

VICTORIA

Auditor General

Victoria

East Gippsland
Shire Council:
Proposed sale of
Lakes Entrance
property

*Ordered to be printed by Authority.
Government Printer for the State of Victoria*

ISBN 1 921060 11 5



AUDITOR GENERAL
VICTORIA

The Hon. Monica Gould MP
President
Legislative Council
Parliament House
MELBOURNE

The Hon. Judy Maddigan MP
Speaker
Legislative Assembly
Parliament House
MELBOURNE

Dear Presiding Officers

Under the provisions of section 16AB of the *Audit Act 1994*, I transmit my audit report on *East Gippsland Shire Council: Proposed sale of Lakes Entrance property*.

Yours faithfully

JW CAMERON
Auditor-General

20 July 2005

Foreword

This report contains the results of our review of the East Gippsland Shire Council's processes and actions in attempting to sell a property at 55 Palmers Road, Lakes Entrance, and in settling an associated legal action.

A number of deficiencies in the council's processes and actions are highlighted in the report, including:

- lack of evidence that a comprehensive analysis was undertaken prior to pursuing the sale of the property
- inadequate due diligence on prospective purchasers of the property
- poorly conducted tender process for the sale of the property which was further compromised by the actions of the then mayor
- lack of transparency to the community and inadequate community consultation
- deficiencies in advice from council officers to the council.

The report draws out a number of important lessons from the events surrounding the sale of the property which should be considered by all local governments when planning the disposal of significant public assets. It also identifies opportunities for further guidance to be provided to local government in Victoria.



JW CAMERON
Auditor-General

20 July 2005

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1. Executive summary



1.1 Introduction

In February 2004, the East Gippsland Shire Council requested our Office to examine the adequacy of its processes and actions in attempting to sell the property at 55 Palmers Road, Lakes Entrance and in settling an associated legal action. This report outlines the results of our review of these matters.

The property at 55 Palmers Road, Lakes Entrance is owned by the council. Covering some 14.9 hectares, it is situated on a hill overlooking the Tasman Sea, and includes the council's Lakes Entrance Corporate Centre.

The former Shire of Tambo had purchased land at 55 Palmers Road, Lakes Entrance in 1982 for \$150 000. Subsequently, council offices were built on the site at a cost of around \$2.5 million and later refurbished at a cost of \$600 000. In December 1994 the Shires of Bairnsdale, Tambo, Orbost and Omeo and the City of Bairnsdale were abolished and the East Gippsland Shire Council was established. The council was governed by commissioners until March 1997. The new council has maintained 2 administrative offices: one in Lakes Entrance at the Palmers Road site, and the other in Bairnsdale, since 1994.

In August 1997, an Inspector of Municipal Administration was appointed to review the council's financial affairs. In his October 1997 report, the inspector expressed concerns about the council's ongoing financial viability and also expressed reservations about the efficiency of the council maintaining 2 administrative office buildings. The council subsequently decided to sell its property at 55 Palmers Road, Lakes Entrance.

The council was unsuccessful in selling this property in the period between 1998 and 2001. In June 2001, it resolved to sell the property for \$1.5 million to a private company, Lakes Village Pty Ltd, by private treaty. Following community unrest and a number of other offers for the property, the council decided not to proceed with the sale, but sell the property by public tender. Lakes Village Pty Ltd was the only tenderer and, in October 2001, the council approved the sale of the property to that company for \$1.525 million. Subsequently, an interested party initiated a Supreme Court action to prevent the sale.

In October 2003, the council settled the Supreme Court action at a cost of \$912 000 and the contract of sale for the property was cancelled.

Appendix A of this report presents a chronology of key events associated with the council's attempts to sell the property and a listing of individuals who held the positions of mayor and council chief executive between 1998 and 2004.

In April 2005, the council resolved to retain the property in public ownership and undertake further detailed analysis of options for its future use and development.

1.2 Overall audit conclusion

We found little evidence that the council had made any real attempt to consult with the community before it decided to try to sell 55 Palmers Road in 1998. Nor is there any evidence that the council adopted a strategy to regularly engage and consult with the local community on progress in selling the property until late June 2001 when the council decided to sell the property to Lakes Village Pty Ltd and had to comply with the statutory requirements of the *Local Government Act 1989*.

Further, there was a lack of transparency and accountability to the local community in relation to the council's actions. Discussions on the progress of negotiations were almost exclusively confined to councillors' briefing sessions and informal discussions which were not open to the public. Based on the evidence available, there was also a pattern where some actions agreed to, or required, by the council and recorded in minutes of informal briefing sessions were ignored and not implemented by management. This was compounded by the council's failure to detect this inaction.

We found little evidence that, during the period 1998 to late 2001, the council or its senior officers seriously considered or addressed many of the matters essential to ensuring that efforts to sell the property were soundly based, transparent and there was fair treatment of all prospective purchasers and developers.

The council could not produce any evidence that it undertook a comprehensive analysis of the financial and operational aspects of its options prior to deciding in 1998 to pursue a sale of the property.

The council failed to conduct proper due diligence enquiries on individuals and companies who were, or were acting for, prospective purchasers and developers. Of more concern was the council's failure to do so even when it, or its senior officers, became aware of adverse information about the past activities and financial capacity of these parties.

The enquiries undertaken by council staff from time-to-time were little more than basic company searches and were insufficiently detailed to discover all the facts about those entities. Had staff undertaken effective enquiries it is likely that the council would have immediately ceased negotiations with those parties. Such early action may have averted or minimised the council's eventual losses.

Some parties dealing with the council failed to act openly and transparently, and may have misrepresented themselves to the council. This particularly relates to Dr Ian Bennett and the Breakaway Group Pty Ltd.

The process leading to the decision of the council in June 2001 to commit itself to the sale of the property to Lakes Village Pty Ltd was deficient because there was a lack rigorous advice from council officers. On occasions, the written advice provided by these officers was inadequate and arguably misleading.

The requirements of the *Local Government Act 1989* were potentially breached as council officers did not obtain up-to-date valuations on the property to assist in the council's decision-making process in June 2001 and, therefore, failed to adequately protect the interests of ratepayers.

The 2001 tender process was "messy" at best and the actions of the then mayor compromised the integrity of the tender process. We identified many significant departures from the council's tendering policy and a number of circumstances which, in our view, provided Lakes Village Pty Ltd with an unfair advantage over other potential tenderers. While the tender period for the sale of the property covered the period 5 September 2001 to 5 October 2001, the tender documents were not distributed to parties who had requested them until 19 September 2001. This effectively meant a tender period of only 17 days. This clearly increased the competitive advantage of Lakes Village Pty Ltd which had prior dealings with the council in an attempt to acquire the property.

We were concerned that councillors were not made aware of the departures from the council's tendering policy or of the problems and delays encountered in providing tender documentation to prospective tenderers before making its decision in October 2001 to sell the property to Lakes Village Pty Ltd, subject to the conditions set out in the contract of sale.

We also identified deficiencies in the tender evaluation process and reports to the council and, based on the evidence available, believe that the council was not provided with complete information when considering whether to accept the tender from Lakes Village Pty Ltd. Council officers advised us that they provided ongoing verbal briefings to councillors and also placed reliance on regular advice received from the council's legal advisers.

In view of the public interest in the sale, we expected to find that the tender process had been conducted fairly and would be capable of withstanding rigorous scrutiny, but this was not the case.

There is strong evidence that the then mayor (Cr Courtney) became too closely involved with the Lakes Village syndicate and its representative Dr Ian Bennett. In our view, the mayor did not retain the objectivity and independence which are essential characteristics of an elected representative of the community. The mayor's actions sometimes seemed to be directed towards furthering the interests of the prospective purchaser rather than those of the council and ratepayers.

Ultimately, the mayor was not directly involved in the tender assessment process before the council considered the recommendations of the tender evaluation panel; so while his actions compromised the probity and integrity of the process, they may not on their own have rendered the process invalid. When looked at in the light of all the other deficiencies in the tender process, however, these actions lead us to conclude that the tender process lacked integrity.

We found no evidence during our audit of a lack of probity by council staff during the tender process. While we have raised a number of concerns about various actions and the quality of advice they provided to the council, we do not consider that any of the council staff acted in a manner designed to provide an advantage to any potential tenderer.

Legal action brought against the council in relation to the sale of this property continued for 18 months before an out-of-court settlement was reached and the contract of the sale was cancelled. The council paid \$912 000 as a result of the out-of-court settlement. Council staff advised us that the total costs to the council of its attempts to sell the property are unable to be accurately determined.

The council's agreement to settle the legal action and pay costs to the plaintiff and to Lakes Village Pty Ltd through the cancellation of the contract of sale seems to have been due in part to the discovery of inappropriate communication involving the mayor, the Lakes Village syndicate and its representative Dr Ian Bennett.

The former chief executives of the council and Cr Courtney advised us that their actions in pursuing the sale of the property at 55 Palmers Road, Lakes Entrance were motivated by a desire to secure a positive outcome for the council and the people of East Gippsland and not by any personal gain or other motives.

In relation to the development of a property at Squatters Row, Slip Road, Paynesville, in 2002 a company associated with Dr Bennett and the proposed development of 55 Palmers Road, Lakes Entrance, submitted an Expression of Interest (EOI) to the council for the development of the property. Parts of the EOI were almost identical to an EOI submitted for the development of this property by a company associated with Mr Courtney in 1998 prior to him being elected to council. Cr Courtney won appointment to the panel established by the council in 2002 to evaluate EOIs for Squatters Row, but did not formally disclose to the council the fact that he had provided Dr Bennett with a copy of the EOI he submitted in 1998.

We found no evidence that Cr Courtney had a pecuniary interest in the proposed development of the property at Squatters Row described in the EOI submitted by the company associated with Dr Bennett, but we believe he should have disqualified himself from any involvement in the evaluation of the EOIs. Ultimately, the EOI process was abandoned for reasons not relevant to our audit.

It is very important for the East Gippsland Shire Council to ensure that lessons learnt from these events be translated into actions and processes designed to ensure that similar incidents do not happen in future. In Part 9 of this report, we have drawn out lessons which should be considered by all local governments when planning the disposal of significant public assets.

Although the circumstances outlined in this report relate to a single council, they provide a sufficient basis for government to consider extending to local governments the requirement for all property transactions over a threshold level to be conducted in compliance with the government's *Policy and Instructions for the purchase, compulsory acquisition and sale of land*, and be overseen and approved by the Government Land Monitor.

RESPONSE provided by Chief Executive Officer, East Gippsland Shire Council

The Shire welcomes the report, which was prepared in response to a request of Council, initiated by its Audit Committee, for an investigation into the matter.

This review has been quite complicated and involved research of documents dating back to the late 1990s and interviews with current staff and many people who are no longer connected with the Shire. The Shire accepts the factual correctness of the report.

In regard to the areas reviewed and the recommendations therein, the Shire accepts the findings and conclusions of the audit.



2. Was the council
decision to sell the
property soundly
based?



2.1 Was the council decision to sell the property soundly based?

In August 1997, an Inspector of Municipal Administration was appointed by the then Office of Local Government to undertake a review of the East Gippsland Shire Council's financial affairs. In October that year, the inspector reported on the results of his review and expressed concern about the council's financial position and budgeted outlook. The clear message for the council was that urgent action was required to ensure its ongoing financial viability.

The inspector also expressed reservations about the council maintaining 2 administrative office buildings: one in Bairnsdale and the other at 55 Palmers Road, Lakes Entrance. He recommended that the council revisit the issue and "if deemed advisable decide to offer either or both of the two buildings for sale with the ultimate intention of selling one". The inspector suggested that the proceeds could be used to reduce the council's debt and generate a saving of \$100 000 each year in interest costs. He also speculated that if housing the vast majority of staff in one building could save a further \$100 000 in operating costs, then the cumulative effect on the council's annual deficit would be a reduction of at least \$200 000 each year.

The inspector's observations were based on purely financial criteria and amounted to a recommendation that the council examine the issue further. He had not examined in detail whether there were sound operational or other reasons why the council should continue to maintain a physical presence in Lakes Entrance, such as community demand for access to a council service centre or branch office in Lakes Entrance.

We expected that the inspector's report would have prompted the council to undertake a comprehensive analysis and community consultation process on the issue. This process should have included:

- identification of the options available to the council
- analysis and assessment of the financial and operational aspects of its options
- adequate and effective communication and consultation with its community regarding the options and the financial and service level implications of each option
- preparation of comprehensive advice for the council on the results of the analysis and the community consultation along with a recommended position

- a decision by the council and communication of this decision to the community.

In January 1998, the council resolved “that the East Gippsland Shire Head Office be based at Bairnsdale”. We saw no evidence of any community consultation prior to that decision being made.

The council could not provide evidence that it undertook a comprehensive analysis of the financial and operational aspects of its options before making its decision. Council maintained that it developed an “Office Consolidation Report”, but it could not locate that report. Accordingly, we were unable to assess its adequacy as part of this audit.

In February and April 1998, strategies and options for relocation from the Lakes Entrance office were considered by councillors at briefing sessions which were closed to the public. There was no reference to the matter at ordinary council meetings.

The council’s corporate plan for 1998-2003 listed the rationalisation of office locations and sale of the Lakes Entrance office and land for redevelopment as a strategy and action for the 1998-99 year. The corporate plan was a public document, but the council took no active steps to seek community views on the proposal to sell the property.

The council’s budget for 1998-99, adopted in May 1998, included income of \$2.5 million from the sale of 55 Palmers Road. This estimate appears to have been based on the 1995 rateable valuation of the property at \$2.8 million.

During 1998, the council staff negotiated with a number of parties interested in acquiring all or part of the property. In July of that year, the council engaged a local real estate firm to market the property locally, nationally and internationally, and put it on the market.

We expected to find evidence that the council had engaged with and consulted the community on the possible sale of the property prior to the decision to pursue a sale. Following this, we expected that it would have devised and implemented a strategy to keep the community informed about the progress of the sale. It is essential for local governments to communicate effectively with the community on deliberations and decisions about the acquisition or disposal of significant community assets such as the property at 55 Palmers Road. Effective communication includes both informing the community about proposed actions and actively seeking their involvement and input.

Communication with the community can take various forms – press releases, notices placed at strategic locations, information placed on council websites, access to council minutes and personal discussions with councillors. Community consultation and input can also occur in question time and debate at council meetings, letters to council, feedback to councillors, community meetings etc.

We found no evidence that the council adopted any strategy to engage and consult with the local community on a regular and ongoing basis about its progress in selling the property until late June 2001, when it decided to sell the property to Lakes Village Pty Ltd and had to comply with the statutory disclosure requirements of the *Local Government Act 1989*.



Council offices at 55 Palmers Road, Lakes Entrance.

2.2 Conclusion

The council could not produce any evidence that it undertook a comprehensive analysis of the financial and operational aspects of its options prior to deciding in 1998 to pursue the sale of 55 Palmers Road, Lakes Entrance.

Further, we found little evidence of any meaningful attempt to consult with the community before the council decided to sell this property, nor any evidence that it had adopted any strategy to engage and consult with the local community about its progress in selling the property.



3. Were the council's
processes for
negotiating with
prospective
purchasers
adequate?



3.1 Audit criteria

Following its decision in 1998 to sell the property at 55 Palmers Road, Lakes Entrance, we expected the council to establish and implement strategies to ensure that its processes were soundly based, transparent and compliant with the law. We expected these strategies and processes to address the following matters:

- preparation of the property for marketing and sale, including possible rezoning of the site within the framework established by the council's planning scheme and land use guidelines for the area, in order to maximise its value to potential developers and purchasers
- valuation of the property
- the preferred method of sale (for example, public tender) and clear guidance on the conduct of the sale
- probity guidelines for council officers and councillors who might be involved in the sale process and negotiations with potential purchasers or developers
- requirements under the *Local Government Act 1989* and planning legislation and how these requirements were to be satisfied
- communication and consultation with the community
- guidance on the conduct of negotiations with potential purchasers and developers, covering:
 - who should conduct negotiations on the council's behalf
 - what is allowable and appropriate in terms of direct councillor involvement and communication with potential purchasers and developers
 - the conduct of due diligence investigations into prospective purchasers and developers to establish their *bona fides* and financial and technical capacity to undertake proposed developments
 - the criteria to be met prior to the granting of "preferred developer" status, and who has the authority to confer this status on a developer
 - mechanisms for keeping the council informed of the progress of negotiations
 - the extent to which council resources should be used in providing information and services to potential purchasers and developers
 - the importance of not divulging valuations of the property and other sensitive information to prospective purchasers and developers
 - the extent to which officers could commit the council to a course of action without reference to the council

- quarantining from the negotiation process officers who may later be required to assess planning applications and development proposals on behalf of the council in its capacity as the responsible planning authority for the site
- the protection of the council's interests through mechanisms such as agreements under section 173 of the *Planning and Environment Act 1987* where the council may wish to encourage a significant development on the site
- the extent to which officers could commit the council to expenditure associated with facilitating a development proposal put forward by prospective purchasers
- acceptance of hospitality and other benefits from potential purchasers and developers.

We expected the council to establish and implement appropriate strategies to address these matters in order to ensure protection of the interests of ratepayers, delivery of a positive outcome for the council and its community, and fair treatment for all prospective purchasers and developers.

The remainder of this part of the report analyses the council's actions between 1998 and late 2001 in seeking to sell the property. We assess those actions in relation to many of the issues outlined above, identify deficiencies and consequences, and make recommendations.

There are risks associated with any significant property transaction. As most public sector agencies, including local governments, are not regularly involved in such transactions, the government has provided guidance in a document entitled *Policy and Instructions for the purchase, compulsory acquisition and sale of land*. This policy includes instructions and guidance on critical issues such as the role of the Government Land Monitor in approving property transactions of \$250 000 or more, valuation of land and the confidentiality of valuations, preparation of land for sale, and the principle that all public land should be sold by a public process.

Compliance with this government policy is mandatory for government agencies, though not for local governments. Nevertheless, we have assessed the council's actions in attempting to sell the property against the government policy because we consider it to represent better practice.

3.2 Initial tendering of the property in 1998

Following the council's decision in early 1998 to sell the property, it undertook various processes over the subsequent 4 years in an effort to achieve this outcome, including: an expression of interest process; 2 public tenders; and a series of negotiations with numerous parties considered to be prospective purchasers.

Early in 1998, the council negotiated with a number of parties interested in the property. By July of that year, the negotiations for the sale had not come to fruition and on 6 July 1998, at a closed councillors briefing session, it agreed to place the property on the market. This decision was not made at a formal council meeting and no mention was made of the decision at the next ordinary (and public) council meeting on 27 July 1998.

In late July 1998, the then chief executive made arrangements with the council's real estate agents to market the property and call tenders for its sale. Marketing of the property locally, nationally and internationally began in September 1998 over a 6-week tender period, closing on 16 October 1998. The council received one conforming tender for the property, for \$350 000 based on land value only. A non-conforming tender in the form of an expression of interest was also received.

At a closed briefing session on 19 October 1998, the council agreed that it would reject the offers received for the property and put it on the open market. This decision by the council was not ratified or acknowledged at the subsequent ordinary council meeting in October 1998.

Negotiations commenced with another prospective purchaser in October 1998 but these negotiations did not result in an acceptable offer.

3.3 Negotiations with Breakaway Group Pty Ltd between November 1998 and August 1999

In early November 1998, Dr Ian Bennett of the Breakaway Group Pty Ltd, a private company, wrote to the council expressing interest in the property. Dr Bennett indicated that his company had purchased the former shire offices in Seymour from the Mitchell Shire Council and had undertaken a successful development of the site incorporating a club with entertainment, dining and gaming facilities. He wished to discuss a similar arrangement for the property at 55 Palmers Road.

Following this introductory letter, the chief executive arranged for Dr Bennett to tour the property in November 1998 and met with him in December 1998 and January 1999.

In November 1998, Dr Bennett proposed a complicated purchase and development arrangement for the property. The proposal's key features were as follows:

- the council would receive payment of \$800 000 over 4 years for the property and an adjoining council-owned aquatic centre
- the company would commit \$1.5 million over 5 years to the development of a sport and leisure stadium adjoining the aquatic centre
- the company would build a retirement village of up to 360 lots and a 36 room conference centre and hotel
- the company would add a third floor to the existing office building
- the office building would be used for entertainment, dining and a gaming facility.

On 21 January 1999, the chief executive met with Dr Bennett to discuss the proposal, and provided him with a document outlining the council's negotiating position. It emphasised the following points:

- given the requirement for the council to advertise the sale of property, any deal would be in the public arena
- the aquatic centre would not be sold but could be leased on a long-term basis, for which a management agreement would need to be negotiated
- the time frame of up to 5 years for the development of the sport and leisure stadium was unacceptable
- the time frame for the payment of the purchase price was too long and the council would expect a normal settlement period of between 60 and 90 days
- as the planning authority, the council would deal with the proposed development at arms-length and follow normal planning processes
- the proposed management structure for the development of the property was unclear
- the council would require performance bonds and/or guarantees to ensure that the development of the property proceeded as agreed.

Following the meeting on 21 January 1999, Dr Bennett wrote to the chief executive outlining the company's understanding of the meeting and provided a revised proposal. There was little change to the Breakaway Group's original proposal on the time frame for the payment of the purchase price and the security to be provided to the council. The company was still proposing a payment period of 5 years; the council would not be provided with a first mortgage over the property; and it would not be provided with personal guarantees by the company directors and principals. In these circumstances, the company was only committed to the extent of its financial capacity. At that point the Breakaway Group Pty Ltd had \$2 in share capital.

Before entering into further detailed negotiations with the Breakaway Group, we envisaged that the council would have:

- undertaken a due diligence investigation into both the company and its principal officers and shareholders to determine their *bona fides*, and their financial and technical capacity to successfully undertake a project of the size and nature proposed
- assessed whether the proposed development complied with the council's planning scheme and whether the council would need to approach the minister to determine any future planning permit application for the proposed development under the *Planning and Environment Act 1987*.

While the then chief executive advised us that he considers these steps were undertaken, the council could not provide us with evidence that this had occurred, as a critical precursor to continuing negotiations.

Granting of preferred developer status to the Breakaway Group Pty Ltd

The chief executive and mayor met with Dr Bennett in Bairnsdale on 1 February 1999 and the chief executive subsequently advised the council that the Breakaway Group would be seeking "preferred developer" status.

On 15 February 1999 at a closed briefing session, the chief executive informed councillors that the council was going to grant preferred developer status to the Breakaway Group for a period of 2 months to allow it to plan and market research any proposed development of the property. The councillors did not formally ratify this decision at that or any subsequent ordinary council meetings.

The council did not have any documented guidance and requirements on:

- what "preferred developer" meant and what rights and obligations it imposed on the council and the preferred developer

- the criteria to be met for the granting of preferred developer status and how the council would go about satisfying itself that the criteria had been met (such as through company searches, and financial and other background checks)
- who had the authority to confer preferred developer status on a developer and whether such decisions needed to be reported to and/or ratified by the full council if the authority rested at officer level.

Our experience in examining projects across the public sector indicates that preferred developer status is usually conferred following an open expression of interest process involving assessment of submissions and appropriate due diligence investigations.

In granting preferred developer status to Dr Bennett and the Breakaway Group, the council was committing both parties to a process whereby they would allocate time and resources to further investigations and negotiations on the proposed purchase and development of the property. As part of this, the council paid a valuer to value the property on the basis of the development proposed by Dr Bennett and to make the valuation available to the Breakaway Group to facilitate further negotiations on the purchase.

The government's *Policy and Instructions for the purchase, compulsory acquisition and sale of land* requires agencies to obtain 2 valuations (one from the Valuer-General and the second from a valuer who is a member of the Valuer-General's Panel of Valuers) for properties where the market value is expected to be over \$500 000. The policy also covers the confidentiality of valuations and states that where an agency is a vendor, it is particularly important not to disclose any valuation to a purchaser or possible purchaser. Where an agency wishes to disclose a valuation to another party, the reasons have to be discussed with the Government Land Monitor and the disclosure is restricted to valuation conferences. We agree with the soundness of the reasoning underlying these requirements.

The council's actions in agreeing to provide a developer with a copy of a property valuation were, therefore, inappropriate and had the obvious potential of weakening its own negotiating position. It should have kept the valuation confidential and used it as a negotiating instrument, rather than passing it on to the developer. It is up to the developer to obtain their own valuations.

In his introductory letter to the council chief executive in November 1998, Dr Bennett advised that the Breakaway Group had previously dealt with the Mitchell Shire Council on the sale of the former Shire of Seymour office building, but it was not until 23 February 1999 – after the council's decision to grant preferred developer status to Dr Bennett and the Breakaway Group – that the chief executive contacted the Mitchell Shire Council to confirm this.

An officer from Mitchell Shire Council provided the chief executive with advice which indicated that Dr Bennett and his company were under financial pressure.

We would have expected the chief executive to inform councillors of the claims that the Breakaway Group was under financial pressure, and to initiate immediate due diligence enquiries into Dr Bennett and his company to determine their financial soundness. **The chief executive failed to initiate due diligence enquiries before awarding the company "preferred developer" status.** The then chief executive has advised us that he did pass on the advice from Mitchell Shire Council to the council, however, we did not sight documentary evidence that this occurred.

In late February 1999, the chief executive instructed a valuer to provide 2 valuations of the property: the first based on the current zonings under the Tambo Planning Scheme; and the second on the basis that the development proposed by the Breakaway Group was permitted under the provisions of the proposed East Gippsland Planning Scheme. The reference to 2 planning schemes was due to the fact that the council was, at that time, developing the East Gippsland Planning Scheme which would ultimately replace the Tambo Planning Scheme. Under the proposed East Gippsland Planning Scheme, the property would be zoned residential and the development proposed by Dr Bennett could have been granted a planning permit. The East Gippsland Planning Scheme was approved on 26 August 1999.

On 17 March 1999, Dr Bennett wrote to the chief executive saying that he had provided the council's valuer with the company's revised development concepts so that the valuation could be undertaken. This letter included a copy of those concepts and the proposal, but Dr Bennett requested that it not be shown to councillors. The concept for the proposed development was to turn the property into a lifestyle village complex and a club/casino with the following features:

- a residential component comprising 200 units built around 2 man-made lakes, 150 two-storey serviced apartments, a 100-lot subdivision, a smaller village of 50 units, a further set of 40 two-storey units, and 36 three-storey, self-contained lodges for corporate training and seminar use
- entertainment facilities, including a small cinema and a club/casino
- dining facilities
- a health club
- a floor to be added to the existing office building for residential use
- development by the company of a sport and leisure stadium adjoining the council's aquatic centre at a cost of \$1.5 million over 5 years.

On 1 April 1999, Dr Bennett and the chief executive met to discuss the development proposal. Later that day, Dr Bennett sent a fax to the chief executive which stated that: "I am very pleased that you approve the concepts in principle". Council management could not locate any evidence that the chief executive informed the council of this meeting, or sought advice from any of the council's planning staff before expressing "in principle" approval of the development concepts.

On 6 April 1999, the council received sworn valuations of the property from its valuer. The first valuation was \$300 000, based on the then zonings under the Tambo Planning Scheme; and the second valuation was \$750 000, on the basis that the development proposed by the Breakaway Group was permitted under the provisions of the proposed East Gippsland Planning Scheme. These valuations were provided to the Breakaway Group on the same day, in line with the conditions of the agreement granting the company preferred developer status.

On 7 April 1999, the Breakaway Group requested that the council extend its preferred developer status to 3 May 1999 and grant the company an option at the end of that period to accept the valuer's price or a price agreed between the parties.

On 8 April 1999, the Breakaway Group Pty Ltd advised the mayor that the company accepted the valuation of the property at \$750 000 and proposed that:

- it would pay the council \$1 million for the property, comprising payment of \$750 000 over 5 years (with \$187 500 of this amount, or 25 per cent, paid up-front) and further payments amounting to \$250 000 to be made progressively at the rate of \$1 000 as each of the 250 subdivided lots were sold
- the council would appoint Breakaway Group as manager of the council's aquatic centre on the property for 21 years and pay the company \$100 000 per year with a further 21-year option
- a third level would be constructed on the main office building for apartments
- the company would commit \$1.5 million over 5 years to the development of a sport and leisure stadium adjoining the aquatic centre
- the council's security over the development would rank second to that of the financiers.

The company's strategy of avoiding a complete up-front payment for the property by seeking ways of paying the purchase price over time as the project was developed and sold, presented some fundamental risks for the council should the developer fail to complete or sell the various components of the development.

On 12 April 1999, Dr Bennett attended a councillors' briefing session and presented an overview of the Breakaway Group's proposal for the property. He requested that the council make a decision on his offer by 3 May 1999. The council agreed to keep his offer confidential, and copies of the full proposals were distributed to the chief executive and the mayor. The council also agreed to list Dr Bennett's proposal for consideration later that month and requested that a summary of the proposal be provided to the council. Councillors were provided with a summary and evaluation of the Breakaway Group's proposal that recommended appropriate due diligence enquiries be undertaken on the Breakaway Group Pty Ltd and associated companies, including their directors and senior officers.

Council officers then engaged a local accounting firm to undertake that due diligence work, but did not inform it of the Mitchell Shire Council's views that the company was under financial pressure. In our view this information should have been passed on to the accounting firm for investigation.

On 27 April 1999, the accounting firm reported to council staff on the outcome of their enquiries. The report concluded that Dr Bennett was very much a sole operator and that they had not managed to establish whether he had sufficient financial substance to persuade the council to enter into any firm business arrangements with him. The report indicated that the total paid-up capital for the Breakaway Group and an associated company owned by Dr Bennett and his wife was \$4. In addition, the assets of both companies were subject to floating charges held by a bank and a finance company. The report recommended that before the council proceeded any further it should ask Dr Bennett to cooperate in a full due diligence investigation into his operations.

The comments in the report by the accounting firm that the Breakaway Group might lack financial substance would seem to be supported by the fact that the company was offering a complicated payment arrangement with a small up-front payment.

The then chief executive advised us that the due diligence report and its conclusion and recommendation would have been discussed with the council, however, we did not sight evidence that this occurred.

The council's chief executive failed to act on the advice of the accounting firm and continued to negotiate with Dr Bennett for a number of months without undertaking further due diligence enquiries.

On 27 April 1999, the Breakaway Group submitted another complex proposal to the council based on the project's envisaged 6 stages of development. The sixth stage was valued by Dr Bennett at \$50 million. The main purpose of this communication was to explain how the council's position and interests would be secured during the development period. There was no indication of the source of the financing or of the capacity and credibility of the development group.

At a councillors' briefing session on 28 April 1999, the council agreed that the chief executive be instructed to advise Dr Bennett that:

- the council appreciated the work put into the proposal, but it could not accept the offer
- the council would accept \$1.25 million unencumbered for the building and land covering approximately 14.9 hectares with a 90-day settlement
- the council would be prepared to negotiate a price for the land not included in the above area which surrounded the aquatic centre
- the council would be prepared to negotiate a long-term management offer for the aquatic centre
- the council would not extend the Breakaway Group's preferred developer status beyond 3 May 1999.

We could find no evidence that the chief executive advised the council that it could not negotiate a long-term management arrangement for the aquatic centre without undertaking a public tender process required by the *Local Government Act 1989*. At that time the Act required local governments to publicly tender contracts for the provision of goods or services to the value of \$50 000 or more.

On the same day, the council agreed that if Dr Bennett did not accept its counter-proposal by 3 May 1999, it would arrange a deputation to another potential purchaser and invite its real estate agents to discuss further marketing strategies for the property.

On 29 April 1999, Dr Bennett made a further offer and advised the real estate agents that the Breakaway Group could not meet a settlement date of 90 days for \$1.25 million. Dr Bennett stated that if the council was not prepared to change its position, the company would withdraw from the negotiations.

A councillors' briefing session on 3 May 1999 considered the company's latest offer and agreed that the chief executive should undertake further negotiations with the Breakaway Group about its proposal.

Negotiations with the Breakaway Group Pty Ltd after its preferred developer status ended

On 5 May 1999, Dr Bennett wrote to the mayor attaching copies of his recent letters to the chief executive and expressing frustration with the process and a wish to discuss the matter directly with the mayor.

The chief executive met with Dr Bennett on 7 May 1999 and informed him that his preferred developer status had ended and that 2 other parties were in discussions with the council about the sale of the property.

On 12 May 1999, Dr Bennett wrote to the chief executive with a further offer for the property, with a purchase price of \$1.25 million to be paid over 4 years and secured primarily by a second mortgage. The council considered this offer at a councillors' briefing session on 24 May 1999 and agreed that it was not satisfactory. It then directed the chief executive to advise Dr Bennett of the council's counter-proposal, which included:

- a non-refundable payment of \$50 000 upon signing the contract of sale
- a further \$450 000 to be paid by 1 January 2000
- \$750 000 to be paid over 3 years, with interest payable based on bank interest rates
- the council to vacate the property by 31 December 1999
- provision of first mortgage security to the council

- the council to consider renting from the developer the building located at 55 Palmers Road from 31 December 1999.

The council's counter-proposal was put to Dr Bennett and negotiations continued.

On 26 May 1999, the chief executive informed Dr Bennett that the council had sent its planning scheme to the Minister for Planning and Local Government for approval. The chief executive confirmed that the council would use its best endeavours to help the company obtain planning approvals for the proposed development, but highlighted the council's need to make a clear distinction between its role as owner of the property and as a planning authority.

The Breakaway Group then submitted a further proposal for the property but this was rejected at a councillors' briefing session on 31 May 1999. Following the session, the chief executive advised Dr Bennett that the council would not consider any offers that varied significantly from its 24 May 1999 counter-proposal, particularly in relation to adequate security for the council. Negotiations then continued with a particular focus on the nature of security available to the council.

On 4 June 1999, the Breakaway Group Pty Ltd was placed in receivership, but Dr Bennett failed to advise the council at that time and the council did not become aware of this fact. Negotiations continued during June 1999, with Dr Bennett making offers to the council using the Breakaway Group name and its Australian company number. There was no statement or indication in correspondence from Dr Bennett and the Breakaway Group Pty Ltd to the council after 4 June 1999 that a receiver had been appointed to the company.

On 9 June 1999, Australian Securities and Investments Commission (ASIC) received notification that a receiver and manager had been appointed for the Breakaway Group Pty Ltd, effective from 4 June 1999 and for its related company Licere Nominees Pty Ltd. This notification was processed by ASIC and was publicly available on 21 June 1999.

As the reporting officer of the Breakaway Group Pty Ltd, Dr Bennett failed to comply with section 428 of the *Corporations Act 1989* which required that where a receiver of a corporation was appointed, the corporation had to set out in every public document of the corporation, after the name of the corporation where it first appeared, a statement that a receiver or a receiver and manager, as the case required, had been appointed. We have informed the ASIC of our concerns.

Dr Bennett made a further offer for the property on 17 June 1999. The council rejected it and agreed that Dr Bennett again be advised that it was not prepared to negotiate an offer which did not meet the conditions of sale as set out by the council on 24 May 1999.

On 29 June 1999, Dr Bennett made a further offer for the property through the Breakaway Group involving payment of \$500 000 up-front. At a councillors' briefing session on 5 July 1999 the chief executive presented the council with this further offer and also outlined his discussions with the Mitchell Shire Council regarding the financial position of the redeveloped former Shire of Seymour's office building. The minutes of this councillors' briefing session do not record the content of the chief executive's advice on these discussions, but the outcome was that the council agreed to cease all negotiations with the Breakaway Group regarding the sale of the property.

As there is no evidence that the chief executive had held a further discussion with the Mitchell Shire Council since that of 23 February 1999, we cannot understand why it took him 4 months to formally pass this information on to the council, during which time considerable effort had been expended on negotiations with Dr Bennett and the Breakaway Group.

On 6 July, the chief executive wrote to Dr Bennett informing him that the council had now decided that it did not wish to continue negotiations with either himself or his group, as he was unable to meet the council's counter-proposal of May 1999.

On 18 August, Dr Bennett wrote to the council chief executive advising that the Breakaway Group's circumstances had changed and that it could now pay \$750 000 up-front for the property. (Based on our inquiries, the Breakaway Group Pty Ltd was still in receivership in August 1999.)

At the councillors' briefing session on 30 August 1999, the chief executive advised the council that he had received another offer from Dr Bennett. The council directed him to inform Dr Bennett that it was pursuing other options for the redevelopment of the property. At that time the council was aware of potential interest in the property by a delegation from China and the council had applied successfully to the Community Support Fund for a grant to convert the property into a regional arts centre (this grant was not taken up by the council.)

3.4 Negotiations with Wenzhou Success Group between October 1999 and January 2000

At a councillors' briefing session on 25 October 1999, the chief executive advised that a delegation from Wenzhou, China intended to visit the municipality to investigate the property located at 55 Palmers Road as a possible site for a school and administrative facility. Councillors agreed to assist the delegation, provided that the proposed use of the building was acceptable to the council and the community.

At a briefing session on 8 November 1999, a copy of a letter of intent between Wenzhou Success Group, Zhejiang Province of the People's Republic of China and the East Gippsland Shire Council, pertaining to the purchase of the council's office property at Palmers Road, was tabled. As this letter was a non-binding document, the council agreed to endorse it.

On 21 January 2000, Wenzhou Success Group's consultants applied for a planning permit to undertake a 51-lot subdivision at the property. The chief executive tabled the consultant's plan of subdivision at an ordinary council meeting on 24 January 2000. At that meeting, the council passed the following resolutions:

- that the chief executive be authorised to sign a planning permit application form pertaining to the plan of subdivision as tabled, subject to the Wenzhou Success Group permitting the council to use the plan of subdivision prepared by its consultants
- that a press release be issued advising that the council had applied for a planning permit to subdivide the property and that the plan submitted was in line with a concept put forward by a prospective purchaser. Further, public comment on the proposed plan of subdivision would be sought.

At an informal councillors' briefing session on 31 January 2000, the council was advised that the Chinese group did not wish to continue with negotiations to purchase the property.

3.5 Negotiations with Breakaway Group between February 2000 and December 2000

In February 2000, the council advertised and pursued the planning permit application for a 54-lot subdivision on the property. On 3 March 2000, the Department of Natural Resources and Environment wrote to the council and advised that while the department had no “in principle” objections to the subdivision, it required a storm water management plan, an erosion/soil management plan for the construction stage of the roads and drainage, and a revised drawing showing an easement over a drainage line on the property.

The record of a councillors’ briefing session on 24 July 2000 noted that the council’s planning permit application for a subdivision of the property had been lodged, but was “on hold”.

At an ordinary council meeting on 28 February 2000, a councillor put the following motion to the council:

“That the Council withdraw from sale the buildings and land at 55 Palmers Road, Lakes Entrance, because despite the Council commitment of valuable time and resources, no outcome has been achieved and Council has been unable to attract a fair and equitable price for the property and such a course of action will remove the angst and uncertainty in the community of Lakes Entrance and allow a fresh approach to future initiatives.”

The motion was not carried.

On 29 February 2000, Dr Bennett wrote to the chief executive on the letterhead of the Breakaway Group of Companies inquiring whether the proposal by the delegation from China had gone ahead and whether the land was still on the market.

On 18 March 2000, there was a council election in which only one of the existing councillors was re-elected. The chief executive informed Dr Bennett of recent developments and said that, given the existence of a new council, discussions on the sale of the property would need to recommence. The chief executive provided the incoming council with a general briefing on the status of the property in early April 2000.

At an ordinary meeting on 14 August 2000, the council resolved:

“(1) that Council reaffirms its commitment to:

- (a) maintaining a business centre and library in Lakes Entrance
- (b) retaining the business centre and library at 55 Palmers Road until that property is disposed of in part or in total
- (c) disposing of 55 Palmers Road subject to the sale (in part or in total) yielding sufficient funds to construct stage 2 of the civic centre in Lakes Entrance and to relocate the remainder of council staff to Bairnsdale.

(2) that Council notes formally the following:

- that the estimated selling price required to reach “break even” point [as identified in clause (1) (c) above] is approximately \$2 500 000 and
- that the current valuation of the property is \$750 000.”

This resolution was based on a report to the council from senior officers which stated, among other things, that the current valuation of the property was \$750 000. This was incorrect, as the valuation had been made more than a year earlier in April 1999 and was not current. The report also failed to disclose that the valuation of \$750 000 was based on the development proposed by Dr Bennett in February 1999 and the assumption that planning permits could be obtained for that development.

On 17 August 2000, Dr Bennett pleaded guilty in the Melbourne Magistrate’s Court to a charge brought by ASIC of failing to act honestly as a director with intent to gain advantage for another person, in breach of the Corporations Law. The council was not made aware of this development.

On 22 August 2000, Dr Bennett was declared bankrupt by order of the Federal Magistrates Court of Australia and a trustee of his bankrupt estate was appointed. He was a declared bankrupt from 22 August 2000 and remained so until 12 September 2003. Again, the council was not made aware of this development.

On the very day that he had been declared bankrupt, Dr Bennett wrote to the council on behalf of a new entity called Lakes Entrance Lifestyle Corporation and made a new offer to purchase the property for \$2.5 million, with \$500 000 to be paid up-front, \$250 000 in each of the 2 following years and \$10 000 for each of the 150 subdivided blocks of land when sold in the future. He sought an exclusive period of 12 weeks in which to negotiate with the council.

In September 2000, the council was advised that 2 other parties, who had been involved in earlier negotiations for the property, had expressed renewed interest.

We were advised that on 4 September 2000 the mayor or another councillor wrote to the chief executive proposing a course of action in relation to the latest offer from Dr Bennett (council staff could not locate a copy of this document). The chief executive responded with the following advice about previous negotiations with Dr Bennett:

- Dr Bennett had made an offer in November 1998 to purchase and develop the property into a major club facility. The council's dealings with Dr Bennett were cordial but essentially non-productive
- at the time of the previous negotiations, Dr Bennett was involved in a similar club project at Seymour that had run into difficulties, with the Mitchell Shire Council losing in the order of \$423 000 as second mortgagee and Dr Bennett's management agreement subsequently being terminated (we have confirmed that Mitchell Shire Council lost \$385 000 on this project)
- Dr Bennett would be unlikely to have the financial capability to undertake a project of the size he was proposing at Lakes Entrance
- the council should check Dr Bennett's current financial status before entering into any negotiations with him
- the council should also discuss the matter with its legal adviser, who had advised it about Dr Bennett's previous offers
- dealings with Dr Bennett had so far been unsuccessful because he did not have the financial resources to buy the property.

There was no evidence that the council checked Dr Bennett's financial standing (such a check would have revealed that he was a bankrupt and that Lakes Entrance Lifestyle Corporation was not registered with ASIC). Further, there was no evidence that it discussed Dr Bennett's prior offers for the property with its legal adviser.

In summary, the chief executive failed to act on his own advice to undertake a check on Dr Bennett's financial standing and the council failed to ensure that such checks were undertaken. While initially rejecting Dr Bennett's offer, the council continued negotiating with him over many months.

At an informal discussion between councillors and officers on 18 September 2000, the council considered expressions of interest and offers for the property from Dr Bennett and 2 other parties. It was agreed that council officers would advise these 3 parties that the council would only consider a firm, simply structured offer. As a consequence of this decision, the council advised Dr Bennett on 18 December 2000 that it could not accept his latest offer and that it could accept only a contract based on a sale price of \$2.5 million and usual settlement terms of 90 days. Similar advice was provided to the other 2 interested parties, although one of these was not informed of the council's desired sale price. One of the parties immediately withdrew.

In October 2000, Dr Bennett visited the property and on 23 November 2000 met with the council's mayor and chief executive.

On 29 November 2000, Dr Bennett wrote to the council in his capacity as Group Managing Director of Breakaway Consulting Services Pty Ltd and made a revised offer for the property. The proposal referred to the meeting with the mayor and chief executive and cited the council's "concept of a leasing arrangement on the main building with the remainder of the land, excluding the Aquatic Centre, being sold up-front for cash". The offer involved various elements, including leasing the office building component of the site and upfront payment of \$470 000 for the land. The offer was conditional on the availability of planning permits. What Dr Bennett wanted from the council was a written commitment that it would enter into an agreement for the sale of the land on the terms specified and provide a separate "consent" to allow the proposed subdivision.

In our view, Dr Bennett made the offer of 29 November 2000 under a false company name. The Australian Company Number provided by Dr Bennett for Breakaway Consulting Services Pty Ltd (ACN 065 114 954), in fact related to a company called Acheron Project Development Pty Ltd (this company was subsequently renamed DTC Construction Group Pty Ltd). Our company search disclosed that **Breakaway Consulting Services Pty Ltd was not registered with ASIC in November 2000.**

On 4 December 2000, the chief executive acknowledged the offer from Breakaway Consulting Services Pty Ltd and advised Dr Bennett that he would discuss it with the council on 11 December 2000.

On 5 December 2000, Dr Bennett advised the chief executive that the funding partner for his group was OzCapital which was backed by the Interstar Group.

On 6 December 2000, Dr Bennett was convicted in the County Court on charges brought by ASIC and was ordered to pay a fine of \$20 000. The judge found that Dr Bennett had entered into conduct designed to avoid a parcel of shares becoming available to reduce a loan of \$1.325 million owing to a major bank.

3.6 Negotiations with the Lakes Village Syndicate between December 2000 and August 2001

On 8 December 2000, OzCapital Pty Ltd provided the council with formal advice of its involvement with the “Lakes Village Syndicate”. The company advised that it had been engaged to provide funding for the project and to co-ordinate and liaise with professional and statutory bodies, including the council. The company estimated the retail capital cost of the proposed development at \$70 million spread over 7 years. It sought a meeting to discuss formalising the purchase of the property.

On 11 December, the chief executive provided the mayor, councillors and senior officers with a memorandum outlining the terms of Dr Bennett’s offer and making the following points and recommendations:

- the offer involved payment of \$470 000 up-front for the land on normal terms (90 day settlement) based on the valuation of the land received by the council
- the remainder of the offer, involving leasing of the building and a 15-year terms contract for the building “presumably with the council holding first mortgage”, appeared to be an ingenious way of financing the purchase of the total property for \$2.470 million
- there would need to be clear performance targets, bonds and guarantees to ensure the development proceeded and the council was not left with partially completed developments around the office building
- the council should explore Dr Bennett’s option further.

In our view the chief executive’s advice to the council was inadequate in that it did not point out that:

- Dr Bennett’s offer for the land was based on an outdated valuation from April 1999 which had valued the property at \$750 000 based on Dr Bennett’s development proposal at that time
- before selling land a council must obtain a valuation made not more than 6 months prior to the sale or exchange
- the chief executive had failed to act on his own advice of September 2000 to undertake a check on Dr Bennett’s financial standing as a pre-requisite to any negotiations

- there was a lack of clarity on whether the council would have a first or second mortgage over the property as security, which was a key issue in the council's rejection of Dr Bennett's earlier proposals for the property
- the council should arrange for a current valuation of the property based on the proposed development and a comprehensive due diligence check on Dr Bennett, his company Breakaway Consulting Services Pty Ltd and OzCapital Pty Ltd.

At an informal discussion on the same day (11 December 2000), the chief executive discussed the contents of his memorandum with councillors and council officers. The councillors were also advised that discussions had occurred with another prospective purchaser. It was agreed that council officers should continue to negotiate with both prospective purchasers and that appropriate credit references should be obtained. **Our audit found that council officers failed to obtain credit references on Dr Bennett and the other prospective purchaser.**

On 19 December 2000, the chief executive gave councillors and some senior staff a copy of a 7 December 2000 press article about Dr Bennett's conviction in the County Court, and briefed them about discussions with the council's real estate agent about Dr Bennett's offer and other potential options for sale of the property. **The chief executive did not, however, recommend that the council cease negotiations with Dr Bennett.**

On 24 January 2001, Dr Bennett wrote to the council on behalf of Lakes Village Pty Ltd and Lakes Entrance Conference Centre Pty Ltd, forwarding various documents on the proposed purchase and development of the property. These included a letter from OzCapital confirming that it had agreed to provide funding for the project.

Dr Bennett described Lakes Village Pty Ltd as a special purpose company acting for the Lakes Village Syndicate. He stated that the company was prepared to pay \$375 000 for the land on condition that the purchase came with the necessary planning permits for the proposed development of the property which involved a 147-lot subdivision and construction of 216 studio apartments. Lakes Entrance Conference Centre Pty Ltd was to acquire the rights to lease or purchase the core office building when the council vacated it. The proposal did not address what form of security Lakes Village would provide to the council to ensure completion of the development and payment of the agreed purchase price.

We expected that this new proposal from Dr Bennett, which involved new companies (Lakes Village Pty Ltd, Lakes Entrance Conference Centre Pty Ltd, OzCapital Pty Ltd and Interstar Securities Holdings Pty Ltd), would have prompted the chief executive to initiate a due diligence investigation before he considered it or advised the council about it, especially as he had advised the council in September 2000 that a check on Dr Bennett's financial standing should occur before further negotiations. **Despite this, council management again failed to undertake any meaningful or substantive due diligence investigation into Dr Bennett and the companies associated with his proposal.**

Our research on these companies indicated that:

- Lakes Village Pty Ltd began as Sichuan Gourmet Pty Ltd on 2 September 1999. The shares in Sichuan Gourmet were held by 2 individuals who had not been mentioned to the council previously. The company name Lakes Village Pty Ltd was not registered with ASIC until 12 April 2001
- Lakes Entrance Conference Centre Pty Ltd had never been registered with ASIC
- OzCapital Pty Ltd was a company registered on 20 March 2000 with a share capital of 100 \$1 shares fully paid up and owned by a single shareholder
- Interstar Securities Holdings Pty Ltd was registered as a company with ASIC in April 1999 with a share capital of 5 \$1 shares fully paid up and held by a single shareholder.

On 29 January 2001, the chief executive verbally updated the council on the Lakes Village proposal at an informal discussion between councillors and council officers. The following day, he requested Dr Bennett to indicate whether he was taking any equity in the project, as he and the mayor were concerned about the ASIC prosecution. Dr Bennett assured him that he would be acting only in a consultancy capacity.

On 19 February 2001, at an informal discussion between councillors and council officers the chief executive provided further details on the Lakes Village development proposal and at that meeting it was agreed that:

- a promotional package would be developed with a view to calling for expressions of interest in the property
- discussions with Lakes Village Pty Ltd would occur with a view to entering into a firm agreement on the eventual purchase price of the building on the property
- representations would be made to local parliamentarians, seeking a government tenancy for the building.

There was no evidence that the council sought expressions of interest in the property at that time and it is unclear to us whether action was taken on the decision to make representations to local parliamentarians. This was a further instance of action not being taken to implement decisions taken at council meetings or informal briefing sessions.

In February 2001, a new chief executive of the council was appointed. The new chief executive had been a senior director within the council and had been involved in discussions on the various proposals put forward by Dr Bennett.

On 21 February 2001, the council's new chief executive wrote to Dr Bennett of Lakes Village and advised him that the council had resolved to consider the current offer only in the context of an agreement being reached on the long-term future of the corporate centre/office building. He pointed out that it was not in the council's interest to dispose of the adjoining land as this would isolate the office building from potential development or sale.

On 28 February, Dr Bennett emailed a revised proposal to the council. It involved purchase of the property in 2 stages for a total purchase price of \$1.6 million with \$400 000 paid up-front and the balance to be paid over a period of 6 years or more, depending on when the council vacated the office building. Dr Bennett described the offer as straightforward and unconditional, but in fact it was conditional on the council providing planning permits for the various stages of the development. The offer indicated that the council would have security over payment of the \$1.2 million component of the purchase price by retaining the title for the office building until the purchase price was paid in full.

The council's chief executive provided the mayor and councillors with a copy of the new offer on 1 March 2001. His attached memorandum advised that the offer was for \$1.6 million and described this as in the right range given the valuation of \$700 000 on the property. He sought advice from the councillors on whether they wished to deal only with the offer from Dr Bennett and advertise the sale for public comment under the requirements of section 223 of the *Local Government Act 1989*, or follow the process adopted by the council in relation to another property and advertise the proposal to sell the property by public tender and at the same time seek public comment.

This advice was deficient on the following grounds:

- **it failed to directly inform the council that there was no certain time frame for the payment of the entire \$1.6 million purchase price, as only \$400 000 would be paid up-front and the remainder over 6 or more years, depending on how quickly the council vacated the offices on the property**

- it ignored the time value of money
- the council was not told that the offer was being compared with a valuation which was almost 2 years old and, therefore, out of date
- it failed to mention the council's formal resolution of August 2000 that it was committed to selling the property subject to the sale yielding sufficient funds (estimated at \$2.5 million) to construct stage 2 of the civic centre in Lakes Entrance and to relocate the remainder of council staff to Bairnsdale.

After 13 March 2001, the record of *Informal discussions between Councillors and Officers* no longer included an agenda item requiring declaration of conflicts of interest or pecuniary interests. The council had no documentation which indicated whether this was a deliberate decision and, if so, who made it and on what basis. The then council's chief executive could not recall the reason for this procedural change.

At an informal discussion between councillors and officers on 13 March it was agreed that the officers would seek more specific information on the latest offer from Lakes Village, including advice on the way in which the council would be protected against eventualities such as bankruptcy. At the same meeting, the council agreed that other parties who had expressed interest in the property would be contacted and told that a firm offer to purchase the property had been received.

The council could not locate any evidence that the other parties were contacted and advised of the "firm offer".

On 16 March 2001, the council's real estate agent advised OzCapital Pty Ltd that the expected average sale price for the 147 proposed subdivision blocks would be in the vicinity of \$35 000 each. On this basis, the subdivision element of the proposed development could be expected to realise around \$5 million before deduction of the expenses associated with the design, approval, construction and marketing of the subdivision. **It is unclear in what capacity the agent was providing this advice to OzCapital Pty Ltd and whether the council was aware that he intended to do so. The council could not clarify this matter.**

On 20 March 2001, the chief executive informed the council's real estate agent that the council was seeking further information from Dr Bennett and Lakes Village on:

- how the consortium would structure the arrangements to ensure that the council retained ownership until final payment was received

- what mechanisms would be in place to protect the council if the consortium chose not to develop the site fully or if the consortium (or one of its partners) went into liquidation (for example, would bank guarantees be in place?)
- whether the offer could be varied to bring forward by 3 years the payment of the final instalment of the purchase price. The rationale for this request was that the discounted cash flow analysis of the existing offer indicated that it was probably worth less than \$1 million depending on assumptions made.

The chief executive also informed the real estate agent that no matter what the council's final decision, it would have to advertise any proposed sale for public comment. The agent forwarded the council's request for further information to Dr Bennett.

On 23 March 2001, OzCapital Pty Ltd responded on behalf of Lakes Village Pty Ltd to the council's request, but its advice did not address some of the key matters raised by the council, including the provision of specific advice on mechanisms to deal with security issues over receipt of the full purchase price and delivery of the full development. The company indicated that it would pay less if the council insisted on a shorter settlement payment period. Following a further request for information by the chief executive, OzCapital Pty Ltd gave the real estate agent details about the directors and shareholders of Lakes Village Pty Ltd. The advice included assurances about the financial substance and background of the 2 individuals named as both directors and shareholders.

However, this advice was partly incorrect. Our company searches have revealed that one of the 2 individuals listed as a director was not appointed until 19 April 2001. In addition, there was another director of the company in March 2001, but OzCapital Pty Ltd had not mentioned him in its dealings with the council. The issued share capital of Lakes Village Pty Ltd was \$10 in March 2001 and was never more than \$1 010.

On 4 April 2001, Dr Bennett emailed the chief executive and asked whether they could go to contracts of sale now that the council had accepted their offer for the property. The chief executive pointed out that the council had not accepted the offer, and advised Dr Bennett that the council required detailed deeds of agreement and potentially bank or director's guarantees to safeguard its interest.

On 10 April, the chief executive wrote to Dr Bennett on behalf of the council informing him that:

- the council had not yet resolved to sell the property to his client or any other party

- although the council was willing to continue dialogue with his clients, it was not satisfied that they had answered its questions about financial guarantees protecting the council's position
- the council had not yet resolved whether to proceed with sale by private treaty or other means such as expression of interest, tender, etc
- no matter which manner of sale was eventually adopted, the council would be following the statutory provisions laid down in the *Local Government Act 1989*
- the council might be in a position to provide direction on its preferred approach to the disposal of the property by the end of May 2001.

A meeting of the chief executive, councillors, Dr Bennett and representatives of OzCapital Pty Ltd was held on 7 May 2001. Afterwards, the mayor wrote to OzCapital Pty Ltd confirming that the council:

- was committed to the sale of the property in an expeditious manner, but also in accordance with its statutory obligations under the *Local Government Act 1989* it was required to give public notice at least 4 weeks prior to the sale of the property and consider any submissions from the public
- needed an irrevocable contract of sale, with absolute financial security, in relation to the disposal of the building on the property and considered any sale of the land at 55 Palmers Road as inextricably linked to the disposal of the building
- would facilitate the planning permit process for the property in accordance with its statutory requirements and that any sale was subject to the issuing of a planning permit.

On 1 June 2001, the council's real estate agent provided a professional opinion to a third party on the market and values inherent in the property assuming rezoning and the issue of relevant planning permits for its redevelopment. On this basis the real estate agent valued the property at \$6.9 million (assuming a 147 lot subdivision, a 216 title apartment complex and the core building incorporating a hotel, club and restaurant).

It is unclear to us who instructed the council's real estate agent to undertake this task. If it was not the council, then the agent should have informed the council of this separate engagement and sought approval before agreeing to undertake the assignment. Acting for both parties in the negotiations of the sale of the property would have been a conflict of interest on the part of the agent.

Council decision to sell the property to Lakes Village by private treaty

On 7 June 2001, OzCapital Pty Ltd submitted a revised offer for the property. It proposed that Lakes Village Pty Ltd purchase the property for \$1.5 million with a deposit of \$75 000 (or 5 per cent) payable on exchange of contracts and the balance of the purchase price (\$1.425 million) payable within 180 days of the contract date or sooner if agreed. The company indicated that the purchase price offered had been reduced from \$1.6 million to \$1.5 million to reflect the earlier settlement date and the imposition of GST.

Despite describing the new offer as unconditional, OzCapital specified the following “special conditions”:

- approval by the council of a plan of subdivision and the relevant permits for the core building (existing council office building) to be operated as a hospitality centre, development of 216 studio apartments, development of a 147-lot subdivision and the use of the balance of the land for common purposes
- agreement by the council to lease the core building for 2 years, with a 2-year renewal option, at a cost of \$120 000 each year.

At the formal meeting on 25 June 2001, the council considered a report from the chief executive on the proposed sale of the property to Lakes Village Pty Ltd and a motion put by the mayor recommending the sale. The council then:

- resolved to enter into a contract to sell the property by private treaty to Lakes Village for the purchase price of \$1.5 million (net of GST), subject to a deposit of 5 per cent (\$75 000), and the remainder of the purchase price (\$1.425 million) payable on the earlier of 12 months from the date of sale, or 30 days after the issue of the planning permits for the development (and in any case, no sooner than 180 days after the date of sale)
- resolved that the sale was subject to the following conditions:
 - the council complying with its obligations under sections 189 and 223 of the *Local Government Act 1989* and resolving to sell the property
 - the purchaser obtaining planning permit(s) within 11 months from date of sale for the core building to operate as a hospitality centre, 216 studio apartments, a 147 lot subdivision and the balance of land in common use
 - the council leasing back the core building for 2 years, with an option to renew for another 2 years, at an annual rental of \$120 000 net of GST

- gave public notice in accordance with section 189 of the Act of its intention to sell by private treaty 55 Palmers Road to Lakes Village Pty Ltd subject to the above conditions
- resolved that if no written submissions were received under section 223 of the Act, the council would sell the property on the terms specified in the report.

In our view, the chief executive's report was inadequate and did not enable the council to make an informed decision. We identified the following specific deficiencies in the report and the council's resolutions of 25 June 2001:

- The resolution committed the council to a sale price for the property of \$1.5 million, subject to the fulfilment of various conditions, in the absence of a current valuation. The chief executive was recommending, and the council was accepting, the price offered by Lakes Village without knowing the current market value of the property based on vacant possession or highest and best use.
- There was a potential breach of the *Local Government Act 1989* which requires that before selling land, a council must obtain a valuation of the land made not more than 6 months prior to the sale.
- The report to the council asserted that Lakes Village's offer of \$1.5 million was well in excess of the current market value for the property, which it quoted as \$850 000. This valuation had been obtained in January 2000 as part of the council's property valuations for rating purposes and was out of date. Without a current valuation, the chief executive did not have sufficient basis to make this claim.
- The report advising the council was not supported by any detailed cost-benefit analysis of the transaction and other matters relating to the relocation of staff.

On 2 July 2001, the council received the results of a company search on Lakes Village Pty Ltd undertaken on 27 June. It revealed that the company had share capital of \$10. Our examination of the information provided by this company search showed that it was inconsistent with information provided to the council by OzCapital Pty Ltd in March 2001 relating to the directors and shareholders in Lakes Village Pty Ltd. **The council did not identify these inconsistencies and was, therefore, not in a position to investigate them further.**

On 4 July and 6 July the council published a notice advising of its proposal to sell the property to Lakes Village for \$1.5 million by private treaty and gave the closing date for submissions as 14 days hence.

On 5 July 2001, the council sought a valuation of the property from a local valuer. The instructions to the valuer requested “a full valuation required in accordance with Local Government Act requirements for anticipated sale purposes ... as at 1 July 2001”. **In our view, these valuation instructions were inadequate.** The valuer should have been instructed to provide 2 valuations: one based on current market value with vacant possession, and the other on the basis that the development proposed by Lakes Village would proceed and would represent the highest and best use of the site, and that the sale was conditional on the purchaser obtaining planning permit(s) for the development within 11 months from the date of sale. **The property was being sold on the basis that the development would proceed and it should have been valued on the same basis.**

The valuer based his assessment on evidence from the sale of other former municipal offices around the state rather than on any proposed subdivision and development of the site, and valued it at \$1.25 million as at 1 July 2001. The council received this valuation at the end of July and made it public at a community consultation forum in Lakes Entrance on 31 July.

Prior to that date, on 12 July the council advised OzCapital of the council's resolution of 25 June and indicated that 20 July 2001 was the final date for public submissions on the proposed sale.

On 23 July, the chief executive informed Dr Bennett that community concern had prompted the council to extend the period for public submissions to 10 August, and that it had agreed to hold a community consultation forum on 31 July to answer questions. Dr Bennett was also informed that this would not delay the process as it had always been anticipated that a final decision would be made by the council at its ordinary meeting on 27 August 2001. Dr Bennett questioned the extension of time for public submissions and indicated that this was the first time he had been advised that a final decision would be made on 27 August. A series of emails then passed between the chief executive and Dr Bennett, with the chief executive reassuring Dr Bennett that he should not read anything untoward into the extension of time for submissions. **In our view, the chief executive should have maintained a more arms-length and neutral stance in these communications.**

At the community consultation forum, the then mayor and the chief executive advised about 80 people that the proposed sale would enable the library/business centre to be relocated into the town area of Lakes Entrance, facilitate a rationalisation of staff workplaces and realise anticipated cost savings of \$4.5 million over 15 years.

The figure of \$4.5 million over 15 years came from a cost-benefit analysis prepared by council officers in July 2001. The analysis was underpinned by the following key assumptions:

- receipt of the purchase price over the first 2 years
- receipt of rate income of \$1.9 million from the proposed development over the 15-year period
- generation of \$3.5 million in savings on current operations over the 15-year period, primarily related to operating and communications costs and efficiency and travel savings
- total costs incurred of \$2.4 million over the 15-year period for the establishment of a business centre and library facility in Lakes Entrance (\$530 000), purchase and renovation of new office accommodation in Bairnsdale (\$1.4 million) and the costs of abandoning the office building on the property at 55 Palmers Road (\$450 000, including \$240 000 in lease payments to Lakes Village Pty Ltd for the 2-year lease period).

On 2 August 2001, the chief executive provided Dr Bennett with a summary of the issues raised at the community consultation meeting. In response to questions from the community, he also asked Dr Bennett if the directors of Lakes Village had any connection with previous offers for the building, and whether there was any background information on previous developments they had undertaken. The chief executive asked for a meeting between councillors and the developers so that the councillors could learn more about the project and the developers. **In our view, all of these issues should have been addressed by council management as part of due diligence enquiries into the parties it was dealing with prior to recommending to the council in June 2001 that it agree to sell the property to Lakes Village Pty Ltd.**

On 7 August 2001, Dr Bennett provided the council with further information in response to the chief executive's request.

On 9 August, the council received an offer for the property from another private company. It was subject to various conditions and offered only partial payment of the valuation of the property.

The council received a considerable number of submissions from the community in response to its advertisement of the proposal to sell the property, and held 2 meetings of a committee of council – on 13 and 20 August – to hear representations from members of the community in support of written submissions.

At an informal discussion between councillors and officers on 13 August 2001, it was agreed that an independent opinion would be sought on the accuracy of the original cost-benefit analysis calculations. The report from the consultant engaged to undertake this task came in on 24 August. Its primary finding was that the cost-benefit analysis prepared by council officers was not prepared on a discounted cash flow basis. The report stated that after applying discounted cash flow analysis, the operating cash flow benefits from the sale of the property to Lakes Village Pty Ltd were around \$500 000 and that the net combined operating and capital cash flow benefits over a 15-year period were around \$1 million. **There was no evidence that the council communicated this information to the community, which had been previously advised that the cost savings were around \$4.5 million.**

The consultant also reported that he had reviewed the draft proposal from Lakes Village and thought there was a significant risk that the project might not proceed. He advised the council to consider including appropriate clauses in the sale contract and/or some form of guarantee to ensure that it was not disadvantaged if the development did not proceed.

At a meeting to hear speakers to the public submissions on 13 August 2001, a resident made a written offer for the property at a price in excess of any existing offer by Lakes Village and on the same terms and conditions. The following day Dr Bennett requested a copy of any other submissions or offers for the property, and on 15 August the council's chief executive gave him a summary of the issues and concerns raised, along with an undertaking that he would forward copies of the "monetary offer" submissions for the property.

On 16 August 2001, the mayor wrote to the resident advising him of the council's view that the submission he had put forward on 13 August 2001 did not constitute an offer for the property. The mayor said that if the individual wished to put forward a genuine offer, it must be done in a legal and quantifiable manner. A similar letter was sent to another individual who had made a proposal to the council. Both letters stated that the council was seeking information to allow company searches to be undertaken. **This approach contrasts with that taken by council in relation to the offer for the property from Lakes Village Pty Ltd. In that instance, the council failed to undertake a company search until after it had resolved to sell the property to the company.**

On 18 August 2001, the chief executive informed the mayor, based on a telephone conversation with Local Government Victoria, that the Minister for Local Government was satisfied that due process had been followed by the council.

Following a meeting between councillors and representatives of Lakes Village on 20 August 2001, OzCapital provided the council with details on the proposed development and the parties involved. There was detailed information on the background and experience of the individual identified as the chairman of the development group, but only limited information on other investors and directors. Parts of the document had obviously been copied from development proposals prepared by the Breakaway Group for other projects, as it included references to powerboats for the Goulburn River and construction of accommodation for conference centre staff in Alexandra, some 400 kilometres away from Lakes Entrance.

On the same day, the mayor issued a media release on the proposed sale and development of the property. It emphasised the value of the investment proposed for the development of the property and the benefits this would generate for the area. The release also stated that the council had not seen any firm financial analysis or costing from the proponents and that there were no guarantees that the project would go ahead.

On 21 August 2001, a councillor forwarded a memorandum to all councillors and the chief executive raising concerns that the cost-benefit analysis prepared by a council officer in late July 2001 while accurate, was simplistic because the cash flow figures were not discounted. The councillor requested the council to consider developing a full and carefully analysed proposal.

On 22 August 2001, in an email to the chief executive, Dr Bennett said that he had discussed with the mayor the possibility that the council may receive a further offer for the property before its final decision on 27 August 2001. On the same day, OzCapital Pty Ltd wrote to the mayor and confirmed that as financiers of the project the company had funds available to complete the purchase and development of the property. Also on that day, the mayor sent emails about the proposed sale to the chief executive advising him of his conversations with Dr Bennett and 2 other potential purchasers of the property. From this, it is clear that the mayor had been in direct contact with Dr Bennett.

On 23 August another councillor gave a member of the Lakes Village syndicate, an advance copy of a newspaper column he had written which was supportive of the sale to Lakes Village and which would be published on 27 August 2001.

The following day, in response to a question from a councillor, Dr Bennett provided some details to the chief executive about his association with the former Shire of Seymour council offices and the Mitchell Shire Council. At some time in the next few days, the chief executive provided the following advice to the mayor on the outcome of his discussions with the Mitchell Shire Council and Dr Bennett:

“After amalgamation, Council decided to sell its second office in Seymour (surplus to its needs). Bennett’s Breakaway Group came forward with a very complicated purchase arrangement that was to buy the building for \$900 000 by way of \$500 000 up front and \$100 000 per year over the next 4 years. Deal also included the sale by Council of an adjoining piece of land for \$85 000. \$500 000 and the first annual payment of \$100 000 received but then deal collapsed. Council had transferred the title before all sale moneys were received and Bennett gave first mortgage to [a major bank]. So when the property was sold [the major bank] lost approximately \$500 000 and Council with second mortgage lost \$385 000. The development went ahead after the project was acquired by a new party at a knockdown price and is quite successful. Bennett has told me he personally lost \$2.8 million because of guarantees.

Other developments in Mitchell Shire

Ian Bennett has been involved in other proposals but none have come to fruition. May have sold one project on, but still no sign of development ... “

Dr Bennett’s written advice to the chief executive on 24 August 2001 described his personal losses on the project but did not mention that a major bank and the Mitchell Shire Council had also suffered losses on this project.

On 24 August 2001, a Mr Eagleson made a written offer of \$1.6 million for the property on exactly the same conditions as those applying to Lakes Village and provided a cheque for \$10 000, representing part payment of the deposit should the council accept his offer. This new offer, which was \$100 000 higher than the purchase price agreed between the council and Lakes Village, was communicated by the chief executive to the mayor, who then conveyed it to Dr Bennett.

On 26 August 2001, the day before the council meeting at which the council would decide whether to continue with the sale of the property to Lakes Village, the council chief executive received:

- An email from the mayor, which included a draft of a letter he had earlier sent to Dr Bennett. The draft letter purported to be from Lakes Village to the council and provided further guarantees regarding the purchase and development of the property. **We have serious concerns about the mayor preparing draft correspondence on behalf of Lakes Village Pty Ltd.**
- An email from the mayor advising the chief executive that he would receive 2 emails from the CEO/managing director of OzCapital Pty Ltd via Dr Bennett which on one hand would detail the guarantees that the company and directors would provide to the council, and on the other would increase the offer for the property. The mayor advised the chief executive that if the council was not willing to accept the existing offer from Lakes Village then it would be increased to match Mr Eagleson's offer of \$1.6 million. **The mayor had clearly conveyed the amount of Mr Eagleson's offer to Lakes Village, thus giving the company an opportunity to match or better it. The mayor did not pass on Lakes Village's increased offer to Mr Eagleson to give him the opportunity to increase his offer.**
- An email from the managing director of OzCapital via Dr Bennett, confirming that the group would be prepared to pay an extra \$100 000 for the property, taking the total offer to \$1.6 million, if the council agreed to an extension of 50 rooms to the core building.
- Another email from the managing director of OzCapital via Dr Bennett, regarding guarantees which the directors of Lakes Village would be prepared to provide on completion of both settlement and stage one of the development.

The chief executive subsequently advised the council that Lakes Village was prepared to pay an additional \$100 000 for the property.

In our view the activities of the mayor were not appropriate and could be seen as giving Lakes Village an advantage over other potential purchasers. There was no evidence that the council had given the mayor explicit authority to conduct these negotiations.

In an interview we conducted with the then mayor about this matter, he maintained that he had not been seeking to give Lakes Village an advantage, but rather was seeking to obtain a higher price from the party he considered to be the only bidder of substance.

Council decision to sell the property by public tender

On 27 August 2001, the council received 2 further proposals for the purchase of the property. The first proposal did not specify a purchase price but indicated that financial requirements would be met and that state and federal governments had expressed their support in principle for the venture. The proposal was described as a confidential document which should not be copied without permission. The second proposal, offering \$1.625 million, was from an undisclosed consortium of investors and was received via a real estate agent in Lakes Entrance. Both proposals were presented to the council on 27 August.

That day, the council was also provided with legal advice obtained by one of the councillors. It dealt with the council's resolutions on the proposed sale of the property at its meeting on 25 June 2001 and suggested that the council's resolution "that if no written submissions are received under section 223 of the Act, Council resolves to sell the property on the terms specified in this report" did not adequately meet the council's obligation to consider any submissions received under that section of the *Local Government Act 1989*.

At the council meeting on 27 August 2001, the council considered a report prepared by its officers on the proposed sale of the property. The report:

- provided background on the council's decision and efforts to sell the property
- outlined the processes undertaken by the council in accordance with sections 189 and 223 of the *Local Government Act 1989* to advertise its intention to sell the property and invite submissions from the public, and advised that the council had exceeded the requirements of the Act by allowing 35 days for submissions compared to the 14 days required by the Act
- informed councillors that 410 submissions had been received, with 30 in favour and 380 submissions against the proposed sale
- advised that a current valuation for the property had been obtained assessing the property in its existing state at \$1.25 million
- indicated that council officers had undertaken a cost-benefit analysis which was subsequently reviewed by an independent firm of local accountants
- advised that at the time of writing the report, the council had received 3 offers for the property (this did not include the 2 proposals received on the day of the council meeting), namely:
 - Lakes Village Pty Ltd's offer of \$1.5 million (note that the chief executive advised the council of the company's willingness to increase its offer by \$100 000)

- an offer of \$2 million less the council retaining equity of \$643 000 in the project; leasing back the building at \$210 000 a year for 3 years with the option of buying back the building at the end of that time; and with the potential to receive back the equity invested at that time
- Mr Eagleson's offer of \$1.6 million (net of GST) on the same terms and conditions as those applying to Lakes Village.

As well, the report on the proposed sale:

- indicated that the council was considering extending the Bairnsdale office at a cost of up to \$1 million and building Stage 2 of the Lakes Entrance Civic Centre, and that on this basis the council would only lease back the property at 55 Palmers Road for a maximum of 2 years while these other 2 projects were completed
- outlined the expected economic benefits of the proposed development, including the generation of 57 full-time and 23 part-time jobs when completed and an estimated \$40 million investment
- included discussion on a number of issues raised in submissions to the council, including concerns about the purchaser, Lakes Village Pty Ltd. Councillors were advised that the company was formed for the purposes of negotiation and that the company structure would be finalised prior to the entering into a contract which was normal for single venture businesses.

The report recommended that the council consider the submissions and offers received.

We expected that, when providing advice to the council on such a critical decision, council officers would have made a clear recommendation based on an independent assessment of the submissions and other offers received along with considerations of transparency and delivery of the best outcome for the council and ratepayers. A recommendation would not have constrained the council's freedom to make a decision. Apart from failing to provide the council with a recommendation, the report also failed to advise it of its options and the possible consequences of each option.

In addition to this report, the chief executive had sought legal advice as to whether it was appropriate for the council to proceed with the proposed sale to Lakes Village, given that other offers for the property had emerged during the process of hearing public submissions. The advice, which was received on the morning of 27 August and was distributed to all councillors prior to the council meeting, was as follows:

- although Mr Eagleson's offer of \$1.6 million (net of GST) on the same terms and conditions as those applying to Lakes Village was received outside the 14 day submission period, a reasonable council would take the offer into account in determining whether or not to proceed with the sale to Lakes Village Pty Ltd
- given that the council had 2 competitive offers in writing from prospective purchasers and might receive others, it would be prudent to go to the market and sell the property by way of a public tender
- tenderers should be required to execute contracts of sale which would remain irrevocable for a defined period
- if the council wanted to ensure that the successful purchaser used and developed the property for the purpose described in its offer, it should require the purchaser to enter into an agreement under section 173 of the *Planning and Environment Act 1987* as a condition of the contract of sale. Such an agreement could provide that:
 - the owner would only develop and use the land for the purpose described in the tender offer
 - the proposal would be developed in accordance with plans and specifications submitted with the tender offer
 - the proposed development must have substantially commenced within 12 months of the settlement date
 - the development must be completed within 2 years of the settlement date
 - the owner would lodge bank guarantees with the council, to be retained until the owner met the requirements of the section 173 agreement to commence and then complete the development within the required time frame.

Such advice was sound and consistent with the State Government's *Policy and Instructions for the purchase, compulsory acquisition and sale of land*, which requires that "all land must be sold by public auction or tender or other public process unless certain defined exceptional circumstances exist".

Ultimately, on 27 August 2001, the council resolved that having considered all submissions and offers to purchase the property in accordance with the *Local Government Act 1989*, it would not sell the property by private treaty to Lakes Village Pty Ltd. Instead, it resolved to sell the property by a public tender that would specify strict provisions, including requiring the purchaser to develop the property in accordance with such provisions. The resolution also stated that the council would give public notice of its intention to sell the land to the successful tenderer. The then mayor advised us that he voted in support of the motion to go to public tender.

Section 223 of the *Local Government Act 1989* governs the process where citizens are given a right to make a submission to a council under the Act. It requires the council to consider all submissions received and, after it has made a decision, to notify in writing every person who lodged a submission, of the decision and the reasons for it. The council did not comply with this section of the Act in a timely way because it did not notify the individuals who had made submissions on the proposed sale of the property of its decision of 27 August 2001 and the reasons for that decision until 15 January 2002. In addition, we were concerned that the council's notice, when provided, did not adequately explain the reasons for the council's decision.

3.7 Conclusion

We found little evidence that, during the period 1998 to late 2001, the council or its senior officers seriously considered or addressed many of the matters essential to ensuring that efforts to sell the property were soundly based, transparent and there was fair treatment of all prospective purchasers and developers.

It failed to conduct proper due diligence enquiries on individuals and companies who were, or were acting for, prospective purchasers and developers. Of more concern was the council's failure to do so even when it, or its senior officers, became aware of adverse information about the past activities and financial capacity of these parties.

The enquiries undertaken by council staff from time to time were little more than basic company searches and were insufficiently detailed to discover all the facts about those entities. Had staff undertaken effective enquiries it is likely that the council would have immediately ceased negotiations with those parties. Such early action may have averted or minimised the considerable time and cost spent by the council up to this point.

The individual who was the council's chief executive between February 1995 and February 2001 advised us that at no stage during his term as chief executive was the council's position as custodian of community assets placed in jeopardy, or the council's legal position compromised, nor did he gain or stand to gain from the proposed sale.

Some parties dealing with the council failed to act openly and transparently and may have misrepresented themselves to the council. We refer here to Dr Ian Bennett and the Breakaway Group Pty Ltd.

The process leading to the decision of the council in June 2001 to commit itself to the sale of the property to Lakes Village Pty Ltd was deficient because there was a lack rigorous advice from council officers. On occasions the written advice provided by these officers was inadequate and arguably misleading.

We consider that the council's former chief executive failed to identify and provide timely advice to council on the problems encountered by Dr Bennett – including his conviction for failing to act honestly as a company director, status as a bankrupt and directorship of companies in receivership.

Based on the evidence available there was also a pattern where some actions agreed to, or required by, the council and recorded in minutes of informal briefing sessions were ignored and not implemented by management. This was compounded by the council's failure to detect this inaction.

There was a lack of transparency and accountability to the local community in relation to the council's actions because discussions on the progress of negotiations were almost exclusively confined to closed councillors' briefing sessions and informal discussions. While it is understandable that certain strategies and negotiations, might and indeed should be tightly managed, the very limited inclusion of the proposal to sell the property on the council's agenda for ordinary meetings fell considerably short of what is expected of a public body.



4. Did the council
follow proper
tendering
processes?



4.1 Background and audit criteria

As outlined in the previous part of this report, on 27 August 2001, the council resolved not to proceed with the sale by private treaty to Lakes Village Pty Ltd and to offer the property for sale by public tender. We expected the council to establish and implement a robust tendering process which was fair to all potential tenderers for the property and which could withstand scrutiny from the community.

The integrity of a tender process depends on the establishment and implementation of appropriate procedures and controls in the following areas:

- designation of a tender period of sufficient length to allow potential tenderers to develop fully researched and considered tender submissions
- advertisement and marketing of the tender opportunity to attract as wide a field of potential tenderers as possible
- establishment of reasonable tender conditions which protect the interests of the council but do not discourage potential tenderers
- distribution of complete and consistent tender documentation to all potential tenderers at the commencement of the tender process
- handling of queries from potential tenderers
- tender lodgement requirements
- opening and registration of tenders received
- evaluation of tenders received against established selection criteria
- probity and confidentiality arrangements.

Given that the council had been dealing with one potential tenderer (Lakes Village Pty Ltd) for around 9 months, the need to establish and comply with adequate probity arrangements for the tender process was critical. We expected the council to have issued a directive to all staff and councillors who had been involved in negotiations with Lakes Village, requiring them to have no contact with this potential tenderer during the tender process, and to direct any enquiries from Lakes Village to a designated contact officer appointed for the tender process. Such a directive would have decreased the risk of staff or councillors deliberately or inadvertently compromising the integrity of the tender process.

On 28 August 2001, the council reissued its policies and procedures for the conduct of tender processes, *East Gippsland Shire Council – Tendering Unit Work Instruction*. We refer to this document as “the council’s tendering policy” for the remainder of the report. We reviewed this document and found it adequate, as it covered most of the matters we expected to find in a tendering policy and procedure manual. One deficiency in the council’s tendering policy was the absence of guidance on identifying and dealing with non-conforming tenders. The council’s tendering policy was applicable to the sale of assets including the property at 55 Palmers Road, Lakes Entrance, and if it had adhered to this policy, many of the deficiencies we identified in its management of the tender process for the sale of the property could have been avoided.

4.2 Events during the period prior to calling tenders

Following the decision to sell the property by public tender, the council failed to issue a directive to all staff and councillors involved in negotiations with Lakes Village requiring them to have no contact with this potential tenderer during the tender process to ensure the integrity of the process. These staff and councillors should have been told to direct any requests for information to the council’s nominated contact person for the tender process.

The council advised Dr Bennett of its 27 August 2001 decision not to proceed with the proposed sale of the property to Lakes Village and to offer it for sale by public tender. Dr Bennett then approached the then mayor and requested details of other offers made for the property during the public submission process. When the mayor asked the chief executive if it was appropriate to do so, the chief executive advised that it was, because all of the offers had been made publicly and were not designated commercial in confidence.

Council officers then faxed copies of the 4 competing offers to Dr Bennett on 28 August 2001.

We have the following concerns with the council’s actions:

- One of the offers was forwarded to Dr Bennett even though it was clearly designated “a confidential document which should not be copied without prior permission ...”. There is no evidence that the chief executive considered this confidentiality requirement or sought permission to release the proposal to Dr Bennett.

- The individuals and groups who had made the offers to the council were not advised that the council was passing on a copy of their offers to Dr Bennett.
- The principle that all potential tenderers should have access to exactly the same information from the organisation responsible for the tender process which is fundamental to the integrity of any tender process was not followed by the council because Dr Bennett was the only party involved in an offer who was given a copy of all the other offers.

Later on 28 August 2001, Dr Bennett sent an email headed “Strictly Confidential” to the mayor. In the email, Dr Bennett:

- expressed disappointment with the council decision to conduct a public tender process for the property and stated that: “I know you are disappointed too, and I would like to keep this communication strictly confidential to see if we can resurrect the situation”
- requested the mayor to call the CEO of OzCapital Pty Ltd
- acknowledged receipt of copies of the other offers for the property received by the council and was critical of these offers
- stated that: “I have been asked not to directly communicate with Council in the interim, but I will with you through your home email, if that’s OK with you ...”
- sought a response from the mayor on thoughts he had for “keeping this show on the road”.

As demonstrated by this email, Dr Bennett was inviting the mayor to participate in a clandestine dialogue. In our view, this was inappropriate because he was acting in a way which undermined the integrity of the tender process.

The following day, the mayor emailed a reply to Dr Bennett. The mayor’s response is noteworthy because it:

- clearly acknowledged that the mayor and Dr Bennett were also in communication by phone and fax
- failed to raise any issues or concerns about the appropriateness of these communications during a public tender process
- made derogatory comments about 2 councillors and the reasons why they had voted for a public tender process
- gave a commitment that the mayor would phone Dr Bennett on 30 August to explain the situation.

In our view, this exchange of emails between the then mayor and Dr Bennett provides clear evidence of an inappropriate relationship between them. It seems clear to us that the mayor was aware that the communication with Dr Bennett was inappropriate because he failed to disclose the fact to senior council officers.

The then mayor advised us that his motives in continuing to communicate with Dr Bennett following the council's decision to go to public tender were directed towards "... keeping Lakes Village as a potential tenderer, in the interests of East Gippsland".

Our key concerns about these communications between the mayor and Dr Bennett are:

- The mayor accepted direct communications at his private email address from a potential tenderer in a manner that ensured that councillors and staff remained unaware of the communications.
- After Dr Bennett explicitly acknowledged that he had been requested not to communicate directly with the council, he communicated with the mayor in a covert manner.
- Dr Bennett clearly perceived the mayor as a supporter of the Lakes Village proposal and treated him accordingly.
- Dr Bennett's criticisms of the competing offers could be characterised as an attempt to influence the mayors perceptions of them.
- The mayor failed to assert and carry out his role as an objective representative of the council and the East Gippsland community.

In our opinion, such a direct line of communication, clearly aimed at maintaining links between the mayor and a representative of Lakes Village during the lead up to a public tender process, was highly inappropriate and contrary to ethical practice. The mayor should have informed Dr Bennett that he needed to remain at arms-length from all prospective tenderers during the process and told him to direct any requests for information to the council's nominated contact person for the tender process.

On 28 August 2001, the chief executive sent an email to the council's legal advisers informing them that the council had decided to go to public tender for the disposal of the property. He said that the mayor was not happy and was blaming everybody, including the legal advisers, for conservative advice, and sought advice on any steps which could be taken to speed up the process.

On 31 August 2001, Cr Smyth sent an email to a member of the Lakes Village group advising that he had voted not to go to tender and that he was going “on the front foot” with a positive media release. Dr Bennett replied on 4 September, stating his belief that the mayor would not “let it slip away next time”. The councillor replied the same day that there had been a positive reaction to his blast at negative people in the local newspaper of the previous day and that he and the mayor were “whipping up support”. He also wrote in his email that: “[The mayor] is extremely supportive and was concerned when he saw the councillors begin to buckle ... The tender will specify ‘best value’ to the community. I think the councillors just wanted to be ‘safe’. Some of them don’t like any ‘heat’”.

In our view, the actions of the councillor were inappropriate and demonstrated a bias towards the Lakes Village proposal.

On 31 August Dr Bennett faxed a draft letter of complaint from the Lakes Village group to the council about its decision to go to public tender. From the evidence available, it is apparent that the mayor suggested some changes to this draft letter which were taken up by Dr Bennett and incorporated into a formal letter of complaint from OzCapital Pty Ltd dated 6 September 2001. **We consider it highly inappropriate for the mayor to assist representatives of Lakes Village to draft a letter of complaint to his own council, and see it as further evidence that the mayor was not acting at arms-length from the group.**

4.3 Decision on tender period and advertisement and marketing of the tender opportunity

We expected the council to designate a tender period of sufficient length to allow potential tenderers, some of whom could be unfamiliar with the property and its development potential, to develop fully researched and considered tender submissions. We also expected the council to advertise and market the tender opportunity widely in order to attract as large a field of potential tenderers as possible.

The government’s *Policy and Instructions on the purchase, compulsory acquisition and sale of land* suggests an advertising period of 6 weeks for land, based on the principle that property needs to be adequately exposed to the market to maximise its sale price. The policy also requires that “land be offered for sale with disclosure of relevant information to enable full and proper due diligence enquiry”. This is to ensure prospective purchasers have equal opportunity to inform themselves about the development potential of land.

On 28 August 2001, the day after the council decided to go to public tender, the chief executive informed the council's legal advisers of the decision and stated that the mayor wanted a tender period of 15 business days.

Around the end of August 2001, the mayor, the chief executive and the manager contracts met to discuss the tender period and process. The recollection of both the chief executive and the manager contracts is as follows:

- the manager contracts initially suggested a tender period of 6 weeks, given that this was not a standard tender for works or services
- the mayor made it clear that he wanted a relatively quick tender period
- the manager contracts asserted that a tender period of nothing less than 30 days, which was the council's standard tender period, would be appropriate. This was agreed, and the tender period commenced when the tender was advertised on 5 September with a closing date of 5 October 2001.

Given the requirements for tenderers to execute a legally binding contract of sale, be fully confident in their due diligence investigations, research the development potential of the site, and arrive at a price, we considered the 30-day tender period to be inadequate. It clearly favoured Lakes Village. Not only had the company been dealing with the council for about 9 months in relation to the property, but its agent, Dr Ian Bennett, had also been dealing with the council for nearly 3 years in relation to the property.

There is no evidence that when setting a 30-day tender period, the mayor or chief executive gave any consideration to the fact that a short tender period would favour Lakes Village over other potential tenderers given its prior involvement and negotiations with the council on the property.

The tender was advertised in local newspapers – the *Snowy River Mail* and the *Lakes Post* on 5 September and the *Bairnsdale Advertiser* on 7 September – and in the *Melbourne Age* on 8 and 15 September 2001. The council's tendering policy required that where competition needed to be attracted nationally, an advertisement should be placed in the *Weekend Australian* as well, but this was not done. We considered this to be a poor decision: a property of this nature could clearly have attracted interest from potential purchasers and developers in other parts of Australia and the council would not have incurred any risk by exposing it to a wider market. There is no evidence that this departure from the council's tendering policy was brought to the attention of the council.

The advertisements stated that tender documents would be available from 12 September - this was a clear breach of the council's tendering policy, which mandated that tender advertisements should not be placed until documentation had been prepared and approved. Again, there is no evidence that an exemption from the application of this requirement was sought or obtained, or that this breach of the council's tendering policy was brought to the attention of the council.

In our view, the requirement that advertisements not be placed until tender documentation had been prepared and approved was well founded because it eliminates the risk that a tender would be advertised with a specified deadline which could not be met because of delays in completing tender documents. By ignoring this requirement, management exposed the council to this risk, and as this report will show, the risk became a reality which ultimately compromised the validity and integrity of the tender process for the property.

4.4 Establishment of tender conditions and distribution of tender documentation to potential tenderers

A critical factor in maintaining the integrity of any tender process is to ensure that all potential tenderers have access to the same information from the organisation seeking tenders at the same time. Distribution of complete and consistent tender documentation to all potential tenderers at the beginning of the tender process was, therefore, vital. This principle is recognised in the council's tendering policy.

We expected the council to establish tender conditions which protected the interests of the council but did not discourage potential tenderers, and which met the requirements of the council resolution of 27 August 2001 - namely, that the tender would specify strict provisions set by the council, including the requirement that the purchaser develop the property in accordance with such provisions. We also expected that tender documents would have been made available to all potential tenderers from the start of the tender period.

Around the end of August 2001, when the mayor, chief executive and the manager contracts met to discuss the tender period and process, the manager contracts was assigned responsibility to prepare draft conditions of tendering and give them to the council's legal advisers to review. From this point, the council's legal advisers assumed responsibility for development of the final tender documents. However, ultimate responsibility for the tender process, together with the development of tender documents, remained with the council.

As indicated previously, the decision to make the tender documents available from 12 September instead of 5 September, which was the start of the tendering period, in substance reduced the tender period.

To make matters worse, the tender documents were not available on 12 September as advertised because the council's legal advisers redrafted them on that day and more changes were made after a discussion involving the mayor, the chief executive, and the council's manager contracts.

Section 173 of the *Planning and Environment Act 1987* is commonly invoked by local governments to control the future use of land and to impose obligations on the purchaser to complete the development within certain time frames and in an acceptable manner. One of the changes to the tender documents agreed by the mayor, the chief executive, and the manager contracts following consultation with the council's legal advisers was the deletion of the requirement for an agreement under section 173 of the Act. In our view, this action was contrary to the council's resolution of 27 August that the tender "would specify strict provisions set by Council, including requiring the purchaser to develop the property in accordance with such provisions". It was also contrary to legal advice obtained by the council in August 2001 that it should require the purchaser to enter into a section 173 agreement as a condition of the contract of sale to ensure that the successful purchaser used and developed the land for the purpose described in its tender offer.

The then chief executive subsequently advised us that the requirement for a section 173 agreement was deleted from the tender conditions because it was regarded as unnecessary, since controls could be imposed on the successful tenderer by way of a planning permit. In our view, the imposition of conditions on a planning permit does not provide protection equivalent to the execution of a section 173 agreement. The primary weakness of such an approach is that it would not stop a speculative purchaser from buying the property and "parking" it in the hope of realising a capital gain at some later point, therefore, overcoming the need to apply for a planning permit.

In our view, the decision to delete the requirement for a section 173 agreement from the tender conditions was flawed and could only increase the risk to the council that a developer may acquire the property for speculative or other purposes and then leave it undeveloped. The then chief executive advised us that he did brief councillors on this change in the requirements, however we were unable to find documentary evidence that this change was brought to the attention of the full council. The council had previously resolved that the tender would require the purchaser to develop the property.

Ultimately, the tender documents were not distributed until 19 September 2001. This left only 17 days for potential buyers to meet tender requirements and prepare responses, and clearly increased the competitive advantage enjoyed by Lakes Village.

In our view, to ensure the process was as fair as possible, the council should have extended the closing date for receipt of tenders to recognise the delays in the release of the tender documents. There is no evidence, however, that the council or its senior management gave any consideration to extending the tender period once it became apparent that potential tenderers would only have the tender documents for 17 days.

Following the release of tender documents on 19 September, the council had to release 2 addenda to the documents:

- Addendum 1, which was sent to prospective tenderers on 24 September, deleted references to a section 173 agreement from the vendor's statement. However, the final tender documents still included a reference to such an agreement; a situation that could have confused potential tenderers
- Addendum 2, which was sent to prospective tenderers on 28 September, consisted of an information statement from East Gippsland Water on the water rates and charges, sewage tariff and other relevant information for the property.

In addition to these amendments, the contract of sale, which had to be executed by tenderers in order to submit a conforming tender, was not provided until 2 days before the closing date. There is no evidence that officers responsible for the tender process obtained an exemption from the application of the requirement of the council's tendering policy that the closing date for tenders must be extended when an addendum to tender documents was not issued to all prospective tenderers at least 3 days prior to the closing date.

Despite amendments to the tender documents and the delay in the provision of the contract of sale, the council did not extend the closing date. In our view, this was not only a clear breach of the council's tendering policy but also contrary to good tendering practice.

The tender process was handled by council officers with advice and input by the council's lawyers, who were located in Melbourne. This contributed to delays in the finalisation and distribution of the tender documents.

We examined the tender documents that were released to potential buyers and make the following observations:

- Tenderers were advised that a tender lodged in accordance with the tender conditions constituted an irrevocable offer to purchase the property for the price bid.
- The property would be deemed to be purchased by the tenderer from the date on which the council's notice of acceptance was provided to the tenderer. The last possible date for this to occur was 16 October 2001.
- Following receipt of the notice of acceptance from the council, the successful tenderer had 7 days to pay the balance of the deposit (the contract deposit was 5 per cent of the purchase price less the deposit lodged with the tender).
- The council was required, as soon as possible after receiving the balance of the deposit, to execute the contract of sale and deliver "a counterpart" of the contract to the successful tenderer.
- The tender documents did not specify the criteria which would be used to evaluate tenders. In our view, this was a breach of the council's tendering manual and would have given potential tenderers the impression that tenders would be evaluated on price.
- The contract of sale included a number of special conditions, including:
 - a mandatory provision that the contract was conditional upon exercise of statutory powers under section 189 of the *Local Government Act 1989*, which involve advertisement by the council of its intention to sell the property, hearing any submissions made and subsequently resolving to sell the property
 - an optional condition whereby the purchaser could elect to make the contract conditional upon the granting of a planning permit no later than 11 months after the date of sale, which authorises the purchaser's proposed use and development of the property in accordance with concept plans annexed to the contract
 - an optional condition whereby the purchaser could elect to make the contract conditional upon the entering into of a lease-back arrangement with the council for the office building on the property, or parts thereof

- an optional condition allowing the purchaser to elect to guarantee the development of the property within a defined time period and provide a bank guarantee of \$50 000 to back-up the guarantee. In our view, the fact that this was an option or condition which could only be exercised by the purchaser exposed the council to a risk that the property would not be developed.

In our view, the key weakness in the tender conditions was that the contract of sale failed to comply with the council resolution, as it did not require the purchaser to develop the property in accordance with provisions specified by the council.

4.5 Handling of request for an extension to the tender period

On 2 October 2001, the council received a request from a potential tenderer for a 10-day extension to the closing date. The request stated that as information needed to complete the tender submission had only been received within the previous few days, further time was needed to study the information to ensure that his submission would be in the correct form with all the appropriate information. In our view, this was a reasonable request, and we would have expected the council to accede, given the delays in issuing tender documents and the fact that the tenderer had not received the contract of sale until 3 October, some 2 days before the closing date.

An extension to the tender period would not have weakened the council's position or created any risks and, arguably, would have enhanced the possibility of receiving a number of competitive tenders for the property. It could also have been justified on fairness grounds given that a potential tenderer (Lakes Village) had spent a considerable period of time researching and working up a proposal whereas others may have had only the 30-day tender period minus the period up until the tender documents and addenda to those documents were issued. But on 4 October, the chief executive advised the relevant tenderer that his request would not be granted. He did not document the reason for his refusal.

As part of this audit, we interviewed the individual who requested the extension and were persuaded that he was considering making a genuine bid. Given his genuineness and the delays with the issue of the tender documentation, we believe the chief executive's refusal was unreasonable. However, council staff have indicated to us that there was pressure to ensure that the tender process was finalised in line with the originally established timelines.

On 5 October 2001, the petitioner seeking the extension advised the council that his consortium was dropping out of the tender process because it could not fully complete due diligence on matters related to a possible subdivision of the property. The individual complained that the timetable for completing the necessary investigations was too restrictive, and indicated that he would welcome the opportunity of negotiating and discussing an acquisition arrangement with the council if no acceptable tender was received.

The chief executive's refusal of the request for an extension excluded a competitive tender and reduced the effectiveness of the public tendering process. Eventually, only one tender was received (from Lakes Village), thus limiting the council's options.

4.6 Non-compliance with tender lodgement requirements

The tender conditions required bidders to place the tender in a sealed tender envelope in the tender box at the council offices at 55 Palmers Road, Lakes Entrance no later than 12.00 noon Eastern Standard Time on the closing date, 5 October 2001. This process was designed to ensure that no one was aware of the content of a tender, including the bid price, until the box was opened in the presence of more than one council officer and all tenders were opened and registered.

On 5 October 2001, Dr Bennett submitted a tender on behalf of Lakes Village Pty Ltd at the council's Bairnsdale office and requested a receipt for the tender deposit cheque which was for one per cent of the tender bid price. Council staff issued a receipt for \$15 250, meaning that at least one staff member knew Lakes Village's bid for the property before tenders had been formally opened and registered. We were advised that the tender was delivered unopened to Lakes Entrance and placed in the tender box at 55 Palmers Road not by the tenderer but by a council officer.

4.7 Opening and registration of tender received and was it a conforming tender?

We were advised that immediately after 12.00 noon on 5 October 2001, the tender box at 55 Palmers Road was opened by 2 council staff and the sole tender received was opened and registered in accordance with normal council procedure. The tender was from Lakes Village Pty Ltd and was for \$1.525 million. Although council's tendering policy requires tenders bearing prices to be initialled on each page by the staff involved in the tender opening process, this did not occur.

Our review of the registration and processing of the tender received from Lakes Village revealed the following omissions:

- no signed *Contract of Sale of Real Estate* was included with the tender (this is the document that had not been distributed to potential tenderers until 3 October)
- the vendor's statement had not been signed by the tenderer
- there was no acknowledgment that the tenderer had received Addendum 1 to the tender documents that deleted the reference to the section 173 agreement.

In addition, the tenderer had elected not to tick the boxes invoking the special conditions of contract which made the contract conditional on: the granting of a planning permit; lease-back of the office building to the council; and provision of a guarantee by the purchaser on completion of the development. While the company had not ticked the box invoking the special condition on the provision of a guarantee by the purchaser on completion of the development, it had nevertheless entered some details in this section of the contract indicating that it was prepared to guarantee commencement of the development works within 3 months of the settlement date. This indicated that the failure to tick the relevant box was an oversight.

Staff of the council's tendering unit immediately asked the company to complete and return all of the necessary documentation as soon as possible and to confirm that it did not want to invoke the special conditions in the contract making the sale conditional on the granting of a planning permit and the lease-back of the office building to the council. Council staff also advised the company that it was assumed that Lakes Village intended to invoke the special condition on the provision of a guarantee about completion of the development, and asked the company to confirm this by ticking the box and returning the relevant page of the contract of sale.

Under the conditions of the tender process, tenderers had to complete all schedules and provide all other information required by the tender documents. Specifically, the conditions provided that “tender submissions must in all respects be in accordance with and subject to the terms and conditions of the tender documents and must be submitted on the Council’s ‘form of tender’ . Incomplete tender submissions may be excluded”. The council’s tendering policy did not provide instructions or formal guidance for staff on determining whether a tender conformed or not - this was left up to their judgment.

We discussed the omissions in the tender from Lakes Village with relevant council staff, who advised that the omissions were not considered to be sufficiently material to constitute a non-conforming tender. We were advised that if the council was to reject every tender that contained similar omissions, then very few tenders would be deemed conforming. However, there was no documentation available which demonstrates that staff actually considered whether the Lakes Village tender conformed or not. Further, there was no evidence that the omissions were brought to the attention of the council’s senior management for evaluation and decision.

On 10 October 2001, OzCapital Pty Ltd provided the documentation required to address the omissions from Lakes Village’s original tender submission. It also provided a replacement page for the contract of sale dealing with the special condition involving the provision of a guarantee about completion of the development. On the replacement page, the company ticked the box invoking the special condition but did not change the details of the extent of guarantee it was prepared to offer. This was appropriate because to have changed the nature of the guarantee offered would have represented a change to the tender after the tender closing date.

In addition, the company provided replacement pages for the contract of sale dealing with the special conditions of the contract on the granting of a planning permit and the lease-back of the office building to the council. On these replacement pages the company ticked the boxes required to invoke both of these special conditions. The council officers accepted these changes to the tender document without question. As a result of these actions, **we consider that the council permitted Lakes Village to change its tender submission after the tender closing date. In our view, such action is not consistent with good tendering practice.**

4.8 Evaluation of tender received

The council's tendering policy requires the appointment of a tender evaluation panel for each contract. The policy also requires that where a tender process involves more than \$50 000 in value, the process must be audited by a person independent of the council. The auditor is required to attend the meeting of the panel and attest to the probity of the panel's findings having regard to the tender evaluation criteria. The tender evaluation auditor's report is required to be submitted to the council as part of the overall report on the outcome of the tender process.

In our view, this requirement is well founded. Given the value of the property, the degree of community interest in the issue, and the council's awareness of allegations that its processes leading up to the June 2001 resolution to sell the property to Lakes Village had lacked transparency, the council should have regarded it as important in this case. The council failed to abide by its own policy, in that it did not appoint a probity auditor to oversee the tender process. There is no evidence that an exemption from the application of this requirement was sought by officers responsible for the tender process or that this breach of the council's tendering manual was brought to the attention of the council.

The panel established to evaluate the tenders comprised the chief executive, the manager contracts, and the manager corporate and financial services.

We consider that because of the chief executive's prior involvement in negotiations with Lakes Village and his responsibility for the report to the council in June 2001 which recommended acceptance of the offer for the property from Lakes Village, it would have been prudent to have excluded the chief executive from the panel.

The inclusion of an external representative with particular tender evaluation experience or town planning skills would have given the panel greater credibility by demonstrating independence and objectivity to the community in relation to the ultimate decision arising from the tender process.

The tender documents did not specify the criteria that would be used to evaluate tenders, which was in our view a breach of the council's tendering policy and inconsistent with sound tendering practices. This could have given rise to allegations that the council had devised or manipulated the evaluation criteria to favour or rule out one or more tenderers. It is notable that the Victorian Government policies on tendering require tender documents to specify the criteria to be used in the evaluation of tender responses, to provide details on the evaluation process and to detail the importance given to different tender evaluation criteria if relevant.

The tender evaluation panel met on 11 October 2001 to consider an analysis prepared by the manager contracts of the Lakes Village tender and to assess the tender against the following criteria:

- tender purchase price
- proposed development
- capacity to fund the development
- timetable for any staging of the proposed development
- experience of the developers.

A *Tender Evaluation Report* was prepared (by the manager contracts) which detailed the results of the tender evaluation panel's deliberations. This report was subsequently provided to the council to assist in its deliberations and decision-making at its meeting on 15 October. The report included:

- a description of the tender process
- details of the tender received from Lakes Village
- the tender evaluation panel's assessment of the tender against the tender evaluation criteria
- an analysis, based on company searches, of the various companies involved in the tender submission and proposed development and the interrelationships between the companies
- advice that personal searches into the indebtedness of the directors of Lakes Village Pty Ltd had been carried out by the council's legal advisers and would be tabled at a later date.

In our view, the *Tender Evaluation Report* was deficient for the following reasons:

- the description of the tender process failed to identify or acknowledge any of the numerous breaches of the council's tendering policy which occurred during the conduct of the process, e.g. the failure to have tender documents available at the date the tender was advertised and the failure to appoint a probity auditor

- it failed to identify that council staff had rejected a request from a potential tenderer for an extension of the tender period which was sought based on the delays in the distribution of the tender documents
- it failed to inform the council that the part of its resolution of 27 August 2001 which stated that “the tender would specify strict provisions set by Council, including requiring the purchaser to develop the property in accordance with such provisions” had not been implemented by the mayor and officers responsible for the final decisions about tender conditions
- it did not address the merits of the development proposal from a planning perspective, even at a very general level
- it provided little information to support the panel’s assessment that the developers had extensive experience in the type of development proposed
- it failed to inform the council that the tender evaluation panel had not sought or obtained from the tenderer any form of evidence as to the extent and enforceability of the financial support to be provided to Lakes Village Pty Ltd by OzCapital Pty Ltd through Interstar Securities Pty Ltd
- it left some issues unresolved, including that of the outcome of personal searches into the indebtedness of directors of Lakes Village, and the amount of rent to be paid by the council under the lease-back agreement for the office building on the property.

In our view, the *Tender Evaluation Report* to the council did not provide a sufficient basis to enable the council to make an informed decision.

4.9 Council decision to accept tender from Lakes Village Pty Ltd

The tender documents issued by the council established the following process for the acceptance of a tender for the sale of the property:

- the council could accept a tender offer for the property by providing written notice of acceptance to the tenderer up until the close of business on 16 October 2001, which was the acceptance date specified in the tender conditions
- the property would be deemed to be purchased by the successful tenderer from the date of the council’s written notice of acceptance, on the terms and conditions contained in the contract of sale.

At a special council meeting on the morning of 15 October 2001, the council considered a summary report on the matter from a senior council officer, the *Tender Evaluation Report*, a further report from the consultant who had previously provided advice on the cash flow analysis prepared by council officers in July 2001, and a summary of options for the future accommodation of staff.

The summary report on the tender process provided to the council on 15 October had many of the same deficiencies we identified in the *Tender Evaluation Report*, as well as the following additional deficiencies:

- It failed to comment on matters identified but not resolved in the *Tender Evaluation Report*. These matters related to the outcome of personal searches into the indebtedness of the directors of Lakes Village Pty Ltd and the amount of rent to be paid by the council under the lease-back agreement for the office building on the property.
- It informed councillors that there were no environmental considerations applicable to the decision when in fact the tender was proposing significant development on what was a largely vacant site which would have an impact on the environment because of its impacts on vegetation and drainage.
- It gave an overview of further advice and discounted cash flow analysis from a consultant based on various assumptions about the costs of extending the council's Bairnsdale office to accommodate staff from the office at 55 Palmers Road Lakes Entrance, but did not inform councillors of the consultant's conclusion that more accurate costing of the extension of the council's Bairnsdale office was required before certainty could be arrived at that the project was positive on a net present value cash flow basis. The report also failed to alert councillors to the consultant's view that a bank guarantee of \$50 000 was insufficient to indemnify the council against risk should the development not proceed.

In our view, the reports considered by council on 15 October 2001 did not provide an adequate basis on which it could make an informed decision.

After considering these reports, the council decided to accept the tender submitted by Lakes Village Pty Ltd and to sell the property to the company for \$1 525 million subject to the conditions set out in the contract of sale. The council also resolved to give public notice of its intention to sell the property in line with the provisions of section 189 and 223 of the *Local Government Act 1989*.

Subsequent to the council making its decision, the council's lawyers late in the afternoon of 15 October 2001 gave the chief executive the results of checks on Lakes Village Pty Ltd, OzCapital Pty Ltd and a number of the individuals associated with these companies. The information provided by the council's legal advisers was limited, but did indicate that Dr Bennett (an adviser to this bidder) had been subject to sequestration¹ orders on 22 August 2000. There is no evidence that this matter was brought to the attention of the council.

4.10 Probity of the tender process

The draft tender document discussed at a meeting around the end of August 2001 involving the mayor, the chief executive and the manager contracts included the standard clause which allowed the council to disqualify any tenderer who colluded, fixed or adjusted the amount of its tender by agreement, arrangement or collusion with any other person or who canvassed any councillor or officer of the council. However, while this clause was included in the draft tender documents which went to the council's legal advisers, it was omitted from the final tender documents issued by council to prospective tenderers.

We found no evidence during our audit of a lack of probity by council staff during the tender process. While we have raised a number of concerns about various actions and the quality of advice they provided to council, we do not consider that any of the council staff acted in a manner designed to provide an advantage to any potential tenderer.

In Part 4.2 of this report – *Events during the period prior to calling tenders* – we described a number of communications between the mayor and Dr Bennett before tenders were called. We found these inappropriate.

Advertisements calling for tenders on the property commenced on 5 September 2001.

On 7 September 2001, Dr Bennett sent an email to the Mayor marked "PRIVATE AND CONFIDENTIAL". The email stated "I can tell you that OzCapital syndicate will tender but would prefer that others did not know. At the moment it would probably be better if people thought we were not going to participate. Did you get a letter from [the CEO of OzCapital]? No doubt we will talk as Oct 5 approaches".

¹ Sequestration is the taking of someone's property, voluntarily (by deposit) or involuntarily (by seizure), by court officers or into the possession of a third party, awaiting the outcome of a trial in which ownership of that property is at issue.

Our primary concerns with the content of this email are that:

- it was sent to the mayor using his private email address during the tender period in clear contravention of any reasonable person's understanding of due process during a tender period
- it disclosed to the mayor the intention of the Lakes Village/OzCapital syndicate to tender for the property while seeming to ask him not to pass this information on to any other party
- it expressed a clear intention to initiate further communications with the mayor before the closing date for receipt of tenders.

In our view, the mayor should have sought advice from the chief executive and manager contracts on how to respond in a manner which would preserve the integrity of the tender process. Instead he sent the following email to Dr Bennett on Sunday, 9 September 2001:

"I advised the other councillors last week that it was possible that you would pull out.

I have since advised them that I have met [another possible tenderer] and he advised me that he and his friends were no longer interested.

[The council's real estate agent] has further advised me that another investor has pulled out.

I will be discussing these again on Monday.

Your name would probably be recorded if you pick up a tender document, so it may be advisable to get someone else to pick up the tender documents for you. It would be better if it was not [the council's real estate agent]. I could arrange for someone else to pick up the documents for you. They would not know who they are picking it up for. There may be a charge of \$25.

If you pick them up yourself, then it may pay to do so later, rather than sooner.

[The council's chief executive] had a visit from one of the major objectors who said that they were having a meeting on Tuesday next week to gauge the level of support for continuing the protest.

I think that the numbers are falling off as the more sensible ones see that the others are stupid and illogical.

It may well be that no one will tender, or if they do, it will be for a straight sale. However, we will not know until after the documents are opened".

We have major concerns with the content of this email as the mayor:

- was communicating during the tendering period with a party which had indicated its intention to lodge a tender

- divulged information to this party about the intention of another potential tenderer not to lodge a tender
- advised this party on how to pick up the tender documents in a way that would avoid identification of the tenderer and offered to have the documents picked up in a way that would prevent others from knowing that the party had obtained them
- expressed views on the opponents of the sale of the property
- speculated on the number of tenders that might be received and on the nature of these tenders.

The email provides evidence of the mayor's bias in favour of Lakes Village Pty Ltd. In our view, the communications between the mayor and Dr Bennett both before and during the tender process compromised the process. The actions of the mayor indicate a loss of objectivity, which we regard as critical to the fair consideration of any tenders received for the property and subsequent public submissions on the proposed sale.

In assessing the actions of the mayor it is relevant to note that our audit also identified communications between the mayor and Dr Bennett on the potential redevelopment of a property at Squatters Row, Slip Road, Paynesville in 2002. In this case Dr Bennett was involved in an expression of interest to redevelop that property by a company associated with the builder that Lakes Village proposed for its redevelopment of 55 Palmers Road, Lakes Entrance. Part 8 of this report deals with this matter.

4.11 Conclusion

The 2001 tender process was “messy” at best and the actions of the then mayor compromised the integrity of the tender process. We identified many significant departures from the council's tendering policy and a number of circumstances which in our view provided Lakes Villages Pty Ltd with an unfair advantage over other potential tenderers.

While the tender period for the sale of the property covered the period 5 September 2001 to 5 October 2001, the tender documents were not distributed to parties who had requested them until 19 September 2001. This effectively meant a tender period of only 17 days. This clearly increased the competitive advantage of Lakes Village Pty Ltd which had prior dealings with the council in an attempt to acquire the property.

We were concerned that councillors were not made aware of these departures or of the problems and delays encountered in providing tender documentation to prospective tenderers before making its decision in October 2001 to sell the property to Lakes Village, subject to the conditions set out in the contract of sale.

We also identified deficiencies in the tender evaluation process and reports to the council and believe that, based on the evidence available, the council was not provided with complete information when considering whether to accept the tender from Lakes Village. Council officers advised us that they provided ongoing verbal briefings to councillors and also placed reliance on regular advice received from the council's legal advisers.

In view of the public interest in the sale, we expected to find that the tender process had been conducted fairly and would be capable of withstanding rigorous scrutiny, but this was not the case.

There is strong evidence that the then mayor became too closely involved with the Lakes Village syndicate and its representative Dr Ian Bennett. In our view, the mayor did not retain the objectivity and independence which are essential characteristics of an elected representative of the community.

Ultimately, the mayor was not directly involved in the tender assessment process before council considered the recommendations of the tender evaluation panel; so while his actions compromised the probity and integrity of the process, they may not on their own have rendered the process invalid. When looked at in the light of all the other deficiencies in the tender process, however, these actions lead us to conclude that the tender process lacked integrity.



5. Were council
processes
adequate
following the
awarding of the
tender?



5.1 Background and audit criteria

The council's tender documents for the sale of the property at 55 Palmers Road, Lakes Entrance, developed in consultation with its legal advisers, included conditions which established the following process for the finalisation of the sale of the property:

- the council could accept a tender offer for the property by providing written notice of acceptance to the tenderer up until the close of business on 16 October 2001 - the acceptance date specified in the tender conditions
- the property would be deemed to be purchased by the successful tenderer from the date of the council's written notice of acceptance, on the terms and conditions contained in the contract of sale
- the successful tenderer was required to pay the balance of the deposit for the property within 7 days of receiving the written notice of acceptance from the council
- following receipt of the balance of the deposit, the council was required to execute a counterpart of the contract of sale (as the tenderer had already executed a contract of sale when submitting a tender) and deliver it to the successful tenderer.

The contract of sale included a mandatory provision making it conditional on the council complying with sections 189 and 223 of the *Local Government Act 1989*. These sections of the Act required the council to advertise its intention to sell the property, to invite submissions from the public, to hold a public meeting to hear people wishing to speak to their submission and to consider any submissions made, and to make a final decision on whether or not to sell the property.

The contract of sale also imposed an obligation on the successful tenderer to lodge an application for a planning permit for the development of the property before the expiry of 30 days from the day of sale. The sale date of the property was the date of the council's written notice of acceptance of the successful tender.

We expected the council to comply with the tender conditions, the contract of sale and the requirements of the *Local Government Act 1989* following its decision to award the tender to Lakes Village Pty Ltd, and to give proper consideration to all submissions made on the proposed sale before making its final decision. We also expected the council to have minimal involvement with Lakes Village prior to that decision in order to avoid any suggestion that it had predetermined the decision.

5.2 Finalisation of the contract of sale

5.2.1 Acceptance of tender and payment of contract deposit

Acceptance of tender

On 15 October 2001, the council decided to accept the tender submitted by Lakes Village Pty Ltd and to sell the property to the company for \$1.525 million, subject to the conditions set out in the contract of sale. It also decided to give public notice of its intention to sell the property in line with the provisions of sections 189 and 223 of the *Local Government Act 1989*.

The tender documents issued by the council specified 16 October 2001 as the deadline for acceptance of the successful tender and specified that formal acceptance would not occur until the council had provided a written notice of acceptance to the tenderer. Following the council decision to accept the Lakes Village tender, the council obtained agreement from Lakes Village to extend the acceptance date to 19 October, on which date it formally advised the syndicate that its tender offer had been accepted. The date of sale of the property was, therefore, 19 October 2001, which was subsequently entered into the contract of sale.

The council requested payment of the balance of the contract deposit within 7 days. The contract deposit was 5 per cent of the purchase price, and the balance remaining to be paid was \$61 000, because a tender deposit of \$15 250, or one per cent of the purchase price, had been lodged with the tender. The council advised Lakes Village that it would execute a counterpart of the contract of sale – which had already been signed by the company as part of its tender submission – when it received the balance of the contract deposit.

On 23 October, Dr Bennett emailed the council's chief executive seeking clarification about the due date for the balance of the contract deposit and asking how the council could execute the contract of sale before it had complied with the requirements of the *Local Government Act 1989* to advertise its intention to sell the property and consider submissions from the community.

Did the Council's process for finalising the contract of sale comply with the requirements of the Local Government Act 1989?

The question raised by Dr Bennett about compliance with the *Local Government Act 1989* was also raised with us during our audit. Concerns were expressed to us that, by seeking to execute the contract of sale before it had advertised for and considered public submissions on the proposed sale, the council was prejudging or predetermining the outcome of the process. That is, the public advertisement and submission process did not accord with the "spirit" of the legislation but was rather a technical compliance. Section 189 of the Act requires that before selling or exchanging land, a council must give public notice of its intention to do so at least 4 weeks before it does so. Section 189 also gives citizens the right to make submissions to the council on the proposed sale or exchange under section 223 of the Act.

Section 223 of the *Local Government Act 1989* governs the submission process, and requires the council to:

- publish a public notice stating that submissions in respect of the matter specified in the public notice will be considered
- consider any written submission which it receives within 14 days of the publication of the public notice
- allow any person who has made a written submission to the council and requested that he or she be heard in support of the written submission to speak to that submission at a meeting of the council or a committee established by the council to consider submissions
- consider all the submissions made and after it has made a decision, notify in writing every person who has lodged a submission of the decision and the reasons for it.

In summary, a council cannot sell land until it has advertised its intention to do so and invited submissions from the public on the proposal. The sale cannot occur before this process is completed and the council has made a final decision on whether or not to carry through its intention or proposal to sell the land.

As indicated previously, the contract of sale included a special condition which made the contract conditional on the council's compliance with the requirements of sections 189 and 223 of the Act. It would not become unconditional until after the council had heard any submissions made and subsequently resolved to sell the property, and the council could not make that decision until 4 weeks after it had published its intention to sell the land. After it had complied with sections 189 and 223 of the Act, the council could rescind the contract if it decided not to proceed with the sale. The contract specified that the purchaser had no right to an action, claim or demand against the council if the council did not proceed.

In the legal case that followed the council's eventual decision to sell the property to Lakes Village Pty Ltd, its legal advisers gave an interpretation of section 189 of the Act. They advised that a council which entered into a binding contract of sale before the statutory processes had been undertaken would be in breach of the section. They also thought it likely that section 189 allowed the council to enter into a conditional contract which could be terminated if the outcome of the statutory process was a decision not to sell the land. The conditional contract was the approach the council had adopted for the sale of the property.

According to the legal advice, a council that entered into a conditional contract faced the following risks:

- If after the completion of the statutory process the council decided to sell the land, there might be an appearance of prejudgement, which would leave it exposed to administrative law challenge. This had occurred in the case *Bycon Pty Ltd v. Moira Shire Council (1998)*, where the Supreme Court found that the council was so committed to the development that it was unrealistic to suggest that compliance with the statutory process was anything other than mere ritual. The conditional nature of the contract did not exclude an inference of prejudgement.
- If after the completion of the statutory process the council decided to not sell the land as proposed, it could be exposed to action against it by the would-be purchaser for damages for breach of contract on the basis that the council had not used its best endeavours to bring about the sale.

In our view, although we have no reason to question the soundness of the legal advice or the lawfulness of the council's contract of sale, the council's process for finalising the contract of sale was not in accordance with the "spirit" of the requirements of the *Local Government Act 1989* because it led to the council signing the contract of sale before the consultative steps required by the Act were complete. The process also allowed for the date of sale to be earlier than the date on which the council made its final decision.

The council's process created the risk that its final decision could be challenged on the grounds of prejudgement of the outcome of the statutory public submission process.

Payment of contract deposit and execution of contract of sale by Council

In response to Dr Bennett's email of 23 October 2001 seeking clarification about when the balance of the contract deposit was due, the chief executive requested that the council's legal advisers explain to Dr Bennett the company's liability under the tender conditions and contract to pay the balance of the deposit within 7 days of receiving advice from the council that the tender offer had been accepted. The council had provided formal advice to the company of its acceptance of the tender on 19 October 2001, so the due date for the payment of the balance of the deposit was 26 October. On 25 October, Dr Bennett requested a 14-day extension for the payment of the balance of the deposit. The following day, the council's legal advisers informed Dr Bennett that the due date had been extended to 9 November. The decision on this matter was apparently taken by the chief executive, and we found no evidence that councillors were consulted.

Lakes Village paid the \$61 000 balance of the deposit on 9 November. The lawyers then wrote to the council chief executive on that date with advice that the deposit had been paid and asked the council to execute the contract of sale as soon as possible. But before doing so, the chief executive sought legal advice on how long the council could delay signing, as it was preparing cost estimates on new building and lease options for staff accommodation and may not wish to sign a 2-year lease for the office building at 55 Palmers Road, Lakes Entrance.

In our view, this was an ill-informed request because the council was obliged by the contract of sale to enter into a lease-back of the office building on the property for a period of 2 years from the settlement date. As this special condition of the contract had been invoked by Lakes Village, the council had no choice in the matter.

Council records indicate that the chief executive executed the contract of sale on behalf of the council and forwarded it to the legal advisers on 21 November 2001.

5.2.2 Lodgement of planning application by Lakes Village Pty Ltd

On 31 October 2001, the council gave public notice of its proposal to sell the property to Lakes Village Pty Ltd. The notice stated that submissions from the public on the proposed sale could be lodged with the council up to 16 November and that a public hearing for persons wishing to speak to their submissions would be held at the council's Bairnsdale offices on 3 December. The council would consider the submissions at its meeting on 17 December.

On 8 November, the council reminded Lakes Village in writing of its obligation to lodge an application for a planning permit for the development of the property before the expiry of 30 days from the day of sale. As the day of sale was 19 October, the planning permit application had to be submitted by 19 November 2001.

The contractual requirement for the successful purchaser to submit an application for a planning permit before the council had made its final decision on whether or not to sell the property could be seen as a further indication that the public advertisement and submission process was not in accordance with the "spirit" of the legislative requirements, but was merely designed to ensure technical compliance with the legislation.

On 9 November, the mayor emailed the officer in charge of the council's planning department and the council's chief executive stating that he had spoken to the CEO of OzCapital Pty Ltd "who wanted to know whether he could start the planning process in anticipation of the final vote in December". The email also stated that the CEO of OzCapital had said that he wanted his planners to talk to the council planning department to ensure that the project proceeded with minimal delay and disruption. The mayor requested that contact be made with the CEO of OzCapital if that was considered appropriate. The mayor forwarded a copy of this email to 4 other councillors. **However, at this point, the council was still receiving submissions on its intention to sell the property and there had been no formal consideration of the submissions by the council.**

On 12 November 2001, the CEO of OzCapital faxed the council's chief executive to advise him that Lakes Village would not be able to meet the deadline of 19 November for the lodgement of an application for a planning permit. He formally requested an extension of time and asked when the company's planners could meet with planning staff from the council. It is apparent that at some point over the following 24 hours the council's chief executive and the CEO of OzCapital discussed this matter and arrived at an agreement whereby Lakes Village could lodge a one-page planning application with no supporting detail or plans of the proposed development.

On 13 November, the council's chief executive faxed an application for a planning permit form to the CEO of OzCapital, who immediately acknowledged the fax and stated that the matter would be actioned by the chairman of Lakes Village.

A fax from the CEO of OzCapital to the council dated 13 November provided advice about the current position of Lakes Village's directors, chairman, and shareholders. It also provided formal advice to the council's chief executive that Dr Ian Bennett's involvement in the project had come to an end, as his primary role was to introduce projects to the syndicate for a fee.

On 15 November, the planning consultants engaged by Lakes Village faxed an application for a planning permit to council's chief executive and advised him that detailed plans, supporting documentation and the required fee would be forwarded at a later date. In our view the planning permit application submitted on behalf of Lakes Village was not valid for the following reasons:

- the mandatory declaration on the form that all information given was true had not been signed
- the application was not accompanied by the prescribed fee, which was a breach of the *Planning and Environment Act 1987*
- the application was signed by the chairman (elect) of Lakes Village Pty Ltd as the "prospective" owner of the land. In fact, Lakes Village was not the owner of the land at the date of the application because the council had not completed the statutory processes under sections 189 and 223 of the *Local Government Act 1989*
- the application was not accompanied by the information required by the East Gippsland Planning Scheme
- the estimated cost of the development was not recorded on the application form, which was a breach of the Planning and Environment Regulations.

The council's planning department accepted the application on the basis that a meeting with representatives of OzCapital Pty Ltd had been organised for 28 November 2001 to discuss the application and that a formal request for additional information would follow that meeting. On 20 November, all councillors were told that the meeting would take place and the council would be represented by the mayor, the chief executive and 2 staff from the council's planning department.

Section 52 of the *Planning and Environment Act 1987* requires a council, as the responsible planning authority, to give public notice of an application for a planning permit where the application is for a use or development which is likely to be of interest or concern to the community. The council did not give notice of the application at that time and it did not require Lakes Village to do so. We were advised that the council did not consider it appropriate to advertise the planning permit application at that time because all of the required information was not available.

On 28 November 2001, 2 senior staff from the council's planning department and 2 councillors met with representatives from Lakes Village Pty Ltd and the planning consultants appointed by the syndicate. The council's chief executive and the mayor did not attend. At the meeting, the chairman elect of Lakes Village signed the mandatory declaration on the planning application form that all information given was true.

We believe that council staff and councillors should not have met with representatives of Lakes Village to discuss the planning issues associated with the site until after the council had considered all submissions received under the statutory process and taken its final decision on whether or not to sell the property. The actions of the council in meeting with representatives of Lakes Village to discuss planning issues before the public consultation process was complete called into question the genuineness with which the council was conducting the consultation process.

On 17 December, the council's planning department acknowledged the planning permit application submitted on behalf of Lakes Village on 15 November 2001, and acknowledged that the application form had been subsequently amended at the meeting of 28 November. The council requested a range of additional information on the planning permit application and stated that the application would not be considered until this information was provided.

5.2.3 Statutory public submission process and legal advice on the adequacy of the tender process for the property

As indicated previously, on 31 October 2001 the council issued a public notice outlining that it proposed to sell the property to Lakes Village Pty Ltd for \$1.525 million and called for submissions by 16 November.

Submissions came in throughout November expressing concerns, and there were public meetings and extensive local media coverage.

On 26 November, the chairman elect of Lakes Village contacted the council and sought any information it may have on allegations about Dr Ian Bennett. The council chief executive apparently discussed this matter with him.

On 27 November, the Member for Gippsland East presented a petition with 1 709 signatures to parliament stating that the council had failed to address major community concerns about the development and seeking a deferment of the sale for 18 months to enable residents and community organisations to explore and present options for community use of the property.

On 20 November 2001, the Association of Ratepayers and Residents of East Gippsland Inc. (ARREG) wrote to the Minister for Local Government requesting him to instigate an investigation of the council's actions by Victoria Police. On 28 November, a representative of ARREG gave a representative of the Minister for Local Government a letter with further details of the association's concerns about the council's handling of the sale. This letter also requested that the Minister for Local Government ask Victoria Police to investigate the council's activities and direct it to not proceed with the proposed sale pending the outcome of the investigation.

On 3 January 2002, the Minister for Local Government wrote to ARREG acknowledging its letter of 20 November 2001 and the meeting of 28 November 2001 involving ARREG and his representative. The minister informed ARREG that it was not his role to instigate criminal investigations and that if ARREG believed it had evidence of illegal conduct it should present that evidence to the police. The minister also indicated that at the meeting on 28 November, an offer was made for his department to examine material collected by ARREG with a view to determining whether a departmental investigation was warranted, and that to date ARREG had not accepted this offer.

On 3 December 2001, the council held a public meeting which heard submissions from 10 individuals. The next day a councillor emailed the chief executive seeking advice on concerns raised at that the meeting, namely, that:

- all tenderers were not treated equally and that bias was shown to Lakes Village Pty Ltd
- the individual making the above allegations had not been provided with tender documents until 16 days before the closing date
- the initial tender documents were incomplete and full documentation was not received until a few days before the closing date.

The councillor said he had not previously been aware of allegations that the tender process was corrupt. Further, he stated that if there was substance to the allegations and the additional information was material and relevant to the individual's ability to lodge a tender, it could cast doubt on the validity of the tender process. The councillor stated that the council should answer the allegations and requested information from the chief executive and the council's lawyers on the issues.

On 4 December, the chief executive provided the council's lawyers with a timetable of the key steps and actions involved in the tender process and requested advice on a number of issues. The then chief executive advised us that this information was also provided to councillors.

On 13 December, the chief executive emailed all councillors that he had received verbal legal advice that the tender process would stand up to a challenge. He said he was awaiting written advice and would forward it to councillors when it was received.

The chief executive received written legal advice on 13 December which indicated that:

- while there is no statutory requirement for the council to allow a designated number of days between making tender documentation available to potential tenderers and the closing of the tender period, it would be required to allow a reasonable time for parties to consider the tender and respond to it
- the issuing of amendments to tender documentation does not invalidate the tender process, provided the same information is made available to all proposed tenderers and all parties have sufficient time to consider the amendments and respond to the tender
- while the individual making the allegations did not seek an extension of time in which to lodge a response to the tender, this did not necessarily preclude him from taking legal action against the council if he was able to establish that the council unreasonably conducted the tender process.

This legal advice did not offer any opinion or advice on whether the tender process conducted by the council for the property met the principles of reasonableness.

This advice was forwarded to all councillors on 14 December 2001 along with a note stating that the council's legal advisers considered the council to be in a good position but could not offer any more detailed advice without knowing the basis for any proposed injunction.

5.2.4 Final decision by Council to sell the property to Lakes Village Pty Ltd, and warning about potential legal action

At the ordinary council meeting on 17 December 2001, the council resolved to sell the property to Lakes Village Pty Ltd in accordance with the terms and conditions of the contract of sale.

Before passing this resolution, the council considered a report prepared by council officers on the proposed sale. The report contained:

- a summary of the major concerns and issues raised in the submissions received from the public, together with responses by council officers
- details of the most recent information available to council officers on the directors and shareholders in Lakes Village Pty Ltd, along with advice about company and other searches undertaken by those officers and the council's legal advisers
- a summary of the requirements to be met for the sale to proceed to settlement
- financial information and analysis on the options available to the council for the relocation of staff from the property.

The report concluded that: the council had an opportunity to sell the property for long-term development for an amount in excess of the current valuation; approval of the sale would see the completion of the Lakes Entrance Civic Centre and the acquisition and construction of additional office accommodation in Bairnsdale; and it would not be advantageous for the council to have 2 business centres in the one town. It recommended that the council confirm the sale on the basis that it had considered the submissions received on the proposed sale in accordance with the *Local Government Act 1989*.

We considered that this report demonstrated the following weaknesses:

- The officers' response to concerns raised about the tender process and time allowed for tenders to be submitted was potentially misleading. It did not address all the issues raised about the tender process or the legal advice given to the chief executive on 13 December 2001 that a person could take legal action against the council if they were able to establish that the council had not conducted the tender process reasonably.
- The officers' response stated that tenderers had 2 weeks to lodge a tender following receipt of all documentation, when in fact the contract of sale which had to be executed by tenderers in order to submit a conforming tender was not provided to prospective tenderers until 2 days before the closing date for receipt of tenders. There were also 2 amendments by the council to the original tender documents.
- Although the conclusion to the report cited as one of the reasons for approving the sale the fact that it would not be advantageous for the council to have 2 business centres in one town, it did not point out that a condition of the contract of sale with Lakes Village required the council to lease the office premises on the property for a period of 2 years from the date of settlement of the sale at a cost of \$120 000 per year.
- The report did not address any potential environmental or planning issues which might arise from the nature of the development proposed by Lakes Village Pty Ltd.

Before the council meeting on 17 December 2001, the council's chief executive received a fax from lawyers acting for the Ratepayers' Association (ARREG) concerning the council's meeting to consider submissions received and hearings on the proposed sale of the proposed property to Lakes Village. The fax stated that the "Council has prejudged this issue and fettered its discretion to such an extent that the tender process and the purported compliance with sections 189 and 223 of the Local Government Act 1989 have been no more than mere pretence". It threatened that, if the council resolved to confirm the sale, it would start proceedings to have the sale set aside. At the council meeting the mayor confirmed that the council had received ARREG's fax. The council's legal advisers wrote to the lawyers representing ARREG on 27 December denying its allegations about the tender and statutory submission processes.

On 31 December, the council's lawyers provided written advice to OzCapital Pty Ltd that the council had resolved to sell the property to Lakes Village Pty Ltd and confirmed that the contract of sale had become unconditional.

In January 2002, the council wrote to all individuals who had made a submission on the proposed sale and informed them of the council's decision to sell the property to Lakes Village Pty Ltd and the supporting reasons. The reasons were taken from the report considered by the council at its meeting on 17 December 2001, which also listed concerns raised in submissions about the proposed sale and the response to these concerns by council officers.

On 25 February, lawyers acting for Mr Eagleson (who had made a written offer of \$1.6 million for the property in August 2001) filed a writ in the Supreme Court of Victoria which set out a range of claims about the council's actions in seeking to sell the property and sought an injunction restraining the council from doing anything to effect settlement of the contract of sale of the property to Lakes Village.

This writ set in motion the legal action which is dealt with in Part 6 of this report.

5.3 Conclusion

In our view, although we have no reason to question the soundness of the legal advice or the lawfulness of the council's contract of sale, the council's process for finalising the contract of sale was not in accordance with the "spirit" of the requirements of the *Local Government Act 1989* because it led to the council signing the contract of sale before the consultative processes required by the Act were complete.

The council's process also created a risk that its final decision could be challenged on the grounds of prejudgement prior to the outcome of the statutory public submission process.

We consider that council staff and councillors should not have met with representatives of Lakes Village and OzCapital to discuss the planning issues associated with the site until after the council had considered all submissions received under the statutory public submission process and had taken its final decision on whether or not to sell the property.

The written legal advice obtained by the council prior to its final decision to sell the property did not address whether or not the tender process conducted by the council met the principles of reasonableness.

In our view, based on the advice from the council's own legal advisers and the threat of legal action from ARREG, the council's chief executive should have recommended to the council that the decision, on whether to confirm the sale to Lakes Village Pty Ltd, be postponed until the council could obtain written advice on whether or not the tender process it had conducted had been fair, reasonable and likely to withstand legal challenge.



6. Did the council
effectively
manage the
conduct and
settlement of legal
action?



6.1 Background and audit criteria

On 25 February 2002, lawyers acting for Mr Eagleson (who had made an unsuccessful offer of \$1.6 million for 55 Palmers Road, Lakes Entrance in August 2001) filed a writ in the Supreme Court of Victoria. The writ set out the plaintiff as Mr Eagleson and the defendants as the council, the Registrar of Titles and Lakes Village Pty Ltd. The accompanying statement of claim set out a range of claims about the council's actions in seeking to sell the property. The writ also sought an injunction restraining the council from doing anything to effect settlement of the contract of sale of the property to Lakes Village.

We expected the council to implement a strategy for the management of the legal action with the following features:

- assignment of responsibility for management of the council's involvement in the legal action to a senior officer with overall direction from the council
- acquisition of high-quality legal advice
- regular communication on the status of the legal action to senior management and the council, and opportunities for them to contribute to the management of the action
- regular reviews of the status of the legal action, the strength of the council's position and recommendations on how to proceed.

The legal action continued for 18 months before an out-of-court settlement was reached in October 2003. The Registrar of Titles refrained from taking part in any of the legal proceedings.

6.2 Supreme Court writ and council response

The Supreme Court writ and accompanying statement of claim made a number of claims about the council's management of the tender process for the sale of the property and the validity of council resolutions on the matter. The plaintiff sought:

- an injunction restraining the council from doing anything to effect settlement of the contract of sale of the land to Lakes Village
- an injunction restraining the Registrar of Titles from registering any dealing giving effect to the purported sale by transferring the land from the council to Lakes Village
- costs against council and Lakes Village Pty Ltd.

The council's response to the lodgement of the Supreme Court writ was to seek immediate advice from its legal advisers and a telephone conference was organised for 4 March 2002. This meeting included the chief executive, mayor, Cr Smyth and a senior council officer. The council has no record of the content of this meeting, but it does appear that the council was advised that, because a temporary rather than a permanent injunction had been sought, there was nothing to stop the sale from proceeding.

It is also apparent that the mayor did not at this point disclose the emails between himself and Dr Bennett before and during the tender process. In our view these emails were relevant to the strength of the council's case and the mayor should have informed the council's lawyers of their existence.

There is no evidence that the council or senior management gave any consideration to the desirability of obtaining independent legal advice on the strength of its position from another legal firm. In our view, it would have been desirable for the council to obtain independent legal advice early in the proceedings because the original lawyers had provided ongoing advice on council resolutions and processes questioned in the statement of claim. The council's legal advisers were heavily involved in the process of developing and issuing tender documents.

In a media release issued on 10 March 2002, a councillor invited representatives of the Association of Ratepayers and Residents of East Gippsland Inc. (ARREG) to meet with councillors and senior staff. The media release also canvassed a range of issues including plans for future accommodation of council staff in Bairnsdale.

Early in March, to prepare for the formal discovery process, the council's legal advisers reviewed council documents relevant to the proposed sale and the legal action. The discovery process involves parties to the action obtaining relevant information before a trial commences. The information can be in the form of documents, written interrogatories (questions and answers written under oath), and written sworn statements by parties to the action or potential witnesses.

6.2.1 Council's initial and amended defence

On 25 March 2002, the council's legal advisers wrote to the chief executive informing him that:

- Once all the documents and other information requested from the council had been received and reviewed, they would provide the council with an opinion on the merits of the plaintiff's case and the strategic options open to the council.

- The council was required to file a defence – the council’s response to each of the allegations in the statement of claim – to the plaintiff’s statement of claim by 5 April 2002. In its response, the council could either admit to each allegation, or deny it or state its version of events.
- The council’s defence would be settled following receipt of its advice on a number of specific issues relating to the tender process referred to in the plaintiff’s statement of claim.
- The legal advisers expected to receive a timetable from the court in mid-April which would outline all steps in the legal case.

On 4 April 2002, the lawyers filed the council’s initial defence to the plaintiff’s statement of claim, denying each and every allegation.

At an informal discussion between councillors and council officers on 10 April it was agreed that council officers would:

- investigate the potential to “speed up” the sale process for the property, given the problems a protracted process would cause for council’s capacity to forward plan
- discuss with the council’s lawyers the possibility of council entering into an agreement with Lakes Village to protect the council from legal action by that company should the sale of the property not proceed through circumstances beyond the council’s control.

On 11 April, a senior council officer sought advice from the council’s lawyers on these issues. On the first point, the council’s lawyers considered the likelihood of council being successful in an application for an expedited hearing process to be uncertain. On the second, they did not believe that the lawyers for Lakes Village would enter into an agreement with the council not to pursue any action against the council if Mr Eagleson was successful in his legal case.

In April, the Court set down the timeline for the early stages of the case. Essentially the parties were to go to mediation by 9 September 2002 and a directions hearing was scheduled for 1 October, at which time the case could be set down for trial.

On 29 April, the council’s lawyers filed an amended defence, which essentially admitted to matters of fact in the plaintiff’s statement of claim but denied all allegations made against the council. The amended defence also claimed that the plaintiff did not have standing to make some of the allegations about the tender process included in the statement of claim.

On 2 May 2002, the chief executive sent a memorandum to councillors on the progress of the legal action. It advised that the Queen's Counsel appointed to represent the council was confident about the case, the date for mediation in the Supreme Court of 9 September 2002 was earlier than originally scheduled and that this earlier date had been agreed to by the council's lawyers. The memorandum also advised councillors that their lawyers had met with the solicitor representing Lakes Village and the council would receive a response by 8 May 2002 to its request for an agreement with Lakes Village aimed at protecting the council from legal action by that company should the sale of the property not proceed.

Around this time, ARREG expressed concerns that the council's initial defence was intended to draw the case out and expose the plaintiff to significant costs. In an email to a councillor, the chief executive explained that the initial and amended defence was based on legal advice that the council should not provide its arguments against the statement of claim up front. The chief executive asserted that this was prudent action and was not designed to draw out the case.

At a public meeting convened by ARREG on 2 May, a resolution was passed calling on the council to rescind the motion of its intention to sell the property, withdraw its defence and stand down while an administrator was appointed, and agree to a full inquiry into the matter. This resolution was forwarded to the council and was discussed at an informal meeting between councillors and senior officers on 22 May. The meeting agreed that the chief executive would respond to ARREG noting its views.

On 14 May, the council published a media release, vetted by its legal advisers, on its website. It stated that:

- contrary to claims that the council was deliberately slowing down the process in order to increase the plaintiff's costs, the council had agreed to mediation in September 2002 which had probably brought forward the case by a few months
- the council had met all deadlines set by the Supreme Court in relation to its submissions and had not sought any extensions of time
- an amended defence had been lodged by the council which admitted those actions that were not disputed by the council, such as the council's resolutions and matters pertaining to the tender process
- the amended defence still denied the majority of the allegations in the writ
- the council had a legally binding sale contract and was proceeding on that basis and would be advertising the tender for construction of stage 2 of the Mechanics Institute in Lakes Entrance on the basis of the sale of 55 Palmers Road.

On 30 May 2002, lawyers acting for Lakes Village Pty Ltd filed an affidavit of documents relating to the case with the Supreme Court. The affidavit listed 217 separate documents, among them the emails exchanged by the then mayor and Dr Bennett prior to, and during, the tender period. We expressed our concerns about the nature of these emails in Part 4 of this report.

On 15 July, the council's lawyers filed with the Supreme Court a document called *Interrogatories of the First Defendant for the examination of the Plaintiff*. This document was a set of questions from the council to be answered by the plaintiff. The questions dealt with particular details on matters in the plaintiff's statement of claim and also raised a question about whether his legal action had been undertaken on behalf of ARREG.

At an informal discussion on 17 July, councillors were informed that the council had already incurred legal costs of \$32 688 on the Supreme Court action.

In July 2002, the council requested the Minister for Planning to call Lakes Village's application for a planning permit in and determine it under the *Planning and Environment Act 1987*. The office of the Minister for Planning expressed concern about the potential impact of the legal action on the planning process, as a result of which the council sought legal advice.

The lawyers advised the council on 10 September that:

- as the plaintiff had not sought an interlocutory injunction to stop the council and Lakes Village from progressing with the sale before the matter came to trial, the remedies sought by the plaintiff could only be achieved if the case went to trial and if the Supreme Court granted the injunctions - that is, the legal position of the parties (including the council and Lakes Village Pty Ltd) would not be affected until such time
- the council could proceed with the planning process in relation to the property. As the Supreme Court action did not prohibit the determination of the relevant planning issues at that time, it should not affect the decisions of those involved in that process.

6.2.2 Council's management of the case before the council elections of March 2003

Despite the significance of the court case to the council's finances and its credibility with the community, it was clear from our examination of documentation from February 2002 when the writ was filed, until September 2002 when mediation was to occur, that it took a passive role in the running of the case. Our review of minutes of both ordinary and informal council meetings revealed minimal information, comment and discussions about the strategic management and direction of the case.

The council did not implement a detailed and cohesive strategy for managing and directing its legal team, rather the legal team managed and progressed the case on behalf of the council. This may have been, in part, due to the council's confidence that it had a strong case and that much of the activity involved legal processes such as answering of interrogatories and preliminary appearances in court. The chief executive gave councillors briefings on the status of the legal action at informal discussions scheduled fortnightly from July 2002.

On 5 October 2002, the former mayor, Cr Courtney emailed the chief executive and other councillors to pass on critical comments from the CEO of OzCapital Pty Ltd (financiers of the Lakes Village project), who had expressed his dissatisfaction about the performance of the council's lawyers at a directions hearing on 3 October. In the email, the councillor:

- expressed concern about the manner in which the case was being run
- expressed concern about the lack of information being provided to councillors, and maintained that when information was provided it was often wrong and demonstrated a lack of knowledge about the proceedings or the possible courses of action
- expressed unhappiness with council's lack of control of, and input to, the court action, and said it was no longer acceptable to him that the council continue in a "haphazard manner"
- proposed that the councillors take control of the action by appointing a small committee which would be briefed directly by the lawyers on a weekly basis and would then direct the solicitors' actions.

Another councillor expressed agreement with Cr Courtney in an email to him and the chief executive.

We are concerned that councillors with significant reservations about the handling of the case, which had by then been in progress for around 8 months, waited until OzCapital complained before raising their concerns with the chief executive and other councillors.

Following these emails, councillors were given periodic briefings by the lawyers and, from 9 October 2002, the chief executive organised weekly teleconferences.

At an informal discussion between councillors and senior officers on 23 October it was agreed that Crs Bommer, Bolitho and Courtney and the chief executive would represent the council at a mediation meeting on 13 November. It was also agreed that any settlement reached at mediation would be “in principle” only, pending formal ratification by the council.

On the eve of the mediation session which took place on 13 November 2002, the council’s chief executive and councillors involved in the session sighted copies of the email correspondence between the former mayor and Dr Bennett during and immediately prior to the tender period.

At the mediation session, Lakes Village offered the plaintiff a settlement, but the plaintiff rejected it.

Councillors were briefed by their lawyers and barrister on 5 December, but kept no record of the content of this briefing. On 11 December councillors were informed that the case was listed for hearing on 21 May 2003.

On 17 December 2002, the council’s lawyers wrote to the lawyers acting for Lakes Village to confirm the council’s offer that the parties terminate the contract of sale by agreement and undertake a fresh tender process managed by a body independent of the council. The offer also stated that if Lakes Village accepted the termination of the contract by agreement it would need to acknowledge that, if it participated in the new tender process, there would be no guarantee that its tender would be accepted.

On 18 December 2002, lawyers for Lakes Village rejected the council’s offer.

6.2.3 Council’s failure to identify and examine an opportunity to rescind the contract of sale

The contract of sale between the council and Lakes Village was conditional on the granting of a planning permit for the purchaser’s proposed use and development of the property by no later than 11 months after the day of sale, or such later date as the parties might agree in writing. As the day of sale was 19 October 2001, and as the parties had not agreed a later date in writing, the deadline for the granting of a planning permit was 19 September 2002. If a planning permit had not been granted by this date, the contract of sale allowed either party to give notice to the other party within 7 days of the deadline that the contract was rescinded. This deadline passed without the council or senior management finding out if this condition had been complied with.

It was not until 18 November 2002, 2 months after the 11 months allowed by the contract, that Lakes Village's lawyers wrote to the council bringing this provision to its attention. The lawyers suggested that since both parties had allowed the deadline to lapse, the window of opportunity for the council to rescind the contract had closed. The lawyers asked for a new date for the granting of a planning permit, and suggested 30 June 2004.

In failing to monitor this contractual provision and bring it to the council's notice, council management missed an important opportunity to reassess the progress of the contract and act to the council's advantage. The matter could have been considered in the light of the status of the legal action and the advice of the council's lawyers and counsel on the likelihood of success.

6.2.4 Action taken by council management in response to impending council elections

Council elections were scheduled for March 2003, and Mr Eagleson and his partner, were nominated to stand. In February, the council's Freedom of Information (FOI) and privacy officer (who had a legal qualification) provided written advice to the chief executive and another senior officer on whether the plaintiff in the legal action was eligible to stand for the elections. He advised that the plaintiff was not entitled to stand. The advice concluded with a recommendation that the council should raise the matter with the Minister for Local Government and consider publicising it during the election campaign.

We were concerned at the context of the advice provided by the council officer. It appeared to be an attempt to construct a legal argument designed to exclude certain citizens from standing at council elections. In our opinion the pecuniary interest provisions of the *Local Government Act 1989* provided an adequate mechanism to deal with any of conflict of interest which may arise in the event that the plaintiff was elected to the council.

On 20 February 2003, the chief executive passed this advice on to the council's lawyers and sought their advice. He also asked whether the council would be exposed to any legal redress from Lakes Village if a "new" council decided not to proceed with the sale of the property.

On 26 February, the council received a letter from the chairman of Lakes Village indicating that the company had been advised that the plaintiff and other members of ARREG were standing for council election. The chairman stated that:

- Lakes Village was seeking legal advice on the implications of this action

- the company wished to proceed with and finalise the sale transaction, but if this did not occur and the company's position was prejudiced by the make-up of a future council, the company would aggressively pursue all avenues for a multi-million compensation claim based on expenditure incurred, commitments made, opportunity lost and loss of profit.

Subsequent legal advice from the council's lawyers in April 2003 indicated that they considered that only Mr Eagleson and his partner held a pecuniary interest in any issue concerning the Supreme Court proceedings that might come before the council.

Council elections took place on 15 March 2003. Two of the councillors did not stand for re-election and of the four councillors who did stand only one was re-elected. Mr Eagleson and his partner were elected to council, as were a number of other individuals associated with ARREG. The plaintiff and his partner declared a pecuniary interest in the legal case at the council meeting on 23 April 2003 and did not participate in any council discussions or decisions on the management of the case.

6.2.5 Council management of the legal case after the council elections of March 2003

On 11 April 2003, the Supreme Court proceedings were postponed. The council's lawyers advised the chief executive that the court had vacated the trial date of 21 May to await the outcome of the council's hearing on Lakes Village's application for a planning permit. The new trial date was set for 13 October 2003.

In mid-April, the new mayor was briefed by the council's lawyers on the court case.

As the panel hearing on the application for a planning permit to develop the property was to take place between 12 and 14 May 2003, the council sought legal advice about its exposure to any liability if it made a submission adverse to the interests of Lakes Village Pty Ltd - that is, would such a submission place the council in breach of the contract of sale?

The lawyers indicated that the council would not be exposed to any liability if it submitted to the panel that a planning permit should not be issued or that any planning permit that was issued should contain specific conditions, so long as there were legitimate and objective grounds for such a submission. They cited precedent, namely: “No authority, given a function to perform for the public good, can by contract or otherwise fetter its future performance of that function in a way that is incompatible with the objects of the provisions under which that function is conferred”. This advice was reinforced by the council’s barrister early in July 2003.

The legal advice emphasised the importance of engaging independent experts without a predetermined outcome, and then assessing whether the proposed development could be supported, based on that expert advice. It emphasised that at no time should the council use the planning process for the ulterior purpose of attempting to induce Lakes Village to end the contract, as to do so would risk an allegation that the council was not acting in good faith and was, therefore, in breach of contract.

The council subsequently commissioned an external planning consultant to undertake an independent and objective evaluation of the planning permit application. As reported in Part 7 of this report, that evaluation was highly critical of the proposed development.

The legal position of councils in situations where they intend to sell land to a party which wishes to further develop the land following purchase is fraught with potential difficulties. General advice provided to the council by its lawyers during the case indicated concerns about:

- developers’ expectation that councils, because they are both sellers of land and the responsible planning authorities, would give easy passage to planning applications
- the need for particular provisions in contracts of sale of land so that councils are protected where similar situations arise because if contracts lack such provisions then councils could be exposed to significant financial risk if they oppose planning applications
- the potential, because of the frequency of council elections (3-yearly), for an incoming council to disagree with decisions made by the previous council.

In our opinion, relevant government departments need to show leadership by providing all councils with guidance which alerts them to the potential for conflict arising from the dual role as both seller and responsible planning authority in relation to council land. Any guidance should provide advice on appropriate provisions for inclusion in contracts of sale.

On 7 May 2003, the Trustee of the bankrupt estates of Dr Ian Bennett and of the CEO of OzCapital Pty Ltd wrote to the council's chief executive seeking advice on the status of the legal action and whether the sale of the property was finalised. The Trustee stated that:

- Dr Bennett was made bankrupt by Order of the Federal Magistrates Court of Australia on 22 August 2000
- the CEO of OzCapital Pty Ltd filed his own bankruptcy petition with the Official Receiver on 10 January 2001, and at a meeting of his creditors on 1 May 2001 a resolution was passed appointing a trustee of his estate in place of the official receiver.

The council's lawyers wrote to the Trustee on 13 June advising that a planning panel would consider the application for a planning permit at a hearing in July 2003, and that the Supreme Court proceeding had been fixed for hearing on 13 October 2003.

During May, there was discussion and correspondence between lawyers of the plaintiff and the council about whether the contract of sale executed by both parties had been discovered as part of the legal action. The position was that the tenderer had executed a contract of sale and submitted it with the tender submission and, that following its decisions on the tender process, the council's chief executive had executed a counterpart of the contract of sale and forwarded it to Lakes Village. But as the council had not retained a copy of the counterpart, there was no single copy of the contract of sale which had been executed by both parties.

On 17 June, the mayor forwarded a document to the council's lawyers detailing a range of concerns about the council's handling of various aspects of the sale transaction including the tender process and the planning permit application process. Various discussions on these issues continued between the council, mainly represented by the mayor, and its lawyers between June and September 2003.

On 4 September 2003, the council's barrister provided written advice to the mayor about the council's position in relation to the contract of sale and the stance the council might adopt when the case went to trial. The barrister was of the view that the contract remained "on foot" or in action and recommended that the council adopt an approach that maximised the prospect that the court, of its own volition, would set the contract aside, with potentially no adverse consequences for the council.

On 8 and 9 September 2003, the council's lawyers took depositions from former councillors and relevant staff in preparation for the court case. The former mayor (the mayor who held office between March 2001 and March 2002) advised the council that he was reserving his decision on whether or not to provide a witness statement until he had a clear indication of the council's position and commitment to the defence of the legal case. The council's lawyers subsequently issued a subpoena on the former mayor which compelled him to appear in court to give evidence.

The emails which had passed between former mayor and Dr Bennett prior to and during the tender process came up in the interviews with former councillors and relevant council staff. The consensus was that none of them had seen or been aware of these emails until after they were discovered by council representatives on the eve of a mediation meeting on 13 November 2002. All former councillors and council staff interviewed expressed concern about the nature and appropriateness of the emails.

In mid-September, Lakes Village sought leave from the Court to lodge a third party notice against the council in relation to the legal case. It was a claim against the council for damages, interest on damages, costs, and such further and other relief as the Court would deem fit, and this claim would be pursued if the plaintiff won the case.

Lakes Village claimed in the proposed third party notice that if the plaintiff obtained the relief sought in his statement of claim, then the council:

- had failed to conduct the tender process in a manner to ensure equal opportunity for all tenderers and potential tenderers
- had failed to conduct the tender process in a manner to ensure all potential tenderers had a reasonable opportunity to tender once the tender documents were made available by the council
- had failed to conduct the tender process fairly
- had failed to hear potential tenderers in relation to the conduct of the tender process
- had failed to conduct the tender process in accordance with the tender advertisements.

Lakes Village claimed that these failures caused it to suffer loss and damage, and sought compensation for such loss. The claim was only precautionary, however, aimed at protecting Lakes Village's position in the event that the plaintiff was successful.

Lakes Village was given leave to lodge the third party notice but did not do so.

6.2.6 Settlement of the legal case in October 2003

The private email correspondence between the former mayor and Dr Ian Bennett during and immediately prior to the tender period, discovered by council and its legal team in November 2002, was seen as damaging to the council's position.

As indicated previously, the then councillors and relevant staff claimed to have been unaware of these communications until November 2002, and expressed concern about their nature.

On 19 September 2003, acting on instructions from council, the council's barrister approached legal counsel acting for Lakes Village to commence without prejudice discussions regarding a possible settlement of the legal proceedings.

The council's legal advisers considered that the strongest argument for overturning the contract of sale was not the technical aspects of the tender process, although these were in themselves significant, but the existence of these private communications and the consequential allegation of prejudgement. This, and reluctance to proceed with the sale of the land, led the new council to enter into discussions with Lakes Village before the trial with a view to arriving at a settlement that would include setting aside the contract of sale and a possible compensation payout to Lakes Village.

The legal case was listed to commence in the Supreme Court on 13 October 2003. In the week prior to the commencement of the case, a council staff member prepared a report for the council. It stated that the case may not proceed on the scheduled dates and outlined the main issues in the case.

The report sought authorisation for the acting chief executive, in consultation with the mayor, to provide ongoing instructions to the council's legal team to advance the position of the council and its ratepayers and residents. We understand that the council gave this authorisation.

The Supreme Court case was adjourned on 9 October 2003.

On 15 October 2003, counsel for the plaintiff forwarded to council's lawyers a draft amended statement of claim. On the same day, the lawyers forwarded the document to the acting chief executive along with advice that the amendments better expressed what was always understood to be the plaintiff's case. The lawyers advised that the "fresh" allegations could be summarised as follows:

- As the sale to Lakes Village occurred on or before 19 October 2001, the council did not comply with section 189 of the *Local Government Act 1989* because the sale was not preceded by the requisite public notice (public notice followed the council's decision to accept the tender from Lakes Village). Alternatively, the sale on or before 19 October meant that the decision to proceed with the sale was predetermined.
- When it was issued, the council's public notice on the sale was defective in that it failed to properly describe the land proposed to be sold.
- The council's statutory discretion as to whether or not to proceed with the sale was fettered by its prior actions.
- The council owed a duty of procedural fairness (or natural justice) to those making submissions under section 223 of the Act, and breached that duty by predetermining the matter (or alternatively, already selling the land and failing to disclose that the land had been sold).

Because of the above contentions the draft amended statement of claim concluded that the council had fettered its statutory discretion in the exercise of its powers and performance of its functions under the Act. As well, its purported compliance with sections 189 and 223 of the Act was a sham and of no legal effect.

On 16 October the parties in the case held an informal mediation meeting, at which they agreed to settle the legal action. The agreed terms of settlement included:

- that the contract of sale between the council and Lakes Village Pty Ltd be discharged by agreement
- that the council pay the plaintiff's costs of, and incidental to, the proceeding to be taxed on a party-to-party basis in default of agreement between the plaintiff and the council
- that the council pay Lakes Village \$400 000 inclusive of costs, GST and interest, and return to it the deposit of \$76 250 paid under the contract of sale within 30 days, subject to ratification by the council of the terms of settlement
- each party agreed to release each of the other parties from all actions, claims suits, causes of action, liabilities and costs of whatsoever kind arising out of the matters alleged in the plaintiff's statement of claim, Lakes Village's third party notice and the contract of sale.

The parties acknowledged that the settlement of the case was conditional on receiving ratification by the council on or before 23 October 2003, and further agreed to keep the settlement and its terms confidential until ratified by the council.

To help it decide whether to ratify the terms of settlement at a council meeting on 22 October 2003, the council sought advice from its lawyers on the status of the Supreme Court proceeding, the likely costs that would be incurred if the Supreme Court proceeding continued, and the council's prospects of success. On 22 October the council received the following advice:

- The Supreme Court case had been adjourned on 9 October 2003 and, if the terms of settlement were not ratified by the council, it was unlikely that any new hearing would occur until the first half of 2004.
- Prior to the settlement conference, the council's legal costs and disbursements totalled around \$220 000 (including work associated with planning issues and the aborted panel hearing, but excluding some senior counsel fees).
- The plaintiff's legal representatives estimated the plaintiff's legal costs at about \$195 000 (probably excluding the costs associated with the settlement conference).
- If the court case continued, there was no doubt that that all parties would incur significant extra costs in the region of \$150 000 each.
- In terms of the council's prospects of success, the lawyers expressed the following opinions:
 - They had always thought (as had counsel) that the council had good prospects of successfully defending the allegations concerned with the legal adequacy of the tender process, and that although the plaintiff's case was far from hopeless in that area there were a number of difficulties he would have to overcome to make good his case.
 - The prejudgement issue was, however, in a different category as there was ample evidence to support the prejudgement allegation. Ever since the discovery from Lakes Village on 30 May 2002, the lawyers (and counsel) had been concerned about the possibility that reasonably apprehended bias on the part of one (and possibly 2) councillors would be found. Having regard to relevant cases – which had been the subject of extensive review by counsel – it appeared likely that reasonably apprehended bias on the part of one councillor would be enough to taint the validity of council's resolution to sell the property to Lakes Village.
 - Depending upon how the plaintiff presented his case, there was a vulnerability here which could lead to the contract of sale being set aside.

Given the above views, the council's lawyers thought that the agreed settlement constituted a good result for the council because it would "buy" certainty at a reasonable price. If the case proceeded and the plaintiff was successful, there was a very real prospect of Lakes Village suing the council, and that if this occurred its liability would easily exceed \$400 000.

Council ratified the terms of settlement of the Supreme Court action at the council meeting of 22 October 2003. The resolution estimated the legal costs to be paid to the plaintiff at \$150 000 and specifically stated that "Council agrees to pay David Eagleson's costs of and incidental to the proceeding, to be taxed on a party/party basis in default of agreement between David Eagleson and Council (such costs estimated to be approximately \$150,000, being about two-thirds of the total costs incurred by David Eagleson)".

On 1 December 2003, a legal consulting firm certified an assessment of the plaintiff's party/party costs as being \$185 339, but lawyers acting for David Eagleson lodged a claim for \$266 000 based on costs and disbursements. Ultimately, \$230 000 was paid to the plaintiff by the council which was some \$80 000 above the estimate included in the council's resolution ratifying the terms of settlement.

Figure 6A outlines the amounts paid by the council to the various parties as a result of the out-of-court settlement.

FIGURE 6A: AMOUNTS PAID BY THE COUNCIL AS A RESULT OF THE OUT-OF-COURT SETTLEMENT

Description of payment	Amount
Lakes Village for costs	\$400 000
Council's lawyers for legal costs	\$277 256
David Eagleson for legal costs and disbursements	\$230 000
Valuation advice to support settlement negotiations	\$5 500
Total	\$912 756

Note: As a result of the settlement, the council also returned to Lakes Village Pty Ltd its deposit on the property of \$76 250.

The council advised that it had been involved with the attempted sale of the property for a number of years and that while some costs associated with this task had been separately identified, other costs such as staff time, and travel were not separately identified. The council further advised that the total costs to the council of its attempts to sell the property are unable to be accurately determined.

6.3 Conclusion

The council's role in the running of the case from February 2002 to September 2002 was passive. It did not implement a detailed and cohesive strategy for managing and directing its legal team - rather the legal team managed and progressed the case on behalf of the council.

In our view, the then mayor should have come forward at the start of the legal action and disclosed the emails between himself and Dr Bennett (as outlined in Part 4 of this report) before and during the tender process. These emails were relevant to the strength of the council's case and the then mayor should have informed the council's lawyers of their existence.

The emails exchanged between the then mayor and Dr Bennett in the period prior to and during the tender period were made available by the lawyers acting for Lakes Village Pty Ltd in May 2002. The council's agreement to settle the legal action and pay costs to the plaintiff and to Lakes Village through the cancellation of the contract of sale seems to have been due in part to the discovery of the inappropriate communication involving the mayor, the Lakes Village syndicate and its representative Dr Ian Bennett.

We could not find any evidence that the council or senior management gave any consideration to the desirability of obtaining legal advice on the strength of its position from a legal firm other than that which had provided it with the original advice on the proposed sale of the property and the related tender and statutory processes. In our view, it would have been desirable for the council to obtain independent legal advice early in the proceedings, as the statement of claim raised issues about council resolutions and processes on which the council's appointed legal advisers had provided ongoing advice. The council's legal advisers had been heavily involved in the process of developing and issuing tender documents.

The contract of sale between the council and Lakes Village was conditional on the granting of a planning permit for the purchaser's proposed use and development of the property by no later than 11 months after the day of sale, or such later date as the parties might agree in writing. This deadline passed without the council or senior management finding out if this condition had been met. By not monitoring this contractual provision and in not bringing it to the attention of the council which was deliberating whether or not to rescind the contract, council management lost an important opportunity to reassess the progress of the contract to its advantage. The matter could have been considered in the light of the status of the legal action and the advice of the council's lawyers and counsel on the likelihood of success.



7. Did the council
comply with
planning and
freedom of
information
legislation?



7.1 Background and audit criteria

Under the terms and conditions of the contract of sale, Lakes Village Pty Ltd was required to lodge an application for a planning permit for the development of the property at 55 Palmers Road, Lakes Entrance by 19 November 2001. The contract allowed 11 months, or until 19 September 2002, for Lakes Village to obtain a planning permit.

We expected the council to handle the application for a planning permit in a manner consistent with the requirements of the *Planning and Environment Act 1987*.

The council received a number of requests for significant volumes of information about its attempts to sell the property under the *Freedom of Information Act 1982*. We expected the council to handle those requests in a manner consistent with the requirements of the FOI legislation.

7.2 Planning permit application process

7.2.1 November 2001 application for a planning permit

In Part 5.2.2 of this report, we reported Lakes Village's initial lodgement with the council of an application for a planning permit on 15 November 2001.

The one-page planning permit application was for *Residential subdivision, refurbishment of existing office building and establishment of entertainment complex, including training lodges with onsite landscaping and carparking*. No supporting detail or plans showing the proposed development were attached to the application.

Part 5.2.2 of this report outlined our view that the planning permit application submitted on behalf of Lakes Village was not valid.

On 17 December 2001, the council's planning department acknowledged the application that Lakes Village had submitted on 15 November. The council also acknowledged that the application form was subsequently amended when the applicant signed the property owner details and signed the declaration that the information provided was true. The council requested the company to provide significant additional information before it would consider the application.

The council did not give notice of the application at this time and did not require Lakes Village to do so. Section 52 of the *Planning and Environment Act 1987* requires a council, as the responsible planning authority, to give public notice of an application for a planning permit where the application is for a use or development which is likely to be of interest or concern to the community. We were advised that the council did not consider it appropriate to advertise the planning permit application as all the required information had not been received.

Lakes Village did not provide the additional information requested by the council. On 2 May 2002, the council chief executive sent a memorandum to councillors advising that the council's lawyers had met with the company's solicitor and had told him that the application could not be advertised until Lakes Village provided more planning material. Lakes Village subsequently withdrew the application and lodged a new one in July 2002. It was not until then that the council could properly assess the planning permit application for the proposed development.

7.2.2 July 2002 application for a planning permit

The planning permit application lodged on 4 July 2002 on behalf of Lakes Village was dated 20 June 2002 and was for *Use and development for the purpose of Place of Assembly with dispensation from car parking, the subdivision of land, the removal of vegetation, the construction of dwellings (multi-unit) and the carry out of buildings and works*. This application was modified later in July and again in October 2002.

On 5 July 2002, the council formally requested the Minister for Planning to determine Lakes Village's application under section 97C of the *Planning and Environment Act 1987*. The council's request informed the minister that the sale of the property had caused concern in some parts of the community and that the sale was the subject of a separate legal action. The council's request also stated that it was extremely important that the application be determined in an open and transparent way that was independent of the council.

In our opinion, the council's decision to request the Minister for Planning to call-in the planning permit application was prudent because it addressed the potential for a conflict of interest to be perceived since the council was both the owner of the land and the responsible planning authority.

On 26 July 2002, the council's development services department forwarded to Lakes Village's planning consultants the results of a preliminary evaluation of the planning permit application by the council's engineering staff. This evaluation raised concerns about the impact on traffic, the proposed road network within the development, the dispensation sought by the applicant from the provision of the required amount of car parking, drainage, and the proposed density of development on the steeper slopes. It also identified the need for further information on a range of matters including traffic and parking studies, a stormwater management plan, a detailed geotechnical investigation, and a detailed soil and water management plan. Council staff and the company's planning consultants conferred about how much more information was needed at that point in the process.

On 28 August 2002, Dr Ian Bennett emailed the council's chief executive to find out, ostensibly on behalf of his client, how the planning permit application was progressing. This request was surprising to us because OzCapital had advised the council's chief executive on 13 November 2001 that Dr Ian Bennett's involvement in the project had come to an end, and the chairman of Lakes Village had made a public statement in December 2001 to that effect. Council gave a short factual response to Dr Bennett on 13 September 2002.

On 18 October 2002, the Minister for Planning agreed to decide the application under section 97C of the Act. The minister's letter of advice stated that any objections and submissions on the application would be referred to a panel to be established under the Act. The minister advised the council that it could make a formal submission about the application. Also in October, Lakes Village's consultants gave the council more preliminary information on soil and water management, stormwater management, road design, and a traffic and parking study.

On 25 November 2002, the Department of Infrastructure which had responsibility for the planning portfolio at the time, wrote informing the council that the planning application had been forwarded to the relevant authorities on 21 November and that Lakes Village had been advised that it was required to give public notice of the application.

The department requested any comments that the council may have on the application and particularly those of its engineering department on stormwater, sediment and traffic management systems.

7.2.3 Panel process on the planning permit application

In January 2003, the Minister for Planning appointed a panel to consider submissions and objections on the Lakes Village planning permit application. The panel was to report to the minister within 3 months.

The panel received 10 objections to the application in January 2003, and gave Lakes Village notice of the nature of concerns raised in the objections.

At a directions hearing on 14 March, the panel agreed to a request from Lakes Village to delay its hearing dates, and a date of 12 May 2003 was set for the hearing to commence. The panel directed Lakes Village to lodge any changes to its proposal by 14 April, and directed the council to lodge a preliminary submission on the matters it would address at the hearing by that date.

As indicated previously, council elections took place on 15 March and all but one of the existing councillors lost office. Mr Eagleson, who was the plaintiff in the Supreme Court action and who had also lodged an objection to the planning permit application, and his partner were elected to the council as were a number of other individuals associated with the Association of Ratepayers and Residents of East Gippsland Inc. (ARREG).

On 11 April 2003, Lakes Village, in response to concerns raised about the application, lodged amended development plans. A significant change was the reduction in residential lot numbers from 127 to 100.

The council's preliminary submission was provided to the panel by 11 April 2003.

In a letter to the panel on 24 April, the council requested that the hearing scheduled for 12 May 2003 be postponed. This request was granted and the new date for commencement of hearings was set at 7 July 2003.

In accordance with a council resolution on 23 April 2003, the council commissioned a planning consultant to undertake an independent and objective review of the planning permit application and prepare a submission for presentation at the panel hearings.

Advice obtained by council on the appropriateness of the proposed development

On 6 June 2003, Lakes Village lodged amended development plans and design guidelines for residential lots that it intended to rely upon at the panel hearings starting on 7 July. The amendments included:

- a reduction in the number of residential lots from 127 to 100, with lot sizes enlarged
- creation of a conference facility island independent of the residential lots

- revisions within the conference facility, with tennis courts removed and a further 38 car parking spaces added.

The planning consultant undertook her evaluation on the basis of the latest amended plans and design guidelines that were lodged by Lakes Village on 6 June 2003.

The council received her report on 26 June. The report was very critical of the proposed development and concluded that a development of the density proposed by Lakes Village was inappropriate for the property because it:

- failed to respond to the site in terms of the existing characteristics of the land
- included a subdivision pattern requiring excessive cut and fill to accommodate the new residential estate
- proposed building envelopes which were too large for many of the proposed lots with little opportunity for landscaping and potential for high levels of impermeable surfaces
- created potential for land use conflicts between the adjacent existing industrial estate and residential development on the subject land close to these industries
- failed to adequately buffer the proposed conference centre from the proposed residential development which would occur around and in very close proximity to the centre
- would establish an intense and very urban subdivision plan on a site which was highly visible from various vantage points in Lakes Entrance and from the eastern end of the Gippsland Lakes system with consequent loss of visual amenity
- introduced residential development at a density and form which was incompatible with its surrounds
- proposed design guidelines which would not create a seaside or coastal atmosphere on the site and would perpetuate the inadequacies and non site-responsive nature of the proposed subdivision and development
- would not assist in a successful and attractive re-vegetation of the site and would provide little scope or incentive for landowners to “green” their allotments
- would exacerbate drainage issues in the local area
- relied unduly on only one access point for vehicle traffic for both the conference centre and the residential uses on the site
- had the potential to create overflow parking from the conference centre facility to the proposed residential streets which would not be wide enough to accommodate additional on-street parking without inconvenience to traffic movements.

The planning consultant concluded that a total re-design would be required to address many of her concerns and that the application should therefore be refused.

Adjournment of the panel hearings and withdrawal of planning permit application by Lakes Village

The permit application lodged on behalf of Lakes Village on 4 July 2002 was for *Use and development for the purpose of Place of Assembly with dispensation from car parking, the subdivision of land, the removal of vegetation, the construction of dwellings (multi-unit) and the carry out of buildings and works*. This application was modified later in July 2002 and again in October 2002. It was further modified in April 2003 when Lakes Village lodged amended development plans with the planning panel appointed to determine the application. On 6 June 2003, Lakes Village lodged further amended development plans and design guidelines.

On 2 July 2003, the council's lawyers advised various parties involved in the panel process that objectors to the application and referral authorities had not been given further notice of amended plans lodged by Lakes Village on 6 June 2003 and that errors of process had occurred which could lead to appealable error if not addressed.

On 4 July, the last working day before the panel was due to commence hearings on 7 July, solicitors acting for Lakes Village faxed the panel and requested that the hearing scheduled for 7 July not occur given the council's lawyers' concerns about the lack of notice given by Lakes Village for its amended plans. The solicitors requested that a directions hearing be scheduled for 8 July to determine what further notice should be given and to whom.

The fax also advised the panel that an adjournment would allow all interested parties to consider a further revised development plan, which was enclosed. This revised plan involved the removal of the 72 apartment-style dwellings which had been part of the original application and replacement with 12 lots, a reduction in residential lots from 100 to 95 (bringing the total number of lots to 107) and clearer separation of residential and conference traffic.

The panel went ahead with its hearing on 7 July 2003, and heard submissions until it adjourned the matter to a directions hearing on 14 August, at which it would hear applications for costs associated with the proceedings. One of the reasons for the adjournment was to allow Lakes Village to determine and advise the panel on whether the existing application would proceed on the basis of the proposal of 4 July 2003, or whether a new application for a planning permit would be made.

On 9 July 2003, solicitors acting for Lakes Village withdrew the application for a planning permit and advised the panel that the company intended to lodge a fresh application. The solicitors indicated that this decision was influenced by opinions expressed in submissions made by the council and ARREG that the July 2003 plans submitted by Lakes Village constituted a transformation of the application and that the revisions to the plans provided with the original planning permit application proposed in these plans could not be addressed by conditions on a planning permit. The solicitors acting for Lakes Village indicated that a new application was needed to avoid the risk of having a decision on the existing application challenged in the Supreme Court.

On 14 August, the panel held a directions hearing to consider submissions relating to applications for costs as a result of the adjournment of the hearing on 7 July. Later in August, the panel directed Lakes Village to pay \$750 to both the council and ARREG. This payment recognised the additional unnecessary and unreasonable preparation costs they had incurred because of the lateness of notice given by Lakes Village for its substantially revised plan of development.

Ultimately, Lakes Village did not submit a new application for a planning permit because the settlement of the Supreme Court action in October 2003 resulted in the contract of sale being set aside and, therefore, bringing the proposed development to an end.

7.3 Council handling of requests for information under FOI legislation

The council received a number of requests for significant volumes of information under the *Freedom of Information Act 1982* about its attempts to sell the property. During the audit, concerns were raised about whether the council had met its obligations under the Act when responding to these requests.

Examination of allegations about whether a public sector agency has complied with the requirements of the Freedom of Information Act falls under the jurisdiction or mandate of the Victorian Ombudsman. The Ombudsman was involved in examining complaints about the council's handling of FOI requests between 2001 and 2003. For these reasons, we did not include a detailed examination of concerns raised with us on the council's handling of FOI issues as part of our audit.

However, based on matters observed during our audit, we make the following comments:

- FOI requests were not always assessed and dealt with in a timely manner by the council.
- Some council staff dealing with FOI requests did not seem to be adequately trained on the provisions and requirements of the Act and particularly on the consideration of FOI requests and determination of whether documents could be released or not. On occasions, applicants for information seemed to have a more detailed knowledge of the FOI requirements than the relevant council staff.
- It is important for the council's credibility to ensure that decisions regarding its inability to release information under the *Freedom of Information Act 1982* are fully considered and defensible prior to communicating such decisions to applicants. Such decisions should be fully explained to applicants. The necessity for the council to reverse a number of decisions on the release of documents raised doubts about the adequacy of the council's mechanisms for processing and assessing FOI requests.
- In February 2003, the council's chief executive acknowledged at a council meeting that: councillors had received complaints that officers had not met the statutory period guidelines set out under the Act; the Ombudsman was investigating some of these complaints; and councillors were very concerned about this issue. He stated that councillors had instructed him to immediately put in place mechanisms to ensure that citizens received the information requested within the statutory period.
- In response to concerns raised with us about the appropriateness of the council releasing documents in which most of the information was blotted out, it needs to be noted that this is allowable under the FOI legislation if the information is not relevant to the request or meets the confidentiality tests in the Act and, therefore, does not have to be disclosed.
- We found no evidence that documents provided by the council under FOI had been tampered with, although some documents looked odd because they had been printed in a standard format from the council's document and records database.
- The council could not locate a small number of documents relevant to the FOI requests and had to seek assistance from external parties to locate these documents, indicating a breakdown in its record-keeping and retention practices.

- The burden imposed upon the council for the extraction and release of the requested information was significant. To deal with FOI requests it made extensive use of its in-house staff and employed an additional staff member.
- In some instances the council failed to comply with the provisions of the FOI legislation in that it:
 - did not furnish ARREG with a list of the documents not provided and an explanation of the reasons for their non-provision
 - failed to respond to some of the requests within the 45 days stipulated in section 21 of the Act.

The difficulties faced by council staff in locating all subject documents for FOI applicants, and the need to undertake subsequent searches for documents not initially found, was evidence that the council was experiencing difficulties similar to those in other organisations that rely on document scanning and data pool storage.

To some extent, this is understandable in that such searches rely on council staff inputting all documentation into the council's DataWorks system and entering it correctly. Then, individual searchers must apply the correct search words to obtain a hit on the required documents. But important documents may not be identified if searchers do not use the right search words. During our audit, the council found and provided us with documents that had not previously been entered into the council's DataWorks system.

In addition to these retrieval problems, we came across many references in council records and in our discussions with staff to significant telephone conversations and verbal discussions which should have been recorded but were not. We feel that this inadequacy could be overcome if staff maintained a manual running diary of such discussions and scanned the diaries into the DataWorks system, thus providing a permanent record.

7.4 Conclusion

The council complied with the legislative requirements governing the handling of applications for planning permits. Once a panel was appointed by the Minister for Planning to consider submissions and objections on the Lakes Village application for a planning permit, the council complied with the processes and requirements established by the panel.

We identified a number of concerns about, and problems with, the council's handling of requests for information under the *Freedom of Information Act 1982* which resulted from:

- inadequate processes to ensure that all documents relevant to an FOI request were captured and recorded, and were retrievable
 - the council not having in place a set of directions and instructions for staff responsible for considering and processing FOI requests to help them make appropriate and defensible decisions
 - relevant personnel not being provided with sufficient training and support to ensure that they are proficient in dealing with FOI requests.
-



8. Expression of interest processes for a Slip Road, Paynesville property



8.1 Background

The council is the Committee of Management for a property at Squatters Row, Slip Road, Paynesville. It constitutes 2 hectares of Crown land on the waterfront. The land title status of the property is part permanent water and part temporary land. In May 1990, the former Shire of Bairnsdale obtained a planning permit allowing the development of the property as a commercial and industrial marina for approximately 150 berths including buildings and works to be used for boat maintenance and associated uses.

Concerns were raised with us about the appropriateness of actions of a councillor when dealing with an expression of interest process run by the council in 2002 for this property.

8.2 Council's expression of interest process for Squatters Row, Slip Road, Paynesville in 1997-98

In November 1997, the council invited Expressions of Interest (EOI) for a project involving the development of Squatters Row, Slip Road, Paynesville for marine, industrial and commercial purposes. As the land was Crown land, the EOI invitation informed potential developers that the project would require a lease under the *Crown Land Reserves Act 1978*. Residential development of the site was not envisaged by the EOI invitation and the planning permit did not authorise this type of development.

The EOI invitation document stated that, after evaluation of the EOIs submitted, selected proponents may be invited to lodge tenders for the lease of all or part of the site for approved marine and allied commercial industrial development.

In January 1998, an individual, who later held the office of mayor for the period March 2001 to March 2002, submitted an EOI to the council proposing a marina and a hotel and conference centre at an estimated cost of \$5.2 million. The steering committee set up by the council to assess the proposals did not recommend this EOI because it proposed a type of development which was inconsistent with the invitation document.

The council received 5 EOIs for the site. Following interviews by a steering committee established by the council with those who submitted EOIs and analysis of all the proposals, the steering committee recommended that one of the proponents be granted preferred developer status for a period of 4 months, during which time development plans could be finalised and the council could prepare a contract. The council accepted this recommendation and on 25 May 1998 appointed a local company as the preferred developer.

We were concerned that the council's EOI process was inconsistent with the invitation document issued to prospective developers. The invitation stated that on the basis of submissions received, the council may invite selected proponents to lodge tenders for the lease of all or part of the site. In our view, the direct appointment of a developer without a tender process did not comply with the provisions of the EOI invitation document.

However, the preferred developer never signed a contract and the site remained undeveloped.

8.3 Council's expression of interest process for Squatters Row in 2002

8.3.1 Events prior to the 2002 EOI process

In March 2000, the individual who had submitted an EOI to council in 1998 proposing a marina and a hotel and conference centre on the Squatters Row site was elected to the council and served as a councillor until March 2003. He was mayor from March 2001 to March 2002. This individual was Mr Tom Courtney.

We interviewed Mr Courtney as part of our audit. He informed us that when he was a councillor he had shown the property at Squatters Row to Dr Ian Bennett. He also advised us that he had provided Dr Bennett with a copy of the EOI proposal he had submitted to the council in January 1998.

Between late 2001 and mid-2002, Dr Ian Bennett made a number of approaches to the council with a development concept and proposals for Squatters Row, even though the council had not called for further EOIs or proposals.

On 14 June 2002, after discussions between council officers and the then Department of Natural Resources and Environment, the council wrote to Dr Bennett advising him that it had decided to pursue a public EOI process for the development of Squatters Row in the interests of fairness and equity.

8.3.2 The 2002 EOI process

On 28 August 2002, a motion moved by Cr Courtney seeking approval for an EOI process for Squatters Row was carried by the council. On 14 September, the council invited EOIs with a closing date of 30 October for submissions. The new EOI invitation document stated that there were no preferred uses for the site and proponents were asked to put forward their ideas.

On 25 October, a company known as On the Waterfront Pty Ltd submitted an EOI for the development of the property into a waterfront conference centre and resort. The EOI identified the primary contact for the company as Dr Ian Bennett.

Dr Bennett did not have an ownership interest in On the Waterfront Pty Ltd. This company was wholly-owned by an individual who was also a director of Jagen Nominees Pty Ltd. Jagen Nominees was a shareholder in Conrock Industries Pty Ltd, the builder nominated by Lakes Village Pty Ltd in its tender for 55 Palmers Road, Lakes Entrance.

We examined the EOI submitted by On the Waterfront Pty Ltd and compared it with the EOI Mr Courtney submitted for the same property in 1998. The documents are almost identical in a number of areas. Much of the wording in the introductory sections of On the Waterfront's EOI was reproduced "word-for-word" or with slight changes from the EOI Mr Courtney submitted in 1998.

On 11 November 2002, the Department of Natural Resources and Environment wrote to the council about the EOI process. The department indicated that as any proposal for development of the site would require approval from the Minister for Environment and Conservation it was imperative that departmental staff be involved in the assessment of any EOIs received.

At its ordinary meeting on 27 November 2002, the council resolved to establish a panel to evaluate the 6 EOIs it had received. The panel comprised representatives of the council and the Department of Natural Resources and Environment. A motion was moved that was seconded by Cr Courtney, that the council's representatives on the panel include Cr Courtney. The motion was carried.

Cr Courtney failed to formally disclose his previous interest in the site, or that he had given a copy of the EOI he submitted to the council in 1998 to Dr Bennett. We consider this omission to be totally inappropriate. Cr Courtney was aware that Dr Bennett had approached the council earlier in 2002 with a development concept and proposal for Squatters Row and that there was a strong likelihood that Dr Bennett would be involved in an EOI submission for the property.

Cr Courtney should have advised the council of both his previous interest in the site and the fact that he had provided a copy of the EOI he submitted to the council in 1998 to Dr Bennett, as this information would have been pertinent to the council's selection of its representatives on the evaluation panel. The fact that one of the EOIs submitted could be wholly or partly based on a concept developed by a serving councillor may have led the council to exclude that councillor from any involvement in the assessment of EOIs for the property. But as this was not disclosed, the council had no opportunity to consider the issue.

On 20 December 2002, Cr Courtney was asked to sign a Guarantee of Confidentiality and Declaration of Interests form as a member of the EOI evaluation panel. There is no evidence that he ever did so. The form required members of the panel to declare that they and their families had no financial or other interest in the EOI and had no family, financial or other connection with any of the parties submitting an EOI.

We have no evidence that Cr Courtney received any payment or other benefit for providing a copy of the EOI he submitted to council in 1998 to Dr Bennett, or that he had any pecuniary interest in On the Waterfront's proposed development project. Nonetheless, we consider his actions to have been inappropriate.

The council has no records indicating that the panel established to evaluate the EOIs for the development of Squatters Row ever met.

Council elections took place on 15 March 2003. As indicated previously, 2 of the councillors did not stand for re-election and of the four councillors who did stand only one was re-elected. The new council suspended the EOI process and initiated a strategic review of future uses for the Squatters Row site.

8.4 Conclusion

The councillor's actions in failing to disclose to the council that he had provided a copy of the EOI he submitted to the council in 1998 for Squatters Row, Slip Road, Paynesville to Dr Bennett when the council was considering membership of the evaluation panel established to assess EOIs received for the development of that site in 2002 were totally inappropriate. The councillor was subsequently appointed to the panel.



9. Lessons learned and opportunities for further guidance for the local government sector



9.1 Introduction

This audit identified significant weaknesses in the processes used by the East Gippsland Shire Council in its attempts to sell the property at 55 Palmers Road, Lakes Entrance. Some findings and themes in this audit have broader relevance for the local government sector as a whole.

In this part of the report we draw out lessons of value to the local government sector when planning the disposal of significant public assets. We also identify a number of opportunities for greater guidance for local government. Consideration of these matters by government may benefit the sector and the community.

9.2 Lessons learned

We set out below, under a number of broad headings or “themes”, lessons of value to local governments when planning the disposal of significant public assets.

Governance issues

- Risks and problems can arise if there is a lack of clarity about the respective roles of council/councillors and management. Council should perform a policy setting, decision-making and monitoring role and leave the management of specific transactions and projects to the chief executive and relevant council officers.
- Appropriate follow-up mechanisms should be in place to ensure that decisions taken by a council are implemented.

RESPONSE provided by Chief Executive Officer, East Gippsland Shire Council

Comments are accepted.

In 2003 the Shire appointed an internal auditor and in 2004 an internal audit program and risk assessment were carried out.

Also in 2004, the Shire adopted its Code of Conduct and Good Governance which inter alia, outlines the roles of the Mayor and Councillors, and management and staff of Council.

Follow-up mechanisms to ensure actions are taken on decisions of Council or expectations from discussions involving Councillors were enhanced during 2004 and are monitored regularly.

Avoiding, identifying and dealing with conflicts of interest¹

- Councillors need to bring to the attention of council any matter or circumstance which could create an actual or perceived conflict of interest for them.

Serving the public interest

- Councillors should make decisions and provide advice impartially, on the basis of the relevant law, policy and merits of each case, without regard for personal gain. Decision-making should not be influenced by religious, professional, political, ethnic, family or other personal preferences.
- Councillors and council staff should restrict their involvement in private interests that could compromise the decisions that they participate in as elected representatives or appointed officials. If this is not feasible, public officials should abstain from having involvement in these decisions.
- Councillors and council staff are required not to misuse their position and government resources for private gain. Officials should avoid private-capacity actions where they may gain an improper advantage from “inside information” obtained in the course of official duties.

Supporting transparency and scrutiny

- Organisational practices should encourage councillors and council staff to disclose and discuss conflict of interest matters, and provide reasonable measures to protect disclosures from misuse by others.
- Councillors and council staff are expected to act in a manner that will bear the closest public scrutiny. In addition to acting within the law, this also entails respecting broader public service values, including impartiality, integrity, transparency and accountability.
- Councillors and council staff should appropriately disclose any private interests and affiliations that could compromise the impartial performance of public duties.

RESPONSE provided by Chief Executive Officer, East Gippsland Shire Council

Comments are accepted.

The revised conflict of interest provisions of the Local Government Act 1989 have been implemented for Councillors and staff.

¹ The majority of the material quoted under this heading is taken from Organisation for Economic Co-operation and Development, *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*, Part 1, 2003.

Importance of community consultation

- Councils should be transparent about their plans, decisions and activities. If actions are driven by protecting and advancing the interests of the community, there is nothing to hide. (It is acknowledged that there are circumstances where commercially or legally sensitive information should not be shared with the community. This should be the exception and not the rule.)
- Community consultation should be early and continuous rather than late or not at all.

RESPONSE provided by Chief Executive Officer, East Gippsland Shire Council

Comments are accepted.

During 2004 the Shire reviewed its decision-making practices as they relate to the confidentiality provisions of the Local Government Act 1989.

An enhanced community consultation program has also been implemented.

Observe proper process

- Councils need to undertake comprehensive analysis and assessment of the financial and operational aspects associated with significant transactions.
- Councils need to establish and maintain strong tendering and contract management processes.
- The fact that a project or transaction is large, important and complex provides more and not less justification for it to be subject to the Council's normal decision-making, tendering and contract management processes and controls. To make exceptions is to invite significant risk.
- Councils need to ensure that they have the skills and capacity to manage significant projects and transactions effectively. This includes the ability to identify and manage risk.
- Councils need to ensure proper documentation is maintained for its own purposes, and also for the purposes of audit and responding to requests under Freedom of Information legislation.
- Council staff need to be provided with sufficient training and support to ensure that they are proficient in dealing with FOI requests.
- All legal and other professional advice should be fully documented and retained.

RESPONSE provided by Chief Executive Officer, East Gippsland Shire Council

Comments are accepted.

The Shire has reviewed its tendering and contract management processes and will continue to monitor these as part of the Shire's internal audit program.

An electronic document management system was introduced into the organisation in 1997 to ensure appropriate documentation is stored and is retrievable. An improved training program has been implemented recently to ensure staff have a clear understanding of the importance of managing document storage effectively, and of the administrative processes that support this.

The Shire has appointed a suitably qualified staff-member to deal with Freedom of Information requests and an ongoing review of compliance is conducted.

Sale of council-owned land

When selling land local governments should establish and implement strategies to ensure their processes are soundly based, transparent and compliant with the law. It is important to protect the interests of ratepayers, deliver a positive outcome for the council and its community, and ensure fair treatment for all prospective purchasers and developers. Council strategies and processes should address the following matters:

- preparation of the property for marketing and sale, including possible rezoning of the site within the framework established by the council's planning scheme and land use guidelines for the area, in order to maximise its value to potential developers and purchasers
- valuation of the property
- the preferred method of sale (for example, public tender) and clear guidance on the conduct of the sale
- probity guidelines for council officers and councillors who might be involved in the sale process and negotiations with potential purchasers or developers
- requirements under the *Local Government Act 1989* and planning legislation and how these requirements were to be satisfied
- communication and consultation with the community
- guidance on the conduct of negotiations with potential purchasers and developers, covering:
 - who should conduct negotiations on the council's behalf
 - what is allowable and appropriate in terms of direct councillor involvement and communication with potential purchasers and developers

- the conduct of due diligence investigations into prospective purchasers and developers to establish their *bona fides* and financial and technical capacity to undertake proposed developments
- the criteria to be met prior to the granting of “preferred developer” status, and who has the authority to confer this status on a developer
- mechanisms for keeping the council informed of the progress of negotiations
- the extent to which council resources should be used in providing information and services to potential purchasers and developers
- the importance of not divulging valuations of the property and other sensitive information to prospective purchasers and developers
- the extent to which officers could commit the council to a course of action without reference to the council
- quarantining from the negotiation process officers who may later be required to assess planning applications and development proposals on behalf of council in its capacity as the responsible planning authority for the site
- the protection of the council’s interests through mechanisms such as agreements under section 173 of the *Planning and Environment Act 1987* where the council may wish to encourage a significant development on the site
- the extent to which officers could commit the council to expenditure associated with facilitating a development proposal put forward by prospective purchasers
- acceptance of hospitality and other benefits from potential purchasers and developers.

RESPONSE provided by Chief Executive Officer, East Gippsland Shire Council

The various strategies and actions proposed in regard to the sale of Council-owned land are accepted.

Adequacy of information provided to senior management and Council for decision-making

- It is imperative that decision-making on significant projects or transactions be informed by accurate information, and rigorous analysis and advice.

RESPONSE provided by Chief Executive Officer, East Gippsland Shire Council

The comment is accepted.

9.3 Opportunities for further guidance

The audit identified 2 areas where the local government sector may benefit from the introduction of greater guidance.

Extending the requirement for compliance with the government's *Policy and Instructions for the purchase, compulsory acquisition and sale of land* to local government

Given the risks associated with any property transactions and the problems identified in this audit, consideration should be given to making compliance with the government's *Policy and Instructions for the purchase, compulsory acquisition and sale of land* mandatory of local government. This would bring the sector into line with other public sector agencies.

The policy includes instructions and guidance on critical issues such as the role of the Government Land Monitor in approving property transactions of \$250 000 or more, valuation of land and the confidentiality of valuations, preparation of land for sale, and the principle that all public land should be sold by a public process. We consider the policy to represent good practice.

RESPONSE provided by Chief Executive Officer, East Gippsland Shire Council

The Shire welcomes the opportunity for this suggestion to be canvassed with Local Government on a State-wide basis.

Guidance for local governments which are both vendor of a property and the responsible planning authority

The legal position of local governments in situations where they intend to sell land to a party which wishes to further develop the land following purchase is fraught with potential difficulties including:

- developers' expectations that councils, because they are both sellers of land and the responsible planning authorities, would give easy passage to planning applications
- the need for provisions in contracts of sale of land which protect councils because if contracts lack such provisions the councils could be exposed to significant financial risk if they oppose planning applications
- the potential, because of the frequency of council elections (3-yearly), for an incoming council to disagree with decisions made by the previous council².

² These points are our summary of legal advice provided to the East Gippsland Shire Council.

There is an opportunity for relevant government departments to show leadership by providing all local governments with guidance which alerts them to the potential for conflict arising from the dual role as both seller and responsible planning authority in relation to council land. Any guidance should provide advice on appropriate provisions for inclusion in contracts of sale.



Appendix A.
Background to the
audit, chronology of
key events and listing
of council mayors
and chief executives



Background to the audit

The property at 55 Palmers Road, Lakes Entrance is owned by the council. Covering some 14.9 hectares, it is situated on a hill overlooking the Tasman Sea, and includes the council's Lakes Entrance Corporate Centre.

The former Shire of Tambo had purchased land at 55 Palmers Road, Lakes Entrance in 1982 for \$150 000. Subsequently, council offices were built on the site at a cost of around \$2.5 million and later refurbished at a cost of \$600 000. In December 1994 the Shires of Bairnsdale, Tambo, Orbst and Omeo and the City of Bairnsdale were abolished and the East Gippsland Shire Council was established. The council was governed by commissioners until March 1997. The new council has maintained 2 administrative offices: one in Lakes Entrance at the Palmers Road site, and the other in Bairnsdale, since 1994.

In August 1997, an Inspector of Municipal Administration was appointed to review the council's financial affairs. In his October 1997 report, the inspector expressed concerns about the council's ongoing financial viability and also expressed reservations about the efficiency of the council maintaining 2 administrative office buildings. The council subsequently decided to sell its property at 55 Palmers Road, Lakes Entrance.

The council was unsuccessful in selling this property in the period between 1998 and 2001. In June 2001, it resolved to sell the property for \$1.5 million to a private company, Lakes Village Pty Ltd, by private treaty. Following community unrest and a number of other offers for the property, the council decided not to proceed with the sale, but sell the property by public tender. Lakes Village Pty Ltd was the only tenderer and, in October 2001, the council approved the sale of the property to that company for \$1.525 million. Subsequently, an interested party initiated a Supreme Court action to prevent the sale.

In October 2003, the council settled the Supreme Court action at a cost of \$912 000 and the contract of sale for the property was cancelled.

In February 2004, the East Gippsland Shire Council requested our Office to examine the adequacy of its processes and actions in attempting to sell the property at 55 Palmers Road, Lakes Entrance and in settling an associated legal action. This report outlines the results of our review of these matters.

The audit was performed in accordance with Australian auditing standards. The cost of the audit was \$140 000.

FIGURE A1: LISTING OF COUNCIL MAYORS AND CHIEF EXECUTIVES

Name	Position held	Period held position
Mr Shaun Beasley	Mayor	30 March 1998 to 18 March 2000
Mr William Bolitho	Mayor	27 March 2000 to 19 March 2001
Mr Tom Courtney	Councillor	18 March 2000 to 15 March 2003
	Mayor	19 March 2001 to 13 March 2002
Mr Peter Bommer	Mayor	13 March 2002 to 15 March 2003
Mr Harvey Bates	Mayor	19 March 2003 to 1 December 2004
Ms Jane Rowe	Mayor	1 December 2004 to the present
Mr Graeme Pearce	Chief executive	20 February 1995 to 20 February 2001
Mr Joseph Cullen	Chief executive	20 February 2001 to 8 August 2003
Mr John Websdale	Acting chief executive	8 August 2003 to 4 January 2004
Mr Steve Kozlowski	Chief executive	4 January 2004 to the present

FIGURE A2: CHRONOLOGY OF KEY EVENTS

Year	Key events
1982	Shire of Tambo purchased land at 55 Palmers Road, Lakes Entrance for the construction of council offices.
1994	The Shires of Bairnsdale, Tambo, Orbost and Omeo and the City of Bairnsdale were abolished and the East Gippsland Shire Council was established. The new council was governed by commissioners until March 1997.
1997	<p>In October, an Inspector of Municipal Administration expressed reservations on the efficiency of the council maintaining administrative office buildings in both Lakes Entrance and Bairnsdale.</p> <p>In November, the council sought Expressions of Interest (EOIs) for development of a site at Squatters Row, Slip Road, Paynesville (Crown land on the waterfront at Paynesville) for marine, industrial and commercial purposes (tourism and residential development was ruled out).</p>
1998	<p>In January, Mr Tom Courtney submitted an EOI to the council for the Squatters Row property proposing a marina, hotel-type accommodation, larger family unit accommodation and conference rooms. However, development did not proceed on that property.</p> <p>In January, the council resolved <i>"That the East Gippsland Shire Head Office be based at Bairnsdale"</i>.</p> <p>In May, the council adopted its budget for 1998-99 that included income of \$2.5 million from the sale of the property at 55 Palmers Road, Lakes Entrance. The council's corporate plan for 1998-2003 listed the rationalisation of office locations and sale of 55 Palmers Road, Lakes Entrance as a strategy and action for the 1998-99 financial year.</p> <p>In July, the council put the property on the market and engaged a local real estate firm to market it locally, nationally and internationally.</p> <p>In October, the council received one conforming tender for the property of \$350 000, based on land value only, and one non-conforming EOI.</p> <p>In November, Dr Ian Bennett of the Breakaway Group Pty Ltd wrote to the council expressing an interest in the property, and negotiations commenced with this company.</p>
1999	<p>In February, the council granted preferred developer status to the Breakaway Group.</p> <p>In April, the council received 2 sworn valuations for the property. The first, for \$300 000, was based on the then zonings under the Tambo Planning Scheme. The second valuation was for \$750 000 on the basis that the development proposed by the Breakaway Group was permitted under the provisions of the proposed East Gippsland Planning Scheme.</p> <p>Negotiations with Dr Bennett and the Breakaway Group over the sale of the property continued without resolution between April and September. Negotiations eventually broke down because of the company's failure to meet the council's required terms for the payment of the sale price which council set at \$1.25 million.</p> <p>In June, the Breakaway Group Pty was placed in receivership. The council was not aware of this development and Dr Bennett continued to make offers for the property without informing the council of the financial position of his company.</p> <p>In October, a Chinese investment group visited the municipality and expressed interest in acquiring the property, but subsequent negotiations did not result in a sale.</p>
2000	<p>In March, a council election occurred at which only one of the 6 existing councillors was re-elected. Mr Tom Courtney was among the newly elected councillors and served until March 2003.</p> <p>On 17 August, Dr Bennett pleaded guilty in the Melbourne Magistrate's Court to a charge brought by the Australian Securities and Investments Commission (ASIC) of failing to act honestly as a director with intent to gain advantage for another person, in breach of the Corporations Law.</p>

FIGURE A2: CHRONOLOGY OF KEY EVENTS - continued

Year	Key events
2000 - <i>continued</i>	<p>On 22 August, Dr Bennett was made bankrupt by order of the Federal Magistrates Court of Australia and a trustee of his bankrupt estate was appointed. Dr Bennett was a declared bankrupt from 22 August 2000 until 12 September 2003. The council was not aware of this development and Dr Bennett did not advise them of the situation.</p> <p>On 22 August, the day he had been made bankrupt, Dr Bennett wrote to the council on behalf of a new entity called Lakes Entrance Lifestyle Corporation and made a new offer to purchase the property for \$2.5 million.</p> <p>Negotiations with Dr Bennett for the possible sale of the property continued without resolution between August and December.</p> <p>In late November, Dr Bennett wrote to the council in his capacity as Group Managing Director of Breakaway Consulting Services Pty Ltd and put forward a revised offer.</p> <p>On 6 December, Dr Bennett was convicted by the County Court of an offence in relation to the charges brought against him by ASIC and was ordered to pay a fine of \$20 000.</p>
2001	<p>In January, Dr Bennett wrote to the council on behalf of Lakes Village Pty Ltd and Lakes Entrance Conference Centre Pty Ltd. Dr Bennett provided various documents on the proposed purchase and development of the property, including a letter from OzCapital Pty Ltd confirming that it had agreed to provide funding for the project.</p> <p>Negotiations with Dr Bennett and Lakes Village continued between January and June 2001.</p> <p>In March, Mr Tom Courtney was elected mayor and served as mayor until March 2002.</p> <p>On 1 June 2001, the council's real estate agent provided professional advice to a third party on the values inherent in the property assuming rezoning and the issue of relevant planning permits for its redevelopment in line with the proposal by Lakes Village. Their valuation was \$6.9 million. The council was not made aware of this valuation.</p> <p>On 7 June 2001, OzCapital submitted a revised offer for the purchase of the property by Lakes Village for \$1.5 million.</p> <p>On 25 June, the council resolved to sell the property for \$1.5 million to Lakes Village by private treaty, subject to compliance with the valuation and public consultation requirements of the <i>Local Government Act 1989</i> regarding land sales.</p> <p>The sale was conditional on:</p> <ul style="list-style-type: none"> • Lakes Village obtaining planning permit(s) within 11 months from the date of sale for the core building to operate as a hospitality centre, 216 studio apartments, a 147 lot subdivision and the balance of land in common use • The council leasing back the core building for 2 years, with an option to renew for another 2 years, at an annual rental of \$120 000 net of GST. <p>On 27 June, council staff undertook a company search on Lakes Village Pty Ltd.</p> <p>In July, the council obtained a valuation of the property of \$1.25 million. This valuation was not based upon highest and best use of the site or the development of the property as proposed by Lakes Village Pty Ltd.</p> <p>In late August, following community unrest and a number of other offers for the property, the council resolved to offer the property for sale by public tender.</p> <p>Lakes Village was the only tenderer, and in October 2001 the council decided to sell the property to that company for \$1.525 million. The contract was conditional upon subsequent council compliance with sections 189 and 223 of the Local Government Act and upon the granting of the planning permit.</p> <p>In December, the council held a public meeting and heard submissions from 10 people in accordance with section 223 of the Local Government Act. Later in that month, the council formally resolved to sell the land to Lakes Village Pty Ltd.</p>
2002	<p>In January, the council advised people who had made submissions under section 223 of the Local Government Act that it had resolved to sell the property.</p> <p>In February, a Supreme Court action was initiated by a ratepayer with a view to stopping the sale process.</p>

FIGURE A2: CHRONOLOGY OF KEY EVENTS - continued

Year	Key events
2002 - <i>continued</i>	<p>In August, the council passed a resolution moved by councillor Courtney to seek Expressions of Interest (EOIs) for redevelopment of Squatters Row, Slip Road, Paynesville.</p> <p>In October, a company (On the Waterfront Pty Ltd) associated with Dr Bennett and with the builder nominated by Lakes Village Pty Ltd in its tender for 55 Palmers Road, Lakes Entrance, submitted an EOI for the redevelopment of Squatters Row.</p> <p>The EOI submitted by On the Waterfront in October for the redevelopment of Squatters Row was almost identical in a number of areas to the EOI submitted in January 1998 for the same project by Mr Courtney who was a councillor at East Gippsland Shire Council between 2000 and 2003 and mayor between 2001 and 2002.</p> <p>In November, a motion was moved which was seconded by councillor Courtney, that the council's representation on the panel established to evaluate EOIs received for Squatters Row, include councillor Courtney. The motion was carried. Councillor Courtney failed to disclose to the council that he had provided Dr Bennett with a copy of his 1998 EOI document for the site.</p>
2003	<p>In March, a council election occurred at which only one of the 6 sitting councillors was re-elected. Mr Courtney was not re-elected. The new council suspended the EOI process for the property at Squatters Row and initiated a strategic review of future uses of the site.</p> <p>In October, the council ratified a settlement of the Supreme Court action initiated by Mr Eagleson, an unsuccessful bidder for the property at 55 Palmers Road Lakes Entrance. The total cost of the settlement to the council was around \$912 000, including \$277 000 in the council's legal costs.</p>
2004	Council examined its options for future use of the property at 55 Palmers Road, Lakes Entrance and undertakes community consultation to inform its decision-making.
2005	In April, the council resolved to retain the property in public ownership and undertake further detailed analysis of options for its future use and development.

Auditor-General's Reports

2004-05

Report title	Date issued
Results of special reviews and other studies	August 2004
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Report of the Auditor-General on the Finances of the State of Victoria, 2003-04	November 2004
Results of 30 June 2004 financial statement and other audits	December 2004
Meeting our future Victorian Public Service workforce needs	December 2004
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Managing patient safety in public hospitals (2005:2)	March 2005
Management of occupational health and safety in local government (2005:3)	April 2005
Results of special reviews and other investigations (2005:4)	May 2005
Results of financial statement audits for agencies with other than 30 June 2004 balance dates, and other audits (2005:5)	May 2005
Our children are our future: Improving outcomes for children and young people in Out of Home Care (2005:6)	June 2005
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