate for the building.
- (3) If it refuses the application after making such a request but before receiving a final fire safety report, the certifying authority must cause notice of the refusal to be given to the Fire Commissioner.
- (4) Unless it has received a notice referred to in subclause (3), the Fire Commissioner must furnish the certifying authority with a final fire safety report for the building within 7 days after receiving a request for the report.
- (5) The certifying authority must not issue an occupation certificate for the building unless it has taken into consideration any final fire safety report for the building that has been furnished to it within the 7-day period.
- (6) In this clause "final fire safety report" for a building means a written report specifying whether or not the Fire Commissioner is satisfied:
 - (a) that the building complies with the Category 2 fire safety provisions, and
 - (b) that the fire hydrants in the fire hydrant system will be accessible for use by New South Wales Fire Brigades, and
 - (c) that the couplings in the fire hydrant system will be compatible with those of the fire appliances and equipment used by New South Wales Fire Brigades.

That inspection revealed a number of items within the complex requiring rectification. These items were deemed by the NSWFB not to be critical in terms of fire or life safety. [E.32]: The final fire safety report listed a number of matters requiring rectification, these include:

- Tactical plans required for control room,
- Smoke detector zone schematic plan required for fire control room,
- Fire stopping required for all penetrations in the fire control room,
- Signage required to identify diesel sprinkler pump,
- All hydrant cupboards required correct signage
- All hydrant cupboards required to be cleaned of all non fire related materials,
- Identification required for all booster inlets at booster assembly,
- Booster assemblies require cleaning and painting,
- Supply lockable doors for booster assembly,
- Block plan of durable construction required for booster assembly
- Fuel required for roof top hydrant pump.

Mr Jurgeit advised that the inspection in April 2005 was in accordance with clause 152 of the EPA regulation. As a consequence, on 8 April 2005 the NSWFB advised Council that *"...it is considered that adequate provisions have been made for the preventing and extinguishing of fires and the protection and saving of life and property in the case of fire..."*

It is noted that while the NSWFB, had reservations about a number of minor items of fire safety in the building, (these being outside of the provisions in clause 152 of the EPA Regulation). The NSWFB is not able to refuse to provide a final fire certificate based on these items.

NSWFB issued the final fire safety certificate in regards to the residential portion of Auburn Central only. This was provided as the certification for the Council to issue the occupation certificate.

While the NSWFB raised concerns and communicated their concerns to the Council in April 2005. Council chose to accept the NSWFB certification based on clause 152 provision of 8 April 2005. Council chose to issue a final certificate for the carpark, commercial, retail and residential parts of the complex on 14 April 2005.

It was later revealed by the NSWFB that the building has a number of deficiencies, including outstanding fire safety works relating to clause 152 of the Environmental Planning and Assessment Regulation 2000.

On 21 December 2006, 18 months after the final occupation certificate was issued, a further inspection by an operational NSWFB officer identified a number of deficiencies with the fire safety standards at Auburn Central. This resulted in an officer of the Structural Fire Safety Unit issuing an emergency order under 121B of the Environmental Planning & Assessment Act for the rectification of the faults.

The NSWFB conducted a further inspection of Auburn Central on 21 February 2007 to determine if the rectification works specified in the emergency order had been completed. This revealed that the owner had not complied with the emergency order.

Subsequent to these inspections, the NSWFB received advice from operational NSWFB officers about fire safety concerns at Auburn Central. Council was notified of the issues on each occasion. Council conducted fire inspections of Auburn Central.

On 18 June, 2007 and at the request of Council's consultant Mr Scheffers, the NSWFB conducted a joint inspection of the complex.

This inspection produced a detailed list of defects. The listed defects included:

- Alarm signalling equipment isolated.
- Fire Indication Panel showing 53 zones in fault and 33 zones isolated.
- Building Occupant Warning System not operational due to isolation.
- Monitored sprinkler valves shown to be isolated at the fire indicator panel.

- Missing and faulty fire doors, door closing devices and smoke detectors.
- Fast response sprinkler heads compromised by paint.
- Penetrations compromising fire compartments.
- Non compliant separation.
- Non compliant spandrel separation.
- Unprotected openings in path of travel to road or open spaces.

In response to these defects Council issued fire safety upgrade emergency orders.

It was during this inspection that the NSWFB discovered that, contrary to the permitted use of the building's residential apartments, several apartments had unauthorised internal additions to increase the number of bedrooms and create de facto boarding house occupancies. This had created severe health and amenity issues in the building.

This illegal construction is detailed further in this report.

During an interview with Mr Jurgeit, concern was raised as to the safety of the building post occupancy. [1.7] He commented generally that he felt that the Auburn Central was *"The worst building he had seen in his 28 years with the NSWFB."*

He stated that *"the NSWFB determined that a serious concern for fire safety of the building occupants existed. While NSWFB had the power to close the building down, removal of approximately 1,500 occupants and preventing them from returning, this option was not considered to be the most suitable way of dealing with the issue."*

Mr Jurgeit was asked what the NSWFB would do had the development been smaller. He commented *"had this been a smaller building, such as a boarding house or smaller residential block, action would have been taken to relocate the occupants"*

The NSWFB and councils can issue orders for the immediate evacuation of premises. NSWFB and the Council did not consider that it was necessary to issue orders for evacuation. It would also be difficult to relocate a large number of residents at short notice. The NSWFB undertook an operational response upgrade

of the Auburn Central site that would require an initial turnout of four fire crews to any fire alarm or call out.

The NSWFB has advised that as at June 2007 there have been 138 fire incidents at Auburn Central in the last 2 years. The NSWFB advised that this number of incidents is high for a newly constructed building.

One of these incidents included a fire in toilets under the residential units on 11 May 2007. The Fire Safety Concern Report that followed from the call out stated that there was no local alarm bell ringing and the EWS (Emergency Warning System) was not operating, and heavy smoke was present. The local station officer notes, *"This would have been a major hazard for any person who had used the lifts not knowing that there was a fire in the building and exited on the ground floor. I feel that there are major safety concerns at this site due to the inoperation of the evacuation system"*. [E.33]

The NSWFB conducts constant monitoring of the site and the progress of the rectification works. The NSWFB acknowledges **that "a serious concern for fire safety of the building occupants exists"**.

In response to the draft report the NSWFB notes that:

"NSWFB and Council continues to work with the Council for the improvement of fire systems to ensure the safety of residents in Auburn Central. In particular, NSWFB has taken the following steps to enhance safety of residents of Auburn Central:

- a) Development of a 'Prevention and Preparedness Initiative' to address fire safety in light of the cultural issues relevant to Auburn Central;*
- b) Upgraded response to the residential portion of Auburn Central. This involved, initially a double response for all calls (both residential commercial) until NSWFB was satisfied with the effectiveness of the fire alarms and sprinkler systems in the commercial portion of Auburn Central, The current upgraded response involves a double response for all calls from the residential portion of Auburn Central and a normal NSWFB response calls for the commercial portion;*

- c) Local fire fighting crews conduct pre-incident planning exercises;*
- d) NSWFB conducts constant monitoring of the site and the progress of the rectification works;*
- e) Continued community education including engaging local real estate agents to draw potential tenants attention to potential fire safety issues at Auburn Central;*
- f) NSWFB continues to review the fire systems of Auburn Central, has conducted an audit of the fire systems in June 2007 and has issued a number of emergency orders in relation to fire safety issues; and*
- g) NSWFB maintains regular contact with the Council to monitor progress in resolving the fire safety issues at Auburn Central.”*

Illegal construction in Residential Units

Since the completion of the residential section of Auburn Central, inspections of approximately 70 units in this building has revealed substantial modification to the units which are not compliant with the BCA. It should be noted that these modifications are the result of each individual owner / occupiers actions have occurred post developed / occupation approval. They do not related to the actions or conduct of the Developer or Councils Certification Unit during the approval process.

For example, the conversion of a 2 bedroom unit to an 8 bedroom unit through the addition of internal walls and floors. A number of units have been illegally converted from 2 bedroom units to 4 or 6 separate bedrooms with one kitchen.

Orders have been served on all identified illegal units. However it is anticipated many more will be discovered.

One such unit inspected by Council officers is described as follows:

“At approx 3-15pm on 29 January 2007, I attended unit xx (Auburn Central complex) in response to a report t from a resident, he said that the unit had a large number of bedrooms. Council officer Rob Lawrence accompanied me.

..... we approached the door and an Asian female answered the door. I introduced myself and showed my ID. I advised her of the complaint received by Council and asked could we inspect the premises. She agreed and allowed us entry. Upon entry it was observed that the unit was dark and was lit by artificial lighting. The hallway areas were extremely dirty with stained carpets and grime covering them. Cockroaches were observed on the floor, walls and ceiling.

The kitchen area could only be described as putrid, with the cupboards and walls dripping with oil residue, food scraps litter on the benches, sink and floors. Cockroaches were everywhere. The cupboards were numbered 1 to 6.

Adjacent to the kitchen, in an area that would have been the dining/lounge, walls had been erected to form three (3) individual rooms. The bedrooms in the unit totalled six (6) all the bedrooms were key locked and accessible by the rooms tenant only. The rooms were let individually. The female occupant advised that she paid \$90 for her room (4). The rent was collected by the landlord in person. Telephone/data cables ran from one central point to the bedrooms. The back up battery in the units smoke alarm had been removed.

[E.34]

In June 2008, a further report was made to Auburn Council that illegal construction was still occurring at Auburn Central with instances of 10 people living in a 2 bedroom unit.

In April 2008 the NSW Police conducted an inspection of the building following a number of criminal incidents. They commented *“that a large number of the units are being sub-let against the rules and regulations, which result in twenty or more persons residing in one unit.”*

Council has now written to all local real estate agents advising that they would be reported to the Department of Fair Trade if they promoted illegal building works .It was also reported to council that an inspection of all units has now been undertaken and orders served on all known illegal construction.

Council is granted powers to enter and inspect premises under section 118L of the Environmental Planning & Assessment Act. The exercise of power under this section

often poses some difficulty for councils in gaining entry to units as owners and occupiers are often difficult to contact. Council is required to obtain a search warrant or court order prior to gaining entry to any premises to inspect for illegal construction.

Alternatively, Council must obtain the consent of the owner/occupier before entering the unit. In many cases in Auburn Central this poses a difficulty where the owner is overseas or the occupants speak little English.

Council's compliance officers advised that over 80 units of the 400 inspected (Council has been denied access to 11 units) have had unapproved modifications to the units. This has resulted in overcrowding of the units and an increase in the risks to occupants from fire where smoke detectors, sprinklers and fire warning systems are altered or removed.

It is felt that the illegal alteration of units is not isolated to the Auburn Central development but is becoming widespread in the Sydney metropolitan areas. Other residential unit blocks in Auburn have shown the same trend. Council officers at Auburn advised that they have identified similar alterations to units in other residential buildings both within Auburn and other areas of Sydney.

The advantage for the owners of these units is that the unit can be rented to a multiple of people at a low rental, with the landlord receiving a higher overall rent for their property. The market rent for a unit in Auburn Central is \$350 per week. By renting out 6 rooms, at \$90 per week, the return to the landlord is \$540 per week.

It is prudent that these concerns are raised with the NSW Department of Planning to strengthen action to prohibit alterations to residential units that adversely affects the safety of occupants of residential development. It is also considered desirable to limit the number of occupants in a building as is the case with boarding houses but not residential premises.

A number of Penalty Infringement Notices (PINs) have been issued in respect of several residential units in Auburn Central. The PINs relate to unauthorised conversion of units – addition of mezzanine levels and addition of partitioning to create multiple small bedrooms etc.

There are real issues of fire and life safety posed by the unauthorised works. Council advised that they believe that the best way to pursue breaches is through orders tying the non-compliance to the BCA rather than to the development consent.

In pursuing non-compliances whether with the development consent or with the provisions of the BCA, there are evidentiary hurdles to overcome. These relate to the right to enter the units (to establish non-compliance in the first place).

The rights of Council staff to enter are curtailed under the Local Government Act and Environmental Planning and Assessment Act. It may be that a search warrant (issued on the entire building/strata scheme or on individual units) is necessary.

It is necessary to progressively inspect sections of the units, resolve non-compliance issues, and then reinspect converted units. Where non-compliance is found, legal action should be commenced.

Council has continued to undertake an inspection program of all units in the building. Council should consult with other councils on current systems of inspection of large residential units for compliance with fire safety requirements.

Building Occupants

There are 471 units in the Auburn Central developments. Of these, 180 units are owned by Hiken Pty Ltd. The main tenant is Woolworths together with a number of other smaller commercial outlets.

An inspection of the building revealed extensive vandalism to the residential common areas and this has required the strata body to undertake a comprehensive maintenance program. The extensive vandalism and maintenance of the buildings has had adverse impact on the fire safety of the building as it includes the removal of fire extinguishers, removal of fittings from fire doors, removal of fire doors, etc.

On 1 May 2008 the NSW Police wrote to the strata manager in regards to an inspection of Auburn Central. This was in response to a high number of criminal incidents that has been reported. They have identified the area as a “hot spot” location for crime with the following incidents being reported:

- Robbery, Robbery with weapon, Robbery in company,

- Break and enter, aggravated break and enter,
- Assault
- Malicious damage (graffiti)
- Steal motor vehicle
- Steal from motor vehicle
- Stealing

The letter reported numerous areas of concern with safety hazards being:

- The majority of entry doors into the area are broken, damaged or destroyed and not suitable to restrict access to unauthorised persons.
- Numerous windows are smashed and broken.
- Large amount of graffiti.

The Police conclude that most of the problem is occurring with multiple of people living in one unit which results in persons living in the building without security passes vandalising the doors and locks to gain entry.

A number of real estate agents manage units for property owners residing overseas. Consequently these absentee owners may not have been kept fully informed of the recent concerns raised by Council about the illegal constructions and the non compliance with the development approval and BCA issues.

Council has advised that they have taken the following action in regards to fire safety at Auburn Central:

- A general warning letter was sent to all occupants of the development advising that Council was concerned about the extent of illegal building works and the potential for overcrowding and therefore fire safety and egress issues. (It should be noted that this was issued in English only and did not consider the diverse source of languages other than English that are likely to be spoken by tenants and owners)

- Council met with NSW Fire Brigade's educational unit about developing an educational package/poster to display in the units to raise awareness about fire safety. These included bilingual information sheet, signs in all elevators, foyers and opposite elevator doors and translated placards on all fire doors.
- A general warning letter was sent to all registered unit owners of the building, advising that Council was concerned about the extent of illegal building works and the potential for overcrowding, fire safety and egress issues. However it has proven difficult to contact all property owners are based overseas.
- Over the past 12 months regular inspections of the units have been undertaken by Council with Notices of Intention (EP&A Act) being issued to have unauthorised partition walls and plumbing works removed and fire safety controls (smoke detectors) reinstated. It is anticipated that further notices will be issued as Council undertakes a staged inspection process of each residential block.
- Bilingual - Chinese/English signs have been displayed around the unit complex i.e. all access / entry points to highlight the fire safety issues.
- Regular inspections are conducted by Council as Notices of Intention expire, with a number of matters resulting in PIN's being issued and/or subsequently being heard in the local court for on going non compliance with Council's directions.
- The NSWFB's Cultural Services Officer was present during the inspections of Auburn Central in an effort to communicate the issues to the residents. Signs have been erected in community languages to educate and prepare the occupants in case of fire in the building.

NSW Fire Protection

In May 2008, the Building Industry Co-ordination Committee (comprising representatives from the NSW Department of Planning, Office of Fair Trade, Department of Local Government, Workcover Authority, Treasury and other areas of

Commerce) released a report seeking industry feedback on Fire Protection systems including recommendations to improve building fire safety.

The report makes a number of recommendations including:

- Reviewing the role of the NSW Fire Brigade in the approval and maintenance of fire protection systems and building fire safety matters.
- Improving the communication of building fire protection system information to designers, installers, authorities, contractors and building owners.
- Implementing an accredited or licensed person overseeing the design of fire protection systems.
- Review of the approval processes associated with alternative solutions under the BCA.

From the above, it is clear that the fire safety of Auburn Central was a result of a number of factors. The report goes to address some of the current statutory limitations that have hindered fire safety.

Auburn Central is an example of fire safety concerns in a large residential development. It highlights that the statutory requirement may not always address the fire safety concerns of a residential complex.

It is recommended that the Department of Local Government forward to the Fire Protection Systems Working Party a copy of this report. (Recommendation 4)

Floor Space Ratio

The Edwards Report of August 2005 looked at the issue of floor space ratio (the ground floor area divided by the site area) it found that the Development Control Plan (DCP) that was applicable when the Auburn Central development application was being considered permitted a Floor Space Ratio (FSR) of 3:1. Auburn Central was approved with a FSR of 3.75:1.

This departure from the DCP for the Auburn Central development was raised at the Council meeting on 4 September 2002 when dealing with DA 237/02. The report

drew councillors' attention to this departure and the potential for precedent this could set as well as the compromising of the DCP.

In making its decision, Council made no comments on the reason for the departure from the FSR ratio. Edwards expressed that it would seem reasonable that Council should have *"justified its decision in view not only of the precedent to be established, but also to allay any potential community concerns over the granting of this FSR concession."*

In interviews with former staff and councillors, no explanation could be provided why Council granted this concession.

Edwards cites a memorandum dated 2 March 2005 to the Director Urban Design from the Senior Development Assessment Officer, reported that the approved development (including section 96 modifications) was based on a FSR of 3.75:1.

[E.35]

He indicated that, based on an average apartment size, the excess FSR over the permitted DCP would equate to an additional 157 apartments. He qualified his comments to the extent that the dimensions on which his calculations were made were approximate and that *"no account had been made for the commercial component of the development"*.

In a letter to the Department of Local Government dated 2 March 2005 by then General Manager, David Lewis, which voiced concerns about Auburn Central, stated that *"the difference in FSR equates to a notional additional 157 apartments currently selling at \$330,000 for a two bedroom unit which in turn calculated to a value of \$51,000,000, bearing in mind that the figures used are only approximates"*. **[E.1]**

In a letter to Council on 30 July 2002 concerning the valuation of part of Queen Street, BEM Property Consultants stated that *"in our opinion the approval of an additional 0.6:1 in floor space over and above the approved 3:1 FSR will add in the order of \$5,000,000 - \$5,600,000 to the value of the total site."* **[E.36]**

Edwards in his report comments that *"whatever the notional value placed on the excess FSR, it would appear that a generous concession was made to the developer as a result of the approval."*

The increase is in excess of the DCP and it is difficult for Council to demonstrate why this departure occurred. Edwards concludes that *“Council has left itself open to criticism that it did not discharge its Charter obligations to have regard to the long-term and cumulative effects of its decision”*.

Pedestrian study

Edwards in his probity audit report into the Auburn Central looks at the pedestrian study. He notes that *“the development consent included a condition that a study on the impact of the Auburn Central development on potential pedestrian infrastructure on Auburn Town Centre.*

The study conducted Space Syntax, [E.37] concluded that:

- *“The project will significantly and adversely change the pedestrian infrastructure in the town centre.*
- *The project’s proposed “New Town Square” will not perform as a traditional town square.*
- *The project will increase an under-used and potentially unsafe urban environment.*
- *Auburn’s growth will not achieve its full potential with the present lack of detail in the urban consolidation policy. The policy is inclined to reinforce a growing trend for haphazard urban development.*
- *The Auburn Central project is insufficiently integrated with the town centre. A more integrated project would better realise an investment return for its mixture of land uses.*
- *Through spatial fragmentation and poor integration, the new retail facilities will miss an opportunity to enhance the value of the existing retail assets of the town centre.”*

Given the size and impact of the development, it would have been more appropriate that this study was done before the development application went to Council. Council and the community should have been made aware of the reports findings before Council issued a development consent or refusal.

Council also notes that the development consent included a condition that the developer pay prorated costs for the undertaking of a study of pedestrian desire line and movement within Auburn Town Centre.

The study was not presented to Council until three months after the consent and were reported orally to Council. No council report was supplied to Councillors and no report appeared in the business papers of council. No documents could be found by Edwards to show what action was taken by Council. Given the lack of documentation, it can only be concluded that no action was taken and the oral report was received and noted by Council.

In response to the draft report Councillors advised that they had no recollection of being presented with the findings of the Pedestrian study.

Council staff have an obligation to ensure that Council is fully informed prior to making decisions. The failure to have this information available to councillors at the time of determining the development application prevented councillors from being fully informed of the impact of this development on the Auburn town centre.

It is concerning the pedestrian study had not been done earlier given that the proposal to have a development on this site had been proposed since 1999.

It is noted that the cost of the study was to be shared between the applicant and Council. Ultimately this did not occur and Council paid for the total cost. This is commented on later in the report.

Missing Files

In 2001 Council implemented an electronic records management system. In interviews with former Council planning staff, they advised that this electronic system was not adopted fully by Council's planning department. Not all employees had documents entered into the electronic records system and no controls were in place to ensure that all staff rigorously recorded documents.

It was clearly evident from this investigation that a significant number of Council's documents relating to Auburn Central were missing. A request for all hard copy files revealed that 10 of the 21 files for the Auburn Central development could not be

located. There was no record of who had removed these files or any reason for their absence.

Council did provide a copy of all relevant documents, which it was able to locate for the Auburn Central development from Council's TRIM database record system on CD. Concern was raised in interviews with former staff at the poor state of filing in Council's planning department generally.

Council's Ombudsman advised that she had conducted an extensive internal investigation into the missing files. However this did not shed any further light on the missing files.

It is noted that while most files were available to Mr Edwards in early 2005 for examination during the probity audit, he notes (page 21 of the report):

"Throughout the course of my review I found it necessary to call for the production of documentation evidencing various decisions and transactions, etc. Invariably that documentation either was not available or needed to be reprocessed.

Indeed, during the earlier stages of this exercise, I specifically required access to certain highly relevant files only to be informed that they were "missing". Access to the TRIM database provided some of the detail needed but even that database appeared to be deficient, especially in relation to issues surrounding Auburn Central. (on requested file was subsequently located).

Of particular concern in respect of production of material was the procrastination encountered in furnishing responses to quite straightforward and – one would consider readily available information subject of my requests."

Robert Bulford, who conducted a review of the files as part of a Department of Local Government's review of Council's handling of the section 96 Application in relation to Auburn Central in 2005.

A detail assessment of the files was done as part of these audits and is commented on in their reports.

Sometime between late 2005 and 2006, when the files were required by ICAC, they were “lost”. It was not possible to determine how these 10 part files from disappeared from Council.

It is noted in the review of Auburn Central by Mr Robert Edwards in August 2005, that *“he has not received full co-operation by staff in providing requested documents”*. This has heightened concerns of wrong doing by Council staff. **[E.38]**

These files are expected to hold relevant plans, reports, letters and certifications that are critical to the history of the Auburn Central development planning process.

The fact the files are missing was the subject of a referral to the ICAC which conducted preliminary enquiries. The loss of Council records show failures in the Council records system and these deficiencies have been brought to the current General Manager’s attention.

The former General Manager, Ray Brownlee was asked to comment on the missing files, he advised via email **[E.20]** that:

“I am quite concerned with this complete lack of administrative practices and procedures.

The losing or removal of the files amounts to a serious breach of public confidence in our local government industry and as I am sure you will agree needs to be resolved to protect the good name of local government with all our communities.

For the record, during my tenure as General Manager at Auburn Council, I was not aware or was it ever brought to my attention that any files had been missing or lost for the Auburn Central development.

..... it is disappointing that these files are lost or removed, as the documentation, correspondence and reports that outlined and supported decisions of the Council and Council staff are not readily available to you for your investigation.”

As a consequence of the lack of documentation the investigation depended on other reports of council to build a picture on the background of Auburn Central, in

particular the *“Review and Probity Audit of the Auburn Central Development – August 2005 and the Review of the operation of the Planning and Environment Department – December 2005.*

It is recommended that Auburn Council conduct an internal audit of its record management system to ensure that it complies with the Records Management Act. (Recommendation 5)

Section 96 modifications

Due to the lack of documentation and files to substantiate all section 96 modifications the investigation relied on the report by the Department of Local Government in 2005 [E.39]. This report sheds some light on the information in the missing records and what section 96 modification occurred.

In 2005, Mr Robert Bulford, Executive Officer Reform, on behalf of the Department of Local Government, undertook a review of “council practices and procedures in respect of the modification of development consents”. [E.39]

In the review of 15 councils in NSW he found *“only one stand out example of a large number of modifications was noted in the review. This was at Auburn Council, and related to a very large and complex project called “Auburn Central” in the Auburn CBD. The project is understood to be in the course of construction. Some 18 modification applications were noted, coming in over a period covering just 3 years.*

Some 8 of these modifications occurred in the one year. All were ultimately approved, though what was approved was not necessarily what was originally applied for and represented negotiated outcomes.

The first modification was in fact approved at the same time as the original DA, which seems odd – it related to a deferred commencement condition. None of the applications could be said to have resulted in a substantial change to the development as originally approved, even the cumulative impact of all modification applications could not be said to have such an outcome.

Not all the modification applications were notified, and when notified not all were notified to the same persons or landowners notified in the first round of notifications

for the original DA. Some questions might arise as to this, but they would not appear to be a major issue in this instance.

No single modification application was considered to be contentious or likely to represent an example of concern”.

The review also reported a gradual increasing usage of section 96 modifications by Auburn Council from 2002 to 2004, this was markedly higher than other councils examined in NSW and was as follows:

Year	Number of Section 96 Applications	Percent of Section 96 applications against total development applications
2002	115	19.1%
2003	153	24.5%
2004	170	31.4%

While it is in order to submit section 96 modifications, the number is significant.

It appears that Council did allow a number of changes, which ignored concerns, raised by Councillors at the original development application stage. For example concerns about shadowing in the Auburn Town Square.

As discussed elsewhere in this report, the failure by Council to adequately levy section 94 contributions from one section 96 modifications resulted in a loss of \$311,146 [E.60] to the Council.

TERM OF REFERENCE 1 – FINDINGS

The investigation highlights a number of areas where the councillors and staff did not appropriately exercise their planning and development control functions in regards to the Auburn Central development.

The Wiggins Report [E.21] recommended significant changes to Council's Planning and Environment Department including records management, development application processes and changes to Council's certification processes. These recommendations were well founded.

The proposed Planning Reforms in NSW will assist in alleviating many of the issues raised. In particular, council certification and certification of building in excess of \$50,000,000.

In addition to these reforms, consideration is needed to be given to Council's acceptance of construction costs and a standard for councils to follow in estimating construction cost. This development showed some dramatic differences in construction cost from \$50 million at the time of submitting the development application, to \$158 million estimated by Council at the time. In response to the draft report Council states that *"The Final development costs of \$158,000,000 as assessed are more relevant than the \$95,000,000 upon which fees were assessed. The Australian Consulting Engineers webpage carries a reference to the Auburn Central development referencing Scott Carver, the project architects, quoting the development value of \$150,000,000. Adopting the webpage reference the unpaid fees amount to \$125,337"*.

I am unable to conclude whether the final amount of \$95 million is an accurate figure. As development application fees are derived from construction cost, this can result in a further loss of funds and opens the Council to possible corrupt conduct by council officials.

It was evident from comments made by Mr Gordon Edgar, who managed the DA process, that he felt professionally compromised in giving advice to councillors and that he failed to give advice to councillors because they were concerned that they would be ignored. However Council had engaged APT Planning for assessment of the DA and to report to Council. Councillors also engaged a design review panel to review concerns about the design of the building and at the approval of the DA removed 10 units from the DA. These were later put back through a section 96 modification.

In weighting the evidence gathered and determining a finding on the balance of probability, it is reasonable to conclude that:

The Auburn Central development had failures in its certification. It is clear that the final occupation certificate was granted without rectifying a number of deficiencies. This was attributed by the organisation failing to release the complexity in managing the development process of such a significant project such as Auburn Central. Of concern is:

- Failure to properly inform / provide Councillors with sufficient information to make the appropriate decision.
- Having an organisational culture where staff were not confident in their decision making.
- Creating a Certification Unit that was inexperienced and did not have the capability to manage a significant project such as Auburn Central.
- Failing to implement adequate safeguards to review and examine major decisions before being approved.
- The decision to entrust the responsibility of the project to inexperienced staff
- Poor records keeping.

TERM OF REFERENCE 2

Whether Auburn Council fulfilled its responsibilities as custodian and trustee of public assets in relation to all financial transactions related to the Auburn Central development (including the determination, collection and application of section 94 contributions, the determination and collection of other developer fees and charges and the disposal of council land).

Sale of Queen Street

Sale of Road to Quad Site Pty Ltd

Auburn Council had resolved to close Queen Street between Park and Harrow Road on five occasions (1984, 1986, 1988, 1991 and 1998).

In September 1998, the Council resolved to close Queen Street under section 117 of the *Roads Act* with all associated costs to be borne by the applicant (Quad Site Pty Ltd).

As part of Council's resolution the applicant was to fund a study into options and costs of improving the capacity of the railway bridges or construction of a new railway bridge at Auburn.

A traffic report was prepared for Scott Carver Pty Ltd in June 1998 on the basis of 460 residential apartments and a retail complex similar to Auburn Central. Other than traffic problems at the railway bridges, the report concluded that the closure of Queen Street would have little undue traffic impact.

Opposition was mounted against the closure of Queen St, by a number of residents and businesses including the Auburn Chamber of Commerce and the local Catholic Church. The local newspaper described the Council meeting as "*nothing less than a three ring circus*". Council ultimately resolved to support the closure with the possibility of leasing the land for 99 years.

However, in April 1999 the matter of the road closure was referred back to Council on the motion that:

“a. After consideration of all relevant issues regarding the proposed closure of Queen Street between Park and Harrow Road and the report to the council to this meeting on legal issue, Council resolves that it would not be in the best interests of the Auburn Community to either close or lease any portion of Queen Street and the applicant be advised accordingly.

b. Any development application in relation to the vacant land bounded by Queen Street and Vales Lane, which is commonly known as the Purcell site, received detailed community input before any final decision is made by the council.

c. The vacant land on the south western corner of the intersection of Park and Queen Street Auburn be the subject of discussion between the owners and council with a view to the land being acquired as part of a section 94 contribution in relation to any development application in respect to land bounded by Queen Street and Vales Lane Auburn.”

A division was called:

FOR

Councillors Curtin, Jones, Hockley, Cassidy, Murray, Lam, Borluk and Donaldson

AGAINST

Councillors Keegan, Chantiri, Saddick” [E.40]

The legal advice provided to Council was that if Queen Street was sold or leased on the condition that a major retail development would be guaranteed, it could not be depended on as Council could not compel a developer to build the retail development. Council was limited to either the granting or refusal of the development application only.

Councillor Curtin stated to the local paper, the Auburn Review on 14 April 1999 *“if the new shopping centre went ahead it would kill half of the existing shopping centre”*

Following this decision the then spokesman for the developer, Milad Raad said to the local newspaper, the Parramatta Advertiser on 14 April 1999 *“it was not possible to rework the proposal to include a supermarket and discount department store without Queen St’s closure”*.

Councillor Curtin who raised the proposal to keep Queen St open to traffic said *“council would lose control of the street, which would become a commercial development if it was sold or leased to the developer.”*

In June 1999, the development application proposal for the Quad development was presented to Council, this included an agreement to lease the road for the development. This was supported by Councillors Keegan, Lam, Borluk, Chantiri and Saddick.

Opposing the development, Councillor Curtin was reported in the Auburn Review on 9 June 1999 as considering that the DA *“was presented to council on the premise that council would be able to sell the street.”* [E.41]

The officer’s recommendation to Council was to refuse the development application. [E.42] The DA report recommended refusal for several reasons including that:

- it did not comply with the Auburn Planning Scheme, SEPP 1 or Draft Town Centre strategy for Auburn,
- the proposed height of the residential component is excessive (7 storeys),
- the design of the retail area is poorly integrated with traditional shopping areas, and
- the proposal will give unreasonable amenity impacts on privacy, overshadowing and visual bulk.

Councillor Curtin was reported in the Auburn Review newspaper on 9 June 1999 as stating that the resolution *“...failed to address many major issues including traffic, engineering reports relating to Auburn’s railway bridges, health and building issues such as fire safety, floor space ratio and the contamination of land.”* [E.41]

At the Council meeting of 7 July 1999 a rescission motion was moved by Councillors Curtin, Jones and Hockley to refuse the development application. The absence from the meeting of 5 councillors, who had previously supported the approval allowed for the rescission to pass.

The Council then moved to refuse the development approval application for Quad Site Pty Ltd. [E.43]

Following this decision, the applicant lodged a Class 4 application to the Land and Environment Court to have a development consent granted to Quad Site Pty Ltd.

On 11 October 2000, by consent of the parties, proceedings were dismissed when approval was granted by the Council to the development application.

The Council agreed to the development consent. This related to a mixed commercial and residential development including the Council roadway (part of Queen Street).

This development subsequently did not proceed and the site was sold with the consent for the development.

While this proposed sale related to the Quad site development many of the issues are reflected in the Auburn Central development sale of Queen Street.

Sale of Road - Auburn Central

In early 2002, the now owners of the land, Holdmark Developers Pty Ltd, submitted a concept plan for the site to council, prior to submitting a formal development application.

This was placed on public exhibition from 15 May to 5 June 2002. This included a public information session attended by approximately 85 people.

A Traffic Impact Statement was prepared for the closure of Queen Street; this identified public transport and parking concerns.

In August 2002 the Auburn Local Traffic Committee recommended that it had no objection to the closure of Queen Street and that the Traffic Management Plan prepared for the closure be forwarded to the Roads and Traffic Authority (RTA) for RTA consent to the closure of the road.

Prior to the determination of the DA, councillors were provided with briefings on the development. The briefing on 15 August 2002 looked at the closure of Queen Street and a study of pedestrian movement in the proposed Town Square due to the road closure.

The briefing advised councillors that the closure of Queen Street would have an impact on the traffic movements in at a number of streets in the Auburn area. A number of design modifications were proposed.

In selling a road the *Roads Act 1993* section 43 (4) states:

“Money received by a council from proceeds of the sale of the land is not to be used by council except for acquiring land for public roads or carrying out road works on public roads.”

Accordingly any proceeds of the sale of Queen Street must be placed in reserves and only spent on public roads.

The Roads Act further defines a road as including:

*“(a) the airspace above the surface of the road, and
(b) the soil beneath the surface of the road, and
(c) any bridge, tunnel, causeway, road-ferry, ford or other work or structure forming part of the road.”*

The closure of the road was subject to the approval of the Minister for Land and Water Conservation at the time of the closure and sale.

Valuation of Land

As detailed in this report, the sale of Queen Street (between Park and Harrow Roads) has been under consideration by Council since 1998.

Council had proposed to sell the street for a previous development.

Prior to this decision in 1999, Council instructed the Australian Valuation Office to provide a market price valuation of that part of Queen Street, Auburn between Harrow and Park Roads for sale to the owners of the property on both sides of Queen Street. This was for inclusion in a proposed commercial/ residential complex development based on the combined area.

Australian Valuation Office (AVO) put the valuation at \$3.6 million. [E.46] Due to the Quad site not proceeding, no further action was taken to sell or lease Queen Street.

In late 2002, three valuations were obtained for the same land – two valuations by Council and one by the applicant /developer (Holdmark Developers Pty Ltd).

The council valuations were from Blackall Eccleston McBurnie (BEM) and the AVO.
[E.36] [E.44]

Council instructed BEM to provide a valuation on either sale or lease of the part of Queen Street. BEM advised against leasing that part of Queen Street to the applicant/developer due to disadvantages of such method far out weighing the advantages.

The BEM valuation for the sale of the street was \$3.645 million. This valuation did not take into account 'marriage value element' (this being factor that land will increase in value if the land is incorporated into a larger block).

In addition to determining valuations on the individual sites in the proposed development, BEM determined a value of the three sites when consolidated. Their view was that the consolidated site is more valuable than the sites individually.

This increase in value is referred to in valuation terms as the marriage value element (MVE). The increase, MVE, is then shared amongst the three sites. The value of the road becomes its value as an individual site plus its share of the MVE. The share of the MVE attributable to each site usually depends on the negotiating position of each party but BEM was of the opinion that the road should receive a minimum value of 50% of the MVE.

"Holdmark were advised of the outcome of the valuation which was in the range of \$7.0 to \$9.0 million depending on the share of the MVE (50% to 75%) attributed to the road." **[E.36]**

On 30 August 2002, Council instructed AVO to provide an update on their 1999 valuation, which valued the road at \$3.6 million. The updated valuation was \$9.425 million **[E.44]**.

The increase in valuation was based on the rise in the value of development sites in Auburn and the increase in the number of residential/commercial units in the Auburn Central development compared to the previous proposal by the Quad site development from 350 units to 462 units.

On 1 September 2002, Holdmark Developer Pty Ltd engaged Mr John Waugh, a registered valuer from Collier International Consultancy and Valuation Pty Limited, to value the street.

Colliers state in their report that various factors had occurred during the life of the DA which had an adverse impact on the value of the development, in comparison to the prior approved DA and that these should be taken into consideration when determining a value of the road. [E.45]

Holdmark had previously expressed these same arguments during negotiations. These arguments were that the value should be reduced by the following factors –

- Cost to construct the Town Square - \$1,000,000.
- Additional construction costs and professional fees due to Council redesign requirements not incorporated in original DA - \$19,000,000.
- Additional community parking in the latest DA - \$2,500,000.
- Lost of commercial FSR of 1,700 sq.m. in new DA - \$900,000.
- Reduction in Section 94 contributions as the Town Square is being funded by Holdmark and is a community facility - \$2,200,000.

Colliers also contend that in allocating any MVE premium, it should be shared by each site in proportion to each lot's area. This would result in the road attracting 14.6% rather than a minimum 50% as suggested by BEM

In the Council business paper dated 2 October 2002, council officers noted that *“the ‘detriment’ factors advanced by Colliers can be challenged on a number of grounds, which were put to Holdmark and Colliers. Some of the counter views put were –*

- *The relevance of comparing the old DA conditions with the latest one can be questioned in the current valuation exercise.*
- *Why should the cost of redesign requests to comply with Council's planning requirements necessarily be offset against the value of the road?*

- *While a Town Square does provide public open space it is not the only type of open space envisaged in the Open Space Contribution Plan.*
- *BEM noted that the original DA provided for an FSR of 3.6:1, well in excess of the DCP's 3:1. While this may be reduced as a result of Council's condition to reduce the height of some of the buildings, the eventual FSR will exceed 3:1 and this is a concession that adds to the value of the overall site. This could be viewed as a concession for additional public benefits that this DA offers compared with the prior DA.*
- *Council approved car parking in the latest DA at a level less than the DCP.*
- *"At the end of the day, the value will be what the buyer is willing to pay and what the seller is willing to accept."*

After negotiations and a review of all valuation submissions, a value was calculated using the BEM method and sharing the marriage value element premium 50/50 between Holdmark and Council. Although Council was clearly in a strong negotiating position the 50% share, despite being at the minimum recommended by BEM, was seen as some concession to public benefit issues.

The calculated value of \$7,100,000 was advised to Holdmark. Holdmark expressed to Council that such a price together with the increase in Section 94 contributions will make the project not viable.

As noted above, Holdmark felt that their feasibility study was based on the old Plans and that they believed they should pay in accordance with those conditions. Holdmark offered Council \$6,100,000 as full payment of Section 94 contributions and compensation for the road.

Under the new Section 94 Plans the contribution was estimated to be \$4,890,000. Under the old Plans it was \$3,660,000.

Council resolution to sell Queen Street

At the Council meeting 4 September 2002 Council considered the development application separately to the sale or lease of part of Queen Street. The area to be sold was the stratum below the road.

Council resolved that:

“subject to approving the Development Application 237/02 council resolving to close that part of Queen Street between Park and Harrow Roads and the Minister’s approval to close the road –

- a) Council sell to the applicant, or to a party designated by the applicant, those strata within the closed road area identified in the development application as being used for underground car parking, retail use and associated service areas with the applicant to reimburse all of council’s costs associated with the sale;*
- b) Delegated authority be given to the General Manager to negotiate and complete the sale; and*
- c) Approval be given for Council’s seal to be affixed to any documents related to the sale of the land” [E.18]*

The resolution granted delegated authority to the General Manager to sell the road without any specified price. For this reason, it was prudent that the General Manager referred the matter back to council in October 2005 to set a sale price.

It was further resolved that:

“No work associated with this consent is permitted to be undertaken underneath, within or above the road reservation of the section of Queen Street between Park Road and Harrow Road until:

- a) The applicable statutory requirements under the Roads Act are fully satisfied;*
- b) Auburn Council and the developer have come to a formal agreement in relation to the leasing/purchase of the stratum lots to be created underneath the Queen Street road reservation;”*

Council Resolution set a sale price for Queen Street

A report was put to Council for determination on 2 October 2002 (ten Councillors were present at that meeting) that informed that Council and Holdmark Developers

Pty Ltd had been unable to reach agreement on the sale price of the sale of part of Queen Street Auburn

The valuations received (2 by Council and one by Holdmark) were reported along with pertinent comments from each.

Council staff, on advice from two valuers, proposed a valuation on the road at \$3,650,000 together with an allowance for “marriage value element” of \$3,520,000. The marriage value element was the increase in the value of land by virtue of the land being incorporated into a larger block of land area giving the land a greater value. This gave a total value for the sale of Queen Street as \$7,170,000 as the proposed sale price of the road.

The report also detailed that section 94 contributions were calculated at \$4,890,000. In response to the draft report, Trevor Brown, Director of Corporate Services, in October 2002, advised that in writing the report he had only included the section 94 *“to clarify the components of Holdmark’s offer of \$6,100,000.At the time of writing the report I did not consider that the section 94 contributions had any relevance to determining a value of the land.”*

At that meeting, then General Manager, Mr Brownlee, was absent and his position was taken by Trevor Brown. **[1.8]**

The Report’s recommendation was:

“Council determines the proposed sale price of the section of Queen Street between Park and Harrow Roads.”

The Council resolved to discuss this matter in closed session. There are no notes related to the discussion that took place in closed session.

When the Council moved back into open Council it resolved:

“Moved Councillor Curtin, seconded Councillor Saddick, that Council authorise the General Manager to negotiate with Holdmark Developers Pty Ltd for the sale of that part of the road comprised of Queen Street for a price of between 6.1 and 6.7 million dollars (inclusive of the Section 94

contribution); and that should a satisfactory resolution not be negotiated, the matter be referred back to the Council for determination.”

An amendment was moved Councillor Balendra, seconded Councillor Simms *“that the subject sale price be a minimum of 3.5 million and a maximum of 4 million dollars (exclusive of the Section 94 contribution).”*

The amendment was put and LOST.

The motion as moved by Councillor Curtin was then put and was CARRIED. [E.47]

It is noted that at the council meeting of 16 October 2002 Council noted that Councillor Simms voted against both the motion and amendment in Minute No. 599.

Mr Brown advised *“ When the inclusion of the proposed sale price of the section 94 contributions was introduced at the Council meeting, I advised Council that the matter to be decided was the value of the land and the Section 94 contributions were a quite separate issue,”*

On 3 October 2002 a letter was issued by Council to Holdmark Developers Pty Ltd confirming:

- A “telephone discussion regarding negotiations on the sale of Queen Street between Harrow and Park Roads.” Advising that *“as discussed with you (Mr Sarkis Nassif of Holdmark) have agreed to pay the amount of \$6.7 million which will include the cost to acquire the relevant section of the road and Section 94 contributions of \$4.89 million related to the development.”*
- Advising that “any increase to the Section 94 contribution as a result of changes to the number or mix of the dwellings would be payable in addition to the \$6.7 million.”
- The letter had provision for Holdmark Developers Pty Ltd to sign confirming agreement with the figure of \$6.7 million. [E.48]

The sale price included section 94 contributions. This does not relate to the sale of land and is part of the requirements under the Environmental Planning & Assessment Act. The sale of a road usually does not include section 94 contributions as they are separate statutory charges under the Environmental Planning &

Assessment Act, and are influenced by section 96 modifications which may occur during the construction of the development. This was confirmed by Mr Brown in writing the report and advised that *“I had no reason to expect that Council would resolve to incorporate the Section 94 contributions in the sale price.”*

The Director Corporate Services, in the report to the Council meeting on 2 October 2002 stated that the section 94 contributions applicable to the development would range in amount from \$3,660,000 under the old contribution plans to \$4,890,000 under the new plans. Mr Brown advised *“The amount by which Section 94 had increased between old and new plans was included as this was advanced by Holdmark as of some relevance in determining their assessment of the viability of the project.”*

The Edwards report found that a negotiated amount of \$6,700,000 was ultimately arrived at and settlement took place on 9 March 2004.

Edwards also notes in the report to council the Director drew attention to the discussions taking place between the developer and the Director Urban Design and Planning in respect of possible Section 96 applications to modify the consent. He further stated in the report that the application *“may vary the number of dwelling units proposed.”* No qualification of the amount of contributions likely to be required in respect of any modified consent was included in the report.

Council's resolution did not specify the amount of section 94 contribution that would apply, only that it was between \$3,660,000 and \$4,890,000. The lack of a clear visibility to the amount for section 94 would indicate two scenarios were applicable at the time of the sale.

1. Sale of land was \$3,040,000 based on S94 of \$3,660,000
2. Sale of land was \$1,810,000 based on S94 of \$4,890,000

These figures did not include future section 94 contributions from section 96 modifications to the building, which increased the amount of section 94 contribution that would have been due.

It was taken that the amount of section 94 to be the higher contribution communicating to the developer that the amount required covered the cost to

acquire the land and the section 94 contributions of \$4,890,000. The contract of sale was preceded on that basis.

However, the consent issued on 6 November 2002 after the sale of Queen Street. Council assessed the section 94 contribution required as totalling \$5,767,715 (plus indexation) as follows: **[E.49]**

Open Space	\$1,599,649
Community Facilities	\$488,371
Town Centres	\$3,679,695
Total	\$5,767,715

Council staff have an obligation to present information to a council when making a significant financial decision that it is reliable and fully informs councillors prior to making decisions.

The failure of Auburn Council staff to fully inform councillors of relevant matters meant that the section 94 contribution was calculated on 450 units. The actual consent was for 452 units.

The number of units increased to 462 after a section 96 modification was approved on 20 August 2003. This was increase on 15 October 2003 by an additional 9 units to 471 units.

Council staff negotiated a fixed sale price of the land at \$1,810,000 (based on section 94 contributions of \$4,890,000) however the official minutes of the meeting did not specify any actual net price.

On 8 March 2004 payment of \$1,991,000 (\$1,810,000 plus \$181,000 GST) was received from Hiken Group Pty Ltd (the owners of the building) for purchase of land in Queen Street Auburn.

Council's costs incurred in connection with the sale of the land were \$23,230.15, which was invoiced to the applicant on 8 March 2004.

The financial records of Council shows that \$1,810,000 was placed in Council's externally restricted funds for the sale of roads. These funds were later used to fund the western overbridge. **[E.50]**

Despite what was presented to the Council meeting on 2 October 2002, the actual total section 94 contributions for Auburn Central development including all additional section 94 contributions from section 96 modifications was \$5,923,049.35 (as per council's section 94 summary dated 25 February 2005). **[E.51]** Hiken paid \$1,810,000 plus GST based on the estimated section 94 contributions in October 2002 (\$4,890,000).

The average of Council's two independent valuations was \$8,000,000. Prior to the Council resolution they initially offered the land for sale for \$7,100,000.

Council clearly sold this land at a greatly reduced price. Further, it provided the developer with interest free instalment payments. This is discussed later in the report.

Interviews conducted with current Councillors Lam, Curtin, Cassidy and Simms, the only remaining councillors who were on council in October 2002, shed little light on the reason why Council adopted a sale price being significantly less than the Council valuations.

Councillor Curtin, the mover of the motion, stated in an interview with me that he moved the sale price as \$6,700,000 inclusive of Section 94 contributions. He admitted *"we should've got further information regarding the sale of the road before moving the motion."* **[I.9]**

Councillor Curtin admitted that he knew that *"There was a valuation of \$9,420,000 and another between \$7,000,000 and \$9,000,000."* He further stated that he *"does not know how this figure for the sale of Queen Street"*. Councillor Curtin advised that he did not understand the reasoning behind the amount moved.

In response to the draft report, Councillor Curtin states, *"I have no knowledge of receiving any valuation documents or being advised of the valuation process."* He further commented that, *"There was no reference to the figures discussed in the negotiations with Holdmark or any comments other than what appeared in this*

section of the report. Bearing these in mind the report went onto say they had approached the Australian Valuation Office which had completed a valuation of the road in regard to the prior DA in December 1999, they were asked to quote on an updated valuation. I think it may have been prudent to obtain an updated valuation before staff commenced negotiations with Holdmark. Council was not privy to the range of valuation figures discussed with Holdmark, maybe if Council had known what they were this perhaps would have assisted in their decision.”

In considering Councillor Curtin’s comments, however it appears that this information was provided to councillors and that the Acting General Manager had spoken to his report. It would have been prudent that any concerns about the sale of a public asset would have been raised prior to the council meeting or seek that the matter be deferred until additional information is obtained.

Councillor Simms gave an insight to her opposition to the sale price and stated in an interview that she was concerned about the inclusion of section 94 contributions.

[I.10]

When asked why she did not seek to rescind the motion she advised she did not believe that she could get a seconder.

Clr Simms stated, “A significant reason for my seconding of Councillor Balendra’s amendment, even though she expressed to me that she felt that the amount was still inadequate., was because it was Council practise not to record motions which were not seconded. Councillor Simms advised that this was the reason why she did not move a further amendment to increase the sale price of the land. I felt there was no chance of a seconder and the motion would not be recorded anyway.”

She further advised that she did not seek to rescind the motion because she needed 3 signatures and there were only 2 possible votes for a rescission.

The amendment to the motion sought an increase in the sale price to raise the price to a minimum of \$3,500,000 and a maximum of \$4,000,000 (exclusive of section 94 contributions). This was lost.

In questioning Councillor Lam [I.11] about her understanding of why the sale price was put at \$6,700,000 inclusive of section 94 contributions she stated, *"That she could not remember"*.

Councillor Cassidy, [I.12] also could not remember about the sale price.

The business paper for 2 October 2002 states that *"At the end of the day, the value will be what the buyer is willing to pay and what the seller is willing to accept."*

The report failed to remind councillors of their obligations under section 8 of the Charter *"to bear in mind that it is the custodian and trustee of public assets"*.

Mr Brown [I.8] who was acting General Manager at the meeting due to the absence of the General Manager, Ray Brownlee, could not give a reason why the Council nominated a lower price. Mr Brown has remarked in his response to the draft report that *"Council made the decision on the sale price. I believe it was a poor decision....The Council knew what the relevant amount of section 94 contribution payable was when they made the decision. The Councillors who moved the amendment clearly showed that there was no confusion over determining a value for the land as a separate issue to section 94."*

Mr Jorde Frangopoles, Director, City Services, spoke to the report and advised Council that the section 94 contribution had nothing to do with the purchase price of the road.

Ms McCredie, Director of Planning [I.5] who was at the meeting advised that there was little debate. This was confirmed by Mr Brown and Mr Frangopoles, Director, City Services who was also present. However there was an amendment which suggests that some debate did occur. She felt that the councillors should have deferred this matter until the General Manager was present. The former General Manager, Ray Brownlee, in an interview conducted during the investigation stated that *"he was not happy with the sale price and believed that the correct price for the sale should have been at least \$7,000,000"*. Mr Brownlee raised concerns during the interview that he was powerless to act and that his role was to put in action the resolutions of Council. [I.15]

In response to the draft report he advised that *“the next day he was advised of Council’s resolution regarding the sale price of Queen Street and the inclusion of the Section 94 Contributions in the sale price. I was surprised and not happy with this decision of the Council. No Councillor had at any time prior to the Council meeting raised with me the issue of including the section 94 contributions in the sale price of Queen Street. If any Councillor had done so I would have advised in the strongest possible terms that it was not the correct action and Council must refrain from doing so. I made immediate representation to the Mayor expressing my concerns about the Council resolution and the implications of the decision. I urged that there be a rescission motion. Despite my representations, no rescission motion was lodged by any councillor regarding this matter.”*

Former Senior Development Officer, Mr Edgar, the officer responsible for the assessment of the development application for Auburn Central, stated in an interview [1.5] that the developer had approached him suggesting that the sale of the land should include the section 94 contribution. He advised that he emailed the General Manager that this should not be done as section 94 contributions are separate.

The former General Manager, Mr Brownlee agreed that section 94 should be treated separately and that the sale price should have been at least \$7 million

Whatever the reason for the lower sale price it is apparent that Council failed in its responsibility to fully appreciate its role as custodians of public assets.

The councillors showed a lack of insight in asking questions that clarified any information that they did not understand .

In response to the draft report Auburn Council, it is believes that the sale and contributions should be as follows:

Land Valuation	\$7,000,000
Contributions	\$5,923,049
Unraised contributions	\$ 311,146
Less Contributions to overbridge	\$1,810,000
Total	\$11,424,195

Council's charter sets principles for Council to carry out its functions. This is not solely the elected body, but the employees of Council as well.

Funds used from the Sale of Queen Street

In selling the road the *Roads Act 1993* section 43 (4) states:

"Money received by a council from proceeds of the sale of the land is not to be used by council except for acquiring land for public roads or carrying out road works on public roads."

The Financial Reports of Auburn Council in Note 6 External Restricted funds show that an amount of \$1,810,000 transferred to the Sale of Roads Fund.

A review of Council records show that the 2004/2005 reserves in the working papers attracted \$1,810,000 (plus \$181,000 GST) for the sale of Queen Street. These funds were used to fund the western overbridge expenditure.

It can be clearly demonstrated that an amount of \$1,810,000 was spent on the construction of the Western overbridge.

Probity Report on the sale of part of Queen Street

Following the release of the Robert Edwards report, Council commissioned a probity report of the sale of Queen Street by Tomesetti. **[E.52]**

Tomesetti concluded that:

"It would appear that Council sold a parcel of land that it owned to the developer of Auburn Central. Prior to the sale it received two independent valuations of the land that it was to later sell. One valuation valued the land in the sum of \$9.425 million and the other valued the land at "\$7-9 million".

The S94 contributions to be paid by the developer pursuant to the Environmental Planning and Assessment Act 1979 as a condition of the development consent were calculated by the council staff to be \$4.89 million. There are no calculations or records made available to me which reveal exactly how this sum was arrived at.

The development consent that issued on 6 November 2003 provided for payment of contributions in the sum of \$5.767 million. I have been unable to determine why council resolved that the s.94 contributions should be paid in the latter amount, notwithstanding the council staff assessment of the former amount.

The Council owned land was sold by the Council to the developer for \$6.7 million or \$1.81 million inclusive of s.94 contributions. The sale price was in an amount significantly below one valuation and below the other. Of critical concern is that this price however was inclusive all s.94 contributions to be paid by the developer to council as a condition of development consent.

Whereas the developer should have paid the Council at least \$12.76 million for the land and s.94 financial contributions it has been required to pay only \$6.7 million. There appears to have been a \$6 – 8 million dollar windfall given to the developer at the expense of Council and local ratepayers in these circumstances. The terms of payment given to the developer were also very favourable.

- 1. I also note that the developer was given development consent for a development that was substantially in excess of the permissible FSR under Council's planning instruments. The Audit Report identifies that the development was approved with a FSR of 3.75:1 whereas what was permitted by council's DCP was a development with a FSR of only 3:1. No documentation could be located or produced in which Council was able to demonstrate the justification for this concession.*
- 2. The Audit Report did not investigate or attempt to attribute motives for the actions of Council and its staff. If there was a proper motive behind what has occurred I have not been made aware of it. Accordingly, I can only draw the inferences that I have on the material briefed to me. If there is an innocent explanation of what has occurred then I reserve the right to alter my opinions."*

This report further reinforces the evidence collected while conducting this investigation. It could be concluded that the Auburn Central development may have significant benefit for Auburn. However, the lack of documentation to substantiate this makes it difficult to conclude whether the loss of funds equates to the community gain of equal value or greater value from the development.

In his response to the draft report the former General Manager, Ray Brownlee, rejects that favourable concessions were provided and notes the following benefits for Council and the community were obtained from the development:

- A) by deferring the operation of the Auburn Central development consent council was provided with a \$1,230,000 financial benefit from section 94 contributions
- B) sold the road at \$6,700,000, a \$600,000 benefit over the lower price of \$6,100,000.
- C) Increased section 94 Contributions when mix of dwellings change \$1,081,128
- D) Upgrading the western overbridge \$3,800,000
- E) Dedicating town square to council \$1,000,000
- F) Installing a stormwater detention tank \$2,000,000
- G) Building 6 new roundabouts \$360,000
- H) Installing smart pole lighting \$180,000
- I) Providing underground electricity \$100,000
- J) Reconstruction of Vales Lane \$1,200,000
- K) Constructed second set of stairs in Building E \$500,000
- L) Queen Street reinstatement bond \$2,700,000
- M) Imposing fines on Holdmark \$47,000

Also the strategic benefit of a major attractor of Woolworths and Big W to the viability of Auburn Town Centre and addition of parking to the Town Centre.

Early commencement of works on Queen Street

At the meeting on 2 October 2002, Holdmark sought to progress works on the development by undertaking works in the Queen Street road reserve prior to the approved closure of the road by the Minister and the sale by Council.

The method proposed by Holdmark's Solicitor was for Council to consent to works being undertaken under Sections 138 and 139 of the Roads Act, this being:

138 *Works and structures*

(1) *A person must not:*

- (a) erect a structure or carry out a work in, on or over a public road, or*
 - (b) dig up or disturb the surface of a public road, or*
 - (c) remove or interfere with a structure, work or tree on a public road, or*
 - (d) pump water into a public road from any land adjoining the road, or*
 - (e) connect a road (whether public or private) to a classified road, otherwise than with the consent of the appropriate roads authority.*
- Maximum penalty: 10 penalty units.

(2) *A consent may not be given with respect to a classified road except with the concurrence of the RTA.*

(3) *If the applicant is a public authority, the roads authority and, in the case of a classified road, the RTA must consult with the applicant before deciding whether or not to grant consent or concurrence.*

(4) *This section applies to a roads authority and to any employee of a roads authority in the same way as it applies to any other person.*

(5) *This section applies despite the provisions of any other Act or law to the contrary, but does not apply to anything done under the provisions of the Pipelines Act 1967 or under any other provision of an Act that expressly excludes the operation of this section.*

139 *Nature of consent*

(1) *A consent under this Division:*

- (a) may be granted on the roads authority's initiative or on the application of any person, and*

- (b) may be granted generally or for a particular case, and*
 - (c) may relate to a specific structure, work or tree or to structures, works or trees of a specified class, and*
 - (c1) in relation to integrated development within the meaning of section 91 of the Environmental Planning and Assessment Act 1979, is subject to Division 5 of Part 4 of that Act, and*
 - (d) may be granted on such conditions as the appropriate roads authority thinks fit.*
- (2) In particular, a consent under this Division with respect to the construction of a utility service in, on or over a public road may require the service to be located:*
- (a) in such position as may be indicated in that regard in a plan of subdivision or other plan registered in the office of the Registrar-General with respect to the road, or*
 - (b) in such other position as the roads authority may direct.*
- (3) In particular, a consent under this Division with respect to the erection of a structure may be granted subject to a condition that permits or prohibits the use of the structure for a specified purpose or purposes.*

Council then applied to the RTA under Section 116 of the Roads Act for consent to regulate traffic on the road by means of barriers or notices, to enable the works to be carried out.

Council's consent to the DA 237/02 on 4 September 2002 states that:

"No work associated with this consent is permitted to be undertaken underneath, within or above the road reservation of the section of Queen Street between Park Road and Harrow Road until:

- a) the applicable statutory requirements under the Roads Act are fully satisfied;*

b) Auburn Council and the developer have come to a formal agreement in relation to the leasing/purchase of the stratum lots to be created underneath the Queen Street road reservation; and

c) Consent to DA 159/02 for the excavation of Queen Street has been granted by Council.” [E.46]

Council’s solicitors were asked to advise on the proposal and made the following comments –

“Although probably unlikely, it is nevertheless possible that the Minister may decline to approve the road closure. Obviously there are serious consequences should works be undertaken under the road and the Minister decline the closure. Section 116 could be utilised for a temporary closure subject to the required processes

being undertaken and RTA approval.” [E.53]

Council agreed to support Holdmark’s request with the condition that any agreement must provide that restoration of the road to Council’s satisfaction should be made if closure is refused by the Minister. Appropriate and sufficient bonds and guarantees were also put in place to ensure that this restoration was achieved at no cost to Council.

Before progressing its application under section 116 of the Roads Act, Council required full details from Holdmark as to the work and actions planned on the road during any temporary closure period and how traffic and pedestrian movements were likely to be affected.

If Council proceeded with an application to the RTA it must then advertise the proposal for a minimum of 28 days. Council determined that, as the proposed permanent closure had been widely advised to the community previously, the RTA should be asked if the advertising period could be dispensed with.

At the Council meeting on 2 October 2002 council resolved as follows [E.53]:

“MOVED Councillor Appleby, seconded Councillor Saddick that:

Subject to Council's prior resolutions in regard to works in the road reserve being complied with:-

- a) the General Manager be given delegated authority to complete an appropriate agreement with Holdmark Pty Ltd giving consent to undertake works in Queen Street between Park and Harrow Roads in accordance with Section 138 of the Road Act;*
- b) the General Manager be given delegated authority to apply to the RTA for consent in accordance with Section 116 of the Roads Act to regulate traffic to enable the agreed works in Queen Street to proceed;*
- c) subject to the agreement of the RTA, the required advertising period under Section 116 (2) of the Roads Act be dispensed with given the prior public awareness of the proposed permanent closure of that section of Queen Street;*
- d) Council's Seal be affixed when required to documents in relation to this matter; and*
- e) the Council provide appropriate community notification of the temporary road closure.*

An amendment was moved Councillor Balendra, seconded Councillor Simms that:

The recommendation be adopted subject to 28 days public notice being given of the temporary road closure.

The amendment was put and was LOST.

The motion as moved by Councillor Appleby was then put and was CARRIED.

Councillor Simms asked that her vote against the motion be recorded."

This motion did not rescind the previous consent condition on approving DA 237/02 on 4 September 2002, that:

“No work associated with this consent is permitted to be undertaken underneath, within or above the road reservation of the section of Queen Street between Park Road and Harrow Road until:

a) the applicable statutory requirements under the Roads Act are fully satisfied;”

The closure of the road took effect on 26 September 2003, almost 12 months from the date that Council resolved to close and sell the road to Holdmark.

Mr Brownlee in response to the draft report commented that the 2 October 2005 resolution superseded the 4 September 2002 resolution.

Lease of part of Auburn Central Town Square

In closing Queen Street between Harrow and Park Roads the ground surface level and air space above was retained by Council and the below ground area was sold to the developer for car parking and retail development.

The former road reserve became the Auburn Central Town Square.

A condition of the consent for the Auburn Central development provided that the developer transfer to Council a part of the Company's land for inclusion within the Town Square. This area of 177 square metres abuts the shops in the lower Town Square on the southern side of the former road reserve.

The developer (Hiken Pty Limited) sought a lease over this area to facilitate outdoor dining, public thoroughfare to the shops and access for maintenance of the area.

Negotiations took place between Council and Hiken in relation to the lease. It was proposed that in return for the lease over the transferred portion for a period of 99 years, the developer pay a nominal rental and undertake cleaning of the Town Square from Harrow to Park Road.

Normally the cleaning would be Council's responsibility as the area remains in Council's ownership. However the lease agreement included a condition to clean the Town Square, including the emptying and cleaning of garbage bins, footpath washing as required, sweeping up and removal of litter and graffiti, cleaning of street

furniture, removal of rubbish from landscaped areas and bi-annual cleaning of moss affected areas.

While the draft lease was for a period of 99 years, the then Acting General Manager, David Lewis proposed that this be reduced to 30 years.

In a file note dated 21 October 2004, David Lewis wrote:

“Telephone conversation with Sarkis Nassif 09:10 21/10/04

Following a tense meeting with Mr Nassif on the 19/10/04 in which I indicated Council could not agree with a 99 year lease for floor space, Mr Nassif contacted a number of Councillors and the Local Member in relation to this agreement.

After receiving advice I withdrew the report to Council on the matter because it became apparent to me that Council had given a commitment to the 99 year period.”[E.54]

The lease provides that it can be terminated if the Company fails to meet the requirements set out in the cleaning agreement.

Following a review of the discussions and negotiations that took place with representatives of Hiken it became apparent that Hiken reasonably believed that a commitment to a lease of 99 years had been made. Accordingly a 99 year lease was recommended to the Council meeting.

However the Acting General Manager recorded that he was of the view that this was excessive given that public land was involved.

Ms McCredie advised she had concerns about leasing the town square including *“that it was not an equitable exchange in terms of compensation for cleaning and that it amounted to the privatisation of public land.”*

At the Council meeting of 3 November 2004, in closed council, resolved:

On the motion of Councillor Curtin, seconded Councillor Simms that: -

a) Council accepts the transfer of ownership of Lot 8 in Deposited Plan 1067959 from Hiken Group Pty Limited;

- b) On transfer, Lot 8 in Deposited Plan 1067959 be determined to be operational land;*
- c) Council enter into an agreement to lease Lot 8 in Deposited Plan 1067959 to Hiken Group Pty Limited for a term of ninety nine (99) years subject to notification of the registration of Deposited Plan 1067959;*
- d) Following notification of the registration of Deposited Plan 1067959, Council enter into the attached lease of Lot 8 in Deposited Plan 1067959 with Hiken Group Pty Limited subject to the lease being for a term of ninety nine (99) years and the other terms and conditions of the lease and the related cleaning agreement;*
- e) Council's Seal be affixed to the agreement to lease, the lease and the cleaning agreement. [E.55]*

A decision was made to lease the Town Square back to the owner, Hiken.

In response to the draft report, Councillors noted the footnotes to the council minutes which shed light onto what the Councillors were told:

Minute No 567/04

“Councillor Curtin asked that the following statement by him be noted in the Minutes. I am opposed to the excessively long lease and the process surrounding that apparent agreement. It was prepared without any reference to Council or Councillors and it would appear that the process has been confirmed by legal documents and the General Manager’s comments. The Council regrettably is left with no option but to support it. To do otherwise could have damaging ramifications for Council if refused.

Resolved on the Motion of Councillor Curtin and seconded Councillor Campbell that in view of what has been experienced, any current/future lease negotiations over anything that involves Auburn Council. Council be advised of their progress at informal meetings and brought back to Council before legal agreements are made.”

It cannot be overlooked that this Square is a public asset and no evaluation of the future use of the Square has been made.

The evidence gathered suggests that Council has effectively disposed of an asset for a nominal lease amount.

Council Land disposal

In the ICAC publication *“Corruption Risks in NSW Development Approval Processes: Position Paper”* September 2007 [E.56] Chapter 7: Council Land Disposal, the disposal of council-owned land which can involve development proposals is discussed.

The paper acknowledges that direct negotiations over the sale of council-owned land can be justified.

The ICAC proposes that where a council decides to sell a parcel of land to a proponent without inviting other expressions of interest, it should commission at least one independent valuation to assess a fair price. It also noted that it is reasonable to seek an examination of the methodology that a proponent has used to arrive at its own proposed price.

Councils who responded to the ICAC discussion paper generally suggested that land valuations should be based on its “highest and best use”.

Concern was also raised about the practice of proponents purchasing land from a council based on prevailing development standards and then relying on State Environmental Planning Policy (SEPP1) objection to significantly increase development returns.

Councils also expressed support for councils to sell land at less than market value for identified strategic purposes.

The Department of Local Government also supports the view that councils should seek an independent valuation of land it proposes to sell by private treaty. In certain circumstances it may be appropriate to seek more than one such valuation.

However in most cases a single independent valuation will be sufficient, particularly in smaller residential sales.

Section 716 of the Local Government Act that provides that the sale of land for unpaid rates and charges must be by public auction. It would be prudent even in these circumstances for a valuation to be obtained in setting the reserve price for the property.

The ICAC has concluded that the implementation of appropriate procedures for the disposal of council-owned land reduces the risk that a council, councillors or council employees could manipulate the disposal process for corrupt purposes.

The ICAC supports the proposition that two valuations should be obtained, as a corruption prevention measure. The council should set the selling price on the bases of the land's "highest and best use". Where a council chooses to sell land at less than market value for strategic purposes, it should be publicly articulated for the reason for doing so.

Auburn Council obtained a valuation for Queen Street based on the "marriage value". Council at the meeting of 2 October 2002 was provided with valuations based on the "highest and best use".

If Council believed that the land should be sold at a lower than market price for strategic reasons, the Council report or resolution fails to demonstrate this.

This is especially concerning when decisions are made at closed Council meetings without the transparency of the decision making information.

As the sale of Queen Street has now concluded, Council should make public all business papers previously considered confidential.

Currently, councils are provided with limited direction in regards to the sale of land in NSW. In other states of Australia procedures for the sale of land are detailed in legislation.

While additional legislative controls are not supported, it is recommended that:

The Department of Local Government issues a circular or practice note on the sale of public land to all councils in NSW drawing attention to the ICAC publication *"Corruption Risks in NSW Development Approval Processes:*

**Position Paper” September 2007 in relation to the sale of land.
(RECOMMENDATION 6)**

Review and administration of Section 94 contributions

On 4 September 2002, (the same meeting as the approval of the development application for Auburn Central), Council resolved to adopt new section 94 plans. This involved a complete review of all previous section 94 plans for drainage, Auburn Town Centre, Residential Flat Development, Parking and Community Facilities.

Section 94 of the Environmental Planning & Assessment Act empowers councils to levy contributions towards or recoup the capital cost of providing or extending infrastructure and services necessary to meet the increasing demand created by new developments in the area.

In March 2002, Council considered that many of its section 94 plans were out of date and did not reflect community needs. The review of the section 94 plans *“also provided staff with an opportunity of assessing the current administrative practices associated with the levying and accounting for section 94 contributions and improvements are recommended as part of this process.”*(Council Meeting report 17 July 2002.)

It was acknowledged that a major weakness in the Council’s section 94 contribution process was the lack of a dedicated officer responsible for managing section 94 contributions. In February 2003 at a Councillor workshop approval was given for a dedicated section 94 planner.

Four draft section 94 Plans were prepared:

- Community Services and Facilities.
- Drainage.
- Town Centres.
- Multi Cultural Youth Services.

The Town Centre section 94 plan was created from the previous two section 94 plans – the Auburn Town Centre Contribution Plan (1999) and the Residential Flat Development Contribution Plan (1995).

This plan provided for streetscape works throughout the town centres of Auburn and provided for traffic management works in Auburn and Lidcombe. This draft plan was a continuation of the Residential Flat Development contribution plan with updated castings and anticipated rates of residential development.

A report to Council notes, *“Council recently applied for rate levy to implement certain streetscape works in Auburn’s town centres”*.

The new section 94 plan saw a reduction in the contributions for Auburn Town Centre to \$63.03 for a 2 bedroom unit this compares with Lidcombe \$124.55 and Regents Park \$410.28. This was due to a projected greater number of units in Auburn, including the then proposed Auburn Central development.

It is noted in condition d) of the development application approval was to:

“d) Grant delegation to the General Manager to grant ‘deferred commencement’ consent to a mixed retail, commercial and residential development at 57-61 and 62-72 Queen Street Auburn and the section of Queen Street between Harrow Road and Park Road on the day after the Auburn Town Centre Section 94 Contribution Plan appears in the local newspaper as coming into effect.” [E.46]

The report states *“that under the existing section 94 plans, the total contribution would have been \$3,898,917.80 and by deferring the decision until after the draft Auburn Town Centre Section 94 contribution plan came into force an additional \$2,590,000 would have been collected totalling \$6,488,917.80.” [E.46]* It is noted that this calculation is significantly different than what was actually collected \$5,923,049.35 [E.51] and what was re-calculated during an audit of the section 94 by Mr Robert Edwards as \$6,039,085 (including all section 96 modifications).

It is noted at the Council meeting of 2 October 2002 that the section 94 contributions are shown as being \$4,890,000 and under the old plan \$3,660,000.

The Town Centre Plan also included contributions for traffic management works in Auburn. It included the cost of extending the western overbridge.

The cost of these traffic management works were valued at approximately \$7,630,000 and also double that of the previous plan.

The report to Council on the section 94 plan noted that Council would need to continue to contribute to this bridge project *“to ensure the cost of development, particularly retail/commercial development does not become prohibitively expensive.”*

The adopted section 94 plan (page 21) puts the cost of bridge widening at \$7,630,000 plus the cost of a left lane at Station Street bridge \$200,000 totalling \$7,830,000.

This was to be funded as follows:

<i>Existing Contributions</i>	<i>\$56,760</i>
<i>Council contribution 30%</i>	<i>\$2,349,000</i>
<i>Developer contribution 70%</i>	<i>\$5,481,000</i>
<i>Less Existing Contributions</i>	<i>\$5,424,240</i>

The RTA had committed \$1.5 million to this project; therefore council will be responsible for \$849,000 in contributions towards the project. [E.57]

The rate of contribution for Traffic management (including the western overbridge) was reduced in the adopted plan with retail contribution falling from \$245.42/ m2 of gross lettable area to \$176.86 of Gross Lettable area and Residential from \$1,244.22 to \$990.92 per dwelling.

The Auburn Town Centre Section 94 plan 2002 also revised the carparking contribution. For each deficient carspace in the commercial centre of Auburn a total of \$12,478 is payable in lieu of the provision of on-site parking. This was reduced from \$12,619.30 in the previous section 94 plan.

The plan showed a reduction in section 94 contribution rates for new units. In 1995 section 94 plan contribution was a flat \$1,070.50 regardless of the number of bedrooms. The 2002 plan was as follows:

Bedrooms	Contribution Plan – Residential Flats – Auburn – Units*
1	\$30.25
2	\$63.03
3	\$88.24
4	\$90.76

*Plus section 94 for carparking, Road and Traffic, streetscape and town centre

The Auburn Town Centres Section 94 Plan – Part 6b – Auburn Carparking makes specific reference to the Auburn Central development “ *it has been identified that future carparking requirements will need to be met within large scale retail development sites in the primary retail areas. One site that can realistically accommodate such provision is the “Auburn Central” site. It is proposed that council will negotiate with owners of this site to seek to provide additional car parking under this Plan.*

Therefore larger developments (over 50 spaces should provide all their parking requirements on-site).”

“ A works program for parking comprises negotiating the provision of a minimum of 80 spaces (and possibly 126 spaces) in the development of the Queen Street site for use as a public parking and additional to the requirements of the development.”

In the review of Auburn Council by John Kleem Consulting in 2005. The Kleem report comments on the administration of section 94 funds **[E.19]** stating:

“Over a period, there have been issues requiring attention and review over the last two to three years and much of the work has been completed through the achievements of the section 94 planner. However, the highest priority of reviewing plans and preparing revised plans was not achieved whilst this officer was required to undertake accounting work.

Not unique to local government, there have been examples of contributions being deposited into incorrect accounts, but prior to the appointment of a specialist employee in the position, there were incorrect allocations and the nature of consents has not yet tracked all moneys that should have been available to council leaving doubts that contributions were ever included in consents. In other instances, contributions were not levied and hence not collected due to their exclusion from Section 94 plans.”

It is noted that Kleem has the highest priority of reviewing plans, it is noted that council revised its section 94 contribution plans on 4 September 2002. It is also noted that the capital result for 2002/03 was \$5,991,000, 2003/04 was \$12,063,000 and for 2004/05 \$14,012,000, this was due to a larger than expected developer contributions relating to drainage and parking.

In discussions Mr John Burgess, the current General Manager, he advised that Council has now implemented systems to ensure section 94 and developer contributions are collected.

Section 94 contributions for Auburn Central

Total section 94 contributions actually raised for the Auburn Central development amounted to \$5,923,049.35 (plus indexation). Council records show the following payments [E.58]:

Date	Receipt	Amount
21.6.04	18890	\$488,370.97
21.6.04	33389	\$1,599,649.94
15.10.04	45451	\$919,923.63
20.11.04	1371	\$919,923.63
17.12.04	10765	\$919,923.63
11.1.05	11843	\$919,923.64

A re-calculation by staff during the Edwards Report Audit of the Auburn Central development shows that the section 94 contributions (un-indexed) on the final approved number of units **[E.59]** is as follows:

Open Space	\$1,718,478
Community Services/Facilities	\$519,465
Town Centres	\$3,801,142
Total	\$6,039,085

Reviews of the documents give little insight as to how section 94 contributions were calculated or whether concessions were granted to the developer.

It is further noted that Council's contribution plans include provision for the base amounts to be indexed to the CPI up to the date of actual receipt of payment of the contributions. On 18 April 2005, Mr Robert Edwards, while conducting a review of Auburn Central identified the amount of indexation then not applied as \$203,412.

On 21 April 2005 this indexed amount was sought from the developer. This was later paid to Council by the developer.

Mr Edwards further notes the failures in Council's systems in the collection and processing of section 94 contributions. *"I was informed that the DA officer does not consult with the Section 94 Planner before loading contributions details into the system. Once loaded the detail is invariably embodied in the consent which – once processed and advised to the developer – becomes binding."* He was informed in 2005 *"the assessment of the various fees payable in connection with development applications is undertaken by Customer Service staff. No independent check is carried out"*. **[E.59]**

This is indicative of the extent of the failures in the system to collect section 94 funds. It could be concluded that there were many other examples of miscalculations and failures to collect section 94 funds.

Council has now established processes to improve the collection of section 94 contributions.

It is noted that in a memorandum to the General Manager on 2 March 2005 that Mr Nathan Croft, Senior Development Assessment Officer, stated in relation to the Auburn Central development “*missed S94 contributions for the modification applications is \$311,146*”. **[E.60]**

It would appear that section 96 modification of Auburn Central was made without the requirement to pay section 94 contributions. The conditions in the consent cannot be altered.

Thus if Council omits the requirement to pay certain contributions it cannot subsequently seek that section 94 contribution. This failure by Council to impose section 94 contributions for additional units and bedrooms were added as part of a section 96 modification approved on 20 August 2003.

The change to the residential configuration of Auburn Central was as follows:

Approval Date	1 Bedroom	2 Bedroom	3 Bedroom	Total	Car Parking
04.09.02	43	260	149	452	1314
20.08.03	33	238	191	462	1324

Number of additional parking spaces that should have been required for the 20 August 2003, Section 96 modification were:

1 Bedroom	(12)
2 Bedroom	(42)
3 Bedroom	71.4
Total	17.4 parking spaces

Additional section 94 contributions that should have been levied as at 20 August 2003:

Approval Date	Open Space	Community	Traffic and Parking	Total
4 Sept. 2002	\$1,516,995.70	\$463,136.75	\$3,146,399.51	\$5,126,531.96
20 August 2003	\$1,497,243.96	\$440,441.94	\$3,499,992.16	\$5,437,678.06

*These figures have not been indexed.

Total \$311,146.10

In an interview with Councillor Simms she produced a copy of her business paper for the Council meeting on 15 October 2003. She had noticed that the section 94 contributions had been omitted from the conditions of approval. She explained that she was advised by Council staff at the council meeting that they would be put in later. In response to the draft report Councillor Simms advised that the General Manager, Mr Brownlee had advised her. They were not included in the conditions of consent, to the section 96 modifications. The former General Manager stated that he has no recollection that Councillor Simms raised the omission of section 94 with him.

Councillor Simms was also able to produce a copy of an email dated 20 November 2004 [E.61] to Acting General Manager David Lewis, subject of the email:

"CONFIDENTIAL; Sect 94, Auburn Central:

I was speaking to Semra Batik today, and she mentioned about section 94 for Auburn Central. On 15 October 2003 a report came to council regarding the additional units requested for this development.

During the debate, I queried the fact that no additional section 94 contributions were mentioned. Either for this modification, or that approved on 20/8/2003. (I keep notes sometimes for issues that I raise). I was assured that section 94 adjustments WOULD be made. I am concerned that, it appears, this perhaps has not happened. We were not provided with conditions, just an 'in principle' agreement.

Irene":

On 22 November 2004 the Acting General Manager, David Lewis, responded: *“During the conduct of the review I noticed that there did appear to have been approval for additional units, however it appeared that no additional section 94 payments were requested”*: [E.62]

This appears not to be the case and section 94 contributions were due.

Of greater concern was the fact that Council’s failure to raise all section 94 contributions was not reported to Council despite a number of staff being aware of this omission.

The failure by staff to include the full quantum of section 94 contributions represents a serious loss to Council and is indicative of poor internal controls, at the very least.

However it could also raise a much greater concern.

In a statement from Sarkis Nassif, a director of Holdmark Developers Pty Limited he contends that *“they have carried out a number of substantial improvements to public amenities in the Auburn area. These include:*

- *Contribution to the construction of a rail bridge.*
- *Construction of six new roundabouts and associated works.*
- *Construction of six pedestrian crossings over Park Road.*
- *Undergrounding of electrical services along Park Street.*
- *Installation of smart pole lighting along upper Queen St and the town square.*
- *Paving of the town square.*
- *Sewer diversion works for adjacent properties.*
- *Upgrade Harrow Road to meet the 1 in 100 year flood in conjunction with increasing the stormwater public tank from 1,400 cubic metres to 4,000 cubic metres, upgrading culverts, sewer and gas pipes.*

- *Rekerbing, reguttering, sewerage and stormwater works in South Parade and resurface and widening Vale Lane.*
- *Dedication and construction of six carspaces plus one carwash space plus kitchenette to Auburn Ambulance station.*

In addition, Holdmark paid section 94 contributions of \$5,971,128.20 as per council's letter to Holdmark dated 6 April 2006. Holdmark alleges that it overpaid council \$155,332.91 which it is seeking a refund." **[E.25]**

It was raised with Mr Sarkis Nassif that an amount of \$311,146 **[E.60]** in contributions were forfeited by Council as a result of the section 96 modification being approved by Council.

Holdmark claims that the relevant section 96 modification effectively added 10 units to the development, but did not otherwise increase the number of bedrooms. The modification decreased the floor space ratio and resulted in a reduced building envelope volume and height.

A review of the section 96 modification approved on 20 August 2003 it shows that 10 additional units. But the modification also added an additional 72 bedrooms in the reconfiguration of the residential units.

Section 94 payment contributions

Approval was given to the developer to pay the amount of \$3,679,696 imposed as a contribution towards town centres by four instalments, each of \$919,923. The instalments were received by Council on 15 October 2004, 24 November 2004, 17 December 2004 and 11 January 2005 respectively.

This was approved by the Director of Planning, Ms McCredie. In her interview, she conceded that this may not have been the best course of action and that interest should have been charged.

The former General Manager Mr Brownlee advised that he had no knowledge of the agreement to pay by instalments. Mr Brownlee left council in September 2004. Mr Brownlee advised that if Jan McCredie had raised that if the instalment payment

arrangements he “*would have reported the matter to Council and recommended, if Council resolved to agree with the proposal, that interest be charged.*”.

Other contributions for Open Space and Community Facilities were paid on 21 June 2004.

The developer was not required to pay interest on the deferred instalments. Thus the developer was allowed to use these outstanding monies on an interest free basis.

It may be considered that the deferred payment arrangement could be construed as the granting of a financial concession to the developer. The size of that gain is subjective as no rate of interest was set, however this would have been substantial given that the section 94 payment was \$3,679,696.

It is possible that (who) may have breached section 356 of the *Local Government Act* by providing financial assistance without a Council resolution or the required 28 days public notice of an intention to provide financial assistance for private gain.

While it may be considered appropriate to grant deferred payment arrangements, this decision was not made by Council nor was delegation granted under delegated authority. No evidence or documentation could be identified as to why this arrangement was approved.

**It is recommended that Council should determine a policy on the granting of deferred payments for developer contributions payments and determine an appropriate rate of interest, if deferred payments are granted.
(RECOMMENDATION 7)**

Other payments related to Auburn Central

On 26 August 2004 Council wrote to Holdmark Developers Pty Ltd seeking monies [E.63] for the following:

Development Application Fees	\$14,058.00
Fees from conditions of consent	\$32,169.20
S94 contributions	\$3,679,694.53
Bonds	\$2,700,000
Space Syntax study	\$50,655.00
Temporary Road closure deed	\$2,805.00
Hoarding Rental	\$26,550.40
Total outstanding	\$6,505,932.13

These outstanding amounts were referred to the General Manager for his attention.

A number of these were subsequently paid by the developer. However, the amount of \$50,655.00 was not paid.

In an interview with Mr Croft, a former member of Council's planning department, [I.13] Mr Croft stated that *"I understand it, this was on the agreement of the General Manager, Ray Brownlee. I was advised to "Back off" as Council was unable to locate documents showing an agreement by the developer to contribute 50% of the total cost of the Space Syntax study"*.

In a letter to Holdmark dated 12 December 2003 from Ms McCredie, Director Urban Design and Planning, requesting payment of outstanding money it was noted *"Ray agreed to back off Not documented"*.

Mr Croft also advised that *"the hoarding rental of \$26,550.40 was agreed to be "written off on the authority of Ray Brownlee"*.

In the same letter to Holdmark dated 12 December 2003, it is noted in the margin that *"Written off authority of Brownlee"* [E.58]. No other documentation could be

obtained to substantiate this. *This comment is not supported by Ray Brownlee in his response to the draft report and cites his letter of 26 August 2004 in which he requests the payment of the outstanding fees. Ray Brownlee left Auburn Council in September 2004. It is possible that these comments were not written on the letter until after August 2004. No other evidence could be obtained to prove that the Mr Brownlee requested the amounts to be written off and it is of concern that the outstanding amounts were not again pursued prior to signing off on the final occupation certificate in April 2005.*

Ray Brownlee recalls reprimanding Jan McCredie in relation to the pedestrian study and said words to the effect "How are we going to get the \$50,000 from Holdmark when we haven't discussed the cost with them and we have no documentation

Estimated construction cost and development application fees for Auburn Central

The Edwards report noted that *"Council is empowered by the Environmental Planning and Assessment Regulation to charge various fees and charges in relation to the consideration of a development applications. These fees are based on the cost of the development.*

The Environmental Planning & Assessment Regulation provides that the consent authority must, unless it is satisfied that the estimated cost indicated in the development application is neither genuine nor accurate, accept the estimate so indicated.

It further provides that a determination made after the lodgement of a development application has no effect until notice of the determination is given to the applicant.

Council thus has the power to assess the genuineness and accuracy of the estimated cost of a development. If not satisfied, herewith it has the additional power to place its own estimate on the development and charge fees accordingly.

As is the case with many issues subject of this review I, there is a lack of documentation that might provide enlightenment as to the processes actually applied by Council in determining the estimated cost and assessment of the fees to be charged.

It would appear that DA237/02 was lodged with Council and fees paid on an estimated construction cost of \$50 million. The assessed fee of \$43,080 was paid on 7 May 2002."

Given the date of lodgement, the provisions of clause 246 of the Environmental Planning and Assessment Regulation were applicable. This clause reads as follows:

"246 What is the fee for a development application?

- (1) The maximum fee for development involving the erection of a building, the carrying out of work or the demolition of a work or a building, and having an estimated cost within the range specified in the Table to this clause is calculated in accordance with that Table.*
- (2) Despite subclause (1), the maximum fee payable for development for the purpose of one or more advertisements is:*
 - (a) \$215 plus \$70 for each advertisement in excess of one, or*
 - (b) the fee calculated in accordance with the Table, whichever is the greater.*
- (3) The fees determined under this clause do not apply to development for which a fee is payable under clause 247.*

Table

<i>Estimated cost</i>	<i>Maximum fee payable</i>
<i>More than \$10,000,000</i>	<i>\$15,875, plus an additional \$1.19 for each \$1,000 (or part of \$1,000) by which the estimated cost exceeds \$10,000,000."</i>

On this basis, the fee payable (excluding advertising fee) would be:

Fee for \$10,000,000	\$15,875
Plus 40,000 x \$1.19	\$47,600
Total	\$63,475

The investigation found no evidence or documentation could be identified as to how Council calculated the fee of \$43,080. Council appears to have accepted the estimate of construction cost then provided by the developer and did not avail itself of an independent estimate of the development cost.

In May 2003, Council sought an independent estimate of the cost of construction. The reason for Council seeking a revised estimate could not be identified.

The revised cost of construction was estimated at \$158,500,000.

This revised estimate is three times greater than the original estimate for the cost of construction and indicates that one of the estimated costs was seriously flawed.

On 20 November 2003 Council wrote to the developer indicating that the cost of construction has been estimated at \$158,500,000. Council informed the developer that *“on that basis... the DA fee payable is \$192,590 plus an advertising fee of \$830.00” and requested payment of the outstanding amount of \$150,340.*

Fee for \$10,000,000	\$15,875
Plus 148,500 x \$1.19	\$176,715
Total	\$192,590

The letter to Holdmark Developers Pty Ltd also stated that an outstanding amount of \$25,432 was payable in respect of a section 96 modification (M.34/03). That amount purportedly represented the assessed fees less the amount previously paid to council and was assessed on an estimated cost of \$150,000,000.

No documentation of this calculation could be identified or explained by staff. These calculations were not documented on file or through other records. However, it is noted on Mr Scott Carver, the Auburn Central architects list the cost of the development on the Australian Consulting Engineers website as \$150,000,000.

The developer advised Council on 2 December 2003 that the estimated cost of the development was \$95,000,000. This is confirmed in a letter to Holdmark dated 12 December 2003 from Ms McCredie [E.58]. states “ *A revised summary of the amounts to be paid is as follows and is based on the estimated cost of the*

development being \$95 million as advised by the applicant to Council's General Manager on 2 December 2003."

It was noted on the copy obtained from Council, *"Jan says CC appeared to confirm this. Any documents?"*

In a submission from Sarkis Nassif he advises that:

"I engaged the service of Colliers International and Washington Brown Associates to assist in valuing and costing the development. The costs were estimated at \$84,993,443 excluding the purchase price of the property". [E.8]

Mr Nassif provided a report from Washington Brown dated 13 December 2002 substantiating this amount. [E.8]

On 12 December 2003 Council wrote to the developer indicating that the amounts payable had been revised. The development application fee based on \$95,000,000 was calculated at \$57,138 (including advertising fee of \$913).

The letter did not mention additional fees applicable from section 96 modifications. Based on the EP&A Regulation, clause 246 the correct calculations on \$95,000,000 construction costs is:

Fee for \$10,000,000	\$15,875
Plus 85,000 x \$1.19	\$101,150
Advertising fee	\$913
Total	\$117,938
Original DA fee (7 May 2002)	\$43,080
Outstanding amount	\$74,858

The lack of documents prevents the amount sought of \$57,138 to be clarified. In the absence of the relevant documentation it is not possible to explain why Council only sought \$57,138 for the Auburn Central development application.

It can however be concluded that the failure by Council in determining the construction cost at the time of the DA provided an additional concession to the developer and the loss of fees to the council.

The lack of a standard guide to establishing the estimate construction costs opens councils to disputes with developers. Auburn Council had not used a standard for determining construction costs.

However steps have now been taken to ensure that more accurate estimates are now obtained. Mr Brownlee advised current practice is to obtain a quantity surveyor report for any estimated construction over \$1,000,000, which is what Council did in 2003.

In response to the draft report Mr Brownlee states that the Environmental Planning and Assessment Regulation provides that the consenting authority must, unless it is satisfied that the estimated cost indicated in the development application is neither genuine nor accurate, accept the estimate so indicated. He notes that the council had Washington Brown quantity surveyors report. He also advised that documentation from the Bank of Scotland authorising approval of financing for the construction of Auburn Central development for \$95,000,000 and council took this higher amount.

It is recommended that Auburn Council establish a standard practices for determining the estimate the cost of construction for determining development application fees and that the Department of Local Government writes to the Department of Planning to determine a statewide standard for estimating the cost of construction. (RECOMMENDATION 8)

TERM OF REFERENCE 2 – FINDINGS

In weighting the evidence gathered and determining a finding on the balance of probability, it is reasonable to conclude that Auburn Council did fail to responsibly manage public assets.

The investigation has shown that Council failed in collecting funds from a number of sources, most significantly in the sale of Queen Street to Holdmark Developers Pty Ltd. In this transaction alone, Council sold the land for \$1,810,000 compared to the valuation of council's two valuations of between \$7,000,000 and \$9,000,000. This is further highlighted by the then General Manager, Mr Brownlee that he believed the sale price for the land should have been \$7,000,000.

It was evident that the developer provided some benefits to council this included the upgrading of the western overbridge, the town square, installation of stormwater detention tanks, reconstruction of Vales Lane. These were in excess of the section 94 contributions made.

The loss of funds from the sale of Queen Street was exacerbated by the failure to impose conditions on consent to collect section 94 of approximately \$311,146. It is difficult to believe that this was purely an administrative error as the matter of section 94 contributions for the section 96 modification was specifically raised by a councillor and assurances given that this condition would be imposed.

The estimated construction cost as at May 2002 was \$50,000,000 and the assessment fee paid on this amount, however council in May 2003 sought an independent estimate of construction costs at \$158,500,000. In December 2003 the estimated construction cost was set at \$95,000,000 based on a quantity surveyors report commissioned by the developer. The large variations in construction costs highlights a need for a consistent and standard practice for estimating construction cost for fees to be calculated.

The loss of funds is compounded by the failure to collect a number of other fees and recovering consultant's cost further highlights Council's failures to protect public assets.

I concur with the findings of the *"Review and Probity Audit of the Auburn Central Development and Related Issues"* report by Robert Edwards that:

“Taken as a totality, the monetary value of the apparent “concessions” to the developer – in addition to other possible concessions not addressed by this review – stretch credulity.”

Grounds for Surcharging

The powers of the Departmental Representative include all surcharging powers set out in section 435(1) and (2) of the *Local Government Act 1993*.

Grounds may exist under section 435 (2) of the Act to establish that a deficiency or loss has occurred as a consequence of the negligence actions in relation to the approval and certification of Auburn Central and the sale of Queen Street to Holdmark Developers Pty Ltd.

These losses include:

- Failure to collect and record collection of section 94 contributions.
- Failure to account for opportunity costs in allowing instalment payments for section 94 contributions.
- Failure to obtain a market price for the sale of Queen Street.
- Failure to collect contributions for the hoarding and pedestrian study.
- Losses incurred by Council in adequately performing the activities of a PCA and ensuring the Auburn Central development met BCA standards.

Considerations in Surcharging

Many of the councillors at the time of making the decisions relating to Auburn Central are no longer councillors.

The *Local Government Act 1993* expressly states that councillors and council staff maybe surcharged. The Act does not state that former councillors and staff maybe surcharged.

There is opinion that, without having regard to case law or public policy considerations, if it was intended to enable the surcharging of former councillors the Act would have expressly stated this intention. However, relevant case law and

decisions of the Local Government Pecuniary Interest Tribunal and general public interest considerations favour the proposition that liability occurs at the time of the offence, not at the time of prosecution.

These considerations suggest that if a person misapplied council funds at the time they were a councillor then they would continue to be susceptible to surcharge even if, for whatever reason, they later ceased to be a councillor.

The situation as to whether former councillors can be surcharged is therefore unclear. However, given that there is no explicit reference to former councillors in the Act in relation to surcharging, and other similar statutes make explicit reference to former public officials, I believe it would be inappropriate to apply the provisions to former councillors.

The specific question as to whether an ex-councillor can be surcharged is yet to be tested and further legal opinion is warranted in this regard. It is recommended against taking action against a former councillor under the surcharging provisions in the absence of a considered legal opinion that any such action could be successful. Furthermore if it is the case that the Act limits surcharging action to be taken against current councillors only, it may not be in the public interest to single out only those councillors that have continued to re-stand for election.

Of the 12 councillors who took part in the decisions set out in this report, only 4 councillors remain on Council. Of these, Councillor Irene Simms clearly voted against the motion to sell Queen Street and on other matters. This leaves the remaining three Councillors, Le Lam, Chris Cassidy and Pat Curtin against whom surcharging action could possibly be taken. It is further noted that Councillor Cassidy has decided not to renominate at the council elections in September 2008.

In relation to current and former staff being surcharged and the failure to correctly levy section 94 contributions, funds from hoardings and inappropriate actions in regards to the certification of the development, all the relevant senior staff have now left Auburn Council.

As is the case set out in regards to former councillors, similarly the Act appears to limit the ability to surcharge current employees only.

It is recommended that the Minister for Local Government consider an amendment to the *Local Government Act 1993* to make former councillors and staff subject to the surcharging provisions under section 435. (RECOMMENDATION 9)

Civil action against councillors for negligence or misconduct

Section 220 of the *Local Government Act 1993* establishes that councils are bodies corporate. Bodies corporate can sue and be sued in their own right. Accordingly, as long as a council can establish a case of negligence or misconduct and is satisfied that a duty of care can exist where a person is no longer connected to a council and satisfied that a person unconnected to a council can be guilty of misconduct, there would be nothing precluding a Council from taking any action against any person.

Ultimately this is a matter for an individual council to determine on the basis of its own legal advice.

TERM OF REFERENCE 3

Any other matter that warrants mention, particularly where it may impact upon the effective administration of the area and/or council's planning administration.

During the investigation a number of issues were identified that warrant mentioning. These relate to issues of on-going concern for Auburn Council including:

- Special Variation 2002/2003
- Draft Town and Neighbourhood Centres Development Control Plan.
- Cancelled Builders' Licences.
- Political donations
- Probity Audit of Auburn Central

Special Variation 2002/2003

In 2002, an application for a special variation to Auburn Council's rates was made to the Minister for Local Government. The application, under section 508 (2) of the Local Government Act, sought to raise an additional \$509,768 in rates for the costs associated with Town Centres improvement projects for a period of three years.

[E.65]

The extra funds were sought to revitalise all of its town centres as part of Council's Public Domain Improvement Program and were aimed at augmenting Councils Section 94 funding levels.

The program was defined as a three year program seeking to *"significantly overhaul the appearance and accessibility of the Auburn, Lidcombe, Berala and Regent Park Town centres"* (2002/2003 Annual Report - General Manager's Message). For the Auburn Town Centre this represented \$105,949 from section 94 funds and \$172,976 from Council, totalling \$278,925.

It was also a condition of the approval for the special rate variation increase that *"the Council clearly reports outcomes and expenditures in its annual report for the term of the variation"*.

In approving the Auburn Central development Council sought to raise funds under section 94 to undertake works on the Auburn Town Centre and included projects under the Public Domain Improvement Program.

The Council's application to the Department of Local Government for a special rate variation proposed that the benefits flowing from the special variation would be as follows:

"The variation would allow the redevelopment of major shopping areas in the Auburn Local Government Area. The proposal would include the provision of improved lighting, signage, active street fronts with outdoor dining and increased public surveillance."

The application included a draft section 94 plan for Auburn Town Centres prepared in May 2002. Part 6 of this draft contribution plan was based partly on the recommendations of the Auburn Town Centre Strategy (PPK Environment and Infrastructure 1998) and was the basis for determining the section 94 needs as detailed under Part 7a - Streetscape Improvements with an estimate total of \$268,500, which is consistent with the special variation application.

It is noted that the section 94 plan for the Auburn Town Centre acknowledges the deficiency in the provision of retail floor space in the Auburn CBD. The plan makes the assumption that *"the role of the Auburn town centre will continue to provide for the convenience needs of the catchment area population and as such, its role within the retail hierarchy will remain unaltered"*.

It would appear to be unusual for Council to be unaware of a pending large development that would attract significant section 94 contributions to the Council. This was not disclosed with the special variation application.

The review of Council's planning department by Wiggins established that council needed to review its section 94 contribution plans (page 16). At the time council was reviewing its section 94 contribution plans, the exist plans resulted in gaps in section 94 contributions. The Kleem report (page 44) Section 94 administration that *"there were incorrect allocations and the nature of consents has not been tracked all moneys that should have been available to council leaving some doubts that*

contributions were ever included in consents. In other instances, contributions were not levied and hence not collected due to their exclusion from Section 94 Plans.”

The investigation did reviewed works done by Holdmark as part of the Auburn Central development. This includes a significant amount of work related to the Public Domain Upgrade Work for which the special rate variation was granted. In particular, streetscape appearance and construction of the Western Overbridge.

The Auburn Central approval also included funds for the Western Overbridge. The estimated cost of the bridge construction stated in the special variation application was \$6,896,400 from Section 94 and \$2,289,000 from Council, totalling \$9,185,400. The actual construction cost was \$7,630,000.

Council in response to the draft report, states *“that Council did not make adequate assessment of the contributions from Holdmark for the overbridge as a consequence of the traffic generated by the development in its own right. The estimated costs of construction were set out in a Confidential Report to Council at its ordinary meeting held 23 June 2004.”*

The following table sets out the reported costs and sources of funding:

PROJECT BUDGET	
Description	Budget, \$ Million (Exclusive of GST and RailCorps (in kind works)).
CONSTRUCTION CONTRACT	
Contractors Tendered Price (\$8,101,487)	8.2
Public Utility and property adjustment and noise mitigation works (Provisional Sum	2.1
CONTRACT SUM	10.3
PROPERTY ACQUISITION COSTS (Provisional Sum)	0.3
COUNCIL COSTS	1.2
(inclusive of feasibility, development application and approval, management, engineering, superintendence and agreement with RailCorp	
CONTINGENCY	1.2
BUDGET PRICE	13.0
PROPOSED FUNDING OF PROJECT	
Source	\$ Millions
RAILCORP	1.86
SECTION 94 TOWN CENTRE PLAN – WESTERN OVERBRIDGE IMPROVEMENTS	
Developers Contributions	5.48
Council Contribution	2.35
Sub Total	7.83
COLLEX	0.15
STATE GOVERNMENT FUNDING	1.50
BALANCE – Council	1.66
TOTAL	13.0

The actual capitalised costs of construction works \$11.63 million.

The actual contribution by council was \$7.68 million as no further contributions under section 94 have been paid beyond that contributed by Holdmark as development has not proceeded.

Arguably the contribution for Holdmark should have been adjusted to reflect the revised final costs”.

On page 27 of the Annual Report of Auburn Council for the period 2003/2004, comments are made on the Public Domain Improvement Program. In discussion with

the current General Manager, Mr Burgess, it appears that some of the achievements noted in the Annual Report had not been done.

It is possible that Council may have failed to comply with the condition of the special variation to “*clearly report outcomes and expenditure in its annual report*”.

Enquiries into the expenditure on projects for the Public Domain Improvement Program were difficult for Council to identify. The General Manager was also unable to identify specific projects where the funds were spent.

Note 6 of the Financial Statements shows the following:

External Restrictions: Public Domain Improvement Program

<i>Year ending</i>	<i>Opening</i>	<i>Transfer to Transfer Restriction</i>	<i>From</i>	<i>Closing</i>
30 June 2003	0	\$1,013,000	0	\$1,013,000
30 June 2004	\$1,013,000	\$1,061,000	\$1,013,000	\$1,061,000
30 June 2005	\$1,061,000	\$296,000	\$1,061,000	\$296,000
30 June 2006	\$296,000	\$649,000	0	\$945,000
30 June 2007	\$945,000	\$681,000	0	\$1,626,000

Despite the special variation generating an additional \$649,000 in 2005/2006 and \$681,000 in 2006/2007, the statements show that no expenditure has occurred since the year ending 30 June 2005, contrary to the original project plan. The project has continued beyond 3 years and funds continue to be transferred to this restricted reserve. It is concerning that no funds were expended, no explanation could be provided why the council did not expend the funds in 2005/06 and 2006/07.

Auburn Council plans to utilise the funds from the special variation for the redevelopment of Railway Park and completion of town centre improvement studies for Lidcombe and Auburn and Auburn Town Centre Traffic Study in 2007/2008.

The former General Manager, Mr Brownlee commented in an email to the Department of Local Government dated 7 November 2007 [E.20] that:

“It is my understanding that the Special Rate Variation levy was collected and expended on the projects as outlined in the proposal to the Department and the Minister for Local Government. There were Council reports that outlined this process and the expenditure.

..... it is my understanding, that the projects that the levy was spent on, was reported to the community in these newsletters that were delivered to every resident in the Auburn LGA.

In relation to the reporting of the Special Rate Variation in the Annual Report, I make the following comment. I resigned from Auburn Council in September 2004, the Annual Report for 2003/04 (the final year of the levy) was not prepared or presented to Council at that time, as these reports are due to the Department in November of each year. As such I was not employed at Auburn Council when the requirement to report the outcomes of the Special Rate Variation in the 2003/04 Annual Report was to be done.

In summary, the levy funds were collected, expended on the approved projects, it was publicly reported to Council, it was publicly reported to the community via the community newsletters and I was not employed at Auburn Council when the 2003/04 Annual Report was prepared and adopted by Council.”

Draft Town and Neighbourhood Centres DCP

The Auburn Business Areas Development Control Plan (BDCP) came into effect on 30 August 2000. Since becoming effective, the BDCP had been the main Development Control Plan (DCP) which had been used by Council to assess developments within the Business zones under the Auburn Local Environmental Plan 2000 (ALEP 2000).

The shortcomings of the BDCP were acknowledged by Council and these include that the BDCP was too generic, with no consideration to building typology and subdivision pattern, has no relationship between floor space and heights, and established no relationship between one building and another within and outside a site.

This DCP covered the Auburn Central development site. It is considered that Auburn Council needed to review this DCP in light of the expansion of residential construction being proposed in Auburn.

In response to these anomalies, Council resolved on 6 February 2002 to prepare a new DCP to replace the BDCP with design based DCPs that were based on the development of three dimensional building envelopes.

It was proposed that this would involve a commitment to broaden the scope of planning for the town centres by integrating objectives relating to urban design, heritage, transport, economic factors, social factors, sustainability and affordability.

This process also involved a greater commitment to developing effective partnerships to ensure planning beyond generic development control and involvement of stakeholders in committing to achievement of an agreed vision.

For development control this meant that there would be a move away from generic controls to developing controls which would be made specific to each of the town centres.

On 19 February 2003, Council resolved to place a new draft BDCP on public exhibition. This new BDCP was prepared and placed on exhibition between 5 March and 4 April 2003.

The changes included a change of name from Business Areas to Town and Neighbourhood Centres DCP to reflect a new emphasis towards an understanding of the different role and character of individual centres.

Some of the main changes included:

- An increase of floor to ceiling heights from 3 metres to 3.3 metres.
- New controls for better design and communal access and roof areas.
- New section on definition, location, design, material quality and building types
- Public and civic buildings.
- Provisions not requiring overhead cabling financial contribution and requiring developers to undertake under grounding.

At its meeting of 3rd December 2003, the draft Town and Neighbourhood Centres DCP was reported to Council and Council resolved to place the draft DCP on public exhibition.

In accordance with Council's resolution and the requirements of the *Environmental Planning and Assessment Act, 1979* and Regulation 2000 a notice was placed in the Review Pictorial and the draft DCP was publicly exhibited between 17 December 2003 and 13 February 2004.

At its meeting in December 2003, Council also resolved that:

"e. Investigations take place into the following possible amendments to the DCP -

i) Absolute height of developments in town centres

ii) Priority of controls

iii) Clarification as to whether only one or two storey commercial only developments can be permissible in Berala and Regents Park

iv) Review & clarification of the bonus FSR and can public benefit be considered

v) Clarify how bonus FSR is to be allocated

vi) Some requirement for communal open space other than balconies". [E.66]

The development controls for the Auburn Town Centre were excluded from the draft DCP prior to exhibition of the draft Town and Neighbourhood Centres DCP.

Instead, Council prepared specific controls which were contained in a series of studies which make up the "Auburn Town Centre Strategy" (The Strategy). This Strategy was also considered simultaneously by Council at its meeting of 3 December, 2003.

In accordance with Council's resolution, the Strategy was placed on public exhibition concurrently with the draft Town and Neighbourhood DCP. A summary of the Strategy is provided below.

The Auburn Town Centre Strategy comprises the following studies:

- a) Strategic Background Study for Auburn Town Centre Strategy;
- b) Study of Community Vision for the Town Centre;
- c) Auburn Town Centre - Open Space Precedents;
- d) Draft Auburn Town Centre Urban Design Study;
- e) Auburn Town Centre Integrated Public Art and Design Framework; and
- f) Draft Auburn Town Centre Accessibility Study and Modelling Options - Traffic Study.

The development controls for the Auburn Town Centre proposed the following:

- To increase the amount and quality of public space in the Centre. It identified opportunities to develop public space in the existing Railway Park, Kerr Parade, the Auburn Central development, Council's Library Lane and in a new Town Square to be located on the south west corner of Auburn Road and Queen Street, Auburn.
- Restrict development within the Auburn Town Centre to either 3 or 6 storey with a maximum FSR of 3:1.

On 20 October 2004 a further report was put to Council to adopt the DCP with minor changes it was again. It was once again deferred for a further workshop. The matter was again referred back to Council in December 2004. It was again deferred.

Despite Council considering this DCP and public exhibition of the DCP, Council has yet to adopt a resolution to proceed with the DCP to control planning in Auburn and other centres.

Council has now chosen not to continue with the DCP and has commenced work on a new DCP for Auburn using an external consultant..

The failure of Council to implement this new DCP was significant in determining the future development of Auburn. It considered design principles and increases in the height of the buildings. It points to failures by Council's planning department to

articulate these changes to councillors and to implement key planning goals for Auburn.

Cancelled Builders' Licences

In late 2003 the Office of Fair Trading identified concerns with a number of building licence applications, which resulted in the cancellation of 80 residential building licences.

These licences were obtained from Granville TAFE using fraudulent qualifications. A review of builder's licences prior to June 2005 shows that a number of these builders had their licences cancelled.

Concern was raised at the number of Auburn based builders that had their licenses revoked. Concerns were raised by Mr Burgess that limited action in regards to works certified by council officers on buildings constructed by now unlicensed builders. In one case, this involved a large residential complex.

It is unknown whether any of the unlicensed builders were involved in the construction of Auburn Central.

It is proposed that this information be provided to the Building Professionals Board for investigation.

As part of this investigation assistance was sought from the Building Professionals Board (BPB) under the Building Professionals Act. The Department of Local Government has briefed the BPB.

Political Donations

During my investigation allegations were made both in the media and in interviews regarding an alleged close association of the developer, Sarkis Nassif, who is a Director of Holdmark Developers Pty Ltd, and with councillors and Council staff at the time.

Concerns also centred on the extent that Holdmark Developers Pty Ltd donated to the Australian Labor Party (ALP) during the construction period of Auburn Central and the perception that this created.

It is noted that the ALP did not have the majority of councillors on Auburn Council. No conclusion can be made from these donations.

It is fundamentally in order for businesses to support and to give donations to political parties. However the public perception cannot be overlooked.

A request was made to verify the actual donation figures from the NSW Electoral Authority and the dates of these donations.

Advice from the Electoral Funding Authority [E.67] is as follows:

Returns to the EFA for the four year period ended 23 April 2007

Donations provided by: Holdmark Developers Pty Limited

Information Source: Party and Candidate Declarations of donations received

Date received by party or candidate	Donation received by	\$ Amount
17-Jun-03	ALP	19,250
19-Nov-03	ALP	2,000
06-Feb-04	ALP	5,000
06-Feb-04	ALP	5,000
12-May-04	John Watkins, ALP	900
01-Jul-04	ALP	19,250
30-Jul-04	ALP	2,750
18-Oct-04	John Watkins, ALP	2,000
18-Oct-04	John Watkins, ALP	1,000
18-Apr-05	David Campbell, ALP	550
01-Jul-05	ALP	19,250
15-Nov-05	John Watkins, ALP	300

07-Jun-06	John Watkins, ALP	500
31-Aug-06	Barbara Perry, ALP	3,000
06-Feb-07	ALP	9,950
20-Feb-07	ALP	15,000
02-Mar-07	ALP	2,000
07-Mar-07	Virginia Judge, ALP	1,400

\$109,100

In addition to these donations, the Electoral Funding Returns for the Legislative Council in 2003 shows the following donations to the Australian Labor Party (NSW Branch):

07.04.03	Holdmark Developers Pty Ltd	\$2000
----------	-----------------------------	--------

The Electoral Funding Authority also provide a copy of the "Declaration of Political Donor" by Holdmark Developers Pty Ltd for the period 22 April 2003 to 23 April 2007 showing donations to political parties as follows:

HOLDMARK DEVELOPERS ELECTORAL EXPENDITURE FROM 22 APRIL 2003 TO 23 APRIL

TO AUSTRALIAN LABOR PARTY NSW BRANCH

DATE	DESCRIPTION	AMOUNT	TAX
6.2.07	STATE DONATION	\$ 9,950.00	FRE
4.8.06	B. FORUM 6.6.06	\$ 136.36	GST
20.2.07	M IEMMA DINNER 2.3.07	\$ 13,636.36	GST
1.7.05	BUSINESS DIALOGUE05-06	\$ 17,500.00	GST
28.2.06	F SARTOR DINNER 23.2.06	\$ 1,350.00	GST
1.7.04	BUSINESS DIALOGUE 04-05	\$ 17,500.00	GST
30.7.04	M LATHAM DINNER 5.8.04	\$ 2,500.00	GST
6.2.04	STRATHFIELD LGC FUNCTION	\$ 5,000.00	FRE
11.3.04	M LEE DINNER 9.3.04	\$ 2,272.73	GST
30.11.03	PARRAMATTA CAM. DONATION	\$ 2,000.00	FRE
26.5.04	DONATION	\$ 5,000.00	N-T
5.5.03	PREMIER & CABINET DINNER	\$ 3,000.00	GST
17.6.03	BUSINESS DIALOGUE	\$ 17,500.00	GST
19.11.03	PARRAMATTA CAM. DONATION	\$ 2,000.00	FRE

TO LIBERAL PARTY

14.5.04	DONATION	\$ 1,000.00	FRE
---------	----------	-------------	-----

Mr Sarkis Nassif and Nassif Bros made additional donations to the ALP in the period 2006/07 being \$15,100 and \$3,500 respectively. In addition to these donations the

Electoral Funding Authority return shows donations totalling \$22,000 from Hiken Group.

In examining a chronology of the key approvals for the Auburn Central no donation was made around a key approval date. In many cases donations were made to candidates or branches outside of the Auburn area.

I note that the ALP did not have control of Council and would have required the support of other councillors to influence the decision of Council. While this may create a perception that the donation was an inducement to approving the development application, no direct link can be established and no evidence of wrong doings can be found.

Interviews with the current councillors and staff showed little to no knowledge of Holdmarks' financial support for the Australian Labor Party (NSW Division). No councillors disclosed any non-pecuniary conflicts of interest.

A review was conducted of Councillors' Declaration of Political Contributions from the March 2004 local government elections. No donations or contributions were declared from Holdmark Developers Pty Ltd or Sarkis Nassif.

There appears to be no evidence to link this political donation to the approval and/ or section 96 modification of the Auburn Central.

It was raised throughout the investigation, from former and current employees and councillors concern at the councillors alleged relationships with developers, much of this was hearsay and rumour.

Particular concern was raised by former Council staff about Councillor Curtin having meetings "regularly" at local coffee shops with developers in the Auburn. Councillor Curtin expressed that it was part of his role as a councillor to meet with developers and other members of the community.

In response to the draft report, Councillor Curtin commented that *"I have never denied meeting people including developers in public places or with council planners in the council building....In relation to my conversations with developers my advice to them has always been to take their matters up with the planners."*

Concern was also raised in regards to the previous Council in which a number of councillors were developers and real estate agents in the Auburn area.

It was alleged that while development applications were considered by Council, no pecuniary interest would exist in the matter. However at a later stage councillors in their employment as a local real estate agent would reportedly sell the development.

Specifically this related to the sale of residential units. I was unable to discover the primary real estate agents for Auburn Central.

It is noted that Combined Real Estate, the same company in which the current Mayor Councillor Le Lam is a partner, manages a number of rented units in Auburn Central.

In an interview with Le Lam [E.11] she advised that another employee deals with the rental units and she has no involvement in the matter. She has also advised that her company was not engaged in selling any units or commercial floor space for Holdmark.

The former General Manager, Mr Brownlee also raised concerns. [I.14] He advised that he was aware of councillors dealing with the sale of residential home units that had been sold and then resold with councillor handling the second sale.

This was not a pecuniary interest matter at the time of approval but opened concerns of perceive conflicts of interest at Auburn Council.

The Act does not restrict members of the public from standing for civic office based on their business interests. Any person who is qualified to hold civic office may be nominated as a candidate to hold the position of councillor. If the community is dissatisfied with real estate agents being their elected representatives then they may express that view at the ballot box.

If the conflict of interest does not amount to a pecuniary interest, then it may be a conflict of interest regulated by the relevant council's code of conduct.

The code is a guide to council employees and councillors. Councillors with business interests must be guided in their conduct as councillors by these provisions.

Under the Act each council is responsible for dealing with allegations of breaches of their own code of conduct.

The *Guidelines for the Model Code of Conduct* cites concerns with developers lobbying Councillors as showing poor judgement and invites suspicion of partial decision making.

Councillors should advise developers to formally submit any material to council's professional staff in line with council's policies. Providing information to a single councillor does not give the others the benefit of the information to others making planning decisions.

Councillors should be guided by 5.7 and 5.8 of the model code of conduct in their duty in disclosing dealings with developers and must avoid any occasion for suspicion and any appearance of improper conduct.

The ICAC publication *"Taking the Devil out of Development"* holds the view that councillors need to understand both the role councillors' play in determining development applications and what acceptable and unacceptable lobbying practice is.

In its Position Paper – *Corruption risks in NSW development approval process* dated September 2007, [E.56] the ICAC formed the view that councillors should be provided with clear instruction on how to manage the conflict of interest created by political donations.

The Guidelines to the Model Code of Council for Councils in NSW provides the following note: *"Extreme care should be taken if the nature of the relationship may constitute a pecuniary interest (for example, where it could be perceived that a donation will be given on the understanding that the councillor will provide support on a particular matter should he or she be elected). Such an arrangement could also constitute an offence under the Crimes Act."*

Probity Audit of Auburn Central

The current General Manager, Mr Burgess, commenced with Council on 7 March 2005.

On 18 March, 2005 the General Manager wrote to Mr Robert Edwards, an independent consultant, in regards to Auburn Central and sought him to *"undertake a complete review, probity audit, of each of the development applications and Section*

96 applications considered by the Council to assess the contributions, land sales and other requirements under each of the consents against the Section 94 plans and valuation principles.”

Council received Mr Edwards report on 5 August 2005. The report contains a number of recommendation and findings as follows:

“1.3 Findings — Auburn Central

1.3.1 Council could be confronted with serious difficulties in demonstrating that it appropriately discharged its obligations under its Charter.

1.3.2 Council has failed to levy fully all applicable Section 94 contributions as provided for in the relevant Contribution Plans.

1.3.3. Council’s financial, administrative and other control processes were seriously flawed during the progress of its handling of the development.

1.3.4 There is a remarkable dearth of documentation evidencing rationale behind key processes and decision-making.

1.3.5 Prior to the commencement of this review, indexation of contributions had not been undertaken and recovered from the developer.

1.4 Findings — Other Issues

1.4.1 In various respects Council’s Contribution Plans are seen to be inconsistent and antiquated.

1.4.2 The methodology implemented by Council in indexation of certain S94 contributions is open to rationalisation.

1.4.3 There are shortcomings in the internal control processes implemented by Council in relation to development application assessment matters and financial procedures.

1.4.4 Some measure of doubt exists as to the reliability of data in the Contributions Register.

1.4.5 There is a need for Council's training and back-up procedures to be reviewed in relation to development applications and associated processing.

1.4.6 Council appears to have acted responsibly in consideration of Section 96 modification applications based on the sample reviewed.

1.4.7 The reporting and recording of business considered at Council and Committee meetings and decisions taken, maybe considerably improved.

1.5 Recommendations. It is recommended that:

1.5.1 Councillors be fully apprised of their responsibilities under Council's Charter.

1.5.2 Council be informed formally of the failure to raise all applicable Section 94 contributions in respect of the Auburn Central development and of the delay in indexation of contributions.

1.5.3. Council assess more rigidly the estimated costs of a development on which fees are to be raised.

1.5.4 The assessment of issues to be included in a recommendation to Council concerning development applications be more thoroughly researched and resolved prior to a report being presented to Council

1.5.5 Official recording of Council's decisions should be more professionally undertaken and accepted meeting procedures more closely observed.

1.5.6 All decisions — be they by Council or by staff — must be properly rationalised and documented and the documentation preserved for ease of future access as necessary.

1.5.7 The issue of receipt # 47318 of 7 January 2003 be further investigated and appropriate action taken.

1.5.8 Council's Contribution Plans be reviewed and so structured to reflect current demands and practices.

1.5.9 Consideration be given to review of methods of indexation of contributions.

1.5.10 Internal controls over development application consideration and subsequent processes should be reviewed.

1.5.11 The S94 Contributions Register should be analysed with a view to determining its accuracy and reliability.

1.5.12 Back-up training should be provided for the S94 Contributions Planner and adequate procedure manuals introduced.”

[E.38]

The Edwards' report was presented to Council at its meeting held on 3 August 2005.

Council adopted all of Mr Edwards' recommendations.

In accordance with the resolution of Council of 3 August 2005, Council also engaged Mr Peter Tomasetti SC to review, from a legal perspective, the report of Mr Edwards and the Auburn Central Development as a whole.

Mr Tomasetti SC formed the view that **[E.52]**:

“1. The Audit leads me to apprehend that Council staff and councillors gave significant direct and indirect concessions to the developer of the Auburn Central development without adequate explanation therefore or adequately documenting the decision-making process in making these concessions.

2. In my opinion, the facts and matters described in the Audit Report give rise to reasonable grounds to suspect that there may have been “corrupt conduct” within the meaning of those words in the Independent Commission Against Corruption Act 1988 (“the ICAC Act”) by council staff and/or councillors in dealing with and determining the development application.

3. I have deliberately refrained from forming specific conclusions concerning any particular person as I have not seen that as a matter falling within the terms of my brief.

4. In the circumstances that have occurred, the General Manager of Auburn Council is under a duty to report the matter of Council's dealing with

the development application to the Independent Commission Against Corruption.

5. *There is discretion whether to report the matter to the NSW Ombudsman. If the Ombudsman decided to investigate, there is clearly material upon which the Ombudsman could be obliged to subsequently make a report to the Minister for Local Government and to the Parliament. If the matter is referred to ICAC however, I see no reason to also refer the matter of the development application to the Ombudsman as well.*

6. *The matter may also be reported to the Director-General of the Department of Local Government ("the DG") pursuant to s.429A of the Local Government Act 1993. The Director-General may authorise an investigation of the Council and may ultimately authorise a surcharge on a Councillor or any other member of staff of the council for the amount of any deficiency or loss incurred by the council as a consequence of the negligence or misconduct of the Councillor or member of staff / have concluded that the matter should also be referred to the DG in view of the provisions of s.429A of the Local Government Act."*

Importantly, the Edwards report looked at how Council has discharged its charter of responsibility under section 8 (1) of the *Local Government Act 1993*.

Under the Charter, Council is made responsible among other things to:

- *Have regard to the long term and cumulative effects of its decisions.*
- *Bear in mind that it is the custodian and trustee of public assets and to effectively account for and manage the assets for which it is responsible.*
- *Ensure that, in the exercise of its regulatory functions, it acts consistently and without bias.*

The Edwards report raises concerns that Council had an "*inexorable desire to facilitate and hasten the completion of the development*". This supposition is supported by the concessions provided to the developer both directly and indirectly.

These concessions include:

- The price at which the land comprising part of Queen Street was sold to the developer.
- The over-riding of the DCP conditions relating to floor space ratio.
- The acceptance of the developer's estimate of the cost of the development.
- Credit given to the developer as an offset against the section 94 contributions.
- An arrangement to pay section 94 by instalments.

The lack of adequate documentation of the decision making process for these concessions may "place at risk public confidence in Council as the responsible custodians of its assets".

The Edwards Report comments:

"Taken as a totality, the monetary value of the apparent "concessions" to the developer – in addition to other possible concessions not addressed by this review – stretch credulity."

The Edwards report re-iterated concerns raised and identified in this report.

It is recommended that this report be referred to the Independent Commission Against Corruption (RECOMMENDATION 10)

TERM OF REFERENCE 3 – FINDINGS

In view of the evidence surrounding the Auburn Central development I consider the findings of the reports by Edwards and Tomasetti as credible.

In weighting the evidence gathered and determining a finding on the balance of probability, it is reasonable to conclude that the Council failed to appropriately discharge its obligations under its Charter.

Given concern about the effect of this on public confidence there are grounds to request that the Minister of Local Government consider the need to hold a public inquiry under section 740 of the Local Government Act.

Given there has been a significant change in the Council's senior management and elected body there is minimal value in utilising this provision as a remedy. During the investigation the current General Manager has indicated a strong commitment in resolving the outstanding issues involving Auburn Central. There is evidence to support this commitment. .

Additionally, the election will be held in September 2008 this will allow the local community to decide on their future. Nearly all staff in the Planning Department have left Auburn Council, including the Senior Managers.

Council has continued legal action in the Land and Environment Court to rectify some of the areas of non-compliance with the BCA.

APPENDIX 1:

FINDINGS FROM GSR BUILDING REPORTS PTY LTD – 30 May 2007

“1. It is evident that assessment of the design documentation by Council and the consultants engaged by the Owner/ Developer could not have accurately identified all departures from the BCA. This has resulted in the Fire Safety Engineering Reports and documentation including architectural plans forming part of the Construction Certificate Approvals being contrary to the Deemed-to-Satisfy Provisions and/or Performance Requirements of the BCA.

2. There is a lack of architectural plans referenced in the Construction Certificate Approvals for the Base Building works. Therefore the comments within the Report are based on the assumptions and limitations as set out in Section 2.

3. The Basement carpark extends below all residential towers within the development. Therefore for the purposes of the BCA the entire building development has an effective height of more than 25m as a result of the height of a number of the Residential Blocks including Tower E. Buildings with an effective height of more than 25m, due to their height, require additional fire and life safety measures to be implemented such as sprinklers, stair pressurisation, emergency lifts. Many of these items have either not been installed throughout the building or have not been addressed in the Fire Safety Engineering Reports approved by Council.

4. The staged Construction Certificate approvals were not appropriately co-ordinated so that there is little or no reference to the Stage 1 works below Podium Level in the reports or approval documentation forming part of the Stage 2 works. This has implications to the Performance Standards referenced in the Fire Safety Schedule for the building so that there is no reference to the Stage 1 Fire Safety Engineering Report (FSER) in the final Occupation Certificate issued. This has the potential for deficiencies in the testing and ongoing maintenance of Fire Safety Systems installed in the Stage 1 works.

5. The works on site were either not adequately inspected during construction or at completion to confirm that the level of compartmentation and standards of construction meet minimum BCA standards. This is likely to contribute to the spread

of fire and/or smoke throughout the building causing the onset of untenable conditions effecting occupants remote from a fire.

6. *There is not a current or accurate Fire Safety Schedule to enable the fire safety measures to be certified to a suitable standard of performance. It is evident that the fire safety systems &/or measures within the building are not being adequately maintained in accordance with Clause 182 of the Environmental Planning and Assessment Regulation 2000.*

7. *As a result of the inadequacies in the building construction and maintenance, implications include:*

- Continued isolation of the smoke detection system is evident that can result in unnecessary delays or a lack of activation of the Building Occupant Warning Systems in the event of a fire, and*
- Prolonged isolation and other deficiencies in the sprinkler system can result in lack of fire suppression or control in the event of fire, and*
- Inadequate maintenance, installation and signage in relation to the fire hydrant system can result in delays and effectiveness of Fire Brigade Intervention, and*
- Lack of compartmentation and separation to building elements is capable of enabling the spread of fire and smoke to compartments throughout the building, and*
- The effective use and operation of fire exits for their intended purpose is compromised as a result of deficiencies in construction, location of services within exits and configuration of discharge points. Also the fire doors including hardware were defective in many locations inspected. That is, there are numerous breaches of Clauses 183 to 186 of the Environmental Planning and Assessment Regulation 2000.*

8. *The FSER for the Stage 1 works states “Unless the systems are completely tested during commissioning, the subsequent maintenance may not be able to identify and restore non operable parts”. Evidence of such testing and*

commissioning having taken place could not be found on Council's files. Therefore without a complete systems audit it would be difficult to confirm that all fire safety systems were adequately installed and the interface between systems functions correctly.

As a result of the above findings, it is considered that the safety of occupants, NSW Fire Brigades and the risk of fire development and spread through out the building falls well below acceptable standards.

Part 7 of the Report contains a complete list of all recommended fire safety upgrading works or required actions to achieve a reasonable level of fire and life safety to the building."

The report recommendations listed in the GRS Report are:

7. Recommendations

An assessment of the building has been undertaken in accordance with the relevant fire safety provisions of the BCA, namely Sections C, D (Parts 1 & 2) and E. Significant non-compliances with the BCA have been addressed to ensure that the building is provided with an adequate level of fire and life safety commensurate with the community's expectations having regard to the Objectives and Performance Requirements of the BCA and Section 1218 Order No. 6 of the Environmental Planning and Assessment Act 1979 which relates to the:

- Prevention of fire*
- Suppression of fire*
- Prevention of the spread of fire*
- Safety of persons in the event of fire*

From the assessment undertaken, it is recommended that the following fire safety upgrading works or actions be implemented:

7.1 Further Investigation or Outstanding Documentation to be Provided

1. That a full assessment of the entire building be undertaken to include sections of the building not part of the scope of this Report including construction and services within individual Residential Units (ie Report is currently limited to areas below Podium and common areas of Residential Blocks 84, B5, C1, C2, C3 and Tower E). The schedule of deficiencies contained below, together with recommendations for upgrade or actions to address anomalies is to be completed to include the remainder of the building.

The list of deficiencies that are unable to be readily rectified are to be documented in a Fire Engineering Report (FSER) that is to follow a Fire Engineering Brief process. This is to include involvement of various stakeholders including Council, Building Owner, Fire Safety Engineer, NSW Fire Brigades to outline a process for documentation and rectification with implementation of upgrade works or Alternative Building Solutions to meet the Performance Requirements of the BCA. Examples include:

- Egress travel from the south-eastern area (near corner of Vales Lane & Queen Street) of the Level B2 carpark exceeds 20m (ie approximately 45m) to reach a poi*
- Egress travel within the Level G2 carpark exceeds 40m to the nearest exit (ie approximately 65m from north-eastern area and approximately 55m from the eastern area to the exit within the residential lift lobby.*
- Egress travel within the Level B1 carpark exceeds 40m to the nearest exit (ie approximately 50m) from eastern area and distance between alternative exits exceeds 60m (ie approximately 80m).*
- Distance between alternative exits exceeds 60m (ie approximately 80m) in the Level G2 carpark.*
- Distance between alternative exits exceeds 60m (approximately 1 70m) in Big W.*
- Lifts opening into fire-isolated stairs, eg Residential Block C3.*

- *Doors opening to fire-isolated exits swinging other than in the direction of egress, eg Residential Block C3 & Block B3 at Level G2.*
- *Services not provided to entire building or relevant portion as a result of the building having an effective height of more than 25m, eg sprinklers deleted from some of the Residential Blocks (ie Block A, B, C1, C 2, D1 and the passageway at Level G2 that connects with Residential Blocks A2 and A3), stair pressurisation deleted from Residential Blocks (ie Blocks C 3, D1 to D6).*

2. *That the following deficiencies in the fire-isolated exits serving the building be addressed in an Alternative Solution Report where upgrade works are unable to be carried out to satisfy the Deemed- to-Satisfy Provisions of the BCA:*

- *Doorways from Woolworths (ie Stair No. 3 at the rear of the liquor shop & stair serving Tower E), Big W (ie Stair No. 5 at the back of house staff area) tenancies or Residential SQU's (ie Block C3 Levels 5 & 6) must not open directly into the fire isolated stairways unless they are separated from the fire-isolated stair with a public corridor, public lobby, air lock or the like.*
- *The doorway from the mechanical ventilation plant room at the intermediate landing must not open directly into the fire-isolated stairway (Stair No. 6) serving the Basement carpark that discharges at the rear of Residential Block B4 unless it is separated from the fire-isolated stair with an air lock or the like.*
- *Each fire-isolated exit must discharge directly, or by way of its own fire-isolated passageway to open space, eg Residential Block A2 at Level G3 and Block A3 at Level G2.*
- *The exit from the north-western corner of the carpark at Level G2 discharges into a passageway that is non fire-isolated.*
- *Unprotected openings in external walls less than 6m from the egress discharge path of travel from fire-isolated exits, eg Stair 5 from the Basement Carpark Levels/Big W back of house discharging at the rear of Block B4 and exits from Residential Blocks C3 & C2 that discharge at Level G2 that passes unprotected glazing to the Block C2 lobby & other Commercial tenancies.*

3. *That a joint inspection be arranged with the NSW Fire Brigades to confirm the extent of non compliances with the existing fire hydrant system and provide a schedule of works necessary so that the system meets the operational requirements of the Brigades, particular having regard to the block plan, labelling of connection points, pressure gauges within the Park Street hydrant sprinkler booster enclosure and also the height of internal hydrant connection points throughout the building being less than 750mm in height. The inspection is also to confirm the status of all outstanding works contained in the NSW FB Fire Order dated 27 December 2006, provision of services generally and confirmation of acceptance of the Stage 1FSER.*
4. *That either the Building Owner or Stephen Grubits and Associates (SGA) be requested to confirm that the outstanding issue of the FSER prepared by SSL for the carpark levels in relation to smoke spread bet ween the carpark levels and the impact on occupant tenability set out in the peer review letter from SGA dated 1 October2003 was addressed by SSL.*
5. *That SGA be requested to provide copies of documents prepared by SSL in response to the SGA peer review process that are referenced in the Stage 1 CC dated 13 October 2003 as these documents may impact on the accuracy of the Fire Safety Schedule, ie submissions by SSL dated 17 July, 30 July & 26 August 2003 and Report issued/ dated 29 September2003.*
6. *That SGA be requested to confirm that the outstanding issue of the Stage 2 FSER peer review in relation to Stair 29 serving Residential Block C3 set out in the peer review letter from SGA dated 3 May 2004 was addressed in the SSL Report dated 11 May 2004.*
7. *That a report from an NPER listed structural engineer be submitted to Council to outline a schedule of works necessary to upgrade, rectify or complete the construction of all fire rated building elements in accordance with Specification Cl.i of the BCA with particular emphasis on compartmentation and fire spread. This is to include but is not to be limited to:*
 - *Internal walls and ceilings to fire-isolated exits,*
 - *Internal walls bounding residential SOU's,*

- *Internal walls bounding residential public corridors,*
- *Internal walls, floors and ceilings to garbage rooms,*
- *External walls*
- *Walls to shafts such as garbage, mechanical ventilation and other services.*

8. *That confirmation be provided of a registered easement that enables egress from Auburn Central over the Ambulance Station site to reach Harrow Road. Provision of egress over this site is to be included in the Fire Safety Schedule.*

9. *That certification be provided to confirm the sliding doors used for egress from the Retail Mall and Woolworths open automatically if there is a power failure to the door or on activation of a fire or smoke alarm in the fire compartment served by the door. The certification is to confirm the 2 main entry points to the Mall are provided with doors with a clear egress width of 13. 7m.*

10. *That certification is to be submitted to confirm doors in a path of travel used for egress are provided with latches that are fitted with a fail-safe device that automatically unlocks each door upon power failure or activation of the sprinkler or smoke detection system, eg Doors from the Level G2 carpark to the Tower E lobby, to the lobby below Block C1 and to the DOGS tenancy (including security cage gates) the door to the central stair at Ground Floor of the building at 128 South Street.*

11. *That an NPER listed or equivalent Fire Services Consultant review the hydrant coverage to the levels below G3 podium to provide recommendations for upgrade to ensure coverage to all areas in accordance with AS2419. 1-1994.*

12. *That all fire hose reels be inspected and certification be submitted to confirm that all hose reels are provided with minimum clearances in accordance with AS2441-1998 and each cupboard is fitted with door latches to operate the door.*

13. *That an NPER listed or equivalent Fire Services Consultant review the hose reel coverage to the levels below G3 podium to provide recommendations for upgrade to provide coverage to all areas in accordance with BCA Clause E1.4 and AS2441-1988.*

14. That certification is to be submitted to confirm a review of all sprinkler heads has been undertaken and sprinkler heads replaced where painted, different heads are located in the same compartment or otherwise defective, together with clearances beneath and around sprinkler heads are adequate in accordance with AS21 18.1-1999.

15. That confirmation be obtained from a suitably qualified electrical consultant that the emergency lighting to the Fire Control Room has been tested and provides not less than 400 lux at the plan table within the room.

16. That certification be provided from an NPER listed or equivalent Mechanical Ventilation Consultant to confirm the smoke exhaust systems to Woolworths, Big W and the Retail Mall has been tested and operates in accordance with AS1668. 1-1998 and BCA Specification E2.2b except as modified by the recommendations and in accordance with Table 13.1 of the FSER prepared by SSL dated 7 May 2003. Note: Further FSER documentation is necessary to confirm the accurate standard of performance in relation to the smoke exhaust system as detailed in Recommendation No. 5 above.

17. That certification be provided to confirm the provisions to minimise smoke spread from the carpark levels at the central travelator/ ramp have been implemented as detailed in the FSER prepared by SSL dated 7 May 2003, ie:

- The central travelator at Basement Level Bi is smoke separated with sliding doors closed upon activation of the detection zone immediately adjacent to the travelator at the retails level and/ or upon sprinkler activation within either the Basement Carpark Levels Bi and B2, and
- A smoke curtain is provided around the open pedestrian ramp at Basement Carpark Level B2 at a depth of 300mm.

18. That certification be provided from an NPER listed or equivalent Mechanical Ventilation Consultant to confirm the stair pressurisation make-up air shaft connecting the lift lobby at each level of the Residential Tower E is provided with sub-ducts or motorised dampers at each level designed and installed in accordance with AS1668. 1-1998.

19. That certification be obtained to confirm the lifts as emergency lifts in accordance with AS1735.2 and BCA Clause E3.4.

20. That certification be obtained on the building's emergency lighting system and carry out repairs or upgrade to ensure that the system satisfies the requirements of Clause E4.2 and E4.4 of the BCA and AS/NZS2293. 1-1998.

21. That the following actions be undertaken with respect of the smoke detection, Emergency Warning & Intercommunication System (EWIS) or Building Occupant Warning System (BOWS):

a) That operation of the BOWS be confirmed in relation to Blocks D2, D3, D4, D5, C3 and Tower E that a BOWS is installed in accordance with AS2220. 1 & 2-1989:

i. With installation of speakers within each SOU in these Blocks with a sound pressure level of 85db. Note: This is also required for Blocks A1, A2 B1, B2, B3, B4, C1, C2 & D1.

ii. Alarm tones for BOWS to be similar to typical EWIS alarm tones.

iii. NSW FB override of the BOWS via public address (PA) system (speakers within SOU's) coordinated from the fire control centre.

iv. The PA system capability is to be independent for each building.

v. The operation of all mimic panels, F/P and interconnection to operate the BOWS is in accordance with AS1670. 1-1995.

vi. Internal inspection on a random number of SOU's in each of the residential Blocks to confirm the existence of speakers as per item i) above. Verification for operation of the BOWS by the PA for use by the NSW FB is to be undertaken in conjunction a joint inspection by the Brigades.

b) That certification for the BOWS reference compliance with the FSERs prepared by SSL dated 7 May 2003 & 11 May 2004 and GN Consulting Fire Strategy Report dated 11 May 2004. This certification is to include confirmation of the smoke detection systems in the building as follows:

- *Smoke detectors within all Residential SOU's in accordance with AS3786—1993 except that thermal detectors be located within the entrance area of each SQU of the Residential Block C3 at Level G3 that is interconnected to the BOWS.*
- *A smoke detection and fire alarm system installed throughout the retail portions of the building in accordance with AS1670. 1-1995 with spacing on an extended grid in accordance with AS1668. 1-1998 requirements.*
- *A smoke detection system to all common areas of the Residential Blocks with the common corridor smoke detectors in accordance with AS1670. 1-1995 except that the spacing in Blocks C3 and Tower E being in accordance with the FSER prepared by SSL and as detailed in Figures 1 and 2 of the GN Consulting Fire Strategy Report dated 11 May 2004.*

c) That documentation be provided from CSIRO (previously SSL) to confirm the requirements or deletion of Warden Intercommunication Phones (WIP's) as a result of this not being documented as a non-compliance or contained in the assessment sections of each FSER prepared by SSL for the Base Building. This requires input and acceptance from the various stakeholders in the approvals process such as Council, Building Owner, Fire Safety Engineer and NSW FB.

22. That certification be provided to confirm the FRL of the lift landing doors and control panels to achieve an FRL of -/60/- in accordance with BCA Clause C3. 10.

23. That the ventilation grilles in the walls separating the common corridor of the Residential Blocks with the lift shaft in Tower E and SOU's in Residential Block C3 are to be inspected and certified to achieve an FRL of -/60/60 (non-loadbearing walls) or 90/90/90 (loadbearing walls). Test reports of the pro-type installation are to accompany the certification to confirm the fire rating achieved.

24. That the services of a specialist fire stopping contractor be engaged to thoroughly inspect all areas within the building to upgrade, rectify and/ or provide fire collars in accordance with a prototype assembly of the service and building element tested in accordance with AS4072. 1- 1992 and AS1530.4-1997. Obtain certification so that all penetrations in the building are fire stopped so as to satisfy the requirements of Clause and Specification C3. 15 of the BCA.

This is to include services in floor slabs, walls to Residential garbage rooms at all levels and the walls bounding public corridors & SOU's with EDB, communications, fire hose reel cupboards and the like.

25. *That Council obtain copies of the architectural plans referred to in the Stage 1 CC and Stage 2 FSER prepared by SSL as detailed in Annexure B and C of this Report.*

26. *That further investigation be carried out by Council to obtain copies of the Construction and Occupation Certificates in relation to the Woolworths and Big W tenancy fitouts to confirm that the assumptions, limitations and recommendations of the Base Building FSER's prepared by SSL have been implemented.*

27. *That in relation to the Kiosk Ki (Donut King) review of Council records be undertaken to confirm if an OC has been issued and otherwise issue as required.*

28. *That upon completion of the recommended upgrade works certification be submitted to Council for all works including each individual fire safety measure and a Fire Safety certificate be submitted to Council detailing all fire safety measures contained in the current Fire Safety Schedule. Further it is recommended that consideration be given to a full systems Interface test of the fire safety measures installed.*

7.2 Upgrade Works Required

29. *That vertical separation of openings in external walls at different storeys be upgraded with fire rated spandrel construction having an FRL of 60/60/60 in accordance with BCA Clause C2. 6 to the following areas currently provided with full height glazing:*

- To the north-eastern façade of the South Street Building. Note: These works should also be included as a condition of approval of any DA for the use of the South Street Building.*
- North-eastern common corridors of Residential Block A2.*
- South-western glazing of Residential Block C1 between Level G2 and G3 (Podium).*

30. That the emergency generator located in the north-east corner of the Level G2 carpark level be fire separated from the remainder of the building with construction having a FRL of 120/120/120 in accordance with BCA Clause C2. 12, subject to confirmation that the generator provide power to sustain emergency equipment required to operate in the emergency mode.

31. That the substations located within the building at Lower Queen Street Level G 1 adjoining Vales Lane be separated from other parts of the building with construction having an FRL of 120/120/120 and doorways protected with fire doors having an FRL of 120/30. Plans are to be submitted to Council for approval prior to construction commencing.

32. That the main switchboard be upgraded by providing a new self-closing fire rated door-set achieving an FRL of at least 120/30 and that all penetrations and construction joints in the walls and ceiling are fire stopped so as to maintain an FRL of at least 120/120/120.

33. That all fire doors within the building (including to doors to all fire-isolated exits, garbage rooms, residential SOU's) be inspected, upgraded and/or replaced as compliant fire rated doors and certified to confirm they are in accordance with AS1905. 1-1997 due to excessive gaps, in operative door closers, missing or faulty door latches, missing fire door tags. This work is to be carried out by a recognised fire door company. Note: Door latches to all fire isolated stair doors are to be inspected, upgraded and certified as compliant with BCA Clause D2.21 as a single handed downward action lever device.

34. That the doorway to the fire-isolated stair serving Residential Block A3 at Level G2 be inspected and certificated in accordance with AS1905. 1-1997 to achieve an FRL of 120/30.

35. That the openings in the eastern walls of the top floor plant room, of the building at 128 South Street, located within 3m of the side boundary be fire protected in accordance with BCA Clause C3.4.

36. That services such as ventilation ducts, PVC pipes and also electrical wiring not serving the fire-isolated exits be relocated outside each of the exits through out the building or the services are to be enclosed with materials to achieve an FRL of -

/90/90 (Residential areas) or -/120/120 (Other areas) when tested from both sides and no access panels are to be provided to such services within the exit.

37. That the egress in the northern corner of the basement carpark levels (Stair No. 2) discharging to the main loading dock adjacent to the main switch room be enclosed at Level G 1 and below with construction having an FRL 120/120/120 and the access door being provided with glass viewing panel and hot smoke seals in accordance with AS1905. 1-1997 and the FSER prepared by SSL dated 7 May2003.

38. That services be relocated at the carpark Level B2 lift lobby area serving Residential Block A2 to provide a minimum clearance of 2.0m to the underside of the sprinkler heads and exit signs.

39. That the fire hose reel cupboard door at Level 6 of Residential Block B3 be re-hinged so that the door swings away from the fire-isolated stair to maintain a clear width of 1.0m for egress.

40. That the following deficiencies in the fire-isolated exits serving the building be addressed in an Alternative Solution Report where upgrade works are unable to be carried out to satisfy the Deemed-to-Satisfy Provisions of the BCA:

- Doorways from Woolworths (ie Stair No. 3 at the rear of the liquor shop & stair serving Tower E), Big W (ie Stair No. 5 at the back of house staff area) tenancies or Residential SOU's (ie Block C3 Levels 5 & 6) must not open directly into the fire isolated stairways unless they are separated from the fire-isolated stair with a public corridor, public lobby, air lock or the like.
- The doorway from the mechanical ventilation plant room at the intermediate landing must not open directly into the fire-isolated stairway (Stair No. 6) serving the Basement carpark that discharges at the rear of Residential Block B4 unless it is separated from the fire-isolated stair with an air lock or the like.
- Each fire-isolated exit must discharge directly, or by way of its own fire-isolated passageway to open space, eg Residential Block A2 at Level G3 and Block A3 at Level G2.
- The exit from the north-western corner of the carpark at Level G2 discharges into a passageway that is non fire-isolated.

- That where travel from the point of discharge from fire-isolated exits necessitates passing within 6m of a part of the external wall of the building that contains openings, the openings are to be protected with internal drenchers on fixed glass. eg Stair 5 from the Basement Carpark Levels/Big W back of house and also Stairs from Residential Blocks C2, C3.

41. That bollards be installed at the entry to the fire-isolated stair at Basement Level B2 (Stair No 3), on the northern central perimeter wall of the Retail carpark to prevent vehicles blocking access to the doorway.

42. That the gap between separate fire-isolated stairs be enclosed or blocked in with non- combustible construction (ie Stair No. 3 descending from the north-east portion of Carpark Level G2 and separate the stair ascending from Carpark Levels B1 and B2) so that the stairs are not connected.

43. That EDB cupboards located in path of travel to an exit, particularly within the residential portions of the building be upgraded so that the enclosing walls are smoke sealed, internal linings of doors are non-combustible and smoke seals are fitted to the entire perimeter of the doors including at the base.

44. The main stairs to the Town Square be reconstructed with going (G), riser (R) and quantity ($2R + G$) dimensions in accordance with BCA Table D2. 13 unless a report is provided from a suitably qualified expert in human movement that is able to confirm the stairs are adequate in accordance with the Performance Requirements of the BCA.

45. That all stairs within the Residential Blocks be surveyed to confirm that riser heights are consistent throughout each flight, with treads having an even and smooth (non-slip) surface.

46. That the landing at carpark Level B2 to the rear of the lift serving Residential Block A2 with a step of approximately 260mm be provided with an additional step, installed to provide 2 risers of consistent size. Handrail is also be installed to one side of this stairway in accordance with BCA Clause D2. 15.

47. That the door to the fire-isolated stair serving Residential Block A3 at Level G2 containing a step at the doorway, contrary to BCA Clause D2. 15, is to be altered

with landing or in fill the doorway and provide alternative means of egress to open space.

48. That the balustrade to the roof of Residential Block B3 be upgraded so that the height of the brick upturn is at least 760mm above the roof surface level.

49. That the balustrade to the north-western area of the Level G2 carpark surrounding the Park Road driveway void be upgraded so that height is not less than 1.0m.

50. That handrails be provided throughout the building to at least one side of each stair or ramp at a height of 865mm including:

- Stair to Residential Block A2 at Level P2.*
- Ramp from Retail Mall adjacent to the Liquor Shop with egress discharging to Vales Lane.*
- Stair to Woolworths tenancy at staff upper floor area.*
- Stair within main switch room adjoining Vales Lane.*
- Stair from southern areas of Basement Bi Level carpark adjoining Vales Lane vehicle entry.*
- Ramp (Steeper than 1:20 gradient) within mall of building at 128 South Street.*
- The handrail within the fire-isolated stair to the building at 128 South Street is to be provided at a height of 865mm at the first floor mid-landing.*

51. That the door latches to the exits doorways and final exit doors are to be provided with lever type latches and where fitted round knob type latches are to be replaced, eg Door from Tower E roof top Plant Room Level to fire-isolated stair, door from Residential Block C1 at Level G3 to the Podium, egress doors adjoining the vehicle driveway entry from Queen Street at Level G2.

52. That Blocks C3, D1 to D6 and Tower E are to be upgraded to provide re-entry to at least every fourth level together with advisory signage at each door or install fall safe devices activated by the fire detection system and/or fire sprinkler system to enable re-entry from the fire stairs at each level. Alternatively address the deficiencies in re-entry from the fire-isolated exits in an Alternative Solution Report where upgrade works are unable to be carried out to satisfy the Deemed-to-Satisfy Provisions of the BCA.

53. That signage at each lift landing door be installed and maintained stating "DO NOT USE LIFTS IF THERE IS A FIRE" in capital letters not less than 10mm high, and in a colour contrasting to the background, located in the vicinity of the call button. That certification be obtained to confirm the works have been carried out.

54. That the system of directional exit signage in Levels below Podium Level be upgraded to provide occupants with a choice of egress in different directions where egress is greater than 20m from an exit. That certification be obtained on the building's exit lighting system and carry out repairs or upgrade to ensure that the system satisfies the requirements of Clauses E4.5 & E4.6 of the BCA and AS/NZS2293. 1-1998 including that exit signs are at a height not greater than 2.7m and are located at each fire-isolated stair door and final exit door.

55. That all Residential Blocks require inspection and defective or incorrect exit sign cover plates be replaced. That within each level of Residential Tower E directional exit signs be provided within the lift lobby adjoining the lift to clearly show the direction to both alternative exits.

56. That signage to the fire-isolated stairs throughout the building be reviewed and upgraded so that all doors are provided with signage in a contrasting colour to the background in capital letters not less than 20mm high as follows:

a) On the corridor side of each door leading to a fire-isolated stairway.

FIRE DOOR - DO NOT OBSTRUCT – DO NOT KEEP OPEN

b) On each side of the final exit doorway discharging from all fire-isolated stairways.

FIRE SAFETY DOOR - DO NOT OBSTRUCT

57. That signage be installed adjacent to each doorway leading to all fire-isolated stairways (on the corridor side) signage in accordance with Clause 183 of the EP & A Regulation 2000 stating offence regarding the fire-isolated exits.

OFFENCE RELATING TO FIRE EXITS

It is an offence under the Environmental Planning and Assessment Act 1979.

- (a) *To place anything in or near this fire exit that may obstruct persons moving to and from the exit, or*
- (b) *To interfere with or obstruct the operation of any fire doors, or*
- (c) *To remove, damage or otherwise interfere with this notice.*

The signage must be in a colour contrasting with the background and the words "OFFENCE RELATING TO FIRE EXITS" in the notice must have lettering at least 8mm high and the remaining words have lettering at least 2.5mm high.

58. That portable fire extinguishers be installed to all plant rooms, lift motor rooms, electrical switch rooms and areas of high risk in accordance with AS2444-2001. That fire extinguishers need not be provided to areas within the remainder of the building served by fire hose reels and all redundant extinguisher signage and brackets be removed. Certification is to be submitted upon completion of the works.

59. That the following works be implemented in accordance with the Fire Safety Engineering Reports prepared by SSL dated 7 May 2003 and 11 May 2004:

- *Install hot-smoke seals to all fire doors opening to the fire-isolated stairs linking the basement Level carparking areas and the upper level retail levels.*
- *Install smoke seals! or replace where defective to doors to the fire-isolated stair No. 29 serving Residential Block C3.*
- *Install signage at the central podium area to clearly indicate the direction to reach the lower street level The FSER necessitates street signs as detailed below to indicate the direction to the stair between Blocks A1 & C1, the stair to the rear of Block D3. Signage is also necessary to the stairway via Block A1 (To be clarified with SSL).*

- *Install speakers within SQU's of all Residential Blocks as specified in the SSL Report and GN Consulting Fire Safety Strategy.*

60. *That the Residential SQU's be reinstated in accordance with the DA/ CC approval to ensure the occupancy numbers have not been increased from the numbers assumed in Page 6 of the FSER prepared by SSL dated 11 May 2004.*

61. *That the cool room to the Chicken Shop Q12, Q13 Chicken Shop be upgraded with an internal light switch and external indicator lamp that is illuminated when the internal light switch is on.*

62. *That the cool room to the Steakhouse Shop P14 be upgraded with an internal light switch and external indicator lamp that is illuminated when the internal light switch is on.*

63. *That the Tenancy SP1 (Shoe shop) be upgraded as follows:*

- *Upgrade the cupboard to the underside of the stair with construction having an FRL of 60/60/60 and fire door installed having an FRL of -/60/30.*
- *Replace the stair to the first floor with timber treads having a thickness of at least 44mm and average density of 800kg/m³ at a moisture content of 12%. Alternatively line the underside of the stair including landings with materials to achieve an FRL of 60/60/60.*
- *Provide emergency lighting to the stairway in accordance with BCA Clause E4.2 and AS2293. 1-1998.*
- *Reduce the height of the exit signs in the shop area to a height between 2m and 2.7m.*
- *Alter egress doors from the tenancy with single handed lever latch and the second door locks are to be removed."*

Regulation of Fire Protection Systems

It is a condition of all development consents that all building works, including installation of fire safety systems, comply with the Building Code of Australia (BCA).

The BCA requires that a fire protection system is installed and specifies the criteria, which systems must meet. This is usually by way of reference to an Australian Standard or other like document.

Certification for building work (being a construction certificate or a complying development certificate) cannot be granted unless it is demonstrated that the works comply with the BCA.

Consent authorities also have the ability to require, and in some circumstances must insist on, the installation of fire protection systems in existing buildings when they are considering an application proposing a change to that building (e.g. alterations, additions or a change of building use). As part of the approval process the certifying authority must be satisfied that the fire protection system complies with the BCA.

It has been indicated that, in practice, certifying authorities do not always check system designs. Rather, the plans and specifications for the proposed building submitted with the construction certification application simply indicate an intention to comply (e.g. a sprinkler system will be installed and it will comply with AS 2118.1). Evidence of compliance is not sought until after the installation is complete, and on many occasions this is in the form of self-certification.

The NSWFB currently has a limited role in terms of the review of fire safety system designs. Under Clause 144 of the Environmental Planning and Assessment Regulation 2000 certain system designs must be referred to the Brigades for review and comment if they involve an Alternative Solution.

Alternative Solutions are variations from the prescribed requirements of the BCA, which still meet the performance standards of the BCA.

A construction certificate cannot be issued for the building until the NSWFB report has been received and taken into consideration by the certifying authority. The certifying authority is not required to adopt a recommendation of the NSWFB that

they do not agree with. However, they must notify the Fire Commissioner of this decision and the reasons for not adopting the recommendation.

Clause 187 of the EP&A Regulation allows construction certificate applicants to lodge an objection with a certifying authority against a requirement of the BCA. Clause 188 of the EP&A Regulation also allows construction certificate applicants to lodge an objection with a certifying authority against certain fire safety requirements of the BCA. Under this provision the certifying authority cannot allow the objection without the concurrence of the Commissioner of the NSW Fire Brigades. When granting certain approvals for Class 1b to 9 buildings (i.e. a development consent for a change of building use (a change of BCA classification), or a complying development certificate for building work or a change of building use, or a construction certificate) the relevant authority must prepare and issue a fire safety schedule. The fire safety schedule identifies, among other things, the essential fire safety measures serving the building and the standard of performance at which they must be maintained.

The schedule must include the fire safety measures currently implemented in the building premises and the fire safety measures proposed or required to be implemented. It must also identify each measure deemed by the authority that prepared the schedule to be a critical fire safety measure and the intervals (being intervals of less than 12 months) at which supplementary fire safety statements must be given to the Council (and NSWFB) in respect of these measures.

Alternative Solutions

What are they.

Alternative Solutions are a concept under the BCA. The concept derives from the performance based version of the BCA adopted in NSW in 1997. The performance based compliance with the performance requirements is achieved using a solution, which complies with the given (prescriptively expressed) Deemed-to-Satisfy (DTS) Provisions, an Alternative Solution, or a combination of these means. These are collectively called 'building solutions'.

Who can propose them.

An Alternative Solution can be proposed by any applicant for approval in relation to any aspect of the BCA. However, it cannot be approved unless the relevant certifying authority is convinced that what is proposed complies with the relevant performance requirements.

There are currently no regulatory restrictions on who can design an Alternative Solution. The legislation does not specify what qualifications a designer must hold. The certifying authority responsible for determining the application for construction certification determines competence.

How are they approved.

Variations to the prescriptive requirements of the BCA (Alternative Solutions) can be approved by individual councils and individuals who are accredited certifiers. There are no qualification requirements for council certifiers.

Clause 144 of the EP&A Regulation does require that the NSW Fire Brigades be consulted regarding certain fire safety Alternative Solutions before they are approved. However, any recommendations can be rejected by the certifying authority.

Additionally, the principal certifying authority must not issue an occupation certificate unless another compliance certificate is obtained or provided from an accredited certifier. A fire safety engineering compliance certificate is issued stating that the building work relating to the Alternative Solution has been completed and complies with that Alternative Solution.

How are they implemented.

Implementation of Alternative Solutions is overseen by the Principal Certifying Authority (PCA) - council or an accredited certifier. A certifying authority must request a final fire safety report from the NSW Fire Brigades in relation to a building subject to an Alternative Solution that has been considered by the Brigades under clause 144 of the EP&A Regulation. The request should be made, as soon as practicable after receiving an application for an occupation certificate.

Concerns about fire engineered Alternative Solutions was raised in the Joint Select Committee on the Quality of Building by the NSW Parliament in 2002. The NSW Fire Brigade in a submission to the Committee expressed concerns that Alternative Solutions may not be adopted by certifiers and developers and some Alternative Solutions were not certified by the Fire Brigade or an approved certifier before the issuing of an occupancy certificate.

Fire Safety Orders

An order No.6 under section 121B of the EP&A Act (a fire safety order) can be issued by a relevant authority (e.g. council or an authorised officer of the NSW Fire Brigades). Fire safety orders generally relate to existing buildings where the standard of fire safety (based on the individual circumstances of a specific building) is not considered adequate. Orders issued by councils can require works to be done (e.g. a fire protection system to be installed) or they can require the owner to submit a fire safety upgrading proposal. The standard of fire safety that an order can require to be met is at the discretion of the authority that issues the order. An order does not have to insist on compliance with the BCA as the work which is subject of an order does not require approval before it is carried out (section 121O of the EP&A Act).

This discretion afforded to the authorities is intentional as it may sometimes be unnecessary, difficult or overly onerous to make an existing building comply. A fire safety order issued in relation to any Class 1b to 9 building must have a fire safety schedule attached.

A person to whom a fire safety order is given must, within the time specified in the order, cause copies of a final fire safety certificate for the building to be given to the person by whom the order was given.

A notice of intention to serve a fire safety order must be given by the council before the order is issued – that is, unless the order is given, or expressed to be given, in an emergency. Where notice of intention is required to be given, it must indicate that the person to whom the order is given may make representations to the authority as to why the order should not be given. The recipient of a fire safety order may appeal to the court against the order or a specified part of the order.

Role of the PCA

The PCA is responsible for overseeing this work for compliance with the development consent and the BCA. Upon satisfactory completion of the works the PCA issues an occupation certificate. It is a requirement under the EP&A Regulation that an occupation certificate not be issued for any Class 1b to 9 building unless the PCA is satisfied that a fire safety certificate has been issued. If the building has been subject to a referral to the NSW Fire Brigades at the approval stage, upon receipt of an application for an occupation certificate the PCA must request the Commissioner of the NSW Fire Brigades to furnish it with a final fire safety report.

The PCA is required to carry out certain inspections during construction. In practice, most PCAs will rely on certification from others in order to be satisfied that the completed fire safety system installations meet the requirements of the BCA. The legislation does not prevent the PCA relying on self-certification from the installing plumber, electrician or other tradesperson provided the PCA is satisfied they are competent. For works being carried out in response to a fire safety order there is no requirement for a PCA to be appointed. The authority that issued the order oversees the works.

Ongoing maintenance of fire protection systems

Maintenance of fire protection systems is regulated under Part 9 of the Environmental Planning and Assessment Regulation. This regulation place an obligation on building owners to continually keep their 'essential fire safety measures' in working order, and to verify to the relevant council at least once each year they are fulfilling this obligation. 'Essential fire safety measures' are those measures listed in the fire safety schedule for the building issued by the relevant authority (at the time of issue of an approval/order).

A copy of the final fire safety certificate and current fire safety schedule must be provided to the Fire Commissioner and be prominently displayed in the building. The fire safety certificate verifies that the building owner has had the fire safety measures that are listed in the fire safety schedule assessed by a properly qualified person and that person found them to be capable of achieving the standard of performance expressed in the fire safety schedule.

A fire safety statement is required to be routinely submitted from the building owner or the owner's agent to the local council. This statement must be submitted at least annually (an annual fire safety statement). However it can be required to be submitted at more frequent intervals. A copy of the statement must be forwarded to the NSW Fire Brigades and a copy must be displayed in the building.

Licensing of Builders

The Office of Fair Trading administers the *Home Building Act 1989* which provides for a system of contractor licensing covering individuals and entities contracting to undertake residential building work. The installation of passive and active fire protection systems in residential buildings falls within the definition of residential building work. Principal contractors and sub-contractors engaged in undertaking such work are required to be licensed.

In relation to passive fire protection systems, the categories of licences covering this type of work would generally be builders and carpenters (although the construction of fire separation walls might be undertaken also by bricklayers and plasterers).

Any electrical wiring work involved in installing an active fire protection system is required to be undertaken and/or supervised by the holder of a supervisor certificate as an electrician.

The installation of sprinkler systems, hydrants, and hose reels as well as the connection of such systems to a mains water supply falls within the definition of the specialist work category of plumbing and is required to be undertaken and/or supervised by the holder of a supervisor certificate as a plumber or water plumber. Persons completing an apprenticeship and the Certificate III course in Sprinkler Fitting can qualify for the issue of a supervisor certificate for water plumbing – fire sprinkler systems (excludes hydrants, hose reels and mains connections) or, where additional plumbing units of competency are completed, for water plumbing – fire protection systems (includes hydrants, hose reels and mains connections).

Council's as Principal Certifying Authorities

Currently, only councils and private accredited certifiers can issue construction certificates, undertake inspections and act as principal certifying authorities. There is no accreditation system for council certifiers. This means that it is not possible for council certifiers to be responsible for building matters in excess of the appropriate skills and experience needed to adequately approve and certify developments.

Councils are often dependent on technical experts. People who design and/or install building systems, such as fire systems are not required to be accredited. The quality of building work can be affected more by the contractors/consultants who design or install major aspects of the building work, than the certifying authority.

The Department of Planning has recently released a Discussion Paper – *Improving the NSW Planning System*, (Planning Reform) this paper proposes a number of issues and solutions. **[E.2]** The paper comments *“construction of new buildings is an expensive and highly competitive process, where any cost savings, particularly in design or construction standards, are actively sought. A certifier can come under considerable financial and contractual pressure from a developer to sign-off on complex building design proposals in extremely limited timeframes”*.

The paper recommends that: *“Requiring staff of the Building Professional Board (BPB) to allocate an accredited certifier for any large or complex buildings will ensure that a certifier appropriate to the task is appointed. The BPB will identify a pool of appropriate certifiers for differing types of buildings from which the developer will be able to choose. Developers would have the right to reject the allocation of a certifier on two occasions for any one project. Buildings would be identified as being large or complex if, based on BCA requirements, the building needs a fire isolated stairwell.”*

The BPB has been given the power to audit both council and accredited certifiers. This auditing process is designed to be a check on the certification activities. The auditing process also provides a check on the behaviour of the certifier and their clients to counter the potential desire to take short cuts in the certification process.

A greater focus on auditing is now possible as a result of the establishment of the BPB. The BPB has commenced undertaking an audit of Auburn Council's certification process and this will be the subject of a separate report.

Council certification processes do not sit in isolation from the rest of the council's planning and governance activities. Councils undertake a key role in the enforcement of consent conditions and compliance with local enforcement practices. In some instances failure in certification practices may demonstrate deficiencies in other areas outside of the jurisdiction of the BPB and mechanisms should be established to monitor these. For this reason greater liaison is required between the BPB and other agencies responsible for overseeing local government, such as the Department of Local Government.

Fundamental to a sound system of certification that has is that it is appropriate accreditation scheme. It is vital that the people with the right skills, experience and probity are responsible for the certification of building work. The Planning Reform proposes the following changes to the certification process:

“Accrediting councils and council officers

Accreditation of certifiers ensures that they can certify buildings based on their experience and qualifications and is dependent on the individual undertaking continual professional development and holding the required insurance. No such system exists for council certifiers leading to concerns about council certifiers being adequately trained to deal with large and complex proposals, as well as not truly accountable to independent scrutiny of their decisions.

Accrediting council certifiers based on their technical competence will ensure that minimum standards are set for all certifiers whether they are employed by a council or in the private sector. This is in the interests of consumer protection; it will help to ensure that all certifiers are accountable and competent and that building regulations, standards and codes are enforced.”

Further there are limited controls to ensure that where a council is the PCA that certification is being done appropriately. With the certification officers having skills to undertake the buildings certification.

The Planning Reform proposes that:

“Accrediting council certification staff in the same manner as private accredited certifiers was a recommendation of the Campbell Inquiry into the Quality of Buildings in 2002. The NSW Government subsequently stated its commitment to accrediting council certifiers subject to consultation with local government about implementation. In recognition of the differences between council and accredited certifiers, the model to accredit council certifiers would be slightly different:

- Councils will need to become corporately accredited under revised rules of accreditation.*
- All individuals in council who council requires to sign certificates or conduct mandatory inspections will be deemed to be accredited.*
- Deemed accreditation for building surveyors would be to the A3 level of accreditation only under the BPB Accreditation Scheme.*
- Staff wishing to be accredited at Building Surveyor level A2 or A1 would need to be accredited in the same fashion as private accredited certifiers.*
- Staff employed by councils after the commencement of the deemed accreditation process would be required to be accredited in the same fashion as private accredited certifiers.*
- ‘Deemed’ accredited certifiers within council could not practice in the private sector.*
- Individuals would be subject to the same competency, continuing professional development (CPD), disciplinary and insurance requirements as accredited certifiers under the BP Act and Accreditation Scheme (council’s existing insurance would provide sufficient cover).*
- All councils, as occurs in Victoria, would be required to provide certification services for building (A1 level), subdivision (B1) and strata certification (D1) through in-house accredited persons, sharing with other councils, or through contractors.*

- *Councils could apply to the Minister for an exemption from providing certain certification services or to provide such services in circumstances where they do not have appropriately accredited persons to do the work.*
- *Complaints could be made against accredited individuals in council or the council as the certifying authority or both. Individuals would be subject to the same disciplinary provisions as accredited certifiers whereas council as a body would be required to consider any complaint investigation report prepared by the BPB at a meeting and report back to the BPB and the Department of Local Government on actions proposed to address issues raised.*
- *Fees for the accreditation of council staff may be lower than private accredited certifiers as there would be no assessment made of the competence of council certifiers as part of the deemed accreditation process.*

Ensuring key building professionals are accountable

While it is proposed that all persons who issue certificates are required to be accredited, those persons who prepare building designs and in particular those who design or install critical building systems (eg: fire safety systems) are not required to be accredited. The Campbell Inquiry into the quality of buildings in 2002 recommended that a range of 'building practitioners' in addition to accredited certifiers should be accredited, including building and engineering consultants.

Councils and accredited certifiers often experience problems with the quality of design and installation undertaken, particularly in relation to compliance with relevant building standards and conditions of development consent. Arguably, the quality of building work is affected more by those persons who design or install major aspects or components of building work than the independent 'checkers' of that work – the certifying authorities. In Victoria, for example, civil, electrical, fire safety and mechanical engineers are required to be accredited whether they are consultants in the design phase of a development or certifying the completed building work.

Requiring all building professionals to be accredited will have cost implications in terms of the payment of accreditation fees, as well as the creation of potentially unnecessary bureaucracy where none currently exists. However, there is certainly a

case to make key building designers, particularly those that design critical building systems, accountable for their decisions. This can be achieved through a number of processes, including giving the BPB and other appropriate regulatory authorities (eg the NSW Fire Brigades) the ability to issue penalties to those designers producing designs which do not meet the required standards. Consideration will also be given to whether certain categories of building design professionals need to be accredited.”

EVIDENCE TABLES

INTERVIEWS

Evidence Code	Evidence Topic
I1	Interview notes, Gordon Edgar – former Senior Development Officer
I2	Interview notes, Manyel Gregory, Senior Health Surveyor
I3	Interview notes, Joe Malouf, former Health Surveyor
I4	Interview notes, Stephen Pratt, former Team Leader, Development Assessment
I5	Interview notes, Jan McCredie, former Director
I6	Interview notes, Sarkis Nassif, Director, Holdmark Developers
I7	Interview notes, Chris Jurgeit, Chief Superintendent, Community Safety Division
I8	Interview notes, Trevor Brown, former Director Corporate Services
I9	Interview notes, Councillor Patrick Curtin –
I10	Interview notes, Councillor Irene Sims
I11	Interview notes, Councillor Le Lam
I12	Interview notes, Councillor Chris Cassidy
I13	Interview notes, Nathan Croft, former Town Planner
I14	Interview notes, Ray Brownlee, former General Manager –
I15	Interview notes, John Burgess, Current General Manager
I16	Interview notes – David Lewis, former acting General Manager

I17	Interview notes - Louise Connolly, Team Leader, Development Assessment
I18	Interview notes – Judy Clark, Manager Development Assessment
I19	Interview Notes –Carlos Quaglia – Stephen Grubits

EVIDENCE LIST

Evidence Code	Evidence Topic
E1	Letter from David Lewis, Acting General Manager to Department of Local Government – 2 March 2005
E2	NSW Department of Planning – <i>Discussion Paper – Improving the NSW Planning System. September 2007</i>
E3	Hansard NSW Legislative Assembly – Peter Nagle MP – 12 May 1999
E4	Council Meeting Minutes – 2 June 1999 – Development Application
E5	Council Meeting Minutes – 21 July 1999
E6	Council Meeting Minutes – 4 August 1999
E7	Construction Certificate – 4 July 2002
E8	Washington Brown Associates – Construction Cost Estimate
E9	Development application – DA237/02 – 4 September 2002
E10	Interim Certificate – 21 June 2004
E11	Final Occupancy Certificate – 14 April 2005
E12	GRS Building Report – 30 May 2007
E13	Emergency Orders – 22 June 2007
E14	Development Application 157/02, 158/02 and 159/02
E15	Submissions from Public on Auburn Central
E16	Section 96 Modification for additional units – 20 August 2003
E17	Auburn Central – Issues Paper – 15 August 2002

Evidence Code	Evidence Topic
E18	Council Meeting Minutes – 4 September 2002 - CD
E19	John Kleem Consulting – Review of Auburn Council
E20	Email from Ray Brownlee to Department of Local Government – 7 November 2007
E21	Review of the operation of the Planning and Environmental Department - Wiggins Report
E22	Councillor workshop – 14/15 February 2003
E23	Bonus to Certification Officers – 23 July 2004
E24	Performance Appraisal – Joe Malouf – 14 December 2004
E25	Statement by Sarkis Nassif
E26	Stephen Grubits letter
E27	Final Fire Safety Certificates – 8 April 2005 and 6 March 2006
E28	NSW Fire Brigade Report – 15 June 2007
E29	Land and Environment Court Orders – 20 July 2007
E30	Council Meeting Minutes - 21 November 2007
E31	NSW Fire Brigade letter – 2 December 2003
E32	NSW Fire Brigade letter – 8 April 2005
E33	Fire Safety Concern Report – 11 May 2007
E34	Report on Illegal construction 11 May 2007
E35	Memorandum from Gordon Edgar dated 2 March 2005
E36	Valuation – BEM Property Consultants – 30 July 2002

Evidence Code	Evidence Topic
E37	Pedestrian Study – Space Syntax
E38	A Review and Probity audit of the Auburn Central development – Robert Edwards Report – 5 August 2005
E39	Robert Bulford report – Department of Local Government - Council practices and procedures in respect of section 96 modification of development consents
E40	Minutes of Council Meeting – April 1999
E41	Press article – Auburn Review – 9 June 1999
E42	Minutes of Council Meeting – June 1999
E43	Press article – Auburn Review – 14 July 1999
E44	Valuation - Australian Valuation Office – 30 August 2002
E45	Valuation – Colliers International Consultancy and Valuation Pty Ltd
E46	Valuation – Australian Valuation Office – December 1999
E47	Minutes of Council Meeting – 2 October 2002
E48	Letter to Holdmark dated 3 October 2002
E49	Council Business Paper 6 November 2002
E50	Letter to Hiken on payment of S94 – 8 March 2004
E51	Section 94 summary 25 February 2005
E52	Tomesetti Probity Report
E53	Council Business Paper – 4 September 2002
E54	File Note – David Lewis – 21 October 2004

Evidence Code	Evidence Topic
E55	Minutes of Council Meeting – Lease of Auburn Central Town Square - 22 October 2004
E56	ICAC – <i>Corruption Risks in NSW Development Assessment Processes – Position Paper</i>
E57	Section 94 Auburn Town Centres Plan
E58	Memorandum - Section 94 for Auburn Central payments – 14 June 2005
E59	E38 – Edwards Report
E60	Memorandum from Nathan Croft to Jan McCredie – 2 March 2005
E61	Email from Clr Sims to David Lewis – 20 November 2004
E62	Email from David Lewis to Clr Sims – 22 November 2004
E63	Letter from Auburn Council to Holdmark – 26 August 2004
E64	Note from Nathan Croft to “write off” hoarding rental
E65	Special Variation application – 2002/2003
E66	Minutes of Council Meeting – December 2003
E67	Electoral Funding Authority – Details of Returns