

AUBURN PUBLIC INQUIRY

Before the Commissioner: Mr Richard Beasley SC
Counsel Assisting: Mr Paul Bolster
Officer Assisting: Mr Darren Sear

Held at the Civic Precinct Centre
1 Susan Street, Auburn NSW

On Wednesday, 1 June 2016 at 9.30am
(Day 2)

1 THE COMMISSIONER: Mr Bolster?

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3 MR BOLSTER: I understand Mr Cheshire has an application
4 to make?

5

6 MR CHESHIRE: Commissioner, I understand Mr Francis is the
7 first intended witness. May I hand up to you,
8 Commissioner, a matter that I wish to raise of some concern
9 to my client. You are about to get a copy of
10 an article from the Sydney Morning Herald website which
11 appeared to have been published yesterday at 4.12pm in
12 light of Mr Bolster's opening.

13

14 THE COMMISSIONER: I have not read it, so what is it?

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16 MR CHESHIRE: Commissioner, there are several matters of
17 concern that arise out of this. If I can take you through,
18 you will understand the flavour of what I have to say.

19

20 THE COMMISSIONER: Yes.

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22 MR CHESHIRE: First of all, you will see the headline,
23 "Auburn council: coloured pencils used to redraw zoning
24 protocols". Stopping there, I don't think it was ever
25 suggested that the use of coloured pencils was improper
26 and, indeed, there were several maps that were produced
27 that had colour on them. You will see then in the headline
28 "used to redraw zoning protocols". That was never
29 a suggestion, that there was an attempt to redraw overall
30 zoning protocols for this area. Individually, these may
31 seem like minor things.

32

33 THE COMMISSIONER: I don't know what a proper rezoning
34 protocol is.

35

36 MR CHESHIRE: I'm not sure what it is. In fact, as you
37 will recall from Mr Bolster's opening, there was simply
38 reference to zoning maps for one particular area.
39 "Protocols" suggests something broader that applies in some
40 broader sense and that was certainly not the suggestion.

41

42 Continuing to the body of the article, in the first
43 line:

44

45 *A staff member [not named at that stage,*
46 *subsequently Mr Francis] had home*
47 *renovations worth thousands of dollars paid*

1 *for by a sitting councillor ...*

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3 Omitting at that stage, in fact, the thousands was only
4 2,000. Then continuing:

5

6 *... whose apartment block he approved ...*

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8 That must mean Mr Francis:

9

10 *... despite allegations it was poorly*
11 *constructed ...*

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13 THE COMMISSIONER: That's not right.

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15 MR CHESHIRE: It is not right. There was never
16 a suggestion that he approved it with some knowledge that
17 it was poorly constructed.

18

19 THE COMMISSIONER: He has said in the private hearings
20 that he issued an occupation certificate in circumstances
21 that he says was an honest mistake --

22

23 MR CHESHIRE: Yes.

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25 THE COMMISSIONER: -- but didn't grant the development
26 approval for the block.

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28 MR CHESHIRE: Yes. And I think he said, in the private
29 hearing, that he never went to the property, but in any
30 event, certainly this is, in the light of Counsel
31 Assisting's opening, what I would describe as a complete
32 mischaracterisation and indeed untruths of what counsel
33 assisting actually said. It was certainly never suggested
34 that Mr Francis approved it with some knowledge of
35 "for construction".

36

37 Then one considers in the next paragraph:

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39 *Top Auburn Council planner Glenn*
40 *Francis ...*

41

42 And he is now named:

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44 *... also handed councillors coloured*
45 *pencils and invited them to redraw the*
46 *city's zoning protocols ...*

47

1 Again, there was no suggestion that it was something
2 broader than the particular map for the particular project.
3

4 Then one continues with two more paragraphs and we
5 then have, it is, and I accept, in the paragraph that
6 starts:

7
8 *But the most striking of the evidence of*
9 *the day came after it was revealed*
10 *Mr Francis alleged that cupboards in his*
11 *home to the value of about \$2000 were paid*
12 *for ...*
13

14 So now a figure is mentioned and that presumably is the
15 figure in the first paragraph which was "thousands of
16 dollars". That appears to be a calculated attempt to grab
17 the readers' attention in the first paragraph by reference
18 to "thousands of dollars" and the \$2,000 is buried further
19 down. Two paragraphs further on:

20
21 *Other tradesmen were paid by Mr Francis, in*
22 *cash, the inquiry was told.*
23

24 Paying somebody in cash, there's nothing wrong with that
25 and there was no suggestion in counsel assisting's opening
26 that there was anything improper. It appears to be, in the
27 context of this article, suggested as what I would
28 describe, Commissioner, as a hatchet job upon Mr Francis
29 and Mr Francis alone.
30

31 Then:

32
33 *Mr Francis, who reported the gift only this*
34 *year, is at the centre of an ongoing issue*
35 *relating to a building constructed by*
36 *a company owned by Mr Oueik ...*
37

38 Again, that shows he is being put at the centre of events
39 by this article in a way that I say is not consistent with
40 the way that it was opened by Counsel Assisting.
41

42 Then one sees, three paragraphs further down, again
43 "Mr Francis, now the executive manager", et cetera,
44 "Fairfax media has recently revealed", then, "The inquiry
45 was told files relating to this approval, including
46 a letter referring to it, had 'been removed from council's
47 records.'" And then, "Mr Francis was at the centre of

1 another planning matter ...".

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Although it doesn't suggest it explicitly, it was Mr Francis who had removed the files and Counsel Assisting never suggested that. First of all, the repetition of Mr Francis's name and then the proximity of the allegation about files being removed or a letter being removed from council's records with Mr Francis's name at the beginning of the next paragraph, in reference to him being at the centre of another planning matter, would leave, in my submission, the reader under some impression that it was Mr Francis that was being suggested removed that letter.

Then it continues:

Mr Francis was at the centre of another planning matter ...

So again, he is being put front and centre and this is in relation to Berala and what is then suggested in the following paragraph is:

Council initially recommended that height limits in the area not be changed. But one year later, Mr Francis took councillors on a 'retreat' ...

That was never suggested. It is not the evidence that it was Mr Francis's retreat where he took councillors:

... where the project was considered anew.

Suggesting that he was the impetus to change the project is also wrong, on the evidence. Council had made a recommendation that there should be rezoning and this was a retreat to consider that matter. Then the repetition about the coloured pencils and a map, being asked to colour in the way the area should be zoned, as if there is something wrong in this exercise when clearly there isn't, and then in the paragraph referring to Mr May, council's new administrator, Mr May, recording his evidence, "advised by council staff to cancel a number of projects ... He said staff seemed to have previously been concerned with 'appeasing' counsellors." I accept that is a proper recording of what he said, but in the context of this article, it adds to, in my submission, what is an unfair hatchet job upon Mr Francis.

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Then:

Mr Bolster said both Mr Francis and the council's former general manager Mark Brisby made trips to Mr Oueik's home to admire his renovations.

One can see the implication in that there is something wrong with visiting a property to look at Mr Oueik's recommendations. In my submission, the use of the word "admire" is to suggest that the reader should not believe that that is in fact what was going on. As I say, individually, it can be explained with some of those comments that perhaps they might be innocuous, but overall, in my submission, this gives an impression that Mr Francis is at the centre of this inquiry and is at the centre of every single piece of wrongdoing that has been alleged and, indeed, not alleged, and this article, as I say, contains at the very least misrepresentations of what counsel assisting said. In my submission, it also includes outright untruths about what Mr Bolster said and indeed what is the evidence.

First of all, I say in the context where Mr Bolster opened on the basis that Mr Francis was going to be giving evidence today, a misrepresentation of evidence in relation to a witness, where a witness is due to give evidence the next day, can and, indeed, in my submission, could be construed as a contempt of court, or contempt of the Commission, as an attempt, whether deliberate or not, but certainly likely to have the effect of intimidating a witness who is about to give evidence the next day.

Commissioner, I don't make an application in that regard in relation to the contempt because for any number of reasons, cost and also it not being Mr Francis's battle in relation to that, because I see it as a contempt of this Commission rather than a contempt in relation to Mr Francis, but, Commissioner, it has had an effect. It has had a significant effect upon Mr Francis in the way that he and, indeed, his legal team perceive the way in which this inquiry is to proceed.

Whilst I say that, clearly, it is not the press that run this inquiry, it is you, Commissioner, and counsel assisting, but the perception of the way in which

1 Mr Francis is being perceived is relevant, in my
2 submission, to his concerns as to future action that may be
3 taken against him.

4

5 THE COMMISSIONER: Can I offer some help?

6

7 MR CHESHIRE: Yes, Commissioner.

8

9 THE COMMISSIONER: I am perfectly happy to say that
10 counsel assisting did not at any stage open by making
11 an assertion that Mr Francis approved the apartment block
12 at Water Street, he didn't do that, and there was no
13 allegation to him that it was poorly constructed such that
14 the roof blew off.

15

16 Mr Francis's role was limited to his role in the final
17 occupation certificate going out, at which time I am not
18 aware and counsel assisting certainly didn't open that
19 there were any allegations about the building being poorly
20 constructed or the roof being poorly constructed.

21

22 As to the rest of the article, I hear your criticisms.
23 It is probably better that I don't say anything about it.
24 Mr Francis obviously has his own rights in relation to the
25 article.

26

27 MR CHESHIRE: Yes, he does.

28

29 THE COMMISSIONER: That part is glaringly wrong.

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31 MR CHESHIRE: Yes, and taking them on the retreat as well,
32 in my submission, is glaringly wrong.

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34 THE COMMISSIONER: You're right, I don't think
35 counsel assisting opened by suggesting that it was
36 Mr Francis that took the councillors on a retreat and I'm
37 sure he didn't pay for it.

38

39 MR CHESHIRE: Commissioner, apart from drawing this to
40 your attention because, in my submission, I should do so,
41 Mr Francis, as you will be aware, cooperated in a private
42 inquiry.

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44 THE COMMISSIONER: Yes.

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46 MR CHESHIRE: And has also volunteered a statement that
47 addresses all the matters that he was asked by counsel

1 assisting, or attempted to address all of the issues that
2 counsel assisting asked to be addressed and therefore he
3 has assisted, as it were, the dialogue between himself and
4 the Commission.

5
6 His concern, though, is the broader perception and
7 therefore, the potentially broader consequences for him.
8 Whilst matters were apparently more confined, he was happy
9 to answer criticisms and he has done so in his private
10 inquiry and in one sense he said all that there is to be
11 said, which is what I say and "I didn't do anything wrong",
12 but given the way that counsel's opening has been
13 perceived, he now has a concern not only that this will be
14 repeated in the press, but also that this perception can be
15 received in the broader community, this is a perception
16 that can be received by prosecutorial bodies.

17
18 In the light of that and the fact that this is not
19 simply, as it were, repeating what he perceived to be the
20 real issues against him but much broader issues, putting
21 him at the centre of apparently every aspect of
22 counsel assisting's opening, he now wishes to claim the
23 privilege against self-incrimination in respect of all of
24 his evidence relating to these matters.

25
26 THE COMMISSIONER: I think in relation to that,
27 Mr Cheshire, we will just have to deal with it on
28 a question by question basis. I don't know that it is
29 proper to put some sort of global claim for privilege
30 against self-incrimination. If there is a specific
31 question which you say, answering it, would potentially
32 expose your client to a criminal charge, you can make the
33 objection there, and we know what provisions of the
34 Royal Commissions Act apply and don't apply which enables
35 your client to object to a question on the basis of having
36 some form of reasonable excuse, but I think it will have to
37 be dealt with on a question by question basis.

38
39 I understand your complaints about this
40 article completely, at least in relation to the areas
41 I addressed; that is, the assertion that he approved this
42 apartment block despite allegations that it was poorly
43 constructed and that he was taking councillors away on
44 a retreat. They are quite clearly not what counsel
45 assisting said, when he opened, as assertions of fact and
46 my understanding is they're just not correct.

47

1 MR CHESHIRE: Yes.

2

3 THE COMMISSIONER: I understand your client's
4 sensitivities, because of this article, completely, but
5 I think for claims in relation to protecting against
6 self-incrimination, it is best to deal with it on
7 a question by question basis.

8

9 MR CHESHIRE: On that issue, Commissioner, the problem
10 with that approach, whilst I understand it, is the
11 privilege applies not just to a direct incrimination but
12 also to an indirect or derivative self-incrimination. In
13 other words, if there is something that could build up
14 a picture that could lead to a conclusion of wrongdoing
15 then that is something against which he is entitled to
16 claim the privilege. The problem with this article and,
17 therefore, with any question is in one sense it's difficult
18 to see quite where the next attack is going to come from.

19

20 The way that it has been perceived is Mr Francis is at
21 the centre of everything upon which counsel assisting
22 opened and therefore any question that goes to any of those
23 issues is something that, in my submission, he would have a
24 reasonable apprehension that that can be used to form
25 a derivative or indirect building up of a picture against
26 him.

27

28 THE COMMISSIONER: I understand that submission. I will
29 still rule that we will deal with it question by question
30 and if there is a particular question that your client
31 considers that he has a reasonable excuse for not
32 answering, I will rule on it as to whether there is some
33 real risk that it could expose him to a particular charge.
34 I will not deal with it on a global basis.

35

36 MR CHESHIRE: As it please, Commissioner. But if I simply
37 warn you - I don't say this in terrorem - to try to avoid
38 irritating you, if I do it, it may well be at a very early
39 stage of the questioning.

40

41 THE COMMISSIONER: Thank you.

42

43 MR WHEELHOUSE: Could I just say something in relation to
44 that?

45

46 THE COMMISSIONER: Yes.

47

1 MR WHEELHOUSE: If your Honour goes to the
2 Royal Commissions Act, the relevant sections, commencing at
3 sections 7 and 17.

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5 THE COMMISSIONER: Section 17 I don't think applies here.

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7 MR WHEELHOUSE: Commissioner, there is also an indication
8 of sections of the Evidence Act of New South Wales which
9 also applies because they are adopted into this Commission
10 by reason of --

11
12 THE COMMISSIONER: I am sorry, section 17 doesn't apply,
13 is what I said. It doesn't apply to a public inquiry.
14 Division 2 of Part 2 of the Act doesn't apply. If you look
15 at section 438U of the Local Government Act, those parts of
16 the Royal Commissions Act don't apply here.

17
18 MR WHEELHOUSE: Yes. Commissioner, what happens by reason
19 of those sections in the Local Government Act is what is
20 important to the hearing is the claim for privilege that
21 applies in relation to any evidence given in court.

22
23 THE COMMISSIONER: What privilege?

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25 MR WHEELHOUSE: Privilege against incrimination that would
26 be provided under section 128 of the Evidence Act.
27 Commissioner, that would permit you to make a blanket
28 ruling rather than question by question, because if we do
29 it on a question by question basis it will --

30
31 THE COMMISSIONER: I am sorry, you are saying that I have
32 the power to make an order, some form of order, against --

33
34 MR WHEELHOUSE: At least in relation to, for example, that
35 topic or group of questions, rather than question by
36 question.

37
38 THE COMMISSIONER: Where do I get that power from?

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40 MR WHEELHOUSE: I am sorry, I didn't come prepared for the
41 discussion this morning, so I will need to retreat and do
42 that properly.

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44 THE COMMISSIONER: That wasn't my understanding when
45 I looked at the Act. Section 17 of the Royal Commissions
46 Act - I might have to turn this up while we are dealing
47 with this. Section 17 says:

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(1) A witness summoned to attend or appear before the commission shall not be excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate ... the witness ...

That section doesn't apply to this public inquiry because section 438U(4) of the Local Government Act says:

(4) The provisions of the Royal Commissions Act ... (section 13 and Division 2 of Part 2 excepted), apply ...

Section 17 is in Division 2 of Part 2. The fallback is section 11 and this does apply here:

A witness summoned to attend or appearing before the commission shall not be entitled ...

Et cetera, et cetera.

MR CHESHIRE: Commissioner, section 128 does - I think Mr Wheelhouse has this in mind:

(1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to ...

THE COMMISSIONER: I am sorry, is this section 128 of the Evidence Act?

MR CHESHIRE: Yes.

THE COMMISSIONER: How does the Evidence Act apply?

MR CHESHIRE: I think that is what Mr Wheelhouse was attempting to pray in aid.

THE COMMISSIONER: We are not court, so I didn't see how section 128 could apply.

MR CHESHIRE: I have to say I had approached it on the basis of common law, but, in my submission, even at common

1 law --

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3 THE COMMISSIONER: Yes, at common law. That applies to
4 a court, though, doesn't it. Does it apply to an inquiry
5 like this?

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7 MR CHESHIRE: Is your question directed at the
8 Evidence Act or directed at the privilege?

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10 THE COMMISSIONER: First of all, the Evidence Act, I don't
11 see that the Evidence Act applies.

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13 MR WHEELHOUSE: Commissioner, my point was that section 11
14 subsection (3) of the Royal Commissions Act gave to all
15 witnesses summoned the same protection as they would have
16 in any civil or criminal proceedings as a case tried in the
17 Supreme Court. Such a person would have the benefit of
18 their privilege contained in the Evidence Act, section 128,
19 Commissioner. In that case, it would be open to the
20 witness to say, "I claim privilege afforded to me by the
21 Evidence Act in respect of this particular branch of
22 evidence", rather than taking a privilege point on every
23 particular question.

24

25 In any event, it is also open to the witness to say
26 that he gives his evidence not voluntarily and under
27 compulsion which, again, would have the effect of it being
28 inadmissible, with respect.

29

30 THE COMMISSIONER: I can't give a certificate under
31 section 128 of the Evidence Act. How do I do that?

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33 MR CHESHIRE: I don't think you can.

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35 MR BOLSTER: Commissioner, I looked at this matter
36 earlier. It would seem to me to be on the basis that the
37 Chapter 2 Division 2 powers which expressly contemplate
38 that very fact have been excluded.

39

40 THE COMMISSIONER: Yes, that's right.

41

42 MR BOLSTER: All that the legislature is saying in
43 section 11 is what it says and that there is no picking
44 up --

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46 THE COMMISSIONER: Section 11 says that you have to answer
47 a question and subsection (2) then says that it is not

1 compulsory if you have a reasonable excuse. Now,
2 a reasonable excuse might be that answering the question
3 might tend to incriminate you for a charge.

4
5 MR BOLSTER: That is excluded.

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7 MR WHEELHOUSE: The section actually says a reasonable
8 excuse is not a claim of privilege.

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10 THE COMMISSIONER: Where does it say that, sorry?

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12 MR BOLSTER: It is not even there. That is only in
13 Division 2, isn't it, that it's got --

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15 MR WHEELHOUSE: Rezoning in Division 2..

16
17 MR BOLSTER: It is a reasonable excuse and I think that is
18 where the field is.

19
20 THE COMMISSIONER: The way I have read this is that
21 because Division 2, part 2, is excluded, a witness before
22 this kind of public inquiry can say, "I've got a reasonable
23 excuse for not answering that question and the reasonable
24 excuse is I think the answer to it might tend to
25 incriminate me, or expose me to a criminal charge".

26
27 MR CHESHIRE: Yes.

28
29 THE COMMISSIONER: If I am satisfied of that, there is
30 an onus on the person refusing to answer to satisfy me of
31 that, I might rule that is a reasonable excuse and you
32 don't have to answer.

33
34 MR CHESHIRE: I think everybody may be in furious
35 agreement whether it is via section 11 or the exclusion of
36 section 17.

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38 THE COMMISSIONER: Or a combination of both.

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40 MR CHESHIRE: Or a combination of both, there is privilege
41 against self-incrimination, so that's the starting point.

42
43 THE COMMISSIONER: Where I am confused is how I could deal
44 with it the way that Mr Wheelhouse was suggesting, by
45 giving some sort of protection. Can I?

46
47 MR CHESHIRE: I think you can because the privilege

1 against self-incrimination is not defined as being
2 a privilege against self-incrimination for a particular
3 question. It is defined as a privilege against
4 self-incrimination and what other part of it, for instance,
5 is the right to silence where a person can say, "I'm not
6 answering any questions", it doesn't just have to be on
7 a question by question basis.
8

9 There is some, albeit the Evidence Act may not apply,
10 guidance, in my submission, that can be gained from the
11 Evidence Act.
12

13 I just pulled up the commentaries of section 128 in
14 Odgers and that does refer to the certificate can be given,
15 not just for each question but may be given in respect of
16 all of the evidence on a particular matter or topic.
17

18 In my submission, if nothing else, you have the
19 ability to rule in any way that you see fit as long as it
20 is in accordance with your overriding duties and the
21 conduct of this inquiry. Therefore, in my submission,
22 there would be no reason or bar upon you making such
23 a ruling. As to whether you will is another matter.
24 I understood that you were declining me in the exercise of
25 your discretion rather than as an absolute rule.
26

27 THE COMMISSIONER: No.
28

29 MR CHESHIRE: But in my submission, by analogy, if nothing
30 else, with section 128 and the commentary which allows you
31 to make such rulings, if you were doing it by the
32 Evidence Act or by analogy, you would have that ability,
33 and bearing in mind that you are not governed by rules of
34 procedure that say you must do it in accordance with the
35 Evidence Act or in some other way --
36

37 THE COMMISSIONER: Are you saying I can adopt my own
38 procedure --
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40 MR CHESHIRE: Absolutely.
41

42 THE COMMISSIONER: -- and decide to grant people, such as
43 your client, a protection against incrimination?
44

45 MR CHESHIRE: Yes, in relation to a particular issue to
46 avoid precisely what I had, as it were, anticipated or
47 warned, which is me having to jump up for every question

1 and saying, "Well, I'm not quite sure where this is going
2 but it may be part of a mosaic", and if you are with me in
3 relation to a particular topic, that any question on that
4 topic may tend to incriminate Mr Francis, then I say
5 Commissioner, you, (a), could and, (b), would, as it were,
6 accede to that claim in respect of a particular topic.

7
8 THE COMMISSIONER: Do you have a form of wording that you
9 would like me to consider or would you like some time to
10 formulate that? I would like to give Counsel Assisting
11 some time to consider what you are putting as well, given
12 it is only recent, this morning.

13
14 MR CHESHIRE: I will give that some thought, but, in a
15 sense, if I make a claim on Mr Francis' behalf, if you
16 accept that claim, then that --

17
18 THE COMMISSIONER: If I accept what claim, though?

19
20 MR CHESHIRE: The claim for privilege against
21 self-incrimination which I claim in respect of any
22 questions that may be now asked in this Commission about
23 the topics upon which Counsel Assisting has opened. If you
24 accept that, then that would be an end of the matter. You
25 don't need to make a formal direction or ruling other than
26 to accede to that claim.

27
28 THE COMMISSIONER: Why don't I adjourn for 20 minutes,
29 though, to let you make sure you have formulated it the way
30 you want to, and also to have a discussion with
31 Counsel Assisting, and then we will come back and deal with
32 it then. I just want to give Counsel Assisting a chance to
33 put a submission to me about what you have been suggesting.
34 I don't think he has had a chance to fully consider it. We
35 might adjourn to --

36
37 MR WHEELHOUSE: Commissioner, might I just say one
38 additional thing?

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40 THE COMMISSIONER: Yes, that's all right.

41
42 Mr Wheelhouse: In my submission, it is very important to
43 get this direction sorted out earlier.

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45 THE COMMISSIONER: Yes.

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47 MR WHEELHOUSE: Commissioner, for section 11

1 subsection (3) of the Royal Commissions Act to have any
2 meaning in the context of that legislation, you should read
3 it with a purposive approach; that is to say the
4 legislators, when enacting this section, could not have
5 intended the section to have no effect because the
6 certificate could only be given by a Supreme Court judge
7 under section 128 of the Evidence Act. In my respectful
8 submission --

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10 THE COMMISSIONER: You are saying where it says

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12 *A witness summoned to attend or appear*
13 *before the commission --*

14

15 In this case the inquiry:

16

17 *-- shall have the same protection ...*

18

19 I will leave out the rest of the words:

20

21 *... as a witness in any case tried in the*
22 *Supreme Court.*

23

24 That includes some form of protection in relation to
25 self-incrimination?

26

27 MR WHEELHOUSE: What I am submitting is if one looks at
28 the protection a witness has in the Supreme Court, one gets
29 guidance from section 128 of the Evidence Act. It sets out
30 a procedure for protecting a witness against
31 self-incrimination. So what, in my respectful submission,
32 reasonably section 3 is to adopt the procedure specified
33 in section 128 but adapting it for the purposes of this
34 Commission and we should deal with it in that way, but that
35 is the point of it, in my respectful submission, to meeting
36 this line of protection.

37

38 THE COMMISSIONER: What do I make of the fact, though,
39 that section 17 of the Royal Commissions Act has been left
40 out of these inquiries?

41

42 MR WHEELHOUSE: Because section 11(3) probably provides a
43 a mechanism to deal with --

44

45 THE COMMISSIONER: To deal with the same?

46

47 MR WHEELHOUSE: Yes. There are two things to be said in

1 relation to that.

2

3 The first thing is, in my respectful submission, it is
4 reasonably open for a witness to say that he does not give
5 or she does not give her evidence voluntarily or under
6 compulsion and, thus, leaving that material to be
7 inadmissible in any subsequent civil or criminal
8 proceedings. In my respectful submission, you,
9 Commissioner, should adopt that procedure in addition to
10 the protection provided --

11

12 THE COMMISSIONER: Your preference is for me to adopt
13 a procedure that somehow mirrors section 128 of the
14 Evidence Act?

15

16 MR WHEELHOUSE: That is the preferred course because it
17 has, in my respectful submission, a sound legislative
18 basis, whereas the other procedure may be seen to be you,
19 Commissioner, adapting procedures for the purposes only of
20 this Commission and that may be subject to some attack
21 elsewhere.

22

23 The sounder basis is the former basis, but, in my
24 respectful submission, it is also open to a witness to
25 claim - giving evidence involuntarily and, thus, render the
26 material being so given inadmissible in civil or criminal
27 proceedings.

28

29 THE COMMISSIONER: It doesn't obviously directly affect
30 your client today, but thank you for raising it anyway.

31

32 MR WHEELHOUSE: We would appreciate knowing the ground
33 rules though, Commissioner.

34

35 THE COMMISSIONER: That's right, yes. Let's adjourn now.
36 We will adjourn for 20 minutes to 10.25 for Mr Cheshire to
37 think further about it and also to have a discussion with
38 Counsel Assisting.

39

40 **SHORT ADJOURNMENT**

41

42 MR CHESHIRE: Commissioner, it may assist if I perhaps try
43 at least to state my thoughts.

44

45 THE COMMISSIONER: Yes.

46

47 MR CHESHIRE: Of the Royal Commissions Act, sections 11

1 and 17 clearly do different things.

2

3 THE COMMISSIONER: Yes.

4

5 MR CHESHIRE: Section 17 appears to commence at the time
6 when a party makes some objection and that, therefore,
7 would override their objection.

8

9 THE COMMISSIONER: Yes.

10

11 MR CHESHIRE: And section 17 --

12

13 THE COMMISSIONER: And that would allow me, if that
14 applied, I could compel them to answer.

15

16 MR CHESHIRE: Yes. But then also the witness would have
17 the protection of it not being admissible against him. So
18 that deals with that eventuality.

19

20 THE COMMISSIONER: So we are missing that, section 11.

21

22 MR CHESHIRE: We are missing that. Perhaps that is found
23 in the High Court's decision in the text which says you
24 need an express exclusion. That clearly is the sort of
25 express exclusion of the privilege. If you go back to 11 -
26 and I think as I said before there are several ways to get
27 to this - whether 11(2)(a) which maintains a reasonable
28 excuse --

29

30 THE COMMISSIONER: In other words, if someone has
31 a reasonable excuse, I can't compel them.

32

33 MR CHESHIRE: Yes, correct. I say self-incrimination
34 either comes in under 11(2)(a) or 11(3), because a witness
35 in the Supreme Court would be entitled at least to make the
36 claim for privilege against self-incrimination, and the
37 reason why I say that is because section 128 of the
38 Evidence Act is not an abrogation of the privilege. It is
39 rather like section 17, it allows the court to override it
40 but only in certain circumstances. In other words, the
41 privilege even in the Supreme Court is still there, albeit
42 it can be overruled.

43

44 That also would be another way to pick up the
45 privilege in 11(3) and also, I would say, the common
46 law - I don't think I need to, but if I need to maintain
47 that as if I have the three limbs --

1
2 THE COMMISSIONER: I read "reasonable excuse" as including
3 if I am satisfied that it exposes someone to a risk of
4 a criminal charge of prosecution, that that falls within
5 what "reasonable excuse" means.

6
7 MR CHESHIRE: Then when one looks at 11(3) - and,
8 Commissioner, you asked me about the procedure - it is
9 important to recognise 11(3) says:

10
11 *A witness summoned ... shall have the same*
12 *protection ... as a witness in any case*
13 *tried in the Supreme Court.*

14
15 When one looks at section 128, that has two parts to it
16 that, if I say, end up with a witness giving evidence and
17 getting a certificate.

18
19 First of all, in terms of procedure, section 128(1),
20 (2) and (3), which have: if a witness objects, the court
21 to determine, and if the court determines that, the court
22 is to inform the witness, et cetera.

23
24 In my submission, that is a protection that a witness
25 has in the Supreme Court and, indeed, would inform you,
26 Commissioner, as to how to determine that issue.

27
28 Just before I go on to the certificate, to pick up
29 a point I made earlier, given that as Odgers discusses that
30 that provision extends to an objection by topic rather than
31 by individual question - for instance, there is reference
32 in the note - do you have a copy of Hodges, Commissioner?

33
34 THE COMMISSIONER: I don't, no. I have the Act.

35
36 MR CHESHIRE: Perhaps I have it electronically as well so
37 I can pass you the book. Perhaps if I hand up this copy to
38 you, Commissioner, hopefully at 1312840, there is
39 reference --

40
41 THE COMMISSIONER: To section 5(3), "A witness objects".

42
43 MR CHESHIRE: Yes. Then there is reference at the bottom
44 of that page to Ollis v Melissari, I will let you read the
45 bottom of that.

46
47 THE COMMISSIONER: Yes.

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MR CHESHIRE: That, in my submission, suggests a broader interpretation. If you continue through to 1312860, which is addressing to give particular evidence or evidence on a particular matter, and then over the page, towards the bottom, there is a penultimate paragraph, a quote from the Law Reform Commission.

THE COMMISSIONER. "Rather than current practice ..."?

MR CHESHIRE: Yes, "... where a certificate is required for each question, particular attention should be defined to hear evidence both in response to questions and evidence on particular topics."

And then the conclusion of the authors:

It is clear that additional words in the provision are intended to ensure that a certificate is not required for each question.

What that therefore means is subject to the privilege being overridden in the Supreme Court, that a witness in the Supreme Court is entitled to take an objection and obtain effectively a ruling in respect of a broader topic-base rather than question-based.

I say that would come within the scope of section 11(3) of the Royal Commissions Act, being a protection that any witness in any case tried in the Supreme Court has. I say that by picking up that protection, that gives you the explicit right to give a ruling at least by reference to particular topics.

My fallback position, as I say, is that you are entitled to go on your own procedure, Commissioner, and therefore would wish to avoid getting bogged down in a next question/objection, next question/objection, which would not be a productive exercise.

THE COMMISSIONER: Mr Bolster?

MR CHESHIRE: Sorry, Commissioner, there is just one other matter which deals with Mr Wheelhouse or at least addresses and/or raises that issue. As I say, section 11(3) picks up any protections in the Evidence Act. As I say, the

1 certificate that a Supreme Court judge is entitled to give
2 is back in section 128 and in subsection (3):

3
4 *... if the court determines there are*
5 *reasonable grounds for the objection, the*
6 *court is ... to inform the witness:*

7
8 *(a) that the witness need not give the*
9 *evidence ...*

10
11 *(b) that the court will give*
12 *a certificate ...*

13
14 *(i) if the witness willingly gives the*
15 *evidence without being required to do*
16 *so ...; or*

17
18 *(ii) the witness gives the evidence after*
19 *being required to do so ...*

20
21 Given that section 17 of the Royal Commissions Act does not
22 apply, and this is bearing in mind that section 11(3) talks
23 about "protections", there is no ability for you to compel
24 a witness to give evidence and, therefore, the
25 section 128(3)(b)(ii) certification does not apply, but
26 there is a question mark as to whether, if you accept and
27 make a ruling that there are reasonable grounds for the
28 objection the witness need not give the evidence, it might
29 be that the witness could willingly give that evidence and
30 receive a certificate.

31
32 Now, that makes me very nervous because I am not sure
33 that I would necessarily want to test the validity of your
34 certificate in any criminal proceedings, and I don't wish
35 to follow that course. Mr Wheelhouse may take a different
36 course. But, bearing in mind the uncertainty as to whether
37 your certificate would have any weight, I wouldn't wish for
38 Mr Francis to place any reliance upon it.

39
40 My submission is made at the level of: if you are
41 satisfied that there is reasonable grounds, then you should
42 in accordance with, as it were, the procedure in
43 section 128 inform the witness that he need not give
44 evidence. I say that can be given, as it were, in broad by
45 reference to topics, which here would be all of the topics,
46 rather than by individual questions.

1 The last aspect of the submission, without wishing to
2 become bogged down in the evidential position, the position
3 in relation to privilege, there is still a criminal offence
4 under section 341 of the Crimes Act of misconduct in public
5 office. Authority for that is Quach which, I think, is
6 a Victorian case from 2010.

7
8 I say that all of the topics upon which
9 Counsel Assisting opened, I think possibly with the
10 exception of the last one, that Mr Francis' name was
11 mentioned not just in passing but as being --

12
13 THE COMMISSIONER: What is "public office" for the
14 purposes of section 341 that you just mentioned?

15
16 MR WATSON: It is not defined. There has been a recent
17 decision of the New South Wales Court of Criminal Appeal
18 about which I know. It is called Obeid v The Crown.

19
20 THE COMMISSIONER: What did that say?

21
22 MR WATSON: Mr Obeid's contention was that a member of the
23 legislative council is not in public office. The Court of
24 Criminal Appeal decided that against him, as had the
25 primary judge, Justice Beech-Jones, but all of that said,
26 it is a complicated issue. It is not simple at all.

27
28 THE COMMISSIONER: It is a long way short of whether
29 a person in a planning position, even a senior planning
30 position in Local Government, is someone in public office.

31
32 MR WATSON: It certainly would require a little bit of
33 looking to determine whether that be so, especially in
34 light of some contentions made here. But, again, that has
35 not been pleaded. It is going to be something which will
36 need to be addressed today.

37
38 MR BOLSTER: May I suggest this Commissioner: it is
39 a matter of some importance. We brought Mr Francis'
40 evidence forward to meet the convenience of Mr Cheshire.
41 Ordinarily, we would have dealt with other witnesses first.
42 We can defer this issue so that the issue can be explored
43 in greater detail.

44
45 My impression, or my position at the moment would be
46 this: that there is no scope for any of the Evidence Act
47 provisions to apply because you have no power to compel.

1 They only make sense --

2

3 THE COMMISSIONER: Essentially section 17 we know doesn't
4 apply, so we are left with section 11 which provides that
5 if someone satisfies me there is a reasonable excuse,
6 I can't compel them.

7

8 MR WATSON: May I respectfully endorse that view and
9 I speak not on behalf of a client at all, it is just that
10 seems to be the only sensible fit to this legislation. And
11 like Mr Cheshire, it would be quite a - well, a risky thing
12 to do to engage in --

13

14 MR BOLSTER: Correct.

15

16 MR WATSON: -- issuing certificates on your part,
17 Commissioner, or seeking them on our part.

18

19 THE COMMISSIONER: I just don't see that there is power to
20 do it.

21

22 MR WATSON: I don't see you have power to do it. At least
23 it is doubtful.

24

25 MR WHEELHOUSE: May I just say one word in addition to
26 what has been said? Commissioner, if you go to
27 section 438U, "Public Inquiries" of the Local Government
28 Act --

29

30 THE COMMISSIONER: Yes, just give me a second.
31 Section 438U, yes, that is why we are here.

32

33 MR WHEELHOUSE: -- and if you go to subsection (4) which is
34 the section that excludes section 13 and Division 2 of
35 Part 2, it then goes on to say:

36

37 *... apply, with any necessary adaptations,*
38 *to and in respect of any inquiry under this*
39 *section and to and in respect of any*
40 *witness or person summoned by or appearing*
41 *before the person or persons holding the*
42 *inquiry.*

43

44 THE COMMISSIONER: Yes.

45

46 MR WHEELHOUSE: Commissioner, my submission is that in
47 addition to what my learned friend Mr Cheshire has said,

1 which I agree, this gives you an added power to conduct the
2 inquiry in the way you consider best, but clearly with
3 guidance from the procedures adapted by the various --
4

5 THE COMMISSIONER: You are saying the adaptations would
6 enable me to do - but it is necessary adaptations to the
7 provisions of the Royal Commissions Act that do apply.
8 I can't read back in section 17 that has been excluded.
9

10 Mr Wheelhouse: No.

11
12 THE COMMISSIONER: I don't think you could read necessary
13 adaptations to go that far.
14

15 MR WHEELHOUSE: All I am saying is that the adaptation there
16 would enable you to make a ruling of the evidence given if
17 it is not given voluntarily. I withdraw that. If it is
18 given voluntarily rather than the witness refusing to give
19 evidence at all, in my respectful submission, that would
20 enable you to direct or give a direction that the evidence
21 is not admissible in any civil or criminal proceedings.
22

23 MR BOLSTER: With respect, how can that bind a court that
24 subsequently has to make that decision? It can't. There
25 may be discretionary issues involved, the circumstances may
26 play out when that evidence is sought to be adduced, but
27 nothing, with respect to the Commissioner --
28

29 THE COMMISSIONER: The way I am seeing it at the moment is
30 that with possibly minor adaptations, I have to deal with
31 it the way that the legislature has said in section 11(2)
32 of the Royal Commissions Act which is that I can't compel
33 someone to give evidence if I am satisfied there is
34 a reasonable excuse. I would read "reasonable excuse" to
35 include that the answer might expose them to the threat of
36 a criminal charge or criminal prosecution.
37

38 I have to say, Mr Cheshire, at the moment I am not
39 convinced about that in relation to your client in relation
40 to what particular charge or what crime he would be exposed
41 to by answering any questions. That is why I get back to
42 what I said at the beginning, that I think we should deal
43 with it on a question by question basis.
44

45 MR CHESHIRE: As I said, then it will be topic by topic.
46 I am happy to go through each one of the topics to
47 address --

1
2 THE COMMISSIONER: And if I am satisfied he has
3 a reasonable excuse, I am satisfied that I can't compel him
4 to answer the question because the Act says I can't.
5
6 MR CHESHIRE: As I say, I am happy to deal with that topic
7 by topic.
8
9 THE COMMISSIONER: I think we should. Mr Bolster, do you
10 still want to defer?
11
12 MR BOLSTER: I think we should defer. I agree with
13 Mr Cheshire. Given there are so many issues that involve
14 Mr Francis, I think Mr Cheshire needs to particularise.
15
16 THE COMMISSIONER: Mr Cheshire, do you have another matter
17 that's --
18
19 MR CHESHIRE: I have a problem tomorrow and I have a
20 problem Tuesday, Wednesday and Thursday of next week.
21
22 THE COMMISSIONER: But Friday and Monday are okay?
23
24 MR CHESHIRE: Absolutely, yes.
25
26 THE COMMISSIONER: Is that your preference? Would you
27 like to formulate a written submission.
28
29 MR CHESHIRE: I am very happy to do so.
30
31 THE COMMISSIONER: I think it would probably help. I was
32 leaning towards going ahead in the manner that I suggested,
33 but Counsel Assisting is saying to me if you want to defer
34 it, then I think I probably should err on --
35
36 MR CHESHIRE: My concern as well is that from my point of
37 view, I could do it on the run and it wouldn't be as good
38 as if --
39
40 THE COMMISSIONER: You didn't do it on the run.
41
42 MR CHESHIRE: -- I didn't do it on the run, but I am also
43 conscious of the fact that other people at the bar table
44 might --
45
46 THE COMMISSIONER: Might want to say something as well?
47

1 MR CHESHIRE: Yes. This has all arisen rather quickly and
2 I apologise I was not able to give further notice, but that
3 is simply the nature of dealing with it at this stage on
4 the run, and I suspect that other people at the bar table,
5 any ruling you make, may well affect them, including some
6 who I know are absent today. They may wish to have
7 something to say.

8
9 THE COMMISSIONER: Bearing in mind what you have to do
10 tomorrow, could you provide us a written submission by
11 when?

12
13 MR CHESHIRE: Whenever you say.

14
15 THE COMMISSIONER: Late Thursday?

16
17 MR CHESHIRE: Yes.

18
19 THE COMMISSIONER: Bearing in mind we could deal with this
20 on Friday with Mr Francis, so 4 o'clock Thursday is fine?

21
22 MR CHESHIRE: Yes, I am very happy to do that.

23
24 THE COMMISSIONER: That invitation is to everyone that
25 wants to make a submission on this. Will you circulate
26 your submission as well to the others, is that possible?
27

28 MR CHESHIRE: I am only pausing because it may well be
29 that it should go via the Commission to put up on the
30 shared site, but where I have email addresses, I will.
31

32 MR BOLSTER: It may help, Commissioner, with issues of
33 time management if people who are thinking of making
34 a similar submission on behalf of other potential
35 witnesses, that we deal with it all at once. I think the
36 opening has laid bear a lot of what the issues are so it
37 should assist people as to whether they wish to --
38

39 THE COMMISSIONER: I will make a general direction that
40 anyone that wants to make a submission as to how issues
41 regarding potential self-incrimination should be dealt with
42 by the inquiry can do that by close of business tomorrow.
43

44 Does that mean we will defer Mr Francis provisionally
45 until Friday at 9.30am?

46
47 MR CHESHIRE: Commissioner, I am very grateful to

1 Counsel Assisting for meeting my convenience, both today
2 and Friday.

3
4 THE COMMISSIONER: In relation to that newspaper
5 article you gave me, Mr Cheshire, I am just going to say
6 this.

7
8 Mr Cheshire, who is representing Mr Francis, who has
9 been summonsed to appear at the inquiry, has handed me
10 an article printed from an online version of the Sydney
11 Morning Herald yesterday, published at 4.12pm, it does not
12 have an author.

13
14 It does contain the assertion that Mr Francis approved
15 an apartment block, despite allegations it was poorly
16 constructed and its roof later blew off.

17
18 I would just like to clarify it was no part of
19 Counsel Assisting's opening that Mr Francis had approved
20 an apartment block, despite allegations it was poorly
21 constructed and its roof blew off.

22
23 All I think I can do is ask the press to make sure
24 that they are as accurate as possible in relation to any
25 submissions that are made by any party or any evidence
26 given in this inquiry.

27
28 Another assertion in the same article was that
29 Mr Francis took councillors on a retreat to Bowral.

30
31 There was nothing in Counsel Assisting's opening in
32 which it was asserted that Mr Francis took the councillors,
33 himself, on a retreat to Bowral, as distinct from the
34 council itself organising a retreat to Bowral for the
35 purpose of discussing various matters, including planning
36 matters.

37
38 That is all I will say about the article.

39
40 One further thing that I did pick up in the press was
41 a suggestion that the inquiry might make recommendations
42 for compensation to people involved in the apartment block
43 where its roof blew off.

44
45 The only observation I will make about that is that
46 there is just no leading authority under section 438U for
47 this inquiry to inquire as to matters of that kind.

1
2 That is all I will say about the article, Mr Cheshire.

3
4 MR CHESHIRE: As you please, Commissioner.

5
6 THE COMMISSIONER: We will defer Mr Francis until 9.30am
7 on Friday provisionally. Do we have someone else now?

8
9 MR BOLSTER: We will make some inquiries. I am sure
10 Ms Cologna who works --

11
12 THE COMMISSIONER: We have a witness available this
13 morning?

14
15 MR BOLSTER: She is upstairs.

16
17 THE COMMISSIONER: We will adjourn until we can ascertain
18 when she is --

19
20 MR BOLSTER: Let's say until 11 o'clock. Perhaps if we
21 have the morning tea adjournment now and we start at 11.15.

22
23 THE COMMISSIONER: Yes, in that case we will come back at
24 five past 11.

25
26 MR HOPPER: Commissioner, can I seek leave to appear. My
27 name is Hopper. I seek leave to appear for Mr Zraika
28 today.

29
30 THE COMMISSIONER: Okay, fine. You're the instructing
31 solicitor?

32
33 MR HOPPER: Yes.

34
35 THE COMMISSIONER: My authorisation to appear, I should
36 have said, covers counsel and instructing solicitors, so
37 that's fine.

38
39 MR HOPPER: I am much obliged.

40
41 THE COMMISSIONER: Thank you. We will adjourn until five
42 past 11.

43
44 **SHORT ADJOURNMENT**

45
46 MR BOLSTER: Commissioner, the next witness is Ms Monica
47 Cologna who I believe is on her way in.

1
2 THE COMMISSIONER: Is Mr Cheshire still here or are we
3 starting without him?
4
5 MR GARDINER: There was a misunderstanding about the
6 timing. I know he is here.
7
8 THE COMMISSIONER: Counsel Assisting kept saying five past
9 12.
10
11 MR BOLSTER: I sought to clarify that.
12
13 MR ROBSON: I don't think that it is five past 12, I think
14 it is 11.15. If you will excuse me, I will make
15 an inquiry.
16
17 THE COMMISSIONER: Yes. If they are not generally here,
18 I will go off and wait until 11.15.
19
20 MR ROBSON: I think there is a misunderstanding.
21
22 <MONICA COLOGNA, called:
23
24 THE COMMISSIONER: Ms Cologna, do you have a copy of your
25 statement?
26
27 MS COLOGNA: Yes.
28
29 MR BOLSTER: Mr Sear, just while we are waiting, could you
30 provide the witness with the bundle for Grey Street,
31 Silverwater. While we are waiting, could I circulate to my
32 friends at the bar table - in addition to the Grey Street
33 bundle, go to the end of the bundle to pages 524 and
34 following, and I hand up a copy to you, Commissioner.
35
36 THE COMMISSIONER: I may have been provided with it this
37 morning. It was on the table here. This is the Grey
38 Street planning proposal, is it?
39
40 MR BOLSTER: Yes. It fits in to the end of that bundle.
41
42 THE COMMISSIONER: Mr Cheshire, in relation to the
43 submission you are putting together, could you give
44 consideration also - it is a matter for you. You might
45 also want to put in a submission as to what crime or crimes
46 you say there is a risk your client could be exposed to for
47 prosecution or conviction if he answered. You couldn't do

1 it question by question, obviously, but you have mentioned
2 topics. You might want to address it that way.
3
4 MR CHESHIRE: I am directing my head to that already.
5
6 MR BOLSTER: Do you have pages 524 and following in that
7 bundle? It should be right at the end.
8
9 THE COMMISSIONER: I am sorry, this is Grey Street.
10 Page what?
11
12 MR BOLSTER: Page 524 - it should be right at the end.
13
14 THE COMMISSIONER: Page 523 is where it stops.
15
16 THE BOLSTER: Could I give you new pages 524 and following
17 and if the witness could be given a copy as well. Just
18 wait for that, Ms Cologna, we will come to that in due
19 course.
20
21 THE COMMISSIONER: Are you ready now?
22
23 MR BOLSTER: I formally call Ms Cologna.
24
25 **<MONICA COLOGNA, affirmed: [11.11am]**
26
27 **<EXAMINATION BY MR BOLSTER:**
28
29 MR BOLSTER: Q. You have given a statement to the inquiry
30 dated 27 May 2016?
31 A. That's correct.
32
33 Q. Are the contents of that statement true and correct to
34 the best of your knowledge, information and belief?
35 A. Yes, they are.
36
37 Q. I want to ask you about some questions about a topic
38 that is not directly covered in your statement. It is
39 another planning proposal that the Commission is inquiring
40 into. I believe you have some familiarity with the
41 Grey Street Planning Proposal?
42 A. That's correct.
43
44 Q. Could you please just tell the Commission what is the
45 current status of that proposal?
46 A. The current status of that proposal is that it has
47 been withdrawn from the Department of Planning and that no

1 further assessment will be undertaken on that planning
2 proposal.

3

4 Q. Did that decision follow a briefing that you provided
5 to Mr May following his appointment?

6 A. Yes, that's correct.

7

8 Q. Did that lead to some form of correspondence being
9 sent to the Department of Planning?

10 A. Yes, following the council's resolution, yes, we then
11 sent correspondence to the Department of Planning.

12

13 Q. The reason why this planning proposal is slightly
14 different from Berala and South Auburn and Marsden Street
15 that you referred to is in the fact that it did not
16 initially pass gateway; is that correct?

17 A. That's correct.

18

19 Q. It was then resubmitted in July of last year, council
20 dealt with it in broad in October, November and December of
21 last year and it was to go to gateway again, but it has
22 been withdrawn, is that the position?

23 A. Yes, that's correct.

24

25 THE COMMISSIONER: Just because it is a public inquiry,
26 you might, for the benefit of the public, have
27 an explanation as to what gateway means,

28

29 MR BOLSTER: Q. You are probably better qualified to
30 describe that to me. What is the gateway process and why
31 does one have a gateway process for a planning decision
32 such as this?

33 A. Sure. The gateway process is a process the Department
34 of Planning undertakes. They undertake it for all planning
35 proposals. If there is a council resolution to proceed
36 with a particular planning proposal, the next step in the
37 process is to send it to the Department of Planning for
38 a gateway determination and the gateway determination is
39 a formal statement by the department and it will indicate
40 whether you may proceed with conditions or whether the
41 planning proposal may not proceed any further.

42

43 Q. If you could open the bundle to page 29, you will see
44 there the actual original proposal which came on behalf of
45 a developer to council back in June of 2013; correct?

46 A. Yes, that's correct.

47

1 Q. The proposal involves a block of land which, if you go
2 over to page 37, you will see on an aerial photograph?
3 A. Yes.
4
5 Q. Do have you that?
6 A. Yes.
7
8 Q. It is the land on the western side, that is, the
9 left-hand side of Silverwater Road, that is in the lighter
10 coloured rectangular box, is that correct, or is it the
11 block immediately above that? I think it is, it is the
12 block above that.
13 A. Yes, it is the block above that and the outline of the
14 block is quite faint on the aerial photograph.
15
16 Q. It is the block that is to the left of the word "Road"
17 in Silverwater Road?
18 A. Yes, that's correct.
19
20 Q. If you could go over to page 40, the photograph there
21 shows the block quite clearly.
22 A. Yes.
23
24 Q. That's it?
25 A. Yes, that's correct.
26
27 Q. If you go to page 47, one sees a rough outline of the
28 concept plan for the site. You will see that that involves
29 two towers, two residential towers. It is principally
30 a residential development; correct?
31 A. That's correct.
32
33 Q. When council received that planning proposal, it went
34 to your office for assessment; correct?
35 A. Yes.
36
37 Q. If you could go to page 165 in the bundle, that is the
38 start of your assessment of the proposal back in
39 November 2013?
40 A. Yes, that's correct.
41
42 Q. Could I ask you to go over to page 167. You will see
43 there a summary of the position. The first four dot points
44 summarise, do they, effectively, what this proposal was all
45 about?
46 A. That's correct.
47

1 Q. We had a B6 enterprise corridor which sat on the
2 western side of Silverwater Road; correct? That was the
3 current zoning?
4 A. Yes, that's correct.
5
6 Q. For the developer to do what they wanted to do, to
7 build those two towers, a rezoning to B4 mixed use was
8 necessary; correct?
9 A. That is what they were proposing. To do residential,
10 you could have proposed to rezone it to a different zone,
11 it didn't have to be the B4, but in this instance they were
12 planning to rezone to B4.
13
14 Q. It could have been R4?
15 A. That's correct.
16
17 Q. But that would have been an attenuation in the
18 development, it would have been a smaller --
19 A. That's correct, and an R4 zoning would have limited
20 the amount of commercial and retail uses you could provide,
21 but yes, you're right, yes.
22
23 Q. The B4 zoning meant relatively unlimited commercial
24 uses within the building framework; correct?
25 A. Yes, that's correct.
26
27 Q. So that would involve some sort of a large-scale
28 supermarket and shopping centre complex underneath the
29 residential towers?
30 A. Yes, that would have been permissible under the B4,
31 yes.
32
33 Q. R4, you just get the residential tower?
34 A. Yes, and you could be permitted a very, very small
35 retail premises down the bottom, like a small cafe, for
36 instance, but yes, predominantly it would be all
37 residential, yes.
38
39 Q. Were you the officer in charge of preparing this
40 report?
41 A. Yes, I was.
42
43 Q. And the recommendation that it not be supported in the
44 four dot points at the foot of page 167, they were your
45 recommendations?
46 A. That's correct, yes.
47

1 Q. That went to council?

2 A. Yes.

3

4 Q. Council took a different view to staff in relation to
5 this matter; is that correct?

6 A. Yes, so yes, they did.

7

8 Q. Could you go over to page 245?

9

10 THE COMMISSIONER: Q. Just before we do that, could I
11 just ask you, if you are looking at page 167 of your
12 recommendations --

13 A. Yes.

14

15 Q. Just so that I understand it, I understand the first
16 two dot points. Dot point 3:

17

18 *Proposal for threat strategically in*
19 *regionally significant industrial land in*
20 *Silverwater, Precinct 5, and could create*
21 *land use conflict.*

22

23 Could you just explain to me what you mean by "land use
24 conflict"?

25 A. Certainly. So the land in Silverwater, the bulk,
26 which is known as Precinct 5, identified in the council's
27 Environmental Land Study, has an industrial zoning and it's
28 currently a mix of different types of industrial land uses.
29 Some of them generate noise, as industry does. If you were
30 to introduce residential land uses in a location that was
31 perhaps close to existing land uses, and the Silverwater
32 area was a large area of industrial employment generating
33 uses, it could then potentially threaten the existing
34 land uses through --

35

36 Q. There would be an impact on the - if you've changed it
37 to residential --

38 A. That's right.

39

40 Q. -- and there is an industrial next door, it might
41 impact on the amenity of the people living in the
42 residential structures?

43 A. That's right, which could then lead to complaints to
44 council on something that was already there. In addition
45 to that, it could then also set a precedent for other
46 proposals to come in and chip away at that industrial land.

47

1 Q. So there is a conflict between the nature or the kind
2 of development that could be done close to each other that
3 are incompatible in some ways?

4 A. That's correct, yeah.

5

6 MR BOLSTER: Q. If you could just go over to pages 186
7 and 187, is the analysis there where you deal with
8 consistency with relevant local studies and strategies, is
9 that another way of putting what you just explained to the
10 Commission?

11 A. Yes, that's correct.

12

13 THE COMMISSIONER: I am sorry, where are we?

14

15 MR BOLSTER: Pages 186 to 187.

16

17 THE COMMISSIONER: I see, yes

18

19 MR BOLSTER: Q. You will see there at page 186 you make
20 reference to a document called the Auburn Employment Lands
21 Study. What is that?

22 A. It is strategic planning study that looks at
23 employment land across Auburn City, so that's land - the
24 2008 study was the existing study we had and that looked at
25 land that had a light industrial, industrial general zoning
26 and B6 enterprise corridor zoning. We were in the process
27 of reviewing that study and updating it because by 2013 it
28 was a number of years out of date. The last study we were
29 doing was expended to also include the town centre zone, so
30 the B4 and the B2 and B1 zonings as well, so we would have
31 a full strategic picture of employment land uses and trends
32 across the whole of Auburn City.

33

34 Q. That study was carried out by AECOM, was it?

35 A. The 2008 study was undertaken by Hill PDA, but when we
36 were reviewing that we engaged AEC Consultants to do the --

37

38 Q. Are they also known as AECOM?

39 A. No, AECOM is a different consultancy, unrelated; there
40 is occasionally confusion between the names.

41

42 Q. Do you just want to have a look at this? There is
43 a copy for the Commissioner and in this case a copy for
44 Mr Watson. I have spare copies. I don't, obviously, have
45 coloured copies for my learned friends, but if anyone wants
46 to see them - I will need that back. That is the study,
47 the final study?

1 A. Yes, this is the final study in 2015 undertaken by
2 AEC.
3
4 Q. There were differences between that study and the
5 study you were referring to in your report on page 186 and
6 page 187?
7 A. That's correct, because this hadn't been finalised at
8 that time.
9
10 Q. I will come back to the changes and how they came
11 about in due course.
12 A. Mmm-hmm.
13
14 Q. When the matter went to council, I take it the
15 recommendation to council was the recommendation in your
16 assessment?
17 A. Yes, that's correct.
18
19 Q. You drafted that recommendation?
20 A. Yes.
21
22 Q. Did you brief council at the meeting on 4 December
23 2013 when this issue was dealt with?
24 A. I can't recall if we wrote to council prior to the
25 meeting. We may have written to them prior to the meeting.
26 There may have been a council briefing two weeks
27 beforehand. I can't remember the exact date.
28
29 Q. Do you have any memory of what happened at the officer
30 to councillor briefings or workshops in relation to this
31 matter?
32 A. I don't have any specific memory. I could check dates
33 for you. What would have happened is I would have done
34 a briefing and quite possibly the council would have
35 listened and not necessarily discussed it at length.
36
37 Q. Was there any debate at the meeting on 4 December 2013
38 that you recall, a council meeting, that is?
39 A. It's quite possible that there was a debate at the
40 council meeting but I can't recall specifics of that.
41
42 Q. The resolution that was ultimately passed, had that
43 been provided to you before the meeting?
44 A. No.
45
46 Q. Do you recall how it came to be moved at the meeting?
47 Was it moved from the floor or --

1 A. My memory is that it was moved from the floor by one
2 of the councillors but I can't say which one.
3
4 Q. Were staff asked to consider the resolution that came
5 from the floor and was passed on 4 December 2013? Just so
6 that you know which resolution I am talking about, it is at
7 page 245 of the bundle.
8 A. No. So the resolution was made and then we were just
9 required to act upon that. Does that answer your --
10
11 Q. No.
12 A. Sorry.
13
14 Q. My question is this: you have a proposal.
15 A. Yes.
16
17 Q. You prepared a briefing. You prepared an assessment.
18 A. Yes.
19
20 Q. You have made recommendations.
21 A. Yes.
22
23 Q. There was a workshop. There were discussions between
24 councillors and staff, presumably about the assessment;
25 correct? You come to the council meeting on 4 December
26 2013. A resolution --
27
28 THE COMMISSIONER: Q. Could you just say "Yes" rather
29 than nod?
30 A. I am sorry. Yes. I thought I was --
31
32 MR BOLSTER: Q. A resolution is moved from the floor?
33 A. Yes.
34
35 Q. Was there any opportunity or did anyone see the advice
36 of staff about that particular resolution?
37 A. Not to my knowledge. At the council meeting, I don't
38 recall. My advice certainly wasn't sought on it and I am
39 not aware that other people's advice - the minutes of the
40 council meeting might indicate the question that would have
41 come through to senior staff, if it did occur, but I can't
42 recall that.
43
44 Q. You will see there that under the employment land
45 strategy at the time this was a B1 corridor, industrial
46 corridor?
47 A. The land was still zoned B6 at the time, yes.

1
2 Q. So a B6 industrial corridor, is that --
3 A. Yes, or an enterprise corridor, but a very similar
4 meaning, yes.
5
6 Q. I do apologise. The proposal was for B4?
7 A. Correct, yes.
8
9 Q. The amendment for the proposal in the minute that was
10 actually passed was for a B2 local centre; correct?
11 A. Yes, that's correct.
12
13 Q. There had been no advice about the application of this
14 particular control, that is, B2 local centre, on that site
15 when council made that decision; is that correct?
16 A. Look, I can't remember specifically. It's possible
17 that staff could have advised council, if they were
18 specifically asking about it, that we were keeping the B4
19 primarily for town centre rezoning and that to create B4 in
20 an out-of-centre location would not be consistent with the
21 State Government planning framework, but I don't recall
22 specifically providing that advice.
23
24 Q. B2 would not have been consistent with it either?
25 A. No, and it would not have been consistent with the
26 draft study.
27
28 Q. R4 would not have been consistent with the draft
29 study?
30 A. No. No, the draft study did not recommend R4.
31
32 Q. When you say "draft study", we are talking about the
33 draft employment lands study which was a draft at that
34 time?
35 A. It was a draft at that time, that's correct.
36
37 Q. After that resolution was made, staff prepared
38 a submission to the Department of Planning to seek gateway
39 approval for this particular planning proposal; correct?
40 A. That's correct.
41
42 Q. Your submission commences at page 251.
43 A. That's correct.
44
45 Q. Leaving aside the appendices, it ends at page 266.
46 You attached the various resolutions, the minutes and
47 a whole range of other documents that we don't need to

1 worry about at this stage, but if you could then turn to
2 page 338, you will see there the gateway determination that
3 came back from planning on 18 December 2014?
4 A. Yes, that's correct.
5
6 Q. That was a refusal?
7 A. Yes, that's correct.
8
9 Q. For the grounds specified 1 through 6 on those pages?
10 A. Yes, that is correct.
11
12 Q. The principal reason for refusal, can I suggest, was
13 the incompatibility with the zoning sought, that is, B2,
14 with the Employment Lands Study 2008?
15 A. Yes, that's correct.
16
17 Q. The matter then went back to council shortly
18 thereafter. If you could just go over to page 340, the
19 recommendation put to council was to note the gateway
20 determination and then to take no further action on the
21 proposal until the draft employment land strategy had been
22 finalised; correct?
23 A. Yes.
24
25 Q. In May 2015, the Auburn Employment Land Strategy 2015
26 was reported to council and adopted; correct?
27 A. Yes, that's correct.
28
29 Q. You can see that on page 346 where you recount that in
30 a further report to council?
31 A. Yes, that's correct.
32
33 THE COMMISSIONER: Is that entry 20 May?
34
35 MR BOLSTER: Yes.
36
37 Q. If you go up the page, you will see then that in July
38 the applicant made a fresh application?
39 A. Yes.
40
41 Q. And you number that PP3 of 2015 and I take it you
42 prepared the briefing note or you signed off on the
43 briefing note?
44 A. Yes, that is correct.
45
46 Q. And you noted it was almost identical to the previous
47 planning proposal we have been discussing?

1 A. Yes, that's correct.
2
3 Q. The same developer, same block of land, same basic
4 proposal?
5 A. Yes, that's right.
6
7 Q. Just pausing there, the Employment Land Strategy at
8 that time, had it made any effective change to the zoning
9 for this particular area or neighbourhood?
10 A. No, it had not.
11
12 Q. That process - I just want to go back a step.
13 A. Yes.
14
15 Q. The process of preparing an employment lands study,
16 what sort of firm carries that out?
17 A. It would typically be a firm that specialises in
18 economics and planning, ideally, but they would have
19 specialist advice. You could get a town planning firm to
20 do it, but they would need to work with a specialist
21 economic consultant.
22
23 Q. And considerable expense is involved to council in
24 having that plan updated as the need arises?
25 A. Yes, that's correct.
26
27 Q. And the budget for this particular plan?
28 A. I think, from memory, the cost of the work was in the
29 order of \$60,000, it could be slightly more, but
30 approximately.
31
32 Q. After the new proposal was lodged in July, what were
33 you given the task of doing in relation to the fresh
34 proposal?
35 A. We were required to undertake an assessment of that
36 proposal.
37
38 Q. What were the circumstances in which you were asked to
39 carry out that assessment?
40 A. The proposal was lodged with council. We may have had
41 some discussions with the applicant and then we would have
42 undertaken an assessment of that proposal.
43
44 MR BOLSTER: Just note, Commissioner, I won't take you to
45 it, the proposal commences at page 367 in the bundle and
46 goes through until page 465.
47

1 Q. If you could turn over to page 466, you will see there
2 the assessment report that you carried out?
3 A. Yes.
4
5 Q. You will see that that is dated September 2015.
6 A. Yes.
7
8 Q. The report was received in July.
9 A. The planning proposal?
10
11 Q. I want to suggest to you that the assessment was dealt
12 with, with some considerable speed, by your office; is that
13 correct or incorrect?
14 A. Look, I don't recall prioritising this one
15 specifically. We had a number of active planning proposals
16 at that time. That is a relatively quick turnaround at the
17 time, but we would have had a number of active planning
18 proposals that we were working on at the same time.
19
20 Q. That involved some considerable work by staff employed
21 under you; is that correct?
22 A. Yes, that's correct.
23
24 Q. Did you instruct the staff under you to have the
25 assessment report ready for the next meeting of council?
26 A. I would have given instructions to the staff to have
27 it ready for a particular meeting of council, so yes, the
28 next meeting. I would have discussed a deadline with my
29 manager and then I would have relayed that information on
30 to my staff.
31
32 Q. Did anyone express any concerns with you about the
33 timeframe that you were asking staff to carry out this work
34 in?
35 A. I don't recall specifically. I do remember myself
36 speaking to my staff, saying that I was constantly varying
37 my workload and that we had a number of large planning
38 proposals we were assessing simultaneously. I don't
39 specifically recall someone coming to me and saying that
40 the time frame was unreasonable. I did acknowledge the
41 high workload of the team and I was trying to check in to
42 make sure everyone was okay.
43
44 Q. Was this proposal given priority over the other
45 proposals then in the queue?
46 A. I don't specifically remember prioritising it, but it
47 may - like, with the timeline, yes, in looking back at it,

1 it may - if it was done more quickly than others then
2 I guess that is the net effect of that.

3

4 Q. Well --

5 A. I would have just been working to a deadline that
6 I had discussed with my manager.

7

8 Q. And the deadline that came from your manager was what?

9 A. I can't remember the specific date, but we would have
10 discussed, like, the next council meeting.

11

12 Q. If you go to the new pages which I handed up to you,
13 which have page 524 at the foot of them, and have a look at
14 those.

15 A. Yes.

16

17 Q. This is the briefing note that accompanied the
18 assessment of the proposal; correct?

19 A. Yes, that's correct.

20

21 Q. You proposed to amend the rezoning to the B1
22 neighbourhood centre. Could you explain why you went with
23 B1 neighbourhood centre when the applicant was seeking a B2
24 zoning?

25 A. Yes. The Employment Land Study that had been adopted
26 by council in May 2015 talked about the fact that a new B1
27 centre could be located somewhere in that Silverwater area,
28 so not onsite specifically but somewhere within that
29 Silverwater area. The study spoke about that specifically.
30 When the planning proposal was lodged with council and it
31 was effectively the same as what had previously been
32 lodged, we went back to the consultant, AEC, to get some
33 additional confirmation of what they had put in the study
34 so that we could include that robust detail in our report
35 to council as part of our assessment, and on that basis,
36 consistent with what the consultant had recommended in the
37 study and the additional advice they were providing us,
38 which was a B1 centre could be appropriate in the
39 Silverwater area, that is why we recommended that.

40

41 Q. Is this another way of putting it, that the
42 recommendation that you made to council was that the
43 planning proposal application be made to comply with the
44 Employment Land Strategy?

45 A. Yes, that is another way of putting it, yes.

46

47 Q. So it would be the employment land strategy that would

1 determine this particular planning proposal?
2 A. Yes, a policy or strategy setting this framework and
3 that would then guide the assessment or the outcome of the
4 proposal, yes, that's correct.
5
6 Q. Is that because an employment land strategy is
7 a fairly important document?
8 A. Yes.
9
10 Q. It's a plan that deals with the way in which
11 development can be made to meet labour market demands
12 within the Auburn Local Government area?
13 A. Yes, that's correct. We also had it done and updated
14 so that it could guide our assessment of subsequent
15 planning proposals, given the amount of pressure for
16 development on land in this area.
17
18 Q. Is it a fair summary of the Employment Land Strategy,
19 at least insofar as it applies to that Grey Street area,
20 the immediate surrounds of this particular site, that it is
21 very close to Silverwater Road?
22 A. Yes.
23
24 Q. Silverwater Road is a transport corridor through it
25 and it is basically an industrial centre?
26 A. Yes, that's correct.
27
28 Q. It is an important industrial centre that stretches
29 along the boundaries of Parramatta Road on the northern
30 side for quite some distance?
31 A. Yes, that's correct.
32
33 Q. I think you touched upon this earlier in some exchange
34 with the Commissioner, that when you introduce
35 a high-density residential development or planning scheme
36 or zone into that pocket, you compromise the whole purpose
37 of that zone; is that correct?
38 A. Yes, that's correct.
39
40 Q. When this matter went to council, if you go back
41 a couple of pages to page 520, you will see on 15 December,
42 one of your staff seems to have been the person who drafted
43 the letter but it is signed by you on page 523.
44 A. I don't have page 523, but --
45
46 Q. You don't have page 523?
47 A. Not in the folder, not here, but I --

1
2 Q. Just have a look at my copy.
3 A. Yes. Well, I don't have --
4
5 Q. Do you have 522?
6 A. No. My folder finishes at page 374 and then I have
7 page 524 and an additional handout.
8
9 MR BOLSTER: Does everyone else have page 522?
10
11 MR WATSON: I have it.
12
13 MR BOLSTER: Just bear with me.
14
15 THE COMMISSIONER: I think it might be in a different
16 bundle.
17
18 THE WITNESS: Sorry, sorry, sorry, my apologies, yes. My
19 apologies, I was in the wrong bundle: I have page 523
20
21 MR BOLSTER: Q. Can I go back there?
22 A. Yes. Apologies.
23
24 Q. Have a look between 520 to 523 and just satisfy
25 yourself that that is your letter.
26 A. Yes, that is my letter and I've signed that letter.
27
28 Q. That records what council did back on 7 October 2015?
29 A. Yes, that's correct.
30
31 Q. Do you recall - it is the same question in relation to
32 the earlier matter we discussed - being asked to provide
33 advice about that particular resolution?
34 A. No. No.
35
36 THE COMMISSIONER: Can I just ask - the bottom of
37 page 523, is part of that also 522, 521, 520?
38
39 MR BOLSTER: Yes, so the resolution is on page 522.
40
41 THE COMMISSIONER: Yes, all right
42
43 MR BOLSTER: Q. Was there a workshop prior to that
44 meeting where this issue was discussed?
45 A. No. Amending the Employment Land Strategy was never
46 discussed to my role. I was never involved in any
47 discussions on that. The first I knew about it was the

1 resolution of council.
2
3 Q. I take it you have responsibility within council for
4 dealing with and enforcing the Employment Land Strategy?
5 A. Yes, that's correct.
6
7 Q. Subject, of course, to you working under Mr Francis?
8 A. Yes, that's correct.
9
10 Q. Who was your direct officer?
11 A. My direct manager at the time.
12
13 Q. The direct manager to whom you reported?
14 A. Yes, that's correct.
15
16 Q. When you have been giving evidence saying your
17 manager, that is Mr Francis?
18 A. That's correct.
19
20 Q. If you had been asked for advice about amending the
21 Auburn Employment Land Strategy prior to the council
22 meeting on 7 October 2015, what would that advice have
23 been?
24 A. I would have advised against amending the strategy
25 because it would not be good planning practice to amend
26 a strategy to be consistent with a planning proposal;
27 that's the reverse, as we've discussed. I would have also,
28 yes, said that I would not have recommended that the
29 strategy be amended.
30
31 Q. Is it a fair way of describing that resolution to be
32 that council was redrafting or seeking to redraft the
33 Employment Land Strategy so as to follow the planning
34 proposal put forward by the applicant?
35 A. Yes, that is a fair statement to make.
36
37 Q. And of course an employment land strategy is not
38 something that should be chopped and changed to meet
39 a particular spot rezoning. Is that a fair summary of the
40 position?
41 A. Yes, that is a fair summary. We actually have a
42 strategy put in place to help guide our assessment of the
43 planning process.
44
45 Q. Have you come across, in all your years as a planner,
46 that sort of bottom-up control of such a document as
47 an employment land strategy?

1 A. No, I have not come across that before.

2

3 Q. Did you raise any concerns about this resolution with
4 either Mr Francis or Mr Dencker?

5 A. Mr Francis and I would have discussed the resolution
6 after it happened, after the council meeting, commenting to
7 the effect of what I have just said, that it's not good
8 practice and that council could have made a resolution to
9 vary the height and even the zoning we had proposed and
10 they would not even necessarily need to amend the strategy.
11 We would have discussed that and then we would have
12 acknowledged it's a resolution of council and the next step
13 in the process would be to package it all up and send it to
14 the Department of Planning; that is the very next step in
15 the process.

16

17 Q. Was that step carried out or did the appointment of
18 the administrator intervene?

19 A. My understanding was that we had packaged it up and
20 sent it off to the department and then once the
21 administrator had been appointed, we then had a council
22 resolution to seek to withdraw that.

23

24 Q. And that resolution was passed?

25 A. Yes. The administrator's resolution, yes, that was
26 passed at a council meeting.

27

28 Q. That left the planning proposal dead in the water?

29 A. Yes.

30

31 Q. What about the Employment Land Strategy, what happened
32 there?

33 A. Yes. The administrator's resolution didn't touch on
34 the Employment Land Strategy because the pressing matter at
35 the time was the planning proposal, so the Employment Land
36 Strategy stands by the previous council resolution.

37

38 Q. Let me show you some documents. Mr Sear?

39

40 THE COMMISSIONER: While are you doing that can I just ask
41 a clarifying question?

42

43 MR BOLSTER: Yes.

44

45 THE COMMISSIONER: Q. You may have answered this and
46 perhaps I just didn't quite understand, but going back to
47 the proposal by the developer here, the term "high-density

1 residential" is being used. This was a high-density
2 residential application, an application to --
3 A. Yes, the application could be considered to be
4 high-density.
5
6 Q. Is there a dividing line, to educate me, between what
7 is considered high-density residential and medium density
8 residential?
9 A. The guiding line that I would use in this instance
10 would be the way our zones are in the LEP. That would vary
11 from council to council, but in the case of the Auburn City
12 LEP 2010, although many residential are now R2, which is
13 the single-storey, dining room, dual occupancy,
14 granny flat --
15
16 Q. B2 is an objective for high-density residential I'd
17 say, I think.
18 A. Yes, B2 is basically local centre, but you can have --
19
20 Q. You can have high-density?
21 A. You can have high-density in that, yes. The B2 zone
22 is typical of centres like Regents Park and Berala:
23 they're small, village sort of local centres. Auburn and
24 Lidcombe, for example, are town centres; you would expect
25 they'd have a much higher density, Bankstown's B4 zoning;
26 Regents Park, for example, has the B2 zoning and then
27 you've got smaller order centres again that have the B1
28 with local centres; there's much more convenience, much
29 smaller scale. Does that --
30
31 Q. Yes. And B4 is to encourage high-density residential?
32 A. It's mixed high-density residential. It's primarily
33 there to encourage a broad range of uses that you'd expect
34 in a town centre, including high-density residential.
35
36 Q. I guess what I am asking, firstly, is there a certain
37 number of apartments for a certain area of land that
38 creates the term "high-density residential", as distinct
39 from "medium-density residential" or --
40 A. Look, different people have different perspectives on
41 that, but in the case of the Auburn LEP, a medium-density
42 residential zone is R3 and that has a two-storey height
43 limit and it's mixed, villas and townhouses. The R4 --
44
45 Q. So it comes down to floor space ratio and height?
46 A. In the case of the Auburn LEP, if you stepped away
47 from that and you were just having a discussion with

1 people, what is low density, what is medium, what is
2 high-density, that then becomes subjective.

3
4 Q. What I didn't quite understand was in the
5 recommendation that was made for the council on 7 October
6 2015, at page 524, the recommendation was to amend the
7 proposed rezoning to B1 neighbourhood centre which doesn't
8 have an objective for high-density residential. I am just
9 confused about that.

10 A. Look, I think - yes. That recommendation about the
11 zoning was focusing on the type of retail uses that you
12 could permit within that zone and it was focusing on where
13 the centre would fit into the hierarchy of centres. Yes,
14 it involved a residential component and that is why we went
15 back to the consultant who did the employment land study to
16 get advice about it. We were trying to limit the
17 residential just to the amount that would potentially make
18 a supermarket viable. We weren't wanting to permit
19 excessive amounts of residential in that area. The primary
20 focus was to create a little neighbourhood convenience
21 local centre. Does that answer it?

22
23 MR BOLSTER: Q. Is it fair to say this, that the existing
24 land strategy at that time, when you made that resolution,
25 contemplated a B1 neighbourhood centre in that area?

26 A. Yes, that's correct, it did.

27
28 Q. And that therefore that would be a legitimate basis,
29 consistent with the land strategy, to make a planning
30 change?

31 A. Yes, that's correct.

32
33 Q. That would be entirely consistent with the strategy?

34 A. Yes, it would be entirely consistent with the
35 strategy.

36
37 THE COMMISSIONER: We probably should introduce the LEP
38 into evidence at some stage.

39
40 MR BOLSTER: Yes.

41
42 Q. I handed you a document with some pink markings on it
43 and I neglected to hand to you and to the Commissioner
44 a document that really needs to go with it that has some
45 yellow marking, the one Mr Watson is looking at. There are
46 two separate bundles. The one with the pink marking,
47 I take it, is what you have extracted from the final land

1 strategy that was made in December 2015?
2 A. Yes, that is correct.
3
4 Q. That was made consequent upon the resolution, that we
5 were just talking about, in December?
6 A. Yes, that's correct.
7
8 Q. That is, changing the land strategy to meet the
9 planning proposal?
10 A. Yes, and the relevant resolution --
11
12 THE COMMISSIONER: That is page 79 of that.
13
14 MR BOLSTER: Yes.
15
16 Q. The copy of the land strategy that you have in front
17 of you and the Commissioner has, that is the final version?
18 A. Yes, that's the final version of December 2015, after
19 it has been amended following that resolution.
20
21 Q. You will see over on the second page there is
22 a recommendation that you have highlighted in red for a B2
23 local centre.
24 A. Yes.
25
26 Q. If you go to the document marked with yellow, on the
27 second page, which is marked page 8 at the foot of the
28 page, the corresponding recommendation is for a B1
29 neighbourhood centre to the west at that particular
30 location as stated; correct?
31 A. Yes, that's correct.
32
33 Q. So that was what was changed?
34 A. Yes, that's what has been --
35
36 Q. Just going down a bit on the yellow marked page, on
37 the same yellow marked page, it would retain the B6
38 enterprise corridor with a B1 neighbourhood centre
39 somewhere inside it; correct?
40 A. Yes, that's correct.
41
42 Q. If you go back to the pink version, the current
43 version, for the corresponding box it is B2 local centre?
44 A. Yes, that's correct.
45
46 Q. And then the last page of the pink bundle includes
47 a new Appendix G in the land strategy which makes it quite

1 clear that the change is the result of a council
2 resolution?

3 A. Yes, that's correct.

4
5 Q. And that is the same resolution we have been talking
6 about?

7 A. Yes, that's correct.

8
9 MR BOLSTER: Commissioner, I tender the land strategy and
10 the two coloured documents.

11
12 THE COMMISSIONER: You tender that and these together as
13 one?

14
15 MR BOLSTER: Yes.

16
17 THE COMMISSIONER: This is about Grey Street, so we will
18 make the exhibit G1. While you are at it, are you
19 tendering Ms Cologna's statement as well?

20
21 MR BOLSTER: Yes, and the Grey Street bundle as well.

22
23 THE COMMISSIONER: Actually, what I might do then is
24 I will make Ms Cologna's statement exhibit S3.

25
26 **EXHIBIT #S3 STATEMENT OF MONICA COLOGNA DATED 27/05/2016**

27
28 THE COMMISSIONER: The Grey Street bundle can be
29 exhibit G1

30
31 **EXHIBIT #G1 GREY STREET BUNDLE**

32
33 THE COMMISSIONER: The Auburn Employment Land Strategy
34 December 2015 document and the two extracts and draft
35 extracts will be exhibit G2.

36
37 **EXHIBIT #G2 AUBURN EMPLOYMENT LAND STRATEGY DECEMBER 2015**
38 **DOCUMENT AND TWO EXTRACTS AND DRAFT EXTRACTS**

39
40 MR BOLSTER: Q. Could I just show you another document.
41 Do you have that document?

42 A. Yes, I do.

43
44 Q. This is a briefing from you to Mr Dencker seeking
45 approval for the amendment of the strategy that we have
46 just been discussing.

47 A. Yes, that's correct.

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Q. You prepared a memorandum to Mr Dencker explaining the need for the works, which is attached, dated 20 November.

A. Yes.

Q. What was the cost of that variation, to the best of your recollection?

A. I can't recall specifically, but the cost was very minimal because the scope of the work required to do the variations was fairly small. I can't recall the exact figure but it could have been less than \$1,000. The figure would be provided. We would have that information on our file.

Q. If you could do that, that would be of some assistance.

A. Sure.

Q. I want to move on now to a different topic.

THE COMMISSIONER: Are you tendering this?

MR BOLSTER: I will tender that document too.

THE COMMISSIONER: This is briefing memorandum dated 24 November 2015, author, Monica Cologna, Manager, Strategy, subject, Variation to Employment Land Strategy 2015. That will be exhibit G3.

EXHIBIT #G3 BRIEFING MEMORANDUM DATED 24/11/2015, AUTHOR, MONICA COLOGNA, MANAGER STRATEGY, SUBJECT: VARIATION TO EMPLOYMENT LAND STRATEGY 2015

MR BOLSTER: You don't need that folder now, you need the folder with the Berala rezoning.

THE COMMISSIONER: Will I put this bundle away?

MR BOLSTER: Yes, Commissioner. Can I perhaps formally tender the Berala bundle as Exhibit B1.

THE COMMISSIONER: This is the bundle with Commissioner "Beazley", spelt with a "Z"?

MR BOLSTER: Yes, I do apologise.

THE COMMISSIONER: That is a 298 page bundle, is it?

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MR BOLSTER: Yes.

THE COMMISSIONER: That bundle of documents regarding Berala Village Planning Proposal will be Exhibit B1

EXHIBIT #B1 BUNDLE OF DOCUMENTS REGARDING BERALA VILLAGE PLANNING PROPOSAL

MR BOLSTER: Q. Ms Cologna, I want to ask you about the workshop in June which you have referred to in your statement and which is discussed in the briefing that was provided to councillors prior to July 2014 - page 85 of the bundle. Do you see in Table 1 it says in June 2014 there was a councillor briefing.

A. Yes.

Q. Sitting there today, do you recall what happened at that briefing?

A. I recall presenting a briefing to the councillors presenting - I had prepared a PowerPoint presentation which I presented to the councillors. It drew together the analysis from the February workshop, analysis of the councillors' comments and mapping that they had done at the February workshop and it reported back to them. It presented - it tried to draw the different views of the different councillors from the mapping exercise. It tried to draw them together and report back to all the councillors in a briefing session an amalgam of the analysis.

Q. Let's go back a step to February at Bowral. At that point in time, council had received the Hill PDA report?

A. Yes.

Q. That report had been prepared so as to meet the requirements of a council resolution for a further study to be prepared for Berala?

A. Yes, that's correct.

Q. Before that resolution was made, there was an existing study that had been prepared by your staff, which you were involved in?

A. Yes, that's correct.

Q. That study suggested no change to the zoning at Berala?

1 A. Yes, that's correct.
2
3 Q. Council then resolved that they wanted a second
4 opinion.
5 A. Yes.
6
7 Q. Hill PDA were engaged?
8 A. Yes.
9
10 Q. They did some testing of the feasibility of
11 development for two sites within the Berala Village area;
12 correct?
13 A. Yes, that's correct.
14
15 Q. One was a B2 zone?
16 A. Yes.
17
18 Q. And one was an R3 zone?
19 A. Yes. Yes, that's correct.
20
21 Q. Both of the zones were within very close walking
22 distance of the railway station; correct?
23 A. Yes, that's correct.
24
25 Q. Ultimately the Hill PDA study made two recommendations
26 in the alternative. The second one was: do nothing?
27 A. Yes.
28
29 Q. And the first one was to, although exercising some
30 caution, increase the height controls and floor space ratio
31 controls within the tested zone; correct?
32 A. Yes. With the intention that that could be applied to
33 the zone, not limited to the two test sites.
34
35 Q. There was no recommendation for any up-zoning in the
36 Berala Village area?
37 A. No, not in the Hill PDA study, no.
38
39 Q. At the time you prepared the briefing notes, the
40 PowerPoint presentation for the Bowral workshop
41 in February, there was no recommendation from any planning
42 expert, whether within council or out, recommending any
43 up-zoning; correct?
44 A. Yes, that is correct. Yes, that is correct. There
45 was no recommendation from any technical expert to any
46 up-zoning.
47

1 Q. The ultimate recommendation that was put forward in
2 the report to council on 16 July - if you go back a few
3 pages to page 83 in the bundle - was that council prepare
4 a planning proposal to undertake rezoning of land within
5 Berala Village and the associated amendment of the Auburn
6 LEP, as per attachment 1 to this report.

7 A. Yes, that's correct.

8

9 THE COMMISSIONER: I am sorry, where were you reading
10 from?

11

12 MR BOLSTER: I was reading from recommendation 3.

13

14 Q. Attachment 1 commences at page 91 and goes through to
15 page 93 of the bundle. You will see there at
16 page 92 - sorry, if you could just clarify for me the
17 difference between pages 92 and 93?

18 A. Yes, certainly. The map on page 92 shows areas with
19 clouding around, to denote areas that were being proposed
20 that could - for consideration to be changed, so that was
21 just purely to clearly identify location.

22

23 Q. Right.

24 A. Then if you turn over to page 93, the table on page 93
25 contains the proposed height and FSR that could be applied
26 to those different zoned areas. So the purpose of page 92
27 was to show location for change so that the councillors
28 could clearly understand, to see whether or not they wish
29 to proceed with that or not, and then the second page - it
30 was splitting of information to try and make it clearer for
31 the councillors.

32

33 Q. There were two different B2 zones, each had
34 a different height?

35 A. That's right, yes. There was a hatched area and the
36 other B2 area.

37

38 Q. The one very close to the station on the eastern side
39 had a height limit of 18 metres?

40 A. Yes.

41

42 Q. Whereas the rest had a height of 21 metres?

43 A. Yes, a proposed height, yes, that's right.

44

45 Q. A proposed height?

46 A. Yes.

47

1 THE COMMISSIONER: Is the station marked there?

2

3 MR BOLSTER: The station is essentially where SP2 is.

4

5 Q. Not having any planning advice, either with or without
6 council about up-zoning, the recommendations in the July
7 report included an up-zoning in the area marked D on
8 page 93.

9 A. Yes.

10

11 Q. That is what we will say is the south side of
12 York Street.

13 A. Yes.

14

15 Q. It was then R2 to B2?

16 A. Yes.

17

18 Q. If we can go back to page 85 and that box where the
19 councillor briefing is referred to, the second sentence
20 there, I would like to ask you some questions about that.
21 What did you mean by, "Further discussion and verbal
22 amendments being made to the plan", on that occasion?

23

24 THE COMMISSIONER: Sorry, I just missed where you are
25 reading from.

26

27 MR BOLSTER: The second sentence in the box adjacent to
28 "June 2014" on page 85.

29 A. The sentence there just noted that it had been
30 presented at a councillor briefing and we were seeking
31 direction as to how the councillors would like to move
32 forward with this prior to formally reporting to council
33 for a decision, and it was recommended that there had been
34 some discussion about differing views about what should
35 happen in Berala.

36

37 Q. Who was involved in the discussion?

38 A. There were a number of councillors attending the
39 workshop. I can't recall exactly who was there but we
40 could probably provide a list. I recall there was about
41 six or so councillors present. I don't necessarily think
42 they were all there. There may have been more. There may
43 have been eight. I don't recall.

44

45 Q. You say amendments were made to the plan verbally on
46 that occasion; correct?

47 A. That's what the verdict says there. It's meant to

1 capture that - what we had put to them in the June briefing
2 was a suggested zoning scenario for discussion and
3 consideration prior to reporting it to council. For
4 example, the hatched area of B2 is something that wasn't
5 shown on the suggested scenario that we put to the June
6 briefing. My recollection is that is something that was
7 discussed at that briefing and that has then come through
8 in the July report.

9
10 Q. I am not asking you about what you told them. I am
11 really wanting to know --

12 A. Sure.

13
14 Q. -- what they told you and what amendments they told
15 you ought be made in their opinion, as councillors, to this
16 plan.

17 A. The amendment that I remember clearly is the
18 discussion of the B2 zone on the southern side or the
19 eastern side of the station, that it should have a low/high
20 FSR because it is a more secondary street, with
21 Woodburn Road on the northern side being the main street.
22 I don't recall a specific discussion about the other
23 amendment, but the plan - the suggested zoning scenario
24 that we presented in June and what went to council in July,
25 it did change. I don't recall the specific discussion, but
26 the amendment that I prepared in that report did change
27 from what was presented at the briefing.

28
29 Q. Let's go back a step. Coming back from Bowral or when
30 Mr Francis came back from Bowral and gave you the
31 coloured-in plans, you analysed them?

32 A. Yes.

33
34 Q. For the south side of York Street, you observed there
35 were three councillors who had marked that area as B2 on
36 their maps?

37 A. That's correct.

38
39 Q. You put that back in your report and you recommended
40 something different?

41 A. Yes, that's correct.

42
43 THE COMMISSIONER: Is this the February workshop that we
44 are talking about?

45
46 MR BOLSTER: Yes.

47

1 Q. You recommended R3 to them?
2 A. Sorry, it's R4. R4 for the top bit and R3 for the
3 triangle below.
4
5 Q. That is what you took to the June councillor workshop?
6 A. That's correct.
7
8 Q. We have seen that between the workshop and the July
9 report which suggests B2 for that area, an amendment has
10 been made.
11 A. Yes.
12
13 Q. The amendment, can I suggest, was made by councillors
14 at that meeting as your note indicates?
15 A. Yes. Well, I would have discussed it with Mr Francis
16 in preparing the report, the July report to council, and
17 from what we could take from the June briefing.
18
19 Q. Do you recall any councillors saying at that meeting,
20 "It must be B2 south of York Street"?
21 A. No, I don't - I'm not saying it didn't happen, but
22 I don't recall specific discussion or a particular
23 councillor saying that.
24
25 Q. When you came to prepare this report and had someone
26 make that map that we have just been looking at, that is
27 the attachment to this report, you put B2 in there south of
28 York Street for a reason.
29 A. Yes.
30
31 Q. Why was that?
32 A. Again, just discussions with Mr Francis and the
33 location of that area falling partly within the 400 metre
34 radius of the station.
35
36 Q. Again I am not concerned about the justification. Was
37 it Mr Francis that said, "Make that area B2 in the map that
38 we take to council on 16 July"?
39 A. Look, we would have had a discussion about should it
40 be R4 or should it be B2, and we've ended up with going
41 with B2.
42
43 Q. Well, you didn't recommend B2, did you?
44 A. No. In the suggested zoning scenario, I had it as R4.
45 You could argue it could be B2; you could argue it could be
46 B4. It's --
47

1 Q. Well, that would only be on the basis that you were
2 being informed by what councillors told you through the
3 coloured maps and at the workshop; correct?

4 A. Yes, that's correct.

5

6 THE COMMISSIONER: Q. Why did you recommend R4 instead
7 of B2?

8 A. I think for the scale, the size of the scale of Berala
9 as a local centre, that land there is very close to the
10 station. It probably doesn't warrant expansion of the B2
11 zone that much. If it is going to expand a little bit on
12 the southern side and a little bit on the western side of
13 Elizabeth Street, that's probably a reasonable expansion at
14 this time of the B2 zone. You could expand it a little bit
15 more to the area of R4 or you could go with R4. Like, you
16 could probably make a case either way. I just put forward
17 a position of R4 but it was a position for discussion. It
18 wasn't a direction to the council. It was a position to
19 them for discussion.

20

21 Q. It was your recommendation?

22 A. Yes, it was my recommendation to the councillors for
23 their discussion.

24

25 MR BOLSTER: Q. Can I suggest that your recommendation
26 only came about because the councillors had told you, or
27 you appreciated the councillors had told you, that they
28 wanted an up-zoning in that area?

29 A. Yes, the recommendation for B2 in that area. Yes.
30 It's come out of that discussion at the June workshop with
31 the councillors, yes.

32

33 Q. If the maps had come back with no colouring-in for
34 south of York Street, you wouldn't have recommended R4,
35 would you?

36 A. No, I probably wouldn't have gone with R4, no.

37

38 Q. Your position today is: put a halt on the Berala
39 rezoning; is that correct?

40 A. Yes, that's correct.

41

42 Q. That is the advice you gave to Mr May?

43 A. That is correct, and that's the advice I'd give today
44 as well.

45

46 Q. You gave that advice whilst Mr Francis was with you?

47 A. Yes. He and I were briefing Mr May together shortly

1 after Mr May's appointment.
2
3 Q. And did Mr Francis take any issue with doing nothing
4 about this proposal at that time?
5 A. No. He was happy to recommend to the administrator
6 both options.
7
8 THE COMMISSIONER: Sorry, he was happy to recommend to the
9 administrator --
10 A. He was happy to recommend to the administrator that --
11
12 Q. To do nothing?
13 A. Well - and the recommendation was until the outcome of
14 the public inquiry was known, so Berala was the --
15
16 MR BOLSTER: Q. If I could summarise the position: you
17 would not have included B2 in the final map that went to
18 council in July if Mr Francis had not directed you to do
19 so?
20
21 MR CHESHIRE: I object to that. The witness did not say
22 that. The witness's evidence, as I made a note, is that
23 she recommended B2 following the June discussions with
24 councillors. Her evidence wasn't that Mr Francis told her
25 to do it.
26
27 MR BOLSTER: I will withdraw the question and I will
28 clarify.
29
30 THE COMMISSIONER: Yes.
31
32 MR BOLSTER: Q. Did any councillor tell you to put B2 in
33 the zone that went to council in July 2014?
34 A. No. No councillor directed me specifically to do
35 that. There would have been discussions about that and it
36 did come through from a mapping exercise in February, as
37 shown in the presentation.
38
39 Q. Can I suggest that your position left to you, if it
40 was up to you entirely to prepare that report, you would
41 not have put forward B2 for the area south of York Street
42 on your own?
43 A. Yes, that's correct.
44
45 Q. And if the councillors didn't instruct you to do it,
46 and it wasn't your decision to do it, whose decision was
47 it?

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MR CHESHIRE: I object to that. The witness is being asked here about what she would have done and now there are two scenarios.

MR BOLSTER: I am not asking that.

MR CHESHIRE: There was a question a minute ago which this now proceeds from when she was asked whether she would have put that in herself. The question is whether she would have put that in herself totally disregarding any involvement of the councillors and disregarding previous involvement, or whether she would have put that in in the circumstances as they stood at the time and the witness may be talking at cross-purposes and that should be clarified.

MR BOLSTER: Let me make it very clear.

Q. Mr Francis suggested to you, may I suggest, that it would be B2 zoning on the map that went forward to council?

A. After discussing and referring back to the maps from the workshop, we - yeah, we discussed it and he suggested that it be B2 on the basis of what the councillors had mapped at the workshop.

Q. Yes. Thank you.

THE COMMISSIONER: When we say "the councillors", who are we talking about?

MR BOLSTER: Yes.

Q. At the workshop, amongst the councillors, to be fair to them, who was talking about the B2 zoning south of York Street, the south side of York Street?

A. So from the February mapping exercise workshop?

Q. You don't know who did the maps other than Mr Yang whose autograph is --

A. Yes, so I was going to say --

Q. At the workshop, I am more particularly interested in, who was doing the talking? Did you take notes at the workshop?

A. I didn't take specific notes. I would have made really sketchy annotations here and there. There was a lot of discussion all at once. It's not a formal setting so

1 it's not one person speaking at a time. There could have
2 been smaller conversations happening as well once the map
3 was put on the screen.
4

5 Q. What is the purpose of a councillor workshop? It
6 doesn't occur in the council chambers, it occurs next door
7 in a committee room?

8 A. Yes, that's correct.
9

10 Q. Is it a decision-making process of council?

11 A. No, no decisions can be made at a councillor briefing
12 or a workshop. It is an opportunity for staff to present
13 matters to the councillors that will subsequently be on the
14 council agenda, a formal council meeting, and
15 an opportunity to explain issues that may be more complex
16 or that the councillors may wish to have time to consider
17 before they consider it at a council meeting and
18 an opportunity for the councillors to ask questions of
19 staff in a more informal setting without having to speak
20 formally through the chair.
21

22 Q. Just going back to the question I asked before, which
23 councillors do you recall taking an interest in the zoning
24 of the land on the south side of York Street at the
25 councillor briefing in June 2014?

26 A. I don't recall any specific councillors. I'm not
27 saying it wasn't discussed but I don't specifically
28 remember that.
29

30 Q. Do you recall the topic of B2 being discussed for that
31 zone at that time?

32 A. Not recently. My main recall is a discussion of the
33 B2 in Campbell Street in a different location; that is very
34 clearly in my mind. The B2 in the York Street location is
35 much less clear.
36

37 Q. I think that's all I wanted to ask you about Berala,
38 so I think you can close up - no, keep that folder because
39 the middle portion of it, I think you will find, has
40 a bundle for South Auburn which we are going to talk about
41 now.
42

43 THE COMMISSIONER: What is the page?
44

45 MR BOLSTER: I have three bundles in one volume. I think
46 the witness has the same. I think you just have the --
47

1 THE COMMISSIONER: Does it start with a --
2
3 MR BOLSTER: It starts with the BASIX material and then
4 behind the first divider is South Auburn.
5
6 THE COMMISSIONER: TP3 2013?
7
8 MR BOLSTER: Yes.
9
10 THE COMMISSIONER: And the first page is a council
11 meeting, April 2015?
12
13 MR BOLSTER: Yes.
14
15 THE COMMISSIONER: You might just want to check that the
16 witness has it. I think that's right, yes
17
18 MR BOLSTER: Q. Mr Cologna, Mr Francis was appointed as
19 your manager, that is, Executive Manager Planning in
20 October 2013. That was shortly after Mr Brisby was
21 appointed; is that correct?
22 A. Yes, that's correct.
23
24 Q. Between then and June 2014, do you recall discussing
25 this particular planning proposal with him and ascertaining
26 his views about it?
27 A. Discussing with Mr Francis?
28
29 Q. Yes.
30 A. Yes, I did. Mr Francis was not in support of this
31 planning proposal but he was aware that we had a council
32 resolution and that there had been a number of previous
33 council resolutions and this proposal in various forms had
34 a long history and that he was also aware that there had
35 been two terminations issued by the Department of Planning.
36
37 Q. I take it when he took over the position of Executive
38 Manager Planning he sat down with you and talked about the
39 current planning proposals that you had in your --
40 A. Yes, I would have given him an update on the current
41 status.
42
43 Q. You would have explained to him, "This is what is
44 being proposed in South Auburn"?
45 A. Yes.
46
47 Q. Do you recall what your position was at the time you

1 explained that to him? Were you supportive or --
2 A. No. Look, I wasn't supportive but I was acting on
3 a resolution of council and the fact that we'd had two
4 previous gateway determinations.
5
6 Q. Did he indicate that he wanted to do anything about
7 the fact that he disagreed with the planning proposal at
8 that time?
9 A. At that time he indicated that he didn't like that
10 particular proposal but he was aware of the resolutions and
11 the gateway determination and we proceeded on that basis.
12
13 Q. Is this a fair way to put it - neither of you liked
14 the proposal but considered yourselves bound by the
15 resolution to progress it?
16 A. That's correct, yes.
17
18 Q. This occurred shortly after he took on the role of
19 Executive Manager Planning?
20 A. That's correct, yes.
21
22 Q. The first indication from staff that there should be
23 some attenuation of the proposal did not occur
24 until April 2015; correct?
25 A. That's correct.
26
27 Q. In the meantime, a planning organisation had done
28 a full assessment. Is it MG?
29 A. MG Planning.
30
31 Q. They had done an assessment on the original proposal?
32 A. That's correct, yes.
33
34 Q. Which needed to be done in order to get gateway
35 approval?
36 A. We were expecting that gateway would require that and
37 we did it in advance, yes.
38
39 Q. So you got the gateway approval for this?
40 A. Yes.
41
42 Q. Based on that report?
43 A. Yes.
44
45 Q. Presumably that report cost a lot of money?
46 A. It did. It was probably more in the order of \$20,000
47 to \$40,000. Again, I can provide that information.

1
2 Q. Is it an unavoidable fact that when anyone proposes
3 a spot rezoning, you need some form of external
4 consultant's report to justify it for gateway purposes?
5 A. If it is a resolution of council, a council initiated
6 planning proposal, then we, council, will pay for that
7 study. We will be required to satisfy - to do a study. If
8 it's an applicant initiated planning proposal, then the
9 study is done to satisfy that the conditions go out at the
10 applicant's expense.
11
12 Q. Let's just be clear - Grey Street was applicant
13 initiated?
14 A. That's correct.
15
16 Q. They did their studies?
17 A. Yes.
18
19 Q. Nonetheless, the actual study that council did it was
20 done internally, that you did?
21 A. Yes, council paid for it, we commissioned it, yes,
22 that's correct.
23
24 Q. Berala --
25 A. Yes.
26
27 Q. -- council initiated the zoning?
28 A. Correct.
29
30 Q. Council did the initial study?
31 A. Yes.
32
33 Q. Marsden Street?
34 A. Yes.
35
36 Q. It was initially an applicant initiated proposal?
37 A. Yes.
38
39 Q. And it was initially supported by their town planning
40 report?
41 A. Yes.
42
43 Q. But council took a decision to look at the issue more
44 broadly?
45 A. Yes.
46
47 Q. Hence, the need for the AECOM --

1 A. Correct, we commissioned them, yes, that's correct.
2
3 Q. It was in April 2015 - we're back now in South Auburn.
4 In the bundle, if I could ask you to go to the maps
5 starting at page 283 and following, you will see there
6 option 1, option 2A and option 2B?
7 A. Yes.
8
9 Q. When in relation to the date of this report, which was
10 prepared for a council meeting on 15 April - which I assume
11 means it was done about two weeks before?
12 A. The report would have had to be finalised about two
13 weeks before, that's right.
14
15 Q. And the report itself would have taken some time to
16 prepare?
17 A. Yes, the assessment report, yes. The council report
18 can be prepared more quickly given that it's a summarised
19 version of the assessment report.
20
21 Q. This report came to council because MG had provided
22 their report?
23 A. Yes.
24
25 Q. And you had received gateway approval?
26 A. Yes.
27
28 Q. Essentially, council was therefore at liberty to make
29 the final decision about proceeding with the rezoning;
30 correct?
31 A. Yes.
32
33 Q. It was in council's hands?
34 A. Yes.
35
36 Q. And subject to completing formalities and sending the
37 documentation to Planning and Gazetting, it would have
38 occurred in the ordinary course?
39 A. That's right, but requiring the decision of council,
40 yes.
41
42 THE COMMISSIONER: What was the zoning just prior to that
43 proposed zoning in option 1? Was it B4/R4?
44
45 MR BOLSTER: It was all R3.
46
47 THE COMMISSIONER: It was all R3.

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MR BOLSTER: It was R3 in the Harrow Road/Auburn Road block, R3 in the Susan and Marion Street block.

Q. In fact, well before this proposal there had been an earlier proposal that didn't proceed which dealt with that Marion Street block too, didn't it?

A. It did. It dealt with the land fronting Susan Street, so it effectively dealt with half of that Marion Street.

Q. Half of that block?

A. Yes.

Q. So it was slightly bigger than this block?

A. That's correct, yes.

Q. The option for including options 2A and 2B in this report to go forward to council was Mr Francis' proposal; correct?

A. That's correct, because he had thought about it at the time that he had been in the role and still wasn't comfortable and it was a way of presenting some alternative options to council if they wished to consider increasing the B4 by smaller amounts.

Q. Essentially, he conveyed what you have just said to you?

A. Yes.

Q. In words to that effect?

A. Yes, that is correct.

Q. When did he do that?

A. I can't recall exactly but it would have been prior to us finalising this report. It would have been relatively close to the report being finalised but it could have been, like, a month before. I can't say exactly.

Q. Were any versions of this report prepared to go forward which did not include options 2A and 2B?

A. There could have been a draft report that we had prepared. It wouldn't have been finalised as anyone hadn't approved it yet, I don't think, but we could have had it sitting there ready to proceed and then Mr Francis and I have had these discussions about a compromise position for consideration by council.

1 Q. You can't say - let's go off the date of
2 15 April - when it was that the decision was made about the
3 option 2A and 2B?

4 A. I can't say specifically the date or how close to, but
5 I think it would have been fairly close to it going to
6 council. Perhaps a month or so; I can't remember exactly.

7
8 Q. A month?

9 A. I can't recall exactly. It would have been relatively
10 close to being ready to go to council; I can't be specific.

11
12 Q. Do you think that if you had an opportunity to look at
13 your records --

14 A. I could - we would --

15
16 Q. -- you might be able to clarify the timing?

17 A. We would have the tracking on our system and I could
18 check that, yes. I just don't have it in my head,
19 you know.

20
21 MR BOLSTER: Thank you. I want to turn now to the
22 Marsden Street proposal, if you can be given that folder.
23 Mr Commissioner, might I just formally tender the
24 South Auburn bundle?

25
26 THE COMMISSIONER: Yes. That will be exhibit SA1

27
28 **EXHIBIT #SA1 - SOUTH AUBURN BUNDLE OF DOCUMENTS**

29
30 MR BOLSTER: Q. In the case of Marsden Street, I wanted
31 to ask you about option G.

32 A. Yes.

33
34 Q. If you go to page 181, here we have, initially,
35 a resident initiated proposal that becomes a council
36 initiated proposal. AECOM are briefed and prepare a very
37 comprehensive report of all of the options. You would
38 agree with that?

39 A. Yes, that's correct, yes.

40
41 Q. When you read that report what was your reaction?

42 A. That it was a very detailed study, it had been very
43 thorough, and that they had identified a number of options
44 as part of that study and met the requirement in the brief.

45
46 Q. When you read that report what did you understand were
47 the competing significant options? Which were the options

1 that were really on the table as far as you were concerned
2 as a planner, with responsibility for this site?

3 A. Well, the consultant had recommended a further
4 scenario, F. In addition to that, I was quite interested
5 in scenarios A and B because they proposed to retain the
6 industrial 2 zoning fronting East Street.

7
8 Q. I think you mention in your statement that much of the
9 discussion within your team revolved around the decision as
10 to whether to retain a buffer between the cemetery and the
11 East Street properties?

12 A. Yes, that's correct. There were some differing
13 opinions. Some of the planners and AECOM took the view
14 that it would be good to extend the residential or the B4
15 zoning so that they could have views over the cemetery.
16 The cemetery is quite leafy there. There were other views
17 and I took an alternative view that it would be good to
18 retain some industrial land as a transition between the
19 town centre and look at the cemetery itself; so both of
20 them are valid viewpoints.

21
22 Q. Your viewpoint on that buffer zone prevailed in the
23 adoption of option G; correct?

24 A. Yes, it did, yes, and I put forward that option to
25 retain one buffer.

26
27 Q. Did you pay much attention to the competing zonings
28 for the residential land along Mark Street and, in
29 particular, the block bounded by Mark Street and
30 James Street, to the north-east of them?

31 A. Yes. I did look at the varying options that could be
32 provided for those, all of that land within the 400 metre
33 radius of Lidcombe Station, so I was of the view that you
34 could rezone that to either B4 or R4, just because of its
35 proximity to the station and that's well within the
36 Department of Planning or the safe metropolitan planning
37 framework guidelines.

38
39 Q. AECOM didn't recommend that, though, did they?

40 A. No, they didn't. They recommended R4 for that area,
41 so they took a differing view.

42
43 Q. Their reasons against the B4 zone are set out on
44 page 175. Can you turn to that, please. One of the
45 significant negative considerations that they proposed was
46 that there was a risk in option E of an over-supply of B4
47 mixed use in that precinct.

1 A. Yes.
2
3 Q. And then they pointed out the consequences of having
4 quite a lot of retail space in that precinct.
5 A. Yes.
6
7 Q. That precinct had always been or was, until that point
8 in time, R --
9 A. I think it was - no, sorry, it had a residential
10 zoning.
11
12 Q. Sorry, I should know this. The existing was R4.
13 A. The land south of Marsden and Day Streets, yes.
14
15 Q. The reason why they proposed R4 in their preferred
16 option F is set out on page 179 of the bundle; correct?
17 A. Yes, that's correct.
18
19 Q. When option G was identified, was there any talk
20 amongst the planning staff that it go back to AECOM for
21 their views?
22 A. I don't recall any discussion of that, and I certainly
23 didn't think that at the time.
24
25 Q. With hindsight, ought that to have happened?
26 A. Yes. With hindsight, yes, it would have been good to
27 have that discussion with AECOM.
28
29 Q. Going back to South Auburn, when the attenuation of
30 the B4 zone was proposed, should that have gone back to the
31 independent planning advisers as well?
32 A. Yes, it could have but because we were proposing
33 a smaller amount of B4, you could argue that if the
34 consultants were happy with a larger amount, then it would
35 follow the smaller amounts. You could also say that, yes,
36 you know, we should have gone back to them as well. If we
37 were expanding the B4 zone in the South Auburn case,
38 definitely we should have gone back to them.
39
40 Q. We are back at South Auburn, I apologise for going out
41 of order, but the problem with that is that you were left
42 with a very tiny pocket of B4?
43 A. Yes.
44
45 Q. A very unusual pocket of B4?
46 A. Yes.
47

1 Q. You would agree with me about that?

2 A. Yes.

3

4 Q. One doesn't normally rezone, spot rezone, a B4 site
5 that is so small?

6 A. That's right, but that small zoning only came about as
7 a proposed scenario as a compromised position in - so that
8 the councillors could consider if they wished to
9 a smaller - well, it was what they originally proposed.
10 You wouldn't necessarily propose that small bit in the
11 first instance.

12

13 THE COMMISSIONER: Q. Is that why you said you didn't
14 like the South Auburn planning proposal?

15 A. Because it was like such an extension of the B4.

16

17 Q. I think you have given a reason why you didn't like it
18 in paragraph 14 of your statement. Is it essentially
19 because it seems quite odd for a councillor to initiate
20 a proposal to deal with such a small block of land?

21 A. Yes, and to do it in quite a spot rezoning kind of
22 way. Ideally you would do that as part of a bigger
23 strategic study.

24

25 THE COMMISSIONER: Sure, yes.

26

27 MR BOLSTER: Q. And Berala where Hill PDA had, you would
28 agree, recommended caution about rezoning in their
29 recommendations, you're familiar with that?

30 A. Yes. Yes.

31

32 Q. Would it not have been prudent to go back to them
33 before taking the options to council that were presented
34 in July 2014?

35 A. We could have. We didn't ask Hill PDA to specifically
36 look at rezoning. It was more testing how the control
37 worked and whether or not the controls as they stood would
38 be sufficient to contribute towards revitalisation of the
39 centre. We could have gone back to Hill PDA but we would
40 have been expanding the scope of what we originally asked
41 them.

42

43 Q. That goes back to the limitations of the Hill PDA
44 report in the first place. It was about feasibility of
45 development.

46 A. Yes.

47

1 Q. It wasn't really a planning issue.
2 A. It was about the feasibility of the council's controls
3 in terms of how the height limits are working together,
4 with the parking requirements and council's DCP thrown in,
5 yes.
6
7 Q. It wasn't a task where they were asked to give their
8 opinion on what the zoning should be for the broader Berala
9 area?
10 A. That is correct, we did not ask them to do that.
11
12 Q. In relation to Marsden Street, that's what AECOM did?
13 A. Yes, AECOM were asked to give an opinion on that and
14 they did that.
15
16 Q. Someone could have been asked to do it for Berala?
17 A. Yes, they could have. We didn't ask someone to do
18 that, but we could have done that, asked.
19
20 Q. South Auburn, no-one was asked to do that?
21 A. South Auburn, we asked the planning consultant to give
22 us a study on what council had resolved in terms of
23 extension of the B4 and a rezoning to R4.
24
25 Q. That was for Gateway purposes only for that proposal?
26 A. Yes, in response to the council resolution we had
27 before us, yes, to satisfy the anticipated conditions of
28 Gateway.
29
30 Q. In the case of Grey Street, there was no external
31 report sought, probably, can I suggest, because council
32 staff had little difficulty in assessing the proposal
33 referable to the later land study?
34 A. Yes, an employment land study there and we went back
35 to the consultant who did the employment land study for
36 some specific additional detailed advice on the proposal
37 before us, to assist us in our assessment of that.
38
39 MR BOLSTER: That is all from me, Mr Commissioner.
40
41 THE COMMISSIONER: Q. Can I just ask, I am not sure
42 whether it is for you or the witness, Mr Bolster, but just
43 on the South Auburn Planning Proposal, do you have that
44 bundle there?
45 A. I don't have it with me.
46
47 Q. Just on page 5, there is a planning proposal title, do

1 you see that?
2 A. Yes, I see that.
3
4 Q. I can see, if you drop down to 17 April 2013, the
5 council resolved to prepare a planning proposal which
6 ultimately becomes PP3 of 2013, but it initially starts
7 back at 12 May 2010?
8 A. That's correct.
9
10 Q. Do we know what the catalyst for that resolution was?
11 A. That was a --
12
13 Q. Do you know?
14 A. I know to the extent that it was a resolution from the
15 floor of council.
16
17 Q. And that's it?
18 A. That's it.
19
20 THE COMMISSIONER: Is there anything further on that?
21
22 MR BOLSTER: That will be explored probably in the third
23 week.
24
25 THE COMMISSIONER: All right.
26
27 MR BOLSTER: Nothing arising. I will just check first.
28 Does anyone wish to seek leave to ask Ms Cologna any
29 questions?
30
31 MR CHESHIRE: Yes, please, Commissioner.
32
33 THE COMMISSIONER: We might do that after the lunch break.
34 Ms Cologna has been giving evidence for about an hour 40
35 without a break, so we will go to lunch early. I just
36 wanted to know whether I could let her go entirely.
37
38 MR CHESHIRE: Yes, I won't be very long.
39
40 MR BOLSTER: The witness could probably stand down --
41
42 THE COMMISSIONER: Does anyone else want to ask any
43 questions?
44
45 MR WATSON: I might. It depends on what Mr Cheshire asks
46 or doesn't ask.
47

1 THE COMMISSIONER: Right.

2

3 MR HOPPER: I may as well.

4

5 THE COMMISSIONER: Given that it is that many, I will
6 unfortunately ask you to come back at 2 o'clock. You are
7 excused until 2 o'clock.

8 A. Thank you.

9

10 MR BOLSTER: Commissioner, could I foreshadow this in case
11 Mr Cheshire has any objection, I will be formally tendering
12 the statement that Mr Francis has provided and the
13 transcript of his private hearing. If he wants to make any
14 objection, I am just giving notice of that.

15

16 MR CHESHIRE: Thank you.

17

18 THE COMMISSIONER: We will adjourn until 2 o'clock.

19

20 MR ROBSON: Just before you do, Commissioner, is it your
21 usual practice that the attempted discussion or negotiation
22 regarding the order of witnesses will be discussed between
23 representatives and Counsel Assisting, and do not involve
24 yourself?

25

26 THE COMMISSIONER: Yes.

27

28 MR ROBSON: I am content with that.

29

30 THE COMMISSIONER: That is Mr Bolster's role. We will
31 adjourn until 2pm.

32

33 **LUNCHEON ADJOURNMENT**

34

35 **UPON RESUMPTION**

36

37 MR WATSON: Commissioner, I don't want to tread on
38 Mr Cheshire's toes, but I am quite happy to go first. My
39 questions are short and sweet.

40

41 MR CHESHIRE: I am very happy for Mr Watson to go first.

42

43 **<EXAMINATION BY MR WATSON:**

44

45 MR WATSON: Q. Ms Cologna, I want to ask you first of
46 all about the various levels of protection in respect of
47 planning decisions. I will explain what I mean by that.

1 A. Yes.
2
3 Q. There has been a lot of evidence in this inquiry about
4 decisions which were taken or not taken by Auburn City
5 Council. You know that of course?
6 A. Yes.
7
8 Q. This is a matter, to which you have referred earlier
9 in your evidence, that there are controls above and beyond
10 Auburn City Council in respect of planning notice?
11 A. That's correct, yes.
12
13 Q. In terms of the Gateway process, you've described
14 that, but could I just get you to do it again in this
15 sense. When are the circumstances that the Gateway process
16 is invoked?
17 A. Whenever there is a planning proposal before Council,
18 whether it's initiated by the Council or initiated by an
19 applicant, for the planning proposal to proceed to
20 subsequent stages of the process, it must go through the
21 Department of Planning's Gateway and that's common across
22 New South Wales.
23
24 Q. So if we look at the particular projects which are
25 under review in this inquiry, a number of them would have
26 been subject to the Gateway process; is that correct?
27 A. Yes, that's correct, yes.
28
29 Q. Let me give an example. South Auburn would have?
30 A. Yes.
31
32 Q. Berala would have?
33 A. Yes, that's correct.
34
35 Q. Marsden Street would have?
36 A. Yes, that's correct.
37
38 Q. Grey Street, Silverwater, would have?
39 A. Yes.
40
41 Q. They're all subject to the Gateway procedure?
42 A. That's correct, yes.
43
44 Q. Let's put it out in the open. What's floating around
45 is the idea that some decisions were made by Auburn City
46 Council which could be for maybe the benefit of some of the
47 councillors or for some of the councillors' friends.

1 I want you to accept the sort of general flavour --
2 A. Yes, I understand.
3
4 Q. -- that has been in the newspapers.
5 A. It has, yes.
6
7 Q. The point is this: any decision in respect of any of
8 those projects would have been subject to review by a
9 completely independent authority?
10 A. Being the New South Wales Department of Planning,
11 that's correct.
12
13 Q. I take it the people in the New South Wales Department
14 of Planning hold skills and training which allow them to
15 see the depth of the issues in planning matters?
16 A. Yes, that's correct. They would have qualified town
17 planning staff working on these matters.
18
19 Q. That's one type of protection which would have been
20 afforded here. Can I ask you about another one.
21 A. Yes.
22
23 Q. You know of course about the JRPP?
24 A. Yes. Yes, I do.
25
26 Q. The Joint Regional Planning Panel.
27 A. Yes.
28
29 Q. Could you tell us what that is?
30 A. As the name suggests, it is a regional planning panel.
31 It has representatives on it appointed by the state
32 government. It has, I think, three representatives on the
33 panel appointed by the state government and it has two
34 other representatives appointed by each of the Councils.
35 The state government appointed representatives are shared
36 around the region and the former Auburn Council, like other
37 councils in the region, would appoint two representatives
38 to sit on that panel.
39
40 Q. So there would have been one or two potentially of the
41 Auburn City Councillors on the JRPP?
42 A. That is correct, yes.
43
44 Q. But they wouldn't have a majority by themselves, of
45 course?
46 A. No, that's correct, because the panel is comprised of
47 other people as well.

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Q. Some of those other people are completely independent of any council, they are appointees of the government?

A. That's correct, yes.

Q. The JRPP, that produces records?

A. It does, yes. The decisions of the JRPP or the recommendations of the JRPP are noted formally and produced on the Department of Planning's website.

Q. If we look at the circumstances in which the JRPP might become involved, what are they?

A. In the case of a DA, it is quite straightforward. In the case of a planning proposal --

Q. Sorry, let's deal with DA first.

A. Okay.

Q. I think it is if the value of the project exceeds \$20 million?

A. Yes, that's correct, so it's quite thicker.

Q. It sounds like a lot of money to me, but in today's terms of producing even a small block of flats, it's going to cost over \$20 million?

A. Yes. I mean the value of the development, the applicant is required to state that, so it is quite clear when the application comes in whether it's going to tip over the \$20 million mark or not, yes.

Q. I interrupted you. You were going to say it is more complicated in respect of planning issues?

A. Oh, not exactly. It is just with the DA, it is very clearcut and there is a numerical figure. It tips over or it doesn't.

THE COMMISSIONER: Q. It is construction cost, is it, \$20 million?

A. Yes, the value of the - yes. With a planning proposal, we have - I have had two planning proposal matters go before the JRPP. They've ended up at the JRPP because in one instance the applicant has taken Council, as they are able to do in the planning proposal process, they've taken Council on non-determination in that we didn't determine the planning proposal within the required time as specified in the legislation, and the applicant is within their rights to do that. That matter ended up

1 before the JRPP. We've had a second instance where a
2 separate planning proposal has ended up at the JRPP for
3 similar reasons, but I think the reason was slightly
4 different.

5
6 MR WATSON: Q. Was there any reason to think that these
7 particular issues under examination in this inquiry,
8 Marsden Street, Berala, et cetera, et cetera, that any of
9 those would need to have been referred to the JRPP?

10 A. There wasn't, and, as I just have said, in the case of
11 Grey Street, for example, which is applicant initiated, if
12 the applicant either wasn't happy with the determination or
13 the resolution they got from Council, or if they felt that
14 Council hadn't determined it within a sufficient period of
15 time, as stipulated in the legislation, they could then
16 accelerate the matter and it might then end up in front of
17 the JRPP.

18
19 Q. This is a matter to which there has been no reference
20 this morning, but I think you'd be generally familiar with
21 the John Street car park issue?

22 A. I do have very limited familiarity. I'm aware of it,
23 but I haven't dealt with that matter specifically.

24
25 Q. I was going to suggest that that was one area where
26 there was likely JRPP involvement?

27 A. Without knowing the details, that would be my
28 understanding based on the sheer cost of that development.

29
30 Q. I am going to make another suggestion, and
31 I appreciate it is very much from a non-lawyer's point of
32 view, a last resort, but there's also the Land and
33 Environment Court for disaffected people who can seek
34 review of decisions made by Auburn City Council?

35 A. Yes, that is correct. I'm not sure that they have a
36 role in planning proposals at this point, but certainly
37 with development application matters, yes, the JRPP, that's
38 clearly their role.

39
40 Q. I was going to deal with another issue. You've had,
41 I don't want to date you, plenty of experience in these
42 sorts of areas?

43 A. Yes, that's correct.

44
45 Q. Let me guess - from time to time you've met
46 Local Government Councillors who are very antidevelopment?

47 A. Yes, yes, councillors have different viewpoints and,

1 yes, some of them are less keen to see development happen.
2
3 Q. Let me guess, you have met plenty of councillors over
4 the years who are very pro-development?
5 A. That's correct, yes.
6
7 Q. Probably the majority is somewhere between those two
8 extremes?
9 A. That's correct, yes.
10
11 Q. All I'm trying to point out is that these philosophies
12 are the kinds of things which are resolved in the Council
13 meetings?
14 A. That's correct, that is the forum where the matters
15 are debated in a public forum and as a result of that
16 debate, resolutions are made and formally recorded.
17
18 Q. Just while we're on the subject of whether there is
19 any owner about decisions made at Auburn, their meetings
20 were conducted in these very Council Chambers; is that
21 right?
22 A. The meetings of Council?
23
24 Q. Yes.
25 A. Yes, that's correct. Yes.
26
27 Q. And except if a confidentiality issue arose, they were
28 conducted in open?
29 A. That's correct, yes.
30
31 Q. They were minuted?
32 A. Yes, they were.
33
34 Q. And they were sound recorded?
35 A. Yes, that's correct.
36
37 Q. So that persons who were suspicious of what had gone
38 on had many means of reviewing precisely what had gone on
39 in the Council deliberations?
40 A. Yes, that's correct. But certainly the minutes are
41 all in the public arena and the recordings could be made
42 available on request in certain circumstances.
43
44 Q. I suggested one area where differences of planning
45 opinions might be resolved as the Council Chamber itself,
46 but there's another place, the ballot box, the elections,
47 is that right?

1 A. Yes, that's correct, yes.
2
3 Q. I was going to ask you about my client, Mr Attie. He
4 was endorsed by the Liberal Party, did you know that?
5 A. I was aware that, yes, he represented the
6 Liberal Party.
7
8 Q. He, Mr Attie, that is, is one of those Councillors who
9 you would say is pro-development?
10 A. Yes. You could say that, yes.
11
12 Q. And he was unashamed about that, that was part of his
13 platform running for Council, wasn't it?
14 A. That's correct, yes.
15
16 Q. So the voters at Auburn elected him and then
17 re-elected him, knowing that he stood on a platform
18 promoting development in this area?
19 A. Yes, that's correct.
20
21 Q. I am going to ask you one last thing, but it only
22 arises because of an article in the press. I read in your
23 statement that it was your idea to hand out the coloured
24 pencils?
25 A. In my statement I said that I organised the colour
26 pencils and the sheets for colouring in. I can't recall
27 whose idea it was. I discussed with Mr Francis ways of
28 trying to document views of the Councillors and there could
29 potentially be 10 different views, so we discussed that.
30 I can't recall exactly whose idea it was, but I certainly
31 organised the materials that would be used in that mapping
32 exercise at that workshop.
33
34 Q. I want you to know I'm not attacking or criticising
35 you about that.
36 A. No, no, I'm just trying to be quite sure.
37
38
39 Q. It's just the opposite.
40 A. No, I'm just trying to be factual, yes. No, I'm just
41 trying to be factual, sorry.
42
43 Q. The point is that, historically, one of the key means
44 of identifying zoned areas is by different colours?
45 A. Yes, the LEP maps across the State do that, yes,
46 that's correct.
47

1 MR WATSON: Thank you very much.

2

3 <EXAMINATION BY MR CHESHIRE:

4

5 MR CHESHIRE: Q. Just on that point, lest there be any
6 doubt, Ms Cologna, did you think that the use of the
7 coloured pencils was a good idea?

8 A. I thought it would be an effective way to - again, for
9 the Council to get down on paper their views, with a mind
10 that there could potentially be 10 different views.

11

12 Q. Indeed it proved a useful exercise; correct?

13 A. It did in that we were looking for some direction to
14 go forward and we were trying to again capture the views of
15 the 10 councillors, yes.

16

17 Q. You were asked some questions about Berala.

18 A. Yes.

19

20 Q. Perhaps if I could just take you back. It is a
21 document you've seen before. It's Exhibit B1 which is the
22 Berala Village exhibit at page 85, and there should be a
23 table dated July 16, 2014, which you've seen before.

24 A. Page 85?

25

26 Q. Yes.

27 A. Yes.

28

29 Q. You've been asked about this passage before. In the
30 second box --

31 A. Yes.

32

33 Q. -- "June 2014: Further discussions and verbal
34 amendments made to plan." Do you see that?

35 A. Yes.

36

37 Q. Am I right that in June 2014 it was the Councillors,
38 themselves, that suggested that there should be some
39 amendments made to the plan; is that correct?

40 A. That is correct. And they were suggesting amendments
41 be made to a suggested zoning scenario. So they were
42 suggesting amendments to something that had been suggested
43 for discussion purposes.

44

45 Q. After the meeting then you discussed, am I right, with
46 Mr Francis, how best to reflect what the Councillors wanted
47 to achieve in the plan that was going to be put forward to

1 the July meeting?

2 A. That's correct, yes.

3

4 Q. Do you recall now whether the suggestion for B2 came
5 from Mr Francis or from the Councillors in the meeting, or
6 do you say that it could have been from either?

7 A. Look, it could have been from either. I do say that
8 at the June briefing, the presentation that I had prepared
9 and presented to the Councillors noted the B4 suggestion on
10 the basis of the mapping exercise I had done in February.
11 So it indicated that at least three Councillors had shown
12 that on their annotated map, so it certainly came from the
13 February workshop.

14

15 Q. So then is it possible that in the June workshop there
16 was an explicit mention by one of the Councillors of the B2
17 zoning which was what then you changed for the July paper?

18 A. Look, it's possible. I don't remember specific
19 discussions about that. It would have been discussed at
20 that time, but there could have been a number of
21 discussions going on at once. My particular memory of that
22 relates to the B2 south of the railway line, but it's
23 possible, yes.

24

25 Q. What was then put forward at the July meeting --

26 A. Yes.

27

28 Q. -- did you regard that plan, with the B2 zoning, as
29 being consistent with what Councillors had said they wanted
30 to happen at the June 2014 meeting?

31 A. Yes, it was broadly consistent. Again, there were
32 still differing views at the June workshop, or briefing.
33 It was broadly consistent with those, and what went to the
34 July Council meeting was for Councillor consideration and a
35 decision. So the Council could have resolved it with a
36 number of different outcomes at that meeting.

37

38 Q. But did you, yourself, believe that the plan that was
39 put forward by you and Mr Francis for the July meeting was
40 an appropriate thing to put forward to the Councillors?

41 A. It was in the sense that it did pull together areas
42 that were proposed to be changed and put that in a report
43 to Council for their consideration, and they could resolve
44 to make no changes if the Council wished at that meeting.

45

46 Q. But as to the report and what you put forward, do you
47 consider that it was appropriate what you did?

1 A. Yes, it was a reflection of what had been discussed
2 with the Councillors in the workshop sessions, and it was a
3 matter for their consideration to make a decision on.
4

5 Q. And you consider that that was an appropriate thing
6 for you and Mr Francis to do in carrying out the functions
7 of your role; correct?

8 A. Yes, that's correct.
9

10 Q. Dealing with the South Auburn development, I think
11 your evidence was that both you and Mr Francis didn't
12 really like this development, but you were proceeding in
13 the light of a Council resolution for there to be some
14 rezoning; is that correct?

15 A. That's correct, and also the fact that there had been
16 two previous Gateway determinations on the matter.
17

18 Q. So when there was a proposal that was put forward, you
19 considered - and I'm particularly referring to
20 proposal 2A - that was an appropriate thing for you and
21 Mr Francis to put forward in a report in the light of the
22 previous Council resolution; correct?

23 A. Yes, it was, it was some alternative options, a
24 position of compromise, yes.
25

26 Q. You considered the position of compromise --

27 A. Sorry, a position of compromise in the sense that
28 Mr Francis and I both agreed that you wouldn't really -
29 ideally, we wouldn't be looking to rezone that land.
30 However, because we had the Council resolution and the two
31 existing Gateway determinations, we were proceeding on that
32 basis. That is what I meant when I said "compromise".
33

34 Q. So, in effect, you and Mr Francis agreed that it was a
35 compromise between you, on the one hand, and Councillors on
36 the other?

37 A. Yes, that's right, the Councillors' position being in
38 their resolution, yes, that's correct.
39

40 Q. In relation to Marsden Street, you were asked about
41 going back to AECOM and that you could have gone back to
42 them. I think you gave evidence that you could have gone
43 back to them but there were reasons as to why you didn't,
44 correct?

45 A. I thought I had said that we could have gone back to
46 AECOM but that I didn't think of it at the time.
47

1 Q. Yes.
2 A. Is that what you meant?
3
4 Q. Yes.
5 A. Yes.
6
7 Q. Do you consider that you acted inappropriately at the
8 time or is it more a case of "I could have acted that way
9 but" --
10 A. Look, it's more of a case of a hindsight thing. The
11 Scenario G that we recommended in the report was an amalgam
12 of scenarios that AECOM had presented. It was not one that
13 they had exactly presented, but it was an amalgam of ones
14 they had presented. They had looked at an option of a
15 large B4 area, so I didn't think it was - I don't think
16 it's inappropriate that we didn't go back to them. In
17 hindsight, yes, we would have gone back to them.
18
19 MR CHESHIRE: Thank you very much.
20
21 THE COMMISSIONER: Is there anyone else that wants to ask
22 questions?
23
24 MR HOPPER: I have some questions, thank you, Commissioner.
25
26 **<EXAMINATION BY MR HOPPER:**
27
28 MR HOPPER: Q. Ms Cologna, you have been on the Council
29 since 2009?
30 A. That's correct.
31
32 Q. Were you aware of the original request by Council to
33 commission a study in relation to Berala, Regents Park and
34 other places?
35 A. Is this the resolution from 2010?
36
37 Q. Yes.
38 A. Yes, I was aware of that resolution.
39
40 Q. That first study came back in early 2012, around
41 April?
42 A. Yes.
43
44 Q. And then a resolution came before Council in relation
45 to making that open for public discussion?
46 A. By that do you mean to further exhibit it, is that
47 what you mean by that?

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Q. Yes.

A. Yes, that's correct, yes.

Q. That was on 18 April 2012, take it from me that's when that resolution went before Council.

A. Yes.

THE COMMISSIONER: The study you're talking about, is that the Draft Berala Village Centre Study of March 2012 that's at page 1 of the bundle?

MR HOPPER: Yes, Commissioner.

Q. That was Resolution 59 of 2012, for completeness, do you agree with that?

A. Yes, that's correct, yes.

Q. It was at that point that Mr Zraika first advised he had a pecuniary interest and that he first excused himself from participating in debate or voting on that?

A. My understanding is that he had excused himself previously on Berala, like, consistently abstained. Declared an interest and abstained from voting consistently on Berala matters, that's right.

Q. Specifically from that point in time --

A. Certainly at that point, yes, he did.

Q. -- he had, and from that time onwards he never participated in Council meetings, either in the debate or on voting?

A. That's correct, yes, he did not do that.

Q. Thank you. If we go to the Bowral workshop --

A. Yes.

Q. -- in February 2014, it is the case, isn't it, that Mr Zraika absented himself during that part of the workshop that involved the Berala proposal?

A. That's my understanding. I wasn't there for that part of the workshop. I did attend Bowral on the Friday, but I was not there on the Saturday when that workshop took place.

Q. You weren't there when Councillors were colouring in?

A. Doing the mapping exercise, no. I was not there for

1 that. I had gone home on Friday afternoon after I had
2 finished presenting on the Friday.
3
4 Q. Thank you. In relation to the briefing in June, the
5 Council briefing --
6 A. Yes, sorry, yes.
7
8 Q. -- Mr Zraika wasn't present during that briefing?
9 A. I can't recall exactly who was there but - yes, I'm
10 sorry, I can't recall who was there.
11
12 Q. All right. It would be fair to say you have no memory
13 whether he was there?
14 A. Yes, that's correct. I can't - I remember that there
15 were about six Councillors, there could have been about
16 eight. I can't remember now who was who, because of the
17 number of councillor briefings I had done in that time,
18 yes, I can't remember exactly.
19
20 Q. Mr Zraika never approached you to discuss the Berala
21 planning proposal at all, did he?
22 A. No, we've never had any discussions about any of the
23 planning matters.
24
25 Q. All right. In essence, the Berala matter was about
26 increasing the density of residential premises and
27 expanding the possibility for commercial and retail
28 premises?
29 A. Yes, that's correct.
30
31 Q. As time goes by, small villages like Berala expand?
32 A. Yes, that's correct.
33
34 Q. In your role as a strategic planner, you look at not
35 only what the demographic is at the time of the study, but
36 you look towards future projections?
37 A. Yes, that's correct, yes.
38
39 Q. You also look at either current or future government
40 proposals, or government proposals that are in development?
41 A. Do you mean things that --
42
43 Q. The policies.
44 A. -- the state governments - the state government
45 planning framework and --
46
47 Q. That's right.

1 A. Yes, we do.
2
3 Q. You would have been aware of a plan for growing Sydney
4 that was being developed?
5 A. Yes, that's correct. Yes.
6
7 Q. And then that came into being around December 2014?
8 A. Yes.
9
10 Q. But you knew about that process of policy development
11 before that paper was released?
12 A. Yes, that's right. The state government keeps us
13 informed of the major strategic framework, yes.
14
15 Q. You would agree that it was a state government policy
16 that was under development and that finally became part of
17 this paper to increase population densities around places
18 like Berala so people can have access to rail, to get to
19 work in different areas quickly, and to have a completely
20 different environment to what existed at Berala at the
21 time?
22 A. Yes. The state government was certainly keen to
23 increase housing close to public transport, particularly
24 railway stations, yes, and shops as well.
25
26 Q. And certainly the proposals by Council to consider B2,
27 and expanded B2 around the Berala Village, was consistent
28 with the emerging government policy?
29 A. Yes, that's correct, particularly within the 400 metre
30 radius of the station, yes.
31
32 Q. Indeed, a similar line of policy in relation to higher
33 density population hubs around rail stations, that was a
34 policy of the earlier Labor Government as well, wasn't it?
35 A. Yes, that's correct, in the previous Metropolitan
36 Strategy, yes.
37
38 MR HOPPER: Thank you.
39
40 MR WATSON: Commissioner, I am sorry about this, my
41 excuses are no better but these questions were on page 2 of
42 my notes, but they are very short.
43
44 **<EXAMINATION BY MR WATSON:**
45
46 MR WATSON: Q. I wanted to ask you something specific
47 about Grey Street, Silverwater.

1 A. Yes.
2
3 Q. There were questions asked by you by Mr Bolster about
4 that industrial area and it was described as lying north of
5 Parramatta Road.
6 A. Yes.
7
8 Q. The Grey Street proposal --
9
10 THE COMMISSIONER: Q. Is that the Silverwater Precinct?
11 A. The Silverwater Precinct, yes.
12
13 MR WATSON: Q. It runs well to the north, right up
14 Rosehill and Camellia and those sorts of places, that
15 industrial area?
16 A. Yes.
17
18 Q. It has been an important industrial area of Sydney now
19 for decades?
20 A. Yes.
21
22 Q. But where Grey Street is is a little different. It is
23 on the southern side of the motorway, isn't it?
24 A. It is on the northern side of it, only just north of
25 it.
26
27 Q. Just on the northern side?
28 A. Yes.
29
30 Q. It is really separate from that major industrial area
31 to the north, isn't it?
32 A. It is. It is separate, yes. The zones virtually
33 adjoin, but it has a different zoning and - yes.
34
35 Q. It was its own separate nest but right at the southern
36 tip of that larger industrial zone?
37 A. Yes.
38
39 MR WATSON: Thank you.
40
41 THE COMMISSIONER: Does that conclude everyone that wants
42 to seek leave to ask questions? No-one else? Mr Bolster.
43
44 MR BOLSTER: Nothing further, thank you, Mr Commissioner.
45 Might the witness be excused?
46
47 THE COMMISSIONER: You are excused, thank you.

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<THE WITNESS WITHDREW

MR BOLSTER: The next witness is Mr Mooney. Could I have access to the opening tender bundle, please.

THE COMMISSIONER: Yes.

MR BOLSTER: Someone has taken my copy.

THE COMMISSIONER: That's Exhibit 01.

MR BOLSTER: Yes. Could I have access to that briefly.

<JASON MOONEY, sworn: [2.28pm]

<EXAMINATION BY MR BOLSTER:

MR BOLSTER: Q. Mr Mooney, you have made a statement in relation to this matter?

A. Yes, I have.

Q. On 18 May 2016? Do you have a copy of it with you?

A. Yes, I do, yes.

Q. Just have that open. Are the contents of that statement true to the best of your information, knowledge and belief?

A. They are, yes.

Q. I would just like you to have a look at this folder which I've opened up, it is exhibit 01 at page 91. Could the witness be given a copy of the Station Street bundle. Do you recognise that document as being the report you prepared that you refer to in your statement?

A. Yes, that's it, yes.

Q. Could you just --

MR WATSON: I am sorry, I don't want to hold things up, but I don't have Mr Mooney's statement. I'm hoping that's a sign that I am not interested.

MR BOLSTER: No, I don't think you will be.

MR WATSON: Well, I will sit back down then.

1 MR BOLSTER: Not a problem.
2
3 Q. You should have a large bundle in front of you and it
4 should be divided into two sections?
5 A. Yes.
6
7 Q. Would you go to the second section? That commences at
8 page 1 which is a copy of a development application. Do
9 you have that?
10 A. Yes. Yes, I do.
11
12 Q. I will just ask you a few very brief questions about
13 some of the documents in there. Could you start off with
14 page 231.
15 A. Yes, I've got that.
16
17 Q. Is that a document you prepared?
18 A. Yes, it is.
19
20 Q. That was the document that accompanied, I presume, the
21 report?
22 A. That's right, yes.
23
24 Q. That summarises the results of your investigation?
25 A. Yes, it summarised up to that stage, I believe, yes.
26
27 Q. To that point?
28 A. Yes.
29
30 Q. Would you go over the page to page 233. You will see
31 that there commence a series of forms that show the result
32 of your inspection of the premises?
33 A. Yes, that's right.
34
35 Q. They're accompanied by photographs?
36 A. Yes.
37
38 Q. I am wondering if you could identify for me a
39 photograph that shows a masonry wall with appropriate
40 fittings where the door is located, so that the
41 Commissioner can get an understanding of how one identifies
42 a masonry wall that you inspected?
43 A. Okay. Well, when you go into the premises, yes, the
44 walls are obviously constructed of some sort of material.
45 A stud wall is a lightweight construction so you can
46 actually hear it, it's plastered. A masonry wall is a
47 block-work wall which has been rendered, so if you knock it

1 it feels like brickwork, rendered brickwork, and the finish
2 will be different; it will be a rendered finish which is
3 pretty obvious when you see it, yes.
4

5 Q. Going back to your statement and the annexure to that
6 statement, that is, I take it, a working paper that you
7 prepared over the course of a number of visits to all of
8 the various units?

9 A. Yes.

10

11 Q. You saw all of the units in the building over time,
12 didn't you?

13 A. Yes, I think that we did, yes, yes.

14

15 Q. Some days people weren't there and you came back?

16 A. Correct.

17

18 Q. For example, if you look at the entries for, say,
19 for example, unit 18, "NOAH" means "No-one at home" on
20 28 October?

21 A. Hang on. Sorry, could I ask what page you're looking
22 at?

23

24 Q. It is on your statement, attached to your statement.

25 A. Oh yes, sorry.

26

27 THE COMMISSIONER: "NOAH".

28

29 THE WITNESS: Yes, that's correct.

30

31 MR BOLSTER: Q. "NOAH" means no-one at home on the --

32 A. On the 28th of the 10th.

33

34 Q. 28th of the 10th?

35 A. Yes.

36

37 Q. And then on the 29th and then you finally got in on
38 some later occasion?

39 A. That's correct, yes.

40

41 Q. You tested, I take it, the difference between gyprock
42 and masonry and made a note to that effect?

43 A. Correct, yes.

44

45 THE COMMISSIONER: Q. "One times X", is that a reference
46 to an extra bedroom, is it?

47 A. Yes, that's correct, yes, one extra room.

1
2 MR BOLSTER: Q. And the green marking in the left-hand
3 column means that the building was built consistently with
4 the plans, as you apprehended them?
5 A. I haven't got the green --
6
7 Q. You haven't got a green colour?
8 A. I've got a black and white copy.
9
10 Q. Let me show you mine because I've got a coloured copy.
11
12 MR WHEELHOUSE: Could I have a green one too?
13
14 MR BOLSTER: I will approach and I will show you.
15
16 THE COMMISSIONER: I think, to help, the green ones have
17 the word "okay". If you see "okay" in the left-hand
18 column, it's green.
19
20 THE WITNESS: Yes. So the units highlighted with the
21 green were the units that were okay and we didn't find any
22 unauthorised works during our inspections.
23
24 MR BOLSTER: Q. Just turning back to the reports, the
25 handwriting on those reports, is that yours or your
26 co-worker's?
27 A. That was, that handwriting is Helen who used to work
28 with us; she was one of the inspectors as well.
29
30 Q. She's no longer at council?
31 A. No, she's not.
32
33 THE COMMISSIONER: Just so that people can follow this,
34 Mr Bolster, could you just set up when the inspection took
35 place and why?
36
37 MR BOLSTER: Q. Yes. You will see there for each unit
38 inspected there is a date and time for each visit.
39 For example, on page 233, the inspection of unit 2 was on
40 28 October at 10.35am. Do you have that?
41 A. Me? Yes, yes, that's correct, sorry.
42
43 Q. The inspections were basically over a period in
44 October 2008; is that correct?
45 A. Yes, and I think - according to this list I've got
46 here which we compiled at the time, I think the odd one
47 spread out through to November, but typically, it was over

1 October, yes.

2

3 Q. And they formed the basis of the report that you
4 prepared which --

5 A. Yes. We went in to the premises from 28 October
6 onwards, I think, from memory, and when we first went in
7 there we observed a large number of rooms that were units
8 which had extra rooms, so I prepared this report up to that
9 stage, so that's why some of these ones here are probably -
10 yes, that was at the time of the report here. It talks
11 about I think we've got 26 units or something, from memory,
12 on my written report that accompanied that graph there.

13

14 Q. All right. The report that you gave to council to
15 your supervisor, what's the date of that?

16 A. I think it was the 30th.

17

18 THE COMMISSIONER: Is that in the opening bundle?

19

20 MR BOLSTER: Yes.

21

22 THE COMMISSIONER: It is page 91 of the other bundle. Was
23 it page 91?

24

25 MR BOLSTER: Yes, right at the bottom.

26

27 THE WITNESS: Sorry, here we go. Okay, yes, 30 October,
28 that's right, yes, I prepared that --

29

30 THE COMMISSIONER: Q. 2008?

31 A. 2008, correct.

32

33 Q. Just on that document you took Mr Mooney to at
34 page 233 of the bundle, just so that I understand it, that
35 form, was that a form that was available for you to take
36 prior to doing these inspections that had been created as a
37 pro forma?

38 A. That's correct, yes, it was a pro forma, so when we
39 did the inspections we could just - it was like a
40 tick-and-flick sheet, you'd make some notes, and on the
41 reverse of it, it's not on this one here, but on the
42 reverse side of it there was an area you could draw a
43 picture if you wanted to.

44

45 Q. You're checking fire doors?

46 A. Correct.

47

1 Q. What does "self-closers" mean?
2 A. The self-closer on the entrance door to the unit which
3 is just --
4
5 Q. "Smoke alarm" is obvious.
6 A. Yes.
7
8 Q. And then the "additional works" which you have circled
9 "yes" --
10 A. Yes.
11
12 Q. Is this your handwriting?
13 A. No, this was Helen who was an inspector who was with
14 me during the inspections.
15
16 Q. You were with her?
17 A. Yes, absolutely, yes.
18
19 Q. Does that say "dining converted to bedroom"?
20 A. Correct, yes.
21
22 Q. What's the circle and it looks like an "M", what does
23 that mean?
24 A. That's "M" - she has identified that wall, the
25 additional works, as being masonry.
26
27 Q. I see, okay. And "original 2" means the original
28 development consent was for two bedrooms?
29 A. Correct.
30
31 THE COMMISSIONER: All right, I understand that, thank
32 you.
33
34 MR BOLSTER: Q. Could you just go to the photo at 239.
35 A. Yes.
36
37 Q. That's one of the additional doorways; is that
38 correct?
39 A. Yes, I reckon it would be, yes, yes.
40
41 Q. That frame, is that a metal frame?
42 A. Yes, it would be a metal frame, correct, yes.
43
44 Q. Is that consistent with there being a masonry or
45 gyprock wall?
46 A. You'd normally only ever use a metal frame on a
47 masonry wall.

1
2 Q. On a masonry wall?
3 A. Yes.
4
5 Q. For example, the doorway at 247?
6 A. Yes.
7
8 Q. That is a wooden door with a wooden frame?
9 A. Yes, it looks - it appears to --
10
11 Q. That's for unit 10, if you go back.
12 A. Yes.
13
14 Q. And correct me if I'm wrong, although I don't have it
15 in front of me, does unit 10 on your coloured list show a
16 masonry wall?
17 A. No, unit 10 is a gyprock wall.
18
19 Q. It's a gyprock wall. All right. Does that photo of
20 the door at 247 assist you in saying whether the wall was a
21 gyprock wall or a masonry wall?
22 A. Yes, I believe that photograph to be a gyprock wall
23 because it's got the timber architrave around the door
24 jamb.
25
26 Q. The timber architrave in the photos is the sign of a
27 gyprock wall as opposed to --
28 A. Yes, for sure.
29
30 Q. And then on 251 and 250 we have a metal frame?
31 A. 251, yes, a metal frame, yes.
32
33 Q. 250 is the same?
34 A. Yes, it appears that way, yes.
35
36 Q. And that would appear to be a masonry wall?
37 A. Yes, that is correct.
38
39 MR BOLSTER: I have nothing further, Mr Commissioner.
40
41 THE COMMISSIONER: Are you tendering --
42
43 MR BOLSTER: Yes, I tender the statement and I tender the
44 Station Street bundle.
45
46 THE COMMISSIONER: The statement of Mr Mooney will be
47 exhibit S4.

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EXHIBIT #S4 STATEMENT OF MR MOONEY DATED 18/05/2016

THE COMMISSIONER: The Station Street bundle will be SS1.

EXHIBIT #SS1 STATION STREET BUNDLE

THE COMMISSIONER: Does anyone wish to seek leave to ask Mr Mooney any questions?

MR WHEELHOUSE: I do, Commissioner.

THE COMMISSIONER: You have leave.

<EXAMINATION BY MR WHEELHOUSE:

MR WHEELHOUSE: Q. Mr Mooney, in your statement it appears that you first inspected the property on 28 October 2008?

A. Yes.

Q. You are of course aware that the occupation certificate was issued back in July 2002?

A. Yes.

Q. Are you aware of any inspection by any officer of the council between July 2002 and 28 October 2008?

A. No.

Q. Is it correct to say that your knowledge of the works having been carried out inconsistently with the DA as approved was based only upon your inspection on 28 October 2008?

A. Yes, and ones after that as well, yes, but commencing on that date, yes.

Q. And as you've given in evidence, your opinion is squarely based on the proposition that some of the walls are masonry walls; is that correct?

A. That's correct.

Q. And if you're incorrect in that regard then your opinion would be flawed, would you agree?

A. I suppose so, yes, yes. I also formed that opinion because occupants of the premises told us that the walls were in there from when they bought them new.

1 Q. These units of course were sold over a very lengthy
2 period of time, weren't they?
3 A. Yes.
4
5 Q. Indeed, some of the units were still registered in the
6 name of BBC Developments up to late 2007, 2008?
7 A. I believe that to be the case.
8
9 Q. Did you actually carry out an investigation to
10 determine when each particular unit that you investigated
11 was sold?
12 A. No, we didn't. We did have a look at some of the
13 units, I remember at the time, to see when they were sold,
14 but we didn't conduct an investigation. We went through
15 the council records and had a quick look on our system to
16 see, you know, when some of the units had changed hands,
17 yes.
18
19 Q. But I am correct in putting to you the proposition
20 that you didn't, for example, do a Land Titles Office
21 search to determine precisely when the property that you
22 were dealing with was transferred from the original
23 developer into the owner at the time you carried out an
24 inspection?
25 A. Yes. We didn't do land title searches but we had that
26 information on our system available to us.
27
28 Q. But you haven't recorded that in your report,
29 have you?
30 A. That we undertook inspections?
31
32 Q. Yes.
33 A. No.
34
35 Q. I'm not suggesting that you had carried out such an
36 inspection; it would have appeared in your report.
37 A. The basis of my report - my report at the time you're
38 talking about, the original report?
39
40 Q. I'm just putting to you a single proposition.
41 A. Yes.
42
43 Q. If you had carried out a title investigation that
44 would have been included as part of your report?
45 A. No, there were no title searches done at the time,
46 that's correct, yes.
47

1 Q. Have you had an opportunity to look at a letter that
2 was sent from Deacons to the council following your report?
3 A. I had seen it at the time, yes.
4
5 Q. It may assist if I provided you with a copy. If you
6 go to the bundle in relation to Station Street, it is at
7 page 302?
8 A. 302.
9
10 Q. 302.
11 A. Thank you.
12
13 THE COMMISSIONER: This is the letter of Deacons,
14 10 December 2008, to Mr Burgess?
15
16 MR WHEELHOUSE: Yes.
17
18 THE WITNESS: Yes, I've got that.
19
20 MR WHEELHOUSE: Q. Have you read that before?
21 A. Yes, I have seen that before, yes.
22
23 Q. Do you need to look at it to remind yourself of the
24 content of it, or have you looked at it recently?
25 A. I haven't looked at it recently, no.
26
27 Q. Could I take you to the paragraph that's about four
28 paragraphs down on page 304?
29 A. Yes, I'm on page 304, sorry.
30
31 Q. Yes. Under the heading "Unauthorised works", units 3,
32 4, 16, 17, 30 and 31?
33 A. Yes, got that.
34
35 Q. They were the six units that, after all the analysis
36 had taken place, were identified as the units that could
37 found a prosecution of the original developer,
38 BBC Developments; correct?
39 A. Yes, according to that it is, yes.
40
41 Q. Without going through all the detail, it was narrowed
42 down to those six units, was it not?
43 A. Deacons narrowed it down to that, yes.
44
45 Q. If you look at the first paragraph, there is a
46 notation that the walls to the dining rooms to units 3, 4,
47 16, 17, 30 and 31 do not have development consent and are

1 not detected on the relevant construction certificates. Do
2 you see that?

3 A. Yes.

4

5 Q. What you were doing was identifying, in your
6 inspection, that having compared the original construction
7 certificate plans to your inspection, they were the units
8 with the additional wall creating the third bedroom;
9 correct?

10 A. These six here or --

11

12 Q. Yes, these six here?

13 A. I actually identified more than that.

14

15 Q. Let's focus on these six. They were the six that
16 ended up being the contentious six. Can I put it that way?

17 A. Okay, yes.

18

19 Q. If you go down further into the paragraph, Deacons
20 note that Schedule B1 to the council's exempt and complying
21 development control plan provides that minor internal
22 alterations and additions to buildings is exempt
23 development. Do you see that?

24 A. Yes.

25

26 Q. If you go down further, in the last sentence it says:

27

28 *However, if it could be established that*
29 *the works were undertaken after completion*
30 *of the building, an owner may be able to*
31 *argue that the works fall within the exempt*
32 *development provisions of the BCP.*

33

34 Do you see that?

35 A. Yes.

36

37 Q. Wouldn't you agree that one of the critical things to
38 ascertain was the precise date when the walls were
39 installed?

40 A. Yes, if you were going to take the matter further,
41 yes.

42

43 Q. That of course is something you did not do, did you?

44 A. This was two days after our inspection I did this
45 report, so we hadn't - it was just to bring it to the
46 attention of management where things were up to, yes.

47

1 Q. Do you accept the single proposition, though, that it
2 was essential, if these works were to be characterised as
3 illegal works and form the basis of a prosecution, to
4 identify precisely when the walls were installed?
5 A. If you were going to go with a prosecution, yes, you
6 would find that out, yes.
7
8 Q. Did you make any inquiry of any of the three directors
9 of BBC Developments to find out when the works were
10 constructed?
11 A. No.
12
13 Q. So as far as you left the matter, it was you carried
14 out an inspection, you identified the relevant walls;
15 correct?
16 A. Yes.
17
18 Q. You'd ascertained that some of the walls, in your
19 view, were masonry?
20 A. Yes.
21
22 Q. And some were gyprock?
23 A. Yes.
24
25 Q. And you've accepted that if all the walls were gyprock
26 and not masonry then your opinion may not be correct?
27 A. I don't understand what you just said, sorry. Say it
28 again.
29
30 Q. I'll put it to you differently. You carried out an
31 inspection and you ascertained that some of the walls were
32 gyprock and some were masonry?
33 A. Yes.
34
35 Q. You made no inquiry to work out precisely when the
36 walls were installed?
37 A. Only by asking the people at the premises, the owners.
38
39 Q. You made no inquiry of the actual builder?
40 A. No.
41
42 Q. You made no inquiry to find out when the persons who
43 were occupying units containing walls obtained those units
44 from the actual developer?
45 A. We asked some of the owners, we asked the owners who
46 they bought the property off and how long they'd owned it
47 for, things like that. We also did some checks on

1 council's records just to find out who were the original
2 owners, but we didn't do a company search - we didn't do
3 property title searches, no.
4
5 Q. Take for example unit 4 - I think that's at page 241.
6 A. Yes. Oh, hang on, sorry. Sorry, what page, 241?
7
8 Q. You will see that unit 4 is on the contentious list
9 identified in the letter from Deacons that I have referred
10 to.
11 A. Yes.
12
13 Q. You will see that there's a record taken not by
14 yourself but by your assistant?
15 A. Yes.
16
17 Q. Were you present when she was filling out this form or
18 did you let her do her own thing?
19 A. We inspected the units together, so she --
20
21 Q. To the extent that there was a conversation recorded,
22 it would have been recorded by her in your presence;
23 correct?
24 A. Yes.
25
26 Q. You will see, first of all, it is a gyprock wall?
27 A. Yes.
28
29 Q. Arguably, would you agree, a minor internal
30 alteration?
31 A. No, I wouldn't agree it's minor, no.
32
33 Q. You're not a lawyer but you would accept, would you
34 not, at least it would be arguable that that was the case?
35 A. As a development control officer I wouldn't argue it's
36 minor, no, because it has increased - from my opinion, when
37 we go into the properties and the unauthorised works, it
38 has increased the units from two to three, so it's a
39 50 per cent jump in rooms, so I don't consider that to be
40 minor.
41
42 Q. That's one of the matters that Deacons, who are
43 lawyers, did point to, didn't they, in their letter?
44 A. Yes.
45
46 Q. So you agree that at least Deacons, being the legal
47 people from whom the council sought advice, it was at least

1 arguable that a stud wall creating a dining room may be --
2 A. Yes, in that thing it was - yes, they said it might be
3 minor, yes.
4
5 Q. That's their opinion.
6 A. Yes.
7
8 Q. It would be a minor internal alteration, would you
9 agree?
10 A. Would I agree it's a minor --
11
12 THE COMMISSIONER: What Deacons said was that an owner may
13 be able to argue that the works fall within exempt
14 development.
15
16 MR WHEELHOUSE: Yes.
17
18 THE COMMISSIONER: I don't take that as an expression of
19 opinion that they were exempt development.
20
21 MR WHEELHOUSE: I accept that.
22
23 Q. I'm saying the owner may be able to argue it; it may
24 be an available argument?
25 A. I suppose they could argue that if they wanted to,
26 yes.
27
28 Q. If this unit number 4 is the unit of whom you made an
29 inquiry of an owner, you will see that that's a person who
30 bought the unit one and a half years ago?
31 A. Correct.
32
33 Q. That is to say, one and a half years prior to 2008?
34 A. Correct.
35
36 Q. If you agree that being in the middle of 2006 --
37 A. Yes.
38
39 Q. -- a period of some four years after the occupation
40 certificate had been ticked off --
41 A. Yes.
42
43 Q. -- it may be that the internal wall, the gyprock wall,
44 was installed in the period after the occupation
45 certificate was granted and prior to the purchase in 2006
46 of unit 4 by this unit owner?
47 A. In regards to unit 4, that could be the case, yes.

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Q. Would you agree with me if that had been the case, it doesn't necessarily follow that the works which comprised the addition of the gyprock wall were unauthorised or illegal?

A. No, I don't agree with that. We've taken action against people before for similar works and we've one action with constructed additional timber framed gyprock walls in units in the Land and Environment Court and in Local Courts, and we've won, so we consider it to be unauthorised works.

Q. You may consider it but it may be open to a person to believe that the works do come within the exempt provisions?

A. Well, they may consider it to be exempt but we would argue it's not.

Q. Yes, but they would argue it was.

A. Yes, that's right, yes.

THE COMMISSIONER: Changing a two-bedroom unit to a three-bedroom room, I reckon it would be a pretty tough argument to say that that was an exempt development.

MR WHEELHOUSE: Q. But ultimately, it's a matter for determination in the prosecution process, wouldn't you agree?

A. Well, yes, if you prosecuted then of course you'd have to make a decision, yes, but if you're asking me would we prosecute, if we get evidence that a person had built an internal gyprock wall to create an extra bedroom, I'd say yes, we would pursue that; it's unauthorised works, in our opinion.

Q. Do you agree that there is no doubt at all that in October 2008 Auburn City Council knew of the existence of these extra walls?

A. Yes.

Q. The first time it has taken any steps in relation to the original developer, BBC Developments, was in March 2016?

A. Correct, that's what you said were steps that were taken, because I'm not privy to everything that goes on.

Q. Are you aware that a letter had ever been written

1 about it?
2
3 MR BOLSTER: Commissioner I must object. It is not
4 established that Mr Mooney, who is, after all, a building
5 safety inspector and an officer, has responsibility for the
6 litigation or the decisions about prosecutions, or that he
7 had a role after he delivered his report. The Deacons
8 advice was not to him, it was to Mr Brisby. Mr Brisby will
9 be here. Mr Brisby is the person - no.
10
11 THE COMMISSIONER: There may have been other letters --
12
13 MR BOLSTER: "Attention Mr Brisby", on page 302.
14
15 THE COMMISSIONER: Q. You don't draft summonses for
16 prosecutions?
17 A. No.
18
19 Q. You provide reports to responsible people in the
20 council and it is up to them to do what --
21 A. We would provide a report to the manager of a
22 recommendation that we sought and he would then pursue
23 whether or not to take out a prosecution, yes.
24
25 Q. You might hear about it further if a prosecution is
26 being launched because you might have to give evidence?
27 A. Yes, for sure, yes. We would then --
28
29 Q. Otherwise, you might hear nothing?
30 A. That's correct.
31
32 MR BOLSTER: Q. Your report was to Mr Lawrence?
33 A. Correct.
34
35 Q. He was under Mr Brisby?
36 A. Yes. Robert Lawrence was my immediate
37 supervisor/manager and his manager was Mark Brisby's.
38
39 Q. He was executive manager planning and development
40 control?
41 A. Mark Brisby?
42
43 Q. Yes, Mr Brisby was.
44 A. No, I think he was the director.
45
46 Q. Director of?
47 A. Environment planning or planning, yes.

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MR BOLSTER: Thank you.

THE COMMISSIONER: Go ahead, Mr Wheelhouse.

MR WHEELHOUSE: Q. The fact is, though, would you agree, as at 30 October 2008 you prepared the report, which appears at page 91 of exhibit P01; you weren't asked to prepare a prosecution brief or anything like that, were you?

A. No.

Q. As far as you were aware, at the time when you prepared your report, apart from the expressions of opinion that you had in your report as to the appearance of the walls, the council had no actual evidence of the date on which these particular walls were constructed?

A. No.

MR WHEELHOUSE: I have no further questions.

THE COMMISSIONER: Does anyone else have any interest in Mr Mooney? Does anything arise out of that, Mr Bolster?

MR BOLSTER: No, Mr Commissioner.

THE COMMISSIONER: You're free to go, thank you.

<THE WITNESS WITHDREW

MR BOLSTER: Given the events of today, Commissioner, we have been caught short. Tomorrow the plan is for the various parking officers and rangers to give evidence in the morning.

THE COMMISSIONER: So that would be Ms Laing.

MR BOLSTER: Ms Laing, Mr Soares, and then there's - I forget the name.

MR WHEELHOUSE: Could I raise a question? What precisely is the relevance of these parking officers' evidence? I will take an objection on the grounds that it's outside the inquiry. It doesn't come within the terms of reference, except for the fact they are expressed in the most general terms - is the moon round - but apart from --

1 THE COMMISSIONER: I think compliance with the code of
2 conduct is squarely within the terms of reference of the
3 inquiry and that's what their evidence is directed to.
4 I don't think there's any doubt that they're called within
5 the terms of reference.
6
7 MR BOLSTER: The issues go to directing staff, to staff
8 feeling intimidated by conduct between the relevant
9 councillor, Mr Oueik, and then the staff having photographs
10 taken against them which they regarded as being
11 intimidatory, all that's within the terms.
12
13 THE COMMISSIONER: I am satisfied that it is within the
14 terms of reference. If there is an objection from you,
15 we'll deal with it tomorrow. Anyway, they're coming
16 tomorrow.
17
18 MR WHEELHOUSE: And Mr Malouf?
19
20 MR BOLSTER: Mr Malouf, tomorrow afternoon.
21
22 THE COMMISSIONER: Mr Malouf as well. Is there anyone
23 else for tomorrow? Is there a prospect of Ms Simms being
24 interposed or is that only if we've got time?
25
26 MR BOLSTER: If we make good progress and we have time
27 tomorrow afternoon, I could call Ms Simms.
28
29 MS MUSGRAVE: Commissioner, that would put me in a very
30 difficult position. I would like to have counsel here for
31 Ms Simms, so Friday would be preferable.
32
33 THE COMMISSIONER: It is Mr Game, isn't it?
34
35 MS MUSGRAVE: It may not be Mr Game, it may be junior
36 counsel.
37
38 THE COMMISSIONER: And they're available on Friday?
39
40 MS MUSGRAVE: On Friday, yes, but tomorrow causes me some
41 difficulty.
42
43 THE COMMISSIONER: To accommodate that, we might --
44
45 MR HOPPER: We have a difficulty as well, Commissioner.
46
47 THE COMMISSIONER: The same witness?

1
2 MR HOPPER: Yes. Our counsel won't be available until
3 Monday.
4
5 MR WATSON: We've only got three weeks; we have to keep it
6 rolling.
7
8 THE COMMISSIONER: You did a very capable job today.
9
10 MR HOPPER: I'm not as experienced as the others here.
11
12 THE COMMISSIONER: As far as possible I will accommodate
13 people, but I think, yes, we do want to wrap this up within
14 three weeks. We do have Mr Francis on Friday, hopefully,
15 and I don't know how long Mr Francis's evidence will go.
16 It might go the whole day, in which case Ms Simms will be
17 on Monday. I don't want to adjourn three hours before
18 4 o'clock. We might reach Ms Simms but we'll see how we
19 go. Is there anything else?
20
21 MR BOLSTER: It may be that I will be taking some time
22 with Ms Simms with some further evidence, but not that
23 long.
24
25 MR WATSON: Could I just respectfully make an observation?
26 It seems to me as though the evidence tomorrow will be very
27 short; it could be over before lunch. I just wonder
28 whether my learned friend Mr Bolster might want to think
29 about whether he does want to wait for somebody. I know
30 that might be controversial. I am not forcing that on you.
31 I am having a private chat in public, in effect.
32
33 MR BOLSTER: Perhaps, Commissioner --
34
35 THE COMMISSIONER: You might have that chat with
36 Mr Bolster and I'll leave.
37
38 MR WATSON: Thank you, Commissioner.
39
40 MR CHESHIRE: Mr Bolster had indicated he wished to tender
41 - and I will remind him in case he accuses me of not
42 reminding him - Mr Francis's statement and private hearing
43 transcript. Could we deal with that on Friday as well
44 because it may well overlap with the issues about
45 privilege? I just wanted to consider --
46
47 THE COMMISSIONER: Is there a reason it can't wait until

1 Friday?

2

3 MR BOLSTER: No, none at all.

4

5 THE COMMISSIONER: We will deal with it on Friday. We
6 will adjourn until 9.30 tomorrow.

7

8 **AT 3.05PM THE INQUIRY WAS ADJOURNED TO THURSDAY, 2 JUNE**
9 **2016 AT 9.30AM**

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| 'appeasing' [1] - 81:44 'been' [1] - 80:46 'retreat' [1] - 81:26 | | | | 6 |
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