Report of the Queensland Ombudsman

Investigation of Brisbane City Council's Tennyson Reach Parkland Transactions

Report under s.50 of the *Ombudsman Act 2001*

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Abbreviations

Acceptable Request Guidelines	Brisbane City Council's AP038 Acceptable Request Guidelines
Advice Guidelines	Brisbane City Council's AP037 Advice Guidelines
CEO	Chief Executive Officer of the Brisbane City Council
City of Brisbane Act	*City of Brisbane Act 2010*
CMC	Crime and Misconduct Commission
Council	Brisbane City Council
Councillor	the Brisbane City Councillor involved in initial discussions with Mirvac
Council's valuer	the valuer instructed by the Council to provide valuations for the land
E&C Committee	the Establishment and Coordination Committee of the Brisbane City Council
Guidelines	AP038 Acceptable Request Guidelines and AP037 Advice Guidelines
independent valuer	registered valuer, Mr Rodney Brett of Urbis Valuation Pty Ltd
land	Lots 3, 4, 5 and 101 on Survey Plan 195275
Lot 3	Lot 3 on Survey Plan 195275
Lot 4	Lot 4 on Survey Plan 195275
Lot 5	Lot 5 on Survey Plan 195275
Lot 101	Lot 101 on Survey Plan 195275
Mirvac	Mirvac Queensland Pty Ltd ACN 060 411 207 and/or Mirvac Constructions (Qld) Pty Ltd ACN 088 536 476
Ombudsman Act	*Ombudsman Act 2001*
parkland works	the works agreed to be undertaken by Mirvac Constructions (Qld) Pty Ltd ACN 088 536 476 on the vacant riverfront land at Tennyson Reach pursuant to its contract with the Brisbane City Council
Procurement Manual	Brisbane City Council's SP101 Procurement Manual
repealed City of Brisbane Act	*City of Brisbane Act 1924*
transaction negotiations	the interactions between the Council and Mirvac relating to the acquisition of the land and the parkland works

Executive Summary

In early 2011 Mirvac[1] determined that it was no longer viable for it to proceed with the rest of its Tennyson Reach development. The development, comprising residential towers, was badly affected in the January 2011 Brisbane River flood. On 30 June 2011 the Brisbane City Council (Council) entered into contracts with Mirvac for the acquisition of vacant riverfront land and for parkland works.

Information was referred to me on 26 March 2012 by the Crime and Misconduct Commission (CMC) concerning the following transactions entered into by the Council in June 2011:

- contract with Mirvac Queensland Pty Ltd for the purchase of vacant riverfront land at Tennyson Reach
- contract with Mirvac Constructions (Qld) Pty Ltd for the design and construction of a parkland on the vacant land at Tennyson Reach.

After assessing the information provided by the CMC, I decided to conduct an investigation on my own initiative under section 18(1) of the *Ombudsman Act 2001*.

In investigating this matter, I:

- considered the information provided by the CMC (which included relevant documentation from Council files)
- considered evidence provided by one councillor and three Council officers, including the Chief Executive Officer, during recorded interviews
- obtained advice from an independent registered valuer in relation to the valuation obtained by the Council in respect of the land
- considered extensive information and submissions from the Council regarding the issues for investigation.

Following is a list of issues I investigated and the opinions I formed:

1. The reasonableness of the Council's transaction negotiations with Mirvac.

Given that the initial agreement between the Council and Mirvac was subject to the Council obtaining a valuation supporting the agreed price and formal approval under Council's processes, I consider that the Council's transaction negotiations were reasonable and that the Council's interests were protected by the terms of the agreement entered into.

Opinion 1

The Council's transaction negotiations with Mirvac for the purchase of the land and for the parkland works were reasonable.

2. Whether the Council took reasonable steps to achieve value for money in respect of the purchase of the land and the design and construction of the parkland.

I considered that it is appropriate to assess value for money for the two components separately, that is, value for money with respect to the land and value for money with respect to the parkland works.

In respect of the land component, I conclude that in obtaining an independent valuation and relying on that independent valuation to purchase the land for $9 million plus GST, the Council did take reasonable steps to achieve value for money in respect of the purchase of the land.

1 Mirvac Queensland Pty Ltd and Mirvac Constructions (Qld) Pty Ltd collectively will be referred to throughout this report as 'Mirvac'.

Opinion 2

The Council took reasonable steps to achieve value for money in respect of the purchase of the land.

As the terms of the contract for the parkland works allow for costs to be independently assessed and there is scope for further savings from that point, I am satisfied that the Council has taken reasonable steps to achieve value for money in respect of the design and construction of the parkland.

Opinion 3

The Council took reasonable steps to achieve value for money in respect of the design and construction of the parkland.

3. The reasonableness of the Council's procurement and contracting processes for the design and construction of the parkland.

The key issue considered in the investigation was whether there was a lawful and reasonable basis upon which the Council entered into a contract with Mirvac for the design and construction of the parkland.

The Council complied with its statutory obligations under the *City of Brisbane Act 2010* and, in my view, had supportable reasons for concluding that it was in the public interest to enter into a contract with Mirvac without undertaking a tender process.

Opinion 4

The Council's procurement and contracting processes for the design and construction of the parkland were reasonable.

4. Whether the Council correctly applied the AP038 Acceptable Request Guidelines (Acceptable Request Guidelines) and the AP037 Advice Guidelines (Advice Guidelines) in relation to requests received from councillors for information concerning the transaction.

With minor exceptions stated in this report, the Council complied with the Acceptable Request Guidelines and the Advice Guidelines.

Opinion 5

The Council correctly applied the Acceptable Request Guidelines and the Advice Guidelines in relation to requests received from councillors for information concerning the transactions.

The enquiries I undertook, the evidence I considered and the reasons for my opinions are set out in the body of this report.

It is outside of the scope of my investigation to consider whether the Council could have achieved a better final outcome. Any consideration of this issue would have been by its very nature largely speculative.

Chapter 1: Introduction

1.1 Background

In early 2011 Mirvac[2] determined that it was no longer viable for it to proceed with the rest of its Tennyson Reach development. The development, comprising residential towers, was badly affected in the January 2011 Brisbane River flood. On 30 June 2011 the Brisbane City Council (Council) entered into contracts with Mirvac for the acquisition of vacant riverfront land and for parkland works.

Information was referred to me on 26 March 2012 by the Crime and Misconduct Commission (CMC) concerning the following transactions entered into by the Brisbane City Council (Council) in June 2011:

- contract with Mirvac Queensland Pty Ltd for the purchase of vacant riverfront land at Tennyson Reach
- contract with Mirvac Constructions (Qld) Pty Ltd for the design and construction of a parkland on the vacant land at Tennyson Reach.

The vacant riverfront land at Tennyson Reach, the subject of the contract, consisted of the following parcels of land:

- Lot 3 on Survey Plan 195275 (Lot 3)
- Lot 4 on Survey Plan 195275 (Lot 4)
- Lot 5 on Survey Plan 195275 (Lot 5)
- Lot 101 on Survey Plan 195275 (Lot 101).[3]

After assessing the information provided by the CMC, I decided to conduct an investigation on my own initiative under section 18(1) of the *Ombudsman Act 2001* (Ombudsman Act).

1.2 Issues for investigation

The issues for investigation were:

1. The reasonableness of the Council's transaction negotiations with Mirvac.
2. Whether the Council took reasonable steps to achieve value for money in respect of the purchase of the land and the design and construction of the parkland.
3. The reasonableness of the Council's procurement and contracting processes for the design and construction of the parkland.
4. Whether the Council correctly applied the AP038 Acceptable Request Guidelines (Acceptable Request Guidelines) and the AP037 Advice Guidelines (Advice Guidelines) in relation to requests received from councillors for information concerning the transaction.

It is outside of the scope of my investigation to consider whether the Council could have achieved a better final outcome. Any consideration of this issue would have been by its very nature largely speculative.

2 Mirvac Queensland Pty Ltd and Mirvac Constructions (Qld) Pty Ltd collectively will be referred to throughout this report as 'Mirvac'.

3 Lots 3, 4, 5 and 101 on Survey Plan 195275 will be referred to throughout this report as 'the land'.

Chapter 2: Jurisdiction

The Ombudsman is an officer of the Parliament empowered to deal with complaints about the administrative actions of Queensland government departments, public authorities and local governments.

Under the Ombudsman Act, I have authority to:

- investigate maladministration by public sector agencies in response to complaints or on my own initiative
- make recommendations to an agency being investigated about ways of rectifying the effects of its maladministration and improving its practices and procedures
- consider the administrative practices of agencies generally and make recommendations, or provide information or other assistance to improve practices and procedures.

If I consider that an agency's actions were unlawful, unreasonable, unfair or otherwise wrong, I may provide a report to the principal officer of the agency. In the report, I may make recommendations to rectify the effect of the maladministration identified or to improve the agency's policies, practices or procedures with a view to minimising the prospect of similar problems occurring.

If appropriate I may also publish the report with the approval of the speaker.

Chapter 3: Investigation

The investigation has been completed. The investigation has been conducted informally under s.24(a) of the Ombudsman Act (that is, without the use of coercive investigation powers under part 4).

This Office assessed the information received from the CMC and identified issues for investigation. I wrote to the Council advising of the investigation and requesting information.

Following consideration of the information provided by the Council, investigators conducted recorded interviews on 11 July 2012 with the following officers:

- a councillor who is chairperson of a Council committee (Councillor)
- the Chief Executive Officer of the Council (CEO).

Following the interviews, clarification was sought from the Council regarding some matters discussed during the interview with the CEO.

On 17 August 2012 I requested that information regarding communications between the Council and the valuer instructed by the Council to provide valuations for the land (Council's valuer) be provided to me. The information was provided by the Council on 9 October 2012. Upon receipt of this information, I sought advice from an independent registered valuer, Mr Rodney Brett of Urbis Valuation Pty Ltd (independent valuer), concerning the valuations for Lots 3, 4 and 5.

Further recorded interviews were conducted with Council officers on 8 November 2012 and further information sought from the Council.

On 14 December 2012 I provided to the Council my proposed report containing a number of opinions which I was considering and invited the Council to make a submission. The Council's submission was received on 16 January 2013. I have included in this report the substance of the Council's response.

In reaching a final view in relation to the issues, the following has been taken into account:

- material provided by the CMC (which included relevant documentation from Council files)
- the Council's written and oral submissions including the Council's submission in response to my proposed report
- the advice of the independent valuer.

Chapter 4: Council's actions

Following is a summary of events leading up to the entering of the contracts between the Council and Mirvac for the purchase of the land at Tennyson Reach and for the design and construction of the parkland on the land (parkland works):[4]

2 March 2011	Meeting request from Mirvac to Lord Mayor to discuss Mirvac's Tennyson Reach development and a potential community based opportunity.
31 March 2011	Following referral of request from Office of the Lord Mayor to the Councillor, meeting in the Councillor's office between the Councillor and a senior representative of Mirvac. During the meeting, Mirvac advised that it did not intend to proceed with the remainder of its development at Tennyson Reach and sought to gauge the Council's interest in acquiring the land for parkland.
Early April 2011	The Councillor advised the CEO of the opportunity presented by Mirvac.
12 April 2011	Meeting between the CEO, the Councillor and a senior representative of Mirvac at the Queensland Government Building Revival Forum, at which all parties were attending on other business, to discuss the proposal. Mirvac presented the concept for it not to proceed with the remaining development but rather offer the Council the opportunity to acquire the site for park purposes.
13 May 2011	Further meeting in the Councillor's office between the CEO, the Councillor, a senior representative of Mirvac and Mirvac's consultant landscape architect to consider the architectural concept for the park development. It was agreed in principle that the Council was interested in acquiring the land at fair value for park purposes, subject to mutual approvals and acceptable terms and conditions.
13-25 May 2011	A number of brief telephone discussions between the CEO and a senior representative of Mirvac to expand on and clarify the proposal.
25 May 2011	Mirvac provided a first draft memorandum of understanding which provided for the payment of $15 million for the land and parkland works.
2 June 2011	Letter from the Council to Mirvac responding to the memorandum of understanding including a price of $6 million for the land (subject to valuation and other conditions) and $9 million for the parkland works.
3 June 2011	The Council's letter of 2 June 2011 endorsed by Mirvac as being approved.
14 June 2011	The Council provided instructions to Council's valuer for valuation of Lots 3, 4 and 5.
22 June 2011	Draft valuation dated 19 June 2011 received by the Council for Lots 3, 4 and 5 totalling $9,150,000.
23 June 2011	Email from the Council to Mirvac advising, in light of valuation, purchase price of land to be $9 million and parkland works not to exceed $6 million.
27 June 2011	The Establishment and Coordination Committee (E&C Committee) of the Council approved the purchase of the land and the entering into of the contract for the parkland works without seeking competitive tenders from industry.
28 June 2011	The Council provided instructions to Council's valuer for valuation of Lot 101.
29 June 2011	Valuation received by the Council for Lot 101 for $236,000.
30 June 2011	Contracts for the purchase of the land for $9 million plus GST and for the parkland works for not more than $6 million (subject to conditions) were entered into between the Council and Mirvac and settlement of contract for the purchase of the land.

4 Evidence regarding the contract negotiations was obtained from the following sources:
- the statement provided to the Commissioner of the Queensland Floods Commission of Inquiry by the CEO dated 20 October 2011
- recorded interviews conducted with the Councillor and the CEO on 11 July 2012
- documents from the Council's files regarding the transaction provided by the CMC
- documents from the Council's files regarding the transaction obtained during the course of the investigation.

Chapter 5: Transaction negotiations

5.1 Evidence

Information regarding the transaction negotiations[5] was provided by persons interviewed as part of this investigation.

The following information was provided by the Councillor in relation to meetings to discuss the transactions:

- With regard to the first contact with the Council by Mirvac on 2 March 2011, the then Lord Mayor's personal assistant referred the appointment request to the Councillor's personal assistant and a meeting was set up for 31 March 2011. The passing of appointment requests from the Lord Mayor's office to the Councillor's office is routine and normal practice.[6]
- It is 'the norm' for people to request meetings with the Councillor to discuss matters.
- During the meeting with Mirvac on 31 March 2011, Mirvac put forward a proposal that the Council purchase the land at Tennyson Reach, though the Councillor did not recall any specific sum of money proposed by Mirvac at that meeting.
- At the meeting of 12 April 2011, Mirvac proposed that the Council purchase the land and also confirmed that they would seek to deliver the parkland works so that it would be of a standard appropriate to the adjacent development. The Councillor believed that a sum of money was stated by Mirvac as a basis for the negotiation but did not recall what the sum of money was.
- The Councillor could not recall if a price was discussed at the meeting of 13 May 2011 and, if any costings had been done at that time for the parkland works, the Councillor was not aware of them.
- The Councillor's only involvement in the transactions after the meeting of 13 May 2011 was, as a member of the E&C Committee, considering the submission seeking approval for the purchase of the land and the contract with Mirvac for the parkland works.
- The Councillor was involved in initial general discussions and then passed the matter over to Council officers to negotiate. The Councillor was not aware that the total cost was $15 million until consideration of the submission to the E&C Committee.

During interview, the CEO advised investigators that the Councillor contacted him by phone to advise of Mirvac's proposal to sell the Council parkland as constructed by Mirvac.

In a statement by the CEO to the Queensland Flood Commission of Inquiry, dated 20 October 2011, the CEO advised:

> I agreed with [the Councillor] that this was a rare opportunity for Council to acquire approximately 2.5 hectares of riverfront land for public purposes at a reasonable price and it should therefore be carefully considered further. It was my understanding that the market for prime riverfront property in Brisbane was already relatively flat at the time due to the downturn in the global and regional economies and that this was heightened due to the then recent January Brisbane River flooding. The timing was therefore good in terms of Council achieving a reasonable purchase [price] for the acquisition.

In relation to the negotiations, the CEO further advised investigators as follows:

- At the meeting of 12 April 2011 the proposal was discussed as was the price. '[Mirvac] liked $15 million and I liked $12 million is the way I recall it'.

5 Defined as 'the interactions between the Council and Mirvac relating to the acquisition of the land and the parkland works'.

6 Statutory Declaration signed by the Councillor on 16 February 2012.

- At the meeting of 13 May 2011, there 'wasn't a further price negotiation other than that they could potentially convince their board that at a $15 million price it was a satisfactory deal …'
- Telephone discussions between Mirvac and the CEO from 13 to 25 May 2011 were very brief and related to things such as the timing of the transaction and the supply of contact details for Council officers.
- At the time the memorandum of understanding was forwarded by Mirvac on 25 May 2011, the Council had not yet agreed to a price of $15 million. There would have been versions of the contracts that stated a sum of $12 million.
- The CEO's decision to start negotiations at $12 million was not based on a valuation or advice received, but was based on previous experience in the Council and as a former State Government executive. The CEO considered that $12 million would have been extremely good value as a regional park and, at $15 million, it was still good value.
- The CEO does not know when the sum of $15 million was agreed and would have instructed his officers that if they have to pay $15 million, this is a fair price, but the CEO would prefer to pay $12 million.
- Ultimately, the agreement in the CEO's mind related to one transaction of $15 million for a completed parkland rather than two transactions being a certain amount for the purchase of vacant land plus a certain amount for the parkland works. The contracts were separated based on legal advice received, however, it was understood that irrespective of how the contracts worked out, the total would need to end up being $15 million.
- The agreement was framed very generally but was subject to Council approval which would be obtained through the E&C Committee and subject to Mirvac obtaining the approval of its board. If valuations came in at a level that did not justify the price agreed, the Council could have extracted itself from the agreement and each party would wear its own costs and therefore it was very low risk from the Council's perspective.

The Council's letter to Mirvac dated 2 June 2011[7] contained the following conditions:

> In respect of the land:
>
> The anticipated purchase price payable at settlement is $6m subject to receipt by Council of a valuation supporting that price. Price to be apportioned between Lot 3 and the rest of the land.
>
> …….
>
> Final agreement will always be subject to Mirvac Board approval.
>
> Final agreement will always be subject to formal approval under Council's processes including sole source approval and budget approval.

Although there were many draft contracts prepared, the next documents signed by the parties were the contracts signed on 30 June 2011 for the sale of the land from Mirvac to the Council and for the parkland works. These contracts detailed the price for the land as $9 million plus GST and the parkland works as not more than $6 million (subject to conditions).[8]

The contract for the sale of the land contained the following as special condition 12:

> 12.1 This Contract is subject to and conditional upon the Buyer Council obtaining the approval of its E&C Committee to the transaction no later than the Due Diligence Date.
>
> 12.2 If E&C Committee approval is not obtained by the Due Diligence Date then this Contract is at an end with no penalty to the Buyer.

The Due Diligence Date was defined to mean 30 June 2011.

The transaction was approved by the E&C Committee on 27 June 2011.

7 The letter set out the initial terms of the agreement and was endorsed by Mirvac as being approved.
8 The issue of value for money is dealt with in Chapter 6 of this report.

5.2 Analysis

In considering the transaction negotiations, I note in particular:

- While initial discussions around price were based on the CEO's experience, rather than a valuation or other independent professional advice, agreement as to price was always subject to conditions including the Council obtaining a valuation supporting the agreed price and formal approval under Council's processes.
- The terms of the agreement between the Council and Mirvac contained in the Council's letter of 2 June 2011 and approved by Mirvac on 3 June 2011 allowed the Council to withdraw from the agreement without penalty at any time prior to 'formal approval under Council's processes including sole source approval and budget approval'.
- As the formal contracts for the purchase of the land and for the parkland works were not signed by the parties until 30 June 2011, the Council could have removed itself from the agreement without penalty at any time up until 30 June 2011 if for any reason it no longer considered the agreement reached with Mirvac to be in the Council's best interests.

Having regard to these factors, I consider that the Council's transaction negotiations were reasonable and that the Council's interests were protected by the terms of the agreement entered into.

Opinion 1

The Council's transaction negotiations with Mirvac for the purchase of the land and for the parkland works were reasonable.

Chapter 6: Value for money

6.1 Transaction/s

The CEO advised investigators that he considered the Tennyson Reach parkland agreement to be one transaction, that is, completed riverfront parkland for $15 million. For this reason, he viewed value from a holistic perspective.

In his statement to the Queensland Floods Commission of Inquiry[9], the CEO advised:

> The final price of $15m includes a fully completed high-quality parkland, designed and constructed by Mirvac. I formed the view that the price is favourably comparable to that of other park acquisition and development that Council (and the State) has undertaken or is considering.

The CEO provided further explanation as to the basis for his view regarding value during interview.

The CEO's evidence was that he had thought the whole agreement could have been documented in the one contract but was advised that this could not happen. One of the reasons provided to him was that the land was being purchased from Mirvac Queensland Pty Ltd and the contract for the parkland works was with Mirvac Constructions (Qld) Pty Ltd. He accepted this advice.

It was necessary from Mirvac's point of view that the land settle by 30 June 2011. It was not possible for the parkland works to be completed by 30 June 2011 and the second and final stage is due for completion during 2013.

Irrespective of the CEO's intention when he negotiated the agreement, two transactions were involved, that is, one for the purchase of the land and one for the parkland works. For this reason, in considering whether the Council achieved value for money in respect of the Tennyson Reach parkland transactions, while the comparative value of the completed parklands is of relevance to the Council's consideration, I consider that it is necessary to assess value for money for the two components separately, that is, value for money with respect to the land and value for money with respect to the parkland works.

I expressed this view to the Council in my proposed report.

Council Response:

In its response to my proposed report[10] the Council advised that it disagreed with this conclusion as the separation of the land and parkland works does not represent the commercial reality of purchasing land and associated works.

The Council offered an analogy of an individual purchasing a house and land which is purchased as a package, not as two separately valued items. It argued in this instance that each item is necessarily reliant on the other for the achievement of the overall purpose of purchasing a new residence. It argued that similarly the transaction to purchase the land and the parkland works was reliant on each other as Council would not have purchased the land without the contract for the parkland works and, as such, any assessment of value for money by the Council required an evaluation of the transaction as a whole, not individually.

My Response:

In considering the Council's analogy of an individual entering a contract for a house and land package, I consider that a prudent individual in these circumstances would consider the value of the land and consider whether the cost of construction of the improvements was reasonable in assessing whether, overall, they were getting value for money and could not achieve a better result by pursuing other options.

9 Seventh Statement dated 20 October 2011.
10 Letter from Council to Queensland Ombudsman dated 15 January 2013.

I agree that if completed parkland was being purchased by the Council, that it would have been appropriate to consider the value holistically as it would not have been commercially realistic to separate the land and its improvements in terms of value. In this case, however, the Council was not purchasing completed parkland. The transactions being undertaken by the Council were:

- contract with Mirvac Queensland Pty Ltd for the purchase of the land with settlement to be effected on 30 June 2011
- contract with Mirvac Constructions (Qld) Pty Ltd for construction of parkland works due for completion during 2013.

I accept that the Council would not have purchased the land without at some point entering a contract with a construction company for parkland works in order to achieve its intended purpose for the property. I do not, however, consider the fact that the contract for the parkland works was entered into with a company associated with the company from whom the Council purchased the land means that it can be considered one transaction for purposes of assessing value for money.

Having regard to the above, I confirm my view that it is appropriate to assess value for money for the two components separately, that is, value for money with respect to the land and value for money with respect to the parkland works.

6.2 Purchase of land

6.2.1 Evidence

Evidence from Council

Evidence from Council's files shows:

- Mirvac's Tennyson Reach development was badly affected in the January 2011 floods. At that stage, the development had not been completed, with three lots (Lots 3, 4 and 5) proposed for future development and Lot 101 proposed for future parkland.
- In early 2011 Mirvac determined that it was no longer viable for it to proceed with the rest of the development. Rather than sell the vacant land, Mirvac proposed that:
    - the Council buy the land for a price to be agreed on valuation
    - Mirvac construct parkland on the vacant land to a design approved by the Council
    - the price for both was not to exceed $15 million.
- Initially, discussions took place on the basis of $6 million for the land and $9 million for the parkland works.

The Council's Project Manager requested, from Council's City Design Planning and Sustainability Services, a Planning Assessment to establish the highest and best use of the subject land, for the purpose of informing land valuation.[11] The advice provided to the Project Manager by Council's Principal Planner on 14 June 2011 concluded that the highest and best use was development as residential apartment towers pursuant to a Preliminary Approval already in place in respect of the land.

An email discussion took place between the Project Manager and the Manager Land Acquisition on 14 to 15 June 2011 regarding whether the valuation was to be on a pre-flood basis or a post-flood basis. The conclusion reached was unclear from the email exchange.

On 14 June 2011, the Manager Land Acquisition provided emailed instructions to a valuer from the Council's panel of valuers as follows:

11 Request confirmed in an email dated 9 June 2011 from the Product Manager, Planning and Sustainability Services to the Project Manager.

> Package as discussed.
>
> 1. Letter of agreement (as much as I could send) 2. Copy of SP 3. Planning advice.
>
> Feel free to discuss.[12]

This was the entirety of the instructions.

During interview, the Project Manager advised that it was his understanding that the valuation would be undertaken on a pre-flood basis, that is, as if the flood had not occurred. He was not, however, certain as to the basis upon which the valuer was instructed, as instructing the valuer was the role of the Manager Land Acquisition.

During interview, the Manager Land Acquisition advised that he had recalled someone saying something about the Council wanting the valuation on a pre-flood basis so he checked with the Project Manager. He advised:

> I believe [the Project Manager] suggested that because the approval pre-dated the flood that it was on a pre-flood basis. That's not correct when it comes to instructing a valuer. I could not go with that instruction because I didn't have anything in writing. The request to me was to get a valuation as at the date and the settlement date was supposed to be the 30th of June if I remember correctly so I think the valuation came in on the 19th of June.

He advised that in sending instructions to the valuer, he did not say one way or the other whether it was to be pre-flood or post-flood but that it was a valuation as at June 2011. He further advised that the valuation was for the current market value and the current market value takes into account events prior to that date.

Relevant details from the valuations obtained from the Council's valuer are as follows:

- Lot 3 - $3.1 million; Lot 4 - $4 million; Lot 5 – $2.05 million (total $9,150,000 excluding GST)
  Instructions – email dated 14 June 2011.
  Date of valuation - 19 June 2011.
  Draft valuation provided to Council – 22 June 2011.
  Final valuation provided to Council – 19 October 2011.
  Purpose of valuation – purchase purposes.
  Highest and best use – for their individual development subject to Council Approval and conditions.
- Lot 101 was valued at $236,000 excluding GST.
  Instructions - by telephone on 28 June 2011.
  Date of valuation - 29 June 2011.
  Final valuation provided to Council – 29 June 2011.
  Purpose of valuation – assess market value for stamp duty purposes.
  Highest and best use – for its development as parkland.

Lot 101 was purchased by the Council for the nominal value of $1 because a condition on the development of Lots 3, 4 and 5 was that Lot 101 would be transferred to the Council as parkland.

In the first drafts of the land contracts, Lots 4, 5 and 101 were the subject of one contract and Lot 3 was the subject of a separate contract because it was awaiting removal from the community titles scheme.[13] The final version of the land contract dealt with all four lots as Lot 3 had at that point been removed from the community titles scheme.

During interview, the CEO advised that in the context of this commercial arrangement, the Council's valuation was 'discoverable' by Mirvac.

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12 Item 1 was the letter from the Council to Mirvac dated 2 June 2011 setting out the terms of the agreement with references to sums of money redacted. Item 2 was the survey plan and Item 3 was the planning advice from the Council's Principal Planner dated 14 June 2011.

13 Lot 3 was part of the Community Titles Scheme as it was originally intended that it be developed into a block of residential units. As part of the Community Titles Scheme, Lot 3 was responsible for the payment of administrative and sinking fund levies to the body corporate. So that the Council had clear title without obligations to a body corporate, it was necessary for the lot to be removed from the Community Titles Scheme.

Following Council's receipt of the draft valuation for Lots 3, 4 and 5 on 22 June 2011, the Council's solicitor emailed Mirvac's Senior Development Manager on 23 June 2011 and advised:

> The Council valuation is now in and I advise of the following changes:
>
> 1. the Purchase price is to be $6m for lots 4, 5 and 101;
>
> 2. the Purchase price for lot 3 is to be $3m.
>
> 3. the D&C contract sum must not exceed $6m and if Council by its own analysis determines that the contract sum is, or should be, less than $6m, then Council and Mirvac shall share the saving equally (50/50).
>
> Please issue revised versions of the Purchase contracts as soon as possible incorporating the previous BCLP revisions with relevant changes arising from points 1. and 2. of this email.

The submission considered by the E&C Committee on 27 June 2011 stated 'The independent valuation and purchasing price of the land is $9 million'. The E&C Committee approved 'Entering into a contract with Mirvac Queensland Pty Limited (Mirvac) for the purchase of Tennyson Reach vacant land'.

The contract for the purchase of Lots 3, 4, 5 and 101 for $9 million plus GST was signed by the parties and settled on 30 June 2011.

At the time the contract was executed, the valuation was still in draft form. On 18 October 2011 the Manager Land Acquisition emailed the Council's valuer and asked him to confirm that 'had you been asked to finalise the valuation report, that the assessed value would remain unchanged' on the assumption that the sale would still be effected on 30 June 2011. The Council's valuer by return email on 18 October 2011 advised:

> …. I wish to confirm that my valuations of Lots 3, 4 and 5 King Arthur Terrace, Tennyson if finalised at the date of valuation and settled on a short term basis, would remain as detailed in my draft report provided to Council and dated 22 June 2011.

The Council's valuer emailed the final valuation report for Lots 3, 4 and 5 to the Council on 19 October 2011.[14]

In response to enquiries as to why the Council did not obtain the final valuation for Lots 3, 4 and 5 until October 2011, from information provided by the Council, it appears that the fact the final valuation had not been received by the Council was only discovered during the Council's preparation of its submissions to the Queensland Floods Commission of Inquiry.

During interview, the Manager Land Acquisition advised that it is not usual to receive a draft valuation and that the final valuation is usually provided in the first instance. He did not recall anyone asking for a draft valuation in this case and assumes that the Council's valuer sent through a draft to provide the Council an opportunity to raise any issues with the format of the valuation which contained separate valuation certificates for Lots 3, 4 and 5 within the one valuation document.

The Manager Land Acquisition advised that once he received the draft valuation he '… passed the valuations up the line on the basis that the figure was the figure. The format was draft but the figure was the figure..'.

When asked whether he was expecting someone to come back to him and say that the valuation is fine and he should get the valuer to issue a final valuation, he advised:

> At the time, I don't know that I was overly concerned. To my way of thinking, the assessment had been done. The number was the important issue. The valuation, while it had draft on it, was the valuation. There may have been format changes or he may have put more in if I requested. But as far as I was concerned, I wasn't asking him for anything more. He had given me what I had been asked for. So, I wasn't overly concerned. If it was never requested, it was not going to be an issue to me.

14 Statement of Manager Land Acquisition, Brisbane City Council, dated 8 October 2012.

Advice from Independent Registered Valuer

I obtained advice from an independent registered valuer concerning a range of issues relating to the valuation obtained by the Council in respect of Lots 3, 4 and 5. The purpose of obtaining the evidence was to assist me in assessing whether, in the circumstances, it was reasonable for the Council to rely on the valuation obtained in respect of Lots 3, 4 and 5.

My instructions to the independent valuer included copies of:

- the valuations for Lots 3, 4 and 5 and Lot 101
- the email dated 9 June 2011 from the Council's Project Manager requesting, from Council's City Design Planning and Sustainability Services, a 'Planning Assessment to establish highest and best use, for the purpose of informing land valuation'
- the advice provided to the Project Manager by Council's Principal Planner on 14 June 2011.

During the investigation I obtained from the Council information regarding all communications between the Council and the Council's valuer relating to the valuations for Lots 3, 4 and 5 and Lot 101 including communications both before the valuations were provided to the Council and after the valuations were provided. This included copies of all written communications and file notes regarding each oral communication. Where there was no file note relating to an oral communication, I obtained from the Council a signed statement by the Council officer detailing the contents of the discussion. This information was also included in my instructions to the independent valuer.

Noting that the Council had provided to its valuer a copy of the advice provided by Council's Principal Planner dated 14 June 2011 which reached a conclusion regarding the highest and best use, I asked the independent valuer the following questions:

- Is it usual/appropriate practice for a council to instruct a valuer as to the highest and best use for land when seeking an independent valuation?
- Having regard to accepted industry practice, who would usually determine the highest and best use for land being valued?

The independent valuer advised that it is the valuer's task to determine the economic highest and best use and said:

> From a valuation perspective highest and best use is as described in the general terms used in the provided valuation; *"--- the most profitable use of an asset which is physically possible, appropriately justified, legally permissible, financially feasible and which results in the highest and best use of the asset being valued."*
>
> It is commonly read as being an economic test with that assessment being the valuer's task based on appropriate information including, among other matters, town planning advice.

He advised:

> It is not appropriate for Council to instruct a valuer as to the economic highest and best use when seeking an independent valuation. However it is not apparent that this has either directly or inadvertently happened here.

He stated that reference to highest and best use in Council's planning advice is in a planning context and noted:

> Both the request and the response are authored by planners in a planning context with the conclusion that the Preliminary Approval provides the higher and better use. The advice does not suggest where the greater value lies, nor does it direct the valuer to only consider the Preliminary Approval scenario.

Noting that the highest and best use was considered to be for development as residential apartment towers despite Mirvac's determination in early 2011 that it was no longer viable for Mirvac to proceed with the rest of the development, I asked the independent valuer:

- Was the highest and best use for lots 3, 4 and 5 for the purposes of the valuation dated 19 June 2011 correctly assessed?

The independent valuer advised that the valuation of Lots 3, 4 and 5 correctly assessed the highest and best use. He advised:

> From a valuation perspective the highest and best use is the one which gives the land its greatest value. Accordingly the choice here is a value attached to the certainty of the existing Preliminary Approval compared with a value based on the limited uses permitted within the Community Use classification and/or the uncertain outcome of a new development application. That application would be considered against City Plan 2000 and the January flood event.
>
> The value in the absence of the Preliminary Approval will be quite low. Although an assessment with the Preliminary Approval is problematic that approval at least provides some certainty for the properties' development prospects.
>
> Whereas the definition quoted above includes the term *"financially feasible"* this is not to be read in the context of the feasibility of immediate development. Purchasers commonly acquire property for future development. It is the price paid in anticipation of that future development which has to be feasible, not necessarily the immediate development itself.
>
> Given the riverfront position and the opportunity to proceed with a modified design (within the Preliminary Approval constraints) it is an appropriate conclusion that the value with the approval is greater than without. Accordingly the highest and best use is as described in the valuation report.

In my instructions to the independent valuer I noted that the only comparable sales considered in the valuation were pre-flood (as there were no post-flood comparable sales to consider at the time) and there did not appear to be any discounting of value due to the fact that the property was affected by flood.

I also noted the final paragraph on page 14 of the valuation for Lots 3, 4 and 5 which stated:

> Searches using PDS live have not revealed sales evidence of similar sites to determine if the flood will have an impact on value. We reserve the right to alter our valuation and the advices contained therein if sales evidence of flood affected residential development sites with similar potential to the subject property become available. It may become apparent from sales evidence that the flood may have an impact on valuations.

I further asked the independent valuer:

- Could it be reasonably expected that the January 2011 flood event, which inundated Lots 3, 4 and 5, would affect their value as assessed in June 2011?
- On the face of the valuation for lots 3, 4 and 5 dated 19 June 2011, was the January 2011 flood event appropriately taken into account?

The independent valuer advised:

> It is inevitable that the January 2011 flood adversely affected the value of these three development sites.
>
> …….
>
> At 9.1 metres the January 2011 flood was appreciably higher than the approved design levels.
>
> Although the Preliminary Approval overrides the Planning Scheme and the development is apparently not compelled to adhere to the post January 2011 flood level, for all practical purposes redesign was needed to properly accommodate flood impacts. That redesign would be addressed as part of the final approval process for each of the remaining apartment towers.
>
> ……
>
> The land value will be reduced by at least the combination of additional construction costs, the probable loss of saleable floor area and the stigma of the January flood.

In relation to whether the January 2011 flood event was appropriately taken into account, he advised:

> On the face of the document it is evident the January flood has been taken into account; whether appropriately taken into account is a matter of judgment rather than precision.

The independent valuer, in his advice, considered various statements in the valuation regarding the flood and its impacts and noted:

> The valuation acknowledges the flood, its depth at these sites, Council's adoption of the TLPI [temporary local planning instrument] and possible impacts. It also acknowledges the absence of evidence demonstrating post flood values for such development sites.

With regard to the final paragraph on page 14, the independent valuer advised:

> Whereas the flood event is readily acknowledged in the valuation and the sought opportunity to alter the valuation if further evidence becomes available need be nothing more than an opportunity to further refine a judgment already made, the final sentence implies uncertainty in respect of the flood having any impact.

While the independent valuer was not asked to independently assess the value of these properties, he gave some consideration to the assessed value of Lots 3, 4 and 5 compared to the value, since June 2011, of other flooded unit development sites closer to the city in terms of price per square metre of gross floor area. He commented that the price paid for Lots 3, 4 and 5 was materially less than values elsewhere.

The independent valuer concluded:

> In the circumstances here a valuer is required to apply professional judgment to accommodate an impact which has not yet been quantified by market sales. On the information available on the face of the report, the flood event was properly recognised and, on balance, was most likely accommodated, but to an unstated extent in the assessed value.

6.2.2 Analysis

I note that the opportunity to purchase the land and develop the parkland was marketed to the wider Council and the community as an excellent opportunity to acquire desirable property taking advantage of a depressed market and a drop in value as a result of the floods. There were, however, allegations made that the Council paid an inflated price for the land and that the land was valued on a pre-flood basis.

While there appears to have been confusion among some Council officers as to whether the valuation was to be prepared on a pre-flood or post-flood basis, the officer providing instructions to the valuer clearly understood that the valuation was to be as at June 2011 which necessarily would need to take into account the impacts of the January 2011 flood as this had occurred prior to that time.

Having regard to the advice from the independent valuer that:

- instructions to the Council's valuer were appropriate in terms of advice regarding the highest and best use
- the valuation correctly assessed the highest and best use
- the flood event was properly recognised and, on balance, was most likely accommodated in the assessed value,

I conclude that it was reasonable for the Council to rely on the valuation it obtained in respect of Lots 3, 4 and 5.

Upon receipt of the valuation, the Council advised Mirvac that it would pay a total of $9 million plus GST for the land despite its initial letter to Mirvac dated 2 June 2011 advising:

> In respect of the land: *The anticipated purchase price payable at settlement is $6m subject to receipt by Council of a valuation supporting that price.*

It is noted that the agreement was subject to approval by Mirvac's board and, according to the CEO, the valuation was discoverable by Mirvac. It does not appear on the face of the documented transaction negotiations that the Council was required to inform Mirvac of the outcome of its valuations. However, I am not able to comment on the commercial realities of the negotiations, including what the Mirvac board would have ultimately accepted.

The focus of my investigation in relation to the land is whether the Council took reasonable steps to achieve value for money. The price paid for the land was based on the valuation and as such there is no evidence that the Council paid more than current market value.

It is outside of the scope of my investigation to consider whether, if the negotiations had been conducted in a different way, the Council could have achieved a better outcome. Any consideration of this issue would have been by its very nature largely speculative.

I therefore conclude that in obtaining an independent valuation and relying on that independent valuation to purchase the land for $9 million plus GST, the Council did take reasonable steps to achieve value for money in respect of the purchase of the land.

Opinion 2

The Council took reasonable steps to achieve value for money in respect of the purchase of the land.

I note that the Council proceeded to enter into the contract for the purchase of the land and settle the contract on 30 June 2011 on the basis of a draft valuation for Lots 3, 4 and 5. The final valuation was not obtained until 19 October 2011, almost four months after settlement.

I also note that the submission to the E&C Committee referred to an independent valuation being for $9 million. The submission did not indicate that the independent valuation was only in draft form and in this regard was not entirely accurate. The E&C Committee approved the purchase of the land on the basis of the submission provided.

It is fortunate in this case that the final valuation was for the same amount as the draft valuation. The Council should ensure in future transactions that when relying on a valuation to enter into a contract, that it has a final valuation rather than a draft valuation.

6.3 Parkland works

6.3.1 Evidence

The submission to the Council's E&C Committee dated 21 June 2011 seeking approval for the transactions provided a list of terms of engagement with Mirvac aimed at ensuring that value for money was achieved by the Council for the parkland works. The list contained the following:

- develop the Design and Specification for the parkland at its own expense for approval by Council
- construct the parkland in accordance with Council approved Design and Specification
- subject to any variations requested by the Council, Mirvac will be paid no greater than $15 million by Council for the delivery of the parkland works and the transfer of the land
- any costs of delivery of the works in excess of the $15 million figure will be the responsibility of Mirvac unless Council agrees to the contrary
- Mirvac will not be entitled to claim any profit margin for its involvement in, or construction of, the parkland works
- Council will not be liable for the costs of removal of contamination, latent conditions and delay costs to the extent caused or contributed to by Council

- Council will only be liable for variation claims where it has previously expressly approved such variation
- Council will engage its own superintendent and independent verifier to check the parkland works as they are undertaken
- Mirvac agrees to a 12 month liability period and maintenance at its own cost for a period of 12 months from the date of practical completion
- Mirvac is responsible for obtaining all necessary approvals for the parkland works, lease and transfer of land at Mirvac's expense
- Mirvac is to allow full access to its financial and project accounts relating to the parkland works for the purposes of audit and verification of payment claims
- Mirvac will not procure any or engage subcontractors except as authorised by Council.

The amount allowed for the parkland works was originally $9 million.[15] A draft head agreement[16] said that under no circumstances were the construction contract costs to Council to exceed $9 million. The amount allowed for the parkland works was reduced to $6 million following Council's receipt of the valuations for the land on 22 June 2011. The effect of this was that the total amount payable for the land and parkland works remained at $15 million.

It is not clear from the Council's files the extent to which cost estimates for the parkland works had been prepared prior to the receipt of the valuations although it is clear that intensive negotiations concerning contract conditions continued up until 30 June 2011 when the contracts were signed by the parties.

The contract for the parkland works was signed by the parties on 30 June 2011. The Form of Formal Instrument of Agreement included the following:

- General conditions of contract for design and construct (main contract)
- Master Plan
- Preliminary Design (return brief)
- Scope of Works
- Terms of Reference
- Draft Cost Plan.

The Draft Cost Plan is a three page document breaking down each item of work to be undertaken for the project and assigning to it a cost. The Draft Cost Plan comes to a total of $5,593,323.

Clauses 9.6, 9.7, 9.8 and 44 of the contract are the most relevant in terms of value for money.

Under clauses 9.6, 9.7 and 9.8, as part of the design phase, costs estimates are to be prepared by Mirvac which include all costs to carry out the works on a subcontractor and supplier basis and shall include all of Mirvac's costs but shall not include profit. The contract sum must not exceed $6 million unless approved by Council. Upon receipt of the design documents from Mirvac, the Council is to obtain an independent cost assessment of the design documents. Once agreement is reached as to the design documents and the cost estimate, the cost estimate will be the revised contract sum and will be used for the purposes of calculating further cost savings under clause 44.

Pursuant to clause 44, at the end of each stage, costs savings, which are the difference between the revised contract sum for the work and the actual cost, are to be calculated and split equally between Mirvac and Council.

15 Council's letter to Mirvac dated 2 June 2011 setting out the initial terms of the agreement and endorsed by Mirvac on 3 June 2011 as being approved.

16 The parties later agreed that the Head Agreement was not required and they would proceed straight to contract.

6.3.2 Analysis

The reduction of the price for the parkland works from $9 million to $6 million (following receipt of the valuation), with the effect that the total purchase price remained $15 million, was one of the issues in relation to the transactions that raised questions in the public arena. The issue I considered in the investigation was whether the Council took reasonable steps to achieve value for money in respect of the design and construction of the parkland. Any consideration regarding whether, for the same overall cost, a $9 million parkland development could have been achieved rather than a $6 million parkland development (if the breakdown of the figures had not been changed following receipt of the valuation) would be purely speculative and dependent on an understanding of matters not ascertainable in the investigation (such as the commercial consideration of Mirvac and its Board).

In considering whether the Council took reasonable steps to achieve value for money in respect of the design and construction of the parkland, I have had particular regard to:

- Clause 9.8 of the contract for the parkland works which requires that, upon receipt of the design document, the Council obtain an independent cost assessment of the design documents which then forms the basis for an agreement between the Council and Mirvac as to the amount payable.
- Clause 44 of the contract for the parkland works which allows for amounts saved (the difference between the amount agreed by the parties as being payable and the actual cost) to be split evenly between the Council and Mirvac thus providing incentive for further cost savings.

As the terms of the contract allow for costs to be independently assessed and there is scope for further savings from that point, I am satisfied that the Council has taken reasonable steps to achieve value for money in respect of the design and construction of the parkland.

Opinion 3

The Council took reasonable steps to achieve value for money in respect of the design and construction of the parkland.

Having reviewed the transaction negotiations, I consider it possible that the questions which arose in the public arena regarding whether the Council had obtained value for money were contributed to by confusion caused by treating it as one transaction when it should have, for the purposes of assessing value for money, more appropriately been treated as two transactions, that is, one for the purchase of the land and one for the parkland works.

Chapter 7: Procurement and contracting for parkland works

7.1 Evidence

In considering the reasonableness of the Council's procurement and contracting processes for the design and construction of the parkland, the pivotal issue is whether there was a lawful and reasonable basis upon which the Council entered into a contract with Mirvac without undertaking a tender process.

Under sections 39E to 46F of the *City of Brisbane Act 1924* (repealed City of Brisbane Act), the Council was allowed to set its own procurement processes and procedures by the development of:

- an Annual Procurement Plan; and
- a Procurement Manual.

Section 42 required the Council to adopt, by resolution, a procurement plan for each of its financial years. The Annual Procurement and Disposal Plan for 2010-11 was adopted by the Council on 8 June 2010.

Section 46 required the Council to prepare a manual of procedures for how it carries out its procurement activities. SP101 Procurement Manual (Procurement Manual) was in place as at 1 July 2010.

When the repealed City of Brisbane Act was replaced by the *City of Brisbane Act 2010* on 1 July 2010, the Annual Procurement and Disposal Plan for 2010-11 and the Procurement Manual were preserved in operation under section 257 of the City of Brisbane Act.[17] These documents were therefore in operation at the time of the E&C Committee's decision in June 2011.

Section 1.2(c) of the Procurement Manual deals with sole and select tendering and lists the circumstances in which the supply of goods and services or the carrying out of works can be obtained from one provider or a restricted group of suppliers without public tenders. One of the permissible grounds is if it is in the public interest.[18]

The Council's E&C Committee has delegated authority to approve any procurement on the basis of a sole source (not through tender) on the basis that it is in the public interest.

The submission to the E&C Committee dated 21 June 2011 for approval to enter into a contract for parkland works with Mirvac 'without seeking competitive tenders from industry in accordance with s.1.2(c), Sole or Select Tendering, of the Procurement Manual pursuant to the *City of Brisbane Act 2010*' listed a range of reasons why directly entering into a contract with Mirvac for the parkland works would be in the public interest.

Some of the reasons set out in the submission included:

- the construction of the parkland works on the land by Mirvac was conditionally tied to the purchase of the land
- while there were a number of contractors in the Brisbane area with the capability of performing the parkland works required by the Council, it was considered that entering directly into a contract with Mirvac would be the most advantageous outcome for Council
- Mirvac had a strong reputational drive to develop the parkland in a manner which would enhance saleability of existing units and would keep faith with existing body corporate members
- the terms of engagement with Mirvac, which included that Mirvac would develop the design and specification for the parkland at its own expense for approval by Council

17 Section 257 says that a decision under the repealed City of Brisbane Act that was in force immediately before the commencement of this section continues in force as if the decision were made under the City of Brisbane Act, made at the same time as it was made under the repealed City of Brisbane Act.

18 See section 1.2(c)(i) of the Procurement Manual.

and that it would not be entitled to claim any profit margin in respect of the project, would ensure that value for money was achieved by Council for the parkland works.[19]

The submission was approved by the E&C Committee on 27 June 2011.

Communications between the Council and Mirvac reviewed during the investigation indicated that once the transactions had been agreed to in principle, each transaction was considered conditional upon the other/s proceeding. There was, however, no unequivocal documentary evidence produced to establish that, during the initial negotiation stage, Mirvac would not have agreed to the sale of the land without an agreement that it also undertake the parkland works.

This issue was the subject of discussion during recorded interviews with the Councillor and the CEO.

The Councillor advised '…Mirvac expressed that they would want to do the parkland component but it was not said to me, well not that I recall, that it was contingent necessarily'.

The CEO advised during interview that:

- During negotiations he suggested to Mirvac that the Council buy the land and put the parkland works out for tender and Mirvac said no.
- Mirvac expressed that they were particularly concerned to ensure that a high quality parkland was established on the land so that they could meet their obligations to residents of their existing development and the only way they could be confident of this being achieved is if they were contracted to undertake the parkland works.
- If the Council had purchased the land without a contract for Mirvac to undertake the parkland works, Mirvac could not have prevented the Council from onselling the land to another developer if the Council had wished to do so.

Section 181 of the *City of Brisbane (Finance, Plans and Reporting) Regulation 2010* requires the Council to publish relevant details of contracts over $100,000 on its website as soon as practicable after the contract is entered into. In accordance with section 181, the transactions were reported to Full Council on 16 August 2011 and recorded in the minutes for that meeting which were publicly released on the Council's website once confirmed by the Full Council.

7.2 Analysis

In determining whether to approve the entering of a contract with Mirvac for the construction of the parkland works without undertaking a tender process, the Council, through its delegate, considered whether to do so would be in the public interest.

In considering whether the Council's assessment of public interest was reasonable, I had particular regard to the following matters:

- The acquisition of riverfront land for use as parkland was considered by Council to be a highly desirable proposition and such land was not often available at a reasonable price. Although there is no unequivocal documentary evidence that Mirvac would not have agreed to the sale of the land without an agreement that it undertake the parkland works, I accept the CEO's evidence that Mirvac had advised him that this was the case. Accepting that this is the case, if Council had insisted on a tender process, Mirvac would not have agreed to the sale of the land and the opportunity would have been lost.
- Given the terms of the agreement with Mirvac regarding the construction of the parkland works, including that it would undertake the project without charging a profit margin, a contract with Mirvac contained benefits unlikely to be available through other suppliers should a tender process be undertaken.

19 Value for money for the parkland works is further discussed in Chapter 6.3 of this Report.

Having regard to these factors, I consider that it was reasonable for the Council to reach the conclusion that it was in the public interest to enter into the contract with Mirvac without undertaking a tender process.

Additionally, it is noted that the contract was approved by the E&C Committee in accordance with its delegation.

For these reasons, I consider that the Council's procurement and contracting processes for the design and construction of the parkland were reasonable.

Opinion 4

The Council's procurement and contracting processes for the design and construction of the parkland were reasonable.

Chapter 8: Application of Acceptable Request and Advice Guidelines

8.1 Evidence

Issues referred to me by the CMC included whether the Council's Acceptable Request Guidelines and Advice Guidelines (Guidelines) were complied with in relation to requests by councillors for information regarding the transactions for the purchase of the land and for the parkland works.

Particular attention was drawn to:

- comments by a councillor during a Council meeting following the public announcement of the transactions, that they had questions regarding the matter
- comments by a councillor during a Council meeting suggesting a request for information had been submitted and the information not provided.

As part of the investigation, I obtained from the Council a copy of:

- all requests made by councillors to the CEO of the Council for information in relation to the transactions
- all responses to requests made by councillors to the CEO for information in relation to the transactions including confirmation of the date the response was provided.

Eight requests for information were made by councillors in relation to the transactions; seven requests by one councillor and the remaining request by a second councillor.

In relation to comments by a councillor during a Council meeting following the public announcement of the transactions, that they had questions regarding the matter, the Council advised that no formal requests for information had been received from the councillor at the time the comments were made.

In relation to comments by a councillor during a Council meeting suggesting a request for information had been submitted and the information not provided, the Council advised that no formal requests for information were received at any time from that councillor in relation to the transactions.

During interview, the CEO advised:

- He does not have Council staff monitor 'Hansard' (Council's recording of meetings) for comments made by councillors in the Council chamber to the effect that they want particular information.
- There is a specific process for councillors to request information and this involves completing a form which requires them to specify the information they want.

The process for councillors to request information or advice is set out in the Acceptable Request Guidelines and in the Advice Guidelines. Requests for information and for advice, other than in relation to routine issues, are to be made in writing on the prescribed form and signed by the councillor.[20]

There are no timeframes set out in the Acceptable Request Guidelines for the provision of information in response to requests from councillors.

There are also no specific timeframes set out in the Advice Guidelines for the provision of advice in response to requests from councillors. Advice requested in relation to a routine issue specific to the requesting councillor's ward is, if the conditions in the Advice Guidelines are met, to be provided 'immediately or in an appropriate timeframe'.[21] For all other requests, the Committee Chairman considering the request is to respond in writing to the requesting councillor 'in a reasonable time frame at their sole discretion'.[22]

20 Section 2, paragraph 1 of the Acceptable Request Guidelines and section 1, paragraph 2 of the Advice Guidelines.
21 Section 2, paragraph 1a of the Advice Guidelines.
22 Section 2, paragraph 2c of the Advice Guidelines.

8.2 Analysis

The investigation reviewed the requests for information made by councillors and the responses provided and observed:

- There was one instance where all information requested was not provided in a reasonable timeframe. This resulted from a breakdown in communication within the Council. Once the councillor in question raised the matter again with the Council, the matter was rectified and the information provided.
- It took approximately six weeks for one response to be provided. The response was provided immediately once the councillor followed up.
- All other requests for information were responded to in a reasonable manner and within a reasonable timeframe, the majority being responded to within approximately one month.

Having regard to the above, I consider that the Council complied with the Guidelines.

Opinion 5

The Council correctly applied the Acceptable Request Guidelines and the Advice Guidelines in relation to requests received from councillors for information concerning the transactions.