AUBURN CITY COUNCIL PUBLIC INQUIRY

REPORT

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SECTION 1: INTRODUCTION

(a) Public inquiry under s 438U of the Local Government Act 1993

1. The City of Auburn was a local government area in the West of Sydney. Its town centre was approximately twenty-two kilometres from the Sydney CBD. It had about eighty thousand residents, and as of 21 January 2016 ten persons filled the positions of Councillors on the Auburn City Council (**the Council**).

2. On that date, the then Minister for Local Government, the Honourable Paul Toole MP (**the Minister**), appointed me as Commissioner under s438U of the *Local Government Act* 1993 (**the Act**) to conduct a Public Inquiry (**the Inquiry**) into the Council. In generalised terms the purpose of the Inquiry was to inquire into, and subsequently report on, the existence of factual matters that largely, but not exclusively, related to the governance of the Council.

3. The use of the past tense in relation to the Council is deliberate. One curiosity concerning the Inquiry is that by the time public hearings commenced at the end of May 2016, the Council no longer existed. This requires a brief explanation.

4. Also on 21 January 2016, the Minister gave notice of his intention to suspend the Council under s.438K of the Act. Under the relevant legislative provisions, the Council was invited to make submissions concerning the proposed suspension. It did so, and opposed suspension. The Minister, however, determined to suspend the Council on 10 February. That decision had the effect of suspending the governing body of the Council – that is, its ten councillors – from their civic office. Mr Viv May was appointed Interim Administrator of the Council. Under the provisions of the Act, Mr May was granted all of the functions of the Council.

5. On Thursday 12 May 2016, a series of council amalgamations were proclaimed. Parts of the City of Auburn and the City of Holroyd were merged to become the Cumberland Council. Other parts of the City of Auburn were merged with the City of Parramatta Council. Mr May was appointed Administrator of the new City of

Cumberland. Despite these matters, pursuant to clause 7(3) of the *Local Government (City of Parramatta and Cumberland) Proclamation 2016*, the Inquiry was to continue as if the Council had not ceased to exist.

(b) Terms of Reference

6. The Terms of Reference for the Inquiry were the following:

To inquire and report on the following matters relating to Auburn City Council:

1 Whether the Council and its elected representatives have complied with applicable laws, Council's adopted Code of Conduct, the procedures for the Administration of the Code of Conduct, relevant planning legislation and Council's administrative rules and policies and have fulfilled its and their legislative duties, powers and functions;

2 Whether the relationships between councillors are conducted properly to ensure that individuals do not receive favourable treatment from decisions made by the elected Council or by Council staff;

3 Whether the governing body commands the community's confidence, and will continue to be in a position, to direct and control the affairs of Council in accordance with the Local Government Act 1993, so that Council may fulfil the charter, provisions and intent of the Local Government Act 1993 and otherwise fulfil its statutory functions; and

4 Any other matters that warrant inquiry, particularly those that may impact on the effective administration of Council's functions and responsibilities or the community's confidence in the Council being able to do so.

7. The Terms of Reference are broad, and not confined by time. People are, and it was not possible for the Inquiry to consider every matter that potentially fell within the Terms of Reference. Further, a proper construction of both s438U of the Act, and the Terms of Reference, did not allow an inquiry into every matter of public controversy that has surrounded the Council in recent years. This matter is discussed more fully in some of the sections of this Report that follow below, but in short, had the Inquiry attempted to inquire into certain matters that were raised peripherally with other matters more central to the Terms of Reference and the statutory scope of s438U of the Act, the Inquiry may have acted unlawfully.

8. Properly construed, the Terms of Reference have a direct link to many of the provisions of the Act and other relevant legislation, concerning both the role of the

governing body of the Council, and the role of the staff, including senior staff. These provisions, and the nature of the Inquiry, are discussed in Section 2 of this Report. For the moment though it is important to note some features of this Inquiry.

(c) What was inquired into?

9. Of the four planning proposals that were the subject of evidence at the public hearing, there was evidence that one had increased the value of properties owned by companies controlled by a former Councillor by nearly twenty-five million dollars. Another of the planning proposals could also have resulted in a significant increase in the value of properties owned by another Councillor. A third planning proposal was persisted with by the Council against the strong recommendations of planning staff, and despite the proposal having failed to achieve "Gateway" approval from the Minister for Planning pursuant to s.56 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The fourth planning proposal inquired into also had little support from the planning staff of the Council, and was described at the public hearing as lacking "sense", amongst stronger criticisms. There was a perception that the Council voted in blocks, perhaps according to their business interests or backgrounds. There was a great deal of publicity over the closure of Frances Street for Mr Mehajer's wedding, and in relation to the Contract for Sale of the Council car park at 13 John's Street.

10. Against this background, the calling of this Inquiry was perhaps inevitable. It should be noted however that the Inquiry was not a "corruption" Inquiry. Its nature and scope comes from various statutory provisions. They are discussed in Section 2 of this report.

11. Much of the Inquiry was conducted by way of public hearings. Some private hearings were conducted pursuant to powers under the *Royal Commissions Act 1923* (**RCA**). The transcript of all private hearings ultimately became exhibits at the public hearing. The Inquiry received evidence and examined witnesses in relation to the four following planning proposals: The **South Auburn Planning Proposal (Section 5)**, the **Berala Village Planning Proposal (Section 6)**, the **Grey Street Planning Proposal (Section 7),** and the **Marsden Street Precinct Planning Proposal (Section 8)**.

12. The Inquiry received evidence and conducted a public hearing in relation to the "sale" of a Council owned car park at 13 Johns Street Lidcombe. The purchaser of this property was a company associated with **Mr Salim Mehajer**, the Deputy Mayor of Auburn at the time that the Council was suspended. The sale of this property was notable for extensions of time granted in relation to various terms of the Contract for Sale, and in relation to advice given by the Council's solicitors but not followed by Council. This issue is dealt with in **Section 9** of the Report.

13. The Inquiry also received evidence and conducted a public hearing in relation to the development of a residential flat building at **40-46 Station Road Auburn**. This was a development of 12 x 3 bedroom and 29 x 2 bedroom units following a grant of development consent in June 2000. The developer was **BBC Developments Pty Limited**, a company owned and controlled by **Mr Ronnie Oueik**, a councillor at the time of the suspension of the Council (but not in June 2000), and a former Mayor. An audit of residential flat buildings was undertaken by the Council in 2008, and there was evidence that a number of the two bedroom units may have been unlawfully constructed as 3 bedroom units. No finding concerning the time of any unlawful construction is made, as it is an issue beyond both the terms of s438U of the Act, and consequently the Terms of Reference. The Inquiry did however receive evidence and conduct a public hearing in relation to the proposed prosecution of BBC Developments as a result of opinions expressed by Council staff in the audit. This matter is dealt with in **Section 10** below.

14. A matter of some public controversy before the commencement of the public hearing concerned the residential flat development at **14-22 Water Street Lidcombe**. The developer of this property was again BBC Developments. On 30 January 2016, during a thunderstorm, the roof blew off the building. This naturally caused considerable distress and inconvenience to the residents. Once again however, the scope of s438U of the Act did not permit the Inquiry to investigate the cause of the failure of the roof. Issues of contempt may have arisen in any event, as this matter is the subject of legal proceedings. Rather, what the Inquiry could consider properly within the Terms of Reference and the Act were the circumstances surrounding the issue of a final Occupation Certificate by a member of Council staff for this

development in circumstances where a Construction Certificate had not been issued. This matter is dealt with in **Section 11** below.

15. An issue concerning the alleged falsification of a BASIX certificate relating to one of Mr Mehajer's developments was briefly inquired into, but only to investigate how the matter was handled by Council staff – the alleged falsification being outside the Terms of Reference and the scope of s438U of the Act. This matter is dealt with in **Section 12** below. No adverse findings are made in relation to it.

16. The Inquiry conducted a private and public hearing in relation to what turned out to be certain unlawful development at a property located at **1A Henry Street Lidcombe**. Evidence was received from a witness who made allegations of dishonesty against **Mr Ned Attie**, a councillor at the time the Council was suspended, and a former Mayor. This matter is dealt with in **Section 13**.

17. Various current and former **Council Rangers** and other Council employees provided witness statements to the Inquiry concerning directions they say they were given by the Council, and some interactions they had with Mr Oueik, all concerning parking issues. This matter is dealt with in **Section 14** below.

18. The Inquiry received evidence concerning the **closure of Frances Street Lidcombe on 15 August 2015**, the day of Mr Mehajer's wedding. The focus for the Inquiry was on the decisions and procedures of the Council in relation to a request by Mr Mehajer to close the street. That matter is dealt with in **Section 15** below.

19. In March 2013, the employment of the Council's then General Manager, **Mr John Burgess**, was terminated. Mr Burgess provided a statement to the Inquiry concerning this and other matters, including the development at 40-46 Station Road Auburn. As a consequence of supplying a written statement to the Inquiry, Mr Burgess was summonsed to give evidence

20. As a related matter to the termination of Mr Burgess' employment, the Inquiry considered aspects of the engagement by the Council of **Mr Peter Fitzgerald** as acting General Manager from March to October 2013. Because of what could be

regarded as inadequate paper work concerning Mr Fitzgerald's engagement – from a lack of specificity of its terms, to a lack of detail in his own invoicing – the Interim Administrator of the Council, Mr Viv May, engaged Mr Robert Honeyman to conduct a short review of this matter. Mr Honeyman produced a report for Mr May which was supplied by him to the Inquiry as part of a written statement which became Exhibit S9 at the public hearing. The circumstances surrounding the cessation of Mr Burgess' employment with the Council and the engagement of Mr Fitzgerald are dealt with in **Section 16** of this Report.

(d) Submissions received prior to public hearing

21. Shortly after the Minister ordered that this Inquiry take place, submissions were sought from the public in relation to the Terms of Reference. A number of other persons or entities were specifically invited to make submissions. This approach was consistent with the nature of the Inquiry. It is public, and active community and interested group participation was to be encouraged.

22. A number of submissions were received, and a decision was made not to publish them on the website that was set up for the purpose of making available to the public matters such as daily transcript for the public hearing, witness statements and exhibits. The decision not to publish the submissions was not made to keep the public or any interested party in the dark. I determined that it was not appropriate to put the submissions on a public website. The main reason for this was that a number of submissions contained untested assertions that could not rationally form the basis of fact-finding. Some did not address the Terms of Reference. I remain of the view that there is no public utility in making these submissions available to the public.

23. Some submissions however were in a different category. For example, the Inquiry received submissions from senior staff of the Council which, rather than addressing the Terms of Reference, at least in a direct way, contained information concerning not only the Council's policies and procedures on a number of matters that had been developed over time, but also in relation to what have been the Council's many achievements for its community, including significant capital projects and also important community services and facilities. Of the matters recorded in previous investigations into the Council, it is clear that the Local Government Area of Auburn

contained areas within it of socio-economic disadvantage. Many of its residents were born overseas, and have English as a second language. The evidence from previous investigations and reviews is that the Council and its staff have done an excellent job in providing community and specialist services for residents.

(e) Public and private hearings

24. Prior to the public hearing commencing, I appointed Mr Paul Bolster of Counsel to be Counsel Assisting the Inquiry. A Practice Direction was prepared that outlined the procedures to be followed at the hearing. The Practice Direction emphasised that all decisions made as to what witnesses would be called to give evidence rested with Counsel Assisting, and all witnesses gave oral evidence by being examined by Counsel Assisting.

25. The Practice Direction also outlined procedures for the means by which legal representatives for a witness or "interested person" (a person having a direct interest in the matters being inquired into) could seek leave to appear and, if leave was granted, how they should apply to examine a witness or witnesses. As things transpired, almost every witness summonsed to appear at the Inquiry, whether an employee or former employee of the Council, was represented by Counsel or Senior Counsel, and by a solicitor. Six of the former Councillors were represented by either Senior or Junior Counsel and a solicitor on each day of the public hearing. Further, because of the nature of the issues being examined by the Inquiry, ultimately no restrictions were placed on any legal practitioner acting for an interested person to examine their own or any other witnesses. As a matter of procedural fairness, prior to the public hearing commencing, or at least with sufficient notice, relevant witness statements and documents were provided to the legal representatives of persons considered to have a sufficient interest. All of this tended to give an appearance of a large piece of litigation to what was an administrative inquiry. Having said that, all lawyers who appeared at the Inquiry provided assistance, both at the hearings, and in the written submissions filed at their conclusions.

26. A number of employees of the Council, and four Councillors at the time the Council was suspended provided witness statements to the Inquiry. The CEO of the Office of Local Government, Mr Tim Hurst also provided a witness statement principally

dealing with various historical matters such as previous investigations into the Council, and a statement was also provided by Mr Viv May, the then Interim Administrator, concerning his actions and investigations since his appointment. They were both summonsed to appear at the public hearing to give evidence. Further, each of the former Councillors who did not provide a statement to the Inquiry was summonsed to appear.

27. In all, thirty-one witnesses gave evidence to the Inquiry. The public and private hearings took twenty-one days to complete. The conclusion of the public hearing was unavoidably delayed by the illness of Mr Glenn Francis, the former head of planning at the Council. Mr Francis, who was originally due to be examined by Counsel Assisting on 3 June 2016, was unable to appear at the public hearing until 23 August 2016. He was an important witness whose evidence was central to three of the four planning proposals inquired into.

28. Over two thousand pages of transcript were taken, and several thousand pages of Exhibits were tendered. Over five hundred pages of submissions were lodged after the hearing, the last being received in December 2016.

29. All of this placed an enormous burden on the persons assisting the commission – Counsel Assisting, Paul Bolster, Darren Sear (Principal Investigator) and Leonie Myers (Office of Local Government). Each of them worked extraordinarily hard and under great pressure.

SECTION 2: IMPORTANT STATUTORY PROVISIONS AND NATURE OF THE INQUIRY

(a) S438U and the Royal Commissions Act 1923

30. The power to order the Inquiry is found in s438U of the Act. That provision confines an inquiry to the following matters:

> "***438U Public inquiries***
>
> *(1) The Governor or the Minister may appoint a person as commissioner, or two or more persons as commissioners, to hold a public inquiry and to report to the Governor or the Minister with respect to:*
>
> *(a) any matter relating to the carrying out of the provisions of this Act or any other Act conferring or imposing functions on a council, and*
>
> *(b) any act or omission of a member of a council, any employee of a council or any person elected or appointed to any office or position under this or any other Act conferring or imposing functions on a council, being an act or omission relating to the carrying out of the provisions of the Act concerned, or to the office or position held by the member, employee or person under the Act concerned, or to the functions of that office or position*."

31. Pursuant to s438U(4) of the Act, the provisions of the *Royal Commissions Act 1923* applied to the Inquiry, with the very important exception of section 17. This section provides that a witness is not excused from answering a question on the grounds that the answer might incriminate them (with s17(2) providing that any answer made is not admissible against the witness in any civil or criminal proceedings).

32. S 11(2) of the *Royal Commissions Act* provides that a witness at this Public Inquiry cannot be compelled to answer a question if they have a 'reasonable excuse' for not doing so. 'Reasonable excuse' is defined in s4 of the Royal Commissions Act in the following terms:

> "***Reasonable excuse*** *in relation to any act or omission by a witness or a person summonsed as a witness before a commission means an excuse which would excuse an act or omission of a similar nature by a witness or a person summonsed as a witness before a court of law*."

33. On 3 June during the course of the public hearing I ruled that 'reasonable excuse' included circumstances where a witness has the right to refuse to answer a question on the grounds that the answer might incriminate them. That ruling can be found from page 318 of the transcript.

34. It seems odd that a witness cannot be compelled to answer a question in a Public Inquiry such as this on the grounds that the answer to a question might incriminate them. I say that because if the Inquiry had been a departmental investigation set up under s.434 of the Act (as distinct from a Public Inquiry under s438U) a witness would not be able to refuse to answer a question on the grounds that the answer might incriminate them. As discussed below, one witness (possibly the most important witness summonsed to give evidence at the public hearings) extensively claimed the privilege against self-incrimination, and I ruled (see from page 1766 of the transcript for 24 August 2016) that he could not be compelled to answer many questions. The fact that an important witness could not be compelled to answer questions about three of the four planning proposals being inquired into was unhelpful.

(b) Relevant provisions of the Act and the Terms of Reference

(i) S 232 – the role of a Councillor

35. The legal status of a council is set out in s.220 of the Act. It is in the following terms:

> "***220 Legal status of a council***
>
> *(1) A council is a body politic of the State with perpetual succession and the legal capacity and powers of an individual, both in and outside the State.*
>
> *(2) A council is not a body corporate (including a corporation).*
>
> *(3) A council does not have the status, privileges and immunities of the Crown (including the State and the Government of the State).*

(4) A law of the State applies to and in respect of a council in the same way as it applies to and in respect of a body corporate (including a corporation)."

36. The "*elected representatives (called "councillors") comprise the governing body of the council*": s.222. The role of the governing body is set out in s.223:

"***223 Role of governing body***

(1) The role of the governing body is as follows:

(a) to direct and control the affairs of the council in accordance with this Act,

(b) to provide effective civic leadership to the local community,

(c) to ensure as far as possible the financial sustainability of the council,

(d) to ensure as far as possible that the council acts in accordance with the principles set out in Chapter 3 and the plans, programs, strategies and polices of the council,

(e) to develop and endorse the community strategic plan, delivery program and other strategic plans, programs, strategies and policies of the council,

(f) to determine and adopt a rating and revenue policy and operational plans that support the optimal allocation of the council's resources to implement the strategic plans (including the community strategic plan) of the council and for the benefit of the local area,

(g) to keep under review the performance of the council, including service delivery,

(h) to make decisions necessary for the proper exercise of the council's regulatory functions,

(i) to determine the process for appointment of the general manager by the council and to monitor the general manager's performance,

(j) to determine the senior staff positions within the organisation structure of the council,

(k) to consult regularly with community organisations and other key stakeholders and keep them informed of the council's decisions and activities,

(l) to be responsible for ensuring that the council acts honestly, efficiently and appropriately.

(2) The governing body is to consult with the general manager in directing and controlling the affairs of the council."

37. The reference to Chapter 3 in s.223 is a reference to the chapter of the Act which deals with the principles for local government. Section 8A sets out the guiding principles for councils which are as follows:

"***8A Guiding principles for councils***

(1) Exercise of functions generally. The following general principles apply to the exercise of functions by councils:

(a) Councils should provide strong and effective representation, leadership, planning and decision-making.

(b) Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.

(c) Councils should plan strategically, using the integrated planning and reporting framework, for the provision of effective and efficient services and regulation to meet the diverse needs of the local community.

(d) Councils should apply the integrated planning and reporting framework in carrying out their functions so as to achieve desired outcomes and continuous improvements.

(e) Councils should work co-operatively with other councils and the State government to achieve desired outcomes for the local community.

(f) Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.

(g) Councils should work with others to secure appropriate services for local community needs.

(h) Councils should act fairly, ethically and without bias in the interests of the local community.

(i) Councils should be responsible employers and provide a consultative and supportive working environment for staff.

(2) Decision-making The following principles apply to decision-making by councils (subject to any other applicable law):

(a) Councils should recognise diverse local community needs and interests.

(b) Councils should consider social justice principles.

(c) Councils should consider the long term and cumulative effects of actions on future generations.

(d) Councils should consider the principles of ecologically sustainable development.

(e) Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.

(3) Community participation Councils should actively engage with their local communities, through the use of the integrated planning and reporting framework and other measures."

38. Section 8B of the Act sets out the principles of sound financial management, and s.8C provides integrated planning/reporting principles that apply to councils.

39. The role of a Councillor is set out in s.232 of the Act which provides as follows:

"***232 The role of a councillor***

(1) The role of a councillor is as follows:

(a) to be an active and contributing member of the governing body,

(b) to make considered and well informed decisions as a member of the governing body,

(c) to participate in the development of the integrated planning and reporting framework,

(d) to represent the collective interests of residents, ratepayers and the local community,

(e) to facilitate communication between the local community and the governing body,

(f) to uphold and represent accurately the policies and decisions of the governing body,

(g) to make all reasonable efforts to acquire and maintain the skills necessary to perform the role of a councillor.

(2) A councillor is accountable to the local community for the performance of the council."

(ii) Section 439 – Obligation to act honestly and with reasonable care and diligence

40. Section 439 of the Act provides that all councillors and staff of councils must act honestly, and exercise reasonable care and diligence in the carrying out of their functions under the Act. This overarching provision was central to a consideration of each Term of Reference. It is in the following terms:

"***439 Conduct of councillors, staff, delegates and administrators***

(1) Every councillor, member of staff of a council and delegate of a council must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act.

(2) Although this section places certain duties on councillors, members of staff of a council and delegates of a council, nothing in this section gives rise to, or can be taken into account in, any civil cause of action.

(3) This section applies to an administrator of a council (other than an administrator appointed by the Minister for Primary Industries under section 66) in the same way as it applies to a councillor."

41. S 439(1) contains two obligations. The first is that Councillors and council staff are to act honestly in carrying out their functions under the Act or any other Act (such as the EP&A Act). The second requires that those functions be carried out with "reasonable care and diligence". The obligation to act with honesty is easily enough understood. The obligation to act with "reasonable care and diligence" is more nuanced.

42. The standard of care and diligence will differ depending on whether a councillor's conduct is being considered, or that of a member of council staff. In relation to a planning proposal for example, the standard of care and diligence required by an expert planner in the council's planning department will be a different and higher standard than that expected of a non-expert councillor. That is a reflection not only of expertise, but of the differing functions of staff and councillors. One is providing expert advice, the other is carrying out a governance function, which is in large part informed by s.232, and the other provisions above such as s.223 and s.8A.

43. A high level of care and diligence in relation to planning matters can therefore be expected of expert planning staff of councils. For councillors giving consideration to planning matters, the standard of care and diligence required would at least extend to considering the various reports provided to them by staff for the purpose of any resolutions they might need to make or vote on.

(iii) Code of Conduct

44. Of equal importance to the Terms of Reference was the **Model Code of Conduct for Local Councils (Model Code)** which was first introduced in 2005, and that has since undergone a number of amendments. Under the provisions of the Act, councillors and staff of councils must comply with the Model Code: s 440. The Code contains obligations requiring Councillors and staff to act lawfully, honestly and with reasonable care and diligence in relation to the carrying out of their functions under the Act. It contains obligations against behaviour that would be unethical or an abuse of power. It obliges fairness in relation to development decisions and contains provisions that largely mirror the obligations in the Act concerning conflicts of interest and disclosure of pecuniary interests in relation to decision-making. Of the things that constitute "misconduct" under the Act, failure to comply with the Model Code is one of them: s.440F.

(c) Administrative nature of the Inquiry

45. It is important to briefly note some other matters concerning the Terms of Reference, and about the nature of this kind of Public Inquiry generally. The Terms of Reference were not a pleading. They were not directed to any specific decisions of the Council,

or to any incident. They do not contain any allegation against anyone. An Inquiry such as this one is not set up to make allegations against any person, or to prove a case in the way that phrase might be understood in a proceeding before a court.

46. This was an administrative inquiry. In essence, it was a fact-finding Inquiry set up to obtain facts and not to finally determine legal rights. A Public Inquiry such as this can only make recommendations to the Minister. The findings of fact that I have ultimately made are expressions of opinion. They bind no one. Nor are any recommendations that I have made binding on the Minister.

47. Given that this was an administrative inquiry, the rules of evidence did not apply. The rules of fairness, however, did. Additionally, there is also the requirement that any finding of fact had to be made rationally, and in accordance with proper standards of satisfaction that have varied depending on whether the asserted factual matter is adverse to the interests of any person. This is a matter discussed in more detail below in relation to some of the issues inquired into.

48. It can be briefly noted here also that this Inquiry is not the first investigation into the Council, or into the conduct of its councillors. There was a general review of the Council conducted by the then Department of Local Government which resulted in a report published in April 2007. There was an investigation in 2008 conducted at the instigation of the then Minister for Local Government and the Department into the development know as Auburn Central, which resulted in a report published in August 2008. That report found various deficiencies in Council processes, and made a series of recommendations to address them, but made no adverse findings against any individual. There was a review of the Regulatory and Compliance Unit of the Council's Planning and Environment Directorate which produced a report in January of 2013.

SECTION 3: COUNCILLORS AND COUNCIL STAFF

(a) Councillors

49. At the time that the Council was suspended by the Minister, there were ten elected councillors, nine of whom gave evidence at the public hearing:

Ms Le Lam

50. Ms Lam was elected Mayor in September 2015. She had been a councillor since 1999, and had previously been the Mayor.

51. Ms Lam is a director of WIN NSW Pty Ltd which operates a business known as Combined Real Estate. In a written statement she provided to the Inquiry (Exhibit S14) she explained that she owned 23 of the 100 shares in that company, with her husband owning 27 shares and her husband's brother, Mr Minh Hua, owning the other 50 shares.

52. Ms Lam ran for election on the Council as an independent candidate and was elected as a councillor for the First Ward.

53. Ms Lam was summonsed to appear at the public hearing and was examined by Counsel Assisting.

Mr Salim Mehajer

54. Mr Salim Mehajer was elected Deputy Mayor in September 2015. Mr Mehajer was first elected to the Council as an independent candidate for the First Ward in October 2012. Prior to the public hearing, Mr Mehajer submitted a written submission to the Inquiry. He was summonsed to appear at both private and public hearings and was examined by Counsel Assisting.

Mr Ronnie Oueik

55. Mr Ronnie Oueik was first elected to the Council in 2004. He was the Mayor from October 2010 to October 2011. Mr Oueik was a candidate for the Liberal Party and

was elected as a councillor for the First Ward. He is a property developer who owns a number of companies including BBC Developments Pty Ltd. Mr Oueik was summonsed to appear at the private and public hearings and was examined by Counsel Assisting.

Mr Ned Attie

56. Mr Ned Attie was first elected to the Council in 2008 and was also Mayor for 12 months from October 2011. He was elected as a member of the Liberal Party, and as a representative for the Second Ward. Mr Attie was summonsed to appear at the private and public hearings and was examined by Counsel Assisting.

Ms Irene Simms

57. Ms Irene Simms was first elected to the Council in 1999 and served as Mayor from October 2008 to September 2009. In October 2012 she was elected as a representative of the Second Ward. She is a member of the Residents Action Group for Auburn Area (RAGAA). Ms Simms provided a written statement to the Inquiry dated 23 May 2016 (Exhibit S10). She was summonsed to appear at the public hearing and examined by Counsel Assisting.

Mr Hicham Zraika

58. Mr Hicham Zraika was elected to Council as a councillor for the First Ward in as a member of the Australian Labor Party. He was first elected in 2004. He was Mayor from 2009-2010 and from 2013-14. Mr Zraika was summonsed to appear at both private and public hearings and was examined by Counsel Assisting.

Mr George Campbell

59. Mr George Campbell was first elected to Council in 2004 as a representative of the Second Ward. He is a member of the Australian Labor Party. He was an unsuccessful candidate in the 2006 election but was successful again in the 2012 election. Mr Campbell provided a written statement to the Inquiry (Exhibit S13). He was summonsed to appear at the public hearing and examined by Counsel Assisting.

Mr Tony Oldfield

60. Mr Tony Oldfield was elected to Council as a representative of the Second Ward. Mr Oldfield provided a written statement to the Inquiry (Exhibit S15) and was summonsed to appear at the public hearing and examined by Counsel Assisting.

Mr Steve Yang

61. Mr Yang was elected to the Council as a representative of the Second Ward. He is a member of the Liberal Party of Australia. He was summonsed to appear at both a private and public hearing, and was examined by Counsel Assisting.

Ms Semra Batik-Dundar

62. Ms Sembra Batik-Dundar was elected to Council as a representative of the First Ward in October 2012. Like Ms Simms, she is a member of RAGAA. Ms Batik-Dundar did not provide a submission to the Inquiry, and although she was summonsed to appear she was not called to give evidence by Counsel Assisting.

(b) Key positions and staff

63. On 10 February 2016 Mr Viv May was appointed the Interim Administrator of the Council following the suspension of the Council that day. On 12 May 2016, on the day that the Council was abolished and merged with Holroyd Council in the City of Parramatta, he was appointed Administrator of Cumberland Council (which was formed from part of the Auburn LGA and the Holroyd Council LGA).

64. Mr May provided the Inquiry with a written statement (Exhibit S2) which outlined his decisions concerning certain of the planning proposals and other issues being inquired into. Mr May was summonsed to appear at the public hearing and was examined by Counsel Assisting.

65. At the time of the suspension of the Council, the General Manager was Mr Mark Brisby. Prior to his appointment as General Manager in October 2013, Mr Brisby was the Council's Director of Planning and Environment.

66. Mr Brisby was summonsed to appear at the public hearing and was examined by Counsel Assisting in relation to most of the issues being inquired into.

67. Mr Hamish McNulty was the Council's Deputy General Manager, Direct at the time the Council was suspended. He has since been employed as the Acting Director Development, Environment and Infrastructure at Cumberland Council. Mr McNulty provided a written statement to the Inquiry dated 14 June 2016 (Exhibit S20) which largely dealt with matters concerning the closure of Frances Street, Lidcombe on the day of Mr Mehajer's wedding 15 August 2015. Mr McNulty was summonsed to appear the Inquiry and examined by Counsel Assisting.

68. At the time the Council was suspended, Mr Glenn Francis was the Executive Manager Planning. This was the same position with a different title that was occupied by Mr Brisby prior to his appointment as General Manager. Mr Francis was first employed with the Council in July 2005, and in the period August 2005 to October 2013 was employed in the role of Manager Development Assessment.

69. Mr Francis had a central involvement in three of the four planning proposals being inquired into. As a consequence, he was examined at a private hearing on 10 May 2016. The transcript of that private hearing ultimately became Exhibit PH10. Further, on 31 May 2016 Mr Francis, through his legal representatives, provided the Inquiry with a written statement of that date: Exhibit S23.

70. Mr Francis was summonsed to appear at the public hearing. On the day he was due to be examined he became unwell and was unable to give evidence. On the basis of confidential exhibits subsequently tendered through Mr Francis' Senior Counsel, Mr Cheshire SC, I accepted that Mr Francis remained unable to give evidence at the public hearing until 23 August 2016. On the following day, when examined by Counsel Assisting, and subsequently by Mr Wheelhouse SC (who appeared for Mr Oueik), Mr Francis refused to answer a number of questions on the ground that the answer might incriminate him. I ruled that he could not be compelled to answer the majority of questions in relation to which the claim for privilege was made.

71. Mr Francis' claim for privilege, and his relationship with Mr Oueik, are matters of controversy from his evidence that are convenient to deal with in an early part of the report: see Section 4 below.

72. A number of employees of the Council as at the time of the public hearing provided written statements to the Inquiry to assist with background factual matters concerning various of the matters being inquired into. Ms Monica Cologna (a Strategic Planner and Manager Strategy), Mr Jason Mooney (Senior Development Control Officer), Mr Karl Okorn (Team Leader, Development Assessment) were all summonsed to appear at the public hearing and were examined by Counsel Assisting.

73. Ms Diana Laing (Council Ranger) and Ms Emma Laing (Council Ranger) provided written statements to the Inquiry regarding parking matters and were summonsed to appear and examined by Counsel Assisting.

74. A number of former employees of the Council also provided written statements to the Inquiry and were summonsed to appear and examined. These included Mateus Soares (Lead Ranger), Stephanie Griffiths (Team Leader, Rangers), Edward John Burgess (former General Manager), Mr Jorge Alvares (Strategic Planner), Mr Joseph Malouf (Building Surveyor) and Mr Peter Fitzgerald (Acting General Manager).

75. All of these witnesses' evidence will be referred to in the relevant matters below.

76. Mr Warren Jack and Mr John Hajje were summonsed to appear at a private and public hearing in relation to the development at 1A Henry Street, Lidcombe and was examined by Counsel Assisting and other counsel.

SECTION 4: MR FRANCIS' CLAIM FOR PRIVILEGE AND RELATIONSHIP WITH MR OUEIK

(a) Claim for privilege

77. An initial ruling concerning Mr Francis' claim of the privilege against self-incrimination was made on 3 June 2016 (see from page 318 of the transcript). At this point, Mr Cheshire SC had simply foreshadowed that a claim would be made by Mr Francis. A more detailed ruling was made on 24 August 2016 at the time that Mr Francis was being examined by Counsel Assisting, and subsequently Mr Wheelhouse SC: see transcript from page 1766.

78. Given the importance of the position that Mr Francis held in the Council's Planning Department, and his close involvement in three of the planning proposals examined by the Inquiry, the inability to compel him to give evidence was unhelpful.

(b) Mr Francis and Mr Oueik

79. During the course of the evidence he gave when examined at a private hearing on 10 May 2016 (Exhibit PH10, T-43), Mr Francis volunteered that he had made a disclosure to the Independent Commission Against Corruption concerning the installation of kitchen joinery at his house in 2006.

80. Mr Francis said that Mr Brisby (the then head of the Council's Planning Department) and Councillor Oueik visited his new home in early 2006. He explained that his recollection was that he only invited Mr Brisby, but Mr Oueik came as well: PH10, T-45.40-.42.

81. During the course of this visit, Mr Francis said that Councillor Oueik told him that he could put him in touch with certain tradesmen to do work on his new home. Mr Francis' evidence was as follows:

> "*Q: Who was the councillor?*
> *A: Councillor Oueik, and he said to me that he had access to tradesmen, but you'd have to pay them directly, and they would – they*

would come, do some work, and then you'd pay them directly. So we had some carpenters come and paid them directly; we had an electrician come and he did the house, and paid him directly; I had a kitchen man come and he put in cupboards; I had an installer come for the cupboards. The kitchen man didn't take the money that he quoted.

Q: What was the name of the kitchen man?
A: I'm not sure. I didn't get his name.

Q: Do you have his phone number?
A: I don't have his phone number.

…

Q: How did you arrange for him to come to the site?
A: Ronnie Oueik sent him to the site. He measured it up and said "it would be 2,000 for the cupboards and the install is separate through another person." And the installer came and installed the cupboards. When the cupboards came, they wouldn't take the money.

Q: Did they say why?
A: No. Just wasn't going to take it." (Exhibit PH10, T-44.10-.42)

82. Mr Francis says that he raised the matter of the tradesman's refusal to take the money with Mr Oueik. His evidence was:

"*Q: When the tradesman who you offered to pay refused to take the money, did you raise that issue with Mr Oueik?*
A: Yes.

Q: What did you say to him?
A: "They wouldn't take the money and I've got the money here. I want to pay you for the cupboards."

Q: What did he say?
A: "No". He became quite agitated about it.

Q: What else did he say?
A: That – that it's a gift and it's – there's no strings attached, he just wants to see the family – help the family out. And then he got quite agitated about me asking about it.

Q: Did he raise the topic with you at any time in the future?
A: No. He never raised it again and I never raised it either."

83. Mr Francis said he did not tell Mr Brisby anything about this matter.

84. During the course of his examination at the private hearing, Mr Francis also gave evidence about what he said was the extent of his relationship with Mr Oueik. He said he had been to Mr Oueik's house at Kenthurst about six times, sometimes alone and sometimes with Mr Brisby. The purpose of these visits was to see Mr Oueik's relatively new house. He said that Mr Oueik, for example, wanted to show him various things:

> "*Q: He showed you around. What else did you do when you went up there?*
> *A: That's basically it. We did have – he went to a coffee shop near his house, coffee there, once – once or twice, and then we had a lunch thing there, a burger. But I'm – I had one – I think I had a burger once with him, lunch up there.*
>
> *Q: When you went by yourself why did you go?*
> *A: Oh, just he'd said to come and see the house. Some more work had been done.*
>
> *Q: What, in particular, work did he want to show you?*
> *A: Oh, some landscaping work. He had some IT stuff put in. He had a pool that was – you know, a new filter on the pool*." (Exhibit PH10, T-47.30-.45)

85. Mr Francis denied that "the gift" of the kitchen cabinets affected his advice or work on either the South Auburn Planning Proposal or the Berala Village Planning Proposal, or in relation to the development at 14-22 Water Street: Exhibit PH10, T-48.45-49.11.

86. Mr Francis addressed the issue of the "kitchen cabinets" in the written statement he provided to the Inquiry dated 31 May 2016: Exhibit S23. Mr Francis' evidence in his statement was:

> "*57. In the period 1 March to 2 April 2006, I undertook various works on the property in order to make it habitable. Sometime during that period, Mark Brisby, who at the time was the Director of Planning and Environment, and Councillor Oueik made a social visit to the property. Sometime during that visit, while discussing the works I was doing on that property, Councillor Oueik mentioned to me that he had a number of people who did work with him who could assist in relation to the various work that needed to be undertaken on the property.*

He would just put me in touch with them or send them to the house and I could simply fix them up with payment directly.

58. Accordingly, over the coming weeks a variety of tradesmen attended the property and undertook various works. I had an electrician come out to the property and undertake an amount of recabling; the carpenter came out and rectified some termite damage and installed skirting boards that I had purchased; and there was some rendering done to the kitchen. I paid each of these tradesmen myself in cash.

59. At one point, a kitchen cabinet maker came out to the property and quoted me $2,000 to make cabinets to the kitchen and told me that I would need to deal with the cabinet installer and pay for the installation myself. When the cabinets were delivered to the property, I spoke to the delivery driver about paying him for the cabinets. He told me he was only delivering them and that I would have to pay the cabinetmaker. A short period of time after that, I spoke with Councillor Oueik and asked him to let me know who I needed to fix up for the kitchen cabinets. He told me not to worry about it. I pressed the issue with Councillor Oueik on a number of subsequent occasions and told him I wanted to fix up all of my outstanding bills in relation to the property and asked him to give me the cabinetmaker's details so I could deal with him. After a number of similar discussions, Councillor Oueik became frustrated with me and told me not to worry about it, that he had done me a favour and to stop bothering him with it.

60. I attended ICAC recently in order to report this matter. I told them that I was worried about the matter and I wanted to make good and fix up the cabinetmaker and do whatever else I needed to do. I was asked various questions and made clear that there was no council involvement at all in any of the trades involved and, it being 10 years ago, I did not know the name of the cabinetmaker."

87. At the public hearing, Mr Oueik was asked about Mr Francis' kitchen cabinets during the course of examination by Counsel Assisting. He denied making any "gift" of kitchen cabinets to Mr Francis. Mr Oueik's evidence was that he did no more than put Mr Francis in touch with a tradesman he knew who had been working on his own house. He was unable to recall the name of the tradesman, or the name of the "small company" he worked for or owned: T-1044.40-1046.26.

88. Mr Oueik denied paying the tradesman on Mr Francis' behalf and said that he expressly told Mr Francis that he would have to pay the tradesman directly: T-1047.36-.39.

89. Mr Oueik agreed that Mr Francis had come to his house and had sought to pay him for the kitchen cabinets. Mr Oueik put this down to a misunderstanding by Mr Francis about how things work in the building industry (and presumably about what he said to Mr Francis about having to pay the tradesman directly). Mr Oueik's explanation was:

> "*Mr Bolster: Q: Sometime after that Mr Francis came to you, didn't he, and said that the tradesman wouldn't accept the money?*
> *A: Mr Francis, he doesn't understand the building, how it works. He did come to my house, yes. One day in the morning he said to me – he knocked on the door, I opened the door and he said, "Good morning. Good morning." He was so happy that he got the kitchen delivered. The cupboards delivered and DSRs. He said, "Yeah, I've got some money." I said, "What for?" He said, "The guy wouldn't take the money." I said, "The way it works, the kitchen will be installed, then you pay the money. That's how it works. You don't pay the kitchen cupboards on delivery, you pay it on installation", but he kept insist to pay me, insist. I said, "Mr Francis" – and I didn't know him well at the time. I said, "I said to you before you will pay them directly"; that's it.*" (T-1047.44-1048.10)

90. Mr Oueik further explained the situation this way in his evidence:

> "*Q: And he asked to pay you for the kitchen cabinet; correct?*
> *A: The way he – Mr Francis doesn't understand the way it works in building. When the kitchen cabinet was delivered, best of my recollection, he wanted to pay the money for the delivery guy. Delivery guy wouldn't take the money, so he thought he'd come and pay me the money and he insisted to pay me the money and I said, "Mr Francis, the first day I said to you before I am happy to assist with tradesmen, but you have to pay them directly." Another thing, the way it works in the industry, when the kitchen cabinet is installed, you will pay in full.*
>
> *Q: Yes. Did he ask you who the person was he should pay once they were installed?*
> *A: No, the installer, the guy that does that.*
>
> *Q: Had you given Mr Francis that gentleman's name and telephone number?*
> *A: I probably did; I don't recall.*

> *Q: Mr Francis told you that when he tried to pay this gentleman, he refused to accept the money.*
> *A: No.*
>
> *Q: And referred Mr Francis to you?*
> *A: Mr Francis said to me, to the best – the best that I can remember, Mr Commissioner, when the cabinet was delivered, he wanted to pay me the money for the kitchen.*" (T-1050.24-1051.5)

91. Mr Francis was due to be examined at the public hearing on 3 June 2016. Prior to this, on 1 June 2016, Mr Cheshire SC, who was granted leave to appear for Mr Francis (amongst other members of Council staff), foreshadowed his client might claim the privilege against self-incrimination in relation to certain questions that might be asked of him. As indicated above, I delivered a preliminary ruling on this on 3 June 2016: see T 318-322.

92. In that preliminary ruling, I determined that a witness at an inquiry such as this had the right to claim the privilege against self-incrimination. If privilege was made out in respect of any question, the witness had a "reasonable excuse" not to answer pursuant to s.11(2) of the *Royal Commissions Act*, and could not be compelled by me to answer.

93. Mr Francis was not well enough to be examined on 3 June 2016. I accepted this, and two medical reports in relation to his health were tendered to the Inquiry and became confidential exhibits. While those reports were made available to legal representatives of Mr Oueik, there is no need for them to be made publicly available. In summary however, the views of Mr Francis' medical practitioner were that as at 3 June 2016 he was unfit to give evidence at the Inquiry. Further, there was a chance that his condition could affect his memory. Confidence was expressed in both reports that Mr Francis would recover fully and be fit to give evidence within weeks or months. Ultimately, Mr Francis was able to give evidence to the Inquiry on 23 and 24 August 2016.

94. Counsel Assisting did not examine Mr Francis at the public hearing about the kitchen cabinets. Mr Wheelhouse SC, for Mr Oueik, did attempt to examine Mr Francis about the matter, principally in an attempt to put Mr Oueik's version of the matter to Mr

Francis. Mr Francis claimed the privilege against self-incrimination in relation to all questions related to the kitchen cabinets. I ruled that he could not be compelled to answer: see the general ruling at T-1766-1773 and specifically on the kitchen cabinet questions at T-1809.23-1814.19.

95. Mr Brisby was examined at the public hearing by Counsel Assisting concerning his visit with Mr Oueik to Mr Francis' house in early 2006. He said he had no recollection of what was discussed: T-451.27-.35. He had no recollection as to whether he suggested to Mr Oueik that they visit Mr Francis at his new house, or whether it was the other way around: T-453.18-.22. When examined by Mr Wheelhouse SC, Mr Brisby's evidence was that any conversation between Mr Oueik and Mr Francis "would have" taken place in his presence, and he believed that he would have a recollection of the conversation if anything improper had been said: T-511.33-512.12.

96. In his written submissions and submissions in reply, Counsel Assisting contends that in relation to the kitchen cabinets, Mr Francis' version of events given at his private hearing and in his written statement should be accepted.

97. Mr Oueik submits that Mr Francis cannot remember what was said: Oueik submissions at [72]. That submission however runs up against the reasonably clear recollection that Mr Francis had in both the evidence he gave at the private hearing and in his written statement.

98. Mr Oueik criticises what he says are two inconsistencies between Mr Francis' evidence in the private hearing and in his written statement. One criticism is that in the private hearing Mr Francis used the word "gift" to describe what Mr Oueik said he had done for him (Exhibit PH10, T-46.22-.31), whereas in his written statement he says that Mr Oueik used the word "favour": Exhibit S23 at [59]. In the context of what Mr Francis was describing as having happened, this difference in my view is not particularly significant.

99. A further criticism is made that in his private hearing Mr Francis appeared to suggest that he raised the issue of the "gift" only once with Mr Oueik, whereas in his written statement (at [59]) his evidence is that he raised the matter a number of times.

100. There are a number of explanations for this difference. The first is that in the private hearing Mr Francis was responding directly to questions from Counsel Assisting, whereas for the preparation of his statement he would have had time to reflect more upon the circumstances that occurred back in 2006 concerning the kitchen cabinets. It would appear also that in his private hearing evidence Mr Francis – who was responding to a direct question from Counsel Assisting concerning whether Mr Oueik raised the matter with him on more than one occasion (Exhibit PH10, T-46.28-.31) - was seeking to emphasise that there were no discussions with Mr Oueik concerning his kitchen cabinets at the time he was considering any planning proposal or other council issue that may have concerned Mr Oueik.

101. On Mr Francis' behalf, the submission was made that "Mr Francis and Mr Oueik were at cross-purposes" in relation to their conversation concerning the kitchen cabinets. The following submission was made:

> "*41. For the sake of completeness, however, it does appear that Mr Francis and Mr Oueik were at cross-purposes in their dealings on this issue: Mr Oueik put Mr Francis in contact with relevant tradesmen and had no further involvement, and Mr Francis' efforts to pay the tradesmen were rebuffed. Mr Francis could then only approach Mr Oueik, but Mr Oueik had not made any arrangement with the tradesmen and was himself not out of pocket.*
>
> *42. Mr Francis then feared that Mr Oueik had tried to do him a favour, but in the light of Mr Oueik's evidence, it seems more likely that one of the tradesmen either mixed something up or was himself trying to do Mr Oueik a favour. Whichever may have been the case, there is no evidence to support any impropriety in this issue on the part of either Mr Francis or Mr Oueik.*"

102. The difficulty with this submission, and the submissions made on behalf of Mr Oueik, is that Mr Francis' evidence was very clear that Mr Oueik had described his role in the supply and installation of the kitchen cabinets for Mr Francis' home as "a gift" or as

"a favour". Mr Francis said in his evidence that Mr Oueik had told him he was trying to "help the family". If Mr Oueik and Mr Francis were really at cross-purposes, that would almost certainly have come to light when Mr Francis pressed Mr Oueik for details of the tradesman's name so that he could pay him: Exhibit S23 at [59].

103. I am comfortably satisfied that the various conversations described by Mr Francis in his evidence at the private hearing and in his statement of 31 May 2016 took place generally in the manner described by him. He felt sufficiently concerned by these conversations to report them to ICAC. The real issue though is whether Mr Oueik sought to achieve anything from Mr Francis as a result of what transpired with the kitchen cabinets, and whether it influenced Mr Francis' conduct as a planner at the Council in any way. Those are matters considered below in relation to the various Planning Proposals and other matters inquired into.

104. Although Counsel Assisting made no direct submissions about the Model Code (as it stood in 2006) and the circumstances surrounding Mr Francis' kitchen cabinets, the conduct of accepting a gift or favour of this kind from Mr Oueik had at least the potential to constitute a breach of the following provisions of the Model Code:

(a) clause 4.1 - relating to financial obligations that might reasonably be thought to influence a person on the performance of their duties;
(b) clause 7.1 - acquiring a personal advantage which has other than token value; and
(c) clause 7.2 - accepting a gift that could reasonably be perceived as intended or likely to influence a person to act in a particular way or deviate from the proper exercise of their duties.

105. This matter though has to be considered in the light of the fact that Mr Francis, I accept, raised the issue of payment for his kitchen cabinets with Mr Oueik. He was rebuffed. To that extent then he was in the awkward position of not being a particulary willing recipient of the gift or favour from Mr Oueik.

106. Further, although I have dealt with this matter below in relation to specific matters inquired into, it can be stated here that I have found that the evidence does not support what would be the serious finding that the circumstances surrounding the installation

of kitchen cabinets in his home influenced Mr Francis in the performance of his professional obligations and duties.

SECTION 5: SOUTH AUBURN PLANNING PROPOSAL

(a) Introduction

(i) Original Proposal and Councillor Yang motion of 17 April 2013

107. The South Auburn Planning Proposal (SAPP) concerned a proposal to rezone a relatively small block of land bounded by Auburn Road, Susan Street, Beatrice Street and Helena Street, Auburn ("the Site"). The SAPP sought the rezoning of part of Auburn Road from R3 (medium density residential) to B4 Mixed Uses, and the part of Susan Street from R3 to R4 (high density residential). At the time that consideration was first given to the SAPP, Beatrice Street was the boundary between the Auburn Town Centre to the North, and land zoned R3 to the South.

108. The Council had first considered altering the zoning of the Site on 12 May 2010. At the Council Meeting held on that date it *"resolved to undertake the necessary planning analysis to rezone the land on the east side of Auburn Road, between Beatrice and Helena Streets, from R3 medium density residential to B4 Mixed Uses and the land fronting Susan Street between Beatrice and Helena Streets from R3 medium density residential to R4 high density residential under the Auburn LEP 2010"*: see the Executive Manager Planning's Report to the Council Meeting of 15 April 2015 at page 5 of Exhibit SA 1.

109. On 10 September 2012 a Planning Proposal to this effect (PP-5/2011) was submitted to the then Department of Planning and Infrastructure. The Planning Proposal was prepared by BBC Consulting Planners. On 9 October 2012 the Department issued a Gateway Determination for the Planning Proposal to proceed, *"subject to conditions including preparation of an urban design study and traffic, transport and accessibility study"*.

110. At its meeting held on 31 October 2012 the Council resolved not to proceed with the Planning Proposal.

111. However, on 17 April 2013 the Council again resolved to prepare a Planning Proposal with the same proposed changes to zoning as those resolved on 12 May 2010 and the subject of the 9 October 2012 Gateway Determination. At this meeting of Council Mr Yang (seconded by Mr Oueik) moved a resolution on notice in the following terms:

> "*RESOLVED on the motion of Councillor Yang, seconded Councillor Oueik that in respect to planning proposal PP-5/2011 action be undertaken to:*
>
> *(a) Rezone the land on the easternmost side of Auburn Road (between Beatrice Street and Helena Street), Auburn from R3 Medium Density Residential Zone to B4 Mixed Use Zone.*
>
> *(b) Rezone the land on the westernmost side of Susan Street (between Beatrice and Helena Streets), Auburn from R3 Medium Density Residential Zone to R4 High Density Residential.*
>
> *(c) Amend the Auburn Local Environmental Plan 2010 as resolved by Council 20 October 2010 (item 257/10) Resolutions "D" and "E".*
>
> *(d) Otherwise proceed as per s.56(2) Gateway Determination Conditions issued by the DP&I, and*
>
> *(e) Report back to the Council following public exhibition on the submissions received for adoption by Council*."

112. Prior to a vote on the resolution Mr Mehajer and Ms Lam declared an interest and did not vote. Councillor Lam declared a non-pecuniary conflict of interest arising out of her company managing property in the block that was subject to rezoning as part of the SAPP. Mr Mehajer declared a pecuniary interest because his sister owned 84 Auburn Road.

113. When the vote took place, Mr Attie, Mr Oueik, Mr Yang and Mr Zraika voted in favour of the resolution. Ms Batik-Dundar, Ms Simms, Mr Campbell and Mr Oldfield voted against. The resolution was passed on the casting vote of the then mayor, Mr Attie.

114. Mr Yang said his motivation for moving the resolution was to develop the Auburn Town Centre given how close the proposed rezoned block was to the railway station:

Exhibit PH-7, T-4.30-5.5). His evidence was that he did not discuss the motion with anyone prior to moving it: Exhibit PH-7, T-5.7-.14.

115. In March 2014 the Council's planning staff (principally Mr Jorge Alvares, whose evidence on this matter is discussed below) prepared the SAPP (page 45 South Auburn Bundle). This was done as a requirement of s.55 of the *Environmental Planning and Assessment Act* in order for the Minister to make a Gateway Determination under s.56 of that Act.

116. On 28 May 2014 the Minister issued a Gateway Determination determining that the SAPP should proceed subject to various conditions: Ex SA 1 pages 371-374. The Minister also delegated to the Council the power to amend the Auburn LEP 2010 in accordance with the Planning Proposal pursuant to s.59 of the *Environmental Planning and Assessment Act*: page 375 Ex SA 1.

(ii) MG Planning and Hyder Consulting Studies

117. Prior to the preparation of the SAPP, the Council had engaged various experts to prepare technical reports in relation to the potential zoning changes. MG Planning prepared an urban design study dated September 2013 (page 69 of Ex SA 1). The urban design study noted the following:

(a) The current R3 zoning of the Site permitted the following uses: attached dwelling; bed and breakfast accommodation; boarding houses; building identification signs; business identification signs; child care centres; community facilities; dual occupancy; dwelling houses; group homes; multi-dwelling housing; neighbourhood shops; places of worship; respite day care centres; roads; semi-detached dwellings; seniors housing. Commercial premises and residential accommodation such as multi-dwelling housing or residential flat buildings were prohibited. A maximum height of 9m applied to the Site and a maximum FSR of 0.75:1.

(b) The relevant section of Auburn Road contained mainly commercial retail, mixed use and community facilities from numbers 74 to 100 and residential

dwellings from 102 to 112. The relevant section of Susan Street was largely residential: see page 89 South Auburn Bundle.

(c) The Site was:

(i) located within easy walking distance of Auburn Town Centre and the Auburn Railway Station (approximately 600m);

(ii) a mixed use corridor along Auburn Road connecting to the Town Centre;

(iii) an existing pedestrian link to the Town Centre: see page 99 South Auburn Bundle.

118. 3D modelling suggested that the 27m height limit for a B4 zone in the Auburn DCP 2010 would have a significant impact on the character of Auburn Road and Helena Street that would be incongruent with the existing low rise character: Ex SA page 106. As such, it was recommended that the rezoning be achieved with site-specific height and FSR controls for the B4 zone of 21m and an FSR of 2.25:1: page 108 Ex SA 1.

119. The recommendation made by MG Planning was that Council prepare a Planning Proposal to:

> *"1. Rezone the study area to Part B4 Mixed Uses (land fronting Auburn Road) and Part R4 high density residential (land fronting Susan Street).*
>
> *2. Within the B4 zone provide for a maximum height of 21m and a maximum FSR of 2.25:1.*
>
> *3. Within the R4 zone provide for a maximum height of 16m and maximum FSR of 1.4:1"* : Ex SA 1 page 111)

120. The Council also commissioned Hyder Consulting to prepare a traffic, transport and accessibility study, and that company produced a report dated 20 August 2013: see page 151 Ex SA 1. The conclusions reached by Hyder were that the proposed zoning changes would:

"*… not suggest the need for any potential upgrading works". The additional traffic to and from the site will only have small impact on the road and intersection operation within the core area. Beyond the core area, traffic analysis has identified only a minor impact from the South Auburn PP*" : Ex SA 1, page 177)

(iii) Objectives and justification for SAPP

121. Having received these two expert reports, the Council's planners in the SAPP proposed a maximum height of 21m for the proposed B4 zone on Auburn Road and an FSR of 2.25:1. A maximum height of 16m was proposed for the proposed R4 zone on Susan Street with an FSR of 1.4:1. The stated objectives of the SAPP were to:

"
- *provide for the redevelopment of land [in the Site] for mixed use and high density residential development in a location that is highly accessible and has good access to public transport and services;*
- *accommodate sub-regional housing and employment targets;*
- *engage the creation of an extension of the existing Auburn Road commercial precinct to the south;*
- *provide for the development of buildings that achieve design excellence, are safe and accessible and provide a high quality urban form;*
- *create a transition between the Auburn Town Centre to the north and the surrounding low/medium density residential areas to the east, south and west of the study area, and*
- *ensure the orderly and economic development of land in accordance with its capability*" : Ex SA 1, page 55)

122. The justifications for the SAPP were set out commencing on page 12 (page 58 South Auburn Bundle) and included that the SAPP was consistent with the Metropolitan Plan for Sydney 2036 and the draft Metropolitan Plan for Sydney to 2031.

(iv) 15 April 2015 – Three options – Option 2(a) recommended

123. In the Executive Manager Planning's Report for the Council Meeting to be held on 15 April 2015 (page 1 of Ex SA 1), rather than simply recommending that Council proceed to progress the proposed changes to the zoning and planning controls as

recommended in the MG Planning Report, three options were outlined for Council's consideration. Option 1 was to amend the planning proposal in accordance with the recommendations of MG Planning. Option 1 was said, however, in the report to have several "cons". These were described in these terms:

> "● *reduces the compactness of the Auburn Town Centre by extending the B4 mixed use zone along a narrow linear strip on Auburn Road to a leaner strip;*
>
> ● *the proposed B4 mixed use zone south of 102 Auburn Road extends beyond the 800m walking catchment of Auburn Railway Station, making it less than an ideal location for high density development;*
>
> ● *greater potential for any adverse amenity issues such as overshadowing, overlooking/privacy and increased traffic between the B4 mixed use zone and surrounding land compared to option 2(a) and 2(b);*
>
> ● *permits 100% commercial buildings being built on the Town Centre periphery*."

124. Option 2(a) proposed a reduction in the B4 Mixed Uses zone along Auburn Road such that it would in this option extend only to 90 Auburn Road. The remainder of Auburn Road in the Site would be zoned R4 high density residential. That part of Susan Street in the Site would be zoned R4 high density residential as per option 1. This was the recommended option: Ex SA 1 page 29.

125. Option 2(b) also proposed a reduction in the B4 mixed use zoning along Auburn Road, with this zoning this time extending to 100 Auburn Road. The balance of Auburn Road in the Site would be rezoned R4 high density residential. Again, Susan Street would be rezoned R4 high density residential as per option 1.

126. When the SAPP came before the Council at its meeting on 15 April 2015, Councillor Attie declared a non-pecuniary interest and Councillors Lam and Mehajer each declared a pecuniary interest and all left the chamber. Mr Attie declared a "non-pecuniary interest" on the basis that he was undertaking consultancy work for a property development consortium that owned land in the relevant block. Mr Mehajer declared a pecuniary interest on the basis that he was an owner of property within the

vicinity of the proposal, although there is confusion as to whether the property is in fact owned by his sister. Ms Lam again declared a pecuniary interest on the basis that her company managed a property in the precinct.

127. The foreshadowed motion was moved by Councillor Zraika and seconded by Councillor Yang and the Council resolved to progress with option 2(a): South Auburn Bundle, page 333. Councillor Simms moved a motion that was seconded by Councillor Campbell that no further action be taken in respect to the SAPP. That motion was carried with Councillors Campbell, Oldfield, Simms and Yang voting for it, and Councillors Oueik and Zraika against.

128. By the time the SAPP came before the Council next on 20 May 2015, Ms Lam was overseas and hence did not participate in any vote. On this occasion Ms Batik-Dundar declared a non-pecuniary conflict of interest on the basis that she had a client who owned land in the precinct. Mr Mehajer declared the same pecuniary conflict as previously and did not take part in the debate or the vote. At its meeting held on 20 May 2015 Councillor Zraika moved a motion (seconded by Councillor Oueik) for Council to progress with option 2(a): South Auburn Bundle, page 364. This Motion was passed on the votes of Councillors Oueik, Attie (who no longer declared a non-pecuniary interest), Yang and Zraika (Councillors Campbell, Oldfield and Simms against): EX SA 1, page 365.

129. On 15 June 2015 the SAPP (amended to reflect option 2(a)) was submitted to the Department of Planning seeking a revised Gateway Determination.

130. On 6 August 2015 the Minister issued an altered Gateway Determination to reflect option 2(a): see South Auburn Bundle, pages 369-370. On the same date the Minister delegated to the Council the power to amend the Auburn LEP 2010 in accordance with the Gateway Determination pursuant to s.59 of the *Environmental Planning and Assessment Act*: Ex SA 1, page 370.

131. On 12 November 2015 the Department of Planning and Environment issued a Second Revised Gateway Determination in order to extend the period for completion of the Planning Proposal: Ex SA 1, pages 300 and 392.

(v) Option 2(a) Resolved – 20 May 2015

132. Following the completion of community consultation, the Council's planning staff prepared a revised Planning Proposal dated 23 November 2015: Ex SA 1, page 295. That Planning Proposal was, however, in accordance with option 2(a) (adopted by the Council on 2 December 2015).

(vi) Interim Administrator – No further action on SAPP

133. At the Council Meeting held on 17 February 2016, the Council's interim administrator, Mr Viv May, moved and declared carried a motion that *"Council take no further action in relation to [the SAPP] and that the General Manager advise the Department of Planning of this decision"*: Ex SA 1, page 427. The notice of rescission motion concerning the SAPP is at page 8 of Mr May's written statement which became Exhibit S-2 at the public hearing.

134. At that hearing, while being examined by Counsel Assisting, Mr May (who has a long background in management at the local government level, having been the General Manager of Mosman Council for 27 years) was able to further explain his decision concerning the SAPP. He advised that he was given a briefing about it by Mr Francis, and another senior planner of the Council Ms Cologna. His view of their briefing was the he was *"being encouraged to stop [the SAPP]"*: T-65.46. He thought *"the staff were recommending in the end and what the staff were saying to me was that really the process should be stopped and this is an opportunity"*: T-66.16-.17. The impression that Mr May gained from Mr Francis and Ms Cologna was that option 2(a) that was resolved by the Council was some form of "compromise" from the planner, but he did not *"think they were even happy with that compromise"*: T-66.22. Mr May also indicated that shortly prior to the public hearing commencing he had had a further conversation with Ms Cologna where he had pointed out that option 2(a) was a recommendation in the Director's report to Council. His evidence was *"that's when she indicated to me that it was an opportunity to take a deep breath, in effect, and start again"*: T-67.28-.37.

135. At his private hearing (Exhibit PH-10) Mr Francis confirmed that option 2(a) in the Executive Manager Planning's report for the council meeting of 15 April 2015 was his recommendation: Exhibit PH-10, T-25.13. He said it came about because:

> "*… My concern as a town planner was that the finger of B4 that extends from the Beatrice Street boundary, from whenever the original – 2010 … presented itself with a problem in terms of having a finger of B4 outside a clear definable boundary on Beatrice Street. My preference as a planner would be to have it as all R4. However, given that the council had mandated that it should be half/half, I wanted to give the option of reducing that area to a small finger of B4, and that correlates to some of the retail tenant uses in that strip*." (Exhibit PH-10, T-24.34-.46)

136. Mr Francis seemed to indicate that prior to preparing his report of 15 April 2015, Mr Oueik, Mr Attie and Mr Zraika had all indicated a concern to him about a B4 zone proposed for Auburn Road. His evidence, however, was that "*they certainly didn't influence my recommendation*": Exhibit PH-10, T-28.9-.10.

137. One thing that is apparent from the report prepared by Mr Francis of 15 April 2015 is that it fails to recommend his preferred zoning of having the whole South Auburn block under consideration zoned as R4. His explanation for this was that;

> "*Q: Why didn't you propose that?*
> *A: Because we had a valid council resolution that said to have the split between the two, and I thought as a – the median way to do it was to try and reduce the amount of B4 but still comply with that initial resolution. In hindsight, it probably – I should've put it up as an option, a secondary option, but the council at that stage could actually put forward that they don't want it at all*." (Exhibit PH-10, T-28.40-.46)

138. In his written statement dated 31 May 2016 (Exhibit S23), Mr Francis explained the presence of options 2(a) and 2(b) in his report of 15 April 2015 in these terms:

> "*51. I believe that by providing the two alternative options to Council, being 2(a) and 2(b), I was discharging my obligations and the functions of my role by identifying to the councillors alternatives that were available to them while still being within the ambit of their previous resolution [option 1]. I did not believe that my decision in presenting those options to*

> *councillors needed to be verified by MG Planning. It was then a matter for councillors as to which option was to be adopted*." (Exhibit S-23 at [51])

139. One problem with this explanation, or at least a missing aspect, is that rather than providing options 2(a) and 2(b) to the Council, Mr Francis' report of 15 April 2015 actually recommended option 2(a). This had not always been the case with all drafts of the Executive Manager Planning's report for the council meeting of 15 April 2015. Thirteen drafts of this report were tendered at the public hearing. They were created between 31 March 2015 and 14 April 2015: Exhibit Gen 27. Early drafts of the report referred to options 1, 2(a) and 2(b), but did not recommend any one of them over the other. It was not until version 8 was created on 8 April 2015 that option 2(a) became the recommended option: Exhibit Gen 27, pages 57-58.

(b) Other evidence at private and public hearings

(i) Monica Cologna

140. At the time of the public hearing Ms Cologna was employed by Cumberland Council as the Manager Strategy but had held the same position at Auburn Council until its abolition. She has 18 years' experience as a strategic planner. Ms Cologna provided a written statement to the Inquiry dated 27 May 2016: Exhibit S-3.

141. Ms Cologna's evidence was that she prepared the first draft of the Executive Manager's report: Exhibit S-3 [8]. She does recall the planning staff at the Council discussing all of the options, including the pros and cons of option 2(a): Exhibit S-3 [13]. The view she expressed concerning option 2(a) in her statement was that she did not consider that including such a small portion of B4 zoning for Auburn Road was "unnecessary". She considered the best planning decision was for the entire area south of Beatrice Street to be looked at strategically and not on a "block-by-block" basis: Exhibit S-3 [14]. Her recollection was that Mr Francis "was not in favour of the rezoning at all" but, being "aware of the council resolution to rezone this land, … sought to address this resolution of council" through the options presented: Exhibit S-3 [15].

142. When examined by Counsel Assisting at the public hearing, Ms Cologna confirmed that she was not supportive of the SAPP, and it was her recollection that Mr Francis

was not either. They both however considered they had to deal with the resolution of Council, being the original resolution for option 1: T-138.30-139.4. Her view was that both Mr Francis and her felt bound by the council resolution to progress the SAPP: T-139.13-.16. The idea of including options 2(a) and 2(b) however in the final report to Council of 15 April 2015 was Mr Francis': T-142.17-.24. She further confirmed that she was not in favour of a spot rezoning of the kind represented by the SAPP, but that a bigger strategic study should have been considered. She further considered that with hindsight the option to reduce the amount of B4 zoning at Auburn Road represented by option 2(a) should have gone back to the independent planners that were engaged (MG Planning) for their view: T-145.29-146.23.

(ii) Jorge Alvares

143. At the time of the public hearing, Mr Alvares was employed as a strategic planner at Woollahra Municipal Council. Prior to that he had been a senior strategic planner at the Auburn City Council for about two and a half years. Mr Alvares was contacted by Mr Sear for the Inquiry, and provided it with a written statement dated 10 June 2016: Exhibit S-17.

144. In his written statement Mr Alvares explained that he was given the job of preparing the SAPP. He expressed the view that the SAPP *"did not make a lot of sense"* and considered that Mr Francis *"didn't necessarily agree with the proposal either"*: Exhibit S-17 [16]. Mr Alvares' evidence was that Mr Francis told him to include in the report that went to Council concerning the SAPP the alternative options 2(a) and 2(b). It was his recollection, however, that this was more driven by certain councillors than Mr Francis. His recollection was that Mr Francis said to him words to the effect *"I have spoken to the councillors and we should provide further options for the council to consider"*: Exhibit S-17 [20].

145. Having described the SAPP as not making much sense in his written statement, Mr Alvares was more expansive when examined by Council Assisting at the public hearing. He described option 2(a) as *"very unusual"* (T-938.27-.30). His personal view was that option 2(a) was either *"crazy"* or *"unwarranted"*: T-953.3-.11, 954.5-.24, and that even option 1 was *"unnecessary"*: T-941.21. This was a view Mr Alvares shared with Ms Cologna.

(iii) Mark Brisby

146. At the time the Council was considering the SAPP in April 2015, Mr Brisby was the General Manager. Until October 2013 he had been the Director of Planning and Environment. During the course of his examination, Counsel Assisting asked Mr Brisby some questions concerning the SAPP.

147. It was Mr Brisby's view also that the SAPP *"didn't make sense"*: T-439.21. This was because in his opinion the area under consideration was not large enough for the zoning changes envisaged, particularly B4: T-439.23-.38, 440.1-.17.

148. Mr Brisby was not involved in relation to the recommendations for option 2(a) but was aware that it had been put forward to the Council.

(iv) Mustafa Hamed

149. On 15 June Counsel Assisting called Mr Mustafa Hamed to give evidence at the Inquiry. Mr Hamed is the Secretary of the Bhanin El Minieh Association. This is a not-for-profit community organisation that provides assistance for *"youth, family support for women and single mothers, assistance for the aged and community development program"*: T-998.5-.7.

150. Mr Hamed was summonsed to appear at the Inquiry because of some comments made by Mr Campbell in the witness statement he provided to the Inquiry dated 23 May 2016 (Exhibit S-13) and in a handwritten document dated 15 March 2016 which Mr Campbell prepared following a conversation he had with Mr Hamed: Exhibit Gen 24. The handwritten note contained the following entry: "Mustafa will confirm B4 → R4 was punishment."

151. In his written statement Mr Campbell's evidence was that following the council meeting on 20 May 2015 when the SAPP resolution was passed by the Council for option 2(a), Mr Oueik said the following words in the car park after the meeting: *"They are greedy, R4 was all they deserved, serves them right."* Mr Campbell said that Mr Oueik was talking about the Bhanin Association: Exhibit S-13 [29].

152. Mr Campbell also gave evidence that on 29 October 2015 he and Councillor Oldfield attended a meeting with representatives of the Bhanin Association, and a representative of the Association called Mr Faydi Saddik said words to the following effect:

> "*We are very angry with the result of the rezoning in being given R4 rather than B4. We are being punished for failing to support Ronnie against Luke Foley in the State election. We had been promised a change in zoning to B4 but all we got was R4. We were sold out because we failed to support Ronnie Oueik in the State election against Luke Foley.*" (Exhibit S-13 [33])

153. This evidence was a reference to the land the Bhanin Association owned at 98 Auburn Road. Had option 1 of the SAPP been approved, the zoning for that property would have changed from R3 to B4. Under option 2(a), however, the Bhanin Association property was excluded from the proposed new B4 upzoning. When examined by Counsel Assisting at the public hearing, Mr Campbell confirmed these aspects from his written statement: T-667-668.

154. In his evidence to the Inquiry at the public hearing, while he described the adoption by Council of option 2(a) for the SAPP rather than option 1 as a "punishment" to the Association (T-1005.20-.21), he did not name Mr Oueik as the instigator of this punishment.

155. Mr Hamed did indicate that he had known Mr Oueik for a very long time (as well as Mr Attie and Mr Zraika).

156. The background to the allegation of punishment was the fact that Mr Oueik had run as the Liberal candidate for the State seat of Auburn in March 2015. The Labor candidate for the State seat was originally intended to be Mr Zraika, but ultimately became the Leader of the Opposition Mr Foley. Mr Hamed did not say in his evidence that he considered that the Association had been punished by the adoption of option 2(a) because the Association had failed to support Mr Oueik in the election. In relation to his own support, his evidence was that Mr Oueik, although he had had a conversation with him about whether he should run for the State seat, had not

specifically asked him for his support because Mr Oueik would have known that he was a supporter of the Labor Party: see T-1003.7-.24 and 1002.10-.29.

Evidence of the former councillors

George Campbell

157. Mr Campbell's relevant evidence concerning the SAPP related to the matters concerning Mr Hamed and the Bhanin Association and Exhibit Gen 24, which are discussed above.

Tony Oldfield

158. Mr Oldfield supplied a written statement to the Inquiry dated 27 May 2016: Exhibit S-15. Mr Oldfield's evidence was that in 2014 Mr Hamed had lobbied him to support the SAPP: Exhibit S-15 [48]-[51].

159. Following the Council meeting of 20 May 2015 when option 2(a) was approved, Mr Oldfield confirmed that he had attended a meeting with representatives of the Bhanin Association and Councillor Campbell in October 2015 during which Mr Faydi Saddik had said words to the following effect: *"Mustafa Hamed had refused to support Ronnie in the State election and this* [option 2(a) rather than option 1] *was payback."* (Exhibit S-15 [61])

160. Mr Oldfield's own view concerning the SAPP was that he was against "spot rezonings" such as what was proposed: T-856.19-.21.

Ned Attie

161. Mr Attie's evidence at the public hearing was that he was in favour of the SAPP when the proposal was moved by Councillor Yang at the 17 April 2013 council meeting. He thought that the B4 zoning proposed for Auburn Road made "common sense" because that strip of Auburn Road already contained a number of commercial retail premises: Exhibit PH-5, T-30.44-.46. The view he expressed at his private hearing was that the proposal moved by Mr Yang made sense:

> "*… because the B4 zoning was a natural extension of the town centre. It already contained a petrol station and approximately 7 or 8 retail*

> *premises there already. It would make sense having a B4 across the road from two education facilities. In addition to the R4, that would also assist in numbers, people rather than getting in their cars and going to the shops, they can then just walk around the corner and attend to their retail needs*." (Exhibit PH-5, T-31.18-.25)

162. His evidence was however that he did not discuss the SAPP with Councillor Yang before Councillor Yang moved it at the council meeting: Exhibit PH-5, T-30.38.

163. Mr Attie's evidence was that he was more in favour of option 1 than option 2(a) which was subsequently developed. He said he had no discussions, however, with any other councillors prior to the council meeting of 15 April 2015 in relation to which he declared a conflict of interest and did not participate because he had been giving advice to a friend who he thought (erroneously as it turned out) owned a parcel of land in the block being considered.

164. Although he ultimately voted for option 2(a) at the council meeting on 20 May 2015, Mr Attie's evidence was that he did not consider option 2(a) made much sense and that his preference was for a B4 zoning for the entire part of Auburn Road that was part of the proposal. His evidence seemed to be however that he supported option 2(a) as it was all he "could get" for the time being: Exhibit PH-5, T-40.19-.47.

165. At the public hearing Mr Attie gave some evidence about some contact he had with Mr Hamed prior to the council vote on 20 May 2015. It was incidental contact in the street and he says that Mr Hamed swore at him and said words to the effect that "*the Council doesn't know what it's doing"*. Mr Attie's assumption was that this was in relation to the SAPP and presumably now proposed option 2(a), which would mean that the Bhanin Association building would not receive the upzoning of B4: T-1176.

166. Mr Attie's evidence was that he supported option 2(a) rather than his preferred option 1 because option 1 would have had no support if he had moved for it: T-1184.30-.39. He viewed it as either going with option 2(a) or getting nothing: T-1186.4-.19. No suggestion was made to Mr Attie that he was aware that Mr Oueik was pressing for option 2(a) as a means of punishing the Bhanin Association.

Mr Oueik

167. At his private hearing (Exhibit PH-6) Mr Oueik said during the course of his examination that he was unsurprised that the Council's planning staff recommended option 2(a) in April 2015. He said that the councillors relied on the planning staff as the "professionals": T-30.7-.17. He recalled no specific discussion with any councillor or member of council staff regarding the proposed reduction in B4 zoning on Auburn Road presented by option 2(a): Exhibit PH-6, T-30.19-.45. He denied having any input into the development of option 2(a): Exhibit PH-6, T-32.22.

168. At the public hearing Mr Oueik's evidence in relation to the Bhanin Association was that he could not recall ever having the discussion with Mr Hamed concerning the SAPP: T-1055.45. He denied knowledge that the Bhanin Association were very much in favour of the SAPP at least in relation to option 1. This was the option that had originally been supported by Mr Oueik in April 2013. When asked then why he supported option 2(a) in April and May 2015, Mr Oueik's evidence was essentially that he trusted "the judgment of our staff": T-1061.44. That no doubt may be the case, although examples could be pointed to in relation to other planning proposals where Mr Oueik has been prepared to vote against the recommendations of the Council planning staff – for example, in relation to the Grey Street Planning Proposal.

169. Mr Oueik in fact denied going and speaking to Mr Hamed concerning running for the State seat of Auburn. Mr Hamed was a supporter of the Labor Party whereas Mr Oueik was a Liberal, and so he suggested that it would be very strange if he went to him to discuss the matter: T-1065.24. Mr Oueik denied saying to Mr Campbell after the 20 May 2015 council meeting words to the effect that the Bhanin Association only deserved R4 because they were greedy and asserted that the members of the Association (as distinct from Mr Hamed) did support him in the State election: T-1068.40-1069.47.

Steve Yang

170. As discussed above, Councillor Yang moved the original motion back on 17 April 2013 for the SAPP for what was essentially option 1 as at April 2015. The most surprising thing about Mr Yang's evidence at his private hearing was that it was apparent that he thought he had voted for option 1 again in May 2015 rather than

option 2(a): PH-7, T-8.17-.20. He denied having any conversations with any councillor concerning option 2(a): Exhibit PH-7, T-8.26-.46. His incorrect memory was that he had voted for option 1 in May 2015, not option 2(a): Exhibit PH-7, T-41-42. At the public hearing Mr Yang again denied discussing option 2(a) with any councillor, a matter that is unsurprising given that he thought he had voted for option 1 at the 20 May 2015 council meeting.

Hicham Zraika

171. When examined in his private hearing, Mr Zraika said that he supported the original proposal in April 2013 as he felt that the town centre of Auburn needed to be expanded: Exhibit PH-8, T-8.33-.44. His reason for voting for option 2(a) in May 2015 was simply because that was what the staff had recommended: Exhibit PH-8, T-9.29-.31. He denied discussing option 2(a) with Mr Oueik: Exhibit PH-8, T-9.42.

172. At the public hearing Mr Zraika's evidence was that it was his understanding that the staff were recommending option 2(a) because they wanted to B4 zoning along Auburn Road to stop where the last shop in that section of Auburn Road was: T-1370.6-.15. He denied that option 2(a) to reduce the amount of B4 zoning in Auburn Road was a suggestion that had come from him or, to his knowledge, Mr Oueik, or had anything to do with the Bhanin Association: T-1379.33-1380.41, 1387.45-1388.36.

(c) Findings and Recommendations

173. Against this background of evidence, Counsel Assisting has made a number of suggested factual findings in his written submissions.

174. The most significant of Counsel Assisting's proposed findings are the following:

> "*SA6: The lack of planning merit in options 2(a) and 2(b) supports the proposition that the decision to create options 2(a) and (b) as proposed can be sourced to Mr Oueik and Mr Zraika, a matter that Mr Francis mentioned at the private hearing and which he also mentioned to Mr Alvares (see also SA10).*
>
> *SA16: … Mr Francis' decision to:*
>
> *(a) recommend option 2(a) given his own views about it;*

(b) exclude the other options that had, to his knowledge, planning merit; and

(c) failure to provide his own professional advice as a strategic planner about the relative merits option 2(a) and the other options referred to in his reports,

amounted to a failure to exercise a reasonable degree of care and diligence in carrying out his functions within the meaning of s.439(1) of the Local Government Act.

SA17: Given that:

(a) there was no rational professional planning basis for Mr Francis to recommend option 2(a);

(b) the suggestion for limiting the B4 zone along Auburn Road came from Messrs Oueik and Zraika,

it is reasonable to conclude that the interests that Mr Oueik and Mr Zraika were seeking to advance were the interests of Mr Mehajer, who clearly stood to benefit from option 2(a).

SA20: … In all of these circumstances the Inquiry would find that each of Mr Oueik, Mr Zraika and Mr Attie neglected his responsibility under s.439(1) of the Local Government Act to act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act."

175. Before indicating my findings about these matters, it is important to reiterate here that an inquiry such as this one cannot finally determine legal rights. It is open to me to make various factual findings – provided they are made rationally and in accordance with a proper standard of satisfaction which may vary depending on the nature of the factual inquiry. However, any view I express as to whether a particular person may or may not have complied with their obligations under the *Local Government Act*, any other Act, or the Model Code, is only an expression of opinion. It is not conclusive of any breach or non-compliance (if one is found), nor does it bind anyone. My opinion, for example, is not binding on the Minister for Local Government.

176. Having said that, in my view the evidence in relation to the SAPP falls short of persuading me that any interested person has acted (or failed to act) in breach of the Act or the Model Code. I hold this view for the reasons that follow.

SA6

177. I am not persuaded that I should find that options 2(a) and 2(b) in the SAPP Planning Report for the council meeting of 17 April 2015 can be sourced to either Mr Oueik or Mr Zraika. They deny it, and such a finding would not be consistent with the evidence.

178. Mr Francis said that option 2(a) (B4 zoning up to and including No 90 Auburn Road) came from him. Ms Cologna's evidence was to the same effect.

179. In relation to option 2(b) (B4 zoning up to No 100 Auburn Road), this would appear to have been Mr Alvares' suggestion.

180. While Mr Francis did mention in his written statement and in his oral evidence that he had some recollection of Mr Oueik and Mr Zraika suggesting that there should be a limit to the B4 zoning for Auburn Road – perhaps because of its distance from the Auburn town centre – in my view, this evidence does not establish that option 2(a) came from either Mr Oueik or Mr Zraika. To the contrary, Mr Francis said that their views (to whatever extent they were expressed) did not influence him. His evidence otherwise, and that of Ms Cologna, was that option 2(a) was his idea.

181. Counsel Assisting's submission that options 2(a) and 2 (b) lacked "planning merit" is accepted. I make the same finding in relation to option 1. None of the planners were in favour of the SAPP. More than that, they were positively against it. This view however needs to be considered in context.

182. The Council had already resolved to proceed with what was, in effect, option 1 back in 2010 and again on 17 April 2013. The planners may have seen little merit in this resolution from a planning perspective, but it nevertheless was both the will of the governing body, had received Gateway approval, and was supported by the independent experts MG Planning. Options 2(a) and 2(b) are just variations of option 1. Option 2(a) may have made considerably less sense to Mr Alvares, but not to Mr Francis.

183. At SA8 and SA9, Counsel Assisting highlights the distinction between the view taken on option 2(a) by the councillors who voted in favour of it, and the approach they took to other proposals, and in some instances to their self-confessed pro-development stance. He highlights the fact that option 2(a) limits the upzoning of part of Auburn Road to a B4 zoning, whereas the councillors otherwise perhaps took an approach of wanting as greater an amount of B4 or retail/commercial zoning as they could get whenever they could get it. He highlights the inconsistency of Mr Oueik saying he relied on the planners as professionals in relation to the SAPP, whereas he apparently did not take on their recommendations in relation to other proposals such as the Grey Street Planning Proposal (discussed in Section 7 below).

184. There are curiosities in this, but they can be taken too far. Once it is accepted that option 2(a) came from the planning staff, it is difficult to make an adverse finding against councillors for voting in accordance with a recommendation made to them in the SAPP planning report.

185. Contrary to the submission at SA16, I am not of the opinion that Mr Francis' conduct amounted to a breach of his obligations to exercise reasonable care and diligence under s.439(1) of the Act.

186. Mr Francis was dealing with a situation where Council had twice before (in 2010 and April 2013) resolved to proceed with what was in effect option 1 for the SAPP. That option had the support of external consultants. He himself may not have seen merit in the SAPP, but at the time of drafting or settling the SAPP planning report for the 17 April 2015 meeting, he was dealing with a resolution that had already been made by the Council. It had further received Gateway approval, and the planning staff including Mr Francis had then progressed the SAPP pursuant to the conditions of Gateway approval, including commissioning reports of external experts. In my view, bearing in mind these circumstances, he was not failing to act with reasonable care or diligence by adding options 2(a) and 2(b), or in recommending option 2(a). They are simply variants of option 1 which the Council had already resolved to progress.

187. That is not to say that some criticisms could not be made of Mr Francis' SAPP planning report for the 17 April 2015 meeting. Clearly neither he, Ms Cologna nor

Mr Alvares thought there was much planning merit in the SAPP. Ideally, it would have been better if that consensus view had found its way into the planning report. In his private hearing evidence, Mr Francis seemed to concede that *"with the benefit of hindsight"*, that should have been done: Exhibit PH-10, T-28.39-.47.

188. That concession does not in my view translate into a finding of a lack of reasonable care. That is particularly so when it is considered – at the risk of repeating it – that the 17 April 2015 meeting of Council was entirely premised on the resolution to proceed with the SAPP made by the Council two years previously, the Gateway approval, and the subsequent work done by the planning staff pursuant to the gateway conditions.

SA17

189. Given that I do not accept that Mr Francis was "directed" by any councillor to recommend option 2(a), either (a) or (b) of the suggested finding, I do not find that either Mr Oueik or Mr Zraika were seeking to advance the interests of Mr Mehajer. However, a little more needs to be said about this.

190. Mr Mehajer's sister is the owner of the 84 and 84A Auburn Road. This is why Mr Mehajer declared a non-pecuniary interest in relation to the SAPP, and did not participate in the debate or vote. It is clear, however, that the properties at 84 and 84A would get the benefit of a B4 zoning regardless of which option the Council resolved on from the three outlined in the SAPP planning report for the April 2015 council meeting. I cannot then see how option 2(a) advanced the interests of Mr Mehajer.

SA20 and Bhanin Association

191. In addition to the handwritten note of 17 March 2016 that he provided to the Inquiry (Exhibit Gen 24), Mr Campbell gave evidence that Mr Oueik said words to him after the Council resolved to adopt option 2(a) that could be interpreted as an indication that Mr Oueik may have voted for option 2(a) to disadvantage the Bhanin Association. Ultimately, Counsel Assisting seems to accept that the evidence falls short of allowing for such a factual conclusion to be reached. I agree.

192. Mr Hamed clearly was angered by the fact that the Bhanin Association property did not get the benefit of a B4 zoning because the Council adopted option 2(a). He felt it

was “punishment”. He did not specifically say in his evidence that it was punishment by Mr Oueik, nor did he allege that Mr Oueik had deliberately voted for option 2(a), not because he believed this was the best planning option, but to “punish” the Bhanin Association (allegedly for not supporting Mr Oueik in the March 2015 State election).

193. Despite his denials, I think Mr Oueik did say words of the kind described by Mr Campbell. Again, despite his denials, I believe he did have a conversation with Mr Hamed about the merit of running for State political office, but not much turns on this. It would be a serious factual finding to make that Mr Oueik had voted on a council resolution not based on what he felt was best for the community, but to deprive the Bhanin Association of a zoning for motives unrelated to the planning merits or otherwise of the proposal. The evidence does not ultimately support that finding. Mr Oueik cast his vote in accordance with a Planning Department recommendation. He was obviously entitled to do that.

194. In the circumstances, I am not of the opinion that Mr Oueik, Mr Zraika or Mr Attie have either acted dishonestly or failed to exercise reasonable care and diligence in relation to the SAPP.

The Future

195. It is not expressly part of the Terms of Reference for this inquiry to make recommendations concerning a planning proposal. Expert evidence on the SAPP was not provided to the Inquiry other than through the views of the participants from the Council’s Planning Department.

196. Having said that, the Council’s planners are less than enthusiastic about the SAPP. None seem to consider that any B4 zoning was warranted for that part of Auburn Road under consideration – whether through option 1, 2(a) or 2(b). The various views were that the block is too small for a standalone spot rezoning to B4, too far from the Auburn town centre or from the railway station, and the matter would have been better considered in a strategic analysis of a larger area.

197. This lack of enthusiasm for the SAPP was made clear to the interim administrator, who has resolved not to progress the SAPP. That resolution appears both warranted and inevitable.

SECTION 6: BERALA VILLAGE PLANNING PROPOSAL

(a) Introduction

(i) Berala Study 2012

198. The Berala Village Planning Proposal (BVPP) had the potential to significantly increase the value of properties owned by Councillor Zraika in York Street, Berala. Those properties stood to have their zoning changed from R2 (low density residential) to B2 Local Centre. Apart from changing permissible land uses, this zoning change would also greatly increase allowable building height and FSR.

199. The origins of the BVPP date back at least to 12 May 2010. On that day the Council resolved to:

> *"Immediately prepare a planning study of Berala Town [sic] Centre and the surrounding Berala residential area to determine what opportunities exist to revitalise the town centre and to provide new residential housing opportunities in the surrounding area."*

200. As a consequence, Council planning staff prepared the "Draft Berala Village Centre Study" in March 2012 ("Berala Study"): page 1 Berala Village Planning Proposal Bundle (ex B1).

201. Berala is classified as a village centre under the classification of centres that was established in the Metropolitan Plan for Sydney 2036 and the Metropolitan Strategy: City of Cities – A Plan for Sydney's Future 2005: Ex B1, page 6.

202. A 400-600m radius was chosen as the study area which at its centre had the Berala Train Station. The significant aspects of the Berala Study were:

(a) At the 2006 census, Berala had 7,901 residents. Its population was expected to increase by 410 people by 2021.

(b) Berala's main street area was zoned B2 local centre under the Auburn LEP 2010. The maximum permissible building height within the main street was

14m which equates to three storeys. It had a maximum floor space ratio of 1.4:1. The other parts of the study area were zoned R2 (low density residential), R3 (medium density residential) and R4 (high density residential – to the north of the station).

(c) No zoning or planning control changes were recommended for the residential areas. The rationales for this recommendation are set out at page 45 of the Berala Study (page 48 of Ex B1) and included:

(i) the land currently zoned R3 contains predominantly detached dwellings and is not currently developed to the maximum capacity allowed under the Auburn LEP 2010;

(ii) when considered in the context of population forecast, there appeared to be sufficient capacity under the current zoning to accommodate the modest population growth expected over the next 10 years;

(iii) the current zoning and planning controls for height and FSR were considered to be appropriate for a village centre as per the centres hierarchy established in the Metropolitan Plan for Sydney 2036 and were considered appropriate to promote a village character and atmosphere desirable for centres the size of Berala;

(iv) the existing planning height and FSR controls work compatibly together;

(v) there is currently a lack of community facilities in Berala and encouraging a substantial population increase through up-zonings would put additional pressure on limited existing facilities (emphasis added)

203. No zoning or planning control changes were recommended in relation to the main street.

204. The conclusion of the Berala Village Study was as follows:

> *"Over the next 10 years minimal change to both Berala's population and the type of residential development, is anticipated within the Berala Study area.*
>
> *The most likely type of residential redevelopment is expected to be incremental, small scale redevelopment dispersed across the residential part of the study area. It is expected that redevelopment will predominantly comprise "knockdown rebuild" of primarily detached dwellings, construction of secondary dwellings (such as granny flats), with the occasional small scale unit development (two storey maximum) occurring. All of these types of development are permissible under Council's current controls. <u>This study recommends that Council's current planning controls (zoning, height and FSR) in Auburn Local Environmental Plan 2010 remain unchanged</u>. Key issues emerging from the community engagement workshops included strong opposition to overdevelopment and "high rise" development, the need for a community facility in Berala, and a need to improve the cleanliness of streets" (emphasis added).*

Council Meeting 20 March 2013

205. The Director's Report Planning and Environment for the Council Meeting of 20 March 2013 addressed the Berala study. The Director's Report recommended that Council "adopt the Berala Village Centre study": Ex B1, page 65.

206. On 20 March 2013 at the meeting of Council, the Council did not adopt the Berala Study as recommended in the Director's Report. Rather, a motion was moved by Councillor Lam (seconded by Councillor Mehajer) that Council undertake a further study of the B2 commercial zoning area of the Berala Town Centre and surrounding area. Councillors Attie, Lam, Mehajer, Oueik and Yang voted in favour of this motion which was carried. Councillors Batik-Dundar, Campbell, Oldfield and Simms voted against the Motion.

207. Over the course of the next year, a revised Berala Village study was prepared by Council planning staff, and completed in July 2014 (Ex B1).

Hills PDA Report

208. In June 2013, the Council retained Hills PDA, a firm of planning consultants, to undertake a further study of Berala Village consistent with the Council Resolution of 20 March 2013.

209. The Hills PDA Report is at page 166 of Ex B1. Their report is entitled *"Economic Review of Proposed Planning Controls Berala Village"*. The Hills PDA Report recommended two options. Option 1 involved an increase to existing planning controls. No zoning changes were proposed, but it was recommended to increase the FSR within the B2 local centre zone from 2:1 and three storeys in height to 3:1 and five storeys in height. It was further recommended that an FSR of 1.5:1 and a height of four storeys replace the current controls for the R3 medium density zone of an FSR of 0.75:1 and two storeys in height. It was suggested that option 1:

> *"…would help to incentivise redevelopment and thereby revitalisation of the village centre and broader study area by making redevelopment a more financially attractive option to build higher density apartment style dwellings in today's market. This option would however result in development at a notably higher density than existing and may be at odds with the community's vision for the study area."* (Berala Village Bundle, page 201)

210. The other option recommended was simply to retain existing controls. It was suggested that this *"option would be likely to see some redevelopment (i.e. less complicated sites and consolidated ownership) yet would have less immediate and apparent revitalisation outcomes in terms of built form in comparison to option 1"*.

211. The Council was briefed by Hills PDA at a workshop in September 2013.

Bowral Workshop – February 2014

212. On 8 to 10 February 2014 the Council held a workshop in Bowral to discuss the Berala study with certain Council planning staff. This workshop is discussed in more detail below. However, during the course of the February 2014 workshop, the Councillors were provided with A3 maps of Berala Village, and asked to mark them with coloured pencils if they proposed any zoning changes. These six maps

(Councillor Mehajer was not present at the Bowral workshop, and some of the councillors it seemed worked on the one map) became Exhibit Gen 8 at the public hearing. Only Councillor Yang marked his map so as to identify that it was his (by writing "Councillor Steve" on it). Only three of the six maps indicated a desire to change the zoning in parts of Berala Village.

Councillor Workshop – June 2014

213. In June 2014 the Council's planning staff conducted a workshop for the Councillors to discuss Berala. This workshop is discussed in more detail below.

Revised Berala Study

214. In July 2014 the Council planning staff completed the revised draft Berala Village Centre Study ("Revised Berala Study"): Ex B1, page 94.

215. The Revised Berala Study recommended changes to the zoning controls. The proposed rezoning scenario was set out in section 4.7 of the Revised Berala Study (page 147 Ex B1). It involved an expansion of the B2, R3 and R4 zones within the Berala Village Study area. The proposal included an expansion of the B2 zoning in a south-easterly direction from the station and also in a south-westerly direction. The south-westerly expansion of the B2 zoning area would incorporate part of the land of York Street Berala which was presently zoned R2 (low density residential). The proposed change in height controls from R2 to B2 was from 9m to a maximum of 21m, and for an FSR change from 0.75:1 to 3:1.

216. The height control for most of the B2 zone was proposed to be lifted to 21m (up from 14m) and the FSR increased to 3:1 (up from 2:1): page 149 Ex B1.

Councillor Zraika's properties

217. As will be discussed below, the proposed changes would have affected the zoning of two residential properties in York Street owned by Councillor Zraika: see the draft Berala Village Study proposed rezoning map of July 2014 at page 148 of Ex B1. Expert valuation evidence tendered at the public hearing suggested that the proposed zoning changes to Councillor Zraika's properties had the potential to significantly increase their value.

Council meeting 16 July 2014

218. Consistent with the revised Berala Study, the Executive Manager Planning's Report for the Council Meeting of 16 July 2014 made the following recommendations:

> *"1. That Council receive and note the further study (by Hill PDA) of Berala Village;*
>
> *2. That Council incorporate the further study of Berala into the draft Berala Village Study, and adopt the Berala Village Study;*
>
> *3. That Council prepare a planning proposal to undertake rezoning of land within Berala Village, and the associated amendments to the ALEP 2010 heights and FSR controls as per attachment 1 of this report; and*
>
> *4. That Council place the draft planning proposal on public exhibition, and report the outcomes of this exhibition to Council, after submitting it to the Department of Planning and Environment's Gateway Process":* page 83 Ex B1

219. At the Council Meeting held on 16 July 2014 Councillor Attie (seconded by Councillor Oueik) moved a motion consistent with these recommendations. The motion was carried on the votes of Councillors Mehajer, Attie, Lam, Oueik and Yang. Councillors Batik-Dundar, Campbell, Oldfield and Simms voted against the motion.

The Planning Proposal

220. A Planning Proposal for Berala Village ("the BVPP") was prepared pursuant to s.55 of the *Environmental Planning and Assessment Act* and forwarded to the Department of Planning on 29 August 2014.

221. The justifications for the BVPP were set out in s.3.3 of the Proposal (commencing at page 247 of Ex B1). The BVPP referred to the Hill PDA Report and suggested that the proposed increase in "existing controls" was in line with the feasibility testing set out in the Hills PDA Report. It was said that this "*would assist in encouraging development and would help to revitalise the Centre"*. The conclusions reached in the original Berala Study were not addressed in the BVPP.

Gateway Determination – 17 December 2014

222. On 17 December 2014 the Department of Planning and Environment issued a Gateway Determination which allowed Council to proceed with the proposal subject to certain conditions. Amongst the conditions was a requirement that Council *"demonstrate to the Department of Planning and Environment that the proposal would not impact on the commercial viability of other centres"*: Ex B1, page 219.

223. In response to the Gateway Determination, Hyder Consulting Pty Ltd was engaged to undertake a traffic and transport study: Ex B1, pages 219-226.

Council meeting 16 September 2015

224. In the Executive Manager Planning's Report to Council for its 16 September 2015 meeting, it was recommended that Council proceed with the BVPP "without any changes": Ex B1, page 225. The other options suggested for the Council were to make changes to the Planning Proposal or to not proceed with the Plan.

225. At the meeting held on 16 September 2015 the Council resolved to request the Department of Planning and Environment to finalise changes to the Auburn LEP 2010 in accordance with the BVPP. Councillors Oueik, Attie, Lam, Mehajer and Yang voted in favour of this resolution, while Councillors Batik-Dundar, Campbell, Oldfield and Simms voted against: Ex B1, pages 285-286.

226. Councillor Zraika had declared a pecuniary interest (as a result of his ownership of the two properties in York Street affected by the BVPP) and did not vote on any matter concerning Berala.

Current Status

227. Shortly after his appointment, Interim Administrator Mr May put the BVPP "on hold" pending the outcome of the Inquiry : Ex S2 page 35.

(b) Evidence at the Public and Private Hearings

Bowral Workshop – February 2014

228. Eight of the councillors attended the discussion at Bowral concerning Berala Village. Mr Zraika did not take part and Mr Mehajer did not attend the workshop.

229. The idea of having the councillors colour in maps to indicate their preferred zoning appeared to come from Ms Cologna: Exhibit S3 [27].

230. At the public hearing, a number of the councillors who were examined by Counsel Assisting had difficulty identifying the A3 map they had coloured in with their preferred zonings for Berala. The exception was Mr Yang, who had written his name on his map. Ms Lam was able to tentatively identify what she thought was her map, which was the map at page 1 of Exhibit Gen 8. Mr Oldfield or Mr Campbell and Ms Simms were in favour of retaining the current planning controls. Three of the maps were coloured so as to indicate a preference for a B2 zoning in York Street, where Mr Zraika owned his two properties. One of those maps would have been Mr Attie's as he was in favour of B2 zoning extending as far south as York Street as he considered it to be a natural extension of the town centre: Exhibit PH5, T-21.39.

Ms Cologna

231. Following the Bowral Workshop, Ms Cologna says Mr Francis gave her the various maps coloured by the councillors. She received six: Exhibit S3[29].

232. After she received the maps, Ms Cologna undertook an analysis of the various preferences of the councillors and prepared a further "Berala Village Further Study" for a councillor briefing held in the Jack Lang Room in June 2014. This study was more in the form of a PowerPoint type presentation: see pages 63-71 of Exhibit O1. A further study prepared by Ms Cologna for the June 2014 councillor briefing was significant in that:

(a) the land south of York Street and west of Wright's Avenue was proposed as R4 and R3 and not as B2;

(b) the B2 zone along Woodburn Road to the east was limited to and included 136 Woodburn Road;

(c) FSR for the B2 zone was proposed as 3:1 and a height limit of 21 metres.

233. Ms Cologna attended the June 2014 briefing and spoke at it. She recalls discussions concerning possible rezoning options, but nothing specific. In her statement she said that the "*discussion at that meeting provided the basis for the report that was prepared by the Planning Department before the matter was considered by Council on 16 July 2014"*: Exhibit S3, [39]. That report, as discussed below, recommended a more extensive B2 zoning than the further study that had been prepared by Ms Cologna for the June 2014 councillor briefing.

234. In her evidence at the public hearing when examined by Counsel Assisting, Ms Cologna says that she could not recall any particular councillor suggesting that the zoning south of York Street should be B2: T-133.19-.23. Her own preference, as she explained, was for an R4 zoning for the area south of York Street. She did not consider that the small scale of Berala as a local centre warranted expansion of its B2 zone by very much and not to York Street. The recommendation for B2, however, came from the discussions with councillors at the June 2014 workshop: T-134.8-.31.

235. Ultimately Ms Cologna agreed with a number of propositions put to her by Counsel Assisting:

- That she considered the rezoning of Berala should be put to a halt and that was the advice she had given to the Interim Administrator, Mr May: T-134.33-.45.

- No councillors directed her to include a B2 zoning for York Street: T-135.34.

- <u>If it had been left entirely up to her, York Street would not have been zoned B2:</u> T-135.43.

- The suggestion for the B2 zoning for York Street ultimately came from a suggestion from Mr Francis *"on the basis of what the councillors had mapped at the workshop"*: T-136.19-.24.

236. The only other matter to note concerning Ms Cologna's evidence, regarding the BVPP was that while she was aware that Mr Zraika owned land within Berala because of his declarations of pecuniary interest, she said she was *"not aware of either the location of the land he owned or the number of properties he owned in Berala, and I was not aware that land he owned was directly affected by this planning proposal"*: Exhibit S3 [43]. Had she been so aware, her *"position would have been to recommend that we engage an independent planning consultant to undertake a workshop with councillors, prepare the planning proposal and report to Council"*: Exhibit S3 [44].

237. When examined by Mr Cheshire SC (counsel for Mr Francis) Ms Cologna qualified her evidence that the suggestion for an expansion of B2 zoning came solely from Mr Francis. She had the following exchange with Mr Cheshire:

> *"Q: Am I right that in June 2014 it was the councillors, themselves, that suggested there should be some amendments made to the plans; is that correct?*
> *A: That is correct, and they were suggesting amendments to be made to a suggested zoning scenario …*
>
> *Q: After the meeting then you discussed, am I right, with Mr Francis, how best to reflect what the councillors wanted to achieve in the plan that was going to be put forward to the July meeting?*
> *A: That's correct, yes.*
>
> *Q: Do you recall now whether the suggestion for B2 came from Mr Francis or from the councillors in the meeting, or do you say it could have been from either?*
> *A: Look, it could have been from either. I do say that at the June briefing, the presentation that I had prepared and presented to the councillors noted the B4 suggestion on the basis of the mapping exercise I had done in February. So it indicated that at least 3 councillors had shown that on their annotated map, so it certainly came from the February workshop.*
>
> *Q: So then it is possible that in the June workshop there was an explicit mention by one of the councillors of the B2 zoning which was what then you changed for the July paper?*

> *A: Look it's possible. I don't remember specific discussions about it. It would have been discussed at that time, but there could have been a number of discussions going on at once. My particular memory of that relates to the B2 south of the railway line, but it's possible, yes*." (T-156.37-T-157.23).

238. When examined by Mr Watson SC (for Mr Attie) Ms Cologna also agreed with the proposition that expanding the B2 zoning for Berala Village was consistent with State Government Policy for upzoning areas with 400 metres of a railway station. They had the following exchange:

> "*Q: You would agree that it was a State Government Policy that was under development and that finally became part of this paper to increase population densities around places like Berala so people can have access to rail, to get to work in different areas quickly, and to have a completely different environment to what existed at Berala at the time?*
> *A: Yes. The State Government was certainly keen to increase housing close to public transport, particularly railway stations, yes, and shops as well.*
>
> *Q: And certainly the proposals by Council to consider B2, an expanded B2 around the Berala Village, was consistent with the emerging government policy?*
> *A: Yes, that's correct, particularly within the 400 metre radius of the station, yes*." (T-162.15-.30).

Mr Francis

239. At his private hearing conducted on 10 May 2016, Mr Francis indicated that he knew that Mr Zraika lived in York Street, Berala, which he pointed out was still within 400 metres of the railway station: Exhibit PH10, T-42.20-.27.

240. The recommended zoning scenario in the Planning Report for Berala Village of 16 July 2014 (for which Mr Francis was responsible) was shown to Mr Francis by Counsel Assisting. It was suggested to him that there were a number of residential blocks of land that were zoned R2 that were closer to the Berala Station than Councillor Zraika's properties in York Street, which were proposed to have a zoning change from low density residential to B2. It was suggested to him that this was odd. Mr Francis' response was as follows:

> "*A: Well, not if you look at the block size pattern. The R2 blocks, they're long and elongated. So in order to get separation for a town centre zone, you need some sort of definable boundary. You've got very long blocks there from Hyde Park Road down to … Kingsland, Seventh, Sixth, Fifth, Fourth – they're very long blocks. So in order to perform the scenario that you suggest, we would have to split those blocks and have a split zone in there, due to its proximity to the station. And given Berala has a – sort of a good side and a poor side, the poor side is on that side, on the southern eastern side, and the north western side is sort of the more developed side, the more prosperous side. I can see that there is some validity in sort of maintaining the bulk of the B2 on that northern side, but I can hear what you are saying*." (Exhibit PH10, T-43.1-.15).

241. In the written statement he supplied to the Inquiry of 31 May 2016, Mr Francis seems to indicate that following the Bowral Workshop he suggested an R4 (High Density Residential) zoning for the south side of York Street: Exhibit S23 [22]. This evidence is consistent with the further study prepared by Ms Cologna for the June 2014 Councillors' Briefing on Berala, which also proposed an R4 zoning for York Street.

242. Mr Francis also indicated in his statement that following the Councillor Briefing in June 2014, he was prompted to change the proposed R4 zoning for York Street to a B2 zoning because there was some agreement concerning this, flowing from the briefing. His evidence from his statement is as follows:

> "*Ultimately, an area was agreed which included, at its outer boundary, property owned by Councillor Zraika. I was aware that Councillor Zraika had property in the area being considered for rezoning and I understood that this was well-known to councillors and council employees. Indeed, Councillor Zraika made no secret of the interest, explicitly declaring that interest and absenting himself from the debate and motion on the zoning. Councillor Zraika's interest did not play any part in my consideration of, and involvement in, the rezoning. My recommendations were based upon the elected Council making a decision of the location of the various zones in the Berala Town Centre that did not conflict with my professional opinion and the opinion of my staff involved in the project*." (Exhibit S23 [26]).

243. In his written submissions, Counsel Assisting has offered some criticism of this statement, suggesting that the evidence of the other former councillors, and of Ms Cologna, fall short of indicating some agreement was reached at the June 2014

councillors' briefing, concerning the proposed zoning for Berala Village, including a B2 zoning for York Street.

244. Part of Counsel Assisting's criticism comes from the fact that tendered at the public hearing were a number of drafts of the Planning Report for the Council meeting of 16 July 2014: Exhibit Gen 26. The draft of the Report (that was prepared by Ms Cologna) made on 8 July 2014 did not recommend a B2 zoning for the land south of York Street, but rather an R4 zoning. It was not until Version 11 of the Planning Report for the 16 July 2014 Council meeting was made, that a proposed zoning of B2 for the south of York Street became part of the recommendation: Exhibit Gen 26 page 86. The amendments made to the various drafts of the Planning Report for the 16 July 2014 Council meetings are some evidence to suggest that agreement was not necessarily reached at the Councillors' Briefing in June 2014 to change the zoning of York Street from R2 to B2.

245. Unfortunately, this was a matter that Counsel Assisting was unable to explore with Mr Francis at the public hearing because he claimed the privilege against self-incrimination and I ruled that he could not be compelled to answer. In particular, Mr Francis could not be compelled to answer Counsel Assisting's questions concerning the changes made in the various drafts to the Planning Report for the Council Meeting of 16 July 2014 and concerning whether he had discussions with one or more persons concerning this matter that prompted the change: see generally, T-1788.

(c) Evidence of the Councillors

Mr Campbell

246. Mr Campbell was against any proposed rezoning for Berala Village, at least partly on the basis of the original Berala Village Study tabled in March 2013, which recommended there was no need to alter any of the zoning controls in Berala. At the workshop at Bowral he abstained from marking the map provided to him, as he was in favour of retaining current zonings.

247. At the public hearing he gave evidence, when examined by Counsel Assisting that he was surprised that Mr Zraika took the attitude that he would have to declare a pecuniary interest when the matter was discussed in Bowral, as Mr Campbell took the

view that any proposed zoning could not affect Mr Zraika's properties in York Street: T-659.35-T-660.7.

248. Some criticism was made of Mr Campbell in relation to this suggestion by Mr Price of counsel (who appeared for Mr Zraika) when he was given the opportunity to examine Mr Campbell at the public hearing. In essence, Mr Price's criticisms related to disagreeing with Mr Campbell's suggestion that the study area for Berala Village in the original Berala Village study were nowhere near Councillor Zraika's properties – presumably because Councillor Zraika's properties in York Street were at around the 400 metre mark in distance from the railway station: see, for example, T-810.5-.43.

Mr Oldfield

249. In his statement (Exhibit S15) Mr Oldfield set out his views concerning the BVPP. One of the issues that he sought to draw to the Inquiry's attention was the fact that Councillor Lam's Real Estate Business managed properties for the Chan family, who owned a property at 150 Woodburn Road, Berala, an area ultimately proposed for upzoning to B2 in the Planning Report to Council for the Council meeting of 16 July 2014: Exhibit S15 [16].

250. Mr Oldfield's evidence was that Ms Lam was very vocal in supporting the changes for zoning proposed for Berala: Exhibit S15 [28]. At the Council Workshop, Mr Oldfield's recollection of the Councillor Briefing in June 2014 was that it was dominated by Councillors Lam and Oueik: Exhibit S15 [34].

251. Mr Oldfield was also against changing any of the zoning and was able to identify his map as map No 7 in Exhibit Gen 8, upon which he had written "Maintain the current zones": T-841.7.

Ms Le Lam

252. As indicated above, Ms Lam was able to identify the map she coloured in at Bowral, which is at page 1 of Exhibit Gen 8. In the markings that Councillor Lam made on her map, she left the zoning for York Street unchanged.

253. She was in favour of extending the B2 zoning, not only to York Street (to the area where Councillor Zraika's properties were), but also north east, along Woodburn Road, which would take in No 150 Woodburn Road, which was a property that her company managed for clients.

254. Ms Lam said she recalled attending the Councillor Briefing in June 2014 and that at that time the Council staff were recommending R4 in relation to York Street: T-691.40-.46.

255. Because Ms Lam's view changed concerning the proposed zoning for York Street, Counsel Assisting pressed her as to why she decided to support a B2 zoning extending as far south as York Street, where Councillor Zraika's properties were. He did this on two occasions:

> "*Q: Yes. What made you change your mind and support B2 in that area when you hadn't proposed to back in February?*
> *A: That the change – because I looked at one side is a railway track and the other B2 is on the corner of Elizabeth Street and York Street just opposite, so it's gradually stepping down, so it could be reasonable to allow that" (T-699.39-.45)* …
>
> *Q: You didn't support it originally, did you?*
> *A: I didn't mark it in the map.*
>
> *Q: No. Because you didn't think that that was a logical or natural place for there to be a B2 zone, did you?*
> *A: Yes.*
>
> *Q: You agree with my proposition?*
> *A: Yes.*
>
> *Q: Again, why then did you support a proposal that extended B2 to that area?*
>
> *THE COMMISSIONER: Just to be precise. When you say "that area", you mean York Street?*
>
> *Mr Bolster: Q: To the pocket of land on the edge of the 400 metre radius on the south side of York Street, Berala, why did you support that?*
> *A: I revisit the map, it recommended R4, and next to the R2, along that pocket, and B2 on Elizabeth Street, just across the road of York Street, so I thought probably that gradually come down from 6 or 7 level*

to 4 level and then to 2 or 1 level. That's how my decision came about." (T-702.41-T-703.18).

256. Ms Lam denied discussing the possible zoning changes with other councillors and denied that she caucused with them: T-703.27.

257. Counsel Assisting also questioned Ms Lam as to why she did not declare a conflict of interest or a pecuniary interest in relation to her business' involvement in the property at 150 Woodburn Road, Auburn. She was asked why she had declared a conflict of interest in relation to properties managed within the area of the SAPP, but had not done so in relation to the 150 Woodburn Road property in Berala.

258. The answer she gave at T-676.30-.41 is not set out here as, frankly, it is difficult to understand. It seemed to be that because she did not declare a conflict of interest because she thought the Berala rezoning was to *"improve the whole Berala precinct"* and she was looking at the *"whole big picture for the area"*: T-676.29-T-677.6.

Mr Attie

259. As discussed above, Mr Attie was in favour of expanding the B2 zoning to York Street, as he saw it as a natural extension of the Town Centre. His evidence was that at no stage did he discuss the potential change of zoning to York Street with Mr Zraika, either at Council meetings or at other times: Exhibit PH5 T-26.20. Further, he had no discussions with any councillor before the Bowral Workshop: Exhibit PH5, T-22.15-.24.

Mr Mehajer

260. Mr Mehajer did not attend the Bowral Workshop and said that he did not recall reading any briefing notes concerning it. His view was that Mr Zraika was essentially living in the Town Centre of Berala and he didn't see anything *"out of the ordinary"* in the proposed rezoning: T-16.31-39; Exhibit PH9.

261. At his private hearing, Mr Mehajer was asked about the fact that Council planning staff were recommending an R4 zoning for York Street at the Council Briefing in June 2014, whereas Mr Mehajer ultimately supported a B2 zoning. When asked why he

did that, Mr Duggan, counsel for Mr Mehajer, indicated the answer to that question might tend to incriminate his client. At that stage, I indicated that I would not compel an answer: Exhibit PH9; T-19.9-.38.

262. At the public hearing, however, Mr Mehajer did answer questions concerning his views as to the appropriateness of a B2 zoning stretching as far south from the Berala Town Centre as York Street: see generally T-1270-1275. During the course of his examination by Counsel Assisting, Mr Mehajer denied that the reason for him supporting the B2 zoning for York Street had anything to do with Councillor Zraika owning properties in that street but he was rather responding to what he considered were the community needs.

263. He denied speaking to other councillors or to Mr Francis concerning the matter.

Mr Oueik

264. Mr Oueik's evidence was that he could not recall the colouring in exercise at the Bowral Workshop but his view was always to *"extend the commercial floor space"* that was available in Berala: Exhibit PH6; T-19.45-T-20.11. He denied ever having discussions with Mr Zraika concerning the Berala rezoning, or with any other councillors. He also denied any further discussions with staff, including Mr Francis: T-1027.35-T-1028.19.

(d) Findings

265. The original Berala Study recommended retention of the Council's current planning controls for zoning, height and FSR in Berala.

266. The revised Berala Study, however, contained the following conclusory paragraph:

> "*This study recommends that Council's current planning controls in Auburn Local Environmental Plan 2010 are modified to include small expansions at the B2 Local Centre, R4 High Density Residential and R3 Medium Density Residential Zones. Increases in height and FSR are also proposed for the B2 Local Centre Zone. These proposed amendments relate to land that is within 400-600m of Berala Station, in a location with good access to public transport, and within walking distance of the shop*s." (Exhibit B1, page 155).

267. In the Planning Report to Council for its meeting of 16 July 2014, which Mr Francis signed off on, recommendations were made to adopt the revised Berala Village Study and undertake a rezoning of Berala Village in accordance with it: see [218] above, and Exhibit B1, page 83.

268. In relation to these matters, Counsel Assisting made the following submission:

> "*In all of the circumstances the Inquiry would find that in making the recommendation in the report to the July 2014 meeting of counsel, Mr Francis neglected his responsibility under s.439(1) of the Local Government Act to act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act. Mr Francis was responsible for making decisions about the recommendations to Council on planning matters. The degree of skill, care and diligence required of him were the skill care and diligence of a strategic planner in such a position of authority. The honesty required was, in recommending a particular proposal to Council to only recommend a proposal that he himself, as a professional strategic planner, believed was called for in the circumstances. In the case of Berala, the only recommended option was never agreed and to recommend it on that basis was not appropriate. Further, the recommended option was not based on any strategic planning merit at all, but rather a summary of the views of a few councillors who wanted change. To recommend that change in all of the circumstances represents a clear breach of s.439(1)*": CA submissions [B23].

269. Further, in relation to Ms Lam, Counsel Assisting submits that:

> "*Consideration should be given to initiating an investigation pursuant to s.462 of the Local Government Act retarding the failure of Le Lam to disclose the pecuniary interest arising out of the agency agreement between Combined Real Estate and the owners of 150 Woodburn Road, Berala, and her participation in the various votes on the Berala Planning Proposal*": CA submissions at [B36].

270. No adverse findings are recommended by Counsel Assisting in relation to any other person, although other recommendations are made of a general nature which will be discussed in due course.

Findings in relation to Mr Francis

271. As part of his "proposed findings" submission for Berala, leading up to the submission that Mr Francis should be found to have breached s.439(1) of the Act, Counsel Assisting submits that at the time of the Bowral Workshop, and based on the original Berala Village Study and the Hills PDA Report, there was "*no legitimate planning purpose"* for the rezoning ultimately recommended for Berala Village: CA submissions at [B1] and [B13].

272. There is force to this submission. There are a number of reasons given in the original Berala Study as to why no zoning or planning control changes were recommended. In order to *"incentivise redevelopment"* Hills PDA did recommend increasing FSR and height controls within the existing B2 Local Centre for Berala, but identified no reasons for any zoning changes.

273. Two detailed studies of the Berala Town Centre had therefore failed to recommend any zoning changes, and in fact identified reasons why zoning changes were unwarranted. As Counsel Assisting accurately points out the impetus for zoning and planning control changes seemed to have come from only three of the 10 councillors (noting that Mr Zraika and Mr Mehajer did not participate) advocating for such changes at the Bowral Workshop: CA submission at [B4].

274. Counsel Assisting, again on a fair interpretation of the evidence, submits that what appeared to happen was that the views of those councillors who wanted change based on the Bowral Workshop and then the June 2014 briefing, became, in effect, the sole view that was reflected in both the revised Berala Study and the recommendations made in the Planning Report to Council for its 16 July 2014 meeting: CA submission at [B18].

275. Counsel Assisting has then submitted that the strong inference that can be drawn from these matters is that Mr Francis was *"directed by someone on Council who advocated the B2 zoning"* in the proposed area: Counsel Assisting written submissions at [B21] and [B22].

276. Counsel Assisting then submits that the conclusion reached in the revised Berala Study was a "crude" amendment made to bring consistency between the revised study and the recommended zoning changes in the Planning Report for the 16 July 2014 Council meeting. He submits that Mr Francis *"improperly amended the draft Berala Study in an attempt to make it support his recommendation; a recommendation that was entirely inconsistent with the original"*: see Counsel Assisting written submission at [B10] and [B14].

277. All of what can be described as the "criticisms" made by Counsel Assisting are open on the evidence. There is, however, more detail to consider.

278. What occurred at Bowral was an indication by a minority of councillors of a desire for some zoning changes in Berala Village to expand the Town Centre and to increase the capacity of development for commercial retail uses. That minority view may have become a (bare) majority view at the June 2014 Councillor Briefing. I say 'may' because as Council Assisting has pointed out at [183] to [192] of his submissions, if the majority formed a view in favour of a B2 zoning for York Street at the June briefing, none of the former councillors had a clear recollection of that.

279. Ms Cologna's evidence was that no final decisions were made at the June briefing, but that there were discussions with councillors at the meeting regarding possible rezonings, and that the planning staff *"made some amendments to the suggested rezoning scenario based on these discussions"*: Ex S3 [36]. She did concede though, when examined by Mr Cheshire SC, that it was "possible" that a majority view was reached at the June briefing for the B2 zone to extend to York Street.

280. The revised Berala Study, and the zoning changes recommended in the Planning Report of 16 July 2014, seem then to have come more from the views expressed at the June 2014 Briefing than the Bowral Workshop (although they may have their origins in the minority view from the Boral Workshop).

281. However, one complication to such a finding is that the first draft of the Planning Report for the 16 July 2014 meeting (prepared by Ms Cologna on 8 July 2014) did not contain a recommendation for York Street to be included in the B2 zone. This change

did not occur until version 11 of the Report was prepared by Mr Francis – who added to the chronology for the June briefing the words *"further discussion and verbal amendments made to plan":* Ex Gen 26 p 86.

282. At [26] of the statement he provided to the Inquiry dated 31 May 2016, Mr Francis said that it had been *"agreed"* (presumably at the June briefing) that York Street would be included in the B2 zone. He said further in this paragraph:

"My recommendations were based upon the elected Council making a decision of the location of the various zones in the Berala town centre that did not conflict with my professional opinion and the opinion of my staff involved in the project."

283. There is no doubt that ultimately the inclusion of York Street into the B2 zoning came from Mr Francis – Ms Cologna's evidence was that she discussed the "maps" with Mr Francis and *"he suggested it be B2 on the basis of what the councillors had mapped at the workshop"* T 136.21-24. The strange part of this is that the Bowral workshop did not produce a consensus or majority view as to including York Street in the B2 zone. It is unclear if that was the majority view by the June workshop. It may have been.

284. Whether by the use of the word *"agreed"* in [26] of his statement Mr Francis intended to convey it was his understanding that the elected councillors had reached a majority view at the June workshop has to be guessed at to an extent – he refused to answer any question about the matter at the public hearing concerning the BVPP, and I ruled he did not have to as he had made out a claim for self-incrimination privilege. In particular he refused to answer questions from Council Assisting as to why he recommended including York Street into the B2 zone, and whether he had any discussion with any councillors about this: T1788.42.

285. In relation to the submission that I should find that Mr Francis was directed by one or more councillors to include York Street into the B2 zone as part of his recommendations in his Planning Report for 16 July 2014, in my view there is no direct evidence to support such a finding. Further, the evidence does not support the drawing of an inference to this effect. To do so would be to indulge in speculation, and not fact-finding based on the evidence. It is unfortunate, of course, that Council

Assisting could not explore this issue with Mr Francis at the public hearing because of his claim for privilege, but the evidence, as it stands, does not support a finding that he acted under direction.

286. In summary, the other main findings urged by Council Assisting relating to Mr Francis are that he recommending a proposal (including York Street in the B2 zone) that he did not believe (as a professional planner) was called for in the circumstances, lacked strategic planning merit, and that was not at the time of his recommendation the majority or agreed view. He says I should find this to be both a breach of the honesty and due care and diligence obligations in s439(1) of the Act.

287. In my view the evidence does not support a finding of dishonesty. While it is very unfortunate that Council Assisting could not question Mr Francis about the June briefing, what he meant by *"agreed"* in [26] of his statement, or the circumstances surrounding his decision to include York Street into the B2 zone, the most likely reason for the relevant recommended changes to zoning is that Mr Francis considered that by the time of the June briefing, the majority council view was that the B2 zone should extend as far as York Street. Having considered this (bare) majority view, and having discussed this matter with his colleague (Ms Cologna), Mr Francis has incorporated that majority view for change into the revised Berala Study and the recommendations in the Planning Report for 16 July 2014 meeting. This is not dishonest conduct. The question remains whether it was conduct that constitutes a breach by Mr Francis of his obligations under s.439(1) of the Act and under the Model Code of Conduct to act with reasonable care and diligence?

288. Legitimate criticism can be made of some of the redrafting of the revised Berala Study. It does appear to have been altered to reflect the majority view of the Council – who would be free to agree or disagree with the Study's recommendations, no matter what they were. The Berala Study should have contained only the best planning views of the Council's expert planners, rather than being altered to reflect some bare consensus view of the Council about possible zoning changes.

289. The same can be said for the recommendations made in the Planning Report for the 16 July 2014 meeting.

290. Rather than truly reflecting best planning recommendations from Council's expert planners, they seem more to reflect the views of the "pro-development" Council majority.

291. I would go further. I think legitimate criticism can be made in relation to the whole manner in which the BVPP was arrived at. The council in effect rejected the original Berala Study which recommended no changes to planning controls. It rejected the Hills PDA report, which recommended no zoning changes (but some changes to height and FSR controls). At that point the planners should have made recommendations to the Council. Those recommendations may well have been to still adopt either the original Berala study, or the Hills PDA report recommendations. Instead the councillors where given crayons and maps at Bowral, and a subsequent briefing where they had in my view more influence than they should have on what became the revised Berala Study and the recommendations in the 16 July report.

292. Despite these criticisms, I am not of the view that Mr Francis' conduct amounts to a breach of his obligations to exercise reasonable care and diligence in carrying out his functions under the Act or his obligations under the Model Code of Conduct: see s.440F(5) of the Act.

293. Mr Francis found himself in a situation where some councillors clearly wanted zoning changes for the Berala Town Centre. By the time of the Council briefing in June 2014, I accept that it was apparent to him that this was the majority view. To assist that majority view to make a logical decision regarding any proposed zoning changes to Berala, the revised Berala Study and the Planning Report for the 16 July 2014 meeting gradually came to take on the form that gave coherence to that majority view. In my opinion this was not done with any dishonest intent or lack of care, but in the desire to assist the majority resolve upon a coherent planning proposal seeking change for Berala Town Centre. While it was still undesirable for the revised Berala Study to reflect the majority councillors' view, in my opinion what happened falls short of demonstrating a lack of reasonable care. It was perhaps a slightly misguided way of attempting to put the majority view into a logical form and set limits. I would not

endorse that approach, but in my view it is conduct that in the circumstances falls short of warranting a finding of failure to act with due care and diligence.

294. Further, a relevant consideration is that unlike with the SAPP, Mr Francis did not consider the majority councillor view in relation to the Berala Town Centre to be without merit. He said in his statement:

> "*The rezoning of the Berala Town Centre was not something that gave rise to significant planning issues. The Town Centre Zone proposed was located about 600-650 metres from a train station, which is considered an easy walk. The rezoning satisfied the Department of Planning's Guidelines for Planning Proposals*." (Exhibit S23 at [27]).

295. Accordingly, while criticisms can properly be made, I would not make a finding that Mr Francis breached s.439(1) of the Act in relation to the BVPP.

296. It should also be stated that perhaps the most crucial issue in relation to the BVPP was whether any councillor, or Mr Francis, acted in the manner that they did to benefit Mr Zraika. There is no evidence of this and such a finding is therefore not open.

Finding in Relation to Ms Le Lam

297. I do not recommend that an investigation take place pursuant to s.462 of the Act, regarding any failure of Ms Lam to disclose a pecuniary interest arising out of the agency agreement between Combined Real Estate and the owners of 150 Woodburn Road, Berala: see CA written submission at [B36].

298. Counsel Assisting has made the submission on the basis that Ms Lam did not declare a pecuniary interest when voting on the BVPP, in circumstances where her real estate company acted as a manager for the owners of 150 Woodburn Road, Berala. I do not consider that Ms Lam, however, had a pecuniary interest under s.442 of the Act. As submitted in the written submissions filed on her behalf, there was no "*reasonable likelihood or expectation of appreciable financial gain or loss to the person"* as required by s.442(1): see Ms Lam written submissions at [15]. The property at 150 Woodburn Road Berala had an existing B2 zoning prior to the Council resolving to adopt the BVPP. The BVPP proposed no change to that property's zoning. In my

opinion then there was no *"reasonable likelihood of appreciable financial gain"* as a result of the BVPP. It might be possible for there to have been some gain as a result of other changes to zoning in Berala from the BVPP, but there was no evidence to this effect.

299. Although it is not necessary for me to express a view, even if Ms Lam did have a pecuniary interest, it was probably not one that needed to be disclosed at the time because of the then s.448(g) of the Act (which has subsequently been repealed) and the effect of the Supreme Court decision of Garling J in *Mehajer v Director General of the Department of Local Government* [2016] NSWSC 143 at [87]: see written submissions of Ms Lam at [20]-[22].

Future of the BVPP

300. Counsel Assisting has made a number of further recommendations as a result of the evidence of the BVPP, which will be discussed later in this report. The Interim Administrator placed the BVPP on hold. I have made no findings of dishonesty or breach of the Act in relation to it. Those matters were no doubt central to the Administrator's decision to put this planning proposal on hold until the outcome of the Inquiry was known.

301. It is entirely a matter for the Administrator but in light of the differing views expressed in the original Berala Study, the Revised Study, and that of Hills PDA, the Administrator may think it prudent to refer this planning proposal to an independent planning expert for further review. Based on the original Berala Study, and the Hills PDA Report, the BVPP is not warranted. Alternatively, he could refer it to the Independent Hearing and Assessment Panel that he has established since becoming the Interim Administrator of Auburn, a Panel that is discussed further below as it forms part of a submission made to the Inquiry by Mr May.

SECTION 7: GREY STREET PLANNING PROPOSAL

(a) Introduction

(i) The First Grey Street Planning Proposal

302. On 28 February 2013, the new owner of land (Hilfor Pty Limited) bounded by Grey, Bligh, Carnarvon Streets and Silverwater Road, Silverwater ("the Grey Street Site") had a meeting at the Council offices with Mayor Attie and Mark Brisby (who at the time was the Director of the Planning and Environment Department of the Council). In addition to representatives of the owner (George Ghossayan), also in attendance were Mr Frank Mosca (architect), Mr George El Khouri (architect) and Mr Fawaz Sankari from the Beirut Bank.

303. Mr Brisby made notes of the meeting which were subsequently circulated to Glenn Francis and Monica Cologna of the Council's Planning Department in an email dated 28 February 2013: Exhibit GS 1 page 20.

304. It would appear at the meeting that Mr Mosca asked whether the Grey Street Site could be redeveloped for residential uses, as the owner's plan was to develop a high density residential complex with retail uses. Mr Brisby indicated that it could not be as it was currently zoned B6 Enterprise Corridor under the Auburn LEP 2010. Use of land for residential accommodation or retail premises was prohibited by that zoning. Mr Ghossayan indicated that they wanted to pursue a rezoning to B4 Mixed Uses, a zone with had the objective of encouraging *"high density residential development"* and *"to integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling":* see the Auburn LEP 2010 and Ex GS 1, page 52. There was an indication that a planning proposal would be lodged in support of this.

305. A planning proposal prepared by APP Corporation (a firm of town planning consultants) was subsequently submitted to Council for the Grey Street Site (the First APP GSPP). Prior to submitting the planning proposal APP had held discussions with Mr Francis, who was by then the Council's Director of Planning and Environment, in

order to discuss the *"broad concepts of the planning proposal"*: Exhibit GS 1, page 33.

306. As described in the First APP GSPP (page 29 of Exhibit GS 1) the Grey Street Site at the time consisted of 12 single storey detached dwelling houses (by then vacant) and a commercial building that had previously been used as a dry-cleaning establishment: Exhibit GS 1, page 39.

307. The concept plan outlined in the First APP GSPP involved four rectangular buildings of 10, 8, 6 and 6 storeys as residential towers, comprising approximately 226 apartments. The concept plan also included 4,000m² of commercial retail floor space at street level: Ex GS 1 at pages 46-49. The highest residential flat building was proposed to be up to 32 metres: Ex GS 1, page 55. It was noted that prior to the Auburn LEP 2010 being made, the area had been zoned to permit residential development.

308. A number of expert reports were also annexed to the First APP GSPP, including an economic need and impacts assessment, an economic and development feasibility study and a transport report.

309. The Council's planners assessed the First APP GSPP in a document prepared for Council's Planning Committee meeting to be held on 20 November 2013. The Council's Assessment Report was dated 12 November 2013: EX GS 1, page 165.

310. The Council's Assessment Report contained a recommendation that the First APP Grey Street Planning Proposal "not be supported" for the following reasons:

> "• *The proposal would facilitate a pocket of B4 zoned land well away from the existing town centres of Auburn and Lidcombe.*
>
> • *Allowing a B4 Zone in an out-of-centre location is inconsistent with the Council's and the State Government's approach to a clearly defined hierarchy of centres (as set out in the Metropolitan Plan for Sydney 2036, Draft West Central Subregional Strategy), and is also inconsistent with the Council's application of the B4 Zone within Auburn City to date.*

- *The proposal is inconsistent with the Auburn Employment Land Study 2008 recommendations and principles, which seek to retain and protect industrial and other employment uses within the Silverwater Road Precinct (Precinct 14) and Silverwater Industrial Precinct (Precinct 5).*

- *The proposal could threaten strategically and regionally significant industrial land in Silverwater (Precinct 5), and could create land use conflict.*

- *The proposal is not required to meet the Council's dwelling targets. Council is currently seeking to encourage housing growth within existing town centres (for example, the FSRPP which substantially increases the dwelling capacity in both Lidcombe and Auburn town centres)":* Ex GS 1, page 167 (emphasis added).

311. In her evidence at the public hearing Ms Cologna explained that the term "land use conflict" used in the assessment report as outlined above, was a reference to the conflicts that might be created by introducing a residential land use to a location that is close to land that is being used for industrial or employment type uses, including the impact such uses might have on the amenity of people living in residential buildings: T-110.25-.42.

312. Ms Cologna also explained that the Auburn Employment Land Study 2008 referred to in the assessment report above was a reference to the strategic planning study for employment land that had been prepared for Auburn in 2008. The First APP GSPP was inconsistent with that study because it sought approval for residential land uses in an area that had been strategically set aside for employment generating uses: T-111.22-.32.

313. The Assessment Report identified that the First APP GSPP was inconsistent with a number of planning strategies. For example, it was inconsistent with Objective 13 of the draft Metropolitan Strategy for Sydney to 2031 which is an objective *"to provide a well-located supply of industrial lands"*. This was because the rezoning of the site from B6 Enterprise Corridor to B4 Mixed Use Zone under the Auburn LEP would result in a loss of 0.75 hectares of significant employment lands within the Silverwater Industrial Precinct: Ex GS 1, page 183.

314. The Assessment Report also noted that *"introducing high density residential uses of this scale on the site could also encourage land use conflict with the adjoining industrial land uses"*.

315. The First APP GSPP was also said to be inconsistent with parts of Strategic Direction E of the Metropolitan Plan for Sydney 2036, which contains strategic directions to *"identify and retain strategically important employment lands"* and to *"strengthen existing freight and industry clusters and support the emergence of new clusters"*.

316. The First APP GSPP was also found to be inconsistent with the West Central Draft Subregional Strategy as it *"would facilitate the development of out of centre retail uses"*: Ex GS 1 page 185. It was also noted that *"no further upzonings"* were required with the Auburn LGA to meet the dwelling target of 17,000 dwellings within the Auburn LGA for 2031, as set out in the WCDSS.

317. In the Assessment Report a number of recommendations were made to Council if it decided to support the First APP GSPP. These included considering a "more appropriate zone that is consistent with the Centres hierarchy, such as B2": Ex GS 1, page 195.

318. As a consequence of the Assessment Report, the Executive Manager Planning's Report for the Council meeting of 20 November 2013 recommended the Council not support the planning proposal for the same four reasons identified in the Assessment Report: Ex GS 1, pages 167 and 285.

319. At the Council Meeting of 20 November 2011, consideration of the APP GSPP was deferred until the following meeting. Despite the contents and recommendations contained in the Assessment Report, at the Council's meeting on 4 December 2013 the Council resolved to prepare a planning proposal in accordance with s.55 of the *Environmental Planning and Assessment Act* to, amongst other things, *"rezone land at 1-17 Grey Street and 32-48 Silverwater Road, Silverwater to B2 Local Centre"*. Amongst the resolutions were to put a maximum height of buildings of 25 metres and a floor space ratio of between 3.75:1 to 4:1: Ex GS 1, page 245.

320. The resolution was based on a motion moved by Councillor Attie and seconded by Councillor Mehajer. Voting for the resolution were Councillor Attie, Mehajer, Zraika, Lam, Oueik and Yang. Voting against were Councillors Batik-Dundar, Campbell, Oldfield and Simms.

321. As a consequence of this vote, in July 2014 the Council submitted a planning proposal to the Department of Planning and Environment for 1-17 Grey Street and 32-48 Silverwater Road, Silverwater ("the First GSPP"): Ex GS 1, page 251. The First GSPP sought to rezone the Grey Street Site from B6 Enterprise Corridor to B2 Local Centre, a zoning that also encouraged and permitted high density residential development. The proposed planning control changes would involve an increase in maximum height allowed from 14m to 25m and an increase in FSR from 1:1 to 4:1: Ex GS 1, page 258. Concept plans for the residential and retail developments proposed were included in the First GSPP.

322. On 18 December 2014 the Department of Planning refused the Gateway Determination: Ex GS 1, page 336. Six reasons were given for the planning proposal to not proceed in the Gateway Determination (Ex GS 1, commencing page 389) as follows:

> *"1. The planning proposal is inconsistent with the Auburn Employment Land Study 2008. The Study identifies the subject site as part of a broader Strategic Employment Precinct that should be retained and protected for new and emerging industries and to avoid rezoning speculation which could undermine the viability of industrial land.*
>
> *2. The proposal to rezone the subject land from B6 Enterprise Corridor to B2 Local Centre would reduce land considered to be strategically and regionally important employment land and permit non-employment generating uses. This has the potential to create significant land use conflict within the area but also undermines the role of the B6 Enterprise Corridor Zone in Auburn City and ensures that employment land is protected during a period of high residential growth across the Local Government Area.*
>
> *3. Proposed rezoning of the subject site to B2 Local Centre is unlikely to contribute to strengthening or maintaining the existing*

industry cluster, and the introduction of a Centre that provides for land uses inconsistent with the objectives of this cluster may impact the long term provision of freight and industrial land in Auburn City.

4. *The planning proposal is inconsistent with the s.117 Direction 1.1 Business and Industrial Zones as it will reduce the potential floor space for employment generating land uses. Permitting residential development of the proposed density will undermine the ongoing operation of the Silverwater Industrial Precinct and set an undesirable precedent for rezoning industrial land for residential purposes.*

5. *The planning proposal is inconsistent with strategic objective B4 of the West Central Draft Subregional Strategy. Strategic Objective B4 – Action B4.1 supports the "concentration of Retail Activities and Centres Business Development Zones and Enterprise Corridor Zones". The planning proposal is inconsistent with Action B4.1 as it would facilitate the development of out of centre retail uses.*

6. *The planning proposal is also inconsistent with Strategic Objective C1 – Action C1.3 which supports "increased housing capacity targets in existing areas". The proposal is inconsistent as it is not located within an existing area that supports residential development, focused around a local centre or a corridor that permits residential uses and has good access to public transport."*

323. Following the Gateway Determination refusal, a meeting was held at the Council offices on 5 February 2015 attended by Monica Cologna, Mitchell Noble and Harinee De Silva of the Council's Planning Department and Elise Crameri and Rachael Snape of APP: see the meeting notes at Ex GS 1, page 361. Amongst the things noted was confirmation by the Council that there was to be a Councillor Briefing Workshop to be held on 6 February 2015 regarding the Employment Land Strategy. This was a reference in part to a section of the letter from the Department of Planning and Environment to the Auburn Council dated 18 December 2014 that was sent with the Gateway Refusal. In that letter the Department stated: *"I am aware that Council is currently reviewing its Employment Land Study with a view to updating Council's policy framework regarding retail, commercial and industrial uses. This draft Strategy investigates renewal opportunities for the subject site and recommends that a Mixed-Use Precinct be considered more broadly and that a Master Plan approach for this area be considered. In this regard, Council is encouraged to finalise its draft*

Strategy and consider the implications for the subject site in the broader context of the Precinct and the appropriateness of non-employment generating uses. Council should subsequently consider preparing a new planning proposal to reflect the findings of the Employment Land Review. The Department is available to work with Council in this regard.": Ex GS 1, pages 336-337.

324. In the Executive Manager Planning's Report for the Council meeting for 18 February 2015, as a result of the Gateway Determination the recommendation to Council was:

> *"1. That Council receive and note the Department of Planning and Environment's Gateway Determination as per s.56(2) of the Environmental Planning and Assessment Act 1979.*
>
> *2. That the council take no further action on this proposal until the Draft Auburn Employment Lands Strategy is finalised and reported to Council for adoption.*
>
> *3. That Council advised the applicant of this planning proposal of Council's decision."*

325. It was further recommended that *"rather than requesting a review of the decision, it is recommended that Council continue to progress the Draft Auburn ELS as outlined in the Gateway Determination"*: Ex GS 1, pages 340-342.

326. At the Council meeting held on 18 February 2015 the Council resolved unanimously to adopt the recommendations in the Executive Manager Planning's Report: Ex GS 1, page 363.

327. In a letter from the Auburn City Council to Elise Crameri of APP dated 23 February 2015, the Council advised APP of the Council's resolution of 18 February 2015 [incorrectly described as 18 March 2015] and stated that:

> *"Council will now progress with the Council's Draft Employment Land Study 2015. I will keep you informed about the progress of this Study": Grey Street Bundle, page 364.*

(ii) Amendment to Auburn Employment Lands Strategy

328. At the Council meeting held on 20 May 2015 the Council unanimously resolved, amongst other resolutions, to:

> "*... endorse the proposed changes to the exhibited versions of the Draft Auburn Employment Land Strategy 2014 and Draft Auburn City Residential Development Strategy 2014, outlined in the report, and finalise the studies*."
>
> And that:
>
> "*Council proceed with the recommended changes to the Auburn LEP 2010 arising from the draft Auburn Employment Land Strategy 2014 and Draft Auburn City Residential Development Strategy 2014 that are supported by Council staff (summarised at attachments A and B, respectively)*.": Ex GS 1, page 365

329. As Ms Cologna clarified in her evidence in the public hearing, the relevant amendment to the Auburn Employment Lands Strategy was that the strategy now contemplated that a B1 Neighbourhood Centre could be incorporated into the Silverwater area where the Grey Street Site was located: T 118 L 25-30. Significantly, the objectives of this zoning did not include encouraging high density residential, but rather small scale retail, business and community uses. Residential flat building development would however be permissible with consent: See ALEP 2010.

330. In June 2015, APP lodged with Council a report entitled "Residential Market Appraisal" concerning Silverwater – Grey Street and Silverwater Road: Grey Street Bundle, page 367. This report noted that: "The Draft Auburn LGA Residential Development Strategy (2014) and Draft Auburn Employment Land Study (2014) both recognised the site for future mixed uses that will make some contribution to the supply of housing and to the supply of retail floor space that will meet strong growth over the next 1½ decades. As such, the proposed development, which will provide 250 residential apartments and 4,000m² of employment generating uses accords with the Regional Planning Policies and Draft Local Strategies": Ex GS 1 page 372.

(iii) Second APP GSPP

331. Following this, in July 2015, APP submitted a second planning proposal for 1-13 Grey Street and 32-46 Silverwater Road, Silverwater ("the Second APP GSPP"): Ex GS 1, page 398.

332. The Second APP GSPP sought to change the zoning from B6 Enterprise Corridor to B2 Local Centre. The maximum height for buildings was sought to be lifted from 14m to 32m and a maximum FSR of 4:1 was sought.

333. In September 2015 Council staff prepared another Assessment Report of the Second APP GSPP. The Assessment report did not recommend a B2 Local Centre zoning as sought by APP. The recommended instead that the proposed rezoning be B1 Neighbourhood centre, giving consistency with the Auburn Employment Lands Study. Instead the Council planning staff made the following recommendations:

> *"This report recommends the Council amend the planning proposal application for the rezoning of land at 1-17 Grey Street and 32-48 Silverwater Road, Silverwater (PP-3/2015), as follows, prior to proceeding with:*
>
> *(a) amend the proposed rezoning to B1 Neighbourhood Centre;*
>
> *(b) reduce the proposed FSR to a maximum of 2.7:1, as recommended by the feasibility analysis undertaken by the AEC Group on behalf of Council;*
>
> *(c) reduce the maximum height of buildings to 20m, and require the applicant to undertake urban design analysis to test the impact in terms of building envelope in relationship with surrounding development;*
>
> *(d) require the applicant to undertake traffic modelling and analysis to assess the potential cumulative impact of the proposal on traffic across the broader traffic network, including Silverwater Road, as recommended by the RMS;*
>
> *(e) require the applicant to provide further justification for the reasons for refusal cited in the Department of Planning's Gateway Determination, and justify inconsistency with s.117 Direction 1.1 – Business and Industrial Zones (via a study in accordance with the Regional, Subregional or the Auburn Employment Land Strategy 2015) for the Director General of DP&I's agreement prior to proceeding;*

(f) *require the applicant to undertake a Phase 1 Contamination Assessment of the site (subject land) in accordance with SEPP 55 – Remediation of Land, to investigate possible site contamination, and suitability of the site for residential uses;*

(g) *require the applicant to undertake further discussions with Council regarding the most appropriate LEP mechanism by which to achieve the 4,000m² retail component (comprising a 2,500m² supermarket and 1,500m² of local specialty retail/commercial floor space) and the need for a site-specific development control plan."*

Notwithstanding this, this report also raised the following:

"

- *the proposal does not satisfactorily address the reasons for refusal in the Gateway Determination for the previous, almost identical, proposal;*
- *inconsistencies with relevant State and Local Plans and Strategies;*
- *the suitability of a B2 Local Centre Zone in this location;*
- *the potential to result in a cumulative loss of surrounding employment lands;*
- *the proposal does not adequately consider the traffic impacts, particularly cumulative traffic impacts on the surrounding network; nor the impacts on other retail areas;*
- *the proposal does not demonstrate that this contaminated site can be made suitable for residential development": Grey Street Bundle, pages 469-470.*

334. By a letter to the Council dated 25 September 2015, APP sent a response to address the AEC Group feasibility study prepared for the Council dated 23 September 2015: Ex GS 1, page 517. In the Executive Manager Planning's Report for the Council meeting of 7 October 2015 a number of recommendations were made that largely repeated the recommendations set out in the Council's Assessment Report dated September 2015: Ex GS 1, page 524.

335. By 2 October 2015 APP had clearly become aware that Council planning staff would only be recommending a zoning change to B1 Neighbourhood Centre rather than B2

Local Centre as sought by them, and also aware of the Council recommendations for reduced FSR and maximum height from what they were seeking. Ms Elise Crameri of APP sent an email to Mr Sankari (from the Beirut Bank) and Mr Mosca (the proposed architect) of 2 October 2015 indicating that Council's planning staff recommendation was "not great news": Exhibit Gen 11. She indicated in the same email that it was "very important that we get the resolution to include amendment to Council's strategies to nominate the site as B2 with FSR and height that we want". In the body of her email she drafted her own recommendation which was in the following terms:

> "*(1) that Council approve the planning proposal to proceed to Gateway for the rezoning of land at 1-17 Grey Street and 32-48 Silverwater Road, Silverwater (pp-3/2015), as follows:*
>
> *(a) zone the site B2 Local Centre;*
>
> *(b) allow a maximum floor space ratio of between 3.75:1 and 4:1;*
>
> *(c) allow a maximum height of 26 metres; and*
>
> *(d) amend the Auburn Employment Land Strategy 2015 to recommend the site be zoned B2 Local Centre and permit residential uses on the site, including land, zoned B2 Local Centre with frontage to Silverwater Road.*
>
> *(2) Once all required amendments have been made, forward the planning proposal to the Department of Planning and Environment for Gateway determination.*
>
> *(3) Note that the Gateway determination will likely require the applicant to undertake a further study prior to the consultation being undertaken in accordance with s.56 and s.57 of the Environmental Planning and Assessment Act (1979), including:*
>
> *(a) additional traffic modelling and analysis to assess the potential cumulative impact of the proposal on traffic across the broader traffic network, including Silverwater Road, as recommended by the RMS;*
>
> *(b) applicant to undertake a phase 1 contamination assessment of the site (subject land) in accordance with SEPP 55 – Remediation of land to investigate possible site contamination, and suitability of the site for residential uses; and*
>
> (c) *the applicant provide a site-specific development control plan for the controls identified above*": Exhibit Gen 11.

336. Ms Crameri sent a further email to Mr Sankari on 6 October 2015 in which she reproduced her resolution with only a minor word change, stating that *"[w]e need the following alternate resolution put forward"*: Exhibit Gen 11.

337. At the Council meeting of 7 October 2015, Ms Crameri of APP was listed in the Agenda as someone who was to speak on the GSPP, but did not do so when called upon. Councillor Simms moved a motion that the Council not support the proposal, largely because in her view the second APP GSPP did not sufficiently address the reasons for the Gateway refusal to the First GSPP and because traffic impacts on Silverwater Road had not been sufficiently addressed.

338. Mr Attie then moved a motion (seconded by Mr Mehajer) that was in near identical terms to the recommendation drafted by Ms Crameri in her emails to Mr Sankari of 2 and 6 October, referred to above. This is a matter discussed further below.

339. At the Council meeting of 7 October 2015 Councillor Attie's motion was carried on the votes of Councillors Attie, Mehajer, Lam, Oueik, Yang and Zraika. Councillors Batik-Dundar, Campbell, Oldfield and Sims voted against.

340. By letter dated 15 December 2015 the Council sent to the Department of Planning a Second GSPP based on the Second APP GSPP: Ex GS 1, page 520. That planning proposal had not received a Gateway Determination by the time of the suspension of the Council in February 2016.

341. On 2 March 2016 the Interim Administrator Mr May moved and carried a motion directing the General Manager to notify the Department of Planning and Environment that the GSPP is withdrawn so as to not require any further action from the Department: Ex S2 page 34.

(b) Evidence at Private and Public Hearings

Ms Cologna and Mr Brisby

342. In the evidence that she gave at the public hearing, Ms Cologna confirmed that one of the principle reasons that the Council Planning Department (she had responsibility for the GSPP) recommended to the Council to not adopt the First and Second APP GSPPs

was non-compliance with the Auburn Employment Land Strategy. She also made it clear in her evidence that it is poor planning practice to amend important strategies such as an employment land strategy, in order to make it consistent with a planning proposal. The situation should be the reverse – planning proposals should be consistent with an important Council strategy like an employment land strategy: T-121.20-.29.

343. In a similar vein, when examined by Counsel Assisting, Mr Brisby agreed that it was a fairly unusual situation for a Council to amend an important policy document such as an employment land strategy in order to make a proposed development permissible: T-462.45-463.2.

Evidence of Mr Attie and Mr Sankari

344. One of the themes explored by Counsel Assisting in his examinations of Mr Attie at the private and public hearing, and in his examination of Mr Sankari, who was summoned to appear at the Inquiry, was that Mr Attie had simply done the bidding of the proposed developer of the Grey Street site and had, in particular, been provided with recommendations drafted by Ms Crameri (or someone else of the developer) which he then moved for adoption at the Council meeting of 7 October 2015.

345. In his evidence, Mr Sankari confirmed that he was engaged as an "owner representative" in a private business capacity for the owner of the Grey Street site: T-1572.10-.29.

346. Mr Sankari was asked about the initial meeting with Mr Attie and Mr Brisby concerning the Grey Street site on 28 February 2013: Exhibit GS1 page 20. It would appear that Mr Attie was involved in this meeting simply because he was Mayor at the time. Mr Sankari agreed that Mr Attie appeared to be a strong supporter of the planning proposal for the Grey Street site (T-573.34-.36), something that Mr Brisby also agreed with in his evidence: T-460.35-.41.

347. Mr Sankari's evidence was that while throughout the process he understood that Mr Attie was supportive of the planning proposals, he had minimal contact with him. His evidence was that he did not pass on to the councillors the recommendation

drafted by Ms Crameri in her email to him of 2 October 2015 because he was too busy at the time: T-1580.4-.10.

348. Mr Sankari also said that he did not contact Mr Attie following the receipt of Mr Crameri's email of 2 October but did contact Mr Attie after he had received the 6 October email from Mr Crameri: T-1581.21-.26.

349. Mr Sankari's evidence in summary was that he did have a meeting with Mr Attie at the Council on 6 October. He believed he would have printed the email from Ms Crameri containing her proposed Council resolution and he would have brought that email with him to the meeting with Mr Attie: T-1584.15-.19. Mr Sankari said that he discussed the planner's advice with Mr Attie and it is possible that he gave Mr Attie a copy of Ms Crameri's 6 October email, but he had no specific recollection: T-1584.36-.47. He denied receiving any assurance from Mr Attie that the resolution drafted by Ms Crameri in her 2 and 6 October 2015 emails would be put by Mr Attie at the Council meeting on 7 October: T-1585.45-T-1586; T-1587.40-.46.

350. In his private hearing evidence Mr Attie confirmed that he was still a strong supporter of the GSPP. He considered it an important proposal for the Silverwater area, which had *"no shopping centre ... and required some retail exposure"*: Exhibit PH5; T-3.14-.23. Mr Attie's evidence was that he drafted the motion carried at the 4 December 2013 Council meeting, but did not discuss it with any other councillors beforehand: Exhibit PH5; T-9.1-.47.

351. In relation to the motion carried by the Council at the 7 October 2015 Council meeting, when examined at his private hearing, Mr Attie said that he had prepared the motion: Exhibit PH5; T-16.38-.42.

352. At the public hearing, Mr Attie again confirmed that he had drafted the motion carried by the Council on 7 October 2015. He insisted that he drafted the motion and that neither Mr Sankari nor Ms Crameri had approached him about moving or drafting a motion in the terms set out in Ms Crameri's emails to Mr Sankari of 2 and 6 October 2015. He denied ever seeing an email from Ms Crameri. He denied receiving an email from Mr Sankari containing Ms Crameri's email, and denied knowing who Ms

Crameri was. Even when faced with the near identical nature of Ms Crameri's drafting and the motion that he moved at the 7 October 2015 Council meeting, Mr Attie remained adamant that he had drafted it independently of anyone else: see generally Mr Attie's evidence at T-131-135.

353. I granted leave to Mr Watson SC to examine his client, Mr Attie. One of the matters Mr Watson addressed with Mr Attie was whether he lobbied any other members of the Council in relation to issues before it. Mr Attie denied that, and also denied that any other member of Council lobbied him about anything: T-1233.41-.47.

354. In relation to the near identical wording of Ms Crameri's proposed resolution and the motion that Mr Attie put to the Council at the meeting of 7 October 2015, Mr Attie's evidence, when questioned by Mr Watson SC was as follows:

> "*Q: Look, it is quite obvious that the wording of your motion and the wording of a recommendation made by Ms Crameri, for all intents and purposes, you could call them identical; you see that, don't you?*
> *A: Yes, I do."*
>
> *Q: ... You say your best recollection is that you wrote it?*
> *A: Yes, and I'm not perfect, I can't remember everything, but yes, I remember that, yes.*
>
> *Q: You wrote the motion. The point is this, it can't be a coincidence that there is identical wording or near identical wording --*
> *A: No, I accept the fact that it can't be a coincidence, yes.*
>
> *Q: It can't be a coincidence. Either they got your work or you got their work; is that right?*
> *A: I assume so.*
>
> *Q: Do you remember sending your work to Ms Crameri or Mr Sankari or anybody associated with the Silverwater Project?*
> *A: No.*
>
> *Q: Could your memory be defective? May you have got something from them?*
> *A: Look, it's possible that I may have got something from them, or I gave them something, but I can't recall.*
>
> *Q: I noticed in the email itself it was suggested by Ms Crameri that letters be sent to all councillors. Could you have got something from them and forgotten it?*

A: That's a possibility (T-1238.20-T-1239.16)."

355. Because he was recalled to give evidence in respect to another issue, and because Mr Sankari had given his evidence after him, Mr Attie was recalled to be examined by Counsel Assisting concerning the GSPP on 24 August 2016. He said, when examined on that occasion that he could not recall meeting Mr Sankari on 6 October 2015 but that it was "possible". He also didn't recall receiving a document from Mr Sankari during a meeting: T-1818.32 - 1819.1. During the course of that examination, the following exchange occurred between Counsel Assisting and Mr Attie:

> "*Mr Bolster: Q: Before you were re-examined by Mr Watson the day after you were examined by me, you repeated your denial, on a number of occasions, that the source of the resolution moved on October 7 was someone other than yourself; correct?*
> *A: I believe that was the case, yes.*
>
> *Q: The reason you did that, Mr Attie, is that you don't want to suggest to this Inquiry that there was any relationship or direction from the developer of this site; correct?*
> *A: Yes, and there wasn't.*
>
> *Q: Mr Attie, you were directed by Mr Sankari to move that motion, weren't you?*
> *A: No.*
>
> *Q: You were requested by Mr Sankari to move that motion, weren't you?*
> *A: No. I was requested to support the proposal ...*
>
> *Q: He asked you to move that motion on behalf of the developers?*
> *A: No, he did not. ...*
>
> *Q: What did he say to you, Mr Attie?*
> *A: I can't say exactly in terms, but he showed me the proposal initially, when we had the meetings in Council, I liked the proposal and I was for the proposal from day 1. I wanted another shopping centre in that precinct, which has no shopping centre, so I was for any proposal to bring about a shopping district for Silverwater. And yes, I supported it from day 1 and I will support any development that brings income to this LGA and also provides jobs for the people and if it means that you have to have residential units on top, that's fine, it's fine by me, I'm a pro-development person. ...*
>
> *Q: You hid the true source of that motion, Mr Attie, despite numerous questions from me on the first day that you gave your*

evidence, and you only revealed it in re-examination the next day; correct?
A: I don't believe I revealed anything. I agreed that it's possible. ....

Q: No, please tell us what your position is now, Mr Attie?
A: My position is that it's quite possible that I may have received something from somewhere else that I could use to create a motion.

Q: Only "possible"?
A: Yes.

Q: You don't accept that Mr Sankari gave you that document on either 6 or 7 October?
A: No.

Q: You don't accept that?
A: I don't accept that he gave it to me. ...

Q: Mr Attie, come on now. Are you now retreating from what you told Mr Watson?
A: No. I said to you it could be possible --

Q: It could be possible?
A: -- that I obtained other information to write the motion ...

Q: What is the other source? What other source could it be, Mr Attie?
A: If you look at the documentation, it's also very similar to previous motions that Council put together as well." (T-1823.17-T-1826.6).

Evidence of other councillors in favour of the GSPP

356. Mr Oueik's evidence was that he was in favour of the GSPP because he considered it would benefit the community because it would create employment. He indicated that he had been asked by the residents of Silverwater and they wanted a supermarket: Exhibit PH6; T-39.2-18 and T-1019.9-.21. Mr Oueik said he didn't discuss the proposal with any other councillor: T-1023.11-.36.

357. Mr Mehajer's evidence seemed to be directed to the proposition that if any proposed development was within a town centre, he would always support an upgrade: Exhibit PH9; T-26.31-.35. He considered all of Silverwater Road needed large scale residential apartments: Exhibit PH9; T-26.43-.47.

358. Mr Zraika's evidence was that during his time as Mayor he had done Saturday street corner meetings around the LGA and residents had told him that the Grey Street site was "quite dead", and he thought there was a strong argument to have mixed businesses there and diversity: Exhibit PH8; T-16.18-.27.

Findings in relation to GSPP

359. Counsel Assisting submits that Mr Attie should be found to have *"abrogated his responsibility under s.439(1) of the Local Government Act to act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions"* under the Act: GS19. He bases this on the submission that Mr Attie did the *"bidding of the developer"* of the Grey Street site and abrogated his own duties and responsibilities: GS17 and 18. Central to this is the submission that I should find that prior to the Council meeting of 7 October 2015 Mr Attie was provided with a copy of the recommendations or resolutions drafted by Ms Crameri on 2 and 6 October that were set out in the emails she sent to Mr Sankari of those dates: GS14.

360. Counsel Assisting also submits that I should not accept the evidence of Mr Attie to the effect that he drafted the resolution of 7 October 2015 without reference to the Applicant or its planning consultants: GS13.

361. There is, in my opinion, irresistible force in Counsel Assisting's submission that Mr Attie was provided with a copy of Ms Crameri's email to Mr Sankari of 6 October 2015. I find that he was. It does not follow necessarily, however, that Mr Attie has acted either dishonestly, or in breach of his obligation of reasonable care and diligence under the Act and Model Code.

362. There was an element of controversy about the GSPP, not because it appeared likely to benefit any individual councillor, but because it was squarely inconsistent with one of the Council's key planning strategies – the Auburn Employment Land Strategy.

363. In my view it would be fair to summarise the evidence of Ms Cologna this way – the Council's Planning Department twice failed to recommend that the (APP) GSPP be resolved favourably by the Council to the developers because, amongst other matters, it was inconsistent with the reservation of employment generating land in the AELS.

She saw the amendment of the AELS as a means of accommodating the GSPP as effectively putting the *"cart before the horse"*.

364. Good planning practice is for planning proposals to receive assent if they comply with an important planning strategy like an Employment Land Strategy. To amend a policy document like the AELS so as to accommodate the GSPP was not Ms Cologna's idea of good planning. No doubt many planners would agree with her. This is in part why the First GSPP failed to receive Gateway determination.

365. The approach taken by the Council majority who voted in favour of the First and Second GSPP was therefore *"unusual"*, an endorsement of poor planning, contrary to the Council's own Employment Land Strategy, and inconsistent with a number of State Government Planning Policies. On the basis of these matters I find that the Council's adoption of the GSPP represented poor planning.

366. Further, a majority of council at the 7 October 2015 meeting, on the motion of Mr Attie, moved an amendment to the Council's employments lands study without community consultation or assessment by Council staff. That simply should not have happened.

367. While criticism can be made of the Councillors (including Mr Attie) who supported the GSPP, that criticism does not translate into a finding that they have breached the Act or Model Code.

368. Mr Attie was entitled to form a favourable view of the GSPP. Had he pushed for it and voted in favour of it in an entirely unthinking way, ignoring all details concerning it, and merely acting as he did because a developer told him to, I would have found that he had failed to exercise reasonable care and diligence in both moving the motions that he did and in voting in favour of the GSPP. I am not inclined to make that finding of fact for the reasons that follow.

369. First, it cannot be said that Mr Attie had no regard to what the developer was seeking. He may have even been better informed than the other councillors, in that he had attended the first meeting with the representatives of the owner and the architect in

March 2013 with Mr Brisby. He also had other meetings with the developer's planners about the proposal: Exhibit PH5; T-5.13-.16. He said he took a great deal of interest in the proposal and that he carried out an analysis of it: Exhibit PH5; T-9.15-.19. He spoke with Council planning staff about the proposal after it failed to receive Gateway determination: Exhibit PH5; T-13.8-.15. Mr Attie considered relevant expert reports and documents concerning the GSPP: T-1137.32-.36.

370. Further, like the other councillors in favour of the GSPP, Mr Attie was able to identify the reasons why he supported the proposal, despite the opposition and concerns from the Council's planning staff, and its inconsistency with planning strategies and policies: see T-1143.1-.5, re the perceived need for a Silverwater supermarket. His evidence was that at least the residents of Silverwater who had spoken to him wanted a supermarket shopping facility in Silverwater, which (along with high density residential development) the GSPP would deliver: T-1143.1-.43. Without referencing each time he asserted it, Mr Attie was at pains in his evidence to underline his general "pro-development" credentials. That much is clear in any event from his voting pattern on all planning proposals examined as part of this Inquiry.

371. Finally, it should be noted that there is no evidence that Mr Attie stood to personally gain anything from his support of the First and Second GSPPs.

372. Given the above facts, even though I have found that someone (probably Mr Sankari) gave to Mr Attie Ms Crameri's 6 October email containing the proposed resolution from the developer, I am not persuaded that I should find that he abrogated his obligations of honesty and due care so as to merely do the developer's bidding. I accept that he was given a copy of Ms Crameri's proposed resolution, but I do not accept Mr Attie thereby acted purely at the behest of the developer or under direction from it, or its advisers. Mr Attie, for his own considered reasons, was in favour of the GSPP, and he gave genuine consideration to the relevant aspects of it.

373. Counsel Assisting is of course right to criticise aspects of Mr Attie's evidence concerning the motion he moved on 7 October 2015. Mr Attie was initially adamant it was the result of his independent drafting. When faced with the virtual word for word Crameri recommendation in the 6 October email, he conceded (in what was in

effect re-examination) that he possibly had received something from someone that he had based his motion on.

374. In my view, this evidence was coy at best, and I do not accept it. I am comfortably satisfied that Mr Sankari printed off a copy of Ms Crameri's email of 6 October 2015 and took it to the meeting he had that day with Mr Attie, and gave Mr Attie a copy of it. It is surprising to me that Mr Attie does not recall that. Despite this, the fact that Mr Attie based his motion (extremely closely) on a recommended drafting by Ms Crameri for the developer does not lead to the conclusion that Mr Attie abrogated his duty of care or acted under direction. He was in favour of a proposal he had properly considered for the reasons exposed in his evidence. No lack of honesty in his conduct as a councillor is apparent from this. Had there been evidence that Mr Attie stood to make some personal gain by supporting the GSPP, or had there been no evidence that he engaged with the proposal independently and formed his own views about it, but rather only acted because asked to by APP or Mr Sankari, the position would be different.

The Future

375. The GSPP has been withdrawn. This occurred after the then Interim Administrator, Mr May, had discussions with Ms Cologna. The reasons for the Council planning staff not supporting the First or Second GSPP are hopefully clear from this report, and are in any event clear from the relevant Council documents tendered as part of Exhibit GS1, particularly the Council Assessment Reports and the Executive Manager Planning Reports for the Council meetings.

376. In my view this Inquiry cannot usefully add anything to those expert reports. It is always open to the owner of the Grey Street site to approach Council again with a further proposal or development application.

SECTION 8: MARSDEN STREET PLANNING PROPOSAL

(a) Introduction

377. The Marsden Street Planning Proposal ("MSPP") was examined into at the Public Inquiry because it affected the zoning and therefore the likely market value of a number of properties owned by companies that are owned by Mr Oueik. Those properties were 4, 6, 8, 10 and 14 Mark Street, Lidcombe (owned by Apartments on Mark Pty Ltd), 9 and 11 Raphael Street, Lidcombe (owned by BBC Group Pty Ltd) and 1 and 1A Marsden Street, Lidcombe (owned by Marque Eight Pty Ltd). Prior to the MSPP, the properties at 1 and 1A Marsden Street were subject to an IN2 zoning while all the other properties were zoned R4 (high density residential). The R4 zone properties had a maximum height control of between 18 and 20m and a maximum FSR of between 1.7:1 and 2:1. Under the MSPP all of the properties were rezoned B4 (mixed uses). The B4 Mixed Uses Zone, in addition to encouraging high density residential development, also has the objective of encouraging office and retail uses (amongst others). Further, the MSPP increased the maximum height allowable in the B4 zone to 32m and the maximum FSR to 5:1. There was unchallenged expert valuation evidence tendered at the public hearing which expressed the view that the combined market value increase of these properties as a result of the MSPP was in the vicinity of $24 million.

378. The MSPP originated with a planning proposal submitted to Council on 18 July 2013 ("the Original Planning Proposal") that was prepared by CBRE Town Planning ("CBRE") for Robert and Helen Kelman, who were the owners of 15 Raphael Street and 21-23 James Street, Lidcombe ("the Original Site").

379. The Original Planning Proposal (see page 67, MSPP Bundle – Exhibit MS 1) sought to have the site rezoned from IN2 Light Industrial to R4 High Density Residential. It proposed a maximum building height control of 16 metres and a floor space ratio of 1.5:1 or 2:1 (see Ex MS 1, page 70).

380. At the time that the Original Planning Proposal was submitted to Council, the majority of the site was used as a warehouse. In the Original Planning Proposal it was contended that the continued industrial use of the site was *"significantly compromised by the adjoining existing and zoned high density residential lands"* and that the *"resulting land use conflict between residential and industrial uses is a poor and undesirable planning outcome"*: Ex MS 1, page 76.

381. The objectives and outcomes of the Original Planning Proposal were to:

> *"*
> - *consolidate future residential development west of Raphael Street;*
> - *contribute to higher density housing stock in the vicinity of Auburn Town Centre;*
> - *complement the built form and scale of existing and likely higher density residential development in the vicinity of the site;*
> - *support the orderly and planned edge to the industrial precinct east of Raphael Street and in turn minimise the extent of land use conflicts"*: MSPP Bundle, page 76.

382. A more detailed set of justifications for the original planning proposal were set out at pages 13-26: Ex MS 1, pages 79-92.

383. In the Executive Manager Planning's Report to the Council's Planning Committee Meeting for 20 November 2013, the recommendations were:

> *"(1) The Council prepare a planning proposal in accordance with s.55 of the Environmental Planning and Assessment Act 1979 ("EP&A Act"), to amend Auburn Local Environmental Plan 2010 to:*
>
> *(a) rezone land at 21 and 23 James Street, Lidcombe from IN2 Light Industrial to R4 High Density Residential;*
>
> *(b) apply a maximum height of buildings controlled land at 21 and 23 James Street Lidcombe of 16 metres; and*
>
> *(c) amend the maximum floor space ratio controls for land at 21 and 23 James Street, Lidcombe, 15 Raphael Street, Lidcombe and the Council owned laneway, known as Laneway 429, to 1.5:1.*

(2) The Council submit this planning proposal to the Department of Planning and Infrastructure for Gateway Determination under s.56 of the Environmental Planning and Assessment Act 1979 (EP&A Act); and

(3) The Council progress the planning proposal, post-gateway, through to finalisation, provided that no substantial changes are required following public exhibition" : Ex MS 1, page 14.

384. The reasons given for these recommendations were that:

"
- *the proposal is generally consistent with the planning policy framework for employment land,*
- *the proposal seeks to rezone industrial land that is not considered to be strategically significant as employment land, and suitable to be considered for a wider range of uses associated with the Lidcombe Town Centre,*
- *the proposal will create better separation and incompatible industrial and residential land uses and a more defined boundary between the two existing Land Use Zones, and*
- *the unique characteristics of the site are unlikely to create a precedent for further similar rezoning proposals.*
- *The public exhibition of the proposal received only a small amount of objection and the concerns raised can be considered at a future development application stage":* Ex MS 1, page 22).

385. The Council's Planning staff prepared an Assessment Report in relation the Original Planning Proposal dated November 2013: page 24 of Ex MS1. The Assessment Report outlined the recommendations referred to above in the Executive Manager Planning's Report and provided more detailed reasons supporting those recommendations. In addition to those referred to in the Executive Manager Planning's Report it was noted in the Assessment Report that the Original Planning Proposal was consistent with, or had justifiable inconsistencies with, the following strategic planning policies:

- Metropolitan Plan for Sydney 2036
- Draft Metropolitan Strategy for Sydney 2031
- West Central Draft Subregional Strategy 2007
- State Environmental Planning Policies

- Section 117 Directions
- Auburn City Community Strategic Plan
- Auburn Employment Land Study 2008:

see generally pages 17-32 of the Assessment Report at Ex MS 1 pages 43-58.

386. At a meeting of the Planning Committee of Council on 20 November 2013, Mr Oueik declared a "non-pecuniary conflict of interest" and did not take any part in the debate or vote concerning the original MSPP. The Council declined to accept the recommendations made in the Executive Manager's Planning Report, and instead a unanimous resolution was carried (on the motion of Councillor Attie, seconded by Councillor Lam) along the following lines:

(i) The Council defer the consideration of the planning proposal to rezone land at 21 and 23 Jane Street, Lidcombe to enable the planning staff to undertake a more complete urban design and planning study of the area bounded by Mark, James, East and Railway Streets being approximately 100-400m from the Lidcombe Railway Station.

(ii) That the proposed urban design and planning study assess as a minimum the following:

(a) the urban design impacts of the existing FSR and height controls, in particular their impact on scale of developments and amenity of adjoining zone boundaries in the study area;

(b) any recommendations with a view to either extending the B4 zone (similar to the Auburn Town Centre) with appropriate FSR, height and parking controls or amended R4 zone to allow a better scale of transition;

(c) any recommendation as to enhancing and retaining the IN2 zone (Rookwood Cemetery support services) bounded by East, James,

Railway Streets and Raphael Lane, including any appropriate FSR and height controls;

(d) any recommendations as to the further provision of open space or adding to existing open space in the proposed study area.

(iii) That a workshop on the matter be undertaken early in 2014 in conjunction with the North Auburn Planning Proposal Workshop.

387. In his evidence at his private hearing, Mr Attie explained that he moved his motion off the cuff because during the course of the meeting he formed the view that it would be desirable *"to look at the wider area rather than just at one particular block"*: Exhibit PH5, T-43.12-.28. This can, of course, be seen in contrast to the way in which the Council dealt with what was merely a block in relation to the South Auburn Planning Proposal.

388. As a result of the resolution on 20 November 2013, AECOM was engaged by Council to prepare a Zoning Review for the "Marsden Street Precinct, Lidcombe". Their report was dated 28 May 2014 and commences at Ex MS 1, page 132. The Marsden Street Precinct was a larger site than the original site that was the subject of the Original Planning Proposal, but incorporated the original site within it.

389. The expanded site ("the Marsden Street Precinct Site") incorporated the properties within it owned by various companies associated with Councillor Oueik outlined above in [373].

(i) Scenarios E, F (preferred) and G

390. The Marsden Street Precinct Site was bounded by Mark Street, Railway Street, East Street and James Street, Lidcombe: see Ex MS 1, page 165. Slightly more than half the land within this site was zoned IN2 Light Industrial with most of the balance being zone R4 High Density Residential. In their Zoning Review AECOM presented seven scenarios (Scenarios A-F) for consideration. Their preferred scenario (Scenario F) is set out at page 179 of Ex MS 1. It recommended an R4 Zoning for the entirety of the

Marsden Street Precinct Site, south of Marsden Street, with the majority of the site north of Marsden Street to be rezoned as B4 Mixed Uses.

391. In the Executive Manager Planning's Report to Council for its 18 June 2014 meeting, the following recommendations were made:

> *"1. That Council note the findings of the Marsden Street Precinct, Lidcombe Zoning Review prepared by AECOM dated May 2014.*
>
> *2. That Council note the additional scenario (G) comprising the retention of IN2 fronting East Street directly opposite Rookwood Cemetery (from Scenario A), application of the B4 Zone across the remainder of the Precinct (from Scenario E) reflecting the study area's proximity to Lidcombe Station (i.e. all within 400 metres), and the extension of public open space (from Scenario F).*
>
> *3. That Council resolve to rezone the study area as per Scenario G, and prepare and submit a planning proposal to the Department of Planning and Environment accordingly.*
>
> *4. That Council review the traffic and parking DCP requirements for all areas of the D4 Mixed Use Zone":* Ex MS 1, page 184.

392. Scenario G referred to in the recommendation was not a scenario that was the subject of the AECOM Zoning Review Report. It came from Council's planners Mr Francis and Ms Cologna, as discussed in more detail below. It was explained this way in the Executive Manager Planning's Report for the Council Meeting of June 18, 2014 at page 78 (Ex MS 1, page 186):

> *"An alternative rezoning scenario (Scenario G) is included in attachment 2 of this Report. This scenario draws together elements of the consultant scenarios A, E and F which are considered to provide a suitable outcome for the study area.*
>
> *Specifically, Scenario G comprises the retention of IN2 fronting East Street directly opposite Rookwood Cemetery (from Scenario A), application of the B4 zone across the remainder of the precinct (from Scenario E) reflecting the study area's proximity to Lidcombe Station (i.e. all within 400m), and the extension of public open space (from Scenario F).*
>
> *Scenario G was presented to counsel at a briefing on 4 June 2014. This scenario was presented in addition to those provided by the*

consultant. The scenario is similar to scenario E with a larger IN2 zone along East Street. It allows for B4 mixed use zone for all land west of Raphael Street and an IN2 light industrial use zone for all land east of Raphael Street": MSPP Bundle, pages 186-187.

393. In the AECOM report, their preferred scenario was Scenario F, which would have rezoned the currently IN2 lands as B4 Mixed Uses. This zoning change would only have affected the two properties owned by companies associated with Mr Oueik in Marsden Street – the other properties would simply have retained an R4 high density residential zoning. AECOM's scenario E, if implemented, would have seen all of the properties obtain the benefit of a B4 Mixed Uses zoning. Scenario G was very similar to Scenario E, and involved only minor difference to parts of the Marsden Street Precinct Site in that it had slightly more IN2 zoned land and public recreation zoned land. Scenario E and G involved the same zoning changes for the properties owned by Mr Oueik's companies.

394. The differences between the various scenarios, and what was said to be their "pros" and "cons" were the subject of commentary in the Executive Manager Planning's Report: pages 187-195, Ex MS 1. This information was said to be presented to Council in order to:

> *"*
> - *receive and note the consultant's report, scenarios and recommendations;*
> - *receive and note the alternative rezoning scenario presented to Council at a briefing on 4 June 2014; and*
> - *consider if it wishes to pursue a rezoning of the precinct;*
> - *consider if it wishes to review the traffic and parking DCP requirements for all areas of the B4 Mixed Use zone"*: MSPP Bundle, page 195.

(ii) MSPP carried

395. At the Council Meeting on 18 June 2014, the following motion (moved by Councillor Attie and seconded by Councillor Yang) was carried:

> *"1. That Council note the findings of the Marsden Street precinct, Lidcombe zoning review prepared by AECOM dated May 2014.*

> 2. *That Council note the additional scenario (G) comprising the retention of IN2 fronting East Street directly opposite Rookwood Cemetery (from Scenario A), application of the B4 zone across the remainder of the precinct (from Scenario E) reflecting the study area's proximity to Lidcombe Station (i.e. all within 400m), and the extension of public open space (from Scenario F).*
>
> 3. *That Council rezone the study area as per Scenario G, and prepare and submit a Planning Proposal to the Department of Planning and Environment accordingly.*
>
> 4. *That Council review the traffic and parking DCP requirements for all areas of the B4 Mixed Use zone":* MSPP Bundle, page 202.

396. Councillors Zraika, Attie, Batik-Dundar, Lam and Yang voted for the motion, Councillors Campbell, Oldfield and Simms were against. Both Councillors Oueik and Mehajer declared pecuniary interests and remained outside the chamber when debate and voting took place.

(iii) Gateway determination and MSPP incorporated into Auburn LEP 2010

397. Following this Council vote, the Council's planning staff prepared the MSPP (which is dated July 2014) and commences at page 240 of Ex MS 1. The MSPP sets out the various justifications for the planning proposal and deals with its consistency or otherwise with various State and local planning strategies and plans.

398. On 30 September 2014 the Minister for Planning, through his Delegate, determined that the MSPP should proceed subject to various conditions: see Gateway Determination at Ex MS 1 page 235. On the same date the Minister authorised Auburn City Council to exercise his functions under s.59 of the *Environmental Planning and Assessment Act* to amend the Auburn LEP 2010: Ex MS 1, page 237.

399. The Gateway Determination conditions required Council to commission a traffic and transport study, to undertake community consultation as required by ss.56(2)(c) and 57 of the EP&A Act, and also to consult with various public authorities under s.56(2)(d) of the EP&A Act. Those matters were attended to and MSPP was placed on exhibition for consultation with community and public authorities between 29

April 2015 and 27 May 2015: Ex MS 1, page 212. The various matters were addressed in the Executive Manager Planning's Report for the Council's meeting of 17 June 2015 (Ex MS 1, pages 208-233). The recommendation made to Council for its meeting on 17 June 2015 was:

> *"It is recommended that Council:*
>
> - *receive and note the status of the current proposal, Gateway Determination and response to community and public authority consultation process;*
> - *note the variations to the proposal considered in this report and accept variation 2 to rezone 24 Railway Street to B4 Mixed Use;*
> - *resolve to progress the planning proposal to the legal drafting and Auburn LEP mapping, without variation; and*
> - *authorise the General Manager as their delegate to sign the legal written instrument and map cover sheet for Auburn LEP Plan 2010 (Amendment No 14) on behalf of the Full Council":* Ex MS 1, pages 232-233)

400. At the Council Meeting held on 17 June 2015 the following motion (moved by Councillor Attie and seconded by Councillor Yang) was carried by majority:

> *"1. That Council receive and note the status of the current proposal, Gateway Determination and response to the post-Gateway community and public authority consultation process;*
>
> *2. That Council note the variations to the proposal considered in this report and accept variation 2 being to rezone 24 Railway Street to B4 Mixed Use;*
>
> *3. That Council adopt (approve) and make (finalise) the Auburn Local Environmental Plan 2010 (Amendment No 14) and associated Auburn LEP 2010 maps, without variation, as per planning proposal PP-3/2014, in accordance with s.59(2)(a) of the EP&A Act 1979;*
>
> *4. That Council staff progress the legal drafting and production of associated Auburn LEP 2010 maps for Auburn Local Environmental Plan 2010 (Amendment No 14) accordingly;*
>
> *5. That Council authorise the General Manager as their Delegate to sign the legal written instrument and map cover sheet for*

Auburn Local Environmental Plan 2010 (Amendment No 14), if adopted, on behalf of the Full Council;

6. *That Council staff send the adopted Auburn Local Environmental Plan 2010 (Amendment No 14) to the Department of Planning and Environment for notification (gazettal); and*

7. *That Council staff report the proposed amendments to the Auburn Development Control Plan 2010 to Council for adoption, after notification of Auburn Local Environmental Plan 2010 (Amendment No 14)*": Ex MS 1, pages 290-291.

401. Councillors Zraika, Attie, Batik-Dundar, Campbell and Yang voted in favour of the motion while Councillors Oldfield and Simms were against. Again both Councillors Oueik and Mehajer declared a pecuniary interest and remained outside the chamber and did not vote.

402. The amendments to the Auburn LEP 2010 to reflect and incorporate the MSPP were made by the General Manager under delegation on 10 September 2015. Relevant amendments to the Auburn DCP 2010 were also made at a council meeting on 2 December 2015.

(b) Evidence at private and public hearings

(i) The planning staff

403. Mr Francis was not examined concerning the MSPP at his private hearing as no documents were available concerning this planning proposal at that stage. In his written statement of 31 May 2016, however, (Exhibit S23) Mr Francis raised the MSPP briefly. He described scenario G as being "staff recommended": Exhibit S23 [11]. He also considered the decision to rezone the precinct as:

> "*…an entirely proper and justifiable one in light of its location and in particular its proximity to a major railway station": Exhibit S23 [14]. His evidence was that he did not recall having "any specific knowledge in relation to ownership of any of the properties within the area covered by the proposal. As part of the process that led to this approval, I did not consider any benefit that might flow to Councillor Oueik.*" (Exhibit S23 [15])

404. At the public hearing, Counsel Assisting sought to ask Mr Francis about scenario E in the AECOM report and whether he had asked for this option to be included in the report. Presumably Counsel Assisting would also have tried to ask questions concerning scenario G. Mr Francis objected to answering any questions about scenario E on the grounds that the answer might incriminate him by claiming the privilege against self-incrimination: T-1698.12-.32. I ultimately ruled that Mr Francis could not be compelled to answer any questions concerning whether he has asked for AECOM to include scenario E in its report.

405. In her written statement (Exhibit S3) Ms Cologna described scenario G as having been developed by "staff": Exhibit S3 [48]. Presumably this was a reference to herself, Mr Francis and Mr Alvares. She recalled discussing scenario G with Mr Francis and recalled that it was Mr Francis who suggested the areas of the Marsden Street precinct that AECOM had a preference for R4 zoning be rezoned B4:

> "*… because a slightly larger area of B4 zoning might increase the likelihood of a supermarket being provided. The lack of a supermarket within the Lidcombe Town Centre has been a longstanding issue for the Lidcombe community, and while zoning cannot guarantee land use outcomes, such as the provision of a supermarket, zoning can allow the permissibility and flexibility for such uses to be provided*." (Exhibit S3 [51])

406. Her memory was that the B4 zoning for the majority of the Marsden Street precinct evolved from discussions of the AECOM report and its proximity to Lidcombe Station (within 400m). Ms Cologna was *"happy for this aspect of option G to go forward [B4 zoning] on that basis alone, given that this is consistent with the State planning framework of facilitating housing within walking distance of public transport"*: Exhibit S3 [52].

407. Ms Cologna says she was also unaware that Mr Oueik's ownership of land (a reference to the ownership of land by companies owned by Mr Oueik might get the benefit of a B4 as opposed to an R4 zoning. Her evidence was that had she been so aware, she would have "had a consultant prepare a report to Council on that issue": Exhibit S3 [54].

408. In her evidence at the public hearing, Ms Cologna conceded that, as scenario G (which was developed by the Council planning staff) was not an option considered by AECOM, it probably should have gone back to AECOM for their view on that option: T-145.19-.27.

409. In the statement he provided to the Inquiry (Exhibit S17) Mr Alvares' evidence was that after AECOM had provided Council with a draft version of their study, he was given a direction from Mr Francis to instruct AECOM to add into their report scenario E: Exhibit S17 [7]. Mr Alvares said that the reason Mr Francis gave him was that *"more B4 zoning should be added to the scenarios"* but the IN2 buffer should remain: Exhibit S17 [8]. Although he thought there was a risk that B4 zoning could create amenity conflicts with nearby R2 Low Density Residential Zone to the south of James Street, Mr Alvares was of the view that *"scenario E was not a bad planning outcome because of the proximity to the railway station"*: Exhibit S17 [8]. Mr Alvares' own view was that the best planning outcome was scenario F which was AECOM's preferred scenario: Exhibit S17 [13].

410. At the public hearing Mr Alvares expanded upon his evidence from his written statement about Mr Francis' direction that AECOM include scenario E. He said that Mr Francis had presented a *"fairly good argument"* to back this up. He said that Mr Francis considered it was more consistent with the Council's initial resolution and that mention was made that James Street might be likely to ultimately upzone for a more intense residential use: T-927.1-.24.

Evidence of the Councillors

Mr Oueik

411. On each occasion the MSPP was before the Council for a vote, Mr Oueik declared a pecuniary interest, left the chamber and did not take part in the debate or vote.

412. At the time of the original Marsden Street Planning Proposal which came before Council on 20 November 2013, which involved a block of land that did not incorporate any properties in which Mr Oueik owned an interest, he nevertheless declared a "non-pecuniary interest". Prior to the matter coming before the Council for the meeting of 20 November 2013, he had filed a disclosure form under s.449 of the

Act. His evidence otherwise was that he did not discuss the MSPP with any other councillor.

Mr Attie

413. As outlined above, and consistently with Mr Oueik's evidence, Mr Attie said that he did not speak to Mr Oueik concerning the motion that he move for a wider study at the Council meeting of 20 November 2013.

Councillor Campbell

414. Mr Campbell supplied a written statement to the Inquiry which dealt in part with the MSPP (Exhibit S13 commencing at [61]). One matter of note concerning the MSPP is that this was the only planning proposal that Councillor Campbell voted in favour of (as distinct from Councillors Oldfield and Simms who voted against). Mr Campbell was cross-examined extensively by Mr Wheelhouse SC essentially on the issue as to whether he had been in favour of the MSPP because the Construction, Forestry, Mining and Energy Union (**CFMEU**) owned a building within the area of the Marsden Street precinct which would obtain the benefit of an upzoning. Perhaps anticipating this attack, in his written statement Mr Campbell clarified that although he is a member of the Labor Party and supports the principle of trade unionism, he is not a member of the CFMEU and owed them *"no obligations"*: Exhibit S13 [70]. Councillor Campbell in his written statement explained the reasons why he was in favour of the MSPP. In essence, he considered that it was a comprehensive plan that still maintained an industrial area, created a new park but was an area *"across the road from one of Sydney's busiest railway stations"*: Exhibit S13 [65]. In those circumstances, Mr Campbell was of the view that to *"block commercial development in such a location seemed difficult to justify"*: Exhibit S13 [65].

Findings and Recommendations

415. Counsel Assisting has made no submission that any adverse finding of fact should be made against any interested person in relation to their obligations and duties under the Act or the Model Code. He has, however, submitted that certain findings of fact should be made which are to some degree adverse to Mr Oueik, Mr Francis and (perhaps) to Mr Attie that are resolved below.

416. Counsel Assisting submitted that there was:

> *"… no basis for Mr Oueik to declare an interest in the original proposal that was before the planning committee of Council on [20] November 2013 unless he knew that Mr Attie was going to move the motion that he moved from the floor and which was passed unanimously."* (Counsel Assisting submission at MS [4])

417. At MS [5] Counsel Assisting acknowledges that there was *"no direct evidence to make a finding that the two* [Oueik and Attie] *of them colluded before that motion was moved"*. Counsel Assisting goes on to observe that it was *"extremely fortuitous for Mr Oueik that Mr Attie's motion began the process whereby the broader area forming the southern half of the Marsden Street precinct came to be zoned B4"*: Counsel Assisting submission at MS [5].

418. Counsel Assisting is correct that there was no legal requirement for Mr Oueik to declare a pecuniary or non-pecuniary interest in the original MSPP that was before Council on 20 November 2013. The original MSPP did not cover the area of the Marsden Street precinct that included properties owned by Mr Oueik's companies. At his private hearing and also at the public hearing, Mr Oueik explained the reasons why he declared a conflict for the 20 November 2013 meeting. In essence, he said that it was his understanding that because the original MSPP involved an area of land in close proximity to the properties that he did have an interest in, he considered he should declare an interest and not take part in the debate or vote. His evidence at his private hearing (Exhibit PH6) was as follows:

> *"Q: But this was a planning proposal that only related to 21-23 James Street and 15 Raphael Street.*
> *A: Yes, but – can I give an explanation, please?*
>
> *Q: Yes.*
> *A: My understanding – to you, Mr Commissioner, what was explained to us always in council, anything relate within the block that you own you should declare.*" (Exhibit PH6, T-7.23-.30)

419. At the public hearing Mr Oueik's evidence was to similar effect:

> "*Q: Yes. This proposal, when it came to council, did not affect any of the holdings that you had, whether you owned them or whether you had an option over them, did it? This proposal sought to rezone the two James Street properties and the Raphael Street property, but it didn't do anything to your interest at all, did it?*
> *A: They were basically behind the property I owned in the same block, Mr Commissioner, the same block, the same block which has four street frontage. My understanding from council, council staff, the general manager, the person in charge of the books and understand the law, always better declare, always; be safe than sorry*." (T-1037.30-.41)

420. Mr Oueik's evidence was that he did not discuss with Mr Attie the motion moved by Mr Attie on 20 November 2013 (that was unanimously carried) seeking a broader study of the Marsden Street precinct: T-1038.35-.47. Mr Attie's evidence was to similar effect: Exhibit PH-5, T-43.34-.39.

421. While Mr Oueik may not have been legally required to declare any kind of interest for the Council meeting of 20 November 2013, on the basis of the above evidence I do not find that this was because of some prior knowledge of Mr Attie's intentions or on the basis of any collusion between Mr Attie and Mr Oueik. There is insufficient evidence for such a serious finding to be made.

422. At MS [6], Counsel Assisting submits that the MSPP essentially proceeded:

> "*… against a background that there was no disclosure of the full extent of Mr Oueik's interest in the property; meaning there were councillors and staff who were unaware of the true nature and extent of his interest. In this respect, it is to be recalled that Mr Oueik's disclosure in November 2013 was of a non-pecuniary interest arising out of ownership of land in the surrounding area*."

423. I accept the evidence of Ms Cologna and Mr Francis that they were unaware of the full extent of ownership of Mr Oueik's companies in properties within the Marsden Street precinct that might be affected by the MSPP. Mr Oueik, however, is not responsible for this. There is no suggestion he did not make the disclosures he was required to make. He made them at council meetings attended by council planning staff and the General Manager. Mr Oueik had also completed a special declaration of pecuniary interest form in December 2013 (in relation to another matter) where the

interest he had in the various properties in Mark Street, Lidcombe was disclosed: see Exhibit JS-1, pages 223-4.

424. Counsel Assisting also submitted at MS [12] that Mr Oueik's evidence at his private hearing that "*he did not propose to develop the properties and had not prepared any plans for their development ought not be accepted given that one of the companies owned by him which owns the land in the precinct is in fact called Apartments on Mark*". He describes this evidence as "*incredible*". Mr Oueik's evidence in this regard is to be found at his private hearing at Exhibit PH6, T-5.19-.34. What Mr Oueik said when examined on this matter is as follows:

> *"Q: And you propose to develop them in due course?*
> *A: No.*
>
> *Q: No?*
> *A: No.*
>
> *Q: You bought them for what purpose?*
> *A: I'm in the industry for many years and I buy properties and I sit on it for long, long time.*
>
> *Q: You still own those properties?*
> *A: Yes.*
>
> *Q: Have you prepared any plans for the development of those properties?*
> *A: No.*"

425. Without intending any disrespect, Mr Oueik's spoken English is not perfect. In my view he was not intending to convey in this evidence that he would never develop the relevant properties. What I take him as having intended to convey was that he had no present plan to develop the properties, no plans have been drawn up, and that he might sit on the properties for a long time before developing them in due course. I also do not consider that I can make a finding that Mr Oueik's evidence was "incredible", at least in relation to his immediate plans and whether his plan when he bought the properties was to immediately develop them. A finding that plans must have been prepared cannot be based merely on the name of the company and some inference drawn from that.

426. At MS [16] Counsel Assisting's submits that "*the result for the voting and recommendations of staff may have been different had"* the councillors and staff been aware of the following matters set out in MS [14] and [15]:

> "*14. In addition to Council and staff being ignorant of Mr Oueik's interest, councillors were also unaware of, and the record did not disclose both:*
>
> *(a) the absence of scenario E and the draft reports of AECOM following its study; and*
>
> *(b) the interventions of Mr Francis and the process that led to AECOM including scenario E in its final report.*
>
> *15. Council was also unaware of the full extent of the relationship between Mr Oueik and Mr Francis and, in particular, of the circumstances surrounding the events of 2006 when Mr Francis benefited from Mr Oueik's largess*."

427. This submission is on solid ground at least as far as Ms Cologna is concerned, as her evidence was that if she had been aware of the circumstances surrounding Mr Oueik's ownership of land within the Marsden Street precinct, she *"most likely would have had a consultant prepare a report to council on that issue"*: Exhibit S3 [54].

428. There is a hint of a suggestion in MS [14] and MS [15] from Counsel Assisting that Mr Francis may have had AECOM insert scenario E into its report, and ultimately recommended the similar scenario G, to benefit Mr Oueik. That submission is not expressly made, however. Had it been, in my view, the evidence falls short of enabling me to find that as a matter of fact.

429. There is no doubt scenario E was added at the suggestion of Mr Francis. Mr Alvares confirmed this in his evidence at the public hearing, and that evidence is fully cooberated by the email Mr Alvares sent to AECOM on 31 March 2013 seeking the inclusion of a zoning scenario which provided for most of the site to be zoned B4: Ex FTB1 p 54. This of course was a scenario which (in the same manner as scenario G) had the effect of seriously increasing the value of properties owned by Mr Oueik's companies. It can be noted however that Mr Alvares also expressed the view that there was a reasonable planning justification for such a zoning scenario.

430. The central issue of course is whether a finding should be made that Mr Francis suggested scenario E (or G) in order to benefit Mr Oeuik? The evidence does not in my view reach a level that would justify such a grave finding of dishonesty.

431. The circumstances regarding Mr Francis' kitchen cabinet occurred in 2006. His evidence was that nothing in relation to that ever affected the decisions he made and the recommendations he made as a council planner in relation to any planning proposal. There is no other direct evidence of collusion between Mr Francis and Mr Oueik in relation to the MSPP. There is no evidence that scenarios E or G were not a reasonable planning outcome for the Marsden Street precinct. The evidence is in fact that both options were supportable as reasonable planning options. There is no evidence that Mr Francis or Mr Oueik ever discussed the MSPP.

432. It was unfortunate again that Mr Francis could not be compelled to give evidence concerning the MSPP, and in particular in relation to his dealings with AECOM. His justification for requesting that AECOM include a planning outcome reflected by scenario E would no doubt have been a matter pursued by Counsel Assisting. To make a finding, however, that Mr Francis' professional recommendations as a planner were dictated by the event that occurred eight years before concerning his kitchen cabinets would be a very serious finding in relation to his conduct, and potentially the conduct of Mr Oueik. Fact-finding in an inquiry such as this is to be made on the standard of the balance of probabilities, but with the *Briginshaw* gloss. I am not comfortably satisfied on the evidence that Mr Oueik's interest in his properties in the Marsden Street precinct had any influence on the recommendations of Mr Francis in relation to the MSPP. In his evidence at his private hearing, Mr Francis said that none of his actions as a planner where influenced by the means by which the kitchen cabinets were installed in his house. The evidence before the Inquiry does not satisfy me that I should reject Mr Francis' assertion on this issue.

433. Having said that, had all the Council staff, and the other councillors, been aware that the MSPP was likely to increase the market value of Mr Oueik's properties by as much as $24 million, the vote might have changed, or different processes might have been adopted.

434. Counsel Assisting has made a number of recommendations in relation to the MSPP at [MS 19] of his submissions. They are as follows:

> "MS 19. *It follows that if councils are to retain their powers to initiate planning proposals:*
>
> *(a) Prior to making any decision about whether to proceed with any planning proposal:*
>
> *(i) Councillors must disclose the full extent of their interests and provide such disclosure at the commencement of the planning process.*
>
> *(ii) Council staff (and any external consultants engaged to provide strategic planning advice) should be made aware of all relevant interests and address the likely benefit that might flow from a particular proposal to the interested councillor.*
>
> *(iii) Council staff should be directed to identify in any reports to Council the nature and extent of all councillor interests affected by a particular planning proposal, including quantification of the likely benefit to the councillor.*
>
> *(b) Council staff should be prohibited from directing professional external planning consultants in such a way as to materially alter the substance of any report the Council accept in the case of manifest error or illegality*."

435. The first part of the recommendation in (iii) above is good sense and should be embraced. Both the Planning Department's reports to the Council, and the reports from external consultants such as AECOM, should have identified or had a schedule within them of Mr Oueik's interests in land that was affected by the planning proposal. Whether staff need to go so far as quantification (which would come at a cost and could be disputed) is another matter. Identifying a potential benefit by way of changes to planning controls would be sufficient in most circumstances.

436. In relation to the recommendations in (i) and (ii) above, the current Act, Regulations and Model Code do have a comprehensive regime for the disclosure of interests. Councillors have to prepare and submit written returns of interests in accordance with

s.449 and must disclose pecuniary interests in accordance with s.451 (see s.444 of the Act). Section 449 relates to councillors having to complete and lodge returns concerning relevant interests within three months of becoming a councillor. Section 451 is a section dealing with declarations of pecuniary interests concerning matters before a meeting of Council. The disclosure required under s.449(1), by dint of Regulation 183, requires disclosure of the address of each parcel of real property in which a councillor has an interest and the nature of that interest. The Model Code also sets out requirements concerning both pecuniary and non-pecuniary interests.

437. In relation to the recommendation of Counsel Assisting set out in [MS [19(b)], Council staff are already prohibited from such direction if it would involve any aspect of dishonesty or a breach of reasonable care. Further, independently retained planning or other experts would have their own obligations concerning ensuring that their work, and the opinions they express, remain truly independent. I am not convinced that a recommendation such as MS [19](b) needs to be made. It would not be inappropriate in many circumstances for independently engaged experts to discuss a draft planning report, for example, with the members of the Council's planning staff. That might ultimately add to the quality of the report. There is no clear evidence in this case of the extent to which Mr Francis "directed" scenario E to be included in the AECOM report. There is no evidence from AECOM in this regard. In that regard, it would be unfair to make any assumption other than that AECOM, by including scenario E in their report, clearly considered it to be a viable and proper planning scenario for the Marsden Street precinct. Further, there is additional evidence to support the view that the AECOM final report was stronger for the inclusion of scenario E, which both Ms Cologna and Mr Alvares said had planning merit.

438. What does emerge from a matter such as the MSPP as a real issue (perhaps highlighted by the italicisation of the word "if" in the first sentence of MS [19] in Counsel Assisting's submissions) is whether it is appropriate for a council to vote on a planning proposal that has the potential to so dramatically increase the market values of properties in which another councillor has an interest. This is the kind of circumstance that does seem particularly suited to a decision by an independent body such as the one put in place by the Interim Administrator, Mr May, following his appointment. This is a matter discussed later in this Report.

439. Counsel Assisting's final recommendation at MS [20] is as follows:

> "*Given the circumstances outlined above, Cumberland Council should give consideration as to whether it should seek to initiate a new planning proposal to take into account the preferred option of the independent planning consultants and so as to rectify the changes that were made in what became Auburn Local Environmental Plan 2010 (Amendment No 14).*"

440. The reference by Counsel Assisting to the independent planning consultant's preferred option is a reference to AECOM's scenario F which differs from both scenario E and the ultimately adopted scenario G in terms of the amount of B4 mixed use zoning for the Marsden Street precinct. I have not found that the MSPP was the result of any dishonest conduct, or that it resulted from a lack of reasonable care and diligence by any person. While not the independent planning expert's preferred scenario, there is evidence that scenario G, which was adopted as the MSPP, is justifiable as a proper planning outcome. Counsel Assisting's suggestion, however, is of course open to the Administrator (or subsequently the Cumberland Council) and is a matter for him or the governing body.

441. As a final matter, it should be briefly mentioned that in Mr Oueik's submissions the assertion is made that Mr Campbell <u>"should have declared a non-pecuniary interest"</u> as a result of the fact that scenario G had the potential to benefit the CFMEU: Oueik's submissions at [397] and see generally [384]-[398].

442. The Model Code of Conduct contains the following clauses in relation to non-pecuniary interests:

> "*4.10. Non-pecuniary interests are private or personal interests the council official has that do not amount to a pecuniary interest as defined in the Act. These commonly arise out of family, or personal relationships, or involvement in sporting, social or other cultural groups and associations and may include an interest of a financial nature.*
>
> *4.11. The political views of a councillor do not constitute a private interest.*

4.12. Where you have a non-pecuniary interest that conflicts with your public duty, you must disclose the interest fully and in writing, even if the conflict is not significant. You must do this as soon as practicable.

…

4.15 As a general rule, a non-pecuniary conflict of interest will be significant where a matter does not raise a pecuniary interest but it involves:

(a) a relationship between a council official and another person that is particularly close, for example, parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the person or of the person's spouse, current or former spouse or partner, de facto or other person living in the same household;

(b) other relationships that are particularly close, such as friendships and business relationships. Closeness is defined by the nature of the friendship or business relationship, the frequency of contact and the duration of the friendship or relationship.

(c) An affiliation between the council official and an organisation, sporting body, club, corporation or association that is particularly strong."

443. The suggestion from Mr Oueik seems to be that because the CFMEU was a significant donor to the Australian Labor Party, and Mr Campbell is a member of that party, he had a non-pecuniary interest. In my view, that is a real stretch of the definition of non-pecuniary interest in the Model Code. Mr Campbell's evidence was that he was not a member of the relevant union, and owed it no obligations. Given that Mr Campbell was not a member of the CFMEU, on my reading of the Model Code as it is currently drafted, a non-pecuniary conflict of interest did not arise for him because of the fact that the CFMEU might, on some occasions, make donations to the political party that Mr Campbell happens to have a membership with.

444. Both the submissions filed on behalf of Mr Oeuik, and those for Mr Zraika seem to suggest Mr Campbell's vote in relation to this matter was influenced by the fact that he is in the left faction of the ALP, and the CFMEU is a left-wing union. The

allegations is that he was anti-development in respect to all planning matters save for the MSPP which had the potential to benefit his side of politics.

445. Mr Campbell justified his vote in relation to the planning merits of the MSPP. The expert planning evidence justifying it was in contrast to the evidence in relation to the planning proposals Mr Campbell opposed. In my view the evidence does not establish that Mr Campbell did anything other than vote in a manner that reflected his genuine views on any particular planning proposal, including the MSPP.

SECTION 9: SALE OF THE JOHN STREET CAR PARK

(a) Introduction

(i) The first Contract

446. On 1 March 2011 a contract for sale of Council land at 13 John Street Lidcombe (the Car Park) was entered into between Sydney Construction and Development Pty Ltd (SCD – a company partly owned by Mr Mehajer) and the Council. Mr Mehajer was not yet an elected member of the Council. The history of this contract for sale (and subsequent contract) was examined at the Public Inquiry for a number of reasons.

447. First, the contract terms were subject to multiple extensions and alterations, and a second contract for sale ultimately resulted. Secondly, the Council elected not to follow certain legal advice is was given by its solicitors in relation contractual issues.

448. At the Council meeting of 17 February 2016, the then Interim Administrator Mr May terminated the contract for sale. The Inquiry has been advised that this matter is now the subject of legal proceedings in the Supreme Court between SCD and the Cumberland Council. It would therefore be inappropriate for any finding of fact made in this matter to concern any of the issues before the Court. The matters the Inquiry can consider within the Terms of Reference are dealt with below.

449. The proposed sale of the Car Park has a long history. At the Council Meeting held on 16 February 2011, the Council unanimously voted to accept a tender from Simon Diab & Associates on behalf of SCD Pty Ltd for the purchase of the Car Park for a total of $6,500,000: ex JS1, page 22. A Contract for Sale dated 1 March 2011 was entered into (the First Contract).

450. Special Condition 14 (C) of the First Contract required SCD to lodge a development application and obtain a consent for a supermarket of a minimum 2000m^2 for the Car Park land and 11 John Street. Special Condition 14(l) of the First Contract provided that:

> *"In the event that the purchaser does not obtain development consent for the subject property and the adjoining property within twelve (12)*

months from the date hereof then either party may be at liberty to rescind the contract…."

451. Special Condition 15 of the First Contract provided that if development had not proceeded within two years of consent being granted, the Council had the option of buying back the land at the original price.

452. By letter dated 12 October 2011 addressed to the Council, Simon Diab & Associates on behalf of SCD sought an extension of 6 months to the period provided for in Special Condition 14(l). In the Director's Report Works and Services Department for the Council Meeting to be held on 16 November 2011, Council was informed of this request, which was *"considered reasonable"*.

453. At the Council Meeting held on 16 November 2011 a motion (moved by Councillor Attie and seconded by Councillor Au) was carried granting the extension of 6 months sought by SCD. The motion included replacing Special Condition 14(l) with the following:

> *"In the event that the purchaser does not obtain development consent for the subject property and the adjoining property within eighteen (18) months from the date hereof then either party may be at liberty to rescind the contract whereupon the provisions of clause 19 shall apply.*
>
> *In the event that the Development Consent is obtained within the said eighteen (18) month period, the Purchaser shall pay on completion in addition to the balance of the price, an amount equal to the interest on the balance of the price at the rate of 10% per annum from the date which is 54 weeks from the date hereof to the date of completion:"* Ex JS 1 p.33-34.

454. The motion was carried on the votes of Councillors Oueik, Attie, Au, Michels and Zraika. Councillors Curtain and Simms voted against. Councillor Lam was absent.

455. On 20 April 2012 SCD submitted a development application *"for a mixed-use development over the properties at 15, 19 and 21 John Street and Council's open car park at 13 John Street Lidcombe"*: Ex JS 1, page 47.

456. On 10 May 2012 a meeting took place at the Council's offices attended by Mark Brisby, Glenn Frances and Tony Goncalves of the Council and Mr Mehajer and Mr Ahmed representing SCD. At the meeting it appears that Mr Mehajer "*asked if feasible for a 3-month extension on settlement. Reason is that the medical centre purchase delayed the project and one of the properties is subject to a will and complexities":* Ex JS1, page 40. It would appear that Mr Brisby indicated that the request *"seems a reasonable and valid request but the process needs to be reported for Council for their determination"*: Ex JS1, page 40.

457. On 22 May 2012 Mr Mehajer sent an email to Mr Goncalves of the Council (c.c. Mr Francis and Mr Brisby) requesting that time for settlement be extended to 1 December 2012 from the current settlement date of 1 September 2012 (contracts exchange on 1 March 2011). In the same email Mr Mehajer sought until 17 December 2012 to settle on the purchase of the Car Park: Ex JS 1, pages 41-42. These conflicting dates were the subject of an email from Mr Goncalves to Mr Mehajer of 13 May 2012 seeking clarification. The reason the extension was sought was because SCD said it could not develop the site without ownership of both 19 and 21 John Street. 21 had been purchased, but there was a delay dealing with the owner of 19.

458. In the Director's Report Works and Services Department for the Council's meeting of 20 June 2012 the Council was advised of the request from Mr Mehajer on behalf of SCD, and that a new settlement date of 17 December 2012 was requested. This was again described as a "*reasonable"* request: Ex JS 1, pages 47-48.

459. At its meeting held on 26 June 2012, the Council resolved:

> *"That the request for an extension of three (3) months and sixteen (16) days for the period of time referred to in the Deed of Variation to obtain Development Consent and effect settlement be refused"*: John Street Bundle, page 74.

460. Councillors Oueik, Attie, Anmak, Curtain, Di Paolo, Michels, Simms and Zraika voted in favour of the resolution. Only Councillor Lam voted against.

461. By letter dated 20 August 2012 from the Council (Mr Francis) to SCD and Mr Mehajer, the Council advised that it was unlikely that the Council would support the Development Application lodged by SCD in relation to the properties at 13-21 John Street, Lidcombe. This appeared largely in relation to issues concerning a large variation in the FSR from the Development Application to that permitted under the Auburn LEP. It was recommended that a redesign occur and that the Development Application be withdrawn: Ex JS 1, pages 81-82.

462. In the Director's Report, Works and Services Department, for the Council meeting to be held on 31 October 2012, it was noted that three options appeared to be available to the Council in relation to the sale of the Car Park:

> "*1. Council rescind the Contract and issue a Notice of Rescission.*
>
> *2. Council not rescind the Contract and issue a 14 day Notice to Complete.*
>
> *3. Council revisit its previous position on this matter with a view to extending the time frame to obtain DA consent and prepare a new Deed to that effect":* Ex JS 1, page 87.

463. The recommendation was for the Council to determine the matter based on these three options.

464. By the time of the Council Meeting held on 31 October 2012, Mr Mehajer had been elected to the Council. Consequently, when the issue of the sale of the Car Park came before the Council at its meeting of 31 October 2012, he declared a non-pecuniary interest and left the chamber and did not vote. After one lost motion and one withdrawn motion concerning the sale, the following motion (moved by Councillor Lam and seconded by Councillor Oueik) was unanimously passed:

> "*1. That Council enter into negotiations with the Purchaser with a view to further extend the time frame to obtain Development Consent by nine (9) months to the period of time referred to in Condition 14(l).*
>
> *2. That Council enter into a Deed of Variation of the Contract to amend the Contract by the deletion of Special Condition 14(l) and the replacement of it with the following:*

> *"In the event that the Purchaser does not obtain the Development Consent for the subject property and the adjoining property within twenty-seven (27) months from the date hereof then either party may be at liberty to rescind this Contract whereupon the provisions of clause 19 shall apply.*
>
> *In the event that the Development Consent is obtained within the said twenty-seven (27) months period, the Purchaser shall pay on completion in addition to the balance of the price, an amount equal to the interest on the balance of the price at the rate of 10% per annum from the date which is 54 weeks from the date hereof to the date of completion."*

3. That Council authorise the General Manager to enter into a Deed of Variation of the Contract and sign all relevant documentation relating to the Deed.

4. That Sydney Constructions & Developments Pty Ltd be advised of Council's decision": Ex JS 1 pp.114-115.

465. Prior to this meeting, an identical motion had been lost (against: Batik, Campbell, Oldfield, Simms and Zraika; For: Attie, Yang, Oueik and Lam). Councillor Simms then moved and withdrew a motion for the Council to serve a 14 day Notice to Complete.

466. Subsequent to this meeting, and prior to the Council's meeting of 7 November 2012, Councillors Simms, Batik and Campbell gave notice of an intention to move a motion that the resolution made on 31 October 2012 concerning the Car Park at 13 John Street, Lidcombe be rescinded: Ex JS 1, page 121.

467. At the Council Meeting held on 7 November 2012, Council resolved (on the motion of Councillor Simms, seconded by Councillor Batik-Dundar) that *"Council's resolution and minute number 213/12 relating to the sale of Council's car park at 13 John Street Lidcombe, be rescinded"*: Ex JS 1, page 128. Councillors Attie, Batik, Campbell, Oldfield, Simms and Zraika voted for this resolution. Councillors Oueik and Yang voted against. Councillor Mehajer declared a pecuniary interest in the matter and left the chamber and did not vote.

468. In the Director's Report, Planning and Environment Department for the Council's 21 November 2012 meeting, it was reported to Council that the Department would recommend to the Joint Regional Planning Panel (JRPP) that was assessing the Development Application for the Car Park that the Development Application be refused for a variety of reasons, including non-compliance with floor space ratio requirements of the Auburn LEP: Ex JS 1, pages 147-148.

469. In the Director's Report, Works and Services Department for the 21 November 2012 meeting of Council, a number of options were said to be available to the Council, including: option 1 that Council issue a Notice of Rescission of the Contract. The report stated that: *"If Council opted for this course of action this would result in no sale of the property at 13 John Street Lidcombe taking place and the deposit moneys paid would be returned to the Purchaser."* This was *"not considered a favourable position for Council"*: Ex JS 1, page 167.

470. Option 2 was for the Council to issue a Notice to Complete, and if no action was taken, to terminate the Contract. This was again described as not being favourable, as it was highly unlikely that *"development consent would be obtained during the 14 day period and thus the sale would not be possible"*.

471. Options 3, 3(a) and 3(b) all related to the possibility of the Council again extending the time frame of the Contract and varying the settlement period and possibly how interest is to be applied: Ex JS 1, pages 167-169.

472. At the Council meeting held on 21 November 2012, the Council resolved on the motion of Councillor Simms (seconded by Councillor Batik) that the Development Application for 13-21 John Street Lidcombe be recommended to the JRPP for refusal for the reasons outlined in the Director's Report from the Council's Planning and Environment Department: John Street Bundle, pages 175-176. Councillors Campbell, Batik, Oldfield, Simms and Zraika supported the resolution, while Councillors Oueik and Yang voted against. Councillor Mehajer had declared a pecuniary interest, left the chamber and did not vote, and Councillors Attie and Lam declared non-pecuniary interests.

473. When the sale of the Car Park came before the Council, an Amended Motion from Councillor Oueik (seconded by Councillor Lam) to extend the time for settlement was lost. Councillors Attie, Lam, Oueik, and Yang voted for granting the extension, whilst Councillors Batik, Campbell, Oldfield, Simms and Zraika voted against: Ex JS 1 185-186.

(ii) Rescission of the first Contract

474. The Council then resolved on the motion of Councillor Simms (seconded by Councillor Campbell) *"that Council note the Applicant's request to alter the terms of its Contract and rescind the current Contract and that no further new contract be entered into"*: Ex JS 1, page 186. This resolution was carried by the votes of Councillors Batik, Campbell, Oldfield, Simms and Zraika, with Councillors, Attie, Lam, Oueik and Yang voting against. Following this meeting of Council, on 30 November 2012 Councillors Attie, Oueik and Lam gave notice of their intention to move a motion that the Council's resolution in relation to the Car Park made on 21 November 2012 be rescinded: Ex JS 1, page 197.

475. By letter dated 27 November 2012 Mr Mehajer on behalf of SCD informed the Council's solicitors, Storey & Gough, that SCD would be *"able to enter into a new Deed of Variation"* of the Contract for Sale to the effect that the time for settlement provision (Special Condition 14(l)) have the words *"twelve (12) months"* replaced by "twenty-six (26) months", and that Special Condition 15 (relating to the time required for settlement) have the term "fourteen (14) days" deleted with the term "nine (9) months" inserted: Ex JS 1, page 207.

476. In a memorandum from the "Executive Team" of the Council to "Councillors" of 27 November 2012, the Council was advised that:

> *"Council's legal representatives Storey & Gough Lawyers have also reviewed the correspondence from the Purchaser and have provided verbal advice that there would appear to be no legal impediment to what is being proposed by the Purchaser and this is a matter for Council to determine"*: Ex JS 1, pages 205-206.

477. At the Council Meeting held on 5 December 2012, the motion to rescind the Council's resolution to rescind the Contract for Sale for the Car Park made on 21 November 2012 was lost. Councillors Attie, Lam, Oueik and Yang voted in favour of the motion, while Councillors Batik, Campbell, Oldfield, Simms and Zraika voted against: Ex JS 1, pages 213-214.

478. A Notice of Termination of the Contract for Sale dated 12 March 2013 was subsequently served on SCD by the Council's solicitors Storey & Gough: John Street Bundle, page 227.

479. On 13 March 2013 an Extraordinary Meeting of Council was convened. At this meeting, the employment of the Council's then General Manager, Mr John Burgess, was terminated. This is a matter discussed later in this Report.

480. By letter dated 20 March 2013 from Salim Mehajer on behalf of SCD to the Council (Mayor Attie), Mr Mehajer indicated that SCD *"would like to offer Auburn City Council to revalidate the Contract of Sale between Sydney Constructions & Development Pty Ltd (purchase) from Auburn City Council":* Ex JS 1, pages 238-239. In this letter Mr Mehajer indicated that the purchase price would remain at $6.5 million, which he stated was $2.5 million "over our valuation conducted".

481. In the Director's Report, Works and Services Department for the Council meeting to be held on 20 March 2013, four options were said to be available to the Council:

> *"1. Council take no further action to dispose of 13 John Street.*
>
> *2. Council invite fresh expressions of interest from adjoining owner/s for the purchase of 13 John Street with a view to inviting selective tenders for the sale of 13 John Street.*
>
> *3. Advertise the property on the open market, with a view to a sale of 13 John Street via option.*
>
> *4. Council explore other commercial opportunities for the redevelopment of 13 John Street":* Ex JS 1, pages 247-249.

(iii) Second Contract for Sale

482. At the Council Meeting held on 20 March 2013 Council resolved on the motion of Councillor Lam (seconded by Councillor Yang) as follows:

> *"1. That Council accept the request in its letter of 20 March 2013 from Sydney Constructions & Developments Pty Ltd and enter into a new Contract for the sale of the property known as 13 John Street Lidcombe for the sum of $6,500,000 under the conditions as follows:*
>
> *(a) The Contract of Sale being conditional upon the Purchaser obtaining Development Consent, such consent to include a supermarket with a minimum of 2,000m^2 and all ground floor areas be dedicated to commercial uses.*
>
> *(b) The existing car park remain open to the public free of charge under a licence to Council to operate the land as a car park, until the development is commenced.*
>
> *2. That the previously proposed contract conditions be incorporated into a new agreement related to the matters in 1 above, save that the following amendments, additions or deletions as the case may be are incorporated:*
>
> *(a) the Purchaser/Applicant is given a period of six (6) months from the date of the Contract to lodge a Development Application,*
>
> *(b) previously proposed Special Condition 14(l) to read – "In the event that the Purchaser does not obtain Development Consent for the subject property and the adjoining property within a period of eighteen (18) months from the date of lodgement, then either party shall be at liberty to rescind this Contract whereupon the provision of clause 19 shall apply",*
>
> *(c) previously proposed Special Condition 15 to include the provision that – "In the event that the Development Application is approved, settlement of the purchase shall be effected within twelve (12) months of the date of consent, and*
>
> *(d) previously proposed Special Condition 15 not include the provision that – "Should the development referred to in the Development Application not proceed within two (2) calendar years from the date of such Development Consent the Purchaser shall give to the*

Vendor an option to purchase the land the subject of this Contract for a period of twelve (12) months at the same purchase price as contained in this Contract".

3. *That the Mayor and the General Manager be authorised to sign and affix Council's common seal to all documents associated with the sale.*

4. *That the General Manager be authorised to sign any development application lodged with the Council from a prospective purchaser.*

5. *That Council insists that any relevant development applications must comply with Council's LEP and substantially with Council's DCP":* Ex JS 1, pages 259-260.

483. The resolution was carried on the votes of Councillors Attie, Batik, Campbell, Lam, Oueik, Simms and Yang. Councillor Oldfield voted against. Councillor Mehajer had declared a pecuniary interest and left the chamber and did not vote.

484. At the Council Meeting held on 3 April 2013 Councillor Simms (seconded by Councillor Campbell) moved a motion that the Council's Resolution of 20 March 2013 regarding the car park be rescinded. The motion was lost on the casting vote of the Mayor (Councillor Lam). Those in favour of Councillor Simms' motion were herself and Councillors Batik, Campbell and Oldfield. Those against were Councillors Attie, Lam, Oueik and Yang. Councillor Mehajer had declared a pecuniary interest and did not vote: Ex JS 1, pages 270-271.

485. In a letter from the Council to Mr Mehajer of SCD dated 10 April 2013, SCD was advised of the Council's resolution from the meeting of 20 March 2013: Ex JS 1, pages 276-277.

(iv) Alteration of deposit term from 10% to 5%

486. In a letter from SCD to the Council dated 11 November 2013, SCD made a request *"that the deposit amount be varied to 5% and any additional funds paid and held in trust be returned to the Purchaser":* Ex JS 1, page 282. It was said that the returned funds "will be used to amend plans to meet approval requirements".

487. As a consequence of the request in the 11 November 2013 letter, advice was sought from Council's solicitors, Storey & Gough. In an email to Antonio Goncalves of the Council from Chris Gough sent on 12 November 2013, Mr Gough gave the following advice:

> *"I would strongly recommend against releasing any of the deposit for the following reasons:*
>
> *1. If a 10% deposit is held, the Courts have held that where the contract is terminated due to the fault of the purchaser, it is accepted that 10% is the price the purchaser pays for the default, even where the vendor can later sell at a profit (save for some disentitling conduct on the part of the vendor). It is the nature of the deposit as money held as "an earnest" (a promise to complete the contract) that enables the vendor to retain it.*
>
> *2. Where the deposit is less than 10%, and the vendor seeks to recover up to 10% in accordance with the terms of a condition of the contract (without evidence that this is the sum of damages), it is likely that the Court will consider that the vendor is seeking to impose a penalty on the purchaser for failing to comply with its obligations and will not enforce it. (Fermiscan v James [2009] NSWSC 546)"*

488. At the Council Meeting held on 20 November 2013, a motion to reduce the deposit for the sale to five percent was lost. Councillors Simms, Oldfield, Zraika, Campbell and Batik voted against. Councillors Attie, Lam, Oueik and Yang were in favour. In his statement to the Inquiry, Mr Campbell said that after this meeting he saw Mr Zraika and Mr Mehajer have a "lengthy discussion": Ex S13 at [79].

489. 4 December 2013, the Council resolved to rescind the resolution passed not to decrease the deposit at the previous Council Meeting. Councillor Zraika now joined Councillors Attie, Lam, Oueik and Yang. A resolution was then passed (on the motion of Councillor Attie, seconded by Councillor Yang) as follows:

> *"1. The Council reduce the deposit to 5% ($325,000) and authorise the General Manager and the Mayor to execute the revised Deed of Variation of the Contract under the Council seal, subject to Council obtaining a personal guarantee for the further 5% in the event of a default on the Contract by the Purchaser.*

2. *That all additional costs with respect to item 1 be met by the Purchaser.*

3. *That the deposit be placed in an interest bearing trust account and all profits be shared between Council and the Purchaser":* Ex JS 1, page 297.

490. The Council Minutes record that Councillors Zraika, Attie, Lam, Mehajer, Oueik and Yang voted in favour of the motion. The reference in relation to Councillor Mehajer would appear to be an error as he declared a pecuniary interest: Ex JS1, page 285. Councillors Batik, Campbell, Oldfield and Simms voted against the motion.

491. At the Council Meeting held on 11 December 2013, Councillor Simms (seconded by Councillor Campbell) moved a motion seeking to have the Council's resolution carried out at its 4 December 2013 meeting rescinded. Councillor Simms' motion was lost. Councillors Campbell, Batik, Oldfield and Simms voted for, while Councillors Zraika, Attie, Lam, Oueik and Yang voted against. Councillor Mehajer did not vote, having declared a pecuniary interest.

(v) Third Contract sought

492. By letter dated 10 July 2015, SCD (Salim Mehajer) wrote to the Council seeking a new agreement in relation to the sale of the Car Park. The letter (Ex JS 1, page 325) contained the following:

> *"We ask that Council considers the below request to validate the Contract to resolve as follows:*
>
> 1. *The Council rescind from Sydney Constructions & Development Pty Ltd and enter into a new contract for the sale of the property known as 13 John Street, Lidcombe for the sum of $6,500,000 under the conditions as follows:*
>
> 2. *The Purchaser name on the Contract to read as "Mehajer Bros or/Nominee". The change of name has been incorporated due to the new company structure, whereby all developing entities remain in such name. The entity namely "Mehajer Bros" has the same directorship/ownership as Sydney Construction & Development Pty Ltd thus, holds greater assets, an amount greater than the sale figure noted in the Contract of Sale. Mehajer Bros Pty Ltd will also guarantor this transaction.*

(a) *To avoid forced attempts of rescinding contracts and entering into a new agreement/s, the Contract of Sale is not be conditional upon the Purchaser obtaining development consent. Settlement is to be complete and paid in FULL with a maximum period of twenty-four (24) months dated from the new contract.*

(b) *If settlement does not take place on time, the Purchaser will pay a penalty of two million dollars ($2,000,000) in addition to any other penalties noted in the standard Contract of Sale.*

(c) *A personal guarantor is also to be provided on execution of this new Contract.*

(d) *Such consent is to include a supermarket with a minimum of 1,000m^2 and all ground floor areas be dedicated to commercial uses.*

(e) *All fees associated with entering this new Contract of Sale by Council's legal team is to be paid by the Purchaser.*

(f) *The existing car park is open to the public free of charge under a licence to Council to operate the land as a car park, until any development is commenced":* Ex JS 1, pages 325-326)

493. As a consequence of this request from SCD, advice was again sought from Chris Gough of Storey & Gough. In a letter of advice to the Council dated 25 September 2015 Mr Gough provided a detailed advice to the Council in relation to a number of questions that had been raised by the Council. In particular, Mr Gough advised that he considered:

> *"The proposed changes to the contract to be so significant that the contract should not be varied but should be terminated and a new proposal put to tender. If this does not occur and Council agrees to vary the contract as proposed, we consider that the varied contract could be challenged on the basis that as it is significantly different from the original contract, other parties who may be interested in such a varied proposal were not given the opportunity through a tendering process":* Ex JS 1, pages 328-329.

494. In relation to the specific matters raised by SCD in its letter of 10 July 2015, Mr Gough provided the following advice utilising the paragraph numbers from SCD's letter:

> *"1. The contract will be terminated, not rescinded. To enter into a new contract the tender process must be followed to avoid any challenges to the sale in the future.*
>
> *2. The proposed purchaser "Mehajer Bros" is neither a natural person or a corporation and could not enter into a contract. We would strongly advise against Council entering into a contract where a "nominee" is proposed. Council in our view should not be put in a position where it was selling to a purchaser the identity of whom they do not know. Council must be satisfied that the purchaser has the ability to complete the contract. A "nominee" could not satisfy this inquiry.*
>
> *2(a) This would be completely contrary to the resolution of Council and the clear terms of the existing contract which was entered into by Council on the understanding that if the development consent was not granted for a particular development, the sale would not proceed. What is proposed in this paragraph is the straight unconditional sale to be completed in two years.*
>
> *2(b) Such a penalty condition would in our view be invalid as the amount of $2 million would exceed he damages suffered by Council.*
>
> *2(c) Noted.*
>
> *2(d) This appears inconsistent with 2(a) above which removes the need for a development consent. It is different from the existing contract which requires a supermarket with a minimum area of 2,000m².*
>
> *2(e) Noted.*
>
> *2(f) This is similar to special condition 16 in the existing contract."*

495. At the Council meeting held on 7 October 2015, Mr Gough addressed the Council in private session. The Council resolved by a majority to defer consideration of the issues concerning the sale of the Car Park until the next Council meeting: Ex JS 1366-367.

496. At the Council meeting held on 18 November 2015 Mr Gough again addressed the Council in relation to the sale of car park. Councillor Lam declared a non-pecuniary

interest and had left the Chamber. This declaration was as a result of an article in the Sydney Morning Herald which mentioned a business relationship between her brother in law (and business partner in Combined Realty) Mr Hua and Salim Mehajer. Ms Lam's evidence, discussed below, is that she had been unaware of this relationship. Councillor Attie also left the Chamber and did not vote on any motion. By a unanimous vote the Council resolved:

> *"On the motion of Councillor Campbell, seconded Councillor Oldfield, that Council terminate the contract for the purchase of 13 John Street, Lidcombe, pursuant to special condition 14L of the contract as the development consent for the site was not issued":* John Street Bundle, page 395.

497. Following the Council meeting of 18 November 2015, a Notice of Rescission of the Motion to terminate the contract was signed by Councillors Oueik, Attie and Mehajer: Ex JS 1, page 401.

498. In a letter dated 30 November 2015 from Madison Marcus (solicitors for SCD) to Mr Chris Gough of Storey & Gough, Madison Marcus indicated that they understood that *"the vendor has purported to serve a notice of rescission with respect to the contract dated 30 July 2015 between the vendor and Sydney Constructions"*. They further referred to the notice of rescission motion referred to in the paragraph above. The letter then contained the following:

> *"In the meantime, without prejudice to Sydney Constructions' rights, we are instructed to request if the vendor will enter into a new contract for sale on the following terms:*
>
> *1. New purchaser entity – A-Link Technology Pty Ltd (ACN 104 470 288).*
>
> *2. Purchase price – the price to be the higher of $6,500,000 and the price noted in an independent valuation of the property by registered valuer which may be obtained by Council. The valuation must be based on the property's current state and zoning.*
>
> *3. Deposit – the deposit to remain at $325,000.*
>
> *4. Guarantors – Salim Mehajer, Zenah Mehajer and Aysha Mehajer be joint and several guarantors. The total guaranteed sum by the three guarantors is to be a maximum of $2 million.*

5. *Completion – 12 months from the date of the development consent.*

6. *Carpark use – the property shall remain a carpark open to public use and operated by Council until demolition of the site. The purchaser shall provide reasonable notice to the public and/or Council of the proposed demolition and shall allow Council to propose the notice period.*

We further note that our client shall submit an amended development application to be assessed and considered at the next Joint Regional Planning Panel (JRPP) meeting at a date to be set by JRPP": Ex JS 1, page 397.

499. At the Council meeting held on 2 December 2015 Mr Gough again addressed the Council on the issue of the sale of the Car Park.

500. As the Mayor and Deputy Mayor (Councillors Lam and Mehajer) were not present in the Chamber for the vote (although Mr Mehajer did address the Councillors before he left, probably in breach of s 451 of the Act), nominations were sought from Councillors to chair the meeting. Councillor Campbell nominated Councillor Simms. Councillor Zraika nominated Councillor Attie. There was an equal number of votes for each Councillor nominated. As such, General Manager drew a lot to determine the result. Councillor Attie's name was drawn and he became the chairperson of the meeting. On the motion of Councillor Attie, seconded by Councillor Oueik the motion was then carried (on the casting vote of the chairperson, Councillor Attie) to rescind the Council's previous resolution to terminate the Contract. Those in favour of the rescission motion were Councillors Attie, Oueik, Yang and Zraika. Those against were Councillors Batik-Dundar, Campbell, Oldfield and Simms.

501. The Council then resolved (on the motion of Councillor Attie, seconded by Councillor Yang) as follows:

"*1. That authority be delegated to the General Manager and the Council's legal representative – Mr Chris Gough – to negotiate a proposed new contract with the applicant to replace the existing contract with Sydney Constructions and Developments Pty Ltd and which incorporates as a minimum the following terms:*

- *The proposed development to contain a supermarket with a minimum floor area of at least 2,500m².*
- *Sufficient carparking to be provided for public uses.*
- *A restricted on use be placed on the title to ensure conditions of the development approval are complied with and not varied.*
- *Completion date of contract within 3-6 months of development application consent.*
- *Call option for Council to re-acquire the property if development not undertaken within 12 months of settlement.*
- *A purchase price in accordance with the valuation provided by McGee's Property.*
- *Deposit of 10%.*
- *Personal guarantees for contracts not limited in amount.*
- *Applicant meet Council's costs associated with new contract.*
- *The contract to be automatically terminated if DA consent is not obtained by June 30, 2016.*
- *The contract to be automatically terminated if the JRPP refuse development application.*
- *The development application must comply with the LEP, RFDS, SEPP 65, DCP, BCA and all other relevant design codes and controls, etc.*

2. That the existing contract be terminated by mutual agreement if the negotiations and in 1 above are not finalised by January 31, 2016."

502. The motion was carried, again on the casting vote of the chairperson, Councillor Attie. Those in favour were Councillors Attie, Oueik, Yang and Zraika. Those against were Councillors Batik-Dundar, Campbell, Oldfield and Simms: Ex JS 1, pages 417-418.

503. The McGee valuation referred to in the resolution above was one of two valuations made available to Councillors for the meeting of the Council held on 2 December 2015. The McGee valuation valued the Car Park as a stand-alone property as having a

market value of $2,070,000. The Market value of that property together with 11 John Street and 2 Mary Street, Lidcombe was $6,500,000. The third valuation of the properties at 13, 15, 19 and 21 John Street Lidcombe combined was assessed as having a market value of $4,750,000: Ex JS 1, page 463.

504. The McGee valuation was dated 1 July 2010. Also made available to the Councillors in the Council papers was a valuation by CBRE Valuations Pty Ltd, it was dated 11 November 2015. CBRE's assessment of market value of the carpark *"on an isolated site basis, assuming the site can be developed for mixed use purposes despite not having street frontage but only access handles off John and Mary Street"* was $13 million. They provided a second market value estimate described as "Basis 2" involving the properties at 13-21 John Street, which they assessed as having a market value of $20 million: Ex JS 1, page 428.

(vi) Termination of Contract

505. At the Council meeting held on 17 February 2016 the Interim Administrator of the Council, Mr Viv May, "terminated" the Second Contract: Ex S2. A notice of rescission was served on the purchaser SCD.

(b) Findings

506. By letter dated 23 November 2016, the solicitors for the Cumberland Council, Storey & Gough, have advised the Inquiry that SCD has commenced proceedings against the Council in the Supreme Court seeking a number of orders, including a declaration that the Contract for Sale of the Car Park remains on-foot. Storey & Gough have advised the Inquiry that the Council is defending the proceedings and a hearing date has not yet been allocated.

507. In these circumstances, it would be inappropriate in this report to express any view concerning the legal rights of either the purchaser SCD or the Council in relation to the Contract for Sale which was subject to the interim administrator's resolution on 17 February 2016 and that is now before the Court. I will instead restrict myself to the following matters that are the subject of Counsel Assisting's recommendations:

(a) the conduct of Ms Lam until 18 November 2015 when she declared a non-pecuniary interest;

(b) the decision of Mr Zraika regarding the reduction in the deposit for the sale of the John Street car park;

(c) the resolution passed by Council at the meeting of 2 December 2015.

(i) Ms Lam

508. Counsel Assisting has submitted three proposed findings in relation to Ms Lam:

(a) at the Council meeting of 26 June 2012 Ms Lam voted to extend the period of time within which SCD could obtain a development consent for the supermarket *"on the basis of the long commercial relationship between she, Mr Mehajer and his father"*: Counsel Assisting written submissions at JS [2];

(b) Ms Lam's failure to declare an interest and abstain from voting until 18 November 2015 *"was a clear breach of the Code of Conduct given her relationships with Mr Mehajer"*: Counsel Assisting written submissions at JS [3];

(c) Ms Lam's evidence that she was unaware of a business relationship between her brother-in-law Mr Hua (who was her business partner in the Combined Realty business) and Mr Mehajer *"ought not be accepted"*: Counsel Assisting written submissions at JS [4].

509. In my opinion, the totality of the evidence does not support a finding that Ms Lam's vote at the Council meeting of 26 June 2012 was because of a "long commercial relationship" between her, Mr Mehajer and Mr Mohamed Mehajer.

510. In his email to Mr Goncalves of the Council of 22 May 2012 (Exhibit JS 1, pp.41-42), Mr Mehajer indicated that SCD needed to purchase the adjoining properties at 19 and 21 John Street in order to include them as part of its development application for the supermarket. It required more time as only the property at 21 John Street had been

purchased. It therefore sought a 3 month extension on the settlement date for the Contract for Sale.

511. As indicated above, the Director's Report Works and Services to the Council for the meeting of 26 June 2012 described this request as *"reasonable"*, and recommended a grant of the extension sought by Mr Mehajer. There is no suggestion or submission made that this recommendation was in any way improper or not itself reasonable.

512. The starting position then for considering the conduct of Ms Lam was that she voted to adopt a recommendation properly made by the Council staff, and it appeared to have a reasonable basis.

513. There are some further background facts that should be outlined, however, that are relevant to any finding in relation to Ms Lam's conduct.

514. The first is that the tender price offered by SCD in February 2011 to purchase the Car Park was $1 million above the other bidder. There is no evidence that there is any other person in the market who has expressed any enthusiasm to purchase the property at the price agreed to by SCD.

515. This might, in part, be because of the difficulties associated with the site. It appears that developing it is unfeasible without ownership of the surrounding land. SCD does now own most of the surrounding land. There are, however, access problems. All of this has made obtaining development consent for the proposed supermarket problematic.

516. Ms Lam's evidence was that she was in favour of granting the extension sought because she was in favour of a supermarket being developed at the site. The effect of her evidence – in a confusing section of the transcript – is that she felt that more time was needed for the purchaser to give the community its best chance of obtaining the benefit of a supermarket: T-679.40-681.35. I will come back to Ms Lam's evidence in this regard in a moment.

517. Counsel Assisting bases his proposed finding at JS [2] on what he asserts is the "*long commercial relationship between* [Ms Lam], *Mr* [Salim] *Mehajer and his father* [Mohamed Mehajer]".

518. In my view, the evidence falls short of establishing that there was a long commercial relationship between these persons. Ms Lam's evidence was that her role in Combined Real Estate (a business she part-owned with her brother-in-law Mr Hua) was that she was in charge of sales, and her brother-in-law dealt with strata management. Her unchallenged evidence was that she had sold no properties for either Mr Salim Mehajer or his father: T-709.46.

519. There was evidence before the Inquiry that in September 2011 Combined Real Estate was engaged by Mr Mohamed Mehajer in relation to strata management agency agreement in relation to two development properties: Exhibit GEN 28, pp.21-50. There was no evidence that these agreements generated significant income. Further, on their own, these agreements do not demonstrate a "long commercial relationship". Ms Lam's evidence was that because she worked on the sales side of the business, she was unaware of any agreements entered into between Combined Real Estate and Mr Mohamed Mehajer.

520. In summary then, Ms Lam's evidence was that she voted as she did at the Council meeting of 26 June 2012 because she thought it was appropriate to give SCD further time in order to give the best chance of the community gaining the supermarket that she wanted to have developed, and at that time she was unaware of any strata management agreements between her business and Mr Mohamed Mehajer.

521. Some further matters should also briefly be stated here before I outline my findings. In considering Ms Lam's evidence, and whether it should not be accepted as Counsel Assisting contends (and this applies to all fact-finding in this inquiry), I first considered whether that evidence was inherently implausible. I have also considered whether her evidence should not be accepted because of other evidence before the Inquiry (either oral evidence or documentary evidence) which weighs in favour of not accepting Ms Lam's evidence. Thirdly, I have considered how the witness presented whilst giving sworn evidence. Finally, all matters involving consideration of

dishonest or improper conduct need to be considered with *Briginshaw* in mind, albeit noting that findings of fact are still made on the standard of the balance of probabilities.

522. Ms Lam's evidence is not, in my view, inherently implausible. She had a coherent reason for voting as she did at the 26 June 2012 Council meeting, and her vote was consistent with the staff's recommendation. There is, in my view, no cogent evidence of a "long commercial relationship" between her, her business and either Salim or Mohamed Mehajer. Further, Ms Lam did not present as a witness who sought to be evasive, unhelpful, or deliberately incomplete with her testimony. Absent evidence to the contrary, I accept that she did not know of the strata management agreements between her company and Mr Mohamed Mehajer that are part of Exhibit GEN 28.

523. Accordingly, I do not make a finding that Ms Lam's vote at the 26 June 2012 Council meeting was other than an expression of her view that a 3 month extension should be granted to SCD for the reasons she outlined in her evidence.

524. The effect of JS [3] and [4] is that I should disbelieve Ms Lam's evidence that she was unaware of the business relationship between her brother-in-law Mr Hua and Mr Mehajer until a media report on 31 October 2015.

525. In relation to this matter, I accept the submission made on behalf of Ms Lam in the written submissions lodged for her that for the Model Code to have been breached because of a failure to declare a pecuniary interest, that interest was one the person had to have knowledge. That is the effect of ss.443(1)(b) and 443(3)(a). The same must be the case for failing to declare a non-pecuniary interest under the Model Code.

526. There was no documentary evidence tendered at the Inquiry establishing that Ms Lam did know of the business relationship between her brother-in-law and Mr Mehajer. No oral evidence was called which threw doubt on Ms Lam's assertion that she did not know. No evidence was called from Mr Hua, and Mr Mehajer did not make any suggestion in his evidence that Ms Lam knew about his business relationship with Mr Hua. There is no evidence before the Inquiry as to how close a relationship Ms Lam has with her brother-in-law other than that they are part-owners of a real estate

business. In the circumstances, I accept the evidence of Ms Lam that she was unaware of the business relationship between Mr Hua and Mr Mehajer. In those circumstances, I therefore do not make a finding that Ms Lam has breached the Code of Conduct in relation to the sale of the John Street car park.

(ii) Mr Zraika – Reduction in the deposit

527. At JS [7] of his written submissions, Counsel Assisting sets out the following suggested finding:

> "*From December 2013 Mr Zraika, despite having voted against Mr Mehajer's request right up until November 2013, joined them in the support of Mr Mehajer after a Damascene conversion in December 2013. His explanation for doing so was hardly credible given that it was based on the legal advice of a "friend" solicitor which was to the effect that one could have a 5% deposit but was contrary to Mr Gough's advice. Mr Campbell's account of Mr Zraika's explanation is more probably correct in the circumstances*."

528. The evidence of Councillor Campbell from his statement about the Council meeting of 20 November 2013 where a motion to reduce the deposit from 10% to 5% was not carried has been summarised above and is set out in more detail at Exhibit S13 [77]-[81]. His evidence in effect was that he says that he saw Mr Mehajer and Mr Zraika having a *"lengthy discussion"* following the Council vote at the meeting of 20 November 2013.

529. His evidence at the public hearing was that after dinner in the Jack Lang room following the Council meeting of 20 November 2013, after Councillor Zraika left the meeting he *"and Salim Mehajer were seen walking together past the door of the Jack Lang room, talking"*: T-656.46-657.3. Mr Campbell said he drew the conclusion from that that they had been discussing something.

530. Mr Zraika in his evidence at the public hearing denied having a discussion with Mr Mehajer after the Council meeting of 20 November 2013 or discussing the possibility of a rescission motion in relation to the proposed deposit reduction for the next meeting: T-1412.2-.36. Mr Zraika agreed that he changed his vote at the subsequent

Council meeting to reduce the deposit from 10% to 5%. When asked why at the public hearing by Counsel Assisting, he gave this answer:

> *"A: Simply because if we go back to the meeting where I initially voted against it, even though, Mr Commissioner, I was actually reluctant at that meeting to vote against it, if you go – you would see me asking questions at that particular meeting about it, trying to – trying to get across the line to see if I can support it, but I wasn't – I wasn't there with the – the answers weren't there for me to cross the line, because I wasn't sure about the 5% as opposed to the 10%. I wasn't sure whether it was doable, but bearing in mind in the back of my head I have always had the thought of having that supermarket because, don't forget, the Council made the decision in March 2013 to award the contract again and it was a unanimous decision to – the unanimous decision by the Council to give him the contract again knowing that the supermarket is a big element part of it, the community wants it there, and at that particular meeting I was actually reluctant to vote against. I wasn't too sure, I wanted to double check. So when the opportunity came back again for the following meeting, I sort of made my own inquiries about whether the 5% was doable, I found that it is doable, plus there was a personal guarantee attached to it all and I thought if I outweighed the two between the community's interests in relation to having a supermarket and what its request is, I found that the other one--*
>
> *The Commissioner: Q: You're using the term doable. Are you using that in the sense you wanted to check whether it was lawful?*
> *A: I wanted to check is it a common practice or is it sort of okay to put a 5% as opposed to 10%. I wasn't too sure.*
>
> *Q: Was the Council at that meeting where you first voted no, was the Council given legal advice?*
> *A: Look, I don't specifically remember legal advice at that meeting. There were discussions about it, so obviously for those that supported it, obviously they saw it was fit to do it. I just wasn't sure. I just wanted to make sure in my mind it was doable, it was okay, and when I made my own inquiries having in mind there is a need for a supermarket there, so I was convinced when I came back at the next meeting.*
>
> *Q: When you say you made your own inquiries, who did you make inquiries of?*
> *A: Look, I've got friends in the legal profession and I said "look, it is common practice?" They said, "it's fine, there's nothing wrong with it".*
>
> *Q: Nothing wrong with it? They were the words they used?*
> *A: Well, yes, to that effect, basically saying it's like buying a house, instead of arranging a 10% deposit you put a 5% deposit. It is*

> *not like there's a reduction in price in general. It's a matter of what's the amount of the deposit you put in and to me that was – that was sort of – that was fine*." (T-1413.6-1414.16)

As indicated above, Mr Chris Gough of Storey & Gough had provided written advice to the Council that strongly recommended against a reduction in the deposit. That email of advice does not mention the other conditions offered by SCD, including a personal guarantee from Mr Mehajer.

531. No specific adverse finding is suggested by Counsel Assisting in relation to Mr Zraika, but his evidence concerning the Council's decision to reduce the deposit is described as *"hardly credible"*. I take from this submission that some adverse inference or lack of credibility should be drawn from Mr Campbell's observation regarding Mr Zraika and Mr Mehajer on the night of the meeting of 20 November 2013, and Mr Zraika's prior voting record in relation to the sale of the car park prior to his vote to reduce the deposit on 4 December 2013. In my opinion, such an adverse inference against Mr Zraika's credibility should not be drawn.

532. First, the vote on 4 December 2013 was not the first time Mr Zraika had voted to accommodate a request from Mr Mehajer's company. As Mr Mehajer has pointed out at [85] of his submissions, Mr Zraika voted in favour of the initial 6 month extension of time for securing development approval at the November 2011 Council meeting: Exhibit JS 1, p.34. Further, Mr Zraika had not voted against the Council's resolution to enter into the second contract with SCD at the Council meeting of 20 March 2013 – Mr Zraika was not present at that meeting: Exhibit JS 1, p.250. In light of these matters, I am not sure that Mr Zraika's vote on 4 December 2013 can be properly seen as a *"Damascene conversion"*.

533. Further, in my view, no adverse inference can properly be drawn purely from the fact that Mr Campbell saw Mr Mehajer and Mr Zraika talking on the night of the Council meeting of 20 November 2013. The combination of both Mr Campbell's evidence from his written statement and at the public hearing indicates that he saw Mr Mehajer and Mr Zraika actually talking together for no more than mere moments. He then has speculated that they have had a "lengthy" discussion, and perhaps speculated about what the conversation was about. He does say that he asked Mr Zraika why he

changed his vote at the 4 December 2013 meeting and Mr Zraika said words to the effect that *"our original decision had unfairly discriminated against Mehajer because he was a councillor"*. Mr Zraika has no recollection of saying such words to Mr Campbell. In terms of fact-finding for this inquiry, more than speculation is necessary. Mr Campbell's evidence proves no more than that Mr Mehajer and Mr Zraika were in each other's presence for a period of time after the Council meeting of 20 November 2013 and exchanged some words. That is not without more a foundation to establish some improper conspiracy about a deposit or a subsequent rescission motion.

534. Thirdly, the deposit issue itself needs to be considered in totality. The request of SCD involved more than a mere request for a reduction in the deposit. In exchange for a reduction of the deposit, Mr Mehajer offered a guarantee: Exhibit JS 1, p.282.

535. Mr Gough gave advice to the Council on 12 November 2013 (Exhibit JS 1, p.283) strongly recommending against a reduction in the deposit and a release of any deposit moneys, based on reasoning that is undoubtedly correct. That said, there is nothing illegal about a 5% deposit instead of a 10% deposit (although it may be commercially unwise), and the reduction in deposit was sought to be offset to some extent by the offer of a guarantee. The effect of Mr Zraika's evidence was that he changed his vote between the 20 November and 4 December 2013 Council meetings because he was very close to agreeing to what SCD was seeking at the earlier Council meeting, but wanted time to make his own inquiries as to whether a reduction in the deposit could be done, or, to use his word, was "doable". He explained his reasons as to why he voted in favour of what SCD sought.

536. It is no doubt preferable that councils follow legal advice from their solicitors. In general, that should be the default position. Further, it is no doubt preferable for a 10% deposit on a sale of council land to be retained, and not reduced to a 5% deposit with a return of a substantial sum of money by the council to the purchaser. An offer of a guarantee as security is not necessarily (and may well not be) a proper substitution for 5% of a deposit.

537. However, the sale of the Car Park, and the site itself, were not matters without complications. Both contracts for sale have always had a condition that the purchaser had to obtain development consent for a supermarket. The site has access difficulties, and it appears unfeasible to develop it without ownership of adjoining land. The deposit issue itself, as mentioned above, was not a mere reduction to 5%, but involved some element of substitute security. Considering all of these matters, and all of the evidence before the Inquiry, in my view, Mr Zraika's evidence should not be found to lack credibility.

(iii) Valuations obtained for the November 2015 Council meeting

538. There was some evidence given at the public hearing on the issue of whether or not valuations that were obtained by the Council for its meeting held on 2 December 2015 – when the Council resolved to enter into a third contract with SCD – were "buried" in the Council papers so as to not be noticed. Counsel Assisting has submitted at JS [9] of his written submissions that "*there is no basis to conclude that there was any deliberate attempt to "bury" those valuations*". I agree with that submission, although I think it could be said that the Council staff could have done a more complete job in ensuring that this valuation evidence was brought to the attention of all the councillors.

(iv) Council Resolution 2 December 2015

539. At JS [11] of his written submissions, Counsel Assisting deals with the resolution of Council made on 2 December 2015 to negotiate a new contract with SCD. That resolution was passed by a majority in response to a letter from SCD's solicitors of 30 November 2015, the terms of which are set out at [494] above. JS [11] of Counsel Assisting's submissions is as follows:

> "*When that motion was subsequently passed on the casting vote of the Acting Mayor or Chairperson (in that case Mr Attie, in the absence of Ms Lam and Mr Mehajer) it was passed against the clearest possible advice from Mr Gough and no member of Council, except possibly Mr Yang, could have been in any doubt about that. By that point, more than four years have elapsed and Mr Mehajer was no closer to getting a development consent for a 2,000m^2 supermarket than he was in June 2012. Any reasonably minded councillor, who had not ties to Mr Mehajer and had not entered into agreements to support him for the*

position of Deputy Mayor in exchange for his vote to be Mayor, would not have contemplated a further agreement at that time."

This submission could be taken to be a criticism of Mr Zraika or of all of the councillors who voted in favour of SCD's offer seeking a new agreement in its letter of 10 July 2015.

540. An extract from the letter of advice from Mr Gough of Storey & Gough dated 25 September 2015 is set out at [493] above. The essence of that advice was that the proposed changes to the contract were so significant that it should be terminated and the matter put out to tender again. Mr Gough was concerned that if the matter did not go out to tender and the contract was varied in the manner sought by SCD, it might be challenged. I have already set out above the complications and conditions of the Council's sale of the Car Park. There is no evidence that the site was of any interest in the marketplace other than to SCD. Further, it does not appear as though there was any prospect of anyone feasibly developing the site unless they owned the surrounding land which was also owned by SCD. All councillors who voted in favour of the resolution of 2 December 2015 expressed a view that a supermarket development was desirable and they hoped it would be achieved through the sale to SCD.

541. The resolution that was passed at the 2 December 2015 meeting was against the advice of Mr Gough. In my view, while that is undesirable, the totality of the evidence in relation to the sale of the Car Park is such that I do not think the finding should be made that no *"reasonably minded councillor"* could have voted for the resolution passed on 2 December 2015. That resolution did not in fact accept the terms proposed by SCD. Rather than a decrease in the minimum floor area of the supermarket down to 1,000m^2, the Council now sought a supermarket of at least 2,500m^2 (an increase from the special condition in the Contract). The proposed terms also included that the Contract would be automatically terminated if development consent was not obtained by 30 June 2016 and that it would automatically be terminated if the Joint Regional Planning Panel refused the development application. Looked at in totality, the terms of the resolution passed by the Council on 2 December 2015, coupled with the difficulties I have outlined above concerning the site generally,

and the majority councillors' desire for a supermarket, do not persuade me that a finding should be made that no reasonably minded councillor without ties to Mr Mehajer could have voted in favour of the 2 December 2015 resolution.

SECTION 10: 40-46 STATION ROAD, AUBURN

(a) Introduction

542. This matter was examined at the Public Inquiry because in October 2008 compliance officers of the Council discovered what they considered to be unlawful development at a residential flat building at 40-46 Station Road, Auburn ("the Station Road Development"). This property had been developed by BBC Developments Pty Ltd (BBC Developments), a company associated with Councillor Oueik.

543. At the time the development application was lodged (29 June 2000), and at the time consent was granted (February 2001), Mr Oueik was not a member of the Council. He was however a councillor by 2008, having first been elected in 2004.

544. The inspections by the Council compliance officers revealed that of the twenty-nine two bedroom apartments in the Station Road Development, twenty-three appeared to have been built with an extra bedroom, contrary to the development consent. After this matter was reported, the Council twice obtained legal advice from Deacons (detailed below) concerning a possible prosecution of BBC Developments. No prosecution however was commenced until after the appointment of the Interim Administrator Mr May. Proceedings were then taken against BBC Developments by way of Penalty Infringement Notices. They were resisted, and had to be discontinued as out of time.

545. It is no part of the Terms of Reference for the Inquiry to investigate whether illegal building works were or were not conducted by a company associated with Mr Oueik at a time when he was not a member of the Council, or to make any factual findings about that matter. What did fall within the Terms of Reference was the conduct of Council staff from October 2008 onwards relating to the proposed prosecution of the developer. The history of this matter is set out in the paragraphs that follow.

(i) Grant of Development Consent

546. As indicated above, the development application for the Station Road Development was lodged on 29 June 2000. The proposed development was for the construction of a three storey residential flat building of 12 x 3-bedroom apartments and 29 x 2 bedroom apartments: Station Road Bundle (Ex SR 1), page 1.

547. Don Fox Planning was retained by Council to assist the development application. By letter dated 3 November 2000 it notified BBC Developments of various non-compliance issues with the plans submitted: Ex SR 1, page 22.

548. The Council's report to the meeting of the Council to be held on 6 December 2000 recommended that approval be granted to the development application, subject to certain conditions: see pages 26-55 of Ex SR 1.

549. At the Council meeting of 6 December 2000 the Council voted to defer consideration of the development application *"in order to give the applicant an opportunity to amend the proposal so as to comply with the Council's floor space ratio requirements"*: Ex SR 1, page 55.

550. As a result of this deferral, by letter to the Council dated 14 December 2000, Storey & Gough, solicitors, acting for BBC, indicating that Council at the meeting of 6 December 2000 had approved other residential flat buildings *"that exceeded the FSR requirements of DCP 2000"*. It was alleged that the Council was *"not applying the controls in the DCP to all developments"* and that their client, BBC, was considering an appeal to the Land and Environment Court concerning this matter *"if an approval is not issued"*: Ex SR 1, pages 98-99.

551. At the Council meeting held on 7 February 2001, the Council granted approval to the development application for the Station Road Development, subject to various conditions. Of particular relevance was condition 34, which provided as follows:

> *"34. <u>Dining room walls</u> – the dining room walls within units 10, 11, 23, 24, 37 and 38 shall be deleted. Details to be provided with the construction certificate":* Ex SR 1, page 81.

552. On 15 March 2001 a construction certificate was lodged with Council. This construction certificate was ultimately approved on 11 May 2001, although the applicant did not collect it until 26 October 2001: Ex SR 1, page 124.

553. By letter dated 2 April 2001, the Council wrote to BBC Developments indicating that a "revised set of architectural plans" was needed:

> *"to demonstrate compliance with the following conditions of development consent ...*
>
> - *Condition 34, deletion of dining room walls of units 10, 11, 23, 24, 37 and 38*": Station Road Bundle, page 171.

554. On 4 April 2001 a meeting was convened between Mr Rajendra Rajbhandary, the Council's Senior Environmental Health and Building Surveyor, and "Ronnie" (Mr Oueik) to discuss the Station Road Development. Mr Rajbhandary's notes of the meeting (see page 113 of Ex SR 1) contain the following annotation: "3. Delete dining room walls – 6 units."

555. On 2 May 2001 BBC Developments lodged and application to modify its development consent pursuant to s.96 of the *Environmental Planning and Assessment Act*. That modification was approved by Council in June 2001: Ex SR 1, pages 116 and 117.

556. In April and May 2001, and again in June 2001 (following a s.96 application relating to ventilation) various plans were lodged for the development. There were inconsistencies between these plans and the consent granted. The details of the inconsistencies relate to internal walls or nib walls, but the details are not relevant save that the plans – which were approved for construction certificate purposes – did affect that advice Deacons gave concerning the extent of prosecution they recommended.

557. On 2 November 2001 a further meeting took place at the Council between Mr Rajbhandary and Mr Oueik. Also in attendance was Mr Joe Malouf, who had recently been employed as a building certifier. Mr Rajbhandary's memorandum of this meeting indicates that Mr Oueik was advised that before a construction certificate could be released, further matters had to be attended to concerning the development as outlined in his memorandum: Ex SR 1 page 123.

558. On 2 November 2001 a construction certificate was approved for the Station Road development: Ex SR 1, pages 128-129.

559. On 9 November 2001 Council sought legal advice concerning the commencement of building works for the Station Road Development prior to the issue of a construction certificate. By letter of advice dated 18 November 2001, Houston Dearn O'Connor, solicitors and attorneys, advised the Council that in its view *"the owner/developer of the site, by commencing building works without the Council having issued the construction certificate to it, was committing an offence under s.81A(2) and s.125 of the EP&A Act"*: Ex SR 1, pages 130-132. Advice was given concerning a potential prosecution: Ex SR 1 pages 130-135. The legal advice the Council received was to the effect a prosecution was out of time. None was commenced.

560. On 18 July 2002 Mr Harley Pearman (the Council's Town Planner) and Mr Joe Malouf inspected the Station Road development. It appears that the inspection was limited to inspecting "the landscaping": Ex SR 1, page 140. On the same date, the Council, through Mr Malouf, issued an Occupation Certificate in relation to the Station Road Development: Ex SR 1, page 141.

561. On 18 September 2008 Council wrote to the Proprietors of Strata Plan 68538 concerning the Station Road Development. This letter referred to the possibility of certain illegal building works: Ex SR 1, pages 143-144.

562. On 28 October 2008 compliance officers from the Council (Ms Helen Daskalakis and Mr Jason Mooney) carried out an inspection of 26 of the 41 apartments in the Station Road Development. Their inspection revealed that 16 of the 2-bedroom units had an

additional bedroom contrary to the approved plans. 12 of the additional rooms were constructed of masonry and 4 were of plasterboard: Ex SR 1, pages 145-146.

563. During the course of their inspection, Council officers took notes concerning each unit, and Mr Mooney subsequently prepared a Schedule of which of the 2-bedroom units had an additional bedroom that had been converted from the approved dining room: Ex SR 1, pages 231-233. Photographs were also taken of the units inspected.

(ii) Legal advice from Deacons re prosecution of BBC Developments

564. As a result of the inspection which took place on 28 October 2008, Council sought legal advice. On 5 November 2008 the Council's then General Manager, Mr John Burgess, and the Head of its Planning Department (Mr Mark Brisby) met with Mr Peter Rigg, a partner in the law firm Deacons, and with Zoe Baker, a senior associate in that firm. Following that meeting, Deacons provided written advice to the Council in a letter to Mr Burgess (attention Mr Brisby) dated 10 December 2008. That letter contained advice concerning a possible prosecution against the builder: Ex SR 1, pages 302-306. As noted in their letter of advice, Deacons were of the view that there was:

> "*… strong evidence that the additional walls (with consent and work without) were built at the time of construction, before completion of the building and issue of the Occupation Certificate. It would appear that the current owners of units in the building did not carry out the building work*". (Ex SR 1 page 304).

565. Deacons advised that Council would be able to enforce the development consent for the Station Road development, either by way of a PIN or by seeking an order pursuant to s.121B of the *Environmental Planning and Assessment Act 1979*. Deacons considered that the strongest prospects of action against the builder related to unauthorised works on units 3, 4, 16, 17, 30 and 31. They also advised that prosecution could be commenced under s.125 of the EP&A Act.

566. Having advised that the builder/developer might have defences available to it, Deacons stated as follows:

> "*There is a strong public interest in Council pursuing the BBC Developments Pty Limited, particularly in circumstances where a director of the company is a councillor [Mr Oueik was by now a member of Council]. It appears that the builder/developer benefit from the cumulative amendments under the Construction Certificate and the s.96 modification application and was able to market and sell units that were approved as 2 bedroom as 3 bedroom units. There are amenity and public policy impacts of the additional bedrooms. The development was approved with s.94 contributions and parking provision well short of that required if approval was sought for the additional bedrooms*." (Ex SR 1 page 305).

(iii) Referral to ICAC

567. On 18 December 2008, Mr Burgess provided a report to ICAC concerning the Station Road Development pursuant to s.11 of the ICAC Act. This letter, and the referral to ICAC, only concerned the conduct of Mr Malouf, the Council certifier who had issued an Occupation Certificate for the development following his inspection in July 2002. Mr Burgess received a response from ICAC by way of letter dated 8 January 2009: Ex SR 1, page 307.

568. On 17 February 2009 Mr Burgess wrote again to ICAC concerning the Station Road Development: Ex SR 1, pages 308-309.

569. By letter dated 25 March 2009 ICAC wrote back to Mr Burgess concerning the Station Road Development: Ex SR 1, page 310.

570. By letter dated 9 June 2009 Mr Burgess provided a further update to ICAC concerning the Station Road Development: Ex SR 1, page 311.

(iv) Second advice to prosecute

571. In or about September or October 2009, Council sought further advice from Deacons concerning the Station Road Development. In a letter to Council dated 14 October 2009, Deacons provided further advice concerning the possibility of legal action against the builder of the Station Road Development: Ex SR 1, pages 312-314.

572. In a letter dated 19 May 2010, Mr Burgess provided a further update to ICAC concerning the Station Road Development, in particular in relation to Mr Malouf who *"had carriage of inspections during construction"*: Ex SR 1, page 315.

(v) No action by ICAC concerning Mr Malouf

573. By letter dated 22 June 2010 ICAC wrote to Mr Burgess concerning the Station Road Development and indicated that *"the Commission has determined not to take any action"*: Ex SR 1, page 317.

(vi) Current position

574. It would appear that in the years since 2010 no attempt was made until 2016 to prosecute or take any legal action against BBC Development. The Interim Administrator Mr May sought further legal advice concerning the Station Road Development from Colin Biggers & Paisley Lawyers. In a letter dated 4 March 2016 Colin Biggers & Paisley provided certain advice to the Council: Ex SR 1, page 321. That advice remains privileged.

575. In a letter dated 11 March 2016, Colin Biggers & Paisley wrote to Mr Oueik of BBC Developments concerning the Station Road Development. The issue of the unauthorised conversion of six of the building's 2-bedroom units to 3-bedroom units was raised in a letter; and it was stated that *"Council is of the opinion that the additional walls were constructed by BBC and were without development consent"*: Ex SR 1, page 326. The letter indicated that the Council was considering issuing Penalty Infringement Notices to BBC Developments pursuant to s.127A of the *Environmental Planning and Assessment Act*. BBC was invited to make a submission with respect to the alleged unauthorised works: Ex SR 1, page 327.

576. Six Penalty Infringement Notices were ultimately issued to BBC Developments in relation to the alleged unauthorised works at the Station Road development. BBC Developments elected to take the penalty infringement notices to Court, at which stage the Council withdrew the notices as they were out of time: T-1662.16-.37.

(b) Evidence at Private and Public Hearings

(i) Mr Malouf

577. When examined by Counsel Assisting in his private hearing, Mr Malouf said that his process at the time, before issuing a construction certificate would not have involved inspecting whether the development had been constructed in accordance with the development consent, at least in relation to compliance with the approved number of bedrooms: Ex PH 1, T-23.4-.11. His focus at the time seemed to be more on compliance with fire safety measures or perhaps privacy screens. In relation to his failure when inspecting the Station Road Development to ascertain from the development consent that the property may have been constructed with apartments having an unlawful number of bedrooms, he explained that he was a very junior certifier at the time and was not given any guidelines in relation to issuing an Occupation Certificate for such a large residential development: see Exhibit PH-1, T-24.44 and T-29.8.

578. In their letter of advice to the Council of 10 December 2008, Deacons raised the issue that there were grounds to suspect that Mr Malouf was aware of the breach of the conditions of the development consent of the Station Road development which conduct might constitute grounds for dismissal. They recommended that the then General Manager, Mr Burgess, refer Mr Malouf"s conduct to ICAC, which he subsequently did: Ex SR 1, page 306.

579. As will be seen below, Counsel Assisting has submitted that there was *"no evidence to support the proposition that Mr Malouf was anything other than mistaken when he came to issue the Construction Certificate for the site"*: Counsel Assisting, written submission at SR 1(k). I agree with this submission. There is, of course, a preliminary issue as to whether certain of the apartments in the Station Road development had unlawful works performed by BBC Developments. As indicated previously, I make no finding in relation to that matter. In relation to Mr Malouf, if there was a failure by him to notice unlawful development, it was because he did not check the number of bedrooms in each apartment in the Station Road development because he was not instructed to do this and did not appreciate that it was necessary. I accept that if there was a mistake made by Mr Malouf, it was an honest mistake.

(ii) *Mr Brisby and Mr Burgess*

580. Both Mr Burgess and Mr Brisby gave evidence at the Public Inquiry concerning their conduct following the initial advice given to the Council by Deacons at a conference on 5 November 2008 (which Mr Burgess attended but Mr Brisby did not) and receipt of Deacons' first written advice of 10 December 2008 (addressed to Mr Burgess, as General Manager, but marked for the attention of Mr Brisby).

581. Mr Brisby's recollection was that he drew the issues concerning the Station Road development to Mr Burgess' attention as General Manager because it concerned a current member of the Council: T-472.45-T-473.1. Mr Brisby's understanding at that point was that Mr Burgess took carriage of the matter and subsequently referred it to ICAC. His evidence when examined by Counsel Assisting was that he did not appreciate that the ICAC referral concerned only Mr Malouf: T-473.40-474.5. In relation to the issue as to why a prosecution was not commenced against BBC Developments, Mr Brisby agreed that as the head of planning he held the delegated authority to initiate all prosecution matters on behalf of the Council, but said that this matter was in a different category because it related to an "elected member": T-475.14-.18. His view was that Mr Burgess had taken over the handling of the matter and that he "*awaited instructions*" from Mr Burgess: T-476.43-T-477.4.

582. Mr Brisby agreed that he had been the relevant Council officer who had sought the further advice from Deacons which was a written advice dated 14 October 2009, which he recalled discussing with Mr Burgess but his recollection was that Mr Burgess was still awaiting the outcome from ICAC and "*didn't want to prejudice it*", presumably by initiating any prosecution matter: T-477.27-T-478.27.

583. Mr Brisby rejected the proposition put to him by Counsel Assisting that Mr Burgess had left the issue of the alleged unlawful works at the Station Road development with him and that it was his responsibility to prosecute: T-479.4-.9.

584. Mr Brisby however conceded when examined by Ms Duggan SC (Senior Counsel for Mr Burgess at the Public Inquiry) that in his position as Director of the Planning and Environment Department he had delegated authority to enforce any non-compliances

such as illegal building works by means of either civil or criminal proceedings: T-521.27-522.31. However, he disagreed with the contention that he could not perform his delegated functions if an elected councillor was involved. His evidence in this regard was as follows:

> "*Q: It is your understanding, is it, that your delegation was limited so that all of those functions that you performed for every other member of the community, you couldn't perform those functions because they hadn't been delegated to you if it was an elected councillor; is that correct?*
> *A: No, that's not, and maybe I've got to clarify that, Mr Commissioner. What I'm saying is in the political environment we work, it would be totally inappropriate and I certainly wouldn't have been game to commence a prosecution or any enforcement action against an elected member without the authority of the general manager. One, I think out of respect to the general manager and by way of being seen to be – things done right in the public.*" (T-522.39-523.4)

585. Ms Duggan also examined Mr Brisby about his evidence concerning Mr Burgess and the referral to ICAC. She took Mr Brisby to the Deacons advice of December 2009 and put to him the proposition that it must have been clear from that advice that the ICAC matter only concerned Mr Malouf and did not concern anything to do with unlawful building works or a potential prosecution of BBC Developments. Mr Brisby's evidence, however, remained that he was told by Mr Burgess that Mr Burgess was handling the entire matter – that is, both the referral to ICAC and any proposed prosecution of BBC Developments: T-525.44-528.32.

586. Mr Brisby maintained the stance that he considered that Mr Burgess was handling the potential prosecution of BBC Developments in the face of concessions that the second Deacons advice of 14 October 2009 concerning the proposed issuing of PIN notices to BBC Developments (Exhibit SR1, p.312) was a letter of advice made out to his attention and he had been the responsible council officer who had requested this further advice from Deacons: T-530.26-.29.

587. Mr Brisby was also examined by Ms Duggan SC concerning a file note made by Ms Simms at the time she was the Mayor of the Council in relation to the proposed prosecution of BBC Developments. Mr Brisby indicated during the course of this

examination that he was aware that Mayor Simms was informed about the advice being received by Deacons concerning the proposed prosecution of BBC Developments because he was present at a meeting when Mr Burgess, the General Manager, informed her about this: T-532.17-.27. Mr Brisby was directed to Ms Simms' handwritten file note (Exhibit S10, p.22) which contained the following handwritten notation:

> "*Raised issue re illegal building works (told of these a few months ago – 2 bedder converted to 3 bedder Station Road prior to sign off by Council) – paid sect 94 as 2 bedroom and then built and fitout as 3 bedroom.*
>
> *GM says discussions are ongoing with Deacons re legal considering conversions were done apparently, prior to sign off by Council.*
>
> *Assures that Mr Oueik will be treated as any other applicant. Mark Brisby is to prosecute for illegal building works.*
>
> *Reminded GM that 1 level playing field 2 message sent to compliance staff if law is different for a mate/councillor than anyone else*." (Emphasis added)

The date of Ms Simms' file note is 30 July 2009, and so it was after the first Deacons advice of December 2008 but prior to their second letter of advice of October 2009.

588. Mr Brisby disputed that the words *"Mark Brisby is to prosecute for illegal building works"* represented an indication that the General Manager had already made a decision to prosecute and that Mr Brisby was undertaking that task. Rather, Mr Brisby's evidence was that because an elected council official was involved, he needed a direction from the General Manager to commence a prosecution. He however accepted that if such a direction was given to him, he would be the responsible council officer for carrying out any prosecution. He maintained, however, that he never received such a direction from Mr Burgess: T-533.1-534.20.

589. Mr Brisby accepted the proposition put to him that if he was standing next to Mayor Simms and Mr Burgess at the time that Mr Burgess said the words *"Mark Brisby is to prosecute for illegal building works"*, he would have understood that to mean that the General Manager had decided to prosecute: T-536.32-.42. In trying to resolve this

matter it is relevant to note that Ms Simms' note of 30 July 2009, as mentioned above, pre-dates a further advice from Deacons concerning the possible issue of penalty infringement notices, which is some evidence that a final decision to prosecute had not yet been made in July of 2009.

590. At the Public Inquiry Ms Simms' evidence was that she had no particular recollection of the conversation or meeting that was recorded in her note of 30 July 2009. The matter was not one that she followed up (Ms Simms' term as Mayor concluded in September 2009) and the next she heard about the matter was when it was in a newspaper in early 2016: T-342.18-344.21.

591. In his evidence, Mr Burgess denied that he took over responsibility for any prosecution or enforcement action against BBC Developments in relation to the Station Road development: T-558.15-.18. He was asked by Counsel Assisting in those circumstances why he did not follow the matter up with Mr Brisby in 2010 or 2011. Mr Burgess' evidence was that he had *"assumed that the action had been taken"*: T-560.6-.8. He said if the matter had gone to court he would have known about it, but not if only penalty infringement notices had been issued: T-560.10-.14. He said that he *"would have assumed that given the advice from Deacons in October of 2009, that Mr Brisby would have initiated the recommendations of that particular firm as contained in their letter"*: T-561.26-.29. In relation to Ms Simms' file note referred to above, Mr Burgess said he did have a recollection of the meeting with Ms Simms concerning the possible prosecution in relation to the Station Road development and said that he did tell her that Mr Brisby would *"prosecute the issue"*: T-563.5. He did not, however, have a specific recollection as to whether Mr Brisby was at this particular meeting: T-563.21. Mr Burgess' evidence was that throughout the course of 2011 he saw Mr Oueik in Mr Brisby's office on a number of occasions - perhaps 10 or 11 times: T-566.1-.46. Mr Burgess considered this to be inappropriate and a breach of the Code of Conduct: T-567.1-.8.

(c) Findings and Recommendations

(i) The Station Road Development

592. At paragraphs SR1(a)-(m), Counsel Assisting suggests a number of factual findings should be made in relation to the Station Road Development from the time of the

grant of development consent in February 2001, until just after the completion of construction.

593. In my view, it is clear that the consent was for a residential flat building of 29 two bedroom units and 12 three bedroom units. It is also clear that neither the consent nor the approved plans authorised a third bedroom for at a minimum units 3, 4, 16, 17, 30 and 31.

594. It is not appropriate for me to make many of the other suggested findings by Counsel Assisting. It would appear that to the extent plans were approved with inconsistencies with the development consent, this occurred due to mistake or oversight. I express no view and make no finding about whether unlawful works were undertaken at the time of construction. That was the view of the Council's compliance officers, but there is no expert nor other evidence about this matter, which is in any event outside of the Terms of Reference. The main issue for this inquiry remains the failure of Council to initiate any prosecution action against BBC Developments, despite the recommendations from Deacons in November/December 2008 and October 2009.

595. Before turning to that matter, I accept Counsel Assisting's submission that any error made by Mr Malouf concerning the issue of a construction certificate was due to an honest mistake.

(ii) Failure to prosecute BBC Developments

596. Counsel Assisting submits that there was a "*clear and strong public interest in Council pursuing BBC*": SR [2](a) of Counsel Assisting's written submissions. This submission picks up a part of Deacons' written advice of both 10 December 2008 and October 2009 referred to above: Exhibit SR1, pp.305. I agree. While I make no finding as to whether any prosecution of BBC Developments would have been successful or unsuccessful, I do find that proceedings should have been commenced in accordance with the recommendation made by Deacons in their letters of advice to Council. The real issue in relation to the Station Road Development is: why weren't such proceedings commenced?

597. Counsel Assisting submits that the principal reason proceedings were not commenced was because *"Mr Brisby failed in his duty to do so"*: Counsel Assisting written submissions at SR [2](e). The submission is not couched as a breach of s.439 or of the Model Code.

598. There is no doubt that the recommended prosecution of BBC Developments fell within Mr Brisby's delegated authority. Further, Mr Brisby attended the conference with Deacons in November 2008, and both Deacons' written advices were marked for his attention (nothing turns on them being formally addressed to the General Manager, as this is standard). Ordinarily then, the prosecution of BBC Developments would be a matter for Mr Brisby to initiate and carry through, not the General Manager.

599. Mr Brisby, however, says that because a councillor was involved (albeit through a company that he was a director and shareholder of), it was a special circumstance and he needed direction from Mr Burgess which he never received. In his evidence he actually put the matter slightly higher, saying that he sought direction from Mr Burgess:

> *"…out of respect to the General Manager. He reports to the Council, specifically the mayor and the councillors. He's employed by the Council. I think it would be very important that he knows* [that a prosecution was going to be commenced against a councillor]" : T-524.35-.43.

600. Mr Brisby's evidence was also that he said he thought that Mr Burgess was *"handling the matter"* – not just the ICAC component involving Mr Malouf, but also any possible prosecution of BBC Developments.

601. Even after the second letter of advice from Deacons regarding a recommendation to prosecute BBC Developments by way of penalty infringement notices, Mr Brisby said he recalled a conversation in late 2009 with Mr Burgess who said he was *"dealing with it"*, which Mr Brisby took to mean not just the ICAC matter (which did not conclude until 22 June 2010) but also the issue of a possible prosecution of BBC Developments: T-489.26-.32.

602. That the issue concerning the Station Road Development was an out of the ordinary matter is supported by the fact that Mr Burgess broke his usual routine and attended the first conference with Deacons in November 2008: see T-627. There is also no doubt that Mr Burgess did deal with the ICAC aspect of the matter (a matter outside of Mr Brisby's authority in any event). However, the second Deacons written advice of October 2009 largely puts the ICAC issue to one side - there is a reference in the letter that ICAC indicated that it was *"difficult to sustain action against the relevant officer"*: Exhibit SR1, p.312. The second letter of advice from Deacons again reaffirmed the strong public interest in the Council taking action against BBC Developments: Exhibit SR1, p.314. The lawyers' recommendation again was to prosecute.

603. The meeting with Ms Simms recorded in her July 2009 note (which is before the second Deacons advice of October 2009) is some evidence that Mr Burgess thought a prosecution was going to take place, and Mr Brisby would be the responsible council officer. Mr Burgess and Ms Simms had no recollection of Mr Brisby being present during this conversation that Ms Simms made a note of, but Mr Brisby himself remembers being at a meeting with Mr Burgess and Ms Simms when the Station Road development was discussed. Mr Brisby accepted throughout his evidence that if a prosecution was undertaken, then he would be the responsible council officer overseeing that prosecution.

604. Mr Burgess cannot recall a specific meeting with Mr Brisby where they discussed the prosecution of BBC Developments: see Mr Burgess' supplementary statement of 6 June 2006 (Exhibit S12) at [19]-[21]. I think a summary of his position was that he assumed Mr Brisby had taken carriage of the matter and was unconcerned he had not heard about it because he was unlikely to hear much further about the matter if the prosecution was by way of infringement notices: T-559.1-.6 and Exhibit S12 at [14].

605. The situation with the evidence is then that Mr Burgess does not have a specific recollection of a discussion with Mr Brisby in which he directed him to initiate prosecution proceedings against BBC Developments. It appears more that he assumed that he would. Mr Brisby on the other hand at all times was waiting for a direction from Mr Burgess to commence any prosecution proceedings, and his

evidence was that he was told by Mr Burgess that he was handling the matter of the Station Road Development generally – both the ICAC part, and the issue of when and if to prosecute BBC Developments.

606. Counsel Assisting does not suggest that adverse findings involving misconduct or dishonesty should be made against either Mr Brisby or Mr Burgess. He contends only that Mr Brisby should be found as a matter of fact to have failed to fulfil his duty to prosecute. In my view the most likely thing that occurred here, and what I find as a matter of fact, is a form of miscommunication between Mr Burgess and Mr Brisby concerning the prosecution of the Station Road Development. I think it is likely that Mr Burgess did tell Mr Brisby that he was handling the matter, but this was in my view likely to have only been a reference to the ICAC matter concerning Mr Malouf. I think for a period Mr Burgess probably did assume that Mr Brisby was taking care of any prosecution of BBC Developments based on the advice of Deacons of October 2009. Mr Brisby, however, was acting under the assumption that he needed some "sign off" by Mr Burgess to commence any prosecution action against BBC Developments because of that company's association with Councillor Oueik. I accept Mr Brisby's evidence that because an elected member of council was involved, involving the General Manager in the decision on whether or not to prosecute made *"common sense"*: T 485.29

607. In my view, both Mr Brisby and Mr Burgess should have at some stage communicated with each other so that a prosecution of BBC Developments was commenced at least some time by early 2010. It appears that neither Mr Burgess or Mr Brisby took any steps to follow the matter up in either 2010, 2011 or 2012.

608. The position was then reached where, according to Mr Burgess, the matter "*went off his radar"*: T-634, while Mr Brisby continued to wait for a direction from Mr Burgess that never came. In relation to a matter where the Council's legal advisers had twice advised there was a strong public interest in prosecuting, both Mr Brisby and Mr Burgess should have ensured they communicated with each other in a way that ensured that a prosecution was commenced within time. Given that there is no misconduct or dishonesty involved in this failure, and that Mr Burgess is retired and that Mr Brisby's employment as General Manager ceased shortly after the abolition of

the Auburn Council, there seems little utility in making any further findings in relation to the Station Road Development.

(iii) Recommendations

609. Counsel Assisting has suggested the following recommendations as a result of the Station Road development evidence:

SR [4] The Local Government Act should be amended to provide, except in relation to minor matters, for the referral of any question concerning the prosecution of a member of council or a staff member of a council to an independent body for a decision to be made regarding, either the DPP or the OLG.

SR [5] It is entirely inappropriate for decisions in the case of significant prosecutions, such as the one in this case, to be taken by council staff and/or the General Manager. Such prosecutions are likely to be rare, but when necessary, generally likely to have a significant public interest attached to them. For this reason, the decision to prosecute ought be made at arm's length from the Council and the staff who have to regularly deal with the relevant councillor.

610. One thing that emerged from the evidence of Mr Brisby was a certain lack of comfort he had in dealing with a potential prosecution in a matter related to a current elected member of the Council. He expressed the view that it would be a very brave person who would initiate a prosecution of a councillor without consultation with the General Manager. The General Manager of a council is of course appointed by the council itself: s.334(1) of the Act. Further, the General Manager must herself or himself consult with the Council concerning the appointment or dismissal of "senior staff": s.337. In his position as Director of the Planning Department of the Council in the period 2008 through to 2012, Mr Brisby held a senior staff position.

611. I agree with the submission from Counsel Assisting that it seems inappropriate for either a General Manager or a senior member of Council staff to be in a position where they have to exercise a discretion as to whether or not to prosecute a member of the elected council (or in this case, prosecute a company of which an elected member

of council was a director and shareholder), or to have to carry through that prosecution.

612. I further agree with Counsel Assisting that consideration should be given to a legislative amendment or amendment of the Model Code such that the decision of whether or not to prosecute an elected member of council is made by an independent body (such as perhaps the DPP or the Office of Local Government) rather than by a General Manager or senior member of staff.

SECTION 11: 14-22 WATER STREET, LIDCOMBE

(a) Introduction – the critical error

613. On 30 January 2016 a storm passed through Sydney bringing heavy rain and high winds. During the course of the storm, approximately two-thirds of the roof blew off a residential flat building at 14-22 Water Street, Lidcombe ("the Water Street Building").

614. The Water Street Building had received development consent from the Council on 9 September 2005. The development approval was for "*demolition of existing structures and the construction of a 4-storey residential flat building containing 50 units with basement car parking*": Ex WS1, page 49.

615. The applicant for development consent was Zhinar Architects, but the owner of the property and the developer was BBC Developments (the developer of the Station Road Development), a company associated with Councillor Oueik. Development consent was granted for the Water Street Building despite an independent external planner recommending refusal of the DA: page 45, Ex WS 1.

616. The damage to the roof of the Water Street Building no doubt caused a great deal of inconvenience and distress to the occupants. On 1 February 2016 Council issued emergency orders to secure the site and undertake works to repair the building in accordance with a structural engineer's advice and certification: Ex WS 1, page 303. The insurers of the strata body (AIG Insurance) were notified of the event. The insurer's solicitors (Lander & Rogers, Lawyers) instructed engineers to investigate the cause of the failure of the roof, and to prepare an expert report on that matter: report of Broune Group Consultants dated 11 March 2016 at page 311 of Ex WS 1. The conclusions of that report included:

> "*(i) The roof support structure does not comply with the requirements of the BCA, that it remain stable and not collapse, prevent progressive collapse and avoid causing damage to other properties, and of AS 1720.1, that it prevent instability due to wind uplift by resisting the actions to which it can reasonably be expected to be subjected.*

(ii) *The roof and ceiling support structure have insufficient anchoring to the walls and floors to prevent uplift by wind forces to which the roof can reasonably be expected to be subjected.*

(iii) *Based on my calculations and analysis, it is my opinion that the roof failed at wind speeds much lower than that which the BCA and Australians Standards required the roof to withstand. In my opinion, any building that was designed and constructed in accordance with the requirements of the BCA and Australian Standards would not have been damaged by the wind that caused the roof of this building to fail"* :Ex WS 1, page 353.

617. The author of the report expressed the opinion that "*the damage to the roof was caused by the failure of the builder to construct a roof structure that had adequate strength to resist the wind uplift forces to which it could reasonably be expected to be subjected"*: Ex WS 1, page 354.

618. As a result of the opinions expressed in the expert report, AIG refused to indemnify the Strata Plan for damage. The Building Strata Plan lawyers (Bannermans, Lawyers) notified the Council of this in a letter sent to the Council dated 17 March 2016: Ex WS 1, page 309.

619. By memorandum dated 21 March 2016 from Mr Glenn Francis (the Executive Manager Planning for the Council) to the Council's General Manager, Mr Mark Brisby, Mr Francis described a "*critical error"* in the certification process for the Water Street Building. The error was his.

620. What emerged from Mr Francis' memorandum and other documents from the Council's files was that:

(a) A Construction Certificate was lodged on 24 March 2006: Ex WS 1, page 79.

(b) On 26 April 2006 consent was granted for the construction of the building through the determination of a Construction Certificate of that date: Ex WS 1, page 103.

(c) On 14 September 2007 the Council approved a s.96(1A) Modification to make some amendments to the development consent: Ex WS 1, page 387.

(d) On 23 October 2007 consent was granted for an amended Construction Certificate to delete three of the 3-bedroom units and replace with six 2-bedroom units on each north east corner of the building and various other minor changes: Ex WS 1, page 387 and page 225.

(e) Also on 23 October 2007 the Council (Mr Francis) wrote to BBC Developments outlining the mandatory critical stage inspections that must be carried out by the Principal Certifying Authority: Ex WS 1, page 223.

(f) On 14 February 2008 a further s.96(1A) application was lodged with Council to modify the roof form of the building: Ex WS 1, pages 236 and 237. What was sought was a deletion of a box gutter form roof to a standard roof whereby all water guns to an external gutter: Ex WS 1, page 301 and page 388.

(g) By letter dated 19 March 2008 from the Council (Mr Francis) BBC Developments was notified that the Council would consider the then current s.96(1A) application at the Council meeting to be held that evening at 6.30 pm: Ex WS 1, page 245.

(h) The Director's Report, Planning and Environment Department for the 19 March 2008 meeting of Council contained a recommendation that the s.96(1A) Modification be approved: Ex WS 1, page 249. The same report expressed the opinion that the *"proposed modification of the roof structure is considered to be a minor variation of the existing approval":* Ex WS 1, page 255.

(i) The s.96 Modification Application for the roof was approved by Council at its meeting of 19 March 2008: Ex WS 1, page 259.

(j) On 18 September 2008 Mr Francis, on behalf of the Council signed and issued an Interim Occupation Certificate for the Water Street Building: Ex WS 1, page 287.

(k) On 19 September 2008 he signed and issued a Final Occupation Certificate: Ex WS 1, page 291.

621. The "critical error" identified by Mr Francis from Council's certifications was that *"an amended Construction Certificate was not received for the new roof"*. Mr Francis explanation for this in his 21 March 2016 memorandum to Mr Brisby was as follows:

> *"The final inspection was completed, certificates complied and the paperwork was generated by Mr O'Neill. The final occupation certificate was signed by myself after reviewing the information. I did not pick-up that an amended Construction Certificate was not lodged for the new roof, nor that a Building Certificate should have been obtained before issue of the Final Occupation Certificate. This was not deliberate and only after reviewing the file again that I have noticed the error. I have always acted in a professional manner and can offer no other reason that I was a relatively new manager at the time, I was developing greater procedures for the Planning and Certification Unit, the emphasis for myself was really on fire safety and that this was a genuine honest mistake":* Ex WS 1, pages 388 and 389. (Emphasis added).

622. The "Mr O'Neill" referred to above was Mr Peter O'Neill, who was engaged by the Council to undertake the inspections for the Water Street Building "as Council has a shortage of building surveyors": Ex WS 1, page 388. Mr O'Neill's status was that he was a temporary employee of the Council for the purposes of inspections.

(b) Cause of roof damage outside the Inquiry's Terms of Reference and s438U of the Act

623. If there was a failure to build the roof of the Water Street Building in accordance with the BCA and Australian Standards such that the roof failed to withstand the winds of the storm that occurred on 30 January 2016, that could no doubt also be described as a "critical error". However, the Inquiry is not investigating that matter, and can make no findings about it. Investigation of that matter, and a final resolution of it, if it proceeds that far, is for a Court. Whether or not the roof of the Water Street Building was or was not built in accordance with the BCA or Australian Standards by BBC is not a matter that falls within the Terms of Reference of the Inquiry. Given the power

granted to the Minister under s.438U of the *Local Government Act*, resolution of such an issue could never fall within the Terms of Reference of an inquiry of this kind. However, the certification process of the Council relating to the Water Street Building does fall within the Terms of Reference.

(c) Findings

624. In his 21 March 2016 memorandum to Mr Brisby, Mr Francis described his conduct in issuing the Final Occupation Certificate as *"a genuine honest mistake"*.

625. In his evidence at his private hearing, Mr Francis accepted his conduct was an oversight (Ex PH 10 T-9.37), but denied that it had anything to do with the evidence he had given concerning the kitchen cupboards installed in his new home in 2006: Ex PH 10 T-49.7-.11.

626. In his written statement, Mr Francis said his error was not deliberate, nor done to assist Mr Oueik: Ex S23 at [33].

627. Counsel Assisting has submitted that the most likely explanation for what occurred is that given by Mr Francis – he made an honest mistake. I accept this submission.

628. Counsel Assisting has also submitted that Mr Francis' mistake was *"almost certainly a failure to exercise [a] reasonable degree of care and diligence for the purposes of s 439(1)"* of the Act.

629. Not every error or mistake by a member of council staff will properly be found to be a breach of s.439(1) of the Act. Whether conduct or omission constitutes a failure to exercise due care or diligence will depend on a number of factors, including the seniority, experience and training of the staff member involved (which in part will determine the level of skill expected of them), and the nature of the conduct or omission.

630. I accept that part of Council Assisting's submission which suggests that ordinarily where a senior member of a council's planning staff issues a final occupation certificate in circumstances which amount to error on their part, a failure to take

reasonable care is likely to be evident – although such a finding would depend on all the circumstances.

631. Mr Francis is no longer an employee of either Auburn Council, or Cumberland Council. Council Assisting accepts his error was an honest one, and no misconduct or dishonesty was involved. His error was made over eight years ago. Further, the issue of the construction of the roof of the Water Street Building, and the cause for its failure, are before a Court, or it is anticipated they might be. For these reasons, I see no utility in expressing an opinion as to whether Mr Francis' error here, made by him when he was a relatively new member of the council's staff, was a breach of s.439(1) of the Act.

SECTION 12: ALLEGED FALSIFICATION OF BASIX CERTIFICATE – DEVELOPMENT AT 36-44 JOHN STREET, LIDCOMBE

(a) Introduction

632. By letter dated 27 April 2016 from Mr Viv May, the Interim Administrator of the Council, to Mr Darren Sear, the principal investigator of the Auburn Public Inquiry (page 1 of the BASIX Bundle), Mr May brought Mr Sear's attention to Development Application DA-294/2004 concerning a property at 36-44 John Street, Lidcombe ("the Johns Street Development") that was lodged with Council on 2 September 2014.

633. The John Street Development was for the proposed construction of an 11 storey mixed use development comprising 137 residential units, 16 commercial units and four levels of basement parking. The applicant for the development approval was Sydney Construction & Developments Pty Ltd, a company associated with Councillor Mehajer.

634. The DA had been initially supported by a BASIX certificate having reference number 572014M dated 2 September 2014. A further BASIX certificate was submitted with amended plans on 14 April 2014 having reference number 58717C and dated 21 March 2015.

635. Mr May's letter to Mr Sear followed receipt by Mr May of a letter from the Department of Planning and Environment dated 6 April 2016 concerning the BASIX certificate 58717C. The Department determined that that certificate was invalid. The suggestion made was that the certificate had been "falsified":

> *"It is possible that the applicant's submission of the BASIX certificate constitutes an offence under s.148B(3) of the Environmental Planning and Assessment Act 1979, however, it is a matter for Council to seek its own advice on what action should be taken in regard to any prosecution for this offence or in respect of the validity of the development consent for DA 294/2014. The Department will also carry out an investigation into the matter"* (emphasis added).

636. Back on 15 December 2015, Mr Peter Holt from the Department of Planning and Environment had sent an email to the Council's Records Department concerning the

BASIX certificate 58717C. This email also advised Council that the BASIX certificate appeared to be falsified.

637. Mr Holt requested that the Council provide to the Department certain information to assist it with its investigation. The Council did this. There is no need to set out here the ensuing events. The Inquiry has received no information as to the outcome of the Department's investigation, if there has been an outcome.

(b) No adverse findings

638. The Inquiry did not seek to investigate whether the BASIX certificate was falsified or not. That would have been outside the Terms of Reference, as it concerned a development consent sought by a company associated with Mr Mehajer, and not his conduct as an elected representative of Council.

639. The only matter of relevance to this Inquiry was the manner in which Council staff dealt with the matter. After inquiring into this, including an examination of Mr Okorn (the Council's Manager of Development Assessment) at the public hearing, no submissions were made by Council Assisting concerning this matter. There is no need for any finding to be made concerning this matter.

SECTION 13: 1A HENRY STREET LIDCOMBE

(a) Introduction

640. Mr Warren Jack is a part owner of a property known as 1A Henry Street Lidcombe ("the Henry Street Property").

641. At some time after the public hearings of the Inquiry commenced, Mr Jack contacted the Interim Administrator of the Council, Mr May, and made certain allegations about Mr Attie in relation to the Henry Street Property. As a consequence, Mr May referred Mr Jack to Mr Sear. Mr Jack provided the Inquiry with documentation from his personal files. Following this, Mr Jack, and his solicitor Mr John Hajje, were summonsed to appear at private hearings, and subsequently at a public hearing.

642. The main matter to be resolved in this Inquiry concerning Mr Jack and the Henry Street Property is in relation to a conversation that took place between Mr Jack and Mr Attie in a café in July 2015. Prior to considering and resolving the evidence of that conversation however, it is necessary to set out in abbreviated form some of the factual matters that lead up to that meeting.

(b) Initial complaint and prohibited use

643. Mr Jack and his wife purchased the Henry Street property in late 2013, and settlement was effected in February 2014. From time to time thereafter, as is evidenced from the phone records of Mr Jack and also Mr Attie (who voluntarily provided the Inquiry with his phone for examination), Mr Jack and Mr Attie were in contact, and Mr Attie on occasion provided Mr Jack with advice concerning his attempts to develop the Henry Street property. Those matters, where relevant, will be outlined below. Mr Jack had known Mr Attie for a number of years prior to his purchase of the Henry Street property, having met him through a local pastor: T-1479.42-.47.

644. On 31 March 2014 a complaint was made to Councillor Simms, concerning what appeared to be an illegal use of the Henry Street Property. That complaint was passed on to Mr Francis, who in turn passed the complaint on to Mr Jason Mooney, who was the senior development control officer of the Council whose duties included

investigating unauthorised development and non-compliance with development consent: see supplementary statement of Jason Mooney dated 11 August 2006 (Ex S 21 at [4]).

645. The complaint related to what appeared to be an impermissible use of the premises as a Training Centre in circumstances where the property was zoned R2 (low density residential), a zoning where commercial businesses are prohibited.

646. Inspection of the Henry Street property showed that large signs had been erected at its front with the heading "IOT Training" amongst other details: Ex WJ1 page 17.

647. As a consequence of this apparent illegal use, Mr Mooney issued Mr Jack and his wife with a Notice of Intention to give an Order pursuant to s.121H of the EP&A Act dated 15 April 2014 (Ex WJ1, page 21). This notice indicated that the Council intended to give a notice ordering Mr Jack and his wife to cease the use of premises as commercial premises and to remove the signs that had been erected.

648. Mr Jack's evidence was that he was unaware that it was impermissible to use the Henry Street Property as commercial premises. At the time he had purchased it from the Salvation Army, which he said had used it for teaching and training purposes, and it was also being used by church groups as a hall: see Ex PH 12 T-7.28-.41. Mr Jack's evidence was that at the time of purchase he had no idea about zoning: T-1509.44. He said that he had paid GST on the purchase price and thought it could be used for commercial purposes: T-1508.8-.39.

649. As a consequence of receiving the Notice of Intention to Issue an Order, Mr Jack had a conversation with Mr Attie, whom he says advised him to lodge a development application to gain approval to operate the property as commercial premises. The business apparently run by Mr Jack and owned by him was some kind of vocational training business. Training did not take place at the Henry Street property but the administration part of the business, including student enrolments, did take place there. By 18 July 2014 Mr Jack lodged a development application seeking a change of use. The change of use was *"from church hall to teaching facility and assembly hall"*: Ex WJ1 p.36. Mr Jack engaged Nino Urban Planning and Development to prepare a

Statement of Environmental Effects in support of this development application: Ex WJ1 from page 44. That report indicated that the development application was based on *"existing use rights"* in relation to *"ongoing use as a non-residential use"*: Ex WJ1, p.46. The development application was rejected on 23 July 2014: Ex WJ1 p.57.

650. As a consequence of the refusal of the development application on 4 August 2014, Mr Mooney issued an Order pursuant to s.121B of the EP&A Act in substantially the same terms as the Notice of Intention to Issue an Order. It ordered Mr Jack and his wife to cease using the property as commercial premises and to remove the signs that had been erected: Ex WJ1 p.58.

651. After the Order was issued on 4 August 2014, Mr Jack says he had a phone conversation with Mr Attie in which he expressed surprise that his development application had been refused. He said that Mr Attie told him that *"the four people that run Auburn Council want that block"*, a reference to the Henry Street Property: T-1521.18).

652. His evidence was that Mr Attie then advised him not to use the property as a business premises because he would receive fines but that he could make non-structural changes to the residential part of the property, including updating the kitchen and bathroom: T-1526.36 and T-1522.24-.30. Mr Attie agreed that he had had a conversation with Mr Jack concerning residential use but that it was a relatively limited conversation in which he advised Mr Jack that if there was an existing residence there then it could be used under that existing status: T-1843.39.

653. Mr Jack then commenced a series of renovations and other building works on the Property, all of which were unlawful. These unlawful building works were observed by Mr Mooney and another patrol officer who, on 8 September 2014 visited the Henry Street property and told a workman to cease work. Mr Mooney and the patrol officer returned to the Henry Street property on 9 September 2014, where they had a conversation with Mr Jack concerning the unlawful works that were taking place. It would appear that during the course of this conversation Mr Jack phoned Mr Attie as Mr Mooney recalled seeing the word "Ned" on the screen of Mr Jack's phone: Ex S 21 at [12].

654. Part of the purpose of the visit by Mr Mooney on 9 September 2013 was to serve Mr Akerry (the workman who was working on the Henry Street Property) with an Order pursuant to ss.121B and 121D of the EP&A Act, ordering him to cease work on the property: Ex WJ1, p.77. After a difficult altercation with Mr Akerry, who would not accept service of the order, Mr Mooney ultimately had to place the order in the post, together with notice of a similar order on Mr Jack and his wife as owners of the property.

655. On 25 September 2014 Mr Jack lodged a further development application seeking a *"change of use from Salvation Army church to residence plus home office. No exterior works or editions"*: Ex WJ1, pp.88-93. Mr Jack lodged this development application in person, and was seen by a Council officer, Ms Ong. Ms Ong made a typed note of her dealings with Mr Jack as she indicated that she could not accept the development application as the unauthorised works issue was unresolved and she suggested that a revised Statement of Environmental Effects be prepared. During the course of her discussions with Mr Jack, it would appear he rang Mr Attie who attended for part of the discussion: Ex WJ1, p.94. At this meeting Mr Attie contacted Mr Jack's consultant who was preparing the Statement of Environmental Effects and had a discussion with him.

656. Mr Jack and his family moved into the Henry Street property in about October 2014. Mr Jack said he did this on the advice of Mr Attie: Ex PH 12 T-18.29-T-20.22. Mr Attie denied this.

657. Mr Jack's development application lodged on 25 September 2014 was refused by the Council on 12 March 2015: Ex WJ1, p.108. Amongst the reasons for the rejection of the development application was that the site was affected by high hazard flooding which would impact the residential use, a BASIX certificate was not submitted, and the office area inside the dwelling house exceeded the maximum of 30m² that was permissible for home businesses in the R2 low density residential zone.

658. Complaints were then received by the Council concerning the alleged continued use of the property for commercial purposes, and concerning the erection of a 2.4-metre-

high fence without consent: Ex WJ1, p.111. A further notice of Intention to give an Order pursuant to s.121H of the EP&A Act, dated 30 April 2015, was served on Mr Jack and his wife concerning the erection of the fence, which did not comply with the development standards of the relevant SEPP: Ex WJ1 p.145. A similar Notice of Intention to Give Order of the same date was served on Mr Jack and his wife, essential seeking reinstatement of the internal works that had been undertaken in the property without consent: Ex WJ1, p.150. As a result of continued non-compliance with these Notices of Intention to Give Orders, Orders were issued under s.121B dated 25 June 2015 in substantially the same terms: Ex WJ1 from page 161. The Order in relation to the reconfiguration of the building also ordered removal of newly laid concrete pavement.

659. Prior to the issue of these orders on 25 June 2015, on 5 May 2015 Mr Attie contacted Mr Francis, who had apparently sought from him an update regarding the status of the Henry Street Property. Mr Francis sent an email back to Mr Attie of 5 May 2015 in which he provided a general update of the various orders that had been served on Mr Jack and details concerning the development applications that had been lodged and refused: Ex WJ1, p.113.

660. Following the service on him of the orders of the Council of 25 June 2015, Mr Jack and Mr Attie made arrangements to have a breakfast meeting.

661. At the private hearing on 14 July 2016, Mr Jack's evidence concerning the meeting of 15 July 2015 with Mr Attie was as follows:

> "*A: Now we went and met around 8 o'clock in the morning, around 8 o'clock in the morning we met at the Flower Shop Café. I ordered the standard $10 breakfast. I think Mr Attie ordered toast with eggs and muffins or something like that.*
>
> *The Commissioner: Q: What was the purpose of the meeting?*
> *A: … He said: "Warren, meet for breakfast. I think I've got a solution for you". This is prior to the meeting. He said, "I've got a solution for you". I went and met him for breakfast. He said to me, "How are the children, how is this, how is that", all the general chit chat. We finished breakfast. He said to me words to the effect "We can make it all go away". He said: "They want $200,000". I stopped, I was taken aback, I said, "What?" He said to me, "It's not me, they want*

> *$200,000". I then went blank for a bit. My – I'd just finished breakfast, my breakfast was coming up and I stopped it. I actually regret stopping it from coming up and going all over him. I stopped it. He looked at me and said, "Calm down, calm down, what's wrong with you?" You've gone white, you are shaking". I said, "What do you mean they want $200,000?" He said, "It's not me". He said, "Hicham Zraika would not approve any development unless he gets at least $500,000". I said, "What the fuck? This is my home. I'm just trying to live here". He said, "Warren, it's not me, calm down". I said, "Where the hell am I going to get that sort of money". He said, "Sell your cars, take a loan on your house". He kept talking to me after that and I just looked at him and I said to him, "Go fuck yourself". I said, "Not even one cent will I give you". He looked at me as if, "Who do you think you're talking to?" Because Ned thinks he's some big gangster, which I believe he's got a lot of connections. He said, "What did you say to me?" I stood up, there were quite a few people around. And in the light of this I said to him, "I said you can go and fuck yourself". And I walked out*." : Ex PH12 at T-33.12-34.2.

662. Mr Jack also said in his evidence at the private hearing that Mr Attie "*always referred to four of them that run and control everything that happens in Lidcombe and Auburn*": Ex PH12, T-34.4. He said that Mr Attie mentioned Mr Zraika's name but could not recall any other person's name.

663. When examined by Counsel Assisting at the public hearing, Mr Jack's evidence concerning the breakfast meeting he said took place on 15 July 2015 with Mr Attie was in substantially the same, but not identical terms, to his evidence given at the private hearing: see T-1497.24-1498.5.

664. Mr Jack produced phone records to the Inquiry, which showed that he received four missed calls from Mr Attie between 8.42 am and 11.32 am on 15 July, the last of which involved Mr Attie leaving a voice message in the following terms: "*Warren, this is the fifth phone call this morning. Where the are you*?": Ex WJ2. Mr Jack said that he did not take any of these calls because: "*I thought he* [Attie] *was someone who looks after the community. I thought he was a good person. He'd warned me about other things previously, but at that point I realised it was him that was doing it*": T-1498.23-.26. Mr Attie's phone records included text messages to Mr Jack on 15 and 16 July 2015 in which he asked, "*What is wrong with U*" and "*Is it that hard to answer you're* [sic] *phone*": Ex FTB1, page 177-178.

665. Mr Jack's evidence was that at around midday on 15 July 2015 he rang his solicitor, Mr John Hajje to inform him of the conversation he alleged he had with Mr Attie at breakfast that morning. Mr Hajje also gave evidence at the private and public hearings, and he confirmed that Mr Jack had called him concerning a meeting he alleged he'd had with Mr Attie. Mr Hajje's evidence was as follows:

> "*A: I can give you words to the effect of – and he was quite distressed when delivering these words to the effect of, it was along the lines of, "I've just been to a lunch", and my recollection is he had believed he had been invited to this lunch to help sort a problem he was having with Council. I was aware he was having a problem with some internal partitioning that had been erected in a premises he'd purchased in Lidcombe, and the nature of his distress centred around the fact that the lunch seemed to be some attempt to elicit a bribe out of him.*
>
> *Q: As best you can, the word that he used, to the effect of?*
> *A: They were words to the effect of, "I've just had lunch". He named some people. Don't recall the actual names. I recall one of the names as being a Ned. He said, "They've said to me $200,000 and all the problems will go away". … He appeared to be quite, as I said, he was rattled, he appeared to have some fears and I told him that I thought he should possibly report it to somebody, put it on the record so that there is a record of it occurring. I think we actually spoke about him reporting it to ICAC. I'm not sure if it was in that conversation or a subsequent conversation.*" (Exhibit PH11, T-3.45-4.30).

666. It can be immediately observed that there is consistency between what Mr Jack said was discussed between himself and Mr Attie at the breakfast meeting on 15 July 2015, and Mr Hajje's version of what Mr Jack reported to him. Mr Jack's evidence however is that there was a breakfast meeting, whereas Mr Hajje's recollection is that he was told by Mr Jack that it had been a lunch. One, but not the only, explanation for this is that it would appear that Mr Jack may have rung Mr Hajje at about lunch time and this may have caused some confusion as to what was said or as to Mr Hajje's recollection concerning whether the meeting was a breakfast or lunch meeting: see T-1503.43.

667. On 16 July 2015 Mr Jack wrote a letter to Mr Mooney at the Council concerning the orders he had been sent. In the course of this letter (Ex WJ1, pages 181-2), Mr Jack asserted that he had taken advice "*from numerous sources, including an Auburn City Councillor*" and that he had been "*reassured that my plans and works were legitimate and that I was on the right track*". There was no mention in this letter of any bribe or

to the sum of $200,000. Mr Jack's explanation of this when asked at the public hearing was: "*I was scared of him* [Attie]. *I've got a family living there. I've had threats from him from bikies, I've had threats of all sorts of things*": T-1505.17-.19.

668. Mr Attie disputed much of the evidence of Mr Jack concerning the breakfast meeting on 15 July 2015, including the central matter that he had sought any form of bribe, either on behalf of himself or anyone else. Aside from some minor disagreement about what was ordered for breakfast, Mr Attie's evidence was that the meeting took place on 10 July 2015 and not on the 15th. He said that a meeting had been organised for 15 July, but that Mr Jack had not turned up, which is why he had made the phone calls to Mr Jack and sent the messages that he did on both 15 and 16 July.

669. Mr Attie agreed that on 10 July 2015 the sum of $200,000 was mentioned. Mr Attie's evidence was that he mentioned this figure in the context of telling Mr Jack what he thought the likely estimate of costs would be for Mr Jack to address the issues of unlawful development that the Council was now enforcing against him. Rather than saying that he could "*make it all go away*", he gave advice to Mr Jack that to remedy the issues of illegality that had been identified by the Council, Mr Jack would have to take such steps as: "*getting a planner involved, a consultant, an architect, a civil engineer, a hydraulics engineer, a flood study of the entire Lidcombe area and an evacuation plan and legal fees*": T-1859.3-.10. He agrees that he told Mr Jack that he *"wouldn't get much change out of $200,000"*: T-1859.14. Having given this advice to Mr Jack, Mr Attie's evidence was that:

> "*What happened then is that Mr Jack sort of then got a bit startled at the amount and he said, "I thought it would only probably cost about $50,000 or $60,000 to fix the problem". I said, "The flood study alone will probably cost you more than that, because you've got to do a flood study for the entire Lidcombe, South Lidcombe area, as it is a known flood area, but you may be able to save some money because Council is about to or have already commenced doing a flood study for the South Lidcombe area and if you talk to the Council staff, they may be able to assist you with a copy or at least help you along the way*": T-1859

670. Mr Jack also gave evidence that within about a week of the breakfast meeting he says he had at the Flower Shop Café on 15 July 2015 with Mr Attie, he rang Councillor

Zraika. He said he then had a meeting with Mr Zraika at the Flower Shop Café. His evidence was that they had a conversation in the following terms:

> "*Q: What were the words?*
> *A: I .....?? the words were that Ned said - I said, "You know I've been having problems with my property. I've had threats by bikers, I've had threats by all sorts of people about the property". I said, "Ned said to me they want $200,000".*
>
> *Mr Watson: I didn't understand.*
> *Mr Bolster: Q: "Ned said" What were Ned's words?*
> *A: They want $200,000. He always – he always referred to the four people that ran Auburn Council. …*
>
> *Q: What did he say?*
> *A: He was shocked.*
>
> *Q: Did he say any words?*
> *A: I don't remember the exact words, but I know – I know he said words to the effect that, "That's terrible". I don't know why he would say that, and he said, "Thank you for bringing that to my attention".*
>
> *Q: In the conversation you just indicated, you said, "You know I've been having some problems with Henry Street?"*
> *A: Yes.*
>
> *Q: Why did you say that to Mr Zraika?*
> *A: Because he knew*": T-1500.26-T-1501.10.

671. Mr Zraika agreed that he had a meeting at the Flower Shop Café with Mr Jack who expressed frustration regarding what was happening with the Henry Street Development. However, Mr Zraika's evidence was that he had difficulty following what Mr Jack wanted. Mr Zraika's evidence was as follows:

> "*Look, I couldn't work out exactly what he wanted. That's the – you know, he just – he was all over the place. He talked about – more about his personal life than anything, you know*." (T-1907.20-.23)

Mr Zraika denied that Mr Attie's name came up during the course of the conversation or that there was a mention of the sum of $200,000. Bearing in mind that Mr Jack says that the breakfast meeting with Mr Attie occurred on 15 July 2015, it can be noted that Mr Zraika's phone records show two calls from Mr Jack, occurring on the evening of 14 July 2015 (Ex Gen 25).

672. On 12 November 2015 Mr Mooney carried out an inspection of the Henry Street property to undertake a compliance inspection. During the course of his attendance at the property that day, Mr Jack made a complaint to Mr Mooney (which Mr Mooney passed on to his supervisors at the Council) that "*persons from the Council and representatives had advised him to do things and he believed they had acted criminally*" and that Mr Jack alleged that "*he was told that for $200,000 he could have the matter sorted*".

673. On 20 November 2015 the Council, through Mr Mooney, issued a Penalty Infringement Notice in relation to the non-removal of the illegal works at the property: Ex WJ1, pages 231-232. The fine sought was in an amount of $3,000. Mr Jack elected to have the matter dealt with at Court, where he received a fine of $50,000. This was following what ultimately became a plea of guilty. In a letter to the Council dated 22 June 2016 concerning the Court appearance, Mr Andrew Gough (the Council's solicitor from Storey & Gough Lawyers) advised the Council that during the course of submissions, Mr Jack attempted to give evidence, or at least make submission concerning conversations he had had with Mr Attie. To the extent that this could be considered evidence, it was objected to by Mr Gough and disallowed: see Ex WJ1, pages 253-254.

674. A final allegation made by Mr Jack during the course of his evidence was that he believed he was being set up by Mr Attie, so that either Mr Attie or someone associated with him would be able to purchase the Henry Street Property. His evidence was that: "*Time and time again, Ned Attie would say to me, "Warren, you don't need this trouble. Let it go. I've got someone who will buy it off you. If you want a developer, there's only four of us who are developers in this area*"." (T-1526.28-.33).

Findings

675. Counsel Assisting's first main submission concerning the Henry Street property is that "*Mr Attie played a role that went above and beyond that of an elected representative of a ratepayer, to in effect become the legal/planning adviser of Mr Jack throughout the whole process*": CA submission at HS2. I accept this submission. It is not clear,

beyond being a member of Council, what expertise, experience or training Mr Attie has to enable him to give the advice that he appeared to give to Mr Jack. That said, this was not a matter directly being inquired into, and there is no finding made that the advice given by Mr Attie was incorrect.

676. Counsel Assisting also submitted that "*the Inquiry ought not find that Mr Attie made any threat to Mr Jack in the terms alleged by him*". Counsel Assisting has gone on to submit that "*there is insufficient evidence to provide any substantiation of the allegation that Mr Attie sought a bribe*": CA written submission at HS3.

677. I also accept this submission, but would go further. In my view to simply find that there was insufficient evidence of a bribe would not be fair to Mr Attie. I find that Mr Attie did not seek a bribe from Mr Jack. I do not accept the construction of the conversation at the breakfast meeting that took place sometime in July 2015 that was placed upon it by Mr Jack in his evidence. I accept the evidence of Mr Attie in this regard.

678. Counsel Assisting at HS4 of his written submissions also submits that there is "*no evidence to suggest that Mr Zraika ever made a demand of the kind referred to by Mr Jack*". I accept this, and my finding is that Mr Zraika did not make any improper demands, either to Mr Attie or to Mr Jack, nor did he behave in any improper way in relation to the Henry Street Property. In relation to the meeting that occurred at the café between Mr Jack and Mr Zraika, I reject the construction of the conversation contained in Mr Jack's evidence and accept Mr Zraika's version of events.

679. These findings squarely raise the issue of what to make exactly of Mr Jack's evidence. I do not accept its reliability, but there is an issue as to whether Mr Jack was deliberately untruthful. I will set out Counsel Assisting's submissions in relation to the finding he suggests I should make about this matter in full, as they are very different to those made on behalf of Mr Attie. Counsel Assisting's submissions are that:

> "*HS5: What is most likely to have happened is that Mr Attie, as his evidence went, explained to Mr Jack that an order for him to deal*

with the multiple problems that faced him as a co-owner of 1A Henry Street and nominated the likely cost of doing so.

HS6: Mr Jack has misunderstood that conversation and ascribed to it an improper purpose that was simply not there.

HS7: The $200,000 figure was clearly used and it clearly upset Mr Jack, judging by his report to Mr Hajii [sic], his call to Mr Zraika and subsequent events. He probably did mistakenly believe, or was at the very least confused about, the basis upon which Mr Attie was mentioning that amount of money.

HS8: From Mr Jack's perspective, he had been placed in that position by reason of the advice that he was given regarding the improvements made in July-October of the previous year. In that respect, the Inquiry would have little difficulty in accepting that Mr Jack acted on the advice of Mr Attie to carry out the relevant alterations. Mr Jack was living elsewhere when the property was acquired for a non-residential purpose. The solution to the residential zoning was to use the property as a home office and for that, residential renovations were needed to accommodate the Jack family. In this respect it was apparent from Jack's evidence and demeanour that he had some difficulties with the written word."

680. In the written submissions filed on behalf of Mr Attie, a number of matters are emphasised in support of the contention that I ***must*** find that Mr Jack is a liar. In relation to this it can first be observed that to contend that I ***must*** make a particular finding one way or another is an unusual submission to make. I will treat it as a submission, boldly framed, that indicates in strong terms that a particular finding should be made on the basis of the evidence.

681. At [76] of the written submission of Mr Attie, a number of matters are emphasised to support the contention that Mr Jack deliberately lied on oath. I have considered all of these matters. Without reciting each of them, the observation can be made that some have more force than others. It is suggested, for example, that Mr Jack's evidence that he believed that the Henry Street Property was zoned commercial before he purchased it because he paid GST was *"quite incredible evidence"*. I do not accept that submission. I accept that Mr Jack did not know because he wasn't careful enough to check. It is also suggested that Mr Jack gave *"inconsistent accounts"* about the intentions he had for the premises and in particular as to the extent that he intended to use them, originally, as business premises. In my view, Mr Jack's evidence may have

been confusing, but was not totally inconsistent. One thing that is clear is that Mr Jack is a poor historian. He presented as an anxious and nervous witness. He claims to be dyslexic and there is no reason not to accept this evidence. There were times where he appeared confused by straightforward questions. I did not view this on most occasions as evasion. He clearly intended to originally use the premises for his business. It is unclear whether it was purely for administrative purpose only, or also for teaching.

682. Criticism is also levelled at Mr Jack's evidence concerning the erection of a fence at his property and the erection of signage. I agree that the explanations given by Mr Jack were strange, but I did not find them to be deliberately untruthful. It is possible, however, as submitted on behalf of Mr Attie, that Mr Jack was not entirely frank in his dealings with a real estate agent in relation to the attempted sale of the Henry Street Property.

683. Reference is also made to Mr Jack's claim that the Council employee, Mr Mooney, who was the relevant Council officer responsible for his prosecution for illegal building works, was a *"puppet"* of four unnamed Councillors. This evidence on one view might be a demonstration of Mr Jack's extreme paranoia regarding much of his dealings with the Council concerning the Henry Street property. Mr Jack's evidence concerning Mr Mooney is rejected.

684. All of the matters drawn to the Inquiry's attention in Mr Attie's written submissions concerning Mr Jack are in aid of supporting the contention that Mr Jack is a "*conscious cold-blooded liar*". The submission is then made (at Mr Attie's submissions at [78]) that it would be a "*very sad outcome of this Inquiry if misconduct of a kind as serious as that of Warren Jack goes unpunished – and even worse if it passes without comment*".

685. Mr Jack's evidence will not go without comment, but it should be noted that this Inquiry has no power to punish anyone. It is, however, necessary to make a finding concerning whether or not Mr Jack gave deliberately untruthful evidence, particularly in relation to the conversation that he asserts took place between himself and Mr Attie at the breakfast meeting in July 2015.

686. There are some difficulties in accepting that all of Mr Jack's account of the breakfast meeting with Mr Attie can be put down to confusion. I can accept that Mr Jack may have become confused concerning what was said about the $200,000 spend in order to remedy the unlawful building works, but I reject that Mr Attie said to Mr Jack words to the effect that "*Hicham Zraika would not approve any development unless he gets at least $500,000*". It is difficult to see how evidence of that kind could have been the result of confusion on Mr Jack's behalf. I also reject that at his breakfast meeting with Mr Zraika that Mr Jack said anything about the "*four people that ran Auburn Council*".

687. I do, however, accept that Mr Jack is a man prone to confusion and, to an extent, paranoia concerning much of what he has been advised or had said to him concerning the Henry Street property. He appears easily agitated, and prone to hyperbole. I do accept, to some degree, as submitted by Counsel Assisting, that Mr Jack probably did become confused concerning what Mr Attie was telling him about the estimated costs to deal with the unlawful works at the Henry Street property. He may have, in that confused state, ascribed to Mr Attie's advice an improper purpose that was not there. Such a finding is supported by my view that Mr Jack does not always listen carefully to what is said to him. It is further supported by his near contemporaneous phone call to his solicitor Mr Hajje, in which in an agitated fashion - and I pause here to indicate that I accept entirely the evidence of Mr Hajje - that some kind of bribe had been offered to him by Mr Attie. To this genuine state of misunderstanding, Mr Jack has embellished his confusion with further matters that could not have come from any conversation he had with Mr Attie and Mr Zraika.

688. My findings in relation to this matter are that Mr Attie did not seek any bribe from Mr Jack. I accept Mr Attie's version of the conversation that took place at the Flower Shop Café in July 2015 with Mr Jack, and reject Mr Jack's version of that conversation.

689. In relation to the meeting between Mr Zraika and Mr Jack at the Flower Shop Café, I accept Mr Zraika's version of the conversation that took place, and reject those aspects of Mr Jack's version that Mr Zraika denies.

SECTION 14: PARKING RELATED MATTERS

Introduction

690. The issues in relation to parking matters that were relevant to the Terms of Reference were the following:

(i) Was "favourable" treatment given to parents parking at the Al Faisal College and if so, why?

(ii) Whether Mr Oueik abused a Ranger in the employment of the Council, outside one of his development sites?

(iii) Whether Mr Oueik received favourable treatment in relation to parking outside of a development site of his and if so, why?

Al Faisal College

691. A number of Rangers and former Rangers at the Council gave evidence in relation to the arrangements for parking outside of the Al Faisal College that were put in place by the Council that were particularly relevant to school pick-up and drop-off times.

692. Stephanie Griffiths, a former Team Leader of the Rangers of the Council who was made redundant in October 2014, provided a statement to the Inquiry which became Exhibit S8. In her statement Ms Griffiths explained that there were difficulties in relation to parking arrangements for the Al Faisal College, especially around school drop-off and pick-up times. In her statement she explained that:

> "*Al Faisal College was particularly problematic as it is situated between two busy streets with school entrances to both Auburn Road and Harrow Road. There were particular issues with the Harrow Road entrance. There are large no parking signs outside the entrances. Some of the parents arrived approximately 20 minutes early to pick-up their children and park their vehicles in the no parking areas and waited around for the children to finish school; this caused a problem with the flow of traffic which was because drivers arriving closer to the pick-up time had nowhere to stop and there were many instances of double parking and vehicles stopping in no stopping areas next to the pedestrian crossing. There was often a dangerous situation and the Rangers/parkers attended*

> *to speak to the driver who were in the no parking areas and asked them to move on. Occasionally vehicles were left unattended in these areas and they were infringed*." (Exhibit S8 [9]).

693. Ms Griffiths and Ms Diana Laing (a Ranger with the Council who also provided a statement that became Exhibit S5) gave evidence to the Inquiry that the problems relating to the Al Faisal College led to the Council bringing in directives that related only to the Al Faisal College.

694. In her statement, and in her evidence at the public hearing, Diana Laing (whose daughter, Emma, also gave evidence at the public hearing) maintained that she was given a directive *"not to patrol the school zone area at Al Faisal College"* from both Mark Brisby (who was at the time, in 2012, the Head of the Council's Planning Department) and by Robert Lawrence (who at the time was the Manager of Building Compliance with the Council). Diana Laing's evidence was that she was informed by Robert Lawrence "*on numerous occasions, that the parking at Al Faisal College was now self-regulating and he said "so be it on our heads if PINs are issued in the no parking area""*: Exhibit S5 at [8]. She said that this direction was "*reinforced at least four times over the next twelve months, during Ranger team meetings by Robert Lawrence*": Exhibit S5 at [10].

695. As part of the Exhibit to her evidence (Exhibit S8), Stephanie Griffiths referred to an email from Matthew Andrew to all the Rangers, c.c. Robert Lawrence, dated 29 March 2011 concerning "*School Zone enforcements*". However, rather than referring only to the Al Faisal College, this email referred to "*the schools within the LGA*". The email in its entirety is as follows:

> "*After attending a meeting with Mark Brisby, Robert Lawrence and myself this morning, it was decided that the schools within the LGA are to be enforced as follows:*
>
> *All no parking (drop-off, pick-up) areas are not to be enforced. Do not educate the drivers that are sitting in their vehicles. If they are sitting in their vehicle, do not chalk up or ask the vehicle to be moved on. If the vehicle is unattended and the driver now where to be seen, infringe as normal. Mark and the schools have asked that this be done over a four week period to see if it self-regulates itself. All other breaches of illegal parking are to be enforced as usual. If a driver, member of the public or*

> *a school representative approaches and asks a question on any parking matter or any other matter, please educate as usual. If there are any questions on the matter and its lack of enforcement on the no parking from members of the public, and schools, please refer enquiries to Mark Brisby*."

696. It may be that this policy initiative came about because of Mr Oueik's particular interest in parking matters which he had from the time that he became Mayor in late 2010. Mr Oueik's evidence (which was supported by Mr Brisby) was that he received a large number of complaints from parents concerning what was happening at school zones at drop-off and pick-up times. The issue of school parking was one that Mr Oueik took up in his various "Mayoral Messages" that were published in order to keep the community informed on this issue, and through his legal representatives, he tendered at the Inquiry a Plan described as the "Oueik Parking Plan" (Exhibit Gen 4). I accept this is evidence that Mr Oueik took school parking as a serious issue that he was attempting to resolve by putting in place a comprehensive School Parking Plan for the Auburn area.

697. Mr Brisby's evidence at the public hearing was also that Mr Oueik and other councillors were receiving complaints from the community, including complaints that the *"Rangers were being over-zealous"* and that Mr Oueik and relevant members of the Council staff sought to come up with a solution: see T-494-497.

698. Also part of the documentary evidence tendered at the Inquiry hearing were what were described as "toolbox meeting records" for meetings between the Rangers and members of staff. One of these toolbox meeting records dated 18 May 2011 (Exhibit S10 at page 68) records Mr Brisby as indicating that *"Mayor currently has schools as big issue"*. The toolbox records tendered indicate discussions concerning parking issues relating to pick-up and drop-off zones, but in relation to schools generally, rather than solely in relation to the Al Faisal College.

699. Further, in his evidence at the public hearing, Mr Lawrence, when questioned by Counsel Assisting, stated that there was no different policy for the Al Faisal school than for any other school: T-894.4-896.18.

700. In his evidence at the public hearing Mr Oueik described how he had received many complaints from parents concerning parking at schools after the time he became Mayor and that he spent considerable time on the issue, including speaking with the principals or deputy principal of every school in the Auburn Local Government Area. He made these visits with either the General Manager or another relevant member of the Council staff: see T-1075.

701. In her evidence at the public hearing, however, Diana Laing was adamant that the discussions at the toolbox meetings were only ever about the Al Faisal College and not other schools. When questioned about a record of the toolbox meeting of 17 August 2011, which referred to *"Further discussion on no booking in school zones"*, she said that the record was inaccurate as no other schools were talked about other than Al Faisal: T-198.15-.18.

Findings

702. At P 1(b) of his conclusions and recommendations concerning this particular aspect of the Inquiry into parking issues, Counsel Assisting makes the following submission:

> "*In the area of schools, there is a clear public interest in transparency in enforcement of the rules regarding parking. Parents are entitled to drop-off and pick-up their children safely at school; however, that can only occur where there is a clear understanding of the relevant rules. Whilst it may be perfectly reasonable to seek to educate drivers about the requirement of the zone surrounding the relevant schools, that cannot be seen as a long-term solution. The failure to enforce the parking rules surrounding schools in the longer term can only lead to abuse of the rules and that in turn must lead to a situation where pick-up and drop-off are more dangerous. Ms Griffiths made the valid point that a no parking zone, where the driver has 2 minutes to complete the pick-up and drop-off, and the driver must stay within 3 metres of the vehicle, is a "kiss and drop-off" zone of itself. She said that where drivers overstayed there were problems with the flow of traffic and this has often led to a dangerous situation. One can readily imagine that a policy of no enforcement in such a location can readily lead to increased traffic conditions and to double parking. A response to ask drivers to move on, on this, viewed objectively, is difficult to criticise.*"

703. While this submission from Counsel Assisting seems to me to have many aspects of common sense, it is not part of this Inquiry to make any findings and recommendations concerning the issues of parking around school zones. That would

require expert evidence which the Inquiry did not receive. The real issue is whether there was any improper conduct by any member of the Council or the Council's staff, in relation to school parking. In this regard, Counsel Assisting at P 1(c) has made the following submission:

> "*The Inquiry would accept the evidence of Ms Griffiths and Ms Laing, the directions were given to the Rangers about enforcement in and around Al Faisal College and that it was treated preferentially and that the source of these directions was Mr Oueik. Even if Mr Oueik did not use the phrase "self-regulating", the substance of the direction was to not enforce that zone*."

704. On the totality of the evidence before the Inquiry, I do not accept this submission. In saying that, I have no doubt that Ms Griffiths and Ms Diana Laing gave honest evidence concerning what they had been directed to do regarding Al Faisal College. This may have arisen because there were particular problems associated with pick-up and drop-off at that school and particular dangers as referred to by Ms Griffiths in her evidence. The evidence, however, does not support a finding that there was a policy only in relation to Al Faisal College or that this college was treated preferentially to any other schools in the area. I accept Mr Oueik's evidence, which is supported by documentation, that he had a genuine concern regarding parking at schools in the Auburn Local Government Area and that he sought to achieve a plan that would apply to all schools. Mr Lawrence's evidence was that there was no different policy for the Al Faisal school, and this evidence was supported by Mr Brisby. There is no proper basis for not accepting this evidence. Indeed, it is consistent with the documentary evidence. While I accept that Ms Laing and Ms Griffiths were truthful witnesses, the balance of the evidence suggests that there was a policy in relation to schools generally, rather than merely Al Faisal.

705. Counsel Assisting has also submitted at P1(e) that "*The inquiry would reject that the parking officers were overly officious in carrying out their duties*".

706. I agree that there is no proper evidentiary basis for such a finding. What the evidence supports is a finding that there were problems in relation to school parking in the Auburn Local Government Area that at the urging of Mr Oueik, senior members of the Council sought to resolve.

Mr Oueik's Park Road Development

707. In 2014 one of Mr Oueik's companies was undertaking development at 6-14 Park Road (the Park Road Development).

708. Mr Mateus Soares held the position of Lead Ranger at the Council until 16 May 2016. He provided a statement to the Inquiry which became Exhibit S7. Mr Soares' evidence was that the Council received a number of complaints regarding cars parked illegally outside the Park Road Development. He said that when complaints were received his manager at the time, Mr Lawrence, would call Rangers and have the staff attend the site as a matter of urgency. Mr Soares' evidence was that "*no other building site was treated like that*": Ex S7 [10].

709. Mr Soares told the Inquiry that on one occasion while he was carrying out a routine patrol of the school zone at Park Road with another Ranger called Karl Yousef, he observed that some barriers used by the workers at the development had been placed on the road outside of the approved Work Zone. Mr Soares asked the Site Manager to move them. Shortly after leaving the site, Mr Soares received a call from Mr Lawrence who said "*I've got a call from Ronnie to meet him out there, can you meet me down there*?"

710. Mr Soares returned to the site, met Mr Lawrence, and as he walked towards him Mr Oueik said words to the effect: "*Keep the fucking Ranger away from here*": Ex S7 [16]. Mr Soares then saw Mr Oueik talking to Mr Lawrence in what he described as an aggressive manner. Mr Lawrence apologised to Mr Soares and said that he would take the matter up with the General Manager, Mr Brisby.

711. Mr Oueik's version of the events was that he did say to Mr Lawrence, in relation to Mr Soares, *"What the fuck is he doing here?"* and the words "*No Rangers, just come yourself*", because there was an issue which had angered his workers and he didn't want there to be a confrontation between them and any Ranger: T-1080.33-1081.4.

712. Mr Brisby's evidence was that Mr Lawrence did raise the matter with him and advised him that Mr Oueik had been speaking in *"quite an aggressive manner"*: T-499.28-31.

Mr Brisby said that neither he or the Council's HR Department received a formal complaint, but he did decide with Mr Lawrence that the best way of dealing with things, because of the difficulty of dealing with an elected member such as Mr Oueik, was that everything in relation to the Park Road Development went through Mr Lawrence. Mr Brisby did not view what Mr Lawrence relayed to him as a "complaint" but rather a matter that was required to be brought to his attention and that required a "resolution": T-500.4. In the course of his evidence Mr Brisby also said the following in relation to the Park Road Development:

> "*In relation to Councillor Oueik's site, it was best felt to deal with – to take out the lower level staff's interaction with an elected member which puts the staff in a really difficult situation. It's very difficult to control the Councillor, but we can protect the staff, and the situation was Mr Lawrence was well experienced and versed and can deal with the matter. It made a lot of sense. We didn't get a lot of complaint about the site. The complaints came from the builder.*": T-503.15-.23.

He said his objective was to "*protect the lower level staff, being the Rangers, from exposure to Councillors. It's a very difficult sensitive situation*": T-503.43-.45.

713. It seems that as a result of the discussions between Mr Lawrence and Mr Brisby concerning this matter, on 19 March 2004 Mr Lawrence sent the following email to Rangers:

> "*Be advised, due to a development at Park Road, Auburn, being a Councillor's site, as per our protocol, staff are advised that all dealings with site will be directed in the first instance to the Manager, who will direct as appropriate complaints or concerns raised. As to school zones, police as normal as to roster or concerns from schools*": Ex S1, page 52.

Findings in relation to Mr Oueik's conduct towards Mr Soares

714. In paragraph P4 of his suggested findings in his written submissions, Counsel Assisting contends that "*the Inquiry would not accept the evidence of Mr Oueik that all he was trying to do was protect the Rangers from getting into conflict with the workers there*". Counsel Assisting also submits at paragraph P5 that "*the Inquiry would accept the substance of Mr Soares' account. It is corroborated by Mr*

Lawrence's evidence and the account, as relayed to Mr Brisby by Mr Lawrence, was accepted by Mr Brisby as outlined above".

715. I do accept Mr Soares' account of what occurred. I note also that in the written submissions filed on behalf of Mr Oueik he has conceded that his language was "unacceptable" and "inappropriate": Oueik's written submissions at [153-154].

716. In my view the only finding that needs to be made in relation to this matter is one that reflects the concession by Mr Oueik: the language that he used to Mr Soares, in circumstances where he was an elected member of the Council, was unacceptable and inappropriate. It has a tendency to place pressure on Council staff when they are dealt with in an aggressive and inappropriate manner by an elected representative. No doubt part of the reasons for Mr Oueik's aggression had something to do with difficulties that he perceived were being experienced at the Park Road Development in relation to persons illegally parking in a Work Zone that he had paid for. That may be an explanation, but it is not an excuse.

717. Mr Soares has left the Council. The Council has been dissolved and Mr Oueik is no longer an elected representative. There does not seem to be any utility in making any further findings in relation to this matter.

718. I do note, however, that at P6 of his written submissions Counsel Assisting has made this submission: "*that Mr Brisby did not treat what was in substance a complaint as a complaint and at the very least raise it with Mr Oueik, is not to his credit*". Mr Brisby described what Mr Lawrence had relayed to him as not so much a complaint but as a sensitive matter that required a solution. In the written submissions filed on behalf of Mr Brisby, Mr Cheshire SC has submitted that Counsel Assisting is inviting "*the Inquiry to engage in a semantic debate as to whether Mr Lawrence's reporting of the incident to Mr Brisby constituted a complaint"*.

719. In my view, what Mr Lawrence was conveying was both a complaint (if not a formal one) and an issue that required some form of solution to be put in place so that certain members of the Council staff did not have to deal with Mr Oueik if he was in an agitated state regarding parking at the Park Road Development. While in my view Mr

Brisby could have conceded that what was passed on to him by Mr Lawrence was a "complaint" of sorts, and as General Manager should have personally spoken to Mr Oueik to ensure there was no repeat of the incident with Mr Soares (or any other member of Council staff), I would not otherwise criticise the manner in which Mr Brisby sought to deal with the matter.

Other matters relating to parking at the Park Road Development

720. Ms Diana Laing also gave evidence to the Inquiry that on 7 August 2014 she was directed by Mr Lawrence to attend the Park Road Development because of cars parked illegally in the Work Zone. She says she observed three illegally parked cars and issued all with Penalty Notices: Ex S5 [12].

721. On 12 August 2014 Ms Laing says that she and Stephanie Griffiths were called into Mr Lawrence's office, who spoke to her in an angry fashion concerning the fact that she had issued the tickets. Ms Laing's evidence was that the following conversation took place:

> *"Rob said: "Don't go to the Work Zone anymore."*
> *I said: "Why?"*
>
> *Rob said: "Because it's Ronnie Oueik's site. If any further complaints come in about this site, let me know first and I will deal with it."*
>
> *I said: "The vehicles were all illegally parked".*
>
> *Rob said: "Don't be argumentative. I don't want to see you suspended down the track".*
>
> *Steph said: "No way, they cannot do that".*
>
> *I said: "Why would they suspend me for doing my job?"*
>
> *Rob said: "You do not know what sort of people you are dealing with and what they are capable of doing".*
>
> *I said: "Who are you talking about?"*
>
> *Rob said (using his index finger: pointed towards East (Administration Building) and said: "Those people up there. You've seen them do these things to other people and they will do it to you as well".*

He then said: "Look Irene Sims, she such a lovely lady and Ronnie Oueik and other councillors are trying to get rid of her so they can bring their own boys in".

I tried to reason with Robert Lawrence, telling him that councillors should be obeying New South Wales legislations, but Rob said "Well mate it's out of my hands, just ignore any vehicles parked in this Work Zone area".": Ex S5 [13].

722. Ms Griffiths gave a version of this conversation that substantially corroborated Ms Diana Laing's version of the conversation.

723. On 12 August 2014 Mr Lawrence sent an email to all Rangers which contained the following message: *"As previously directed by email, NO OFFICERS TO INVESTIGATE OR PIN Work Zone in Park Road unless under my instruction. All complaints should be directed to me in the first instance"*: Annexure 4 of Ex S5.

724. Emma Laing, a Ranger employed by the Council, also provided a statement to the Inquiry which became Ex S6. Her evidence was that from about February 2014 she and other Rangers began to receive a series of complaints from the site manager of the Park Street Development about cars parking illegally in the Work Zone. She gave evidence of a conversation she said she had with Mr Oueik on 21 June 2014 at the Work Zone which was along the following lines:

"I said: "Do you want me to fine all the vehicles?"

He said: "No, only this one … It has been parked there for four days".

I said: "What about the other two?" (Pointing at a silver Honda sedan … and a silver Subaru station wagon).

He said: "No, they are workers at the construction site".

I said: "Both of those vehicles are not meant to be in a Work Zone" (Both were locked and unattended) "The only vehicles that should be in a Work Zone are vehicles undertaking work in the construction site".

He said: "What? So you're not going to fine this one?"

I said: "Yes, I will fine it because it's been here for four days and it is not doing work in the construction site".

He said: "I don't care if the cars are not trucks or utes or whatever is allowed in the Work Zone, I just want you to fine this car and leave the other two because they are working inside the site".

I said: "Okay, but if they are from the construction site, make sure they keep coming out to the vehicle to get their tools because they really, they should really be here".

He said: "Where does it say that those cars have to be only work cars to be in a Work Zone?"

I said: "In the Road Rules under the Work Zone. It states that a vehicle can only park in a Work Zone that is undertaking work".

He said: "Can you give me a copy of that?"

I said: "Yes. I don't have one on me at the moment but when I finish this ticket I will go to the office and print it out and give it to you. Will you be here?"

He said: "Yes"."

725. Ms Emma Laing described Mr Oueik as standing in close proximity to her during the course of this conversation, being rude and intimidating, and telling her "*don't argue, just do it*", when she began issuing the Infringement Notice: see Ex S6 at [23]-[26]. Ms Emma Laing also described a circumstance where she believed that when she was patrolling with her mother, Diana Laing, near the Auburn Public School and Al Faisal College, Mr Oueik took out his mobile phone and appeared to photograph or video them: Ex S6 [32].

726. Mr Oueik's version of the conversation described by Ms Emma Laing was that he asked her to organise for the owner of the car to be rung so that the car could be removed because it was in the way of his trucks. His evidence was that Emma Laing said to him she was going to book all of the cars and there seemed to be a dispute between them concerning whether workers on the site could or could not park their cars in the Work Zone: T-1082.20-.41.

727. In his evidence at the public hearing, Mr Lawrence explained his email concerning Rangers not issuing PINs outside the Park Street Development unless they went through him in the following way:

> "*It was a big site. There were spill zones there and on a few occasions, or many occasions, the Rangers would PIN cars that were in the Work Zone there on Mr Oueik's site. The foreman complained and I believe he would have complained initially to the manager of planning, Glenn Francis, who then asked me to investigate. I investigated it and found there were some anomalies, especially with the parking restrictions for the Construction Zone, which I would have taken up with the Engineers, to get more parking there for them in school times and not to bring concrete mixers, and that, on the time when the school zones were on. So I said "Until further notice, I don't want any PINs issued", to see how they could alleviate this by either changing the parking and so on*." (T-891.31-.47).

728. Ms Diana Laing also gave evidence of observing other illegal activity, in terms of the operation of cranes, apparently at work sites associated with Mr Oueik: Ex S5 [20]-[22].

Findings

729. In relation to the various versions of the conversations that were given in evidence, as set out above, I substantially accept the versions provided by Diana Laing, Emma Laing and Ms Griffiths.

730. I find that it is highly likely that Mr Oueik was frustrated by the fact that some of the workers on his site were receiving Parking Infringement Notices, when parked in the Work Zone. Whether these workers were or were not illegally parked is frankly not a matter that this Inquiry needs to resolve, and does not fall within the Terms of Reference. The issue is Mr Oueik's conduct. In my view, given that he was an elected official, Mr Oueik should not have involved himself directly with the Council Rangers in respect of any parking issues concerning the private interests he had in his development site. He should have left the matter to his Site Manager to deal with. I accept that Mr Oueik did speak to the Rangers involved in an aggressive manner and this should not have occurred.

731. Counsel Assisting also submits that *"Mr Oueik's directions were not lawful directions"* and that his actions involved various breaches of the Code of Conduct and the *Local Government Act*. At P12 of his submissions, Counsel Assisting has submitted the following breaches:

"(*i*) *Code 4.32, prohibits requesting preferential treatment in any matter where a councillor has a private interest.*

(ii) Code 5.8, prohibits the use of the position to influence other council officials in their public or professional duties to obtain a private benefit.

(iii) Section 352 and Code 6.2(a) prohibits councillors from directing Council staff, other than to give "appropriate direction to the General Manager in the performance of Council's functions by way of Council or Committee resolution …".

(iv) *See also, Code 6.7 generally, but in particular 6.7(a); (e) (which governs being "overbearing or threatening to staff"); and (g) (which governs "directing or pressuring Council staff in the performance of their work").*"

732. I accept that in his own mind Mr Oueik was not seeking preferential treatment, but was rather seeking to ensure that at his building site, people that were parked illegally in a Work Zone that he had paid for were either fined or had their cars removed. Equally, he was no doubt upset that workers who were working on the site received Infringement Notices when he did not think they should receive them. I would not go as far as to find that Mr Oueik himself sought preferential treatment from the Council. In my view, however, because of his conduct, he obtained a form of preferential treatment, through the decisions made by Mr Lawrence about how to deal with the matter. Mr Lawrence, of course, himself was in the difficult position of dealing with an agitated developer, who also happened to be an elected member of the Council. By involving himself in issues of dispute concerning his private development, while also being an elected member of the Council, Mr Oueik clearly had an influence on how a senior member of the Council treated him and probably obtained a more favourable approach from the Council than would have been available to other developers who were not elected members of the Council. Mr Oueik, as an elected member of the council, should have left all disputes in relation to parking at his development site to his site manager, and should not have intervened himself.

SECTION 15: THE CLOSURE OF FRANCES STREET, LIDCOMBE ON 15 AUGUST 2015

Introduction

733. Salim and Aysha Mehajer were married on 15 August 2015. Their wedding attracted considerable publicity. Based on the evidence given at the Inquiry, that was understandable. Almost nothing concerning the wedding however was of relevance to the Terms of Reference. The sole matter that warranted investigation was the closure of Frances Street on the day of the wedding and the conduct of Mr Mehajer and employees of the Council concerning that.

734. On 26 May 2015, Mr Mehajer sent an email to Mr Brisby, the General Manager, Mr Ian Dencker, and Mr Hamish McNulty (who was at the time the Deputy General Manager Direct at the Council) concerning his wedding. In the email, Mr Mehajer informed the Council that was intending to get married on 15 August and was seeking a consent from Council regarding the placing of traffic cones along a strip of properties in Frances Street for a period of 3 hours and for "helicopter landings" on Council owned land. The landing site was not yet identified. Mr Mehajer said he would obtain relevant permits from the Civil Aviation and Safety Authority in relation to the helicopter: Ex S20 (Statement of Hamish McNulty) pages 8-10.

735. In his evidence at the public hearing, Mr McNulty indicated that when he first saw this email he thought that Mr Mehajer was seeking some kind of approval to land the helicopter in Frances Street. Consequently, when he responded to Mr Mehajer in an email of 16 July 2015 (Ex S20, page 20), he suggested that approval be sought to land the helicopter in Wyatt Park or Phillips Park. He also advised Mr Mehajer that he would require Traffic Committee approval to close a portion of Frances Street on the day of the wedding.

736. On 23 July 2015, Mr Mehajer sent an email to Mr McNulty, asking for an update on the conditions or requirements from Council, if he was to proceed with landing the helicopter in either of the parks mentioned: Ex S20, page 24.

737. On the same day, Mr McNulty sent an email to Mr Mehajer, referring him to the CASA website for requirements in relation to helicopter landings and advising him of Council requirements should he proceed to wish to land a helicopter in one of the Council parks: Ex S20, page 29.

738. On 4 August 2015, Mr Fitzgerald sent an email to Ahmad Yaseen (an assistant in the employ of Mr Mehajer) seeking information from him, including the reason for the proposed road closure of Frances Street and the timing and re-opening of the street. He also sought an indication as to whether the proposed landing site in Phillips Park had been hired; and confirmation that it was going to be used: Ex S20, page 35.

739. On the same day, Mr Mehajer responded to Mr Fitzgerald by stating that the reason for the road closure was *"the safety of pedestrians and drivers using the subject street"* and that the closure would also be only for 1 hour (10.00 to 11.00 am). Phillips Park was confirmed as the landing site for the helicopters: Ex S20, pages 39-40.

740. Following this advice, contact was made with a sports club that was using Phillips Park and agreement was reached for them to move their game, so as to facilitate the landing of the helicopter.

741. On 5 August 2015, Mr Yaseen, on behalf of Mr Mehajer, sent an email to Mr Fitzgerald, in which he provided:

(a) A copy of an application form for the hire of a sports ground.

(b) A colour photo of the landing area at Phillips Park.

(c) Certificates of Insurance for the helicopter landing.

742. The colour photo for the proposed site of the helicopter landing at Phillips Park is at page 58 of Exhibit S20. Mr McNulty's evidence at the public hearing was that he had always assumed only one helicopter was involved. Mr Mehajer's evidence was that he had always intended that there were four helicopters, and although no written

advice was given of this, the photograph at page 58 of Ex S20 does show four landing sites and three red carpets: Mr Mehajer's evidence at T-1294.32.

743. On 6 August 2015, the form to hire the park was returned, as was a Road Occupancy Licence, which appeared to request to close both lanes of Frances Street from 2.00 pm 14 August to 2.00 pm 15 August, for the purposes of a "*public celebration*": Ex S20, page 75. The requested times may have involved a typographical error, as the requested start date is 15 August 2015, as was the requested completion date.

744. On 6 August 2015, Mr Siva Kumar of the Council sent an email to Mr Yaseen, indicating, amongst other things, that an application for the purposes of a "*public celebration*" did "*not fall within road occupancy criteria*": Ex S20, pages 92-94.

745. No doubt as a consequence of the advice concerning road closures for "*public celebrations*" a further application to close the street was lodged for the purposes of a "feature" film: Ex S20, pages 207-208.

746. Also on 14 August 2015 Mr Yaseen sent an email to Mr Siva Kumar, advising that he was urgently awaiting the road occupancy licence and that "*as a courtesy message, the Traffic Controllers for the day, giving notes to people on the street, confirming the changes of traffic and their contact details*".

747. A copy of the letter that had been forwarded to Frances Street property owners was given to Mr Siva Kumar, who passed it on to Mr McNulty and Mr Francis. The letter was in the following terms:

> "*Subject: Clearway of street parking from 14 August 2015 12.00 pm till 15 August 2015 2.00 pm Frances Street Lidcombe, between Maude Street and Edith Street.*
>
> *Dear Frances Street Residents,*
>
> *Please work with our traffic control team to have no vehicles parked on Frances Street Lidcombe between 14 August 2015 from 12 pm till 10 pm on 15 August 2015. As such, all entry into Frances Street from Maude Street and Edith Street will be blocked, only residents parking in their properties will be allowed between 14 August 12pm till 15 August 2pm.*

All entry will be blocked totally on 15 August 9am till 2pm. Roadwork hats will be left on the road, any cars left or parked illegally during this time will be towed and removed by Police as per DA approval.

We apologise for any inconvenience caused and look forward to your kind co-operation.

Vehicles will be towed, if not moved at vehicle owners' cost.

Thank you.

Management." (Ex S20, pages 201-202).

748. This notice was inaccurate and should not have been provided to the residents of Frances Street. Mr Mehajer's evidence at the public hearing was that he was unaware of this notice and had not authorised it: T-1296.30-.41.

749. As a result of seeing this notice, Mr McNulty asked Mr Yaseen to come into Council for a meeting at 1.00 pm on Friday, 14 August. At that meeting, Mr Yaseen was told that the notices were inappropriate and should be withdrawn. Mr Yaseen agreed to do that.

750. On 14 August 2015, conditional approval was granted for the helicopter landing, although the Council still thought only one helicopter was involved. Also, during the afternoon of 14 August 2015 approval was sent by Mr Siva Kumar of the Council to Mr Yaseen for the road closure. Mr Siva Kumar's email to Mr Yaseen made it clear that "*two-way traffic moments* [sic] *need to be maintained at all times*" and that "*partial closure should not be beyond 24 Frances Street*": Ex S20, page 200. The approval was subject to a Traffic Control Plan, which is at Ex S20, page 202.

751. On the day of the wedding (15 August 2015), Mr Fitzgerald became aware that four helicopters were involved, rather than one. He relayed this to Mr McNulty. It appeared, however, that the area that had been hired by Mr Mehajer was sufficient to accommodate the four helicopters and the view was formed that the safety measures were appropriate and the area was still secure and so the helicopter landings could proceed: T-986.33-.41.

Findings

752. While multiple helicopter landings and partial road closures requiring Traffic Plans are not synonymous with every wedding, it is clear from the above history that Mr Mehajer sought appropriate approvals from the relevant authorities, including the Council, to have the kind of wedding that he wished. In saying that, however, I agree with Counsel Assisting's submission at FS7, that the wedding did not involve the making of a "feature film" and approval to partially close the street should not have been granted on this basis.

753. Further, on 14 August 2015, a clearly inappropriate flyer was provided to the residents of Frances Street, concerning the proposed road closure. Counsel Assisting submits that there is no evidence that Mr Mehajer himself knew of the offending flyers (Counsel Assisting submission FS9). I accept that, although I also find that the Mr Mehajer must take ultimate responsibility for the actions of those engaged by him to organise his wedding.

754. I also accept Counsel Assisting's submission that the Council itself responded promptly to the issue of the inaccurate flyer: Counsel Assisting's submission FS10.

755. At FS12, Counsel Assisting has made the following submission:

> "*Council should review its road closure procedures to provide greater transparency and accountability. Effectively, what Mr Mehajer wanted to do in the street was comparable to a development application, which would have required clear notice to surrounding residents of the proposal and afforded them an opportunity to respond. In that way, the residents would have been engaged in the approval process and the terms upon which the approval was granted would have been transparent to them*."

756. I agree with Counsel Assisting. Consideration should be given to putting procedures in place so that the Council is required to notify affected residents of a proposed road closure or partial road closure, sufficiently in advance to enable them, if they wish, to make their own objections or submissions concerning what should occur.

757. At FS13, Counsel Assisting has submitted that "*the fact that the Council staff and Mr Mehajer were at cross-purposes over the number of helicopters involved in the event and for which approval was sought, can be attributed to a breakdown in the lines of communication between the applicant and Council staff*". In my view, the reason that Mr McNulty did not know that more than one helicopter was involved was that he was not told. With the exception of the colour photograph at Ex S20, page 58, all other indications, up to the day of the wedding, were that only one helicopter would be landing. In my view, no blame can be attributed to Mr McNulty for not realising until he was told by Mr Fitzgerald on the day of the wedding that more than one helicopter was involved. No one would have assumed multiple helicopters would be engaged.

758. As to the manner in which things were dealt with, once it became clear that four helicopters were involved, an assessment was made of the situation and the evidence was that a sufficient amount of space at the park had been hired by Mr Mehajer to safely land four helicopters. There was no evidence before the Inquiry that this was not correct; nor was there any evidence that the safety procedures put in place were not sufficient for a four helicopter landing, as distinct from one.

SECTION 16: TERMINATION OF MR BURGESS AND ENGAGEMENT OF MR FITZGERALD

759. The Inquiry received some evidence concerning the termination of Mr Burgess from the position of General Manager of the Council in March 2013. Mr Burgess also supplied the Inquiry with a statement. Mr Peter Fitzgerald, who was appointed Acting General Manager from March 2013 until the appointment of Mr Brisby in October 2013, and thereafter engaged for a period as a consultant to the Council, was also summonsed to give evidence at the public hearing and examined by Counsel Assisting.

760. Counsel Assisting has not made any submission that any adverse findings should be made against any person concerning the evidence surrounding either the termination of Mr Burgess or the engagement of Mr Fitzgerald. In those circumstances, there seems little point in referring to the evidence in detail. However, given that these matters were covered at the Inquiry, I set out a short summary below.

Mr Burgess

761. Mr Burgess became General Manager of the Council in February 2005 for an initial term of 5 years.

762. On 13 March 2013 a resolution was passed *"that Council does not have confidence in the General Manager and terminates his contract of employment effective immediately in accordance with the conditions of the contract"*. The resolution was evenly split, and carried on a casting vote. Those in support of the motion to terminate Mr Burgess' employment were Mr Attie, Mr Campbell, Mr Oueik, Mr Yang and Mr Zraika. Those against were Ms Batik-Dundar, Ms Lam, Mr Mehajer, Mr Oldfield and Ms Simms: see Exhibit JS-1, pp.233-4 and Exhibit S-15 at [35].

763. On 18 March 2013 a rescission motion was moved by Ms Simms which was passed unanimously by the Council and included the following:

> *"1. That Council enter into an agreement to release Mr John Burgess as the General Manager from his contract of employment as requested by him due to health reasons.*
>
> *2. That Mr Burgess be given full entitlements in accordance with his contract of employment and in addition, an undisclosed amount as requested by him that will be noted in the Deed of Release."* (Exhibit JS-1, p.237)

764. There was evidence tendered at the public hearing concerning Mr Burgess' performance reviews. None of these reviews (which dated from 2006 onwards) indicated any matter of substantial concern nor any matter which would have warranted termination of his employment.

765. Also tendered at the public hearing was advice from a law firm called Maddocks which became Exhibit Gen 3. It appears Maddocks was briefed to advise on certain decisions and conduct of Mr Burgess, for example his appointment of a principal legal officer for the Council, the actioning of council resolutions, and the use of Mr Burgess' credit card and vehicle. More than one advice was provided. The material given to Maddocks for the purposes of their advice did not indicate in their view any basis for the termination of Mr Burgess' employment.

766. After reviewing the evidence, Counsel Assisting submitted that the matter that clearly caused the cessation of Mr Burgess' employment with the Council as its General Manager was the breakdown in his relationship particularly with Mr Oueik and Mr Attie, which was having an impact on the operation of the Council and filtered through to Councillors Campbell, Zraika and Yang, who were also in favour of removing Mr Burgess from the position of General Manager. Upon questioning by Mr Watson SC (Senior Counsel for Mr Oueik), Mr Campbell explained the reasons that he wished to terminate Mr Burgess' employment as General Manager which mainly related to his view that council resolutions were not being implemented: T-741-743.

767. As stated above, Counsel Assisting has not made any submission that any person engaged in any breach or misconduct under the Act or Code in relation to the cessation of Mr Burgess' employment as General Manager in March 2013. In those

circumstances it can simply be noted that no material was tendered at the Inquiry which would have of itself supported a termination (noting that ultimately what occurred was framed as a resignation resolution upon agreed terms between Mr Burgess and the Council), but there was a relationship breakdown such that a half of the Council acted in the manner that they did. The full reasons behind this relationship breakdown were not explored by the Inquiry. Evidence was given however by Mr Burgess of disagreements he said he had with Mr Oueik that related to Mr Oueik's visits to the Council Planning department (a matter that Mr Alvares also referred to in his evidence) that Mr Burgess did not approve of, and ultimately banned in late 2011:Ex S 11 [191] to [198].

Mr Fitzgerald

768. Mr Fitzgerald was the Acting General Manager from March 2013 until October 2013, and then was engaged as a consultant for a period of 3 years during which he was paid the sum of $144,000: Exhibit S-9, p.7.

769. During the course of his time as the Acting General Manager, Mr Fitzgerald also carried out a review of the Council structure and a general management review: Exhibits Gen 12 and 13.

770. Upon his appointment as the Interim Administrator, Mr May became concerned at what in his view was a lack of or inadequate paperwork concerning the services provided by Mr Fitzgerald to the Council. As a consequence, he engaged Mr Robert Honeyman to undertake a short form of investigation and prepare a report for him. Mr Honeyman provided a statement to the Inquiry which became Exhibit S9. Amongst other matters, Mr Honeyman's investigation did reveal an inadequacy of proper disclosure of what Mr Fitzgerald was engaged to do, when he did it and how he charged the Council for it.

771. While I accept the criticism of Counsel Assisting that Mr Fitzgerald's invoices were "rudimentary" and did not clearly identify the work that was performed, I also accept that there was no evidence that Mr Fitzgerald did not properly perform whatever he was engaged to do by the Council during the course of his consultancy. Having heard his evidence, I accept that he did.

772. Counsel Assisting has also submitted that some criticism should be made of Mr Brisby (who from October 2013 was General Manager) for not ensuring that the work performed by a consultant was properly identified in both the instructions or brief given to the consultant for work to be performed, and in the invoices rendered following the performance of any work. I agree that is desirable.

SECTION 17: SUMMARY OF FINDINGS

Mr Francis' claim for privilege against self-incrimination

773. I found that Mr Francis could not be compelled to answer many question put to him at the public hearing, by both Counsel Assisting and Mr Wheelhouse SC, on the ground that the answer might incriminate him.

774. My rulings on this matter commence at T 318 and T 1766.

Mr Francis and Mr Oueik – the Kitchen Cabinets

775. This matter is addressed at [77] to [106] above (findings at [103] to [106]).

776. Mr Francis could not be compelled to answer questions on this matter at the public hearing, as I ruled he was entitled to claim the privilege against self-incrimination. I have however accepted the version of events provided to the Inquiry by Mr Francis in his private hearing and in his written statement that he received a "gift" or "favour" from Mr Oueik of some joinery for his kitchen in about 2006.

777. Mr Francis was not however a particularly willing recipient of any such gift or favour, and the evidence did not support a finding that this matter affected Mr Francis's professional conduct as a senior planner with the Council, or that he acted in any way to benefit Mr Oueik.

778. Further, there was no evidence that Mr Oueik sought any kind of benefit or favour in return from Mr Francis in relation to any matter before the Council, including the MSPP (the findings of which are summarised below)

South Auburn Planning Proposal

779. My findings in respect of the South Auburn Planning Proposal are set out at [173]-[197] above.

780. I find that the SAPP lacked planning merit.

781. It would be no exaggeration to summarise the consensus view of the Council's planning staff as being one where they had little regard for the planning merit of the SAPP. Shortly after the appointment of Mr May as Interim Administrator, he met with Mr Francis and Ms Cologna who encouraged him to stop any further progress with this planning proposal. As a consequence of this advice, Mr May carried a motion that the Council would take no further action in relation to the SAPP.

782. Ms Cologna's view concerning the SAPP was that it was an "unnecessary" proposal and lacked strategic merit. Mr Alvares considered it "very unusual", "unwarranted" and even "crazy". Mr Brisby's view was that the SAPP "didn't make sense".

783. I accept the views of these members of the Council's planning staff.

784. Despite this, no adverse findings are made against Mr Francis in relation to his decision to recommend option 2(a). It was again unfortunate that Mr Francis could not be compelled to answer questions on the SAPP at the public hearing. For the reasons outlined at [186]-[188] above however, I find that Mr Francis did not breach his obligation to act with reasonable care and diligence required of him under both the Act and the Model Code. He was, rather, attempting to provide the elected body with options in relation to resolutions that they had already passed and where there had been a Gateway approval.

785. I do find, however, that Mr Francis' planning report for the 17 April 2015 meeting should have more clearly reflected the consensus view of the planning staff that they did not consider that there was planning merit in the SAPP. "*With the benefit of hindsight*", Mr Francis acknowledged this: see [187] above. That acknowledgment, however, does not in my view justify a finding that he acted without due care or diligence.

786. I reject the submission made that the SAPP (or at least option 2(a)) can be sourced to either Mr Oueik or Mr Zraika. The evidence of Mr Francis, which I accept, was to the contrary.

787. There was no evidence that either Mr Oueik or Mr Zraika acted in any way in relation to the SAPP to advance the interests of Mr Mehajer.

788. No adverse finding is made against Mr Oueik in relation to the manner in which he voted on the SAPP and the circumstances surrounding the Bhanin Association: see [191]-[194] above.

Berala Village Planning Proposal

789. My findings in relation to the BVPP are set out at [265]-[301] above.

790. The BVPP was another planning proposal which the evidence indicated was unnecessary, and I make that finding.

791. In terms of the changes to planning controls it proposed, the BVPP was not consistent with a study prepared by the Council planning staff towards the end of 2012 or with the expert report prepared by Hills PDA following this.

792. In relation to the recommendation to include York Street in the B2 zone, it is again unfortunate that Council Assisting could not explore this matter with Mr Francis at the public hearing because of his claim for privilege.

793. There is insufficient evidence to make a finding that Mr Francis was directed by one or more councillors to make changes to the Berala Study such that it supported the BVPP: see [285] above.

794. I agree, however, that criticism can be made of the revised Berala Village study. Rather than fully reflecting the views of the Council planning staff, it was drafted to support the majority view of councillors who wanted to make the relevant changes to the Auburn LEP.

795. Despite that finding, I do not find that Mr Francis' conduct amounts to a breach of his obligations to exercise reasonable care and diligence in carrying out his functions under the Act or the Model Code. Rather than acting with a lack of care, Mr Francis accepted what he considered to be the councillors' majority position in relation to this

planning proposal and attempted to formulate that into a coherent form. In my view, this was undesirable but not conduct warranting a finding of lack of due care and diligence: see esp. [287] to [293] above.

796. There is no evidence on which a finding could be made that any councillor or Mr Francis conducted themselves so as to provide a benefit to Mr Zraika.

797. For the reasons outlined at [297]-[299] above, Ms Lam did not have a pecuniary interest that required disclosure in relation to the BVPP. Accordingly, I do not recommend the investigation sought by Counsel Assisting pursuant to s.462 of the Act.

Grey Street Planning Proposal

798. My findings in relation to this planning proposal are set out at [359]-[376] above.

799. I find that this was another planning proposal that lacked planning merit.

800. I find that it was inconsistent with local and State planning policies and strategies, and with the Council's employment lands strategy.

801. The Council voted to amend the employment lands strategy so as to make the GSPP consistent with it. That occurred without public consultation, or expert advice. That should not have happened.

802. I find that Mr Attie was provided with a copy of Ms Crameri's email to Mr Sankari of 6 October 2015, which contained the resolution the developer of the site wanted the Council to adopt.

803. I have not found however that Mr Attie abrogated his obligations of honesty and due care under the Act or the Model Code. Mr Attie was the Mayor at the time that the proposed developer of the Grey Street site sought to have the Council move forward with the GSPP. He was therefore one of the first points of contact. He may have subsequently "championed" the cause, but did not do so unthinkingly. He gave independent and genuine consideration to the merits or otherwise of the GSPP and for

his own considered reasons was in favour of it – despite this again being a planning proposal which in this case the Council's planning staff recommended not be adopted and which had failed to gain Gateway approval.

Marsden Street Planning Proposal

804. My findings in relation to this planning proposal are set out at [415]-[445] above.

805. Unlike the other three planning proposals, the MSPP was a planning proposal which did have the support of the Council planning staff.

806. It was again unfortunate as a result of Mr Francis' claim for privilege that Counsel Assisting could not examine him at the public hearing concerning the reasons for his request to AECOM to include scenario E in their report.

807. Counsel Assisting did not make any submission that a finding of either a breach of the Act or Model Code should be made in relation to this planning proposal.

808. Counsel Assisting did, however, make some criticisms of Mr Oueik, whose companies owned properties favoured by the MSPP. Mr Oueik made a declaration of interest in relation to a planning proposal that was a precursor to the MSPP which affected the properties nearby his own but which would not have affected the planning controls of those properties. In my view, Mr Oueik should not be criticised for making that declaration.

809. I have also not accepted that Mr Oueik gave "incredible" evidence concerning his development plans for the properties owned by his companies..

810. The evidence did not support a finding that Mr Francis requested AECOM to include scenario E in their report in order to benefit Mr Oueik.

811. There was no evidence that Mr Oueik and Mr Francis discussed the MSPP.

Sale of the John Street Car Park

812. My findings in relation to this matter are set out at [506]-[541] above.

813. The evidence does not establish that Ms Lam, Mr Mehajer and his father had a *"long commercial relationship"*. I do not find that the evidence establishes that Ms Lam voted in relation to this matter in a manner solely to provide a benefit to Mr Mehajer.

814. There was no evidence to the contrary, and I have accepted Ms Lam's evidence that she was unaware of the business relationships between her brother-in-law (who she is in business with) and Mr Salim Mehajer. I decline to make any finding that she breached the Act or the Model Code in relation to the sale of the Car Park.

815. For the reasons outlined above at [527]-[537], in my view, no adverse finding should be made against Mr Zraika's credibility in relation to the manner in which he voted concerning the sale of the Car Park, in particular the reduction of the deposit.

816. The resolution passed by the Council at its 2 December 2015 was against legal advice. While I find this is undesirable, having considered the totality of the evidence, I do not accept that no "reasonably minded councillor" could have voted to pass the resolution of 2 December 2015. The terms of that resolution, coupled with difficulties concerning the Car Park site generally that were identified in the evidence, and the view of the majority of councillors that a supermarket at the site was desirable, were all reasons why a finding should not be made that a vote in favour of the resolution was unreasonable.

40-46 Station Road, Auburn

817. My findings in relation to this matter are set out at [592]-[612] above.

818. It was no part of the Terms of Reference for this Inquiry to investigate whether BBC Developments engaged in unlawful building works in relation to this development, or to make any findings in relation to that. What was at issue here was the Council's failure to institute prosecution proceedings against BBC Developments despite twice being provided with legal advice (in 2008 and 2009) that it was in the public interest to commence a prosecution, and that there were reasonable prospects of success.

819. The evidence revealed a dispute between Mr Burgess (the then General Manager) and Mr Brisby (the person with delegated authority at the time to commence a prosecution) as to who was responsible for initiating a prosecution against BBC Developments. Mr Burgess' view was that it was Mr Brisby's responsibility. Mr Brisby accepted that it was ultimately his responsibility, but because an elected councillor was involved (Mr Oueik), he required the General Manager's "sign off" before initiating any prosecution action. I accept the situation was a sensitive one.

820. I find that it was in the public interest for a prosecution to be commenced against BBC Developments in accordance with the legal advice provided to the Council on two occasions. A prosecution should have been commenced.

821. My finding in relation to why it did not is that there was a form of miscommunication between Mr Burgess and Mr Brisby. Between them, however, they should have at some stage reconciled with one another that a prosecution had not been commenced. Between them they should have ensured that prosecution proceedings were commenced within time.

Water Street Development

822. My findings in relation to this matter are set out at [624]-[631] above.

823. Evidence was tendered at the Inquiry that the reason for the failure of the roof of this building during the course of a storm in January 2016 was that it had not been built in accordance with BCA and Australian Standards. It was no part of the Terms of Reference for this Inquiry to investigate this matter or to make any findings. To do so would probably have in any event been a contempt given that legal proceedings had been issued concerning the failure of the roof.

824. What the Inquiry investigated was an error made by Mr Francis in 2008 in issuing a final occupation certificate in circumstances where an amended construction certificate had not been issued.

825. I find that the error made by Mr Francis was an honest mistake.

826. I have declined to make a finding that Mr Francis failed to exercise a reasonable degree of care and diligence as a consequence of this mistake. Not every error made by a member of the Council staff, even senior staff, will constitute a breach of the obligations to act with reasonable care and diligence. Mr Francis' error was an honest one. He is no longer an employee of the Council. The error occurred more than eight years ago. The issues of the construction of the roof of the Water Street building are before a court. For all these reasons, in my view, there is no utility in expressing an opinion as to whether the error made here by Mr Francis involved a breach of s.439 of the Act.

Alleged falsification of BASIX Certificate

827. No finding was made in relation to this matter.

1A Henry Street Development

828. My findings in relation to this matter are set out at [675]-[689] above.

829. I reject the reliability of Mr Jack's evidence in relation to critical conversations he says he had during two meetings at a coffee shop with, first, Mr Attie, and secondly, Mr Zraika.

830. I substantially accept the version of those conversations given by Mr Attie and Mr Zraika.

831. I make no adverse findings against Mr Attie or Mr Zraika. I find that Mr Attie did not seek a bribe from Mr Jack. I find that no discussion was had between Mr Jack and Mr Zraika in relation to this.

832. I have made some criticisms of Mr Jack's evidence that are set out at [679]-[687] and which should be considered in full rather than summarised.

Parking-related matters

Al Faisal College

833. My finding in relation to this matter is that the Council had a whole school approach in relation to parking at pickup and drop off zones for schools during the time Mr

Oueik was Mayor. In my view, the evidence does not support a finding that there was any particular preferential approach taken to Al Faisal College.

Park Road Development

834. Mr Oueik, by his own admission, spoke in an aggressive and inappropriate way to a council ranger. That is a technical breach of the Model Code.

835. In relation to other parking matters concerning the Park Road development, I accept the evidence of Diana Lang, Emma Liang and Stephanie Griffiths. Although it was his development, in my view Mr Oueik, as an elected member of Council, should have played no role in any disputes concerning the work zone for his development and the council rangers or the Council itself. While I have not found that he sought preferential treatment, in my view he received a form of preferential treatment from the Council. By involving himself in issues of dispute concerning his private development while also being an elected member of Council, Mr Oueik had an influence in the manner in which members of Council staff dealt with parking issues concerning this development site.

Closure of Frances Street, Lidcombe

836. My findings in relation to this matter are set out at [752]-[758] above. No adverse findings are made against any member of the Council staff.

Termination of Mr Burgess and Engagement of Mr Fitzgerald

837. Nothing in Mr Burgess's performance reviews warranted his dismissal. His employment ceased because half of the councillors decided they had lost confidence in him. A resolution was passed accepting his resignation.

838. In relation to Mr Fitzgerald, despite deficiencies in paper work, I accept he performed all the tasks for which he invoiced Council during the period of his consultancy.

SECTION 18 – RECOMMENDATIONS

S438U Public Inquiry and claim for privilege

839. Under s.430 of the Act, the Chief Executive of the Office of Local Government at his or her own initiative or at the request of the Minister may conduct an investigation into any aspect of a council. Pursuant to s.434C of the Act, no person is excused from providing documents or answering a question in the course of such an investigation on the grounds that the information provided or the answer given might incriminate them: s.434C(1). If a person in such an inquiry objects to providing information or answering a question on the grounds that it might incriminate them, compliance with a requirement to answer a question or provide information is not admissible in evidence against that person in criminal proceedings: s.434C(2).

840. To some extent, this provision mirrors s.17 of the *Royal Commissions Act* which also provides that a witness summonsed to appear at a commission is not excused from answering a question or producing documents on the grounds that to do so might incriminate them: s.17(1). Any answer given or document provided is not admissible against that person in any civil or criminal proceedings: s.17(2).

841. Section 17 of the Royal Commission Act did not apply to this Inquiry: see s438U(4). As discussed above, upon objection I ruled that Mr Francis could not be compelled at the public hearing to answer many of the questions put to him by Counsel Assisting in relation to three of the four planning proposals inquired into. Given that he was the most important planning witness, that was unhelpful.

842. There seems no reason in principle why section 17 of the *Royal Commissions Act* should not apply to public inquiries ordered under s.438U of the Act. Consideration should be given to amending s.438U(4) of the Act so as not to exclude s.17 of the *Royal Commissions Act*.

Property developers and real estate agents

843. Mr Oldfield, Ms Simms and Mr Campbell have each made a submission to the Inquiry that real estate agents and developers should not be permitted to be elected members of local councils. Their view seems to be based on their perception of potential

conflicts of interest and no doubt their own opinions as to what has occurred in particular in relation to the planning proposals at the Auburn Council during the time they were elected members of the Council.

844. This inquiry has examined the conduct of one council only. It is unlikely that an inquiry into only one council (and only four planning proposals) would provide a firm foundation for broad based recommendations for changes to the Act or the Model Code.

845. In relation to real estate agents and property developers, I am not inclined to make any recommendation that they be excluded from being able to participate in local government as elected representatives of the community. First, the Inquiry did not receive and was not set up to receive evidence of a kind that would justify the making of such a recommendation. What has occurred in other councils in New South Wales would have to be considered as well.

846. Secondly, it does not seem to me that there is merit in excluding people from the opportunity of seeking elected office on the basis of their occupation. Real estate agents and property developers may have valuable insight into matters pertaining to both local government and local government areas based on their training and experience that would make them valuable elected members of their community. The issues in relation to conflicts that concern Ms Simms, Mr Campbell and Mr Oldfield should be able to be managed by the regimes that are currently in place in the Act and the Model Code. In my view, the answer to the concerns raised by them is not by excluding people based on their occupation, training or trade.

Mr May's submissions

IHAP

847. The Administrator of the Cumberland Council, Mr Viv May, has made a number of submissions to the Inquiry on important matters.

848. Upon his appointment as the Interim Administrator of the Auburn Council (prior to its merger with Holroyd Council), Mr May introduced an Independent Hearing and

Assessment Panel for making recommendations concerning planning matters. An IHAP can be set up by a council pursuant to s.23I of the EP&A Act.

849. Mr May has made a submission that councillors should be removed from the determination of development applications under Part 4 of the EP&A Act. He also submits that in relation to the planning proposal-making process under Part 3, an independent assessment panel review system should be put in place prior to recommendation to Council. A number of the former members of the Council oppose this on the grounds that in their view such a process would be undemocratic.

850. Mr May has submitted that in relation to the development application process, planning staff could retain their delegations in certain circumstances (relating to the number of objections or perhaps the amount of money involved) and in other circumstances the matter be assessed and determined by an IHAP. He has made submissions as to how that IHAP should be constituted.

851. Mr May has about 46 years' experience in local government, and spent 27 years as the General Manager of Mosman Council. His submission should be carefully considered. Given that three of the four planning proposals inquired into did not have the full support of the planning staff, Mr May's submission has all the more force

852. I note however that in May last year, before the public hearings began, the then Minster for Planning announced various proposed legislative changes to the EP&A Act. In January of this year, the Department of Planning published an update on this titled *"Planning Legislation Updates – Summary of Proposals January 2017"*. Section 7 of this update dealt with proposed changes to IHAP's.

853. Further, a public consultation Draft Bill is now available of the Department's website. Extensive legislative changes are proposed for planning decision making generally. "Local Planning Panels" are dealt with in clause 2.5 of the Draft Bill. Much of what Mr May has submitted is incorporated into the proposed legislative changes.

Independence in reporting

854. Mr May has also made a submission that the provisions of s.352 of the Act be amended *"to make it very clear that all staff of a council are to carry out their duties without undue influence from councillors or other staff members"*. I believe the provisions of the Act and the Model Code do sufficiently address this matter.

855. Mr May has also recommended that a *"senior member of Council staff be appointed as an internal ombudsman to deal with"* matters such as conflict between councillors and council staff and circumstances where attempts are being made to improperly influence them. In my view, consideration should be given to ensuring that all councils have a person in such a position. Until 2013, the Council had such a position.

General Manager

856. Mr May has also made a submission that the Regulations of the Act should be amended to ensure that a *"General Manager still under contract may only be removed by the CEO, Office of Local Government at the recommendation of the council"*, as distinct from being able to be removed by the elected body (as effectively occurred in relation to the Auburn Council with Mr Burgess). There is not sufficient evidence before this inquiry for me to adopt such a recommendation.

South Auburn Planning Proposal

857. At the Council meeting held on 17 February 2016 Mr May as Administrator declared and carried a motion that *"Council take no further action in relation to* [the SAPP] *and that the General Manager advise the Department of Planning of this decision"*.

858. The overwhelming evidence of the Council planning staff was that they did not consider that the SAPP had planning merit. I would not recommend any course in relation to this planning proposal other than that already taken by the Administrator.

Berala Village Planning Proposal

859. The Administrator has placed the BVPP on hold. Although I have made no findings of dishonesty or breach of the Act in relation to this planning proposal, the planning evidence before the Inquiry in my view supports a conclusion that this planning

proposal is currently unwarranted. I would not recommend it be proceeded with unless some appropriate independent expert assessment concludes that it should.

Grey Street Planning Proposal

860. The GSPP has been withdrawn. In those circumstances, no recommendations are necessary other than to observe that this planning proposal at no stage had support from the Council's planning staff, and was rejected at Gateway.

Marsden Street Planning Proposal

861. In relation to the MSPP, Counsel Assisting suggested a number of recommendations that are set out at [434] above. The first two recommendations related to councillor's disclosure of interest. In my view, the current Act, Regulations and Model Code do contain a comprehensive regime for disclosure of interests and I make no recommendations for any further legislative amendment than has currently recently been made (such as the repeal of s.448(g)).

862. Counsel Assisting also made the following recommendation:

> *"Council staff should be directed to identify in any reports to Council the nature and extent of all councillor interests affected by a particular planning proposal, including quantification of the likely benefit to the councillor."*

863. I agree with at least the first part of this recommendation and support it – that is, council staff should be directed to identify in any reports to council, concerning for example a planning proposal, the nature and extent of all councillor interests affected. I would not go as far as recommending that there be a requirement that this include "quantification of the likely benefit" to the councillor. To do that would require expert valuation evidence which might be expensive and in relation to which there may be a dispute. In my view, it would generally be sufficient to identify any councillors' land interests, and to indicate how the proposal might affect that land in relation to proposed changes to planning controls.

John Street Car Park

864. The Council and Mr Mehajer's company are involved in a legal dispute concerning a contract for sale. In those circumstances, it is not appropriate to make any recommendations.

Station Road

865. Counsel Assisting has submitted the following recommendations in relation to the Council's failure to commence prosecution in relation to this development:

> *"The Local Government Act should be amended to provide, except in relation to minor matters, for the referral of any question concerning the prosecution of a member of council or a staff member of a council to an independent body (such as the DPP or the office of local government) for a decision to be made whether or not to proceed with such prosecution."*

866. The evidence before the Inquiry in relation to this matter indicated that Mr Brisby had a lack of comfort in dealing with a potential prosecution involving an elected member of council. Mr Burgess the General Manager also had a similar concern and involved himself in the process whereby legal advice was obtained. I would in the circumstances make the recommendation suggested by Counsel Assisting.

DATED: 10 February 2017

RICHARD BEASLEY SC
COMMISSIONER
AUBURN COUNCIL PUBLIC INQUIRY