

Auburn Public Inquiry 2016

Written submissions

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Document 1 Written submissions of Counsel Assisting

AUBURN PUBLIC INQUIRY
Auburn City Council Chambers
Before the Commissioner: Richard Beasley SC

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Part 1: The 2012 Council, Councillors, Staff, Relationships and the Termination of John Burgess

Introduction

1. Ten Auburn City Councillors were elected across two wards at the Local Government Council Elections held in September 2012.
2. The representatives of the First Ward, comprising the Western third of the LGA (encompassing Auburn and parts of Silverwater) were Ronney Oueik, Le Lam, Semra Batik-Dundar, Salim Mehajer and Hicham Zraika.
3. The representatives the larger Second Ward (encompassing Lidcombe, Berala, Regents Park, Newington, parts of Silverwater, Wentworth Point, Sydney Olympic Park) were Councillors Irene Simms, George Campbell, Ned Attie, Tony Oldfield and Steve Yang.
4. The Councillors were elected on various tickets. Of those elected in 2012 Zraika and Campbell were candidates of the ALP; Yang, Attie and Oueik were candidates of the Liberal Party. Simms and Batik-Dundar were members of Residents Action Group for Auburn Area (RAGAA) and Oldfield, Le Lam and Salim Mehajer were independents.

Election of Mayor and Deputy Mayor

5. At the first meeting of Council following the 2010 election, ballots were held for the positions of Mayor and Deputy Mayor, each of which had a 12 months term.
6. The significance of the position of Mayor, whose responsibilities include chairing all Council meetings, is emphasized in his/her casting vote in the case of deadlock, a power that passes to the Deputy Mayor in the absence of the Mayor. As will be seen, that vote was critical in a number of controversial issues that were considered by Council over the term of the Council.
7. There was evidence that prior to the vote on these position in September 2012 Zraika, Campbell, Simms, Oldfield and Batik-Dundar reached an agreement that they would support the following candidates for the two position over the four year term of the Council¹:

Year	Mayor	Deputy Mayor
2012	Simms	Zraika
2013	Zraika	Batik Dundar
2014	Campbell	Simms
2015	Batik Dundar	Campbell

The 2012, 2013 and 2014 Mayoral Elections

8. 2012. At the first meeting of the 2012 Council there were two candidates for each position: Ned Attie and Irene Simms for Mayor and Hicham Zraika and Salim Mehajer for deputy.
9. The votes were in each case deadlocked at 5-5², necessitating the casting of lots and Messrs Attie and Mehajer were successful.

¹ Ex Gen 6

10. 2013. Twelve months later in September 2013 there were again two candidates. Before that meeting Mr Campbell sought and obtained a written assurance from Mr Zraika that he would honour an agreement that was reached prior to the 2012 Mayoral Elections and a document was prepared and signed by each of them; Ex Gen 6. The document recorded agreement by Mr Zraika that he would support the candidates referred to above and that the two Labor Councillors would only "support developments consistent with the (LEP) and DCP, and will not vote to amend the LEP unless there is overwhelming public interest to do so."
11. The votes were deadlocked once again. After lots were drawn, Mr Zraika was elected Mayor and Mr Mehajer was elected Deputy Mayor.
12. 2014. Twelve months later in September 2014, the positions were again deadlocked: the mayoral candidates on the respective tickets being Messrs Campbell and Mr Oueik and the deputies were Ms Simms and Mr Mehajer. The votes were deadlocked at 5 all and Messrs Oueik and Mehajer were elected on the drawing of lots.
13. There is little dispute that at least as far as the mayoral and deputy mayoral elections were concerned; there were two 'blocks' on Council and that during the first three years of the Council, the blocks stuck to their respective tickets/ agreements regarding those positions.

The 2015 Mayoral Election

14. In September 2015, the position changed for the first time. Critically, the vote occurred after the public furore regarding Mr Mehajer's wedding.
15. The two mayoral candidates were Le Lam and Semra Batik Dundar. The deputy mayoral candidates were Mr Campbell and Mr Mehajer.
16. The evidence of Messrs Oueik, Attie, Mehajer, Yang and Ms Lam was to the effect that despite these relatively firm and fixed blocks, they never met to discuss Council business as opposed to the Mayoral elections. As the evidence shows, that was not entirely correct, as there were a number of instances where there was communication amongst the members of that group.
17. Mr Oueik said that he never met with the group comprising himself, Mr Attie, Ms Lam, Mr Zraika, Mr Yang and Mr Mehajer to discuss business that would be coming up at Council; PH Tr 23.42. When asked whether a group of six comprising himself, Ms Lam, Mr Yang, Mr Mehajer, Mr Attie and Mr Zraika met to discuss support for the positions of Mayor and Deputy Mayor, he said that it was "5" not six:

"Q. Do I take it that your evidence is that five of that group of people met to discuss their approach to the mayor and deputy mayor elections; is that right?

A. And that happened every single council throughout the state. (PH Tr 24.18-22)

.....

MR BOLSTER: Q. Yes, I am talking about the 2012 election. Is it fair to say that the five of you reached an agreement that you would support Mr Mehajer for deputy mayor at each of the subsequent four mayoral elections; correct?

A. I can't recall that 100 per cent, but no-one cares about the deputy anyway, honestly. Like, when you're mayor you don't want to go back to deputy. (PH Tr 24.40-47)

18. The Inquiry would not accept Mr Oueik's flourish about the power of the deputy. As the evidence shows, the ability of the deputy to deliver a casting vote in the absence of the Mayor, gave that position a power that was significant on a Council that was divided in the way Auburn was, at least for the first roughly three years of the Council when there were

² Attie, Oueik, Yang, Lam and Mehajer in support of the Attie/Mehajer "ticket" and Zraika, Campbell, Batik Dundar, Oldfield and Simms in support of Simms and Zraika.

two loose groupings of 5 and Mr Zraika was aligned with the so called, "Poor Four"; Messrs Campbell and Oldfield and the Mss Simms and Batik-Dundar. The significance is also demonstrated by what happened at the 2015 Mayoral Elections themselves.

19. Mr Zraika, although he nominated Mr Campbell, left the chamber before the vote. His explanation for doing so was to the effect that he, "didn't find (Mr Campbell) to be leadership material" and felt that Mr Campbell had been undermining him, both internally and publicly, in the context of Mr Zraika's unsuccessful attempt to be pre-selected to the state seat of Auburn, Tr PH 21.20-36. Under cross-examination by counsel for Mr Zraika, Mr Campbell said that although he took some part of Mr Zraika's conduct personally, he was more concerned by the fact that Mr Zraika was doing something for Salim Mehajer, Tr 800.7. He added;

"... in the context of what was going on in council at the time, that it was his way of giving a leg-up to Salim Mehajer, and I regarded that as demonstrating some sort of obligation towards that person." (Tr 800.15-18)

20. It was suggested to Mr Campbell that it may have been because of some comments that he made on the 7.30 Report. Mr Campbell denied that and denied there was friction between himself and Mr Zraika at that time, Tr 800.40. Mr Yang's evidence was that at the 2015 election for mayor and deputy mayor, he knew that there would only be two candidates for each position. He said that once Ms Lam was going to nominate for Mayor, he was going to nominate to be the deputy mayor, but no one "recommended" him for that position. He became aware that Mr Mehajer was going to run as the deputy mayor for a fourth term; PH Tr 17.15 and told people that he would not support him; PH Tr 17.17-19 because of what had happened during 2015, Tr 17.27. When it came to the vote, he abstained; PH Tr 17.32 and observed Mr Zraika leave the room and not vote; PH Tr 18.33-38. Clearly, if Mr Zraika had voted in accordance with the agreement he had signed, Mr Campbell would have been elected Deputy Mayor.
21. Mr Mehajer said that Mr Yang did not talk to him about this matter, Tr 1249.26. He said none of the other Counsellors told him that he did not have the numbers for Deputy Mayor, Tr 1249.37-1250.3. In relation to Mr Yang he said, frankly; "I don't understand him. I don't speak to him. That's the honest truth. I actually don't communicate with Councillor Yang." Tr 1249.33-5.
22. Mr Yang also gave evidence that between September 2012 and February 2016 there were no meetings between himself, Oueik, Attie, Lam and Zraika to discuss Council business. He also said that they did not talk on the phone before meetings to discuss how they were going to vote on particular matters; PH Tr 18.42-19.18. He did however say that when he had trouble understanding something during a Council meeting he asked the person next to him, Mr Attie, for help; PH Tr 19.25-30.
23. He said that he did not talk about Council business with Mr Attie outside the chamber but did say that after meetings there was dinner in the Jack Lang Room involving Councillors and staff where, "sometimes we have a different conflict, so we're talking and then we try to resolve the matter to be understand each other." PH Tr 20.2-4.
24. He was aware of meeting between the Labor Councillors (PH Tr 20.19) and Mr Oldfield, Ms Simms, Ms Batik-Dunbar, Mr Campbell before Council Meetings but said that the Liberals and independents never did that; PH Tr 20.25.
25. Mr Oueik in cross-examination by Mr Wheelhouse gave evidence that:

"He never met with the other councillors, either individually or as a group, regarding how he would deal with any rezoning resolution coming before the council, Tr 1126.15

26. Ms Lam said that prior to 2012, when she agreed to support Mr Attie for Mayor, he had wanted to run for two years. She said that they had a conversation about that:

"I did say to him, "Look, you are three and you are four, it's my turn", but 2010 Mr Attie ran but draw from the hat he lost, and 2014 Councillor Oueik said he would like to run, so he did put his name forward too, but he didn't have any discuss with me." (Tr 706.26-31

The General Managers during the term of the 2012 Council

27. John Burgess. John Burgess was the General Manager of Auburn City Council for the first few months of the Council until his termination in March of 2013. The circumstances of his termination and the circumstances leading up to it are deal with below.
28. Peter Fitzgerald Senior – Acting General Manager. Following Mr Burgess' dismissal, Mr Fitzgerald was appointed acting general manager on and from. During that period he oversaw the selection process for the appointment of a permanent general manager.
29. Mark Brisby. Mr Brisby was appointed General Manager of Council from 3 October 2013 (Tr 426.13) and remained in that position till the abolition of the Council In May 2016. Prior to that he was the Director of Planning and Environment.

Significant Relationships

Mr Attie's Phone – Evidence of Various Relationships

30. At the conclusion of the public hearings, Inquiry staff were, by consent, provided with the mobile phone of Mr Attie for the purpose of forensic examination. This issue arose, at least in part, because of the failure of Mr Attie to return his Council mobile phone following his suspension; Ex S 18, [7]-[11] and p 4 see Tr 1834.26-1835.26.
31. The result of that forensic examination yielded a significant body of sms data evidencing the relationship between Mr Attie others over a number of years. That material forms part of Ex FTB1. In summary Ex FTB1 is made up of:

EXTRACTION REPORT PHONE RECORDS – Mr ATTIE	
Description	FTB1 page #
SMS Messages (121) between Mr Attie and Mr Mehajer	136-142
Selected SMS Messages (43) between Mr Attie and Mr Mehajer	143-147
SMS Messages (96) between Mr Attie and Mr Jack	148-152
Chat records between Mr Attie and Mr Jack	153-177
Selected SMS Messages (104) between Mr Attie and Mr Zraika	178-186
Chat records between Mr Attie and Mr Brisby and ors	187-207
Selected SMS messages (22) between Mr Attie and Mr Brisby and ors	208-225
SMS messages (67) between Mr Attie and Mr Francis and ors	226-231
Chat records between Mr Attie and Mr Francis and ors	232-266
Selected Chat records between Mr Attie and Oueik and ors	267-285
SMS messages (123) between Mr Attie and Mr Oueik & ors.	286-296
SMS messages (22) between Mr Attie and Ms Lam	297-306

Glen Francis

32. Glen Francis was the Manager of Development Assessment at the time of Mr Brisby's elevation and had held that position since August 2015³. At that time Mr Francis' responsibilities included managing the development assessment process which involved the assessment and determination of development applications, Tr 431.3.
33. His responsibilities also included managing the Planning section within Council. In this role Mr Francis was responsible for managing Monica Cologna and Jorge Alvarez, both senior strategic planners (Ms Cologna with 18 years experience⁴ – Mr Alvarez 20 years⁵) with responsibilities that included aspects of the various planning proposals examined by the Inquiry. They were assisted by two other strategic planners. Mr Alvarez explained the distinction between strategic planners and development control planners in these terms:

“Development control planners typically do your DA assessment. A strategic planner typically does your planning proposals, policies, interpreting, Department of Planning work, and things like that.”
(Tr 947.46-948.3)

34. Ms Cologna was appointed Manager of Strategy in 2012, Ex S3, [3]-[5]. At the relevant times, Mr Alvarez reported to Mitchell Noble, who in turn reported to Ms Cologna, who in turn reported to Mr Francis, Tr 948.5-23.
35. Following Mr Brisby's elevation and the associated re-structure of Council in October 2013, Mr Francis took up a new position of “Executive Manager Planning”, a position broadly equivalent to Mr Brisby's former position. Mr Francis did not report directly to Mr Brisby, but through Mr Ian Dencker, who together with Mr Hamish McNulty, were the two deputy general managers.

The Position of Mr Francis – Relationships with various Councillors

36. On 10 May 2016 the Inquiry took evidence from Mr Francis at a private hearing. Much of that evidence will be dealt with in these submissions in the context of the various planning proposals and other matters under consideration, however critical aspects of his evidence, and in particular his relationships with certain former councillors needs to be separately addressed. The reason for this is that these matters and these relationships began well before the various significant matters that occupied the majority of hearing time and Mr Francis played a central role in many of those issues. There is considerable evidence to suggest that this conduct and his relationships compromised Mr Francis in the way in which he dealt with a number of planning and certification matters.
37. Mr Francis was so concerned about certain of these matters that he self-reported to the ICAC before giving his evidence to a private hearing of this inquiry. He has subsequently expanded certain aspects of that evidence in his written statement to the inquiry (prepared with the benefit of legal advice) and which clearly involved a disclosure of matters adverse to himself.

Relationship with Mr Oueik

38. In substance, the evidence given at the private hearing was to the effect that:
 - a. In early 2006 Mr Francis was intending to carry out certain renovations on a recently purchased house at Bexley. The works included the installation of a new kitchen.

³ Ex S23 (Francis Statement) [4].

⁴ Ex S3, [3]

⁵ Ex S17, [3]

- b. Messrs Oueik and Brisby attended the house for lunch one day. It was a workday but Mr Francis was himself off work. Mr Oueik said he could arrange for the work to be done to help Mr Francis out. He said he had access to tradesmen, but that Mr Francis would have to pay them directly. Mr Oueik said it was all above board and that he would pay the tradesmen directly.
 - c. The budget was about \$10,000, however in total, Mr Francis spent around \$6.5 to 7 thousand dollars.
 - d. Various tradesmen attended and were paid directly in cash with the exception of the person who installed the cupboards in the kitchen. This person, whose name, phone number and contact details Mr Francis does not recall, was arranged by Mr Oueik.
 - e. He measured up the site and quoted \$2,000 for the cupboards with installation through a third party. When the installer came and installed the cupboards and Mr Francis attempted to pay him, he refused.
 - f. Mr Francis then took the matter up with Mr Oueik and said to him that the tradesperson would not take the money. He said that he wanted to pay for the cupboards and had the money, ie \$2,000, with him.
 - g. Mr Oueik did not accept the money and became agitated about it. He said to Mr Francis that it was a gift and that he wanted to help the family out. Mr Oueik got agitated when Mr Francis asked him questions about it.
 - h. Further, Mr Francis has attended the home of Mr Oueik on several occasions to be shown the grounds and renovations. The first such visit was with Mr Brisby who drove the two of them there. Mr Brisby told him that they were going up to see "Ronney's house to see what was there". They had coffee nearby.
 - i. Mr Francis went on at least one other occasion by himself to be shown some landscaping work, some IT improvements and improvements to the pool.
 - j. Mr Francis recollection that the first visit to Mr Oueik's home was in October or November 2015 and that there have been a number of visits since then. On one occasions Mr Peter Fitzgerald Junior was also present.
 - k. Mr Francis did not disclose these matters to anyone else until 2016 when he reported the matter to ICAC and disclosed the matter to the inquiry.
39. Mr Brisby's recollection of the meeting was vague and he could not recall what was said about the renovations, Tr 451.32. He said that he drove Mr Oueik there, Tr 453.12-16. He said that the visit was, "a courtesy to have a look at his new house" Tr 453.21.
40. Mr Francis subsequently, and with the benefit of legal advice, provided the Inquiry with a statement elaborating upon Mr Oueik's gift. In it he clarified the position regarding the delivery of the cabinets in these terms:

"59. At one point, a kitchen cabinet maker came out to the property and quoted me \$2,000 to make cabinets for the kitchen and told me that I would need to deal with a 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 that he was only delivering them and that I would have to pay the cabinet maker....." (ExS23)

41. Mr Francis re iterated the circumstances in which he raised the matter with Mr Oueik in these terms:

"59.A short period of time after (the delivery of the cabinets), 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 cabinet maker'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." (Ex S23)

42. Mr Francis himself said at his private hearing that at the time of the issue of the construction certificate for Water Street, he had what he described as a, "sort of - a colleague, work colleague relationship." Tr PH 22.15
43. He said that he had coffee with Mr Oueik and Mr Brisby on a regular basis, 3 or 4 times a month, possibly more where they discussed politics, the council, and kids.
44. He said Mr Oueik would also call him on his mobile phone some times more regularly than their meeting for coffee, Tr PH 23.37. He said that when Mr Oueik called, *"he raised various issues as councillors would.....he had his role as a councillor and then he had his role as a developer, and the majority of the time it was more on the role of the councillor, in terms of raising things."*⁶ When Mr Oueik rang as a developer, it was mainly to ask questions.
45. He said that Mr Oueik would often raise, by way of complaint, illegal works and rubbish with him. He recalls Mr Oueik discussing the Water Street development.
46. Mr Brisby also confirmed the two visits to Mr Oueik's new house in late 2015 with Mr Francis, Tr 451.37-46 but could not recall either Mr Fitzgerald Senior or Junior attending at the same time. He also mentioned one or two visits to Mr Oueik's previous home in St Hilliers Road; 452.5-11. He said that the visit to the new house (which occurred on a work day and during work hours, Tr 494.11-14) entailed Mr Oueik showing them and given them a "tour" of his new house. He could not recall the discussion, but said that they talked about:

"The house, and what he liked and where it was. I did make a comment it was too far away from Auburn for him and I didn't expect he'd ever, ever stick it out. But other than that, it was general chitchat." (Tr 494.508)
47. Mr Brisby also exchanged birthday and Christmas gifts with Mr Oueik from the time of his first term as Mayor in late 2010. The gifts included toys for Mr Oueik's children. He said that no other councillors ever gave him gifts.
48. Mr Brisby also gave evidence of an apparently social visit to the almost complete home of Mr Mehajer in Frances street Lidcombe, Tr 454.21 et seq. He said that the Mayor asked he and Mr Francis to accompany him and that he, *"thought it was important that more than one of us be there and have a look at the progress of his property."*
49. There was no suggestion of any official need to visit or inspect, as Council was not the certifier, Tr 455.44. He did however say that subsequently another Councillor raised the question of the dwelling's building certificate with him and he referred the matter to Mr Francis and Mr Dencker for investigation. The result of the investigation, according to his evidence that that the certifier, "had issued the final occupation certificate", Tr 456.26.
50. Mr Brisby described his relationship with Mr Francis as a professional colleague and friend, Tr 492.37-42. Mr Brisby said that the two of them started at Auburn a week apart, Tr 492.47 meaning they had worked together for nearly 15 years. Mr Brisby said Mr Francis was; *"generally seen as the second-in-charge of the old planning and environment department."* Tr 493.8.
51. Whilst he resisted the proposition that Mr Francis followed his path up the chain, he conceded that many of the features of his position before he was elevated to General Manager were taken over by Mr Francis when appointed Executive Manager, Planning, Tr 493.8-20.

⁶ Tr PH 23.40

52. He recalls 2 visits to Mr Francis's home, one of which was the occasion described by Mr Francis as involving Mr Oueik. He said Mr Francis had never been to his home, Tr 493.34.
53. In so far as the visit to Mr Oueik's house was concerned, Mr Brisby said that Mr Oueik had invited them to look at his new house and gave them a tour of it, Tr 493.36-46. They went on a workday, during work hours, but did not talk about Council business, they talked about "the house", "what he liked and where it was" and "general chit chat".
54. Mr Lawrence gave evidence that he observed both Glenn Francis and Mark Brisby to have a close relationship with Mr Oueik; Ex S16 [21] and added that at the time of the advice from Deacons regarding 40-46 Station Road, he observed Mr Burgess to have a very close relationship with Mr Oueik; Ex S16, [20] although he said both Mr Francis and Mr Brisby had control over the issue of the illegal works.

Councillor visits to the Second Floor – Mr Oueik and Mr Attie

55. The planning and development control staff are located on the second floor of the Council Buildings. The office of the general manager is on the first floor, as is the office of the Mayor.
56. Mr Alvarez, when asked how often he saw Mr Attie in Mr Francis's office on level two, answered:

".....Sometimes more than not, but I would have to say possibly at least once a month.

Q. Once a month?

A. Or maybe – maybe less than that.

Q. All right.

A. But I would never see any other - the only councillors I ever saw entering Glenn Francis's office while I was there was Councillor Oueik and Councillor Attie, and no other councillors." (Tr 939.11-21)
57. When asked about his experience, having worked at both Sydney and Woollahra Councils, as to whether he had seen councillors attending the office of planning staff or someone in the equivalent position to Mr Francis, he said that he had not seen such things at the other Councils. He added:

"... it's sort of contrary to that separation of power so - I'm just trying to think. No, I don't think I've ever seen it. I've only worked at two other councils, Woollahra and Sydney, and I don't think I ever saw it in either of those workplaces. I'm fairly certain." (Tr 939.29-34)
58. Mr Alvarez said that he saw Mr Oueik on the second floor "only a few times, three or four times possibly" over a period of two and a half years, Tr 939.36-45.
59. Mr Oueik did not deny such visits, but sought to justify his presence on the second floor on the basis that he was, "working so hard at that time" that he needed, "to see the engineer and the engineer and the planner was on the second floor", Tr 1120.45-47. He said that he did not have a swipe card for the second floor and that if he wanted to get up there he had to call them, or they would call him, Tr 1121.7.
60. Mr Oueik was of the understanding however that development applications lodged by him whilst he was on Council were dealt with externally and that Mr Francis had no role to play in the assessment of such applications, Tr 1120.11-20.
61. There is other evidence before the Inquiry regarding the relationship between Councillors and Mr Francis.

Mr Attie and Mr Francis.

62. The phone records of Mr Attie indicate an ongoing relationship between he and Mr Francis over an extended period of time following Mr Attie's term as Mayor.
63. For example, in the case of 1A Henry Street there was this exchange which occurred on 8 September 2014 shortly after service of the stop work order:

8/09/2014 12:36:27 PM(UTC+10), +61.....550
 Henry street Lidcombe. Help!
 8/09/2014 12:37:27 PM(UTC+10), +61.....413 (Glenn Francis)
 Needs a DA for use/fitout. Zone complies
 8/09/2014 12:39:00 PM(UTC+10), +61.....550
 I know.
 8/09/2014 12:39:18 PM(UTC+10), +61.....550
 Da on the way
 8/09/2014 12:39:24 PM(UTC+10), +61.....550
 Let them clean up
 8/09/2014 12:40:00 PM(UTC+10), +61.....413 (Glenn Francis)
 Great. Can they advise Jason or Me in an email
 8/09/2014 12:40:32 PM(UTC+10), +61.....550
 Yes. Email coming. (EX FTB1, p 249)

64. A fairly typical exchange occurred on 15 September 2014:

15/09/2014 8:57:21 AM(UTC+10), +61.....550
 Did u call me?
 15/09/2014 8:57:57 AM(UTC+10), +61.....413 (Glenn Francis)
 No not me
 15/09/2014 8:58:08 AM(UTC+10), +61.....413 (Glenn Francis)
 WAffa is do you want me to go get it
 15/09/2014 8:58:08 AM(UTC+10), +61.....413 (Glenn Francis)
 It's been with Zed since Friday
 15/09/2014 8:58:14 AM(UTC+10), +61.....550
 Did u finish all the paperwork?
 15/09/2014 8:58:19 AM(UTC+10), +61.....550
 I'll collect in 15.
 15/09/2014 8:59:12 AM(UTC+10), +61.....550
 But zeds not in is she?
 15/09/2014 9:00:16 AM(UTC+10), +61.....413 (Glenn Francis)
 Ok
 15/09/2014 9:00:16 AM(UTC+10), +61.....413 (Glenn Francis)
 I've got a meeting for about 45 mins
 15/09/2014 9:00:33 AM(UTC+10), +61.....550
 If you have time for a coffee at impress in 10 minutes.
 15/09/2014 9:01:16 AM(UTC+10), +61.....550
 ???????
 15/09/2014 9:02:04 AM(UTC+10), +61.....550
 Then at 9:45????
 15/09/2014 9:02:36 AM(UTC+10), +61.....550
 Don't be late.
 15/09/2014 9:02:46 AM(UTC+10), +61.....413 (Glenn Francis)
 I'll try
 15/09/2014 9:03:02 AM(UTC+10), +61.....550
 To be late? I'll fix u
 15/09/2014 9:44:56 AM(UTC+10), +61.....550
 Finished yet???
 15/09/2014 9:50:47 AM(UTC+10), +61.....550
 Hello
 15/09/2014 9:55:08 AM(UTC+10), +61.....550
 Can u tell me where you are
 15/09/2014 9:56:59 AM(UTC+10), +61.....550
 I'll be in the cafe in 5 minutes
 15/09/2014 12:18:40 PM(UTC+10), +61.....550
 Need to talk to u
 15/09/2014 12:42:11 PM(UTC+10), +61.....550
 You free yet? (EX FTB1, p 251-2)

65. Whilst it is not suggested that there was anything untoward in these particular exchanges, what they do show is a relationship where Mr Attie regularly sought out Mr Francis to deal with, presumably, Council matters.
66. In the context of Berala, where Mr Francis made the change to the recommendation about York Street on or about 9 July 2015, there was an exchange between Mr Attie and Mr Francis in the week leading up to that in these terms:

4/07/2014 7:34:34 AM(UTC+10), +61.....550
 Need to see u this morning as you won't answer your phone or return my calls.
 4/07/2014 8:19:44 AM(UTC+10), +61.....413 (Glenn Francis)
 No probs
 4/07/2014 8:21:11 AM(UTC+10), +61.....550
 Great. See you around 10.
 4/07/2014 8:21:25 AM(UTC+10), +61.....550
 That should be enough time for you to get in.
 4/07/2014 8:21:52 AM(UTC+10), +61.....413 (Glenn Francis)
 Ma fish ma sheckle
 4/07/2014 8:23:13 AM(UTC+10), +61.....550
 Hahaha
 4/07/2014 8:25:30 AM(UTC+10), +61.....550
 مشكلة+يوجد+لا
 4/07/2014 10:12:39 AM(UTC+10), +61.....550
 On my way
 4/07/2014 10:17:31 AM(UTC+10), +61.....550
 On my way
 4/07/2014 10:17:32 AM(UTC+10), +61.....550
 On my way
 4/07/2014 10:20:46 AM(UTC+10), +61.....413 (Glenn Francis)
 K (EX FTB1, p 247)

67. A further example of the relationship between Mr Francis, Mr Attie as well as other members Council and staff is to be seen in this "invitation" from Mr Attie to him and various others, including Mr Brisby:

<p>Sent To +61.....979 Joseph Tannous* To +61.....341 Hisham Zraika* To +61.....822 Ronney Oueik* To +61.....949 Peter Fitzgerald* To +61.....413 Glenn Francis* To +61.....2353 Hamish McNulty* To +61.....168 To +614.....430 Mark Brisby*</p>	<p>17/03/2014 8:36:26 AM(UTC+11)</p>	<p>Sent Good morning gentleman. Just a reminder and for those who don't know, lunch is confirmed tomorrow (Tuesday) at 12:30. Venue is the usual Lebanese watering hole. 175 wattle street Mt Lewis (bankstown). Car pool, single file, get a lift, organise it!</p>
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(EX FTB1, p 185, 217)

68. Similar meetings were organised in the GM's boardroom on 11 March, 23 March and 18 May 2015 at involving variously Messrs, Attie, Ftizgerald Junior, Oueik, McNulty, Denker, Francis and Brisby; EX FTB1, p 216, 190 and 191. This followed an earlier meeting on 29 January 2015; EX FTB1, p 191.
69. When Mr Attie sought support in relation to a Chines delegation visiting he approached Messrs Mehajer, Zraika and Oueik; MFI TB1, p 146.
70. He sent jokes to Messrs Oueik, Fitzgerald Jnr, Francis, McNulty and Zraika; Ex FTB1, p 181.

71. The phone also revealed that contrary to their evidence, Messrs Yang, Oueik, Zraika, Mehajer, did in fact meet:

<p>Sent To +61.....650 Steve Yang* To +61.....822 Ronney Oueik* To +61415936341 Hisham Zraika* To +61.....66 Salim Mahajer*</p>	<p>17/08/2013 8:49:16 AM(UTC+10)</p>	<p>Sent Good morning. There will be some light breakfast before the meeting so come a little earlier. (EX FTB1, p 147, 294)</p>
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Relationships between Councillors and the Council Staff

72. A theme that emerged during the inquiry were various relationships between Councillors and Staff. A particular matter of complaint was the propensity of a small minority of Councillors to visit the planning department and the offices of Messrs Brisby and Francis.

Mr Oueik and Mr Brisby

73. Mr Brisby described his relationship with Mr Oueik as a “close” and “good working relationship”; but not a personal relationship, Tr 451.8-12.
74. Mr Campbell gave evidence that after Mr Brisby was appointed Mr Oueik said to him:

“Thanks very much for voting for Mark. I really appreciate you voting for Mark. When somebody does me a favour, I never forget it, Never!” (Ex S13[48])

75. Mr Campbell said that he did not regard himself as having done Mr Oueik a favour and “was greatly surprised that he regarded my having voted that way as being a favour to him.” Ex S13, [49].
76. Mr Burgess was clearly concerned by the relationship and made a number of contemporaneous diary notes about both the relationship and contact between Mr Oueik and Mr Brisby.
77. He made a note in his diary on 28 September 2010 to the following effect;

“Discussed with Mark Town Centre Auburn/Lidcombe/Mehajer Mark said Ronnie had not spoken to him about the business paper. Mark then said Ronnie had spoken about lands St Hiller/Dartbrook which completely contradicts Marks previous comments of no contacts with Mayor.”

78. On 31 October 2011 he made this entry, “Ronny Staff work areas – Code of Conduct” Ex S11, p 97. Mr Burgess said the discussion at this meeting was, “robust and very loud” Ex S11, [191] et seq. He said that Mr Oueik:

“.... resented the fact I was banning him from entering staff areas. I was made aware he was entering the Planning floor on level 2 and was either gaining access by use of a swipe card he had or was being let in by staff.
My notice was drawn to his activities by the Internal Auditor Mr Habib Chamas and other concerned staff.
Councillor Oueik not only entered the area he went straight to Mr Brisby’s office and demanded to see staff about his own applications.
I informed Councillor Oueik he could not enter nor could he direct staff.
I recall he told me he would go wherever he wanted, whenever he wanted.
I recall informing Mayor Oueik he was in breach of the Code of Conduct advising him he was not allowed access to staff only areas.” (Ex S11, [193]-[198])

79. On 4 November 2011 he noted, "No e-mail from Brisby as requested re visits to Mayor." Ex S11, p 97. On 22 November he made a further note of a conversation with Mr Brisby; "Ronney personal relationship – no more" Ex S11, p 99.

Mr Attie and Mr Brisby

80. Mr Attie's phone records show a similar relationship as between Mr Attie and Mr Brisby. The relationship would appear to have extended beyond one of Councillor staff member to a relationship of friendship; see generally EX FTB1 p 187-225. There are constant references to each other as "mate". In June 2014 he inquired how Mr Brisby's holiday in the US was going; EX FTB1, p 204. At the end of that trip Mr Attie asked him to buy 4.5 litres of scotch for him, which he would refund in due course, 11 June 2015; EX FTB1 p 204, having discussed their whiskey preferences earlier on 30 May 2015; EX FTB1 p 203. Mr Attie even wanted to have a scotch with Mr Brisby at 10.20am on 6 September 2015; EX FTB1 2015. Mr Attie sent numerous pictures of meals and food to Mr Brisby, of the hotels in which he and Mr Oueik were staying as well as reports of their travels. Jokes were shared as to Mr Oueik going to the toilet on 6 February 2015; MFI TB1 p201. Mr Brisby sent Mr Attie a Christmas greeting on Christmas morning itself in 2014, EX FTB1, p 200.
81. Mr Attie's phone records also show Mr Brisby as part of:
- a. a 4-way chat with Messrs Zraika, Attie and Oueik totally unrelated to Council business; see EX FTB1.
 - b. a 3-way chat with Messrs McNulty and Attie; EX FTB1, 189.
 - c. a 3-way chat with Messrs Francis and Brisby, where there is a reference to a dinner on 21 October 2014 where Mr Oueik was present an ordered dinner for Messrs Brisby and Francis; EX FTB1, 191-2.
82. On 12 September 2014 Mr Attie sought information about a s 96 application and remonstrated with Mr Brisby, when told it was being assessed, "It's been in being assessed for too long." EX FTB1, p 196. He followed up the issue on 25 September 2014; EX FTB1, p 197.
83. In December 2015, Mr Attie shared with Mr Brisby a rumour that Auburn, Holroyd and Parramatta Councils would be merged; EX FTB1, p 206. Mr Brisby responded, with a forslly typical, "Thanks Mate !!"
84. Mr Attie sought to pursue the relationship beyond the suspension of the Council as these exchanges demonstrate:

2 March 2.54pm

Attie: Mark. Why is the IHAP set up for 2 years when council will be changed within 1 year.

21 March 4.40pm

Attie: Still waiting

24 March 11.34

Attie: No courtesy as a resident either? When can we meet?

29 March

Attie: Can I expect a call?

23 April 7.29am-

Attie: Good morning. Are u in the office yet?

Brisby: Yes

Attie: See u at 8. Will you have your minions with you?

Brisby: No just me !!

Attie: Aren't they coming to have some breakfast.

Brisby: We are not allowed but thanks !!

Attie: Not allowed what?

Attie: You're not allowed to talk to me too but that's still happening.

(EX FTB1, p 207-8)

Other significant Relationships

Mr Attie and Mr Mehajer

85. Mr Attie's phone also revealed a very close and apparently business connection with Mr Mehajer that includes reference to the existence of a "wikr" account. The "wikr" instant messaging app enables end-to-end encrypted and content-expiring messages. On 14 March 2016 Mr Attie stated that he couldn't find Mr Mehajer on wikr; EX FTB1, p 142. There followed a very lengthy exchange of text and SMS messages showing details of a close business relationship from EX FTB1, 142 through to 137.
86. On 19 December 2015 he joked with a group that included Mr Mehajer, Mr Zraika, Mr Oueik, Mr Francis, Mr Fitzgerald Junior, Mr Denker, Mr McNulty and Mr Brisby that he had observed, "2 white Ferraris blocking the entrance to Harold Street Guildford for a wedding, Cant see police, council, the media or Irene Simms anywhere." EX FTB1 180, 209.

Mr Attie and Mr Zraika

87. A similar close relationship is demonstrated by the messages passing between Mr Attie and Mr Zraika. In particular, in October 2014 at EX FTB1, 183 and 184, it is clear that Mr Attie and Mr Zraika are good friends. At line 76 on p 184, Mr Attie jokingly refers to Mr Zraika as a "traitor" and asked him to come to lunch. This was shortly after the 2014 Mayoral Election that took place on 24 September 2014⁷ where Mr Oueik was elected Mayor and Mr Zraika voted for Mr Campbell and Ms Simms as Mayor and Deputy Mayor. In the lead up to that vote, there was this exchange between Mr Attie and Mr Zraika:

23 September 9.23am – 11am
 Attie: Any progress.
 Zraika: Nope
 Attie: Why
 Attie: Did you speak to him
 Zraika: No
 Attie: Stop being lazy
 Attie: So did you like georges new cars
 24 September 8.00am
 Attie: What's your plan of attack
 24 September 4.42pm
 Attie: Sorry. Battery died. I'll speak later.
 24 March 11.34
 Attie: No courtesy as a resident either? When can we meet?
 29 March
 Attie: Can I expect a call?
 23 April 7.29am-
 Attie: Good morning. Are u in the office yet?
 Brisby: Yes

Mr Attie and His Car

88. On 24 September 2013 Mr Attie lodged two Councillor Expense Claim forms totalling \$11,260.83; Ex S9, pp 230 and 231. Included in that total were claims for:
- \$7,800.00 for a car allowance.
 - \$2,275 for car-washing for the period from September 2012 to May 2013.

⁷ Ex O1, p 21

89. On 1 October 2013 Mr Cockayne sent an e-mail to Mr Hon Wing Ho, then Manager of Finance⁸ in which he dealt with each claim in these terms:
90. Car Allowance. He referred to the Mayor having *"discontinued use of the Council owned vehicle....and is entitled to claim for the use of his own vehicle for the months of August and September at the rate of \$1,950 per months as approved by the AGM on 24 September"*.
91. Car Wash. He referred to the claim of \$2,275 for car washing having been:
- "based on the estimate weekly costs applicable for such service, and after review by the AGM is still considered reasonable. As it has been duly approved by the AGM it is therefore appropriate to be referred for payment. It should be reduced by that amount previously paid for car washing in November 2012 (\$70.00) as detailed in your memo."
92. Mr Wong responded on 2 October 2013 (Ex S9, pp 235-6) stating his position on each issue in these terms:
93. Car Allowance. The relevant provision in the Civil Expenses policy was to the effect that the relevant rate had to be determined by the General Manager based on the "historical cost averaged over the most recent three year period for the operation of a vehicle provided by Council" which he calculated as being around \$1,000 per month, well under the \$1,950 per month claimed by Mr Attie.
94. Car Wash. In this respect Mr Wong stated that prior to 7 August 2013 car washing would have been covered by Council Fleet Management with extra out of pocket expenses to be reimbursed by Council. He said that clause 2.1.1.2(a) of the Policy clearly specified:
- "Reimbursement of costs an expenses to Councillors will only be made upon production of appropriate receipts and tax invoices and completion of a Councillor's Expense Claim Form. Expenses and costs incurred must be in accordance with the requirements of this policy."
95. He added:
- "Mayor Attie claims \$2,275 for the 9 months period of September 2012 to May 2013 however "based on the estimated weekly costs applicable for such service" mentioned in your e-mail below. During this period, the Mayor's vehicle I believe it was fully under Council fleet management or services and maintenance, including car wash.
- Accordingly, this \$2,275 claim totally do not satisfy with Clause 2.2.2.2(a) if Mayor cannot provide the receipt or invoice for the claims, and therefore I disagree with your decision the claim is 'still consider reasonable.'" (Ex S9, p 236)
96. There were further exchanges between Mr Cockayne and Mr Ho on 3 and 4 October; see Ex 9 pp 232-235 before Mr Cockayne authorised a payment of \$6,150.86 to Mr Attie on 4 October 2013. That relevantly included \$2,988.03 in lieu of the \$7,800 claimed for the car and \$2,205.00 in lieu of the \$2,275 claimed for car washing from September 2012 to May 2013. If one assumes that the \$2,205.00 for car washing from September 2012 to May 2013 included both months then it covers a period of 9 month or \$245 per month (or \$56.54 per week).
97. To his credit Mr Ho took issue with, and placed on the record his objections to, the acceptance of the car wash claim in an e-mail dated 4 October 2013; Ex 9 pp 233-4 at point 3. His reasons are compelling.

⁸ Ex S9, p 237

The Position of Ms Lam – Various Relationships

98. Ms Lam gave evidence that she has been in business with Minh Hua since 1997 and that they operate from an office in Auburn from where she currently works three days a week, Tr 674.30-47. Ms Lam said that she dealt with the retail side of the business and Mr Hu dealt with rental management.
99. She agreed that she clients across the whole of the Auburn LGA, including Berala. She agreed that one such client was the Chan family and that the business has manage one of the Chan properties, 150 Auburn Road Berala, located within the Town Centre, in Berala since 2009, Tr 675.15-41. Ms Lam also agreed that the business listed on the market a property in Susan Street Auburn, located within the area covered by the South Auburn Planning Proposal, Tr 675.43-676.27. Whilst she sought to draw a distinction between management and selling on the basis that she did not have a direct involvement with the management of the Berala property, she eventually conceded that the business was hers and she managed the property.
100. Mrs Lam also gave evidence that previously a company owned by Mr Oueik had engaged Combined Strata to set up the incorporation of strata plans, Tr 684.2-6. She said that one such strata corporation was 40-46 Station Road, but that the particular relationship no longer exists, although she could not say when it ended, Tr 684.8-22. Further, she gave evidence of another Oueik property at 48 St Hilliers Road that was managed by her business. The agreement in question is dated 23 June 2010 and is signed by Mr Oueik as the sole director and shareholder of 48 St Hilliers Road, Auburn.
101. Ms Lam also produced evidence of Combined doing work for the owners of 12/9 Elizabeth Street Berala, a property located within the existing area of B2 zoning in the Berala Town Centre. Ex X included a copy of an agency agreement with the owners of that property, T & P Bieri, dated 20 November 2014.
102. Ms Lam also produced evidence of Combined Strata being contracted to manage the strata plans for the Owners Corporations for 46-50A and 52-56 John Street Lidcombe for a term of 3 years from 30 September 2011. Each agreement was signed by Mohamad Mehajer and Aiyal Mehajer.
103. Ms Lam said that she was unaware of Combined picking up the Mehajer business because she is “never involve with the strata management” (sic), Tr 685.44, and that she does not discuss with him what he does in the office despite the fact that the two of them are directors in the business, Tr 686.7 through to 689. The inquiry would have some doubt about this evidence given that in the case of the South Auburn Planning proposal, Ms Lam disclosed a non-pecuniary interest and abstained from voting on the basis that the same business managed a property within the area affected by the proposed re-zoning.

John Burgess

104. Mr Burgess was appointed General Manager of Council in February 2005 for a term of 5 years; Ex S11[4].
105. On 13 March 2013, the following resolution (moved by Mr Campbell and seconded by Mr Yang) was passed on the casting vote of Mr Attie:
 - “1. 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.
 2. That the Mayor notify Mr Burgess of Council's decision as a matter of urgency and seek the immediate return of all property of Auburn City Council in Mr Burgess' possession.

3. That until an Acting General Manager is appointed, all correspondence from councillors that would otherwise go to the General Manager is to be directed to the Mayor.

4. That the Mayor be delegated authority to appoint a well-qualified consultant to begin appropriate recruitment procedures to: a) Fill the vacant position. b) Meanwhile, appoint an Acting General Manager.

5. That Council requests the Mayor to expedite a revision of the delegations and the structure of Council which is to include the establishment of committees that will correspond to each department, thereby allowing councillors to accept greater responsibilities and to interact productively with management and staff.”
(Ex JS1, 233-4)

106. Those in support were Attie, Campbell, Oueik, Yang and Zraika. Those against were Batik, Lam, Mehajer, Oldfield and Simms. Ms Simms’ notes of that meeting are at Ex S1, pp 32 – 37. Mr Oldfield said that in the lead up to that meeting Mr Oueik and Mr Attie were lobbied in a number of meetings to support a motion to sack him; Ex S15[35] et seq.
107. On 18 March 2013 a rescission motion moved by Ms Simms (seconded by Ms Batik Dundar) was passed unanimously and in its place the following resolution was passed:

“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.

3. That the Mayor be delegated authority to establish and sign a suitable Deed of Release including undertakings from Council and Mr Burgess that confidentiality provisions will apply and Council and Mr Burgess will take no further action in respect of matter whether legal or otherwise.

4. That the Mayor notify Mr Burgess of Council's decision as a matter of urgency and seek the immediate return of all property of Auburn City Council in Mr Burgess' possession.

5. That until an Acting General Manager is appointed, all correspondence from Councillors that would otherwise go to the General Manager is to be directed to the Mayor.

6. That the Mayor is delegated authority to appoint a well-qualified consultant to begin appropriate recruitment procedures for two positions: a) The Acting General Manager for a short period of time, and b) The full time position of General Manager.

7. That Council request the Mayor to expedite a revision of the delegations and the structure of Council which is to include the establishment of committees that will correspond to each department, thereby allowing councillors to accept greater responsibilities and to interact productively with Senior Management.” (Ex JS1, 237)

108. On 20 March 2013, Mr Brisby was appointed interim Acting General Manager until the Council appointed an Acting General Manager; Ex JS1, 264.
109. On 25 March 2014, Mr Peter Fitzgerald (Senior) was appointed Acting General Manager; Ex JS1, p 266.
110. An issue before the inquiry was the basis for the original termination of Mr Burgess.
111. Mr Oueik accepted that from 2006 onwards, when Mr Burgess joined council, his performance reviews did not raise any matter of significant concern, Tr 1114.45-1115.46, and certainly none warranting termination.
112. Mr Burgess gave evidence about a number of other matters that were perceived by him to form the basis of the Council moving against him.

Jack Au and Operation Barrow

113. The first such matter was his report to the ICAC that led to Operation Barrow; Ex S11, [134]-[143].
114. Mr Oueik resisted the suggestion that a reason for the breakdown in the relationship with Mr Burgess was his report of Mr Oueik's deputy mayor Jack Au to the ICAC and the fact that this led to subsequent findings of corrupt conduct against him, Tr 1085.28-1086.7. In this respect Mr Oueik said Mr Burgess was simply doing his job. He denied the relationship with Mr Burgess got to a point where he actively discouraged others from dealing with him because of the position he'd taken with ICAC with former Councillor Au, Tr 1113.37-40

Auburn Town Centre and Sam the Paving Man

115. Mr Burgess gave evidence about a number of problems associated with the process for the Auburn Town Centre Upgrade in 2011 Ex S11 [115]-[133]. In short:
 - a. The preferred tenderer was GMW Urban for a price of \$7.2 million; [116] and the report of tenders recommended their tender be accepted.
 - b. On 15 March 2012 council received a report recommending Council decline all tenders, however in closed session Mr Attie moved a motion (ruled out of order by the Deputy Mayor) that the tender of Mr Harb, whose business name was "Sam the Paving Man" be accepted. A rescission motion was then moved for consideration at the April meeting.
 - c. Mr Burgess gave evidence that Mr Oueik was intent on Council awarding the tender to Sam the Paving Man and in a conversation in March said to him words to the effect of:

"I met Sam the Paving Man in a shopping centre in Chullora. He is a paving specialist who did all paving in Sydney Olympic Park. He told me that he could drop his tender to \$5 million. He was away in Lebanon when the tender was prepared but knows all about Auburn. His staff prepared the tender and they stuffed it up. He is illiterate and pays contractors and staff in cash. His tender should be considered as the tender costs could be reduced by \$1million dollars." Ex S11, [125].

Mr Burgess made a note of the conversation in his diary; Ex S11, p101.
 - d. Mr Burgess reported the issue to the department of Local Government on 16 April; Ex S11, p 57. One of the matters that he raised was that Mr Harb seems to have been provided with confidential information about the tender process. The e-mail from Mr Chamas (who was personally known to Mr Harb) refers to a conversation with him in which he appears to have known of the successful tenderer; see Ex S11, p 65.
 - e. At the 18 April meeting Mr Burgess tabled advice from Norton Rose which was to the effect that there had been a breach of confidentiality, the tender process had been compromised and fresh tenders should be called for; Ex S11 [121].
 - f. Council resolved to order an investigation into the matter.
 - g. The ICAC ultimately resolved in June 2012 not to investigate the matter Ex S 11 p 77.
116. On 14 March 2015² Mr Burgess made a file note of a conversation with Mr Attie, but recorded in his diary on 15 March. He relayed the conversation in his statement at Ex S11 [220]-[223]. The diary note is in these terms:

"Ned Attie

Came to see me before Council Meeting. Started off saying after election when we get control things will be different. We will subcontract works to get better value. Progress Park costs 3 times real cost and is a shit job. He then said Sam (a Councillor from Canterbury) had contacted him about the Auburn Town Centre contract alleging staff bias, claiming staff were against Sam the Paving Man. He said he is a good contractor. Someone was biased. I said he had done no electrical and Attie corrected me by saying he did all of Olympic Park. I listened as Ned is usually full of shit. He never raised with me the motion I saw on the Mayors phone and he left about 6 o'clock."

117. Mr Oueik also denied that he was troubled by the treatment of Sam Harb in relation to a tender for the Auburn Town Centre Upgrade, Tr 1086.23.
118. Mr Oueik conceded that he made representations to Mr Burgess about Mr Harb⁹, that he had met Mr Harb at Chullora¹⁰ but deined that Mr Harb could drop his tender to \$5 million, Tr 1087.9. He denied that he told Mr Burgess that Mr Harb was away in Lebanon when the tender was put in and that his staff had "stuffed it up", that Mr Harb was illiterate but that his tender should be considered because it could be reduced by a million dollars and that he had a similar conversation with Mr Chamas, Tr 1087.7-25. He gave an account of the conversation with Mr Harb at Tr 1089.35-1090.5 which was to the effect that Mr Harb was overseas when the tender closed and he inquired if he could still put in a tender. He said he never spoke about the tender or the price of it and that he had explained that to the ICAC when they spoke to him about the matter. He also denied alleging bias on the part of the staff or that they had something against, Mr Harb even though he did not know what the word "bias" meant, Tr 1121.9-41.
119. Mr Brisby said that by the end of 2012, "it was well known that Mr Burgess had some problems with the elected members".
120. Mr Brisby said he became aware of the move against Mr Burgess when Mr Burgess called a meeting of the executive on the afternoon of the Council meeting, Tr 480.30. He said that he had not previously discussed the matter with Mr Attie or Mr Oueik, Tr 480.3240 saying that he would not discuss matters relating to Mr Burgess with elected members, Tr 480.45.

Mr Burgess and Mr Brisby.

121. Mr Burgess gave evidence of a poor relationship with Mr Brisby.
122. A file note of 22 November 2011 prepared by Mr Burgess indicates a problematic relationship, and that Mr Burgess raised with him the issue of the personal relationship that he appeared to have with Mr Oueik.
123. Mr Oueik denied that Mr Burgess raised problems with him about Mr Oueik visiting staff (and in particular Messrs Francis and Brisby) on level 2 of the Council Chambers, Tr 1087.27-42.
124. Mr Oueik's reasons for why it was necessary for Mr Burgess to be terminated were;

'In 2012, I had a complaint about Mr Burgess, telephone complaint, a private number, about three or four times. Someone ring me, a lady, and she say, "You better check your GM, what he's doing", one, two, three, four, five. Anyway, I come to the GM's office. I said, "Mr Burgess, I had a complaint about you and these are the stuff that was said about you". He went yellow. Anyway, I thought about it, thought about it; I said, "I'm going to put a" - either that way, or I was talking to other councillors as well, like advice. I had Councillor Simms, I went to her house

⁹ Tr 1086.28-33

¹⁰ Tr 1086.46-1087.5

once and ask her about advice, and I think I spoke to Councillor Lam at the same time because they were mayor before me and they - Councillor Lam had better experience in council and I really think she had good - good idea in council as well. And then I said to Mr Burgess, "I'm going to bring the complaint to the council" (Tr 1088.23-41)¹¹

125. He said that after he put it on the agenda;

"I had a call from the media that you're sacking the general manager because he created some rumours in Westella or 3 New Street, and other rumours with Jack Au or Sam the Paving Man. Like, if someone had a problem, they tried to shift the problem elsewhere, that's how I feel. Anyway - then at the same time I had an email from ICAC, "Don't suspend him. We're investigating him", and all the documents are in council, you can check it for yourself. Took it to council and the council made a decision,

126. He said that the decision involved referring the matter to a legal firm Maddocks, for advice and that the advice that was ultimately provided (Ex Gen 3) was important to him when he came to decide to terminate him, Tr 1089.28. He accepted in cross-examination that the matters dealt with in the Maddocks advice were the matter that he had raised with Mr Burgess as being of concern, Tr 1111.20.
127. The Maddocks material does not give rise to a case for termination.
128. Curiously, Mr Burgess gave evidence that he was approached in the month leading up to the termination by Mr Howe, about what it would take for him to resign in which the sum of \$40,000 was mentioned as possibly being payable towards the purchase of a new car; Ex S 11, [146]-[152].
129. Mr Campbell supported the termination of Mr Burgess and moved the motion of no confidence on 13 March 2013; Ex JS1, p 233-234. He explained his reasons in his oral evidence at Tr 742.11-744.20.755.

Conclusion

130. For present purposes, there is little to be gained by relating all of the permutations surrounding the events leading up to Mr Burgess's departure suffice to say that it is abundantly clear that:
- a. By March 2013 the critical relationships between Mr Burgess on the one part and each of Messrs Oueik and Attie had irretrievably broken down.
 - b. That breakdown was affecting to operation of the Council.
 - c. The newly elected Council was divided, however the supporters and critics of Mr Burgess on Council did not line up in accordance with the other blocks and groups that appeared during the life of that Council:
 - i. His supporters included Mr Mehajer and Ms Lam, in addition to Ms Simms, Mr Oldfield, and Ms Batik Dundar.
 - ii. His critics comprised Messrs Oueik, Attie, Campbell, Zraika and Yang. Indeed Mr Zraika only formed the view that he could no longer support Mr Burgess on the day of the vote.
 - d. He was originally dismissed on the casting vote of Mayor Attie.
 - e. His subsequent re-instatement in order to effect a consensual separation was carried out unanimously and does not give rise to any follow up action. It was a

¹¹ See also Tr 1110.36 et seq.

legitimate response for the purposes of resolving any dispute arising out of the termination.

131. To the extent however that the dismissal was based upon the advice of Maddocks, the substance of that advice did not, of itself, give rise to any case for dismissal.
132. Similarly, the performance reviews of Mr Burgess did not at any stage indicate concerns warranting his termination; Ex Gen 14.
133. The Inquiry has taken evidence regarding the subsequent appointment of Mr Fitzgerald Senior as Acting General Manager, his proposed re-structure, the appointment of Mr Brisby as general manager and whether or not a performance review was carried out by Council following Mr Brisby's appointment.
134. The evidence was that Mr Brisby's performance was in fact reviewed and it was included as part of Ex S10.
135. Mr Fitzgerald did carry out a review of the Council structure and prepared a report to Council, which is in evidence (Ex Gen 11 – note it is a confidential exhibit owing to the names of staff mentioned in it) and which he described at Tr 1310.38 et seq. He also prepared organisational structure charts as well, Ex Gen 13. Mr May's criticism that he was unable to locate any of the relevant files really fall at the feet of Mr Brisby, who was provided with the file when he took over as general manager, Tr 1311.24.
136. In this regard the evidence did not disclose any short comings that warrant the making of a finding or recommendation except in the following respects:
 - a. The record keeping regarding the appointment of Mr Howe; See Ex S9, p 6.
 - b. The record-keeping that related to the remuneration of Mr Fitzgerald Senior following his retention as a consultant for a period of 3 years when he was paid a sum of \$144,000; see Ex S9, p 7. The invoices, which were in the most rudimentary form and incapable of identifying the work performed by Mr Fitzgerald Senior were all authorised by Mr Brisby are in evidence at ExS9 pp 272-286. In this respect Mr Honeyman said that he approached Mr Brisby about what Mr Fitzgerald did:

“Only in general terms in that Mr Brisby indicated he was the responsible officer for supervising Mr Fitzgerald. Many of the tasks for Mr Fitzgerald would come through him, but that Mr Fitzgerald was generally available to all senior staff, probably more than that, all senior staff as a referral point for policy or mentoring in relation to the nature of local government, because of his seniority as a long-serving employee and mayor.”
(Tr284.11-18)
137. There is no evidence to suggest that services claimed to have been provided by Mr Fitzgerald were not performed. There are however grounds for complaint about the failure of Mr Brisby, once he was appointed to the office of GM, to maintain transparent and proper files about the work that was performed.
138. Given that Mr Brisby has now left Council, the real issue is to ensure that where consultants are engaged by the GM, it should always be on the basis that the work to be performed is clearly identified in such a manner to enable verification to be facilitated. Some form of record of the time spent on a task should be kept and checked by the officer responsible. Loosely defined consultancies, where a flat fee is charged and paid on a monthly basis should not be permitted. Council's purchasing protocols should be reviewed to see that such an open-ended arrangement does not recur.

Part 2: The Berala Planning Proposal

Introduction and Background

139. The background to the decision of Council to prepare a planning proposal to re-zone land within the Berala Village can be traced back to a resolution in May 2010 that a planning study be prepared in relation to the Berala Village Centre and surrounding residential area.
140. This planning proposal required scrutiny by this inquiry given the fact that were it implemented it would have the effect of substantially changing the zoning within Berala Village and, in particular, establishing a B2 commercial zone in an area bounded by York Street, Wright Avenue and the railway line presently zoned R2. The area in question included real property owned by Mr Zraika, namely 2 and 10 York Street Berala, and he stood to benefit substantially from such a change of zoning.
141. The proposal was also the subject of considerable community engagement and interest. There was, and remains, a vocal section of the Berala community determined to oppose the change so as to preserve the "Village" character of the locale.
142. It should be said from the outset however that Mr Zraika consistently declared an interest when the matter was discussed and absented himself from all Council consideration of the matter.
143. The current status of the Proposal is that it has been placed on hold pending the outcome of this inquiry.

The Draft Berala Village Study

144. The draft "Berala Village Study" was completed in March 2012 and exhibited in April and May 2012¹². It concluded as follows¹³:

"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 (2 storey maximum) occurring. All of these types of development are permissible under Council's current controls. This study recommends that Council's current planning controls (zoning, height and FSR) in Auburn Local Environmental Plan 2010 remain unchanged. Key issues emerging from the community engagement workshops included strong opposition to over development and 'highrise' development, the need for a community facility in Berala, and a need to improve the cleanliness of streets.

In terms of Berala's main street area, it is anticipated that the Woolworths development (currently under construction) will re-energise retail activity Woodburn Road, and is likely to be a catalyst for attracting more diverse local retailers/mix of retail development. In addition, there is a need to improve the quality of the public domain in this area, particularly paving, landscaping and places to sit. Key messages emerging from the community engagement workshops were the need to improve the appearance of Berala's main street area, and the need to retain a village atmosphere." ("emphasis added")

145. Mr Campbell, with some justification it must be said, described the study as:

¹² Ex B1, p 1-63

¹³ Ex B1, p 61

"... one of the best, most comprehensive and well-written reports I've ever seen come to the Council, I was thoroughly aware of that. I did discuss it with Hicham Zraika and with other councillors." (Tr 807.29-32)

146. He described those discussions in these terms:

"... we [meaning Messrs Campbell, Oldfield, Zraika and Ms Simms and Batik Dundar] discussed the need for us to support the Berala Village study and he indicated that he felt that he should declare a conflict of interest. And as the area covered by the report didn't seem to go anywhere near his property, I think I questioned that, and then I accepted finally what he said, that "It's better to be on the safe side", or words to that effect." (Tr 808.2-7)

147. He also gave account in his statement at Ex S13 [60] about which he was challenged at Tr 810.24 where he agreed that the words were to the effect of, "Well, you know, it's better to be on the safe side?" Mr Campbell said he did not understand why Mr Zraika thought he had a conflict of interest, Tr 811.33.
148. In the face of a recommendation from the Director of Planning and Environment that Council adopt the Study¹⁴, Council resolved, in May 2013, by a 5 to 4 vote¹⁵ (in the absence of Mr Zraika) to undertake a further study of the B2 commercial zoning of the Berala Town Centre and surrounding area.
149. The further study was undertaken by Hill PDA planning consultants who were engaged in June 2013 and prepared a draft report in September 2013¹⁶ which was briefed to Council at a workshop on 4 September 2013.

The Hill PDA Draft Report

150. In summary the Hill PDA report, set out at Ex B1, p 176 recommended consideration of "*two potential approaches or options*" regarding Berala's Strategic Planning framework in the contest of the "*extensive analysis already undertaken to inform the draft Berala Village Study*". The two options (and their implications) were summarised in these terms:

"Option 1 Increase Existing Controls - this approach would seek to increase the FSR for each zone tested in accordance with the findings of our development feasibility modelling. It 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.

Option 2 Retain Existing Controls: This option would be a 'wait and see' approach that recognises the existing planning controls are not at odds with other locations and that the housing market in the Study Area is on an upward trend. This approach would have a less immediate effect than Option 1 yet would be more in keeping with community expectations. This Option would be likely to see some redevelopment (i.e. less complicated sites in consolidated ownership) yet would have less immediate and apparent revitalisation outcomes in terms of built form in comparison to Option 1."

151. Leaving aside the fact that the report was a draft report, it is clear that:
- a. Hill PDA did not express any preference as regards either option.

¹⁴ Ex B 1, p 65

¹⁵ In favour Attie, Lam, Mehajer, Oueik and Yang. against, Batik, Campbell, Oldfield and Simms.

¹⁶ Ex B1, 166-212

- b. The study area referred to by Hill PDA was the same as the study area of the draft Village study; Ex B1 p 177 [1.1].
- c. The test sites or zones were identified at Ex B1, p 173 as:
 - i. 178-184 Woodburn Street, which was located within the existing B2 zone; and
 - ii. 30-34 Campbell Street and 20 Burke Avenue, located on the South side of the Railway line, which was an R3 zone.
- d. No testing was carried out in respect of the land in the vicinity of York Street, and in particular the South side of York Street. Indeed that locale received no express consideration in the report.

The February 2014 Bowral Workshop

152. The next substantive consideration of the proposal took place within a Councillor Workshop held at Bowral in February 2014.

Background to Workshop Briefing

153. At his private hearing Mr Francis said that, as Executive Manager of Planning, the purpose of the workshop was to, *"try and get a firm position from the councillors about where the boundary for the town centre should start and finish."* Ex PH 10 Tr 35.2-4. He said that the reason for this was to:

"... just to get some feedback from them, some council - council had been - it's been a little bit chaotic with re-zonings and we'd like to see - try and get all their positions across to see where they see, as the community leaders - where they see the town centre is." (Ex PH10 Tr 35.7-11)

154. Ms Cologna recalled the workshop and gave evidence that she prepared a number of the power-point presentations for it. She said that Mr Francis asked her to prepare the Town and Local Studies presentation which dealt with Beralá; Ex S3 [25]-[26]. The presentation is annexed to Mr Francis' statement; Ex S23.
155. Mr Francis also said in his statement that the workshops on Beralá were undertaken, *"at the suggestion of the executive"* and in order to, *"keep Councillors informed and to obtain their views on a variety of issues, including the viability of rezoning changes to Beralá town centre"*; Ex S23 [19].
156. According to Mr Brisby:

"It was an opportunity for what we in planning parlance call a charrette, to give the councillors an opportunity to provide their individual input to allow us to move forward. So, for example, an individual councillor could say what they thought their vision for the Beralá Village was, the extent, what type of controls they looked for, and what they did, so it's effectively what we call a charrette." (Tr 431.32-39)

157. Ms Cologna said the colouring in process was derived from:
- "... a desire to get from all ten councillors their individual impressions of what they wanted to see in Beralá. I bought the sets of coloured pencils and prepared 15 A3 maps for the Councillors to colour and annotate as they wished at the forthcoming workshop. The maps only related to Beralá, as this was a Councillor-initiated planning proposal via a resolution of Council." Ex S3 [27]

The Workshop Itself

158. Ms Cologna was not present for the briefing; it was carried out by Mr Francis. Mr Zraika did not take part in that debate as he was absent¹⁷.
159. Mr Francis recalls that Mr Zraika did not take part in the discussion,¹⁸ however he recalled that there was discussion to the effect that Mr Zraika owned property within the 400 m radius; Ex PH10 Tr 37.6. Mr Francis also said that he observed certain councillors *“grouped together on the same map”* and he was also aware of a number of councillors who express a desire not to change anything. At his private hearing he said that Mr Oueik and Mr Attie worked together as did Ms Simms and Ms Batik Dundar, Tr 37.17. He said each Councillor saw what the others were doing, Tr PH 37.33.
160. Mr Brisby said that:
- “... there was a lot of discussion, interaction between the councillors and the senior staff who were present, to come up with their individual inputs. My understanding or recollection is we didn't get input from everyone, but there was input from the vast majority.” (Tr 432.22-27)
161. He could not recall any discussion about York Street, Tr 432.31.
162. Mr Zraika did not take part in any subsequent subsequent debate concerning Berala on the basis that he owned property located on York Street Berala.
163. Mr Mehajer did not attend the Bowral Briefings and did not fill in any map; PH Tr 10.37 & 12.12. He said no-one on Council discussed the colouring in process with him; PH Tr 12.27.
164. Mr Attie's evidence was that although he did not recall marking colours, he marked both sides of York Street as B2 local centre; PH Tr 20.29.42. His reason for doing so was that it was a natural extension of the town centre; PH Tr 21.39. Mr Attie said that he did not discuss the issue of York Street and the way he or they had marked the map with any other Councillors; PH Tr 22.15-43.
165. Mr Oueik could not recall the colouring in exercise and could not identify, from the original maps, the map that he coloured in, Tr 1024.42-1025.16 & 1025.44-1027.19. His evidence was unclear as to what he wanted to happen to York Street:
- “Q.....You couldn't identify the map, but do you recall the way you marked the area south of York Street between York Street and the railway line? Did you mark it R3, R2, B4, B2? How did you mark it?
A. We were asked to do a study - I mean, we were to give our opinion at the time and I gave my opinion and then that was my opinion.
Q. What was your opinion?
A. My opinion was very open, is to extend the commercial floor space, which I've said it, I wasn't hiding it. I've said it to council, I've said it at the workshop, openly, because on the other side it's all flood between Woolies and Woodville Road.”
(PH Tr 19.45-20.11)
166. Mr Oueik said that Mr Zraika never discussed the issue with him.
167. Although not at all clear, Mr Yang's evidence was that the blue colouring on his map (which is the only one with a name on it) represented the Council recommendation at the Bowral Workshop and explained this in the following terms:
- “When we had a workshop on that day they suggested our proposal to which one we can choose, so that's why we put it in the colouring with the name on the top.

¹⁷ Ex B1, p 79.

¹⁸ Ex S23 [20]

168. At the same time he said that his marking in blue underneath York Street was his idea and his reason for doing so was because of the distance between York Street and the station and had nothing to do with the fact that Mr Zraika owned land in York Street; PH Tr 12.29-36.
169. Ms Lam recalled the colouring in exercise at the workshop but said that she was sure that did she not make any marking on the South side of York Street, Tr 691.28-31. She says that she roughly indicated her preferences at that time and discussed the matter with councillors and the staff as well, Tr 691.4. Her recollection of the discussion was that, "... (w)e upgraded R3 and R4 and the B2 in Woodburn Road and the other side of Campbell Street, York Street, those areas¹⁹"; but could not recall any discussion about York Street, Tr 691.20. She agreed that she was focused on the Town Centre. As will be seen, that is where the Chan Family owned premises which were the basis of a commercial interest of Ms Lam.
170. At first she could not identify which coloured in map was hers²⁰, however later marked in green with her initials a map that could have been hers, Tr 696.8- which is page 1 of Gen 8. The feature of that map is that it extends the B2 zoning along Elizabeth Street as far south of York Street, as well as extending the B2 zone North East along Woodburn Road to the vicinity of Tilba Street.
171. Mr Oldfield gave evidence that his impression was that Ms Lam was very vocal in supporting an increase in zoning across the town centre during the Bowral meeting. He was aware of her business interests associated with the Chan family, who owned the premises at 150 Auburn Road. He produced photographs showing the property being marketed for lease by Ms Lam's business; Ex S15 [28] and p 9.
172. Mr Campbell said he recalled abstaining from marking the maps on the basis that he was content with the original study; Ex S13; [53].
173. Mr Oldfield identified his map as number 7 in Ex Gen 8 with handwriting, "maintain the current zones", Tr 841.7. He recalled a briefing by Mr Francis and "possibly" Ms Cologna. He could not recall a lot of the debate but did recall that a number of councillors indicated that that they did not want any change from the staff recommendation. He said there was a lot of discussion about Berala itself,

"It wasn't totally about the actual rezonings, it was about things like facilities and a community centre in Berala and those sorts of things." (Tr 841.34-37)

174. He mentioned that when there was a discussion about the B2 zone in Berala;

"... I can't remember exact words, but I can remember being very, very angry and having the feeling that we were being steamrolled, and that wasn't an unusual feeling. I felt that quite a lot, that staff seemed to bend to a number of councillors' wishes." (Tr 842.43-47.)

Follow up from Bowral Workshop – Ms Cologna Prepares a Study

175. Following the February briefing, Ms Cologna prepared a further study based on the input from Councillors²¹. That study involved identifying the number of councillors who had proposed extensions to the B2 zone, as well as increases in the R3 and R4 zones. The study of counsellor input is explained in the maps at pp 67-69 of Ex O1. It is to be immediately observed that:
- a. In the case of the land on the South side of York Street Berala; there were only 3 councillors who proposed the introduction of a B2 zoning.
 - b. In the case of the North side of Woodburn Road to the East of the existing B2 zoning, there were 4 (of 9) councillors who proposed increasing the existing R4

¹⁹ Tr 691, 15-17

²⁰ Tr 694.15

²¹ Ex O1, pp 63 to 73.

- zoning to B2. The dividing line between the exiting B2 and R4 zones along Woodburn Road was (and is) 150 Woodburn Road, which is itself zoned B2.
176. Ms Cologna then proposed a suggested zoning scenario which is set out at Ex O1 on pp 71 and 71. It is immediately apparent that:
- The land south of York Street and West of Wrights Avenue was proposed as R4 and R3, not B2;
 - The B2 zone along Woodburn Road to the East was limited to and included 136 Woodburn Road (as opposed to the extension proposed by 4 Counsellors that would have extended much further to the East, ie to 106 Woodburn Road.
 - The FSR for the B2 zone was proposed as 3:1 with a corresponding height limit of 21m.
177. Ms Cologna said that that:
- “The suggested zoning scenario did not seek to take into account the Councillors who did not mark or return the maps, however I clearly noted that a number of Councillors has not submitted maps, and had indicated that they wished to see no change to the current zoning in Berala when delivering the Councillor briefing in June 2014.” (Ex S3 [33], emphasis added)
178. The presentation was, in essence, a summary of the position taken by those councillors who wanted change, not a proposal that recommended the views of the broader Council as a whole. It was, as Ms Cologna said, “an option for Council to consider”; Ex S3 [34].
179. Mr Francis, on the other hand said in his statement that briefing:
- “..... identified areas of agreement between the Councillors and areas where views differed, highlighted flooding areas and provided a suggested zoning scenario. My recollection is that the Strategic Manager spoke at that meeting and the Councillors who were present, which I recall did not include Councillor Zraika, suggested amendments to the position set out in the briefing document. I do not recall the reaction of the individual Councillors during that briefing, but I believe that a consensus was reached regarding the analysis.” (Ex S23 [24])
180. At his private hearing Mr Francis, when asked if staff knew of Mr Zraika’s interest in York Street, gave this answer:
- “... I knew he lived there. I'd done a - we'd done DAs in there for his physiotherapy clinic. But, you know, again, it's not based on who owns what, it's based on whether it fits the planning mould. So within that concentric circle is 400 metres, it's still a walking distance to the station. But the council resolved to move that way. It's not a kilometre away from the station.” (Ex PH 10, p 41.21-27)
181. Ms Cologna’s evidence was that she did not know that Mr Zraika had an interest in the York Street area; Ex S3, [43]-[44].
182. Mr Brisby’s evidence was that he had no input into the process Tr 433.2. Mr Francis said that when he saw the plans before the June briefing, he was:
- “... shocked that B2 was being proposed for York Street. This would be a massive windfall for Hicham Zraika. It effectively was a large-scale extension of the Berala village centre in an inexplicably strange direction, past an unusable railway embankment along Elizabeth St, around a corner into York St as far as Wrights Ave, just past his property.” (Ex S 13, [57])

The June 2014 Council Briefing

183. Ms Cologna said that there was considerable discussion at the briefing and that, *“Council staff made some amendments to the suggested rezoning scenario based on these*

discussions"; Ex S3 [36]. She added however that, *"no decisions were made at the June Councillor briefing, as is standard practice, as a decision can only be made via a Council resolution at a Council meeting."* Ex S3 [30].

184. Mr Brisby, whilst present, had no recollection of the detail, Tr 433.10. If a consensus was reached as regards York Street, Ms Cologna and Mr Francis were not made aware of it, given the terms in which Mr Cologna prepared the subsequent report to Council, which Mr Francis approved.
185. Further, given the entrenched positions of Councillors on this hotly contested issue, there seem little likelihood of any consensus being reached in any event.
186. Mr Oldfield recalls power-point presentation that is reproduced at pp 24-34 of Ex S3²².
187. Mr Oueik says that he had no discussion with anyone between the June workshop and the final vote in July about a B2 zoning South of York Street, Tr 1027.35-46. When it was put to him that the chronology in the report refer to *"further discussion and verbal amendments"* being made during that period, he said that he played no part in it, Tr 1028.6-19. He also said that: *"The staff they had the workshop on and they explained to us and everyone have their opinion and that's it."*²³ He said that he was not aware of whether any Councillors expressed a view that the area south of York Street should be B2 and not R4²⁴ but said that if he had been asked would probably have said B2; Ex PH6 Tr 22.40.
188. Mr Attie's evidence was that he was not there and could not recall reading the briefing notes if they were e-mailed to him as he did not always read his e-mails, Tr PH 24.8-17.
189. Mr Mehajer said that the briefing involved; *"a rundown of what went on at the workshop at Bowral and if there was any additional feedback that was required or input for changes or recommendations....."*²⁵. Mr Mehajer said that he appreciated that staff were suggesting an R4 zoning for land that was owned by Mr Zraika. He did not seem to have any issue with that on the basis that Mr Zraika's property was within the town centre. He explained himself as follows:

"The town centre is simply a reflection of – from the station to X amount of metres to where the property ends, and we were mirroring that. So it was Lidcombe, Auburn and Berala. Mr Zraika appeared to be living within the town centre, so the rezoning was not out of the ordinary, it was within the town centre. A mirror image of what's happening in Lidcombe and Auburn and within that vicinity of a few hundred metres." PH Tr 16.31-39

190. When asked at his private hearing as to why, when staff were recommend R4 for the York Street zone at the workshop, he ultimately supported a B2 zoning, he declined to answer on the grounds that the answer may incriminate him; PH Tr 19.9-38.
191. Mr Yang said that he recalled the June briefing but could not recall what staff were proposing on that occasion; PH Tr 12.45-13.6.
192. Ms Lam recalls that at the June briefing there was general discussion regarding Berala; with Mr Francis and Ms Cologna providing the briefings, Tr 691.43-46. She had little recollection of the briefing itself, but just went along with it, Tr 694.41. She recalled that the briefing recommended R4 in the case of York Street but could not recall anyone speaking up against it, Tr 694.46, and could not recall being made aware that a number of other councillors had suggested it, Tr 695.4.

²² See also Ex O1, pp 63-73.

²³ Ex PH6 Tr 21.13.

²⁴ Ex PH6 Tr 22.31

²⁵ Ex PH9 Tr 13.5-8

The Preparation of the Report to Council in July 2014

193. When the matter came back to the full Council in July, Mr Francis's report as Executive Manager of Planning stated the following in the Chronology of Key Milestones²⁶:

Date	Milestone/Action
July 2014 current	The draft proposed rezoning scenario for the Berala Village Town Centre and surrounding area has been developed based on the Hill PDA study, planning principles outlined in Section 3 of this report. Council to review and amend/change as necessary and is the subject of this report.
June 2014	Councillor briefing – analysis of the February Councillor workshop presented to Councillors for consideration. Further discussion and verbal amendments made to plan.

194. The report went on to recommend a number of changes (numbered a. through m.) all of which are set out in the text of Mr Francis's report. In particular the report stated:

3. PROPOSED REZONING SCENARIO FOR BERALA

The recommendations of the further study by Hill PDA, together with the outcomes of the February Councillor workshop, were presented to Council at a Councillor briefing in June 2014, and this analysis has informed the proposed rezoning scenario for Berala outlined below [refer also to Attachment 1], and in the revised draft Berala Village Study [Attachment 2, Section 4.7 pg 51-53].

The proposed rezoning scenario comprises:

- Rezoning the following land to B2 Local Centre [refer to Attachment 1]:
 - North of the railway line
 - a. certain land north of Nicol Lane between Elizabeth Street and Nicol Lane, as far north as Clarke St (currently zoned R4);
 - b. certain land west of Elizabeth Street, and north of Lidbury Street, as far north as Nicol Lane (currently zoned R3);
 - c. certain land south of Lidbury Street (between Lidbury and York Streets) and west of Elizabeth Street and east of York Park (currently zoned R3);
 - d. certain land south of York Street, east of Wrights Ave and west of railway line (currently zoned R2); and South of the railway line
 - e. certain land west of Burke Avenue and south of Campbell Street (currently zoned R3)
 - f. certain land east of the laneway (east of Burke Street) fronting Campbell Street as far as Berala Street (currently zoned R3).
- Rezoning the following land to R4 High Density Housing [refer to Attachment 1]:
 - North of the railway line
 - g. certain land between Elizabeth, Clarke, Guilfoyle and Lidbury Streets (currently zoned R3);
 - h. certain land south of Lidbury Street and east of York Park (currently zoned R3);
 - i. certain land east of Wrights Avenue and west of the railway line to R4 (currently zoned R2); and
 - South of the railway line
 - j. certain land fronting Berala Street (northern side), east of the laneway (and Burke Street) (currently zoned R3).
- Rezoning the following land to R3 Medium Density Housing [refer to Attachment 1]:

²⁶ Ex B1, p 85

South of the railway line

- k. land bound by Burke Avenue, Berala Street, McDonald Street, Bathurst Street and Hyde Park Road (currently zoned R2);
- l. land bound by Bathurst Street, McDonald Street, Brixton Road and Hyde Park Road (currently zoned R2);
- m. land bound by London Road, Brixton Road, McDonald street and Berala Street (currently zoned R2).

195. The changes marked in the letters (a. to m.) are all denoted or identified in a briefing map at Ex B1, p 92.

196. The evidence discloses that the first draft of the report prepared by Ms Cologna at 11.04 am on 8 July 2014²⁷ did not include the final item d. (ie York Street as a B2 zone) rather it proposed as item h, within the proposed R4 changes, the following:

- Rezoning the following land to R4 High Density Housing [refer to Attachment 1]:

North of the railway line

.....

- h. land south of York Street and east of Wrights Avenue to R4 (currently zoned R2); and South of the railway line

.....

197. The first draft of the report also differed in the following key respect, namely that the Chronology as outlined above did not include reference to verbal amendments being made to the plan and was simply expressed in the following terms²⁸:

Date	Milestone/Action
June 2014	Councillor briefing – analysis of the February Councillor workshop presented to Councillors for consideration.

198. There were 12 subsequent variations to the report. Mr Francis approved the 4th of those at 11.34 on 8 July 2014²⁹ and subsequently approved 6 further versions until version #11 was created at 11.29 on 9 July 2014, one week before the critical Council meeting on 16 July 2014.

199. In version #11:

- a. A change was made to the land south of York Street so as to give it a B2 zoning as outlined above; Ex Gen 26, p 86.
- b. The chronology added the entry for July and the following description of the June workshop: "Further discussion and verbal amendments made to plan" Ex Gen 26, p 86.

200. The report to Council also attached a Revised DRAFT Berala Village Study dated July 2014 which updated the earlier 2012 study to reflect these changes; Ex S1, p 94-211. It included:

- a. A new Ch 2.13 dealing with an analysis of the Hill PDA Report, which was attached as Appendix 4; Ex B1 164-202.
- b. A new Ch 4.7 setting out the proposed re-zoning scenario; Ex B1, pp 147 – 149. It is noteworthy from the map on p 149 (which also identifies the changes a. through m. in Mr Francis' Report) that in addition to increasing the size of the B2 zone as indicated, the height and FSR controls across the entire B2 zone were also increased. The effect of these changes was that but for a small shaded pocket of B2 on the South side of Beralas station (area f. on p 149):
 - i. the new B2 height limit was 21m (up from 14 metres)

²⁷ Ex Gen 26, pp1-8 at p 5&7.

²⁸ Ex Gen 26, p 3

²⁹ Ex Gen 26, pp 81-88.

ii. the new FSR was 3:1 up from 1.4:1³⁰.

201. Ms Cologna said that the York Road change was directed by Mr Francis;

“After discussing and referring back to the maps from the workshop, we - yeah, we discussed it and he suggested that it be B2 on the basis of what the councillors had mapped at the workshop.” (Tr 136.21-24)

202. Mr Francis objected to responding to three questions about how that change came to be made:

- a. Firstly, to the proposition, when put to him that the sentence concerning "further discussion and verbal amendments" was included at his direction (Tr 1788.3-9);
- b. Secondly, to the question that he was the person who directed that change by the addition of York Street as the new subparagraph (d) at the top of page 86 of Ex Gen 26; and
- c. Thirdly, to the proposition that he made that change because he had a discussion with one or more members of the Auburn Council, Tr 1788.42-4.

203. The new conclusion, marked up to show relevant differences from the 2012 version was in these terms:

“Over the next 10 years Berala’s population, and the type of residential development, is anticipated to remain relatively consistent and stable.

In terms of Berala’s main street area, it is anticipated that the Woolworths development will continue to stimulate retail activity in Woodburn Road, and is likely to be a catalyst for attracting more diverse local retailers/mix of retail development. In addition, there is a need to improve the quality of the public domain in this area, particularly paving, landscaping and places to sit. Council will address these issues through its forthcoming public domain improvement plan. Key messages emerging from the community engagement workshops were the need to improve the appearance of Berala’s main street area, and the need to retain a village atmosphere. The public domain plan will seek to address these issues.

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 smaller scale unit development also anticipated. ~~All of these types of development are permissible under Council’s current controls. This study recommends that Council’s current planning controls (zoning, height and FSR) in Auburn Local Environmental Plan 2010 remain unchanged.~~ Key issues emerging from the community engagement workshops included strong opposition to over development and ‘highrise’ development, and a need to improve the cleanliness of streets.

This study recommends that Council’s current planning controls in Auburn Local Environmental Plan 2010 are modified to include small expansions of 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 shops.

204. There was no suggestion that the crossed out section was untrue or no longer correct. The order of the second and third paragraphs was also reversed. The Study was amended at the last minute to support the proposal that Mr Francis was recommending when the report

³⁰ see Ex B1, p 117 2.7 (which was not changed) where it is stated that, “Berala’s main street is a small traditional main street with 1, 2 and 3 story developments, and some shop top housing...”

itself was entirely to the contrary. Mr Francis has, unfortunately not been forthcoming with any explanation for that.

205. Mr Brisby said that he would have been aware of the report on the basis that he had signed off on it, but not across the detail, Tr 433.30. He said he was aware that Mr Zraika owned a property in York Street and said the fact was, "well known", Tr 435.20.

206. He said that he did not seek any explanation from staff as to the changes they were now recommended on the basis that the staff would have:

"... worked through all the detail and - all the detail, the input from councillors, the studies, the reports, and had come up with that scenario." (Tr 436.29-32)

207. When asked specifically about B2 zoning for York Street Berala he said that he accepted it:

"... as a report from experienced planning staff who had been involved all the way through, and other than something out of the ordinary in their report, it would be accepted and they would speak to it and stand by it." (Tr 436.45-437.2)

208. He did not seem to accept that the change for York St was "out of the ordinary" and had no concerns about the change, Tr 437.4-15.

209. Mr Francis' explanation for this in his statement was in these terms:

"26. 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 his interest, explicitly declaring that interest and absenting himself from the debate and motion on the rezoning. 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." (Emphasis added, Ex S23)

210. With respect to Mr Francis, that cannot be correct. Firstly, any agreement was unlikely given the entrenched positions on Council. Secondly, Ms Cologna said that there was no agreement at the June workshop in any event. Thirdly, Ms Cologna prepared the report in the terms of the scenario presented to the June briefing, ie an amalgam of the proposal for change made by those Councillors who were in favour of change and who had marked their maps accordingly back in Bowral. It did not seek to incorporate the positions of those Councillors, albeit a minority that sought either no change or minimal change. Similarly, it ignored the earlier "professional" planning reports, namely the Draft Study and the Hill PDA report. Fourthly, if there was agreement, it is likely that Ms Cologna would have implemented that agreement in the first draft of the report. As far as the professional planning staff were concerned, nothing had changed.

211. Mr Francis sought to further justify the decision by reference to the fact that the zone in question was within "about 600 to 650 metres from the train station, which is considered an easy walk" and that the proposal otherwise satisfied the DPI's Guidelines.

The July 2014 Council Meeting

212. Council resolved to proceed with the recommendation of Mr Francis. The vote was 5-4. Mr Zraika had declared an interest and not participated. Ms Lam did not declare any interest.

213. Mr Oldfield could not recall any discussion about York Street at the July 2014 meeting. His recollection was that it only became an issue later, "when people realised that the zoned

area had been extended.³¹ He did not appreciate the difference between the proposal put forward at the June briefing and the July meeting, Tr 843.30. He explained;

“I was more concerned about the fact that the original staff recommendations were being overwritten and particularly that, you know, the views of the majority of residents were just being thrown in the garbage bin.” (Tr 843.33-36)

214. Mr Attie says that he “never” discussed the issue of the zoning of York Street with Mr Zraika; Ex PH5 Tr 25.19, either inside or outside meetings. He also said that he did not discuss the zoning of York Street with staff either at the meeting of 16 July 2014 or before it; Ex PH5 Tr 26.18-34. He appreciated that neither the Draft Berala study or the Hill PDA study recommended the up-zoning of the Berala Town Centre (Ex PH5 Tr 27.6) and did not accept the concerns expressed in the draft study that the

215. Mr Yang initially said that he did not support the up-zoning to B2 of the land south of York Street; Ex PH7 Tr 14.38. His explanation for that was very difficult to comprehend:

“....Especially B2 zone is that they're already set up with the height, it's already as set up, we cannot touch or anything else, it's already there, so that's why we can't able to - I mean, we can't - we not actually decide or anything else.

Q. Is this your evidence, that you didn't see yourself as having any choice about zoning the area south of York Street as B2.

A. (Through interpreter). All I understand is that at their workshop we have our own idea to colouring and then after that there will be summarised all people's ideas together, all the information bit, and then they will then have a proposal, that's all I understand, but nothing else. So I - when the proposal has the result then we not always taking for the one agenda to follow up, so we also had another one, so when the plan was adopted, and then after that it became the proposed, then that will be it, so we don't actually follow afterward.” (Ex PH7 Tr 14.41-15.12)

216. Despite that, he went on to say that he agreed with the B2 zoning for the south side of York Road because that's the way he coloured in the map; PH Tr 15.21.

217. Ms Lam supported the proposal that was adopted in July 2014 on the following basis:

“Q. What convinced you to support the zoning of B2 in that area?

A. When I have a look again with B2 and across the road B2, it just gradually sank into R4 so gradually - like, six level to four levels and then down to single houses, four step, that why I went along with that.

Q. Was it an issue that you actively thought about during the debate or was it something that you are only thinking about now for the first time?

A. No, that during the council meeting.” (Tr 699.18-29)

218. Ms Lam said she did not discuss the issue with other councillors, Tr 699.32. As outlined above, Ms Lam managed at that time, and continues to manage, a property located in the Berala Town Centre owned by the Chan family at 150 Woodburn Road since 2009.

219. Ms Lam, despite having an interest in the Chan property at 150 Woodburn Road Berala, did not at any point disclose an interest in the consideration of the Berala Planning Proposal. The Chan family property is located within the existing B2 area

220. When confronted with the fact that in the case of a property that she “managed” and which was located within the area of the South Auburn Planning Proposal she declared an interest but did not do so in the case of Berala, she sought to explain the conflict by reference to having been elected to *“improve the local area, like Berala precinct or auburn precinct or Lidcombe precinct. That's how....”* Tr 676

³¹ Tr 844.17

Subsequent progression of the proposal

221. The Department of Planning and Environment issued a Gateway Determination for the Planning Proposal on 17 December 2014, which allowed Council to proceed subject to conditions. One such condition required the preparation of estimates as to the likely dwelling and retail floor space that will be provided by the proposal.
222. On 16 September 2015, Council had before it a report summarising the findings of the exhibition of the Berala Village Planning Proposal; EX FTB1, p 118-128. The meeting lasted from 5pm till 6.10pm; Ex B1, p 283.
223. The report included a study which summarised the effect of the changes which are set out in the table which appears at p 30 of the Report; EX FTB1 121. In brief it was estimated that potentially an extra 5,068 m² of commercial floor space would be made available and that potentially a further 1,086 dwellings could be built.
224. Annexure F to that report³² broke up the effect of the changes by reference to the areas identified in the planning proposal for area d. to the South of York Street the total area of the block was 5,137 m² which would yield 15,411 m² of developable floor space, 128 dwellings and 1,110 m² of retail floor space: all of this in an are presently zoned R2.
225. The recommendations of the Executive Manager Planning were, relevantly to finalise the proposal and:

“3. request the Department of Planning and Environment to make (finalise) the Auburn Local Environmental Plan 2010 (Amendment No 18) and associated Auburn LEP 2010 maps, without variation, as per Planning Proposal PP-4/2014, in accordance with section 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 18) accordingly....” GET REF

226. Ms Simms moved a motion, seconded by Mr Oldfield that the Council not proceed with the proposal, but that was lost 4-5. The recommended resolution was then passed 5-4.
227. The data extracted from Mr Attie’s phone establishes that contrary to his earlier evidence that he never spoke to Mr Zraika about the Berala Planning proposal, text messages passed between he and Mr Zraika either during the course of that meeting or immediately after it:

Sent To+61415936341 Hisham Zraika*16/09/2015 6:41:05PM

Sent Get the recording and see what Simms said about a certain councillor and why the berala study was put through.

Sent To+61415936341 Hisham Zraika*16/09/2015 6:40:03PM(UTC+10)

Where did u go? (EX FTB1, 180)

228. A previous extraordinary meeting of council was called on 9 September 2015 to deal with fallout following the Mehajer wedding on 15 August 2015.
229. The meeting started at 5.05 and finished at 5.45 and there was only one item of business: it began as a motion moved by Councillor Campbell calling for Mr Mehajer to resign.
230. During that meeting, Mr Zraika and Mr Attie texted each other in these terms:

Inbox From+61415936341 Hisham Zraika*9/09/2015 5:23:12PM(UTC+10)

You move it and ill speak too

Sent To+61415936341 Hisham Zraika*9/09/2015 5:22:54PM(UTC+10)

Sent Wait

Inbox From+61415936341 Hisham Zraika* 9/09/2015 5:22:40PM(UTC+10)

Read Differ for legal advise? (EX FTB1, 180)

³² EX FTB1, 129-135

231. The word “differ” in the text is obviously a reference to a deferral of the matter. Ms Lam then moved a motion that further consideration be deferred to enable legal advice be obtained.

The Value of 2 and 10 York Streets Berala

232. The evidence before the inquiry included a valuation by Mr Ferdinands which was to the effect that there would be a substantial increase in the value of both 2 and 10 York Street Berala (Mr Zraika’s properties) as a result of the B2 zoning, were those properties to be amalgamated with surrounding properties.

Proposed Findings: Berala

- B1. At the time of the Bowral workshop there was no town-planning basis to propose any up-zoning on the scale that was ultimately recommended in July 2014. The existing town planning reports, both the Draft Berala Study and the Hill PDA report were to the effect that either no re-zoning should occur, or, at its highest (and in the case of Hill PDA only) to increase the FSR for each zone tested.
- B2. The York Street area in question, bounded by York Street to the North, Wright Avenue to the West and the Railway line, was not a tested zone, although it did sit on the edge of the study area, ie the circle 600 m from the Berala Railway Station.
- B3. The only impetus for an up-zoning came from the “colouring-in” process employed by staff at the Bowral workshop in February 2014.
- B4. Only three of ten Councillors advocated a B2 zoning south of York Street.
- B5. It is unfortunate that the “charette” and colouring in process, whatever its benefits, was the vehicle whereby the views of a minority at Bowral became the recommendation of Mr Francis despite being inconstant with the only professional planning reports.
- B6. From Bowral onwards the drivers for the planning proposal were the Councillors who advocated a significant increase in the B2 zone across a large part of the Study Area.
- B7. The preparation of the original “proposal for change” for the June Councillor briefing led to the final proposal that Mr Francis “recommended”.
- B8. That proposal for change was however based on the Councillors who favoured change and did not embrace or accommodate the views of those Councillors that did not. It was, in substance, merely an option to consider. It was not based on the planning studies received.
- B9. All other options fell by the wayside and none were referred to in the final report to the July Council meeting.
- B10. As part of that process the Draft Berala Study was crudely amended to be consistent with the proposal for change. Against that background it was entirely inappropriate for Mr Francis to direct the changes to the Berala Study outlined above as a means of justifying his recommended.
- B11. That process enabled the change proposal to develop a momentum that led to it becoming the *recommended* view of Mr Francis, as Executive Manager of Planning.
- B12. Mr Francis elected to not give any satisfactory explanation for how that came to be.
- B13. Given the results of the Draft Berala Village Study and the Hill PDA Report, there was no legitimate planning purpose for a re-zoning on the scope and scale set out in the original change proposal or the amendment of it (with the B2 zone Sought of York Street as its only change) which Mr Francis “recommended” to Council and ultimately accepted by it in July 2014.
- B14. 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.

- B15. For the reasons outlined above, and having particular regard to the fact that Ms Cologna's first draft of the report did not refer to or propose it, the recommended proposal was not the subject of any agreement reached at the Councillor briefing in June 2014; either broadly or as regards the inclusion of a B2 zoning for the South side of York Street.
- B16. It is hard to imagine that then Councillors Simms, Campbell, Oldfield and Batik-Dundar would have agreed, given their stated positions, to the change proposal in any event, let alone the up-zoning of the land South of York Street to B2.
- B17. Had there been any agreement reached at that meeting, it is inconceivable that that Ms Cologna would not have included it in the first draft of the report. Further, no councillor was prepared to say that he or she formed part of the process whereby the end result was "negotiated and agreed".
- B18. Council staff, who reported to Mr Francis and who in turn submitted the final report to Mr Brisby for his approval, allowed the "proposal" or option that gave effect to the preferences of a few Councillors to become, in effect, the only option for change on the table. It was given a life that it otherwise would not have had, when regard
- B19. The suggestion of some counsellors, Mr Ouiek in particular, that a reason why the proposal extended in the direction and to the extent of the South side of York Street ought be rejected. The *only* place where B2 reached, cut and extended beyond the 400 m radius was York Street. No significant extension was proposed by the change advocates to the South of the Railway line where large pockets of R2 much closer to the Station than York Street were untouched.
- B20. There was no legitimate planning basis for Mr Francis to direct that the draft report to Council be amended in such a way that there was to be *only one* change from the proposal that went to the June workshop, and that the change involved a B2 zoning South of York Street.
- B21. The fact that the only amendment of significance benefitted Mr Zraika gives rise to a strong inference that Mr Francis was directed to do so by someone on Council who advocated the B2 zoning in that area. Without Mr Francis' co-operation however, the identity of precisely *who directed him* is difficult to identify. The fact that a Counsellor voted for the final change proposal is not evidence that they directed Mr Francis that it be created. In this respect, absent Mr Francis co-operation, identification of who directed him is likely to be difficult.
- B22. The proposition that Mr Francis was directed by someone on Council gains strength from the fact that virtually the same thing happened in the case of South Auburn a few months earlier when a new option and unmeritorious option was developed at the direction of Counsellors and subsequently recommended by Mr Francis despite his own views (as well as the view of others) that it was not appropriate in the circumstances.
- B23. In all of the circumstances the Inquiry would find that in making the recommendation in the Report to the July 2014 meeting of Council, 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 was the skill care and diligence of a strategic planner in such a position of authority. The honesty required was, when 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).

Berala Planning Proposal - Recommendations

- B24. No further action should be taken to progress the Berala Planning Proposal in its current form. To the extent that formal withdrawal of the Proposal is necessary, that ought be undertaken.
- B25. Council should correct the record and revoke the adoption of the 'Amended Berala Study' that occurred on 7 July 2014 and in its place adopt or give consideration to adopting or updating the previous 'Draft Berala Study' as it stood prior to the changes effected in July 2014.
- B26. Should Cumberland Council consider that there is a need for any increase in zoning, that process should proceed in the light of, and be informed by, principally, the Draft Berala Study, as well as the Hill PDA report. Any study should be undertaken based on planning merit
- B27. The Local Government Act should be amended to require Members of Council and Staff to disclose the full extent of any conflict, identifying particular properties or interests, as opposed to mere the existence of pecuniary or non-pecuniary interests.
- B28. Experience at Auburn has shown that at in the case of planning proposals where there is an issue of Councillor interest, whether pecuniary or non-pecuniary, the mere declaration of interest and abstention from participation in the debate on planning proposals is an effective safeguard against abuse. Here, an unmeritorious planning proposal that conferred a benefit on Mr Zraika was passed by Council without Mr Zraika ever taking part in the debate. In large part this was due to the relationships on Council at the time.
- B29. Spot re-zoning proposals that involve the *possibility* of any Councillor, regardless of whether they have disclosed an interest or not, obtaining a benefit to an independent panel such as either the JRPP in the same that development applications made by Councillors are now dealt with or a transparent.
- B30. It is to be noted that since the appointment of Mr May as Administrator Auburn, and now Cumberland, Council have established the Independent Hearing and Assessment Panel (IHAP) to consider
 - a. All development applications ordinarily referred to the Council for a decision.
 - b. All planning Proposals and make recommendations to the Council with regard to their merits³³.
- B31. The political process in Local Government is not as transparent or as readily open to the scrutiny as the process in State and Federal government. Alliances and voting blocks are often not as clearly identified.
- B32. Where Councillors and staff have declared interests in relation to particular planning proposals and decisions, those conflicts should be directly referred to in the relevant planning reports to the General Manager and Council so that Councillor conflict issues are *fully* disclosed. It should no longer be permissible for disclosure to be left up to the individual councillors at the meeting where the proposal is being discussed. Reports dealing with planning proposals should include express reference to Councillor conflict and processes established to ensure planning staff are be made aware of conflicts.
- B33. During the 2012 Council there were, to a large extent, blocs of Councillors which formed to enable the positions of Mayor and Deputy Mayor to be allocated within the bloc over the lifetime of the Council. Where express commitments exist they should be disclosed. They

³³ See Administrators Minute, 17 February 2016.

give rise to interests which should be on the public record so as to foster accountability within Council processes. For example, Mr Zraika obtained the commitment of Mr Oldfield to support him for Mayor on the basis of commitments (set out in the document Ex O1, p 76) which included Mr Zraika's support for "*all of the recommendations included within the Berala Village Study*" and a commitment that each would "*use our votes as Councillors to ensure that Council enacts on all findings in the study.*" It is on this basis that the Local Government Act and or the Code of Conduct should be amended so as to expressly require the disclosure of such Councillors agreements as to the way in which they will vote in respect of Mayoral and Deputy Mayoral Elections during the life an elected Council as "interests" requiring disclosure for the purposes of the Code of Conduct.

- B34. The Local Government Act should be amended to require that all reports to Council and or the Department of Planning and Infrastructure in support of any planning proposal, should incorporate a statement identifying all Councillor interests in the are affected by the proposal.
- B35. Consideration should be given to abolishing the ability of a Mayor or Deputy Mayor (or acting Mayor as the case may be) to determine a vote on the floor of Council *in relation to a planning matter* on the basis of a casting vote unless the relevant Mayor has been elected by popular vote. The rationale for this change is that a planning matter involves, by definition, a change to the status quo – a change from an existing planning regime or development control. The mere fact of a deadlock does not provide a sufficient basis for change to the status quo.
- B36. Consideration should be given to initiating an investigation pursuant to s 462 of the Local Government Act regarding 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.
- B37. Finally, an anomaly in the Code of Conduct arises where a Councillor, although having an interest, elects to vote, as a matter of principle, contrary to that interest. The policy behind not being able to participate in a decision making process where an interest arises is understandable enough, since it may not always be easy to determine whether a particular vote is contrary to one's interest. On the other hand, Mr Zraika (having committed to opposing changes to the planning controls in Berala in both his agreement with Mr Oldfield (Ex O1, p76) and the note that recorded the earlier 2012 agreement between himself, Ms Simms, Ms Batik Dundar, Mr Oldfield and Mr Campbell) was prohibited from voting in accordance with those commitments on the basis of his interest alone. It is said against him that he used the interest provisions of the Act to effectively deny the opponents of the proposal a vote (noting that it would have been an important vote had Ms Lam disclosed and acted upon her interest). If it is assumed that that is what occurred, which is a matter about which no submission is made, it would be a case of the current provisions being used to effect a mischief in preventing Mr Zraika from giving effect to a commitment given in order to achieve the support of 4 other Councillors that enabled him to assume the position of Mayor. In the circumstances, consideration should be given to enabling a Councillor to take part in a debate in which it is proposed that he or she will vote against a *planning resolution*.

Part 3: The South Auburn Planning Proposal (PP-3/2013)

Background

233. This planning proposal relates to a block bounded by Auburn Road and Susan Street (which run East to West) and Beatrice and Helena Streets (which run North to South). They are located on the Southern side of the Auburn Town Centre. The Northern boundary of the block, Beatrice Street, forms a natural boundary between the existing Auburn Town Centre to the North and a large R3 zone to the South.

April 2013 - Mr Yang's Motion

234. The origins of the proposal in its present form lie in a resolution moved on notice by Mr Yang³⁴ and seconded by Mr Oueik on 17 April 2013 in the following terms:

RESOLVED on the motion of Cllr Yang, seconded Cllr Oueik that in respect to the planning proposal PP-5/2011 action be undertaken to:-

- a) rezone the land on the eastern most 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 western most 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. (Ex SA1, p 6)

235. The resolution was passed on the casting vote of the Mayor (Mr Attie) after the division was tied at 4-4. Councillors in favour were; Attie, Oueik, Yang and Zraika. Councillors against were; Batik, Campbell, Oldfield and Simms. Mr Mehajer and Ms Lam declared an interest and did not participate in the debate. Councillor Lam's non-pecuniary conflict of interest arose out of her company managing property subject to rezoning as part of the Planning Proposal. Mr Mehajer's pecuniary interest arose out of his ownership of property and land subject to rezoning as part of the Planning Proposal.
236. Mr Brisby's personal professional view of the proposal (at the time he was Director of Planning and Environment) was that it did not make sense, *"because it didn't allow enough space, primarily, for a development to occur if those zonings were realised"* Tr 439.24. He expanded upon this by saying that a larger footprint was needed to allow development to occur and agreed that one would need at least an entire block to effectively utilise a space for B4, Tr 439.33-42.
237. Mr Yang gave evidence that he did not discuss his 2013 motion with anyone on Council before he moved it³⁵ and that the reasons for the resolution were develop the Town Centre, given how close the area is to the railway station; Ex PH7 Tr 5.4. He also said that Auburn Road had shops all along the Eastern side of the zone and that this was discussed at a workshop; Ex PH7 Tr 6.43. He was not aware of the earlier planning proposals; Ex PH7 Tr 6.2-3. Mr Yang also said that he was not aware of Mr Mehajer's interest; Ex PH7 Tr 7.11.
238. Previously Council had in 2010 resolved to "undertake the necessary planning analysis" to re-zone a much larger section of South Auburn in substantially the same terms, ie R4 on the

³⁴ Ex PH4, pp 2-3

³⁵ PH Tr 5.9, although in fact the Acting General Manager prepared a briefing in relation to the matter.

East side of Auburn Road between Beatrice and Helena Streets. Mr Brisby gave evidence about this at Tr 438.17-439.5. A planning proposal PP-5/2011 (referred to in Mr Yang's resolution) was then submitted to the DP&I in September 2012 which in October 2012 received a favourable Gateway Determination subject to conditions which included the preparation of various urban design, traffic, transport and accessibility studies. Curiously, Council resolved to take no further action in relation to the matter on 31 October 2012; Ex PH4, pp 2-3.

239. After the 2013 resolution, Mr Alvarez was tasked with preparing the planning proposal and was involved in the engagement of MG Planning to prepare an urban design study and Hyder Consulting to complete a traffic study. From the beginning Mr Alvarez formed the view that the proposal zone *"did not make sense"*³⁶; his reasons including the fact that:

"... it creates a town centre zone, outside the existing town centre and part of the subject area is outside the 800m radius of the Auburn Railway Station. Further to that, in my opinion there was also sufficient capacity within the existing town centre to provide B4 type land uses." Ex S17, [16]

240. Mr Alvarez explained the significance of the 800m radius during his oral evidence in these terms:

"All of these radius radii tend to originate from metropolitan strategy and general planning principles, but I believe the reason why 800 metres is considered more appropriate in the Auburn context is that Auburn is a larger town centre than the Lidcombe town centre and it - the Auburn train station has better services, although either one is fine, it's just that when you're within 400 metres it's quick, it's approximately a five-minute walk for an adult, but with 800 metres it's more like a 10-minute walk for an adult, so it's still considered within that catchment radius that is good planning practice and the department also advocates." (Tr 933.27-38)

241. He noted the contrast between Auburn and Lidcombe, on the one part, and Berala. The former are characterised as town centres, whereas the latter is designated as a "village", Tr 933.46-934.10.
242. Mr Alvarez also recalled that Mr Francis did not agree with the proposal himself. This was confirmed by the evidence of Mr Francis at his private hearing when he stated that his preference as a planner was to have no B4 in the block³⁷ and to have R4 all the way along Auburn Road³⁸. Despite this view, and despite Mr Brisby's equally negative views of the proposal, their views as professional planners were never presented as an option, nor did they form the basis of the recommendation made to Council and which was ultimately adopted.

The Report to Council, April 2015

243. The matter was first considered by Council on 15 April 2015. Like the report to Council in respect of Berala, Mr Francis signed off on the final report to Council, as did Mr Brisby as General Manager. It made a recommendation in these terms (formal provisions excluded):

- "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 has reviewed alternative rezoning options presented in this Council report and resolve to progress reducing the B4 Mixed Use zone on the east side of

³⁶ Ex S17, [16]

³⁷ Ex PH10, Tr 28.37

³⁸ Ex PH10, Tr 27.38

Auburn Road to between Beatrice Street and 90 Auburn Road (comprising all lots from 74-78 to 90 Auburn Road, inclusive) and applying R4 High Density Residential to the remainder of the subject land as per Attachment 6, Option 2(a).....”

244. Option 2(a) was one of three options presented to Council in that report. Option 2(b) was similar to 2(a) but had a larger B4 Mixed Use zone on the east side of Auburn Road comprising all lots from 74-78 to 100 Auburn Road) and applying R4 High Density Residential to the remainder of the subject land.
245. The “alternative rezoning options” referred to were described in Mr Francis’ report in these terms³⁹:

“The three options are described below:

1. The current proposal;
2. 2(a) An alternative proposal, shown in the maps in Attachment 6, similar to the current proposal, but reducing the B4 Mixed Use zone on the east side of Auburn Road to between Beatrice Street and 90 Auburn Road (comprising all lots from 74-78 to 90 Auburn Road) and applying R4 High Density Residential to the remainder of the subject land; and
3. 2(b) An alternative proposal, shown in the maps in Attachment 6, similar to the current proposal, but reducing the B4 Mixed Use zone on the east side of Auburn Road to between Beatrice Street and 100 Auburn Road (comprising all lots from 74-78 to 100 Auburn Road) and applying R4 High Density Residential to the remainder of the subject land.”

246. Maps showing each option and the relevant height and FSR controls are in evidence at Ex SA 1, pp 283-294.
247. At his private hearing Mr Francis originally said that having a “finger” of B4 was a problem given that it was outside of a, “clear definable boundary on Beatrice Street”; Ex PH10 Tr 25.34-41. He said:

“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.” (emphasis added, PH Tr 25.41-46)

248. When asked if he was sure it was his idea he gave this evidence:

“Q. Are you sure, Mr Francis, that it was your idea to propose the limited section of B4 along Auburn Road that was ultimately adopted by council?

A. I'd like - I would have liked it to be - to have it removed into R4, but reducing it was put up as an option towards it. There was some talk within the chamber about having it reduced, but --

Q. Was that before or after you put forward your proposal to the meeting of April 15?

A. Probably before.

Q. Before?

A. There was some –

Q. Who wanted it reduced?

A. There was a number of councillors talking about it.

Q. Did Mr Oueik discuss that reduction with you before you did your report for 15 April?

A. He was - he and Ned Attie and Hicham Zraika, they were, I think, concerned about the amount of B4 in that area, but they certainly didn't influence my recommendation.” (Ex PH10 Tr 27.34-35.10)

³⁹ Ex SA1, P 29

249. Mr Francis continued to state that he was not happy with B4 in that location because it extended past the clear definable boundary in Beatrice Street. He added that being new to the position of Executive Manager of Planning (he was appointed to that position in October 2013⁴⁰) he, *“had a chance to look at it and address it.”*
250. In his statement, Mr Francis stated that:
- “I do not have any specific recollection of the views of individual Councillors, save that I have some recollection that Councillor Zraika or Councillor Oueik may have raised a view that the extent of B4 should be reduced and that Councillor Zraika suggested to me that the B4 controls, namely SFR and height, should be the same as the Auburn Town Centre. I do not recall what was said within the Council chambers regarding the reduction and the extent of the B4 zoning.” (sic, Ex S23, [53])
251. He explained why he recommended option 2(a) despite his own concerns, and his own preference as a planner that there be no B4 zoning in the block, in these terms:
- “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 have 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.
252. Whilst he said that his report included all options, he did not include his preferred option, namely R4 for the entire block. There was no satisfactory explanation for this.
253. Mr Alvarez recalls being specifically instructed by Mr Francis on 4 March 2015 to vary the draft Council report to include options 2(a) and 2(b) which he noted did not form part of the consultant's consideration and their report had been finished; see Ex SA 1, pp 69-148 in the case of MG, and 151 to 199 in the case of Hyder, each of which was an annexure to the Report to Council. Mr Alvarez notes that MG's report supported the proposed zonings, but did recommend lower Height and FSR controls for the B4 zone; see their option 1B at [5.4] of the report at pp 107 to 109 of Ex SA1.
254. Mr Alvarez said in his statement that he could not recall his exact reasons but did recall Mr Francis saying to him words to the effect of; *“I have spoken to the councillors and we should provide further options for the Council to consider.”*⁴¹ He said that Mr Francis said, *“the B4 zone should go from the corner of Beatrice Street to the final shop along Auburn Road”*, which he said was 90 Auburn Road; Ex S17, [21], see also Tr 934.46.
255. Mr Alvarez also pointed out that:
- a. the last shop was in fact at 98 Auburn Road, which was more consistent with option 2(b) that was not his preferred option.
 - b. the B4 zone recommended in option 2(a) had the greatest impact on Auburn Public School since it would have been adjacent to both campuses as it was adjacent to both the Beatrice Street and Auburn Rd frontages, Tr 935.4-936.3.
256. In his oral evidence he explained further;
- “... his justification or his reasoning was, well, if you just extend it to where the existing shops are, as far down as the existing shops are on Auburn Road, then it would be a better fit, and that's when I had the discussions about where he thought the last shop was, where the actual last shop was.” (Tr 935.8-13)
257. Mr Alvarez said that as far as he was concerned it was Mr Francis who determined the boundaries of option 2(a), Tr 937.1-17. He also stated, in answer to a question from the

⁴⁰ Ex S23, [4]

⁴¹ Ex S17 [20]

Commission, how “very unusual” it is, from a planning perspective to have such a small commercial zone, comprising a few lots, in the same section of a street with predominately residential zoning, Tr 938.13-38. He agreed that option 2(b) would have been as equally unusual.

258. This was entirely in keeping with Mr Brisby’s evidence as outlined above, which was to the effect that a whole block would be needed to effectively utilise a B4 zoning.
259. Mr Alvarez said he would not have supported any of options 1, 2(a) or 2(b). He explained his reason for not supporting option 1 on the basis that it made no sense, Tr 940.27. He explained that the Auburn Town Centre finishes “roughly” at Beatrice Street which is, “almost like a natural watershed” due to a slight ridge with Auburn Road goes down the hill on the north side towards the train station, Tr 940.26- 941.1. He also said that the current town centre:

“... is actually quite large and has several development opportunities already present, so extending the town centre didn't seem to - it didn't seem to warrant - it didn't seem to be a necessity.” (Tr 941.4-8)

260. In the case of Option 2(a) he said:

“... splitting that B4 even further it just, again, adds another layer of ‘doesn't make sense’, type argument to me. Why extend it to a certain property and not extend it further? It seems to be an arbitrary cut off.

.....

I've discussed with my colleagues that we were of pretty much the same opinion, that we didn't really understand how this particular planning proposal had come about, why the council had recommended this particular planning proposal, but it stems back from 2010 I believe.” (Tr 941.25-32 & 38-43)

261. At his private hearing Mr Francis said that three Councillors; Messrs Zraika, Oueik and Attie wanted a reduction in the B4 zone along Auburn Road, which they communicated to him; Ex PH10 28.7-10.
262. His reason for proposing option 2(a) was:

“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.” (Ex PH 1025.34-46 – emphasis added)

263. Thirteen drafts of the final report to Council are in evidence that were created between 31 March 2015 and 14 April 2015. A bundle of 4 such versions forms part of Ex Gen 27. The first version of the report dated 31 March 2015 (at pp 1-27 of Ex Gen 27) included, in substance, reference to all three options that were in the final report but, critically, did not recommend any one of them, rather it asked Council, in substance, to note the options and resolve to progress 1. Excluding formal parts the recommendation was in these terms:

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 alternative rezoning options presented in this Council report. The three options presented in the report as described below:
 - a. Option 1 – The current proposal;

- b. Option 2(a) – An alternative proposal, similar to the current proposal, but reducing the B4 Mixed Use zone on the east side of Auburn Road to between Beatrice Street and 86-88 Auburn Road (comprising all lots from 74-78 to 86-88 Auburn Road, inclusive) and applying R4 High Density Residential to the remainder of the subject land; and
 - c. Option 2(b) – An alternative proposal, similar to the current proposal, but reducing the B4 Mixed Use zone on the east side of Auburn Road to between Beatrice Street and 100 Auburn Road (comprising all lots from 74-78 to 100 Auburn Road, inclusive) and applying R4 High Density Residential to the remainder of the subject land.
3. That Council provide Council staff with direction by resolving one of the following suggested options:
- a. progress the Planning Proposal without variation, described as option 1, including the following associated actions.....:
 - b. progress the Planning Proposal with the variation described as option 2(a); OR
 - c. progress the Planning Proposal with the variation described as option 2(b).
- (Ex Gen 27, p 2)

264. A further, but minor difference was that Option 2(a) only extended as far as 88 Auburn Road, not 90 as in the final report.
265. None of the planner's (and in particular Mr Francis') concerns about any of the three options were included in this first draft report. The fact that Mr Francis did not support the proposal is not at all apparent from the contents of the report. It represents a further example of Mr Francis proposing a planning scenario without seeking to provide the Councillors with all available options and excluded critical advice about the way in which the Planning Department viewed the proposal and the options.
266. Given that Mr Francis' view (which was shared, to a large extent, by Mr Brisby and Mr Alvarez) was that there should be no increase in the planning controls for the zone and that if there was to be any change it ought be a uniform R4 zoning; one would have expected those views to be identified in the report. That was certainly a view shared by four Councillors; ie Simms, Batik, Campbell and Oldfield. It is hard to explain why then, the only options put forward were those which one might he might reasonable expect to be the views (given his evidence) of Messrs, Oueik, Attie and Zraika.
267. It is true that Mr Francis did not, at that time, propose recommending any particular option, however for present purposes it is remarkable that he omitted to include the option that he regarded, as a professional planner, represented the best outcome for the site. This is all the more strange given that he did not, "feel intimidated about putting up (his) preferred option to council."⁴²
268. Like so many aspects of the Berala Planning proposal, Mr Francis has elected not to explain why although he did explain how he came to determine the boundaries of options 2(a) and 2(b); Ex PH 10, p 32.6-18.
269. A further version of the report to Council (version 7; bearing the time and date 10.49 am on 8 April 2015⁴³) is in substantially the same terms but has been seen by Mr Francis; see p 55 of the bundle, a matter he confirmed in his evidence at Tr1792.22 et seq.
270. On the same day, version 8 was created. In that version the recommendation was changed to prefer and propose option 2(a); see pp 57 and 58 of Ex Gen 27. Mr Francis' initials appear in the box for sign-off.
271. The final version is dated 14 April 2015 and is at pp 85 et seq of Ex Gen 27.

⁴² Ex PH 10 Tr 35, Tr 5-13

⁴³ (pp 29-55 of Ex Gen 27)

272. Mr Brisby said that he was aware that there had been a change to Mr Yang's original proposal, Tr 443.18 but had not been involved in any discussions in the lead up to that report, Tr 443.25. He said that he was not involved in any discussion about staff "recommending" option 2(a) and, as in the case of Berala, had faith in the planning staff who were "across all these issues" Tr 444.4.
273. As was the case in Berala viz a viz Mr Zraika, Mr Brisby was aware of Mr Mehajer's interest in the proposal and simply left it to staff to deal with the matter. He said:

"Everyone was well aware of the land ownership and my understanding and recollection is that it was always declared and handled appropriately." (Tr 444.37-39)

Consideration by Council – 15 April 2015

274. The proposal was on the agenda for the Council Meeting held on 15 April 2015. The recommendation in the report from the Executive Manager of Planning, Mr Francis was in the terms outlined above.
275. At his private hearing Mr Oueik said that he was "not surprised" when Council staff recommended option 2(a) on the basis that the Council staff, "are the strategic planners not me" Ex PH 6, Tr 29.34. He added that Council relied upon them as they were "the professionals"; Ex PH6 Tr 30.14.
276. Pausing there, and accepting, for the sake of argument, Mr Oueik's account; it is a matter of great concern that a Councillors who did in fact rely upon the Council strategic planners to provide their own independent professional advice about Mr Yang's proposal, would not have obtained any idea of that advice, based on Mr Francis report to Council. Instead they got a report and recommendation that purported to be independent professional advice but was not. It was in fact a proposal derived by Mr Francis from either two or three of the Councillors so to further their interests.
277. Mr Oueik said, contrary to Mr Francis' evidence, that he had no input into the development of option 2(a) (Ex PH6 Tr 32.22) and that it had not been discussed by him with anyone before he got the papers for the April 2015 meeting; Ex PH6 Tr 30.22. He could not remember discussing option 2(a) with Mr Francis at any stage; Ex PH6 Tr 35.7-10. He also denied suggesting that Option 2(a) should be the option that went forward to Council; Ex PH6 Tr 31.2. He asserted that when he came to consider the staff recommendation of option 2(a) that he did not consider whether zoning only a third of Auburn Road as B4 made any sense from either a builder's point of view or from a planning point of view; Ex PH6 Tr 34.38-35.5.
278. Mr Oueik said he did not seek the support of Bhanin at the election; Ex PH6, Tr 31.34. When it was put to him that the Bhanin Association did not support his candidacy during the State Election, Mr Oueik sought to draw a distinction between the membership of the Association (whom he asserted supported him) and the Association itself; Ex PH10 Tr 31.40 asserting that the membership of the Association (whom he claimed supported him) ought to be contrasted with the leadership (whom, one can infer did not) Ex PH6 Tr 31.40-32.17.
279. Mr Mehajer's evidence on this issue, noting that he always declared an interest and did not take part in any meeting or vote on the issue, was that there were no discussions between him and other councillors regarding the proposal; PH Tr 20.27-33.
280. The minutes of the meeting on 15 April 2015 (EX SA1, PP 333-4) indicate that:
- a. Mr Attie declared a "non-pecuniary interest" on the basis that he was "undertaking consultancy work for one of the property development consortiums that own land in the subject precinct."

- b. Ms Lam declared a pecuniary interest on the basis that her company manages a property in the precinct.
 - c. Mr Mehajer declared a pecuniary interest on the basis of being “an owner of property within the vicinity” of the proposal.
 - d. Ms Simms moved a motion (seconded by Mr Campbell) that no further action be taken in relation to the matter. Mr Zraika then moved (seconded by Councillor Yang) a foreshadowed motion recommended by Mr Francis.
 - e. Council resolved not to proceed with the proposal. The vote was 4-2, with Mr Yang joining with Ms Simms and Messrs Oldfield and Campbell to vote against the Zraika foreshadowed motion and then voting in favour of Mr Simms motion.
281. The curious feature of that result is that having originally moved the motion that initiated the proposal back in 2013 and having seconded Mr Zraika’s motion to adopt the recommended resolution, Mr Yang is recorded as having voted against it. Making the matter more curious is the fact that on the very same evening Mr Yang joined Messrs Oueik and Zraika in moving a motion of rescission; Ex JS1, p 413A. Mr Zraika could not recall how the document came to be signed, Tr 1427.45 and did not recall discussing it with either Mr Yong or Mr Oueik, Tr 1428.23. He explained the process for preparing rescission motions at Tr 1428.26-32. He said that he didn’t discuss the motion with Mr Yang or give the motion to him, Tr 1430.8-15. He had no explanation for how it came to be that Mr Yang signed a rescission motion in respect of a motion that he had just voted for. To be fair to him, Mr Yang had no explanation either.
282. Had Mr Yang voted in favour of Mr Zraika’s resolution, it would have passed on the casting vote of the Mayor, Mr Oueik. To compound the absurdity of the situation; after the matter was dealt with Mr Yang joined with Mr Oueik in moving a rescission of the motion. This fact alone gives rise to a serious issue regarding the ability of Mr Yang to comprehend, having regard to his difficulties with the English language, the workings of a process that required attention to detail in that language. In the case of the Auburn Planning Proposal that required, at the very least, the ability to distinguish between Option 1 and Option 2(a).
283. Mr Attie remained extremely interested in the matter despite his declaration of interest, given that on 19 April 2015 he sent Mr Zraika a text which stated, “*Did u guys rescind that motion?*” Ex FTB1, p 182. There is not record of a reply.

Rescission Motion and Further Consideration - 20 May 2015

284. When the matter was next before Council on 20 May 2015 (Ex SA1, p 409-10 & 412-3) the result was entirely different. On that occasion:
- a. Ms Lam was absent overseas⁴⁴.
 - b. Ms Batik Dundar declared a non-pecuniary conflict on the basis that clients of hers owned land in the precinct⁴⁵.
 - c. Mr Mehajer declared the same conflict as previously and did not take part.
 - d. Mr Attie did not declare any conflict of interest, took part in the debate and voted.
285. Mr F Saddik spoke on behalf of the Bhanin Association and spoke in support of the rezoning of the Bhanin property to B4 – which would only occur under the original option or option 2(b).
286. The rescission motion was then voted upon and passed by 4 votes to 3, Mr Yang deciding to vote in favour of the rescission.
287. The resolution recommended by Mr Francis was then moved by Mr Zraika (seconded by Mr Oueik) and passed by the same majority.

⁴⁴ Ex SA1, p 409

⁴⁵ Ex SA1, 410

288. Mr Campbell gave evidence that after the meeting Mr Oueik made an angry outburst in the car-park and expressed open hostility towards the Bhanin Association. Mr Campbell gave evidence that Mr Oueik said words to the effect of; "They are greedy, R4 was all they deserved, serves them right." Ex S13 [28].
289. Mr Yang's evidence as to his understanding of option 2(a) was that he could not recall option 2(a) and but could recall option 1 (his original proposal):

Q. Can he look at page 284, please.

A. (Through interpreter). Yes.

Q. Do you see there that council staff recommended an Option 2(a)? Do you see that?

A. (Through interpreter). I cannot able to remember page 284 for this zoning, but do I remember 283 for the zoning, but I can't remember the 284 page for this zoning, no.

Q. Does Mr Yang remember that when council came to vote on this matter in May 2015, it adopted Option 2(a)?

A. (Through interpreter). Option 2(a)?

Q. Yes, Option 2(a).

A. (Through interpreter). Well, in my memory, the zoning was selected by the page 283.

Q. 283?

A. (Through interpreter). Yes, but this is first time I knew if this zoning they took 2(a) site plan. I don't even - I mean, now I know first time but I didn't even know before. (PH Tr 7.21-43)

290. He did however go on to say that, when asked when he found out about option 2(a):

"A. (Through interpreter). Well, we just progressed, ran through it from, initially through the workshop and then we have a progression and then finally we adapted the plan 2(a), so yes, we just followed the rules, that's all.

Q. All right. Did he agree with Option 2(a)?

A. (Through interpreter). I can't remember exactly.

Q. Isn't it the case that he is surprised, sitting there today, to hear that Option 2(a) was the option that was adopted by council in May 2015?

A. (Through interpreter). Yes, for me the first time I knew this Option 2(a).

Q. Until today is it fair to say that you thought it was Option 1 that was adopted by council?

A. (Through interpreter). Yes, I remember the option 283, the page number 283, Option 1.

Q. You didn't agree to a change from Option 1 on page 283 to Option 2(a) on page 284, did you?

A. (Through interpreter). I can't remember." (PH Tr 8.3-24)

291. In a further exchange he said that when he was voting, he thought he was voting for option 1; PH Tr 9.24-42). He also said that he never discussed option 2(a) with any of Oueik, Attie, Zraika, Lam or Mehajer.

October 2015 Meeting

292. After the vote Mr Campbell and Mr Oldfield met with representatives of both the Bhanin Association (Mr Saddiq) and the Church of Christ (Mr Cippolline). The Church of Christ, like Bhanin, owned land that would have benefitted from a B4 zoning in that it would have, in all likelihood increased the value of their land which both, in turn, hoped would improve their capital position as charitable institutions.
293. Mr Oldfield gave evidence that during the course of that meeting, Mr Saddiq said words to the effect of;

"Mustapha Hamid had refused to support Ronney in the State election and this was payback." I wasn't surprised by this." Ex S15, [61].

He said this was because he had previously been told by Mr Hamid that Mr Hamid had told him that the Association was being discriminated against.

294. Mr Oldfield's evidence about this was that he was approached by the Bhanin Association on three occasions where they sought his support the original proposal, but that he had always made it clear to them that he did not support the proposal. On one occasions at a picnic in Chipping Norton where no other Councillors were present, he said that Mr Hamid said to him, words to the following effect:

"Ronney has done a job on us because I refused to support Ronney and the Liberals at the State Election.....I told him that I had a tradition of supporting the ALP and had been a member of the Labor Party myself." (Ex S15 [65])

295. Mr Hamid also told him that he:

"...had a tradition of supporting the ALP and had been a member of the Labor Party myself." (Ex S15 [66])

296. Mr Oldfield's evidence that the services provided by the Bhanin included training, child care, services for aged and that they did good job in the community, Tr 851.23 that they were not a political organisation, Tr 851.27

297. Mr Hamid gave evidence regarding the work that the Association was engaged in, which included:

"We have assistance for the youth, family support for women and single mothers, assistance for the aged and community development program. Community development programs and we have a few other projects and we give services for quick emergency relief. Okay. And in case of death, they can use, families could use the help for the you know, for the funeral." (Tr 998.5-18)

298. Mr Hamid has known each of Messrs Attie, Oueik and Zraika for many years, Tr 998.26-100.4

299. He said that all three of them had been to Functions at the association.

300. He said that when Mr Oueik was Mayor an Association application for a grant to fund cooking classes was rejected. He said, "when Mr Oueik was the mayor we didn't - we weren't granted or given anything. We didn't get any benefit." Tr 1001.21-22.

301. He said that about one month before the State Election, which was held on 28 March 2015, Mr Oueik came and saw him. He described their conversation in these terms:

"He asked me, he said, "What's opinion, what do you think if I do" - you know, "if enter into this election as a candidate?" I asked him and I said, "What do you think?" And he said that "My heart is saying that I should but my mind is saying I shouldn't", and I told him, "Well, use your mind. Follow your mind." Tr 1002.17-25

302. He said there was a second meeting where:

"... I asked him the same question and he said, "My wife didn't want me", doesn't - "she need" - I asked him, "What does your wife think, Fatun?", "What does your wife Fatun think about you going into the election? Does she want you to run or not?", and he said "No." And I told him, "Well, I agree with Fatun", like, "don't run".

Q. And what did he say?

A. (Through interpreter) He didn't say anything.

Q. Did he ask you to support him at the election?

A. (Through interpreter) No, but he knows where I stand. I'm with Labor."
(Tr 1002.47-1003.12)

303. He said that when the re-zoning originally proposed the same zoning all the way down Auburn Road, the Association did not seek to discuss the matter with anyone, Tr 1004.12. He said:

"....when we knew later that the rezoning only included up to number 92, only included up to 92 where they are allowed to have nine levels and our - the properties owned by our association and the church were only allowed to have four levels, this is when we discussed the matter." Tr 1004.15-20

304. He then said that this troubled the association, as he put it, because:

"... we are a non-profit organisation where the business people, like Mohamed Mehajer, and where the petrol station are allowed to have, to build nine levels, when the church and the Bhanin Association, which is the community welfare, non-profit, will only - are only allowed to have four levels..... the money we make or we take we use it-we put it again in the community and we use it for people while the other people are business people." (Tr 1004.26-38)

305. He added that this concern was despite his own personal view which was against high rise anywhere, Tr 1004.44.

306. He said the he felt the association was being punished, because:

"... at the beginning we were included in that zoning where we could have eight or nine levels, but then when they changed it, as a community we felt as we are being punished. It's normal to feel like that." Tr 1007.32-36

307. He said that he did not discuss the matter with Messrs Zraika and Oueik but did raise the matter with Mr Campbell and Mr Oldfield in conjunction with representative from the Church, Tr 1008.

308. He said that he raised the matter with Mr Attie when he was walking through Auburn and saw him having a coffee and said:

"I told him, 'Why have you done this to us?' He told me, 'It's got nothing to do with me. I'm out'. He said, 'I left the meeting, I went out.'" (Tr 1010.40-42)

309. He said that the was upset with, "Ronney, Hicham and Ned" because, "they all know the services that this association are offering for the community. For 30 years they know what we do." Tr 1011.18-20.

310. Mr Campbell gave evidence of a conversation that he had with Mr Hamid on 15 March 2016 of which he made a note of in these terms:

"15/3/16

Mustapha Hamid – Wants to be subpoenaed

LMA/Samir Dandan came to him and said they had \$100,000 to spend in Auburn if Ronney Oueik is the candidate because Labor failed to support Hicham Steve Yang was going to run against Hicham/.....tried to get Mustafa's support

Libs wanted Ronney to run because of Luke Foley Ronney, Hicham, Ned, Salim

Mustafa will confirm B4-R4 was punishment

M believes Hicham & Ned got \$ but can't prove it.

Hicham wanted max vote for Ronney to punish ALP

Mustafa said ~~Hicham~~ he did not lean on Hicham to vote for rezoning. Hicham ~~was~~ wanted Bhanin to seek help for re-zoning so that they would owe him. But they did not! Mustafa doesn't favour high rise."

311. Mr Oueik evidence was that:

- a. He knew that Mr Hamid was a representative of the Bhanin Association.

- b. He denied being a supporter of the organisation and said he had no connection with them at all; 1055.38 & 47.
- c. He did not know that the Association support the Yang proposal, Tr 1057.29-35. He could not recall reading their representations on the issue, which were included in the Report to Council; 1057.37-1058.1.
- d. He could not recall considering the Association position when he came to vote on the matter and repeated that he;

“... voted for the matter back then based on the recommendation of council.”

- e. He repeated this in these terms:

“We go off the circle. Firstly, we trust the judgment of our staff. Everyone has an opinion, Mr Commissioner. I have an opinion, the Commissioner has an opinion, you have an opinion, I'm sure everyone in this room have an opinion. My understanding at the time, it still is, the facility of public transport here, you will have 400 for B4, extend that another 400, which is for R4, and then it become.....R3, B4, R4, R3 and A2, whatever. It is like an umbrella, down, down, down, down.....The most important thing of the station, anywhere you go in the State, station in the middle, there is a circle, in every planning proposal that you see there's a circle, 400 metres, B4, 800 metres, R4, 1,000 metres, R3, then become 2A, which is normal residential to protect the residential. The way I've seen it in the report back then, the way I was convinced, there is no difference between 16 metres and 21 metres, 5 metres, and the applicant there they have commercial, existing commercial and if you do have an existing commercial and you were to lodge a DA under the existing commercial, you can still take advantage of - use the commercial into your development.” (Tr 1061.43-1062.21)

- 312. Mr Oueik also sought to further justify the position by reference to the fact that the Association had an existing commercial use right.

The current status of the Proposal

- 313. Mr May gave evidence that following his appointment, he was briefed on the matter by both Mr Francis and Ms Cologna. He recalled that they were telling him that the process needed to be stopped (Tr 66.17). The impression that he gained from their briefing was that the 2(a) option was a staff compromise to enable Council to what Council was trying to resolve but that they were not happy with it, Tr 66.22. In cross examination he gave this evidence:

“Q. And so you received a briefing in relation to this option 2A in South Auburn and I think you gained the impression, I think your evidence was, that this was the compromise of the staff in order to achieve what the councillors wanted; is that correct?

A. Yes.

Q. There would be nothing untoward in staff seeking to put forward a proposal on that basis; correct?

A. I don't agree with that. There's independence in reporting for staff and a council or a mayor can request advice or a recommendation. I don't recall seeing that.”

(transcript 70.4-15)

- 314. Mr May explained the position further, by reference to his considerable experience as General Manager of Mosman Council for 27 years:

“I was getting briefings from them which was outlining the process of what had

happened, but at the same time I'm being asked to stop it and I said to myself, you know, "How has this been allowed to happen?" And then, you know, there were so many of them --

Q. That was something they don't agree with as plans?

A. Yes, yes, correct, and there's independence in reporting. Now, at Mosman if a planner didn't agree with the council, they reminded the council all the time.

Q. That disagreement would be properly documented?

A. Correct." (Tr 71.44-72.9)

South Auburn Planning Proposal – Proposed Findings

- SA1. Mr Yang's original option 1 was not a workable planning proposal for the reason that it divided the block into two relatively narrow "strip" zones of R4 and B4, neither of which were large enough to support development under those development controls.
- SA2. Council voted to support it without any strategic planning advice or input from Council staff, the people Mr Oueik said he and other councillors relied on.
- SA3. The relevant staff were all critical of the proposal yet acted to implement it.
- SA4. There was no rational or legitimate planning basis for Mr Francis to direct the creation of options 2(a) and/or 2(b) for consideration. As alternatives to Mr Yang's original option 1, options 2(a) and 2(b) were less workable and inferior planning proposals. Reasons for this include the shape of the block, the size of the respective zones and in particular the very small size of the B4 zone in option 2(a).
- SA5. Options 2(a) and 2(b) were also at odds with the views of both Mr Francis and Mr Brisby; both of whom were professionally qualified planners.
- 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 proposal 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 Alvarez.
- SA7. Once it is accepted that the decision to create these options was from Mr Oueik or Mr Zraika and that there was no planning merit in them, the reason for doing so must be for some other purpose, not a planning purpose but a political purpose.
- SA8. Precisely what that purpose was must also be seen in the context that the Councillors who voted in favour of option 2(a) were, in all other respects and in respect of other planning proposals, content to support significant increases in planning controls. In the case of Berala, Grey Street and Marsden Street, significant increases in the planning controls were supported, which were predominantly against the advice of staff or consultants. To pick up on Mr Attie's phrase that it was his position to "take what you can get" it is most surprising that in the case of South Auburn, that did not occur.
- SA9. Put another way, the attitude of the Councillors who voted in support of Option 2(a) is hard to reconcile with their stated claims to be pro-development Councillors.
- SA10. The Inquiry would not accept Mr Oueik's evidence that he voted for Option 2(a) because he was relying on the advice of staff. The Inquiry would accept the evidence of Mr Francis at both the private hearing and in his statement that smaller B4 zones were Mr Oueik's idea. There was no basis for Mr Francis to put forward such zones unless he was directed to do so.
- SA11. Mr Francis did not see it as being open to him to present either his preferred option or at least his own honestly held views on the options suggested.
- SA12. The decision to proceed with option 2(a) with its minimal B4 zone would have had an effect on the value of the property which formed the basis of Mr Mehajer declared pecuniary interest even if there were question marks over the ability of the B4 zoning to be carried into a development.

- SA13. There was a reasonable professional basis for Mr Francis to put forward two further options, namely doing nothing or re-zoning the entire block R4.
- SA14. As was the case in the Berala Planning Proposal, he amended a report and recommendations to accord with Councillor views despite his own professional views being to the contrary.
- SA15. Mr Francis' refusal to answer questions on this issue on the basis that his answers may tend to incriminate him, mean that there is no explanation for how he came to recommend Option 2(a).
- SA16. In the circumstances outlined above, Mr Francis decision to:
- recommend option 2(a) given his own views about it;
 - exclude the other options that had, to his knowledge, planning merit; and
 - 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 report; and
- 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:
- there was no rational professional planning basis for Mr Francis to recommend option 2(a);
 - 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).
- SA18. In view of Mr Francis' evidence that they directed the creation of options 2(a) and 2(b), the Inquiry would be reluctant to accept the explanation of Mr Oueik, Mr Zraika and Mr Attie that they votes to support Option 2(a) because of their reliance upon the advice/recommendations of staff.
- SA19. Furthermore, although the political background suggests that Mr Oueik and Mr Zraika had a motive to punish the Bhanin Association in respect of a perceived failure to support Mr Oueik when he was a candidate at the March 28 2015 State Election, there is insufficient evidence to conclude that they sought to influence Mr Francis in the performance of his professional duties so as to confer a benefit upon a third party, namely Mr Mehajer.
- SA20. However, in all of these circumstances the Inquiry would find that each 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.

Part 4: The Grey Street Planning Proposal

Background

315. The Grey Street Planning Proposals ("GSPP") concerns the land bounded by the Bligh, Grey and Carnarvon Streets and Silverwater Road, Silverwater⁴⁶.
316. The genesis of the GSPP are to be found in the acquisition of all but three parcels of that block by the developer Hilfer Pty Limited in late 2012.
317. At a preliminary meeting on 28 February 2013 lasting almost an hour the then Mayor Mr Attie, Mr Brisby and Ms Cologna met with representatives of the owners and their advisers, including Mr Fawaz Sankari. Mr Attie has made no secret of his ongoing support for the project; Ex PH5 Tr 3.13. His reasons were to the effect that it was, "an important proposal for the Silverwater area, as there was no shopping-centre in Silverwater and required some retail exposure." Ex PH3 Tr 21-23.
318. Despite this Mr Attie's evidence was that although he had subsequent meetings with Mr Sankari, he had no subsequent meetings with him about this project (other than meetings with his planners and Council staff on 2 or 3 occasions⁴⁷) or any other developments; Ex PH Tr 4.37-46.

June 2013 – The First Grey Street Planning Proposal

319. By June 2013 a proposal was lodged on behalf of Hilfor by APP Corporation⁴⁸, a firm of planning consultants. It sought to rezone the land then owned by it, namely a 6,277 m² parcel from B6 Enterprise Corridor to B4 mixed use with corresponding amendments to height and FSR controls to be "commensurate with the proposed mixed use zone". The proposal included concept planning for the site that included four rectangular buildings of 10, 8, 6 and 5 storeys encompassing the entire block with 19,539 m² of residential floor space and 4,000 m² of retail floor space; see GSB pp 46-47.
320. The proposal noted that the land had, prior to 2009, been zoned for residential development, and thus it was reasoned that a residential development of the site would not be "significantly out of context with the established planning intention for the area."

Council Staff Assessment of First Grey Street Proposal

321. The first Grey Street Planning Proposal was assessed by Council's Planning Staff and the subject of a report to Council dated 12 November 2013⁴⁹. The report recommended that Council not support the proposal for 4 key reasons⁵⁰:
 - a. That it would establish a small pocket of B4 land in an out of centre location.
 - b. That it was inconsistent with the Auburn Employment Land Study 2008 recommendations and principles which were to, "retain and protect industrial and other employment uses within the Silverwater Road Precinct and Silverwater Industrial Precinct."
 - c. The threat to strategically and regionally significant industrial land which could "create land use conflict."
 - d. The proposal was not needed to enable Council to meet dwelling targets, noting that Council was then, "seeking to encourage housing growth within existing town

⁴⁶ 1-13 Grey Street and 32-46 Silverwater Road, Silverwater

⁴⁷ Tr PH 5.17

⁴⁸ Ex GS1, p 29 et seq

⁴⁹ Ex GS1, 165-244

⁵⁰ Ex GS1, p 167

centres (for example the FSR PP which substantially increases the dwelling capacity in both Lidcombe and Auburn town centres”.

322. Ms Cologna explained what was meant by “*land use conflict*” in these terms:

“...the land in Silverwater, the bulk (of) which is known as Precinct 5, identified in the council's Environmental Land Study, has an industrial zoning and it's currently a mix of different types of industrial land uses. Some of them generate noise, as industry does. If you were to introduce residential land uses in a location that was perhaps close to existing land uses, and the Silverwater area was a large area of industrial employment generating uses, it could then potentially threaten the existing land uses...” (Tr 110.20-34)

323. Ms Cologna also observed that such a development could also set a precedent for other proposals to come in and chip away at that industrial land, Tr 110.46.
324. Ms Cologna also explained that the Auburn Employment Lands Study⁵¹ (carried out by Hill PDA in 2008) was a:

“... strategic planning study that looks at employment land across Auburn City, so that's land - the 2008 study was the existing study we had and that looked at land that had a light industrial, industrial general zoning and B6 enterprise corridor zoning. We were in the process of reviewing that study and updating it because by 2013 it was a number of years out of date. The last study we were doing was expended to also include the town centre zone, so the B4 and the B2 and B1 zonings as well, so we would have a full strategic picture of employment land uses and trends across the whole of Auburn City.” (Tr 111.22-32)

325. A further report to Council was prepared and included in the Council Business papers, Ex GS1 at 285-290. Mr Attie's evidence was that he “skimmed through the proposal”; Ex PH5 Tr 7.43.
326. Ms Cologna could not recall briefing Councillors about the report but thought there may have been a Council briefing two weeks before hand, Tr 112.24-27.
327. On 4 December 2013 Council, by a 6 to 4 vote and on the motion of Mr Attie, seconded by Mr Mehajer, rejected the recommendations of the planning department and resolved to:
- a. Prepare a planning proposal to amend the ALEP 2010 to rezone the area to B2 Local Centre, carry out various further studies and apply maximum height and FSR limits of 25m and 3.75:1 to 4:1.
 - b. Submit the proposal to the DPI for Gateway Determination under s 56 of the EP&A Act.
328. Ms Cologna said that the resolution had not been provided to her before the meeting, Tr 112.44. Her recollection was that it was moved from the floor, but could not identify which Councillor moved it, Tr 113.2. She said staff were not asked to consider the resolution⁵²; in her words it was just made, “and then we were just required to act upon that.”⁵³
329. Mr Attie's evidence about the reason for that resolution was that he wanted a shopping centre in the Silverwater area, which it did not have; Ex PH5 Tr 9.2-3. Mr Attie said that he

⁵¹ Ex GS2, and which includes the amendments made following the Council Resolution of 7 October 2015.

⁵² Tr 113.8 & 35-42

⁵³ Tr 113.9

prepared the motion itself⁵⁴, did not circulate it to any other councillor⁵⁵ and simply moved it from the floor⁵⁶.

330. Mr Brisby said that it is, "not uncommon for a council, an elected council to resolve in a way that's different to council recommendations, it's not unheard of." Tr 460.5-6. He explained that, "part of my job description is to implement council resolutions." Tr 460.11.
331. Mr Brisby said that he discussed this planning proposal with Mr Attie several times and observed him to be a strong supporter of the project, Tr 460.35-41, see also 460.43-461.9.
332. Mr Brisby agreed that the process of, amending a planning control, such as an employment land strategy, to permit such a development was "most unusual." Tr 462.45-7.
333. That being said he could not recall discussing the motion moved with Mr Attie either before or after the vote, Tr 463,14-18.

Gateway Rejects Proposal – Inconsistent with ELS

334. On 18 December 2014 the DPI wrote to Council giving notice that the proposal should not proceed for the 6 reasons set out at Ex GS1, pp 338-9, the most significant of which was the inconsistency with the Employment Lands Study in respect of which it was stated that; *"the broader precinct should be retained and protected for new and emerging industries and to avoid rezoning speculation which could undermine the viability of industrial land."*
335. The matter returned to Council on 18 March 2015 where it was resolved that Council take no further action on the proposal until the "Draft Auburn Employment Lands Study is finalised and reported to Council for adoption"; Ex GS1 p 364.
336. On 20 April 2015 Council resolved, unanimously, to endorse and proceed with the proposed changes to the draft Auburn Employment Lands Study 2014; Ex GS1 p 346 and Tr 115.27.

A further Application for Planning Proposal (PP3-2015)

337. A fresh application for a planning proposal for the site was lodged on 24 July 2015; bundle 398 et seq. The substance of the proposal was for a mixed-use development comprising 19,539 m² of residential floor space and 4,000 of retail floor space. The residential component would be comprised in 3 eight storey towers and a fourth four-storey tower, see designs at Ex GS1 pp 418-420.

The Planning Staff Report on the Second Application

338. The proposal was assessed by Council Planning staff. Ms Cologne gave evidence that it was almost identical to the previous proposal, Tr 116.1 and Ex GS1, p346. A further assessment report was prepared in September 2015. It was produced with, what Ms Cologne referred to as a "relatively quick turnaround" despite having a number of active planning proposals that staff were working on at the time, Tr 117.11-18. When asked if it was given priority Ms Cologne said:

"A. I don't specifically remember prioritising it, but it may - like, with the timeline, yes, in looking back at it, it may - if it was done more quickly than others then I guess that is the net effect of that.

Q. Well –

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

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

⁵⁴ Ex PH5 Tr 9.30

⁵⁵ Ex PH5 Tr 9.42 & 11.3.41

⁵⁶ Ex PH5 Tr 11.1

A. I can't remember the specific date, but we would have discussed, like, the next council meeting. “ (Tr 117.46-118.10)

339. The next meeting of Council was 7 October 2015 and the matter was dealt with on that occasion.
340. The report is dated September 2015, Ex GS1, pp 466-516, and made the following recommendations at 469-470:

RECOMMENDATION

1. That 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:

- (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 20 metres, and require the applicant to undertake urban design analysis to test the impact in terms of building envelope and relationship with surrounding development;
- (d) require the applicant to undertake 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;
- (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 section 117 Direction 1.1 - Business and Industrial zones (via a study in accordance with the regional, subregional or the Auburn Employment Lands Strategy 2015) for Director General of DPE'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 modify the Planning Proposal to ensure that the 4,000 sqm retail component comprises a 2,500 sqm supermarket and 1,500 sqm of local specialty retail/commercial floor space.
- (h) The applicant provide a site specific development control plan for the controls identified above.

2. Once all required amendments have been made, finalise the planning proposal and send to the Department of Planning for a Gateway Determination.

341. Ms Cologne explained in her evidence that:

“The Employment Land Study that had been adopted by council in May 2015 talked about the fact that a new B1 centre could be located somewhere in that Silverwater area, so not onsite specifically but somewhere within that Silverwater area. The study spoke about that specifically. When the planning proposal was lodged with council and it was effectively the same as what had previously been lodged, we went back to the consultant, AEC, to get some additional confirmation of what they had put in the study so that we could include that robust detail in our report to council as part of our assessment, and on that basis, consistent with what the consultant had recommended in the study and the additional advice they were providing us, which was a B1 centre could be appropriate in the Silverwater area, that is why we recommended that.” (Tr 118.25-39, emphasis added)

342. Ms Cologne agreed that the effect of her resolution was to enable the proposal to comply with the ELS, Tr 118.45. In substance her evidence was that a planning proposal should defer to the ELS.

343. Mr Attie gave evidence at his private hearing that he did not give the report a close interest but that he read parts of it and had no recollection of reading it in its entirety; Ex PH5 Tr 13.40-14.2. Mr Attie rejected the proposition that the recommendation from staff set out a way forward for the application so that it would be consistent with council's employment land strategy⁵⁷, and claimed that the ELS still had to be amended to include the zoning⁵⁸. Based on Ms Cologna's evidence, this is simply not correct.
344. Further, Ms Cologna said that the issue of amending the ELS was never raised with her in any discussions or workshops. As she said, the first that she became aware of the proposal to amend the ELS was the resolution on 7 October 2015. She said that had her advice been sought about amending the Auburn Employment Land Strategy prior to the council meeting on 7 October 2015, she would have:

"... advised against amending the strategy because it would not be good planning practice to amend a strategy to be consistent with a planning proposal; that's the reverse, as we've discussed. I would have also, said that I would not have recommended that the strategy be amended." (Tr 121.21-29)

345. APP became aware of the terms of the recommendation on 2 October 2015 and sent an e-mail to Mr Sankari (copied to Mr Mosca)⁵⁹ in these terms:

"Fawaz
Not great news.
See below council officer recommendation and our alternate resolution. I recommend we send letters to all councillors stating our position etc and address Council meeting. It's very important that we get the resolution to include an amendment to Council's strategies to nominate the site as B2 with FSR and height that we want.
Will call.
Thanks
Elise"

346. After setting out the terms of the recommendation proposed by Council staff, Ms Crameri set out her own recommendation in these terms:

RECOMMENDATION

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 25 metres; and
 - d) amend the Auburn Employment Lands 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 that Gateway Determination will likely require the applicant to

⁵⁷ Ex PH5, Tr 15.1

⁵⁸ Ex PH5, Tr 15.8

⁵⁹ Ex Gen 11

undertake the further studies prior to consultation being undertaken in accordance with s56 and s57 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.

347. Mr Sankari's evidence was that he recalled receiving the e-mail from Ms Crameri on 2 October but did not engage her to send out the letter to councillors stating or advocating the developer's position, Tr 1579.15. He said he didn't arrange for any letter to be sent because he was too busy, Tr 1580.9. He also said that he did not call Mr Attie after receiving that e-mail, Tr 1580.42. Mr Attie could not recall receiving any such e-mail in any event.
348. In a further e-mail to Mr Sankari on 6 October 2015⁶⁰, Ms Crameri reproduced the alternative resolution that the developer needed to be "put forward".
349. It was in slightly different terms. The difference was follows: the words, " , consistent with the findings of the Publicly Exhibited Draft Auburn Employment Lands Strategy," were added after the word "Centre in 1(d).
350. She went on to add:

"The AEC supplementary report recommended that as a minimum, to get development happening on the site, you would need an FSR of at least 2.7:1 to 3.1:1. Council has misinterpreted this report and are seeking to set the 2.7 to 3.1:1 as a maximum not a minimum development standard. They are also undermining the viability of the proposed centre and development on the site. There was also a number of people that made submissions that wanted a supermarket on the site including General Manager in 2013."

351. Mr Sankari said that he called Mr Attie after receiving this e-mail to discuss the matter with him, Tr 1581.23. Mr Attie could not recall that, Tr 1818.30.
352. Mr Sankari also said that he came to council to see Mr Attie after the 6 October e-mail. Mr Attie could not recall that either, Tr 1818.40. Mr Sankari said that at that stage, he had met Mr Attie less than 10 times, Tr 1581.46.
353. When asked if he had any recollection of Mr Sankari providing him with the document that he used to move the resolution on 7 October 2015, Mr Attie said this:

"I don't say that I don't have a recollection of it. I don't remember having meetings where I received a document, that I actually took that same document to council."

354. When he rang him he said he would like to meet but he could not recall what he said. He said that he had not known Mr Attie in any personal capacity, Tr 1582.30. He had however rung Mr Attie on several occasions to facilitate communication between the developer's planners and Council staff, Tr 1575.38-1576.9.
355. He could not recall where he was when he called⁶¹, but said that he didn't send the e-mail, rather he printed and brought it with him to the meeting. He couldn't recall if he gave him the e-mail or just the resolution, Tr 1584.47. He couldn't recall the conversation when they

⁶⁰ Also in Ex Gen 11

⁶¹ Tr 1583.22

met, Tr 1585.13. His evidence of what he could recall Mr Attie saying was, "I think he would look into it" Tr 1584.17. Oddly, he said that he did not know whether Mr Attie would be moving the motion or not, Tr 1585.25

356. When asked about whether Mr Sankari spoke to him on 6 or 7 October he said he didn't recall such a conversation, Tr 1819.12.

357. When asked about Mr Sankari seeking support for the proposed motion, Mr Attie had trouble recalling that conversation as well and sought to answer the question by reference to the way such matters are usually broached by applicants:

"I can't recall the specific context of any conversation, but most applicants, whether it's a granny flat up to a high-rise building, will always ring up and ask for support, not just of me but from any councillor." (Tr 1819.20-24)

358. It is highly unlikely and commercially implausible that Mr Sankari as the developer's representative would have left the matter of the resolution that the developer needed in the hands of Mr Attie alone, unless he was satisfied that the resolution would at least be put and supported by him. In this respect it is noteworthy that Ms Cramer was listed to speak on the night and the transcript shows that the Mayor even called for her to speak but she did not. This is entirely consistent with Mr Attie having given some form of assurance that the motion would be put and passed.

The Council Meeting on 7 October 2015

359. The Council met on 7 October 2015 and the second Grey Street Planning Proposal was on the agenda. The minutes of the meeting are at Ex PH4, pp 27-29.

360. The Inquiry heard the tape of the meeting which showed that Council was addressed by a resident, Ms Mooney. A transcript of the relevant portion of the meeting is Schedule A to these submissions.

361. The Mayor then called upon Ms Cramer, who although listed in the minutes as intending to speak on the matter, did not do so when called upon.

362. Councillor Simms moved that Council not support the proposal for three reasons:

"(i) the application does not sufficiently address the reasons for refusal in the Department's Gateway Determination PP_2014_AUBUR_003_00 (18 December 2014), given that it has the potential to result in a cumulative loss of employment lands during a period of high residential growth across the local government area;
(ii) the application is inconsistent with relevant state and local plans and strategies, and does not sufficiently justify the rezoning of the subject land; and

(iii) the traffic impacts on the broader traffic network, including Silverwater Road as well as cumulative traffic impacts, have not been sufficiently addressed."

363. The actual motion moved by Mr Attie (seconded by Mr Mehajer) was in these 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 4:1;
 - c) allow a maximum height of 25 metres; and
 - d) amend the Auburn Employment Lands Strategy 2015 to recommend the site be zoned B2 Local Centre, consistent with the findings of the Publicly Exhibited Draft Auburn Employment Lands Strategy, and permit residential uses on the site including land, zoned B2 Local Centre with frontage to Silverwater Road.

2. That once all the required amendments have been made, Council forward the planning proposal to the Department of Planning and Environment for Gateway Determination.
3. That Council note that Gateway Determination will likely require the applicant to undertake the further studies prior to consultation being undertaken in accordance with s56 and s57 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.

364. Other than;

- a. the addition of "That" at the beginning of paragraph 2, and
- b. the deletion of the words "between 3.75:1 and" in 1(b);

it was identical to the alternate resolution in Ms Cramer's 6 October 2015 e-mail, Ex Gen 11.

365. Mr Attie's evidence at the private hearing was to the effect that no one had a copy of the resolution before the meeting started and that it was moved from the floor, Tr PH 16.36-42 and the transcript appear to bear this out. As to the preparation of the motion, his evidence as follows:

Q. Is it fair to say that as with the previous motion that you moved from the floor, it was something that you prepared based on your review of the planning proposal and the council --

A. That's correct.

Q. I think earlier in your evidence you said one of the ways around it was to amend the employment land strategy; correct?

A. Correct.

B. Q. And that's what you sought to do in this motion?

A. Correct. (PH Tr 16.38-17.3)

366. When asked about the process of dealing with the motion, his evidence was as follows:

"Q. Did you speak to the motion?

A. Of course I did.

Q. Did you speak for long?

A. I don't recall how long, but I did speak to - I speak to every motion.

Q. You say you explained the practical effect of that resolution, do you?

A. Yes.

Q. All right. Did any of the councillors ask you any questions about the effect of your resolution?

A. I don't recall exactly what questions they asked, but there would have been a debate."

(PH TR 18.15-29)

367. There was, as the transcript shows, no debate about his motion other than for Mr Oldfield speaking against it. He had no recollection of whether or not Ms Cramer was listed to speak, Tr 1820.19 and was unable to account for the fact that she did not.

368. At his private hearing on 9 June 2016 Mr Attie gave evidence about how the motion was prepared and how it was moved. He stated that it was prepared by himself based on his review of the proposal and the Council report. Consistent with his normal practice, he said

that the motion, in either printed or written form, was handed to Council staff so that it could be entered into a computer and displayed on one of the 4 screens that sit above the Council chamber so everyone could read it, Tr 17.24. When asked if he spoke to the motion, he said "of course I did." He couldn't recall precisely how long he spoke for but stated that he spoke to every motion, Tr 18.20. In the case of this motion his evidence was that he explained the practical effect of the resolution.

369. At the public hearing on 16 June 2016 Mr Attie's evidence on this issue was that he rejected the suggestion that the motion was "completely new" and the motion that he drafted was, "actually very similar to the previous motion that was before council, with some amendments" Tr 1131.19. He did agree however that the October resolution which referred to the ELS, whereas the earlier resolution did not, Tr 1132.4-6. On any view, this was a significant difference. He was then asked about how he came to prepare the document:

"Q. How much time did you spend, from start to finish, in drafting the October 2015 motion?

A. I can't tell you. I don't remember how long.

Q. Did you do it on the day of the meeting?

A. I can't recall, but it wouldn't have been on the day the meeting, no.

Q. Are you sure you prepared it?

A. Yes."

370. He was then shown a copy of Ex Gen 11.

"Q. Do you see that it proposes an alternative recommendation for council in the light of what council staff had recommended in their report?

A. Yes.

Q. I want to suggest to you, Mr Attie, that the evidence that you gave that you prepared the motion that you moved on 7 October 2015 was wrong. What do you say about that?

A. That is not correct." (Tr 1133.3-11)

371. Mr Attie had no explanation for how the motion that he moved on 7 October was substantially the same as the motion that Ms Crameri. He denied that the e-mail was sent to him by either Mr Sankari or Ms Crameri. He persisted that the resolution was his in these terms: "

"... I did write this report, this motion. I did not receive anything from the applicant or from the planner.

Q. Mr Attie, that cannot possibly be correct, may I say, with respect?

A. That is 100 per cent correct. I will not purger myself. I just swore on the bible. I did this motion."

372. Even allowing some minor changes of form⁶², he persisted

"Q. Do I take it your evidence is this, that you came up with the motion that appears on pages 28 and 29 of exhibit PH4, that is, the motion you moved on 7 October last year, you came up with those words completely independently of a draft motion in the terms of the document in the email that I've just shown you?

A. Yes, that's correct.

Q. Completely independent?

A. Completely independent

Q. Is it your evidence to the inquiry that neither Mr Sankari nor Ms Crameri, nor anyone else associated with the developer, approached you about moving a motion in those terms?

A. That's correct.

⁶² Tr 1134.30-1135.13 although the only differences are in fact between the form of resolution in the 2 and 6 October e-mails from Ms Crameri.

Q. I want to suggest to you, Mr Attie, that that is a fanciful proposition, that just cannot be correct?

A. I'm telling you it's correct." (Tr 1135.28-47)

373. The evidence of Emma Laing, one of the parking rangers referred to later in these submissions was then put to him at [19] of Ex S6 which was to the effect that she as told in a conversation with Mr Lawrence that Mr Attie had directed that Ms Laing was not to issue an infringement notice to the owners. Mr Attie denied this account as did Mr Lawrence, Tr 890.13. Mr Attie's version that that he saw Mr Lawrence, "in passing, through the corridors of council and I mentioned it to him", Tr 1136. Mr Lawrence said; "I wouldn't have been influenced by Mr Attie. I would have made my own judgment on that and the team leader, Stephanie Griffiths" Tr 890.5-7.

374. It was put to him that he had a reason to hide the fact that the motion came from Mr Sankari:

"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 you 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. To support it?

A. Yes.

Q. How were you going to support it if no-one moved it?

A. I can move it myself.

Q. You were going to move it, weren't you, Mr Attie?

A. I supported their proposal.

Q. He asked you to move that motion on behalf of the developers?

A. No, he did not.

Q. He didn't?

A. No.

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 one. 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 one 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."

375. As late as 24 August 2016, the final occasion when he gave evidence, his position was that he, "may have received something from somewhere else that I used to create a motion". When pressed on this issue, he retreated further:

"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. You see, that, Mr Attie, can't be right, with respect, that cannot be right, you know that?

A. I'm telling you now I don't accept what you stated.

Q. How do you explain the motion that appeared in the email on both the 2nd and the 6th which Mr Sankari says he gave to you here at council, on his oath he says that, and how do you explain how you moved it the following night on the 7th?

A. I believe it wasn't the same motion; it wasn't entirely the same." (Tr 1825.10-27)

376. It was put to him that he was doing the bidding of Mr Sankari and the developer, however he did not deny that, stating:

"... I do the bidding of every proposal that comes to council, whether a DA or not, if I believe it's the right thing for the area, irrespective of who it is. I do the bidding for the community and what they benefit from every proposal or every application.

Q. On this occasion you were doing the bidding of Mr Sankari because he rang you the day before, or the morning of the meeting, and he said, "We need this up. We need this to get up", words to that effect, that's what he wanted?

A. It is quite possible but that is exactly what every single applicant does to councils."

(Tr 1829.31-43)

Mr Attie's and Mr Sankari's Phone Records

377. The phone records of Mr Sankari indicate that contrary to Mr Sankari's evidence, Mr Sankari sent Mr Attie at least 1 SMS at around 1pm on 6 September.
378. When he was asked to look at his phone to ascertain if there were any texts on between himself and Mr Sankari, he said there was nothing prior to 2 December but possibly as many as two dozen after that point (it is to be recalled that Mr Attie produced messages passing between him and Mr Jack on that date in connection with 1A Henry Street). It was this line of inquiry led to Mr Attie's mobile phone being voluntarily provided to the Inquiry for analysis and the extraction of data from it and the tender of the documents that now form part of EX FTB1.

The Other Councillors who voted for Mr Attie's Motion

379. At both his private hearing and at the public hearing Mr Oueik's evidence was that Mr Attie never discussed the Grey Street Development with him or sought his support: PH Tr 36.12-17. Mr Oueik could not recall Mrs Mooney's address to Council.
380. He said that Mr Attie did not raise with him the terms of the motion before it was moved on the 7th of October, Tr 1018.12. He said that he voted for the resolution on the basis of what he heard at the meeting, the "way it was put forward, and the motion was put forward"; Ex PH6 Tr 40.10. Mr Oueik said that he voted in favour of the amendment, and supported the proposal on the basis that it would be good for the community. He explained his decision in these terms:

A. The dry cleaner there, the one that you're talking about, has been empty for years and many houses around it was told that it's been owned by one person or a company and a big chunk of land, a big parcel of land. And as you know, I come from a business background, I will never say no to any development as long as it complies and, like, you know, it's a benefit for the community, that is my opinion, and the reason that I voted for it is there's not lots of employment there, it's still empty there, and the houses are run-down and if something can be built there it's benefiting the country, the state, like, everyone can benefit from it. But there's some group there, they always say "no", always. It doesn't matter what you do, always say "no", and we are - like, if you're going to say "no", Strathfield would say "no", Burwood would say "no", Parramatta would say "no", what would happen to the economy? "

(PH Tr 39.2-18)

381. At the public hearing he stated that he thought it was a good thing for the area, Tr 1017.38. When asked to rationalise that approach to the approach taken by him in relation to the South Auburn Planning Proposal Mr Oueik answered by reference to a requirement that a B4 zone had to be a certain distance from the station and the same principle applied in relation to R2, R3 and R4; PH Tr 40.22-25. He said that he didn't question option 2(a) because it was too far from the station and he relied upon the expert; PH Tr 40.30.
382. At the public hearing Mr Oueik avoided directly answering the question of why he voted for Mr Attie's motion on 7 October 2015 given it was the first time that particular motion had been before Council. He seemed to suggest that the terms of the resolution did not really matter and that it was the broader project that he was interested in:
- A. If I was convinced from the first time I have supported it, I would continue to support it all along.
Q. Is this the case - you really didn't take any notice of what was in Mr Attie's motion, you wanted to support a development at the Grey Street, Silverwater, site, no matter what?
A. All I wanted to see there is supermarket, as I was asked by the residents of Silverwater.
Q. That was the only thing that was concerning you when you came to support it on 7 October; correct?
A. All along. (Tr 1019.9-21)
383. After hearing the tape of the meeting which showed the lack of any debate, other than Ms Simms stating why her motion not to proceed should be supported (which was dealt with before Mr Attie's resolution was moved) and Mr Oldfield speaking in support of Ms Simms' motion; Mr Oueik was asked why, given his support of the project, he did not seek to persuade other Councillors to support it:
- Q. Why didn't you seek to persuade any of your fellow councillors of your apparently strong support for this project?
A. I can only speak for myself, not other councillors.
THE COMMISSIONER: Q. No, you were asked why did you not speak in support of Councillor Attie's motion?
A. Okay. I didn't speak.
MR BOLSTER: Q. Did you think that you didn't need to persuade anyone to support Mr Attie's motion?
A. No.
Q. Was it the case that you thought that Mr Attie's motion had the numbers and that that was one of the reasons why you didn't need to put forward a case, say, to Mr Yang?
A. No.
Q. To the mayor?
A. No.
Q. To Mr Zraika?
A. No.
Q. And persuade them about the matter?
A. No, I don't need to. (Tr 1023.11-36)
384. When it was put to him that there was no debate, he tried to suggest that the debate may have occurred at the previous meeting, Tr 1022.14. When it was then pointed out that this was a new motion, he did not give a meaningful answer, Tr 1022.19-1023.14. Later he said he did not know the way they were going to vote, Tr 1023.29 and denied that he knew that the motion would be passed, Tr 1024.26-29.
385. Mr Mehajer could not recall who on Council was supporting the project and couldn't even recall if Mr Attie was the person who was agitating in favour of it; PH TR 25.28.

386. He said that he was supportive of it for the following reasons:
- “Purely because of my understanding and background in construction, infrastructure, and so on, and the requirements and the need for the LGA with buildings, high-rise developments, rezoning, that's where my belief comes into play and my understanding of why we need change within our vicinity. (PH Tr 26.5-10
387. He added:
- “...my understanding of how I operate is if I believe it's within a town centre, I always support for an upgrade, but if it's not within the town centre, you always see myself as objecting to any planning proposal, even if it's spot rezoning and so on. (PH Tr 26.31-35)
388. When asked whether he considered it as being within a town centre, he stated the following:
- “If it's not in a town centre it would have been – and it's a ward in particular where there's infrastructure and a need along a busy road and along a corridor that's in need of apartments or mixed use development.”
389. He went on to say that in his opinion, all of Silverwater Road needed large scale residential apartments; PH Tr 26.43-47.
390. Mr Attie also had a poor memory of discussing the Grey Street planning proposal when the Council was suspended and the administrator was appointed, Tr 1821.33-36. He also had a poor recollection of discussing with Mr Sankari what might happen to the proposal after the appointment of Mr May, Tr 1822.4-8
391. He could not recall any conversations with Mr Sankari about Grey Street in 2016.
392. It is to be observed that Mr Attie's memory of the events surrounding Grey Street planning proposal deteriorated from the time of his original private hearing on 9 June 2016 and the public hearing on 16 June 2015 when compared with his further evidence on 24 August 2015. This was despite the fact that the events occurred within the last 12 months.
393. Mr Zraika explained his support for the project in these terms:
- “...there was a strong argument to have mixed business there and I thought that there's no reason why not to because the area needed diversity in that place and it was confirmed in my mind when I started doing street-corner meetings, because I was doing every Saturday street-corner meetings around the LGA and when it came to that particular spot, I had residents come up to me saying, some saying, "There's a need for diversity in that area, it's quite dead", so I have no issue of not supporting that.” Ex PH 16.18-27.
394. He appreciate that in order for the proposal to get past Gateway the Employment Lands Strategy needed to be amended; Ex PH 18.3. He said that he voted to amend it because,
- “... the arguments put forward were convincing arguments and why - we can always change the land employment strategy based on the arguments put forward, so that could be subject to change; I saw why it couldn't be.
- Q. The arguments you are talking about, were they arguments that you heard from Mr Attie or from someone else?
- A. No, from the floor.
- Q. From the floor?
- A. Yes.”
- (Ex PH Tr18.12-23)

Events Following the 7 October 2015 Council Meeting

395. Mr Attie could not recall making a telephone call to Mr Sankari to let him know the result, Tr 1820.29. He also could not recall if Mr Sankari called him to find out the result. He said he could not recall if Mr Sankari was in the chamber or not, Tr 1820.32. He could not clearly

recall when it was that he next spoke to Mr Sankari after the 7th of October 2015 but thought it may have been in 2016 when he put a friend in contact with Mr Sankari to arrange some finance, Tr 1821.2.

396. Ms Cologna's evidence was that after the meeting;

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

397. In November 2015 Ms Cologna sought and obtained approval from Mr Dencker engage AEC Group to undertake the variation in the Employment Lands Study as resolved by Council; Ex GS3.

398. She said that after the administrator was appointed there was a resolution to withdraw the proposal, Tr 122.17-29.

399. She also said that the resolution that withdrew the proposal did not reverse the changes to the Employment Land Strategy which she said "stands by the previous council resolution." Tr 122.31-36.

Grey Street Findings

GS1. The Application for a Planning Proposal lodged with Council in July 2015 (PP3-2015) was for all intents and purposes identical to the first application lodged in 2013 which was rejected by the Department of Planning on the basis *inter alia* of its inconsistency with the Employment Lands Study.

GS2. By the time PP3-2015 was lodged it was clear that it too did not meet the requirements of, and was clearly contrary to, the Auburn City Council Employment Lands Study 2015.

GS3. The Council Report addressing the PP3-2015 prepared in advance of the Council Meeting on 7 October 2015 was circulated to Councillors, the applicant, and its planning consultants in advance of that meeting.

GS4. On receipt of that report, it became apparent to the applicant and its advisors, and in particular Ms Crameri, that:

- a. the resolution proposed by staff, would not enable the sort of development that the applicants were advocating to occur; and
- b. the only way for a development along the lines contemplated by the applicant would be to amend the Employment Lands Study.

GS5. Ms Crameri sent e-mails to Mr Sankari, the developer representative on 2 and 6 October, identifying this problem and proposing the movement of a resolution that would achieve the result that the developer was looking for; Ex Gen 11.

GS6. Each e-mail included a slightly different version of the alternate resolution

GS7. As she put it in her first e-mail on 2 October, the developer "*needed*" an alternate resolution to be put forward.

GS8. Each of the e-mails sent on 2 and 6 October 2015 contained a resolution, as to which there were very slight differences.

GS9. The principal thrust of each resolution however was the approval of the planning proposal with a B2 Local Centre zoning and the amendment of the Employment Lands Strategy to recommend the site be zoned B2 Local Centre, consistent with the findings of the Publicly

Exhibited Draft Auburn Employments Lands Strategy, and permit residential uses on the site including land, zoned B2 Local Centre.

- GS10. Mr Sankari then spoke on the phone, and later met, with Mr Attie who was provided with a copy of the resolution attached to the 6 November e-mail from Ms Crameri a face-to-face meeting at Council on either 6 or 7 October 2015.
- GS11. Mr Sankari did not take any other steps, ie by sending letters to Councillors or instructing Ms Crameri, to appear and advocate the developer's case at Council.
- GS12. Mr Sankari was content to leave the matter in the hands of Mr Attie. The only explanation for this is that he understood that Mr Attie would move the resolution and that it would be passed. It is most odd that Mr Attie, the advocate of this development did not see the need to canvass on behalf of the developer and persuade his fellow Councillors of the merit of *his* resolution.
- GS13. The Inquiry would not accept the evidence of Mr Attie to the effect that he drafted the resolution without reference to the applicant or its planning consultants.
- GS14. The Inquiry would find that Mr Attie was provided with a copy of a motion to move by Sankari either or via e-mail.
- GS15. Mr Attie then moved the motion provided to him by Mr Sankari without seeking advice on the matter from Council staff.
- GS16. The motion, although slightly different from the text of the motion in the 2 October 2015 e-mail from Ms Crameri was exactly the same as the motion in her 6 October 2015 e-mail.
- GS17. In moving the motion in the circumstances outlined above, Mr Attie was effectively doing the bidding of the developer. He did so without disclosing the fact that the motion that he was moving was the developer's motion.
- GS18. Mr Attie recognised the obvious, that he needed to bring his own independent judgment to the matter, to deal with it on the merits; hence his evidence that he drafted the motion himself. His continued persistence with the false explanation that he brought his own experience and drafted the resolution himself, when that was not the case, itself demonstrates his awareness that what he did was unacceptable and amounted to an abrogation of his duties and responsibilities in this matter. His denials also raise serious questions as to his reliability as a witness of truth.
- GS19. The Inquiry would find that in the circumstances Mr Attie 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 this or any other Act.

Part 5: Marsden Street Planning Proposal

Background

400. The genesis of the Marsden Street Planning Proposal lies in an application of the then owners of 21-23 and 15 Raphael Street Lidcombe to re-zone that land together with a Council owned laneway, from IN2 (Light Industrial) to R4 High Density Residential. Their original application for a planning proposal was made by CBRE Town Planning on 25 July 2013⁶³ and was the subject of an Assessment Report dated November 2013⁶⁴. The Proposal and Report were listed on the business paper of a Planning Committee Meeting of Council on 20 November 2013.
401. The report of the newly appointed Executive Manager Planning, Mr Francis, recommended the preparation of a Planning Proposal in the terms sought in accordance with s 55 of the EP&A Act.
402. Mr Oueik did not take part in the debate concerning this proposal. The minutes record that he declared an interest on the basis that companies controlled by him owned property *in the surrounding area*; Ex PH4, pp 5 and 6.

Planning Committee Meeting of Council on 20 November 2013

403. Mr Francis' recommendation was not adopted. In its place Mr Attie moved a motion⁶⁵, passed unanimously, deferring consideration of the proposal 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". The motion included the following:
- "2. 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 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." (Ex PH4, pp 6-7)(emphasis added)
404. Mr Attie said that he "*wanted to look at the wider area rather than just at one particular block.*" and that he reached that view at the meeting itself without reference to anyone on Council (in particular Mr Oueik) or the staff; PH Tr 43.12-28. He said that he read it out as he moved it, "*off the cuff*" unlike the two Grey Street resolutions moved by him.

Mr Oueik's interests in the Marsden Street Precinct

405. Previously, on 30 November 2012 Mr Oueik filed a 'special interest disclosure'⁶⁶, in the context of a proposal to increase the floor space ratio of land in the zones B4 and R4; Ex JS1,

⁶³ Ex M1, p 61-108

⁶⁴ ExM1, p 24-130, note the summary at p 26.

⁶⁵ Ex PH4, pp 13 and 14.

⁶⁶ See ss 451(4) of the LGA

- p 222-223. In that disclosure he referred to interests in 4-10 and 14 Mark Street Lidcombe, which sit within the Marsden Street planning proposal.
406. As matters currently stand, Mr Oueik (through companies controlled by him⁶⁷) owns the following properties that are located within the area nominated by Mr Attie: 4- 10, 12 and 14 Mark Street; 9 and 11 Raphael Street and 1 and 1A Marsden Street. Mr Oueik agreed that he bought the properties (with the exception of 15 which bought in 2015 after the re-zoning⁶⁸) when the properties had an R4 zoning but that he did not propose to develop them in due course; PH Tr 5.20 and had not prepared any plans for their development; PH Tr 5.34. Mr Burgess gave evidence about how at least one such property was acquired; Ex S11 [77]-[79].
407. Mr Oueik said that he declared an interest and did not take part in the debate on that occasion on the basis that it had been explained to him that if he owned any land within a block of the property under consideration, he ought to declare. This is of some significance since when the proposal went before Council it was only limited to the three blocks 21-23 and 15 Raphael Street. More particularly the resolution proposed in the staff report would not have conferred any benefit upon him since his properties were already zoned R4 in any event; Ex MS1, p 63. He said that he had no discussion with Mr Attie prior to the meeting on 20 November about Council looking at a broader re-zoning of the Marsden Street precinct; ref PH Tr7.38.
408. Mr Brisby's evidence was that when it came to questions of interest, he relied upon the returns of the Councillors. As he put it, *"the conflicts of interest pecuniary interest is a matter for the individual."* Tr 448.1.

AECOM's Draft Reports

409. A study was eventually carried out by AECOM Australia Pty Limited (on Council's instructions) and ultimately four Reports were prepared following an open tender process; Ex MS1, p 185. Mr Brisby said that he was not involved in the instruction of AECOM and this was left to Mr Francis, Tr 447.10. The documentary evidence suggests that Mr Alvarez was the officer who principally dealt with AECOM on the matter.
410. The first draft AECOM report "for client Review" was dated 21 March 2014. The second was dated 24 March 2014⁶⁹ and distributed on that day; Ex FTB1, p55.
411. At EX FTB1, pp 49 to are the minutes of the briefing given by AECOM to staff on 26 March 2014 where AECOM "talked through the preliminary draft report" Ex FTB1 p 49. These minutes (as well as the other Marsden Street documents in EX FTB1) were provided to the inquiry by Ms Cologna after the completion of oral evidence.
412. At page 29 of the report⁷⁰, the authors noted that 4 lots in Mark Street comprising 2,080 m² were in single ownership. At p 35 of the report the existing scenario was identified. These were, in fact, Mr Oueik's properties at 4-10 Mark Street.
413. From pages 34 to 41 of the report proposed scenarios A to D were identified; Ex FTB1 pp 35-44. None of the proposed scenarios included a B4 zoning south of Marsden Street. Note 4 has a third dot point to the effect that, *"cross-referencing ownership in ASIC register of companies for director names is problematic. No further action requested on this"*⁷¹. Note 9 suggests that there was to be a briefing on 7 May 2014; EX FTB1, p 51.

⁶⁷ Apartments on Mark Pty Limited, BBC Group Limited and Marque 8 Pty Limited.

⁶⁸ PH Tr 6.44

⁶⁹ EX FTB1, pp 2-48

⁷⁰ EX FTB1, p 32

⁷¹ EX FTB1, p 49

414. The day following a briefing from AECOM to staff (where Mr Francis was not present), Mr Francis and Ms Cologna were called into Mr Francis' office and directed, "to include a scenario that had more B4 zone land within the precinct"; a process Mr Alvarez described at Tr 926.42 – 927.6.
415. Mr Alvarez said that Mr Francis said that more B4 zoning should be added to the scenarios and the IN2 buffer should remain; Ex S17, [8]. He justified the change on the basis that, "it would be more consistent with what the initial council resolution was"⁷² and by reference to the fact that, "there was no IN2 buffer zone along East Street and that should be re-implemented."⁷³ He said that Mr Francis also expressed the view that;
- "....he could envisage in the future that land to the south of James Street was likely to be rezoned for R4 uses for a more intense use and, therefore, there would not need to be a buffer or amenity type buffer between the B4 land to the north of James Street and the R2 land to the south of James Street because it would no longer be R2."
416. Mr Alvarez gave effect to Mr Francis' direction in an e-mail from Mr Alvarez to AECOM on 31 March 2013; EX FTB1, p 54 which states as follows:
- "At the request from the Executive Manager Planning, AECOM is requested to consider an additional scenario of in which the entire precinct would be zone B\$, except for the 2 existing RE1 parks, and the block in the south-east corner, bounded by James, East, Raphael and Davey Streets would be retained as IN2."
- (EX FTB1, p 54)(sic)
417. The briefing for 7 May 2013 was also confirmed in that e-mail, but later changed to 21 May 2014; Ex FTB1 p 109. The third "final draft", was dated 1 May 2014; EX FTB1 pp 62-108.
418. At p 17 of that report (EX FTB1, p81) it was noted that 4-10 and 14 Mark Street were in single ownership and comprised a total of 2,650 m². Scenario E appears for the first time at pp 40 and 41 of the report; EX FTB1, p 103 and 104.
419. The fourth and final report was dated 14 May 2014; Ex MS1 132-180. The final report⁷⁴ described six options for re-zoning and identified option F as a preferred scenario.

Option F

420. In summary, option F divided the precinct into roughly two halves, on either side of Marsden Street. To the South it recommended an R4 High Density Residential Zoning whilst the North B4 Mixed Use was preferred. As with each of the other scenarios, a 3D model was included showing the indicative building envelopes.

Option E

421. Of the other options, option E provided for the greatest increase in the planning controls for the precinct. It provided for a B4 zoning across most of the precinct, the exception being a buffer zone of IN2 in the South Eastern corner between Raphael Street, James Street and East Street. The report expressed the view that the extent of the B4 zoning in option E, "may result in an oversupply of retail/commercial floor space, or may not be realised."
422. Mr Alvarez' own view was that option E was not a bad planning outcome due to the proximity of the railway station, a theme echoed by Ms Cologna; however he was concerned

⁷² Tr 927.14

⁷³ Tr 927.17

⁷⁴ Ex M1, p 132-180.

that it “could create amenity conflicts with the R2 zone on the South side of James Street”⁷⁵. He explained that when giving oral evidence in these terms:

“The amenity conflict, I guess, in the R2 zone on the south side of James Street there is mostly single detached dwellings, so very low scale and low density residential. if a B4 was to go into the north side of the James Street they might include - they might constitute a redevelopment of 7, 8 storey residential apartment buildings with shops at the bottom which could include a restaurant, cafe, et cetera, which would actually increase traffic movements, it might increase noise; more people in the street. Therefore, the people who are living in the single detached dwellings and they have an expectation of living in a sort of quiet environment, are all of a sudden impacted. Their amenity is impacted by higher uses, more movements, more people, so that's what I was referring to.
(Tr 924.38-925.15)

423. This is borne out by the AECOM “*block modelling*”⁷⁶ sketch plan showing the streetscape under option E.
424. Mr Alvarez’s preference as a planner was for Option F; one important reason being the overshadowing under that option when compared to option E, a matter he discussed at Tr 925.31-926.5. He explained this further by reference to the fact that the original resolution referred to an amended R4 zone to “*allow a better scale of transition*” which is precisely what option F did. In this respect it is to be recalled that one of the matters that was the subject of the Council resolution of 20 November 2013 was advice as to achieving a better scale transition in respect of any recommendation to extend the B4 zone; see Ex PH4, p 7, [2(b)].

The Report of the Executive Manager – Planning

425. The report of Mr Francis to Council in advance of the meeting recommended a new option, Option G, which provided for:
- e. B4 Mixed Use across the bulk of the precinct to the West of Raphael Lane. As far as the land south of Marsden Street and West of Raphael Street was concerned, it was identical to the Option E introduced by Mr Francis.
 - f. Maintenance of the existing IN2 zoning to remain along East Street as a buffer between Rookwood Cemetery and was a combination of Option E and the existing zoning
426. The most concerning issue with the recommendation of Option G is the fact that in substance, it proposed an option that was not recommended by AECOM, did not arise out of their independent analysis of the site and was only included in their report at the request of Mr Francis. Given the relationship between Mr Francis and Mr Oueik, one might be forgiven for having a sense of unease about Mr Francis’ decision. In this respect it is to be recalled that the Council resolution called for, “*the planning staff to undertake a more complete urban design and planning study of*” the relevant area, that it was AECOM who was tasked with that role. Mr Francis himself had not carried out any such study, yet was directing the experts who had, what their conclusions ought be.
427. Mr Francis was not prepared to give any reasons as to why he asked for option E to be included in the AECOM Report.
428. Further, his report to Council does not indicate or disclose that option E was not included in the draft report from AECOM, was only included at his direction and therefore did not flow from their study. His summary at Ex M1 p 184 was to the effect that:

⁷⁵ Ex S17, [8]

⁷⁶ Tr 925.22

- a. AECOM has undertaken an urban design and planning study in according with the November 2013 resolution.
 - b. The consultant prepared a draft report “outlining the findings of study” and recommended preferred scenario for rezoning.
 - c. An alternative re-zoning scenario, scenario G has also been included in the report.
429. To be fair to Mr Francis, as Mr Alvarez accepted, there was a case that given the proximity of the zone to Lidcombe Station within the Lidcombe Town Centre there was some justification for a B4 zone. It should also be observed that the relative strengths and merits of all options were set out in the AECOM Report.
430. Although aware of the difference between the AECOM recommendation and Option G, Mr Brisby answered the question as to whether he raised the matter of why they were putting forward option G with his planning staff, he said:
- “I’m sure that’s included in the report and, again, the same scenario would have been as we prepared the business paper with the executive team.” (Tr 450.8-13)
431. Similarly, when he was asked about whether he appreciated the significance of the difference, he said this:
- I was aware there was a difference in the scenarios in the options that were provided to council.” (Tr 440.19-22)
432. He said that he could not recall discussing the matter with Mr Francis. He said that on one occasion, when he could not say but probably in the lead up to the meeting on 18 June 2014, Mr Oueik sought from him the status of the matter and when it would be back before Council, Tr 450.31-42
433. Mr Oueik said that he never read the report; PH Tr 8.1-10, that he didn’t see it and had nothing to do with it (PH Tr 8.29-30); no-one told him what was in it; PH Tr 8.23-30 and that he did not discuss it with Mr Francis, Ms Cologna or anyone; PH Tr 8.35-9.1, including Mr Brisby. He said that he found out about the result in a conversation with Mr Brisby, on a date he could not recall, where Mr Brisby said to him as a “passing comment”⁷⁷ words to the effect that Council had made a decision to make it commercial and it was sent to the Department.

18 June 2014, Council Meeting - Adoption of Option G

434. At the meeting on 18 June 2014, which occurred in the absence of Messrs Mehajer and Oueik, Mr Attie moved (seconded by Mr Yang) the recommendation in the staff report. The minutes record Mr Oueik declaring, a “*pecuniary interest as his company is the owner of property in the surrounding area.*” Ex MS1, p 199. That was not entirely correct: Mr Oueik owned a number of properties *within* the area under consideration.
435. Ms Simms moved an amendment (seconded by Mr Oldfield) that proposed the adoption of Option F (but with the land along East Street being zoned IN2 – which was consistent with option G).
436. Mr Campbell then moved a foreshadowed amendment which differed from Ms Simms motion to the extent that the properties fronting Mark Street be zoned B4 with a 19 m height limit (the B4 mixed use zone had an FSR of 5:1 and height of 32 m, Se Ex MS1, p 164). He explained that the purpose of the amendment was to scale down, “the heights on James St and on Mark St south of Marsden St to R4 levels. I did not want to see tall buildings on the

⁷⁷ PH Tr 10.24 & 11.7

northern side of James St especially opposite detached houses nor for the full length of Mark St⁷⁸.”

437. Ms Simms’ motion was put and lost by 6 votes to 2; with she and Mr Oldfield the only Councillors voting in favour.
438. Mr Campbell’s foreshadowed motion was then put and lost by the same margin; with he and Ms Simms the only Councillors voting in favour.
439. Finally Mr Attie’s motion was put and passed, by 5 votes to three; those against being Ms Simms, Mr Oldfield and Mr Campbell.

Subsequent Resolutions

440. On 3 July 2014 the proposal was submitted to the Department of Planning for a Gateway Determination, which was approved on 30 September 2014 subject to certain conditions. In April and May 2015 the proposal was placed on exhibition for consultation. On 17 June 2015 Council resolved to proceed with the proposal in these terms:

“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 section 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 MS1, 290-291)

441. Messrs Oueik and Mehajer did not take part in the vote. Mr Campbell joined with Messrs Zraika, Attie, Campbell and Yang and Ms Batik-Dundar to vote for the resolution (Ms Lam was absent overseas). Only Ms Simms and Mr Oldfield voted against. Mr Campbell explained why he voted for the proposal at that stage in these terms:

“[68] The rezoning was approved by Council and the State Government. It returned to Council for final approval. I judged that my arguments for my previous amendment would now meet the same fate. I was influenced by the point that, as the relevant sector of James St was lined with reasonably new 3- and 4-storey units, nothing taller would replace them in the foreseeable future. As regards Mark St, I partially accepted the argument that the Lidcombe Bowling Club’s units being constructed on the western side would balance the eastern side. However, I remained concerned at the overall increased population this would bring to the area.” (Ex S13)

⁷⁸ Ex S13, [67]

442. The proposal was formalised and became Auburn Local Environment Plan 2010 (Amendment No 14); Ex MS1, 293-336.
443. Of the four planning proposals under consideration at this Inquiry, it was the only that was actually made.
444. Mr Campbell was criticised by senior counsel for Mr Oueik on the basis that he voted out of sync with Ms Simms, Mr Oldfield and Ms Batik Dundar when it came to Marsden Street on June 2015 (see Tr 760.5 764.40, 771.3-785.3 & 786.19-791.38).
445. Mr Campbell explained his position in his statement at [61] to [72]. More particularly, as regards the CFMEU, he said this at [70]:

“I was aware that this re-zoning affected land owned by the CFMEU. It makes up a very small part of the precinct. I support the principle of trade unionism but am not a member of that union and owe them no obligations. The CFMEU, neither directly nor via the Labor Party, had anything to do with my decisions. In fact, if it would be a breach of Labor Party policy to direct me how to vote on planning/development matters.”

446. Furthermore there was a significant difference between the treatment of the CFMEU land in any event, which was North of Marsden Street which was to be zoned B4 on the AECOM preferred option F in any event.
447. Mr Campbell made the further criticism that although he knew Mr Oueik had interests in property in Mark Street, he was not made aware of the extent of that interest. He said that had he known of the extent of the interest or exactly where the property were located, he may have taken a different view.

The Practical Effect of the Re-Zoning

448. Unchallenged evidence before the Inquiry was that the effect of the rezoning of the Marsden Street Precinct on the properties owned by Mr Oueik was likely to increase the market value of the properties owned by Mr Oueik of the order of \$24 million. See Valuation Report of FPV Consultants dated 6 May 2016. Ex MS1 pp 1-7.

Marsden Street Re-Zoning – Proposed Findings

- MS1. Unlike each of the three previous planning proposals, there was some planning merit in the decision of Council to proceed with Option G.
- MS2. Option G, for the purposes of the area South of Marsden Street and West of Francis, which included Mr Oueik’s land, was the same as the option E in the final AECOM report.
- MS3. Critically, AECOM’s draft reports, prepared after carrying out the study that Council’s original resolution called for, did not include, let alone recommend that option. It was however, the option that conferred the greatest benefit on Mr Oueik.
- MS4. There was no basis for Mr Oueik to declare an interest in the original proposal that was before the planning committee of Council on 23 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.
- MS5. On that other hand Mr Attie says that he moved the motion “off the cuff”, from the floor, on the night and had not discussed it with anyone, including Mr Oueik, before hand. There is no direct evidence to make a finding that the two of them colluded before that motion was moved. It was, however 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.
- MS6. All of this occurred against a background where 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.
- MS7. When the matter came back before Council 18 June 2014 and the critical decision was made to proceed with Option G, a similar disclosure was made; although it was expressed as being a pecuniary as opposed to non-pecuniary interest.
- MS8. The minutes record that disclosure as being a "pecuniary interest as his company is the owner of property in the surrounding area." That was not entirely correct, as Mr Oueik owned a number of properties that were actually within the area under consideration. Indeed the grouped ownership (but not the identity of the owner) was identified by AECOM in its various reports and Council directed them to take no further action in the problematic task of, "cross-referencing ownership in ASIC register of companies for director names."
- MS9. Mr Oueik did previously disclose the nature of that interest in the special disclosure he made in the context of the LGA wide changes to the B4 and R4 zones⁷⁹.
- MS10. In this respect there are two different public interests to be served by disclosure; the first is the identification of both the nature and breadth of the interest so as to ensure that the Councillor does not take part in the process so as to protect or further his interest; the second is the identification of the extent to which that interest will be affected by the decision once the Councillor removes themselves from the debate.
- MS11. Put another way, there is a clear public interest in identifying the extent to which a Councillor will benefit from decision made by other Councillors even that Councillor does not take part in that process. This is particularly important in the case of planning decisions where Councillors routinely can be expected to take part in decision making that can confer, as was the case here, the prospect of considerable financial gain.
- MS12. Mr Oueik's rather incredible evidence 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 land in the precinct is in fact called Apartments on Mark
- MS13. More concerning however are the failures in the process that led to the result.
- MS14. 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 in the draft reports of AECOM following its study; and
 - b. the interventions of Mr Francis in the process that led to AECOM including scenario E its final report.
- MS15. 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 benefitted from Mr Oueik's largesse.
- MS16. The results of the voting and recommendations of staff may have been different had all of these matters been disclosed or known.
- MS17. As in the case of Berala and South Auburn, there is no explanation from Mr Francis regarding his actions.

Marsden Street Re-Zoning – Recommendations

- MS18. The Marsden Street Planning proposal identifies the need for greater disclosure and transparency in the process of Councillor initiated planning proposals. The deficiencies in the process are clear;

⁷⁹ Ex JS1, 223-4

- a. Council was not given specific particulars of the extent to which Mr Oueik owned property located within the area under consideration.
- b. Staff were not made aware of the extent of Mr Oueik's interest in the area under consideration.

MS19. 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 effected 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 to Council except in the case of manifest error or illegality.

MS20. 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 Environment Plan 2010 (Amendment No 14).

Part 6: The Sale of Council Land at 13 John Street Lidcombe

Background

449. The background to the Council's consideration may be summarised as follows:
- a. In October 2010, Council resolved to sell 13 John Street. The land in question is an irregularly shaped lot used as a Council car – park due to its location in the central Lidcombe town centre; see the photos at Ex JS1, p 151, Ex Gen 9, p 49 and the survey and DP attached to the original tender in Ex JS1.
 - b. Mr Burgess explained the process at Ex S11 [90]-[112].
 - c. On 16 February 2011 Council resolved to accept the tender of Sydney Constructions & Developments Pty limited for \$6.5 million; Ex JS1, p 21-2.
 - d. Contracts were exchanged on 1 March 2011. Salim Mehajer signed as a director of the purchaser.
 - e. Special Condition 14C required the purchaser to lodge a development application and obtain the consent for a supermarket with a minimum 2,000 m² "and all ground floor areas to be dedicated to commercial uses for both the subject property and 11 John Street."
 - f. Special condition 14I was in these terms:

"In the event that the purchaser does not obtain Development Consent for the subject property and the adjoining property within 12 months from the date hereof then either party may be at liberty to rescind this contract whereupon the provisions of clause 19 shall apply."
 - g. Special condition 15 provided that was to be effected within 14 days of the purchaser notifying the vendor of the approval. It also provided that should the development not proceed within 2 years from the date of the consent, the purchaser was to give the vendor an option to purchase the land the subject of the contract at the same price as the original contract.
 - h. On 12 October 2011 the purchaser sought a six-month extension of the time to obtain development consent. On 16 November 2011 Council resolved to grant that extension on the basis of advice that the request was reasonable; Ex JS1, p 24-25 (advice) and pp 33-34 (resolution). Shortly thereafter a Deed was entered into giving effect to that extension.
 - i. On 20 April 2012, Development Application 119/2012 was lodged.

May 2012 - The First request to Extend the Settlement

450. On 22 May 2012 the purchaser sought to extend the settlement date; Ex JS1 p 41-2. On 26 June 2012 Council resolved by 8 votes to 1⁸⁰ to refuse a request to extend by 3 months and 16 days the period of time in which to obtain the DA and effect settlement. Of the 2012 Council, Messrs Oueik, Attie, Simms and Zraika all voted against the extension which was against the recommendation of staff; Ex JS1, 46-8.
451. Le Lam was the only member of the Council to vote in favour of the resolution. She explained her reasons for doing so on the basis that having imposed the condition that required a supermarket to be built, the Council was obliged to give time to enable that to occur, Tr 680.7-11. She said that at that time she did not know that Salim Mehajer was involved in that business, Tr 713.10, but did give evidence of the relationship with Mr Mehajer's father, Tr 709.37-711.2. She said that she first met Salim Mehajer when he ran for the State election (709.15) when he was handing out how to votes, Tr 709.22.

⁸⁰ Ex JS1, p 74

452. Mr Oueik said that he could not recall why he voted against that request⁸¹ but conceded the importance of the extension being sought given that without it, Council could bring the contract to an end, Tr 1091.11-16.
453. On 20 August 2012 Mr Francis wrote the purchaser identifying a range of problems with the development application and suggested that it be withdrawn; Ex JS1, p 81-2.

October 2012 - Mr Mehajer's Second Request for an Extension

454. Following the election of the 2012 Council in September and the election of Mr Mehajer as Deputy Mayor, a further request for an extension of 6 months was made. Council considered it on 31 October 2012. The briefing paper listed three options without recommending any one of them; namely rescission, the issue of a notice to complete, or extend time; Ex JS1, p 85-88. The minutes of that meeting show that Ms Lam initially moved a motion (seconded by Mr Oueik) to extend the timeframe for consent in special condition 14I by 9 months, which was defeated by 5 votes to 4⁸². Ms Simms then moved a motion to issue a 14 days notice to complete, which was withdrawn, following which the earlier Lam motion was put and passed unanimously⁸³.
455. A rescission motion was moved by Ms Simms at the next meeting Council on 7 November 2012 and passed by 6 votes to 2⁸⁴. At that meeting Council resolved to defer further consideration to the next meeting of Council but extended time under the contract until Council considered the matter. Mr Attie voted in favour of the rescission motion and Ms Lam was absent and did not take part⁸⁵.

November 2012 - Council Resolves to Rescind

456. The business papers for the next meeting on Council on 21 November 2012 include a report dealing with the merits of the development application⁸⁶ and which recommended refusal to the JRPP for a number of reasons; Ex JS 1 p 147-162.
457. A key issue was car park access; ie there was no separate access between the residential and commercial car parking areas. A separate report was prepared to deal with the contract where a number of options were presented as being available, with no preference for any particular one⁸⁷.
458. At the meeting on 21 November 2012 Mr Attie and Ms Lam declared a pecuniary interest in the consideration of the development application on the basis of their membership of the JRPP and Councillor Campbell was appointed acting Chair. Council resolved to adopt the recommendation to recommend refusal to the JRPP; Ex JS1 p 175-6. When the issue of the contract was before Council, Mr Oueik moved a motion (seconded by Ms Lam) to⁸⁸ amend:
- j. clause 14I to delete 12 months and replace it with 26 months; and
 - k. clause 15 to replace 14 days with 9 months.
459. The resolution was lost by 5 votes to 4⁸⁹. Ms Simms then successfully moved a motion to effectively rescind the contract and not enter into a further contract; which passed with the same numbers. Ms Lam explained her reasoning for that by reference to the supermarket that she wanted built in that location, Tr 716.30-35. A rescission motion was moved and

⁸¹ 1091.25, and 1092.12.19.

⁸² In favour; Attie, Lam, Oueik and Yang. Against; Batik, Campbell, Oldfield, Simms and Zraika.

⁸³ Ex JS1, p 113-5

⁸⁴ Ex JS1, p128

⁸⁵ Ex JS1, p 116

⁸⁶ ExJS1, p 147-162

⁸⁷ Ex JS1, 163-169

⁸⁸ ExJS1, p 185

⁸⁹ For: Attie, Lam, Oueik and Yang. Against; Batik, Campbell, Oldfield, Simms and Zraika.

dealt with at the next Council meeting on 5 December 2012, however it was lost on the same numbers; Ex JS1, p 213.4.

460. A notice of termination was then served on 12 March 2013; Ex JS1, p 226-7.

20 March 2013 - Mr Mehajer seeks a new Contract

461. On 20 March 2013 Mr Mehajer wrote to Council stating that he had noticed the issue of John Street was listed for the Council meeting on 20 March 2013 without notice to the "former" purchaser; Ex JS1, p 238-9. He then made what he referred to as a "*last-ditch offer*" on the part of SC&DPL. The offer was put on the same terms as the previous contract and on the basis that the car park would be amalgamated with 15, 19 and 21 John St so as to develop them into one site with 13 John Street.
462. Mr Oueik could not recall receiving that letter, Tr 1093.44. Ms Lam said she didn't see the letter, Tr 718.38-41.
463. The minutes of the meeting on 20 March show that Ms Lam moved a resolution (seconded by Mr Yang) effectively accepting the offer referred to on Mr Mehajer's letter, subject to the development application being lodged within 6 months, obtained within 18 months and settlement within 12 months of development consent. That motion was successful with only Mr Oldfield voting against it⁹⁰. The resolutions included a condition that the contract of sale be conditional upon the purchaser obtaining development consent to include a supermarket with a minimum of 2,000 m² with the existing car park to remain open to the public free of charge until the development in commenced. No valuation was obtained at that time, however Ms Lam said that the market for land in Lidcombe had gone up in value since the original contract was entered into, Tr 721.30-722.23.

A new Contract – 30 July 2013

464. Contracts were exchanged on 30 July 2013. The new contract provided:
- A purchase price of \$6,500,000.
 - That the purchaser was to lodge, at its expense, a development application seeking consent that included a supermarket with a minimum area of 2,000 m²; Clause 14C.
 - That if the development consent were not forthcoming within 18 months from the date of lodgement on terms acceptable to the purchase then either party was at liberty to rescind; Clause 14I.
 - Settlement was required within 12 months of consent being obtained; Clause 15.

Mr Mehajer seeks release of half of the deposit

465. On 11 November 2013 Mr Mehajer wrote to Council seeking a variation of the contract to reduce the amount of the deposit to 5% with the remaining funds returned to the purchaser. The letter stated that, "Upon acceptance, the purchaser is willing to enter into a deed as an assigned guarantor for security reasons."
466. Advice was immediately sought from Chris Gough, from Storey & Gough, the solicitors for Council in relation to the transaction; Ex JS1, 283. Unsurprisingly, the advice was, "*strongly against*" releasing any of the deposit. Ms Lam could not recall that advice being provided to Council, but understood the substance of it from her experience as a real estate agent of some experience, Tr 726.36-42.
467. On 20 November 2013 Ms Simms moved a resolution (seconded by Mr Campbell) that Council decline the request. Mr Oueik moved an amendment agreeing to the request on

⁹⁰ Ex JS1: 257-260.

terms which was lost by 5 votes to 4 following which Ms Simms' resolution was passed on the same basis⁹¹. Mr Oueik could not recall whether Mr Gough gave advice at that time, Tr 1094.9-14. He conceded that Mr Gough was a good solicitor, Tr 1094.19.

468. Ms Lam sought to explain why she voted for the resolution in these terms:

"It has been in real estate for many years that when we have the property to sell, the purchaser pay 5 per cent or 10 per cent in trust, but if the property do finally have any issue, the purchaser need to repay the balance of 10 per cent and if - because so far this property has gone through such an obstacle up and down for many years and I believe there is request to refund 5 per cent to hope to put the submission of the plans in. So 5 per cent or 10 per cent in trust, it stay in trust, and if the contract do fell apart, the purchaser need to pay 10 per cent regardless it's 5 per cent or 10 per cent." (Tr 723.27-37)

469. That being said Ms Lam agreed that she had never advised one of her clients to release half of a 10% deposit but would have suggested that her client consult a solicitor even if there was a personal guarantee in the case of a corporate purchaser, Tr 726.21-30.

470. Mr Campbell gave evidence that after this meeting, whilst Councillors were having dinner in the Jack Laing Room; *"Hicham Zraika, then mayor, returned to the chamber and joined Salim Mehajer. After a lengthy discussion, they emerged together."* Ex S13[79].

471. Mr Zraika denied this, Tr 1412.28-36.

December 2013 – Council resolves to release half of the deposit

472. On 4 December 2013 Council dealt with a rescission motion moved by Mr Attie (seconded by Mr Yang) which, according to the minutes, was passed by 6 votes to 4⁹², although in truth the margin was likely to have been 5-4 as Mr Mehajer had declared an interest⁹³.

473. It was at this point that there was a fundamental change in the numbers that affected this and all future votes on the matter. Mr Zraika, who till then had voted with Simms, Campbell, Batik and Oldfield when the purchaser sought liberties with respect to the transaction, voted with the block that had supported Mr Mehajer's position, namely Oueik, Lam, Yang, Attie. By this time however Mr Zraika had been elected Mayor with the support of Simms, Campbell, Batik and Oldfield.

474. The resolution passed was in these terms:

1. That Council reduce the deposit to 5% (\$325,000.00) 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. above 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.

475. Mr Campbell gave evidence that after this meeting he asked Mr Zraika why he had changed his vote to support Mr Mehajer and was told the following; *"Our original decision had unfairly discriminated against Mehajer because he was a councilor."*

476. Mr Zraika said that the reason why he changed his vote was that he was "actually reluctant"⁹⁴ at the first meeting to vote against it. He said:

"....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 per cent as opposed to the 10 per cent. I wasn't sure whether it was doable, but bearing in mind in the back of my head I have

⁹¹ Minutes of Planning Committee Meeting of 20 November 2013, pp 14 and 15.

⁹² For: Zraika, Attie, Lam, Mehajer, Oueik and Yang. Against: Batik, Campbell, Oldfield and Simms.

⁹³ Ex JS1, p 285

⁹⁴ Tr 1413.8

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 per cent 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 it's 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 per cent as opposed to 10 per cent. I wasn't too sure.

477. He agreed that the advice given by Mr Gough was strongly against releasing any of the deposit for the reasons set out in his e-mail at Ex JS 1 p 283 but said that he spoke to friends who were solicitors he was told there was no difference between 5% and a 10% deposit, Tr 1415.2-8. He further justified his position on the basis that, *"... if the return of that half of the money goes to assisting to put a DA, then that sort of convinced me to make sure that DA goes through and have a supermarket in that area."*

July 2015: Mr Mehajer's offer to rescind with fresh nominee purchaser

478. On 10 July 2015 Mr Mehajer wrote to Council⁹⁵ seeking to rescind the contract and replace it with a fresh contract at the same price but with a new purchaser, stated to be "Mehajer Bros OR/ Nominee". The new contract was to include the following terms:
- a. There be no requirement that the purchaser obtain development consent, with settlement being paid in full within 24 months.
 - b. If settlement did not take place on time "the purchaser will pay a penalty of \$2 million."
 - c. A personal guarantee.
 - d. The consent is to include a supermarket with a minimum size of 1,000 m² with all ground floor areas dedicated to commercial use.
 - e. Legal Costs to be paid by the purchaser.
 - f. The car park to remain open as a free car park till development is commenced.
479. Messrs Storey & Gough provided detailed written advice on 25 September 2015; Ex JS1, p 328-330. The advice was strongly against entertaining the purchaser's request.
480. Mr Oueik did not recall the request or the advice given by Mr Gough at that time, although he accepted that Mr Gough must have given advice, Tr 1094.29-40.
481. When shown Mr Gough's written advice, he recalled being provided with it and understood the terms of it, Tr 1097.2-10. He defended his decision to take a different position by reference to the suggestion that Mr Gough said that the decision was up to Council as the *"elected members of the community"* Tr 1097.20 et seq. Later he stated the following:

"I'm not a qualified solicitor or barrister, I don't have your experience. But what it - this advice was typed in the office of the solicitors. It was sent to council in an email or - then it was distributed to councillors here. We read it. We looked at it. Then in the presence of the solicitor, and Darren was here at the time, there was a long meeting and a long debate and the way at the end the solicitor was happy, happy, my understanding, my memory tells me, was happy that the councillors, the

⁹⁵ Ex JS1, p 325-6

elected members of the community, if that's what they want I'm happy to assist them with the contract, the new contract. That has my understanding." (Tr 1098.43-1099.7)

7 October 2015 – Deferral to Obtain Valuation

482. The matter was considered at Council's Meeting on 7 October 2015 (the same day as Council's consideration of Mr Attie's Grey Street resolution). Councillors were provided with a blue confidential briefing paper from the Executive Manager, Planning (Mr Francis) on the day of the meeting⁹⁶ which recommended that Council terminate the contract pursuant to special condition 14(1) given the that development consent had not issued. Mr Gough spoke to Council and recommended that the matter should go to tender; see Mr Campbell's notes: Ex Gen 9 p 21 and 21
483. Ms Simms moved (seconded by Ms Batik-Dundar) that Council terminate the contract. Mr Attie then moved and amendment (seconded by Ms Lam) to the effect that the matter be deferred to the next meeting of Council to enable the information provided and to enable the submission of a report on the site and a valuation. The amended was carried by 5 votes to 4⁹⁷.

18 November 2015 – Valuations are obtained

484. The Matter was next considered on 18 November 2015. On that occasion further confidential reports were provided to Councillors; see Ex Gen 9, p 25-86. One such memorandum included two valuations of the site, one from McGees Property Valuers⁹⁸, the other from CBRE Valuations Pty Limited. The valuations may be summarised as follows:
- a. McGees: Valued the combined site, (ie. 13-21 John Street) at \$8,700,000 with the contribution to that value due to 13 John Street as being \$6,900,000. The report noted at 10.2.3 that McGees were not instructed to assess the value of 13 John Street in isolation but that based on the restrictions on the development of the site were amalgamation not possible, a significant discount on the \$6,900,000 figure would apply; Ex Gen 9, p 59
 - b. CBRE: Valued the isolated site at \$13 million and the combined site (13-21 John Street) at \$20 million. CBRE did not value the site as part of the combined site.
485. Mr Oldfield, Mr Campbell and Ms Simms evidence that at the meeting where the valuations were distributed, they were not made aware of the CBRE valuation⁹⁹. Mr Campbell's evidence on this was as follows;

"Well, as I recall it, this was given to councillors at the beginning of a confidential session. It would be the normal practice that you would get confidential papers a week in advance. There would be some relatively rare occasions when it would be put there at the beginning of a meeting. On this occasion, I don't - I'm not certain that it wasn't there at the beginning of the meeting or it may have been distributed when the confidential session started.

The memorandum on the front page, saying that there are two valuations there, I don't recall reading it. I agree that it was there, but there was a fairly thick document, apparently one document, given to people to read hurriedly before

⁹⁶ Ex Gen 9 pp 12-22.

⁹⁷ Ex JS1, p 366. For; Lam, Attie, Oueik and Zraika. Against; Simms, Campbell, Batik-Dundar and Oldfield.

⁹⁸ Ex Gen 9, pp 39-76.

⁹⁹ Mr Oldfield, Tr 845.39-846.46 said that the first time that he became aware of the CBRE valuation was at the Christmas Party when he discussed the matter with Mr Brisby and each of Mr Campbell and Ms Simms.

discussion started. There was no report - there's nothing in this memorandum to suggest that we - there's no comparison between the two valuations.

A normal council report would have a staff report saying there is this valuation, there is that valuation, and there would be some commentary on the fact. I would expect there would be a commentary on the fact that there was a huge discrepancy. This was not brought to the attention of councillors.

May I say that this document was presented to the November meeting. The closed session in which the discussion took place was at the December meeting, one month later, and it was not recycled. That is a set of circumstances which I have not encountered before on Auburn Council." (Tr 830.19-831.2)

486. He also made the valid point that his intention at the time was to:

"... reject the whole proposal for the sale of 13 John Street. It was not my intention to examine this document in detail. If I had been interested in council going ahead with the sale, then I would have paid the kind of attention to numbers that you're talking about." (Tr 833.25-30)

see also, Tr 838.33-43.

487. Mr Oueik said that he read the valuations and looked at, "the bottom line" Tr 10999.37. He said that he noted the two different figures, Tr 1099.39-44. He said that he preferred the lower valuation:

'... you get one company giving you a valuation of 13 million, maybe I should use them myself, and another company gives you a valuation of 6.9 and you in the middle, okay? What do you decide on, 13 million or 6.9 million? Then you use your own experience in the field and then that's what I did and that was my opinion and that's why I supported it because to use the 13 million is a risk, it's in pie in the sky, as I described it, and \$13 million on that site by itself, there will never be a supermarket in there, nobody will buy it, no-one will go nowhere near it. The other price, in my opinion, as we promised the community many years ago that would be a supermarket, and I was under a lot of pressure, especially when I ran for the state election, in 2012 election, I had a lot of calls from the residents of Lidcombe. My ward is in Auburn, yes, I understand that, but as the elected member of the community we serve all the LGA. So if you're a member of Auburn Ward 1, you don't say to the people in Ward 2, "Go talk to your own councillors, even if they don't work for you". You serve the whole of the community.' (Tr 1100.36-1101.12)

18 November 2015: Resolution to Terminate

488. A further sea change occurred at this meeting. Ms Lam, for the very first time, declared a non-pecuniary interest arising out of a professional relationship between companies in which she had an interest and Mr Mehajer. This followed, according to Ms Lam's evidence, the publication in the Sydney Morning Herald of a story concerning the business relationship between her partner Minh Hua and Mr Mehajer, a relationship that she says she discovered on the publication of that article.
489. The absence of both the Mayor (Ms Lam was elected Mayor in September 2015) and the Deputy Mayor (Mr Mehajer) meant that a Chairman had to be elected.
490. The matter was also complicated by the fact the Mr Oueik was absent from that meeting. This meant that the Councillors previously sympathetic to Mr Mehajer's position no longer had the numbers to support his position.
491. The minutes record that Mr Campbell nominated Ms Simms and that Mr Attie nominated Mr Campbell, who declined. Ms Simms assumed the Chair and Mr Gough addressed Council.

Mr Attie then left the Chamber and did not take part in the vote. Council then voted unanimously to terminate the contract.

Mr Mehajer's rescission motion

492. There followed the lodgement of a notice to rescind that resolution prepared by Mr Mehajer and signed by Messrs Oueik and Attie which is at Ex JS1, p 401. Evidence about this was given by all three.
493. Mr Attie's evidence was to the effect that he did not recall Mr Mehajer giving the motion to him. He added, I don't recall Councillor Oueik giving it to me. More than likely it would have been Councillor Oueik but I can't recall. When it was suggested to him that Mr Mehajer gave him the motion to move he said:

"A. Again, I don't know if he gave it to me. Like I said to you, more than likely it would have been Councillor Oueik, but I don't recall either one giving it to me, but one did.

494. Mr Mehajer frankly admitted that he prepared the document, explained how he did so, and identified the handwriting on it that was his, Tr 1257.14-1258.12. He said that he brought it to Council and gave it to Mr Oueik, who was still in the process of shifting his belongings out of the Mayor's office following the election of Ms Lam, Tr 1258.13-34. He said to Mr Oueik:

"... You should be given the opportunity to hear what we have to say, because I also wasn't present at the meeting as well. Besides the fact that I walked out, I was not present at this entire meeting..... So I believe he should be given an opportunity to hear what I or my consultants have to say in regards to this development. Not to support me, but just to hear what we have to say because he was not present at that meeting."

495. Mr Oueik reply was in these terms:

"He simply said he was ill, he couldn't attend the meeting. He was ill at the time and couldn't attend. He'll consider, it's a matter or council. The words he said was 'a matter for council to consider'." (Tr 1259.7-10)

496. Mr Attie's explanation for why, having voted to deny the request for an extension of time *before* Mr Mehajer came onto the Council and having supported him on every occasion after that was that he, "did not have all the facts back then; new facts came on board through council meetings." Tr 1222.11.

The Meeting of 2 December 2015

497. Ms Lam declared an interest on the basis that her brother in law was in partnership with Mr Mehajer and all other Councillors were present.
498. The minutes then record as follows¹⁰⁰:

"The General Manager advised those present in the Chamber that Clr Mehajer had declared a pecuniary interest in the matter, however, Clr Mehajer assumed the Chair at 8.27pm on his own legal advice that he was able to remain in the Chamber for the presentation. Councillors sought advice from Council's Legal Panel Member – Mr Chris Gough in respect to Clr Mehajer remaining in the Chamber for the presentation. Mr Gough advised that he was of the opinion that Clr Mehajer should not be present for any part of the presentation or consideration of this item. Clr Mehajer vacated the Chair at 8.31pm and left the Chamber before the consideration of the matter and remained outside the Chamber during all of the discussions and did not vote."

¹⁰⁰ Ex JS1, p 417

499. With eight remaining members of Council and the Mayor and Deputy Mayor unable to take part, the issue then arose as to who would chair the meeting.
500. The issue of Chair was critical since the casting vote of the Chair would decide how Council would resolve the rescission motion and any subsequent issues arising.
501. The matter was not dealt with on the same basis as the previous meeting when the very same situation arose. Mr Campbell nominated Ms Simms and Mr Zraika nominated Mr Attie. The vote was deadlocked at 4 votes all¹⁰¹ and lots were cast, which favoured Mr Attie, who then assumed the Chair.
502. The rescission motion was then put and carried on the same numbers with the casting vote of Mr Attie carrying the day.
503. After lengthy debate the following motion was proposed and passed on the same basis:
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 car parking to be provided for public usage.
 - A restriction 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 reacquire 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 Contract 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 the 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 as in 1. above, are not finalised by January 31, 2016.
504. Mr Oldfield's evidence was that he was still unaware of the CBRE valuation when this resolution (which expressly referred to the McGees valuation and fixed the price by reference to it) was dealt with; Oldfield Tr 848.8-850.13
505. Mr Oueik agreed that from March 2013 onwards Mr Gough gave consistent advice that Council should rescind and bring the contract to an end, Tr 1101.10-16. He also said that when oral advice was given, he said, "If that's what the elected members want, I'm happy to assist" Tr 1102.31. He agreed with the proposition that he didn't change his advice but clarified that it was up to Council to make the decision, Tr 1101.36.
506. Mr Oueik seemed to criticise those Councillors who, though opposed to a further contract, sought to impose conditions on the sale if it were to proceed, Tr 1103.29-35 & 1104.2-11.
507. When it was put to him that the motion was going to be passed, he said that he could only speak for himself and then sought to justify his support for the extension on the basis that:
- a. Council wanted to sell the land because it made a mistake when it didn't buy, contrary to his advice, the corner block of land, Tr 1104.28-34.

¹⁰¹ Ex JS1, p 417. For; Attie, Yang, Oueik and Zraika. Against; Simms, Oldfield, Campbell and Batik-Dundar.

- b. The only reason to sell was in order to get a supermarket, Tr 1104.36-41.
 - c. Because of the promise to the community that there will be a supermarket, you need to, "do whatever you can legally to provide them what you promise" Tr 1104.46-7
 - d. The car park would be open until the building gets up and that would deliver them a supermarket. On that basis he could not discern any loss to the community, Tr 1105.18-26.
508. At the same time Mr Oueik seems to concede that without 15-21 Johns Street, which he referred to as "the front" and which was either owned by or controlled by the developer, "there would be no supermarket in Lidcombe." Tr 1105.38-42. This is really another way of saying that given that Mr Mehajer's companies controlled the adjoining land, the only way in which Council could achieve the aim of having a development of the car park area into a supermarket, was to stay with the
509. When asked why, if getting a supermarket was the issue, he voted against any extension back in 2012 he responded by stating that he could not, *"remember the term of the condition back then."* Tr 1106.18.22.
510. He rejected the proposition that the decisions he made the to extend the contract at the request of the purchaser were all made on the basis of his relationship with Mr Mehajer, Tr 1108.8-16.
511. Mr Zraika's evidence was that he regarded Ms Simms as being in support of the new contract at that time, Tr 1422.39 and that Mr Gough gave the impression that although his initial advice was not to agree to the purchaser's demands, he changed his advice so as to be, in effect, that it was up to Council to decide. When it was put to him that one the Chairmanship had been determined by the casting of lots, it was inevitable that the motion moved by Mr Attie would succeed, he said that he didn't see it that way, Tr 1426.16-45. He did not accept that Councillor Simms was simply seeking to get the best possible deal for the council, Tr 1427.5.
512. Mr Oldfield agreed with the proposition that if he had known that CBRE had valued the land at \$6.9 million he would have said something about it at the time.
513. The fact that they did not make anything of the CBRE valuation does seem to support the accounts of each of Simms, Oldfield and Campbell that they were unaware of it at the time of the two key debates in November and December 2015. Given the way in which the valuations were present to Councillors, at the last minute, with insufficient time to enable them to be read and analysed in detail, their evidence ought to be accepted on this issue. There is no basis however to suggest that there was any intention to "bury" or hide the CBRE valuations from them.
514. It ought be noted that at the very same meeting Council adopted the planning proposal fro South Auburn. It is to be observed that Ms Lam did not declare an interest despite having previously declared an interest owing to the same business managing property in South Auburn and, more critically, despite having declared an interest arising out of her relationship with Mr Mehajer. Had she done so, there would have been the need for a Chair to be elected in the same way as occurred for John Street.
515. It was put to Ms Lam that she supported Mr Mehajer in relation to this matter throughout because of her relationship with him. She denied that, Tr 729.40. She explained the matter in these terms

"This site - because council's carpark is in such a difficult position at that place because the carpark quite often parked by quite lots of commuters from elsewhere to come and park at Lidcombe and quite often quite a lot of garbage were dumped in the carpark, so complaints quite often came to council and we were looking for

purchase the corner at Mary Street, that was the Children's Court and the police station, and we did lobby our local member for many times but we wasn't give the support for that, and when the Children's Court and the police station was put on the market, auctioned by, it was the State Government put auction and the development - the court was sold, so council lost the opportunity for future development of the carpark, or to anyone who purchased the carpark. And it was until council was approached by, to my recollection it was the owner of the one who bought the Children's Court and the police, that company approached the council to buy the land. It's connect to the carpark because at least they can do a lot better."

516. The reference to the Children's Court/Police Station is to the land to the South of 13 John Street which is on the corner of John and Mary Streets, namely 11 John Street, which was never owned by Mr Mehajer or companies associated with him.

Findings – 13 John Street

- JS1. By mid 2012 it was readily apparent that the purchaser would not be able to deliver on the supermarket that was provided for in the original contract. The road access was such that without 11 John Street the combined site never had the capacity for both a 2,000 m² supermarket and the car park required and the subsequent failed attempts at development consent bare this out.
- JS2. Of the Council in place at that time, *only* Ms Lam voted to give Mr Mehajer more time. She did so on the basis of the long commercial relationship between she, Mr Mehajer and his father.
- JS3. Her failure to declare an interest and abstain until November 2015 was a clear breach of the Code of Conduct given her relationships with Mr Mehajer.
- JS4. The proposition that she was unaware of the relevant relationship between Mr Francis and her brother in law ought not be accepted. There were other relationships between her business and the Mehajer business in any event; see Ex Gen 28.
- JS5. Messrs Attie, Oueik and Zraika who were on Council at that time were not, at that time when Mr Mehajer was *not* on Council, so interested in the supermarket that they later professed to be when he was.
- JS6. Thereafter however, once Mr Mehajer came onto Council, Messrs Oueik and Attie and Le Lam supported the extension of time to complete, the granting of more than one fresh contract, the reduction and release of one half of the 10% deposit, and virtually every other request made by Mr Mehajer as a means of retaining an interest in the site.
- JS7. From December 2013 Mr Zraika, despite having voted against Mr Mehajer's requests 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.
- JS8. In key respects, the critical decisions made by Council after the 2013 contact was entered into, including the release of the one half of the deposit, the extension of time and the final resolution in December 2015 to enter into a fresh contract after Mr Mehajer offered to build 1,000 m² supermarket were all contrary to uncontroversial, strong and negative legal advice from Council's long standing lawyers.
- JS9. Council staff, and in particular Mr Brisby, have been criticised about the way on which the valuations that were obtained for the purposes of the November 2015 Council Meeting

were provided to staff. In this respect, there is no basis to conclude that there was any deliberate attempt to “bury” those valuations. At the same time however, there is little reason to doubt the evidence of Ms Simms and Mr Campbell that they were not aware of the second, higher valuation by CBRE. In large part, that is explicable by reason of the fact that the documents were provided to them at the last minute (which was not consistent with standard practice where briefing papers would be provided some time before Council meetings) and, perhaps more significantly, that each of them were determined to vote against any new contract with Mr Mehajer’s company.

- JS10. The motion to rescind the resolution to terminate the contract that was made on 18 November 2015 (in the absence of Mr Oueik who was ill and Ms Lam who declared her interest) that was prepared by Mr Mehajer which he then provided to Mr Oueik who signed it and then provided it to Mr Attie who also signed it, clearly shows the link between them. It shows them, contrary to their earlier evidence, communicating about matters before Council.
- JS11. 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 4 years had elapsed and Mr Mehajer was no closer to getting a development consent for a 2,000m² 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.
- JS12. The suggestion from Mr Zraika that Ms Simms was of that mind, when all she was doing was seeking to get the best possible deal, knowing that Mr Attie, Mr Yang, Mr Oueik and Mr Zraika would vote for it, does not do him any credit.
- JS13. Given that the contract has now come to an end, that no further contract has been entered into, no recommendations are made in relation to this matter.

Part 7: The Closure of Francis Street Lidcombe on 15 August 2015

517. The background to the closure of Francis Street Lidcombe for the wedding of Salim and Aysha Mehajer on 15 August 2015 may be set out as follows. In large part the relevant matters are drawn from the documents attached to the statement of Mr McNulty, then the General Manager, Direct at Auburn Council. His evidence is at Tr 971 et seq.

First Contact – May 2015

518. On 26 May 2015 Mr Mehajer sent an e-mail to Messrs Brisby, Dencker and McNulty requesting Consent from Council where needed that concerned the “placement of traffic cones along a strip of properties to secure space for a period of three hours” and helicopter landings on as yet un identified Council land: Ex S 20, pp 8-9. On 14 July 2015 Mr Mehajer sent a follow up e-mail asking Mr Fitzgerald and Mr McNulty to contact him to discuss the matter; Ex S20, p 11. Mr McNulty responded the same day to the effect that he was, “clarifying some issues” and would call him that week; Ex S20, p 15.
519. On 16 July 2015 Mr McNulty made his first substantive response which was to the effect that a request to “close off a portion of Frances Street will require Traffic Committee approval” and invited an application to be made in that regard. Mr McNulty also suggested in would be impossible to get approval from the “relevant regulator” to land a helicopter in Frances Street and suggested the nearby Wyatt Park or Phillips Park; Ex S20, p 20. Mr McNulty explained in oral evidence that at the time he was of the view that he actually wanted to land the helicopter in the street, Tr 972.8.
520. On 23 July Mr McNulty sent an e-mail directing Mr Mehajer to the CASA website dealing with the requirements for helicopter landings; Ex S20, p 29
521. On 4 August 2015 Mr Fitzgerald junior sent an e-mail to Ahmad Yaseen, Mr Mehajer’s personal assistant¹⁰² seeking information as a matter of urgency as to the timing of the road closure, the reasons for it and the location of the proposed helicopter landing site; Ex S20, p 35. This was in response to Mr Yaseen sending a Traffic control plan¹⁰³ and schedule for the events (then scheduled for the following weekend) and his desire to “have everything confirmed this week”, Ex S20 p 37.
522. Mr Mehajer responded at 1.10pm on 4 August 2015 stating that the reason for the road closure was, “the safety of pedestrian and drivers using the subject street” and that the closure would be for one hour, ie from 10-11am. He also identified Phillips Park as the site for the landing.
523. Later that day Council made enquiries of the sports group which had booked the oval for that day and that as a consequence of their bookings the Park would be available from 11.45am; Ex S20 p 49. Mr Fitzgerald relayed this information to Mr Mehajer shortly thereafter; Ex S20, p 50. Council was subsequently informed that the that the soccer club had agreed that they could move their games, Tr 978.7 and 981.9-10, Ex S20, p 130.
524. On 5 August 2015 Mr Fitzgerald sought further information from Mr Yaseen which was provided later that day; Ex S20, p 56-7. Mr Yaseen provided:
- a. a copy of the application form for the hire of the sports ground, Ex S20, p 67.
 - b. a colour photo (ExS20, p 58 showing the are of the landing/s at Phillips Park, including the area to be marked off with “security tape”).
 - c. Certificates of Currency from JLT insurance brokers to a Mr Harrold of “Heliport” showing the coverage in respect of a fleet of 7 helicopters; Ex S20, 59-64.

¹⁰² Tr 976.21

¹⁰³ Ex S20, p 38

525. Mr McNulty agreed during his oral evidence that the photo at Ex S20, p 58 (which he did not recall having seen at the time, but accepted he could have¹⁰⁴) indicates sited for helicopters but that at that time he had understood that only one helicopter would be involved, Tr 978.21-23, see also 989.30-34. He said that if he had seen the photo at p 58 of Ex S20, "I would have thought they were potential landing sites for a helicopter because our discussion all along had been about a helicopter."
526. Mr Mehajer gave evidence that he had always intended that there be 4 helicopters landing, Tr 1294.32.
527. On the same day, Mr Sivakumar sent Mr Yaseen a copy of the road license application form to be completed and details of other requirements for the closure of Frances Street. The note stated that it was required to maintain a 6-metre trafficable way for two-way movements. He pointed out that the full road closure requires Auburn Traffic Committee (ATC) approval and that the next meeting was on the 26th of August; Ex S20, p 70.

6 August 2015 - The First Road Closure Application Form

528. The completed form was returned at 11.52am on the following day; Ex S20, p 73-77. The document was signed by Mr Mehajer. The application stated that the "type of work" necessitating the closure was a "public celebration" and that the closure would involve the closure of both lanes from 2pm on 14 August to 2pm on 15 August; Ex S20, p 75, a matter that was clear from the Traffic Control Plan. Ex S20, p 76.
529. Mr Sivakumar responded at 4.10pm that day, ie 6 August 2015. He pointed out that a road closure for the purposes of a wedding, or public celebration, did not fall within the road occupancy criteria, noted that the period of closure was longer than the hour previously indicated and stated that the TCP needed to be amended to allow traffic; Ex S20, pp 92-94.
530. On 7 August 2015 Mr Fitzgerald provide an update to Ahmad Yaseen about the Phillips Park booking. At that point an 11am start could not be accommodated due to an existing booking. Mr Fitzgerald indicated the cost of hiring the park (\$2,000) and the requirement for a security bond and set out certain insurance requirements; ExS2, p 110. He also asked for the details of the person who would be controlling the landing site.
531. Mr Yaseen responded two days later, ie on 9 August stating that an agreement had been reached with the existing hirer to exchange bookings, attaching relevant insurance details and promising the contact number of the ground crew by 10 August; Ex S2, p 120.
532. On 12 August¹⁰⁵, Ms Willingham provided Mr Fitzgerald with a copy of the invoice for the "Helicopter Landing" and pointed out the outstanding informant from the applicant, namely:
- a. Revised details of the landing site and the dimensions of the touchdown area,
 - b. contact numbers,
 - c. written confirmation from the existing booking holders and
 - d. a risk assessment.
533. It ought be noted that the receipt refers to the activity as "Landing of Helicopter for Wedding Celebratory Purposes" and refers to 15 attendees. Mr Fitzgerald then sought the relevant information from Mr Yaseen; Ex S20, p 137.

13 August 2015 – The Updated Road Closure Application

534. The following day, 13 August 2015, Mr Yaseen responded to these queries attaching a map showing the landing site on Park #2 owing to the fact that Park #3 was too hilly. Mr Yaseen also indicated that *he* would be the person on the ground responsible for the site. This

¹⁰⁴ Tr 978.16

¹⁰⁵ Ex S20, p 130

information satisfied Mr Fitzgerald who sent an invoice for the park booking stating that following payment, he would issue a letter of approval, "*granting the permission to land the helicopter*" with final instructions to be followed; Ex S20, p 155 (emphasis added). Mr Mehajer responded to that e-mail regarding payment, but made no mention of the fact that Mr Fitzgerald was referring to a single helicopter; Ex S20, p 162.

535. Mr McNulty, in hindsight, would have been concerned by that prospect as he thought that "it would need more than one person to secure a site to stop people getting on to a site that a helicopter was landing." Tr 982.18-20. He added, "We were concerned to be sure that the ground was going to be suitably secured to ensure the helicopter could operate safely." Tr 982.34-6.
536. On the same day, Mr Yaseen sent an updated road closure application to Mr Sivakumar; Ex S20, p p143. In his e-mail, which was copied to Messrs Fitzgerald, McNulty, Francis and Mehajer, he stated; "*Please note that we cant close only a portion of the road on Frances Street & rather the whole road will have to be closed and re-directed dur to OHS Concerns from the traffic/planning sector...*".
537. The filming proposal application form itself is dated 14 August 2015¹⁰⁶ and bears the signature of Mr Mehajer who is stated to be the applicant. The production company is stated to be, "CH Ferro T/A CHESFX Films". The entry for the Production Title is "N.A" and type of production is indicated as, "FEATURE".
538. When asked about this, Mr Mehajer sought to assert that it really was a feature film;

Q. Didn't you sign an application which was to the effect that the sort of film was a feature film?

A. Yes.

Q. Was it really a feature film?

A. Yes, there was.

Q. A feature film? You know what a feature film is?

A. Yes, you can just call it a feature. It might have multiple meanings but there was a feature film. You can view that if you actually want it played.

Q. Would you go to page 207.

A. Yes.

Q. This is the filming proposal form prepared by Mr Ferro who did the audiovisual work at your wedding; correct?

A. Yes.

Q. Do you see, "Type of production?", and it gives examples: "Feature, TV commercial, TV series, doco"?

A. Yes.

Q. A feature film is The Godfather, isn't it, or Apocalypse Now?

A. Don't know. I had my very own feature film, I guess.

Q. Wasn't it the case that this was just, as the description is on page 208, a public celebration? It was at your wedding?

A. I did undertake a feature film. I mean I can present that film to you, if you wish. I don't want to get carried away here but –

THE COMMISSIONER: Q. How long is the running time?

A. It's a trailer of about 45 seconds.

MR BOLSTER: Q. The trailer goes for 45 seconds?

A. Yes.

Q. How long does the feature go for?

A. Well, it's just a term they use "feature film", but you can have multiple meanings for that. (Tr1300.18-1301.13)

539. The only reason why Mr Mehajer's wedding video was described as a feature film was because there was no basis to approve the road closure on the basis that was originally

¹⁰⁶ Ex S20, p 207-8.

sought, namely for the “public celebration” that was certainly a more truthful description of what was going on.

540. Mr Yaseen followed this up on 14 August at 9.42am stating the following:

“Please note I await urgently for the road closure license.

“As a courtesy message, the traffic controllers for the day have given notes to people on the street confirming the changes of traffic and their contact details. They have been calling them frequently and stating where the licence is and we are aware it is being processed by currently by staff.....” (Ex S2, p 178)

Distribution of Clearway/Towing Notices

541. At 10.42 am on 14 August 2015 Mr Sivakumar forwarded to Messrs McNulty and Francis “a copy of a letter which was given to Frances Street property owners” and sought to discuss the matter with them; Ex S20, p 182. The letter itself, styled “IMPORTANT NOTICE” is at Ex 20, pp 201-2, is dated 11 August 2015 and stated:

“SUBJECT: Clearway of street parking from 14th August 2015 12PM till 15th August 2015 2PM Francis Street Lidcombe, between Maud Street & Edith Street.

Dear Frances Street Residence,

Please work with our traffic control team to have NO vehicles parked on Frances Street Lidcombe between

14th August 2015 FROM 12PM till 10pm on 15th August 2015

As such ALL entry into Frances Street from Maud Street & Edith Street will be blocked, only residents parking in their properties will be allowed between 14th August 12PM till 15th August 2PM. All entry will be blocked TOTALLY on 15th 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” (sic)

542. Mr Mehajer said that he was first made aware of the notices when Ms Simms brought them to his attention and that this was after the wedding, Tr 1296.30-41. He said that Ahmad had responsibility for that issue but did not communicate to him the fact that Council was in receipt of complaints about the flyers or that Council wanted to know who issued the flyers, Tr 1298.6-11.
543. He said that did not give any instructions regarding the total closure of Frances Street on 15 August between 9am and 2pm, Tr 1298.41.
544. He said he saw the traffic control plan before the wedding, read it and accepted it, Tr 1299.7-16. He said that the phone number on the leaflet was the third party wedding hire car business, Tr 1299.26-32. He said that he instructed them to instruct traffic controllers. He said that the instruction to the wedding car hire company was, “*to only use one lane and just follow the traffic control plan and ensure there'd be traffic in both of the directions all the time.*” Tr 1300.6-9
545. Mr McNulty said that when he became aware of the notices a meeting was arranged with Mr Yaseen at 1pm on Friday 14 August where Mr Yaseen was told, “that they were not

appropriate and should be withdrawn.” He recalls that Mr Yaseen agreed to that. Mr McNulty said that he did not realise the matter with Mr Mehajer, Tr 985.46.

14 August 2015 Helicopter Landing Approval

546. At 12.20pm on 14 August 2015 Ms Willingham forwarded a conditional approval for a “helicopter landing” on fields 2 and 3 of Phillips Park to Mr Fitzgerald; Ex S20, p 186-187. Mr Fitzgerald made changes that reduced the approval to field 2; Ex S20, p 186-7. The final letter of approval¹⁰⁷ was sent at 2.58pm on that day; Ex S20, p 192.
547. At 3.29pm on 14 August Mr Sivakumar sent a draft letter of Approval to Messrs Fitzgerald and McNulty; Ex S20, p 194-196. Shortly after that, at 3.58pm, in response to an inquiry from local media regarding reports that residents had been told that Frances Street “*has been declared a clearway through a DA....and cars left parked in the street will be impounded or towed away*” Mr Fitzgerald proposed a response opt the effect in these terms:

“Council is in receipt of an application for a partial road closure to conduct filming activities in Frances Street Lidcombe on Saturday the 15th August. Council is working closely with the applicant to ensure full residential access is maintained.”

14 August 2015 – Final Approval for Road Closure

548. At 4.39 pm Mr Sivakumar sent the final approval for the road closure to Mr Yaseen. His e-mail¹⁰⁸ stated, “Please note that two-way traffic movement need to be maintained at all times. The partial closure should not be beyond 24 Francis Street.”
549. The three-page license is described as a “*road occupancy licence*” clearly states that the location is from Maud Street to 24 Francis Street and that the licensee is to maintain 2-way traffic movement at all times. The third page of the license is the traffic control plan which clearly shows the extent of the licence and is to be contrasted with the earlier TCP’s submitted on behalf of Mr Mehajer.
550. The night before the wedding Council staff became aware that four helicopters, and not one, would be landing, Tr 982.41. From Mr McNulty’s perspective, Council had, “given approval for the hire of a ground to land a helicopter on.”

The Big Day – 15 August 2015

551. He said at on the following day:

“I was advised that the helicopters were due to arrive at 10. When - at that time the safety measures hadn’t been implemented on the ground so the helicopters were delayed until the safety measures that were intended to be implemented had been implemented.” (Tr 983.2-30)

552. The report came from Mr Fitzgerald Junior and was to the effect that certain safety measure outlined in the Safe Work Method Statement had not been implemented. Mr McNulty was unable to produce that document and could not recall having seen it himself, Tr 984.5.

553. He added that later,

“I received a telephone call from Mr Fitzgerald saying that he had spoken to the operator of the helicopter, was advised that there were four helicopters involved, but that the area that had been hired by the applicant was sufficient to accommodate the four helicopters and on that basis he - because they’d hired the

¹⁰⁷ Ex S20, p 203

¹⁰⁸ Ex S20, p 200.

space anyway it didn't seem a problem, and the safety measures were still appropriate, the area was still secure, that the thing could proceed." (Tr 986.33-41)

554. Mr Mehajer was unaware of any delay; he said he, "*didn't notice there was a delay because I was delayed myself, to be honest.*" Tr 1295.6. He said Ahmad was not on the ground but was at Kingsford Smith with him, Tr 1295.42-46. He said he was not aware that Mr Yaseen was nominated to be the person on the ground at Phillips Park to look after the landing, Tr 1296.4.
555. He was unaware of there being a problem the night before due to the number of helicopters; 1296.32. He said it was not made clear to him, and he did not question on the day, that this was the reason for the one-hour delay in arriving at Phillips Park, Tr 1296.40

Post Wedding Events

556. Mr Brisby said that in the days following the wedding he asked for a report about what had happened in relation to the road closure from Mr McNulty. No written report was provided, rather it was an oral report. He described the report in these terms:

"A. That following the application - this is just my recollection, Mr Commissioner, I'm not across all the detail, but it was what it was. The wedding got out of control. The deputy mayor, as the applicant, asked for a road closure. That was refused. He asked for permission to land helicopters on the oval - the name just eludes me - in nearby Lidcombe and the initial response from us was, 'No.'" (Tr 466.5-12)

557. He said that on the day before the wedding;
- "the deputy mayor's advocates or contractors, who were supplying and running the wedding, started letterbox dropping in Frances Street to the neighbours, putting out traffic cones saying, "You can't park here. You can't park here." It was brought to my attention by Councillor Simms and again that started, that was mid-to-late Friday afternoon." (Tr 467.6.23)
558. When Ms Simms raised the matter with him, Mr McNulty was present and arrangements were made rangers to attend and advise residents that there was no permission to close the street, Tr 468.2-6. He did not attend the site on the day of the wedding and did not follow up the matter with the Police; the matter was left to Mr McNulty;

Conclusions

- FS1. It ought be emphasised, given the extreme publicity surrounding this particular episode in the affairs of the former Auburn City Council, that matters of taste, expense and extravagance associated with the closure of Frances Street Lidcombe are not the subject of this inquiry and do not call for comment, submission or report.
- FS2. The issues revolve around the Council decision-making process and in particular:
- a. how Council came to decide to accede to the two applications;
 - b. what Counsel was told by the applicant;
 - c. how effectively Council responded to contentious matters as and when they arose, namely:
 - i. the clearway/towing flyer;
 - ii. the purpose of the road clause; public celebration or feature film
 - iii. the late realisation that there were 4 helicopters and not one, that were due to land at Phillips Park on the morning of 15 August 2015.

Also important is the way in which the applicant communicated with the public in the lead-up to the wedding.

- FS3. Although Mr Mehajer delegated aspects of that process to his staff, and in particular Mr Yaseen, he must bear responsibility for the actions of his staff in this regard.

Road Closure

- FS4. By the time the final approval was granted and the Road Occupancy Licence was issued, it was issued on a false premise, namely that a feature film was to be made at the location on that day.
- FS5. The evidence does not disclose why, once it was determined that the road occupation licence could not be issued in respect of a wedding that was characterised as a “public celebration” the application became, overnight, an application in respect of a feature film.
- FS6. This application, based on a false premise, was made on the day before the wedding and after the leaflets referring to the road closure were issued.
- FS7. No reasonable person, objective bystander or film historian could reasonably regard Mr Mehajer’s wedding video as a feature film. Whilst its cost may have been more than some low budget feature films and he himself may have regarded it as such; a feature film is something completely different to a wedding video, regardless of its cinematographic qualities, the number of drummers, the number of drones, jets or helicopters.
- FS8. All of this is of little comfort to the residents of Frances Street affected by what went on in their street on 15 August 2015.
- FS9. There is no evidence that Mr Mehajer himself knew of the issue of the offending flyers, however he must take responsibility for the actions of those he had engaged to perform that work.
- FS10. Council responded promptly to the issue of the flyer and it would appear that when the matter was raised with Mr Mehajer’s representative, the point was taken. What ameliorative steps that involved is not altogether clear.
- FS11. Many of the problems associated with the road closure lie in the late notice that was given to Council of the applicant’s intentions in the first place and the extremely late change in the basis of the application itself.
- FS12. 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.

Helicopter

- FS13. The fact that 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.
- FS14. That there was such a breakdown in a matter that involved a helicopter landing, is a source of serious concern and suggest that thought needs to be given developing guidelines for such unusual and “one-off occurrences”.
- FS15. Timing is critical and as much notice as is possible needs to be given of the details of such events, not the sort of last minute scrambling that occurred in this matter.
- FS16. In one sense the breakdown in communication is understandable given the novelty and relative rarity of an application of this kind, however that does not excuse the fact that Mr Yaseen the person nominated to be in charge of Phillips Park on the morning of the wedding from a safety perspective, was instead waiting at Kingsford Smith to board the helicopters himself.

- FS17. Whilst it is unlikely to be of much comfort to the residents of Frances Street and the residents surrounding Phillip Park, the best thing that can be said about the episode is that it is hardly likely to happen again.

Part 8: 40-46 Station Road Auburn, BBC Developments Pty Limited

Background

559. In June 2000 BBC Developments Pty Limited (a company owned and controlled by Mr Oueik) applied for development consent in relation to a 12 x 3 bedroom and 29 x 2 bedroom unit residential development (the Station Road Development); Ex SS1 and 6-21. The application was assessed (at least in part) by external planning consultants, Don Fox Planning due to "staff resignations". It is to be observed that Mr Oueik was not then yet on Council, and hence there was no need to deal with the matter having regard to any conflict of interest issues.
560. Development Consent was forthcoming on 12 February 2001 and referred 10 approved plans; Ex SS1, p 101. A condition of that consent was that, "the dining room walls within units 10,11, 23, 24, 37 and 38 shall be deleted." Ex SS1 p 109. The stated reason was, "To ensure these rooms are not utilised as bedrooms." The relevant walls are show on 3 of the approved Zhinar Architects DA plans:
- a. 2618 DA:05 C
 - b. 2618 DA:04 E
 - c. 2618 DA:03 E
- which are at pages 1-3 of Ex PH3. It is to be immediately observed that they appear in the same location on each of the three floors that they occupy; ie 37 and 38 (on level 3) are immediately above and replicate 23 & 24 (on level 2) as well as 10 & 11 (on level 1).
561. When the construction certificate was applied for in April 2001 Mr Rajendra Rajbhandary, the senior Environmental Health and Building Surveyor carried out an assessment of the plans and sought a revised set of plans to "demonstrate compliance" with inter alia special condition 34; Ex SS1 111-2. Mr Rajbhandary subsequently met with Mr Oueik on 1 April and re-iterated the need for compliance on that issue; Ex SS1 113.
562. Plans were then prepared in April and May 2001 by BBC Developments which removed the walls on each of units 10, 11, 23, 24, 37 and 38 but introduced similar walls to create formal dining rooms on 12 other units (4 on each floor), the corner units 2, 5, 9, 12, 15, 18, 22, 25, 29, 32, 36 and 39; Ex PH3, p 5-7. Those plans, although clearly at odds with the development consent, were approved for construction certificate purposes CC79/01 on 11 May 2001.
563. The same construction certificate was issued with respect to engineering plans prepared by Far West Consulting Engineers in April 2001 styled, "Mechanical ventilation Services" for each of floors 1 and 2; Ex PH3 9 and 10. Those plans show the formal dining room walls in each of units 10, 11, 23, 24, 37 and 38 but do not show the walls used to create dining rooms in units 2, 5, 9, 12, 15, 18, 22, 25, 29, 32, 36 and 39.
564. On 21 June 2001 BBC obtained a modification of the consent under s 96 of the EP&AA to allow for natural ventilation of the basement car park; Ex SS1 117-118. The application made no reference to any reconfiguration of the any unit; Ex SS1, 116.
565. The plans stamped during that process included a Zhinar ground floor plan dated 26/4/2011 number 2618 DA:03 F which showed the re-introduction of the walls in each of units 10 and

- 11 but did not include the dining room walls in 5, 9, 12, 15, 18, 22, 25, 29, 32, 36 and 39. Plans 2618 DA:05 d and 2618 DA:04 F replaced the relevant plans at [559] above.
566. On 2 November 2001 Mr Rajbhandary made a note that he had explained to Mr Oueik that before the Construction Certificate could be released it was necessary for Mr Oueik to inter alia: *"confirm to council...the work carried out.... and to identify the works carried out on the plans."* Mr Rajbhandary also stated that Mr Malouf attended the meeting to familiarise with, "building compliance issues." Ex SS1, 123. The certificate was issued on 2 November 2001 but did not refer to any of the Zhinar plans, referring to plans by BBC and B Haykal; Ex SS1, p 128-9. On the same day, Mr Oueik sent a letter to Council stating that, "as the registered builder and owner of the property, I undertake to advise Council when inspections are necessary to be carried out. I have today submitted a copy of the plans that indicate the approximate amount of work carried out as of 26 October 2001" Ex SS1, p 126.
567. A week later, on 9 November 2001 Mr Rajbhandary sought advice from a firm of solicitors regarding prosecuting BBC for various breaches of the development consent and in particular the carrying out of works before the issue of the construction certificate; Ex SS1, p 124-5. Advice was provided on 18 December to the effect that it was not clear when the relevant works were commenced and that there was a six-month time limit with respect to a prosecution of that kind. It was pointed out that, "it is imperative that Council commence proceedings as soon as possible in this matter and preferably before 21 December next" together with advice as to the consequences if there were any delay.
568. On 23 January 2002 the solicitors gave further advice, following a phone conference with Mr Rajbhandary to the effect that any prosecution was by then out of time; Ex SS1, pp 133-135. No prosecution was instituted and the files were returned.
569. The occupation certificate was issued on 18 July 2002 it was issued by Joe Malouf. It followed a site inspection earlier that day by Mr Malouf and Harley Pearlman, a Town Planner; Ex SS1, p 140.
570. Mr Malouf, when he gave evidence at a private hearing on 11 May 2016 stated that he had no recollection of doing the inspection for Station Road.
571. Mr Malouf stated that at the time, his process before issuing a construction certificate was:
- "To have a look at the building compared to the plans or if there's any DA conditions that refer to, you know, a privacy screen had to be built or something like that, so you would check to see that what was there, the DA conditions that were referred to had been complied with." Ex PH Tr 9.12-16
572. He said two people would go if there were units to go through. He seemed to suggest that his focus would have been on smoke alarms, which became an important issue within Council after the Auburn Central development, Tr 9.37-45.
573. When asked about whether he would check the number of bedrooms specified in the consent he said:
- "Yeah, you possibly could. You might not check every single room, you know, because you may be looking at the fire services or measuring a balcony, you might not check but if there's - you know, if there was two or three units you would, if there's 50 you might not look at every single room to see --:
574. He later said that he wouldn't have checked whether the development had been constructed as 12 three-bedroom units and 29 two-bedroom units Tr PH 23.4-11. He added that the focus was on fire safety, that sometimes he would have brought an engineer in and sometimes;
- "I'd get a planner to look at the landscaping and possibly even the units but I don't remember..." Tr PH 23.16

575. He said his current practice, in which he only deals with houses, not units is to look at the latest plan that he stamped, Tr PH 22.29-32.
576. He said that at the time of this inspection he was the junior certifier of the 4 certifiers at Council¹⁰⁹ and had not previously done anything as complicated as this development (Tr PH 24.44) and said that he would have expected someone with at least 10 years experience to deal with the matter; Ex PH Tr 26.41. He said that if he asked for assistance, he would have asked Mr Rajbhandary to accompany him, Tr PH 25.30-36. He was not given any guidelines as to issuing an occupation certificate for a large residential flat, Tr PH 29.8 but developed his own checklist for the construction certificate stage, a matter that was developed further in the context of the Water Street Development.

The 2008 Audit

577. In 2008 Council Compliance staff were instruction by Mr Burgess to carry out an audit of all residential flat buildings in the light of an inspection carried out by Mr Mooney and Robert Lawrence that identified between 80 and 100 units of the 471 in Auburn Central having illegal building works. Mr Burgess explained the background to that process arising out of the problems at Auburn Central at Ex S 11, [17]—[37] and Ex S12 [10]. Mr Mooney and Ms Daskalakis inspected 40-46 Station Road as part of that process.
578. In a report dated 30 October 2008¹¹⁰ they identified 16 two-bedroom units in the Station Road Development that had been converted into three bedroom units contrary to the approved plans.
579. Annexure A to Mr Mooney's statement which is exhibit S4 summarised the time and date of the inspection and his findings which were to the effect:
- a. That units 2,3,4,5,9,10,11,12,15,16,17,18,22,23,24,25,29,30,31,32,36,37,38 and 39 had an extra non-compliant bedroom.
 - b. That of those the extra room arose because of a masonry wall that had been added, the remainder being gyprock.
580. It is to be observed that each of units 10, 11, 23, 24, 37 and 38 had the additional wall in the location described in the original Zinar plans referred to in the development consent.
581. Of those 11, 24 and 38 had masonry walls, whereas 10, 23 and 37 were gyprock. It is to be observed that 10, 23 and 37 have the same layout and are in the same position on the three different floor, ie they are directly above and below each other. The same can be said of 11,24 and 38.
582. It is also to be observed that the "corner" units 5, 9, 12, 15, 18, 22, 25, 29, 32, 36 and 39 had walls built in accordance with the plans referred to above.
583. Of those 2, 5, 15, 18, 22, 25, 29, 32, 36 and 39 had masonry walls whereas the other two were masonry (nos 9 and 12, although it is unclear what unit 12's wall were made of; see Ex S4 p 5).
584. 6 other units had conversions that were non-complying: 3, 4, 16, 17, 30 and 31. It is to be observed that they are in the same format as the original 6 units that were referred to in the development consent. At no stage were any plans stamped by Council which referred to the addition of walls in those units. It is to be observed that of those six; 3, 16 and 31 were masonry, whilst 4, 17 and 31 were gyprock, just like 10, 23, and 27, which are mirror images of 3, 16 and 31. Unsurprisingly units 3, 16 and 30 had masonry walls just like their mirror image units 10, 23 and 37.
585. The similarities between the various units strongly support the conclusion that the changes were made at the same time and therefore must have been made by the builder. The

¹⁰⁹ TR PH 24.29

¹¹⁰ Ex SS1 pp 145-147

relationship and similarities between them clearly demonstrate that they were not ad hoc additions or changes made by subsequent occupiers.

586. That conclusion is re-enforced by the evidence of Mr Mooney¹¹¹ to the effect that:
- a. in the case of the masonry walls the render was consistent with the rest of the unit as was the painting, cornices, skirting boards and architraving and door hardware. He also said that the walls were in their original colour.
 - b. he has never come across in all of the 800 cases of unauthorised works that he has inspected, addition of rooms where masonry was employed.

Legal Advice is Sought

587. At that time Mr Brisby had been the Director of Planning and Environment since 2005. That position involved responsibility for enforcement action in respect of non-complying development through Council's regulatory compliance service unit, Tr 469.18-21. Mr Brisby said that the decision to prosecute depended on the "level of the work", Tr 470.29.
588. Given the seriousness of the matters contained in Mr Mooney's report, Council promptly sought the advice of Deacons regarding the unauthorized works. Mr Brisby said that Deacons did high-level prosecution work in 2008, Tr 471.40. Mr Burgess and Mr Brisby attended a conference with Zoe Baker and Peter Rigg of that firm on 5 November 2008. Mr Burgess said that it would not be his usual practice to attend such a meeting as, "Mr Brisby was the Council officer with the responsibility of enforcing breaches of development consents." He said that he attended because the developer was a Councillor (by this time Mr Oueik had been elected to Council) and because he wanted to raise concerns regarding Mr Malouf; Ex S12 [5].

Deacons Advice – December 2008

589. Written advice was provided on 10 December 2008¹¹². The advice was addressed to Mr Burgess and GM but marked to the attention of Mr Brisby. In summary that advice:
- a. Recommended prosecution of the builder. The letter stated that:

"... there is a strong public interest in Council pursuing BBC Developments Pty Limited, particular in circumstances where a director of the company is a Councillor. It appears that the builder/developer benefitted from the cumulative amendments under the construction certificate and s 96 modification application and was able to market and sell units that were approved as 2 bedroom units as 3 bedroom units." (Ex SR1, p 305)
 - b. Stated that Council had the strongest prospects of success in respect of units 3, 4, 16, 17, 30 and 31.
 - c. Expressed concerns about prosecution in the case of units 10, 11, 23, 24, 37 and 38 because the walls appeared to be the subject of development consent when regard was had to the stamped plans referred to at [562]-[565] above.
 - d. Expressed similar concerns regarding prosecution in the case of units 5, 9, 12, 15, 18, 22, 25, 29, 32, 36 and 39 on the basis that there was an argument open that they were not inconsistent with the development consent.
 - e. That ICAC be notified in respect of the conduct of both Mr Malouf and Mr Oueik.
590. Mr Brisby agreed that the advice was initiated by himself and Mr Burgess. He said that he was informed by the regulatory compliance staff that the building had been constructed by a "builder/developer" who was then (ie, in 2008) on council and therefore referred it to the

¹¹¹ Ex S4, [14]-[17]

¹¹² Ex SS1, pp 302 to 306

general manager, Tr 472.23-29. Mr Burgess said that because the matters, *“were within Mr Brisby’s area of control I assumed that he would, in accordance with usual practice, make decisions and take steps after considering the Deacons advice.”* Ex S12 [14].

Subsequent Action/Inaction

591. On 16 December 2008 Mr Burgess reported the matter, and in particular his concerns regarding Mr Malouf to the ICAC which responded by a letter dated 8 January 2009; Ex SR1 307. Although the letter of Mr Burgess was not in evidence, it is plain from the ICAC response that the letter addressed concerns surrounding the conduct of Mr Malouf.
592. On 17 February 2009 Mr Burgess wrote to the ICAC raising further matter of complaint referable to Mr Malouf, Ex SR1, p 308-9.
593. There was no satisfactory explanation for why Mr Burgess’ original letter to the ICAC was not on Council’s file. Mr Burgess provided a further report to the ICAC in February 2009 regarding other matters in which concerns had previously been expressed regarding the conduct of Mr Malouf; Ex SS1, 308 and 309. ICAC responded to that letter on 25 March 2009.
594. Mr Brisby said that in March of 2016, when the issue was raised in the media, steps were taken to retrieve the relevant paperwork from the Council files. At that time he saw the ICAC letter to Mr Burgess in January 2009 but subsequent searches of the Council file were unable to locate it.
595. The ICAC responded to that letter on 30 March 2009 ; Ex SR1, p 310.
596. Mr Burgess wrote to the ICAC again on 9 June, in which he dealt with the issue surrounding Mr Malouf. His letter did however state the following:

“Council is reviewing legal advice in respect of the matter relating to 40-46 Station Road, Auburn. No timeline for the completion of the review can be provided at this stage due to the complexity and potential for action under insurance cover which needs to be examined. ICAC will be notified of the outcomes as they evolve.” (Ex SR1, p 311)

Ms Simms’ Evidence

597. Ms Simms gave evidence that in July 2009, when she was Mayor of Council, she had a conversation with Mr Burgess regarding the matter which she recorded at that time; Ex S10 [5]. Her note¹¹³ is in these terms:

“*Confidential – JB re illegal building works Clr Oueik

raised issue re the illegal building works (told of these a few months ago – 2 bedders converted to 3 bedders Station Road PRIOR to sign off by Council. Paid Sect 94 as 2 b/room & then built & fit out as 3 b/room.

GM says discussions are ongoing with Deakins re legal considering conversion were done: apparently, prior to sign off by Council. Assures that 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 compliances staff if law is different for a mater. Councillor than anyone else” (sic)

598. Mr Burgess said that at the time in question he had a weekly schedule meeting with the Mayor and recalls discussing the “Station Road development application with her.” He said that his recollection of the matter is as recorded in her file note.
599. Mr Brisby, in cross-examination by senior counsel for Mr Burgess, said that he knew that Mayor Simms knew that the matter was on foot because he was present when Mr Burgess

¹¹³ Ex S10, p 22

informed her.” Tr 532.27. He was then asked if he saw her write down what she had been told in her diary and said he could not recall that, Tr 532.34. When it was put to him that Ms Simms would not write that unless it was something she was told, he answered; “I can't - it's not my note. It's Ms Simms' note, not mine.”

600. He was then confronted with the following:

“Q. If you were standing with Mr Burgess when he told Ms Simms, if he had said words to the effect of: “Mark Brisby is to prosecute for illegal building works”, you would have said, “Hang on a second, it's not me, it's you”, wouldn't you?

A. I've never accepted, Mr Commissioner, that it wasn't myself to carry out the work. Due to the matter being - the subject being an elected member, I needed a direction, a guidance from the general manager to say do it or don't do it, or what to do. I accept that it wouldn't have been his role to carry out the prosecution.

601. Mr Brisby's stated position was that he needed a decision from Mr Burgess, Tr 533.28. It was then put to him that his previous evidence was to the effect that Mr Burgess said he would take care of it but that the evidence he was then seeking to give was that it was his responsibility to do it, but that he needed a direction to do so. He agreed with that (Tr 533.37) but did not see any difference, Tr 533.41.

602. Ms Simms was replaced as Mayor in September 2009 by Mr Zraika, Tr 342.27. She did not convey the information provide by Mr Burgess to Mr Zraika and next heard of the matter when she read it in the newspapers in 2016, Tr 344.15.

Further Deacons Advice October 2009

603. On 14 October 2009 Deacons provided follow up advice. Whilst the letter was addressed to Mr Burgess as General Manager, it was marked to the attention of Mr Brisby; Ex SR, 312-4. Mr Burgess said he had not recollection of instigating the request for that advice; Ex S12, [17].

604. Mr Brisby said that subsequently there was further advice from Deacons in September/October 2009 and that, “*on the odd occasion I informally raised it with Mr Burgess, and I was still well aware the issue was a matter before ICAC.*” Tr 477.22-25

605. He said that he spoke to Deacons in October 2009 and sought the advice and that he was the point of contact for the legal representatives, Tr 477.29-39. He explained this on the basis that; “*he was seeking further advice so the general manager and I could resolve the matter.*” Tr 477.43. When the advice came in, Mr Brisby said that he discussed it with Mr Burgess but could not recall what he said, Tr 478.6. He agreed that Mr Burgess did not say that he should sit on the advice and do nothing, Tr 478.11 but denied that Mr Burgess made it clear that he wanted to pursue the matter, Tr 478.19 on the basis that he did not want the matter to “prejudice” the matter that was before ICAC, Tr 478.20-27.

606. Mr Burgess said that he could not recall seeing the advice; Ex S 12 [17].

607. Mr Burgess said that he had weekly meetings with all directors to discuss issues of strategic importance as well as an open door policy; Ex S12 [18]. He said that Mr Brisby had “delegated authority to issue notices orders and fines on behalf of Council” and the he did not get involved in, “day to day decisions about operational matters.” He said that he did not recall “having a conversation with Mr Brisby about taking enforcement action against the developer of the Station Road development.”

Mr Brisby's Evidence

608. Mr Brisby was Director of Planning and Environment from 2005 onwards in which position he had responsibility for enforcement action, including prosecutions, in respect of non-complying development through the regulatory compliance service unit, Tr 470.18-26.

609. He agree that council delegates those functions to the general manager who in turn sub-delegates some or all of his or her functions to appropriate nominated officers and that such delegations are in writing as 'instruments of delegation', Tr 518.4-19. He also agreed that the decision as to whether to initiate proceedings, which court, how to take it, whether to goes to solicitors, whether to issue a PIN, was within his job description and delegation, Tr 522.24-31, see also his delegations at the relevant time at Ex Gen 2, p 33.
610. He accepted that the matters referred to in Mr Mooney's letter to the owners of 18 September 2008 (Ex SR1, pp 143-4) were matter within his responsibility through the manager of regulatory compliance, Mr Lawrence, who reported to him, Tr 520.37-40.
611. He also said that ordinarily prosecutions were dealt with by the Manager of Regulatory Compliance; however some prosecutions, generally due to their complexity, were dealt with Mr Brisby. Mr Brisby could not however point to a significant prosecution that he carried out, Tr 470.6-11.
612. He said that in 2008 Deacons dealt with high-level matters, Tr 471.40. Mr Brisby said that he brought the matter to the attention of Mr Burgess because of the involvement of a current Councillor, Tr 472.46.
613. His explanation for why no prosecution was initiated was as follows:
- "...following the written advice received from Deacons in December 2008, I discussed the matter with the then general manager, as I repeat; that we were talking about an elected member of council being the builder/developer, and Mr Burgess at the time informed me he either was or already had referred the matter to ICAC and that he would take carriage of the matter." Tr 473.41-47
614. He did not know who had the file and said that Mr Burgess was dealing, directly with the manager of regulatory compliance, Mr Lawrence, Tr 474.32. He said that Mr Burgess took over the handling of "the matter", Tr 476.47-478.1 and said that he "would have" awaited instruction. He resisted accepting the proposition that it was a development assessment matter over which he had responsibility by reference to the involvement of "an elected member of Council" Tr 477.10-13.
615. His basic position was that the prosecution "required the concurrence or intervention of the general manager." Tr 477.16.
616. He agreed that Mr Burgess dealt with ICAC and that he dealt with Deacons, Tr 478.39.
617. He said that Mr Burgess did not provide any advice either way about prosecuting, but rejected the proposition, when put to him that it was his responsibility, Tr 479.9.
618. When asked why the follow up advice from Deacons came to him October 2009, he said that he would have sought further advice, Tr 477.39. He said that he raised the further advice with Mr Burgess but could not recall a specific response
619. Mr Brisby's evidence was to the effect that even though a prosecution of that kind was within his area of responsibility, the fact that it involved an elected member of Council meant that Mr Burgess had responsibility for it.
620. Mr Brisby even went so far as to suggest that he was not aware that the matter remained unresolved in the period from December 2008 right through until his appointment as CEO, saying that he was not aware that no prosecution had commenced or penalty notice had issued, Tr 488.37-45. He said he assumed the matter was dealt with by the then general manager, Tr 489.1. He said that although he left it to Mr Burgess, Tr 489.13 and assumed that he would have been made aware of any prosecution, he followed it up briefings that occurred, "probably in later 2009", Tr 489.28. He said that Mr Burgess told that the matter was, "still with ICAC and he would be dealing with it" Tr 489.32.
621. When it was put to him that the issue that the ICAC was dealing with was Mr Malouf and not BBC, he agreed that he wouldn't be talking to the ICAC about BBC

622. In cross-examination he agreed that there was no limitation in his delegation precluding him from exercising that delegations where the subject of the concern was an elected councilor, Tr 523.22 but said that:

“.....in the political environment we work, it would be totally inappropriate and I certainly wouldn't have been game to have commenced 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.” (Tr 522.45-523.4)

Current Status

623. At the time the inquiry commenced its public hearings, a penalty notice had issued with respect to construction without authorisation of the six units. Since then however the developer elected to take the matter to Court whereupon Council withdrew the prosecution because it was out of time, Tr 1662.16-37.
624. Furthermore the various residents of 40-46 Station Road who have non-complying residences have been invited to submit building certificates applications to Council for consideration pursuant to s 149A-149E of the EPAA as a means of regularising all of the unapproved changes.

Findings and Recommendations

- SR1. The Inquiry ought find that in the case of the physical defects in the premises at 40-46 Station Road:
- a. There was never any modification to the development consent that enable any three bedroom units to be built other than the 12 units identified in the original planning consent, namely units 1, 6, 8, 13, 14, 19, 21, 26, 28, 33, 35 and 40; Ex SR1 1 and 222-224.
 - b. Special condition 34 of the development consent made express reference to the deletion of the dining room wall in each of units 10, 11, 23, 24, 37 and 38 so as to ensure that the rooms were not utilised as bedrooms.
 - c. Mr Rajbhandary sought a revised set of plans to “demonstrate compliance” with inter alia special condition 34 and met with Mr Oueik on 1 April 2001 and re-iterated the need for compliance on that issue.
 - d. Although Mr Rajbhandary was anxious to ensure that there was compliance with the development consent as outlined above, the plans that were prepared despite not including the offending walls in each of units 10, 11, 23, 24, 37 and 38 introduced similar walls to create formal dining rooms in 12 other units (4 on each floor), the corner units 2, 5, 9, 12, 15, 18, 22, 25, 29, 32, 36 and 39; Ex PH3, p 5-7. The revised plans, although clearly at odds with the development consent, were approved for construction certificate purposes CC79/01 on 11 May 2001; see for eg, the BBC and Far West Engineering plans at Ex PH3, pp 5-10.
 - e. The subsequent s 96 modification to deal with the issue of basement ventilation did not extend to this issue and did not provide the developer with the development consent necessary to build the extra three bedroom units identified in the audit. The BBC and Far West plans stamped during that process re-introduced of the walls in each of units 10 and 11 but did not include the dining room walls in 5, 9, 12, 15, 18, 22, 25, 29, 32, 36 and 39; Ex PH3, pp 11-13.
 - f. By November 2001 an amended construction certificate issued that referred to plans which did not include any of the offending features: Ex PH3, pp 14-17.

- g. The approval of plans that were inconsistent with the development consent can only be described as an oversight by the planning staff and in particular Mr Rajbhandary. The oversight was probably made possible by the inconsistencies in the plans themselves.
 - h. The only units for which there are no stamped plans that authorise the extra bedroom are in fact units 3, 4, 16, 17, 30 and 31. As Deacons put it, in their December 2008 advice, the additional walls to those units do not, "have development consent and are not depicted in the relevant construction certificates." It was on the basis these units afforded the, "strongest prospects of any action against the builder", prosecution was recommended; Ex SS1, p 304-306.
 - i. The building, when constructed, included the offending extra third bedrooms that were identified following the inspections carried out by him and Ms Daskalakis; see Ex SS1, p 231-2 and Ex S4, annexure A. Whether that occurred in the mistaken belief that construction was authorised by reason of the approved plans is not entirely clear.
 - j. In the case of the units 10, 11, 23, 24, 37 and 38 that were expressly referred to in the development consent, that is an unlikely conclusion given that the issue was expressly referred to in correspondence and discussions between Mr Rajbhandary and Mr Oueik at the time and not expressly referred to in any subsequent application for modification or variation of the consent.
 - k. Despite Mr Burgess' concerns about Mr Malouf, there is 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.
 - l. Whilst the inspection by Mr Malouf in advance of the issue of the occupation certificate should have revealed the full extent of the breaches, that, regrettably did not occur.
 - m. Whilst Deacons were correct to advise that such a failure gave rise to the possibility of a disciplinary offence having been committed, given the passage of time and the relative inexperience of Mr Malouf at the time, no further action is required.
- SR2. In the case of the absence of any prosecution action against the developer until the doomed, out of time, service of penalty infringement notices referable to units 3, 4, 16, 17, 30 and 31 in 2016, the following findings appear to be open on the evidence:
- a. There was a clear and strong public interest in Council pursuing BBC as Deacons advised.
 - b. Mr Brisby, by virtue of his position and the delegations held by him, held the primary responsibility and authorisation to do so *and* dealt with Deacons throughout.
 - c. He says he was present with Mr Burgess reported on the matter to them Mayor, Ms Simms.
 - d. Ms Simms' note of the conversation states that Mr Burgess said that Mr Brisby was to prosecute Mr Oueik.
 - e. Mr Brisby failed in his duty to do so.
 - f. His assertion that he was awaiting direction on the matter from Mr Burgess cannot be accepted, in light of Ms Simms' evidence – which Mr Brisby himself accepted,.
 - g. That being said, Mr Burgess was the general manager and remained in that position for at almost 4 more years. It is hard to explain why he failed to follow up on the prosecution issue given that he was following up the ICAC issue regarding Mr Malouf. That being said, given that it was Mr Brisby's responsibility, it may have been reasonable for him to have assumed that Brisby would have carried out his

duty. However, as Mr Burgess was keen to state, he had serious misgivings about Mr Brisby arising out his relationship with Mr Oueik. Those issues do seem to have arisen however in late 2010 and early 2011.

- SR3. The *Environmental Planning and Assessment Act* 1979 (NSW) establishes the statutory framework for the issue of building, compliance and construction certificates; see Part 4A and in particular ss 109F-H. Councils should have in place procedures that facilitate the identification of the statutory requirements and give the certifier carrying out the inspection and issuing the certificate (whether Council or private) an accountable framework in which to approach the certification process. The absence of any such worksheet or aide memoire in the case of Station Road and Water Street meant that matters which ought to have been picked up and addressed, were not. Those procedures should require certifying officers to ensure that in the case of the issue of construction certificates and occupation certificates, any plans/work are/is assessed by reference to the development consent and associated approved plans. Certifiers should be expressly required to look for inconsistencies in the construction plans as well, the aim being to ensure that effect is given to the consent, not an amended drawing for which no consent exists.

Prosecution of Councillors

- SR4. 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 a 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.
- SR5. 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, are generally likely to have a significant public interest attached to them. For this reason the decision to prosecute ought be made at arms length from the Council and the staff who have to regularly deal with the relevant Councillor.

Part 9: 14-22 Water Street, Lidcombe

625. The property in question comprises a 4 storey and 50 dwelling residential flat building.

The Present Situation

626. On 30 January 2016 a severe thunderstorm occurred in the vicinity of the building. The building was severely damaged; Ex WS1 pp 324-341. A report prepared on behalf of the owners corporation by Mr Charles Thornley, a Chartered Professional Engineer¹¹⁴ expressed the opinion that:

“15.38....

(a) The nature and extent of any structural defects in the roof of the Building.

(i) The roof did not comply with the (Building Code of Australia) that it remain stable and not collapse, prevent progressive collapse and avoid causing damage to other properties, and of AS1720.1 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 structure have insufficient anchoring tot eh walls and floors to prevent uplift by wind forces to which the roof can reasonable be expected to be subjected.

(iii) The roof failed at wind speeds much lower than that which the BCA and Australian Standards required the roof to withstand.....” (Ex WS1, p 353

627. Mr Thornley also went on to consider the remedial work required; Ex WS1, 353 et seq.

Development Background

628. Development consent was originally sought by Zhinar Architects on behalf of BBC Developments Pty Limited in 2006. Due to the interest of Mr Oueik as the sole shareholder in that company, an external planner was tasked with preparing a report in relation to the application. That report¹¹⁵ was before Council on 17 August 2005 and recommended the refusal of the application for four reasons, namely inconsistency toe SEPP 65, inconsistency with clause 14 of the LEP, non compliance with various aspect of the Auburn DCP and overall “adverse visual impacts in the locality”; Ex WS1, p 45.

629. Notwithstanding the recommendations of the independent planner, Council saw fit to invite further plans to deal with a number of the matters referred to by the planner and referred the application to the general manager for determination; Ex WS1, p 47. The consent was determined on 9 September 2005 and the officer whose name appears on the notice of Determination was Mr Francis. Mr Francis joined Council in July of that year as a Team Leader in Development Assessment. From August 2005 to October 2013 he held the position of Manager of Development Assessment, reporting to Mr Brisby.

630. A short history of the Assessment Action relating to the project is set out in a report prepared by Mr Francis on 21 March 2016 following the storm event; Ex WS1, p 387-388.

631. The construction certificate (CC-37/2006) was issued by Mr Malouf of 26 April 2006. Mr Francis could not recall seeing a roofing construction plan amongst these plans, Tr PH 13.5. He did however recall Mr Oueik discussing the construction certificate with him because he wouldn’t have talked directly to the building surveyor, Tr PH 23.24. He had no specific recollection of what was discussed, Tr PH 23.22-30.

¹¹⁴ Ex WS1, 311-379

¹¹⁵ Ex WS1, p 23-45

632. On 28 August and 4 September 2007 inspections were carried out, Ex WS1, p 137-140
633. On 23 October 2007 Mr Francis wrote to the Developer setting out the “critical stage inspections” that were required. On the same day an amended construction certificate was issued, signed by Mr Burgess; Ex WS1, pp 225 and 226
634. The critical event for the purposes of this inquiry was DA 157/2005D¹¹⁶ which involved an application to modify the roof form and to replace what had previously been approved as a box gutter system (with water draining to the centre of the roof form) with a more traditional pitched roof system, with water draining out to the roof edges. The plans were identified in a letter from Zhinar Architects to Council dated 13 February 2008¹¹⁷. Shortly after that, the application was allocated to Mr Francis for assessment; Ex WS1, p 237. Mr Francis acknowledged that the drawings were not construction drawings¹¹⁸ and that a builder would need plans to show how the roof would be affixed to the building¹¹⁹. He could not however recall seeing such plans; PH Tr 12.31 or any certificate from any engineer to the effect that the roof was constructed in accordance with the BCA.
635. On 19 March 2008 Mr Francis generated pro-forma documents referring the application the Development Engineer and seeking comments on a range of matter within 14 days; Ex WS1, p 243. On the same day Mr Francis wrote to the developer stating that Council would consider the matter at a meeting to be held that very night at 6.30pm and stating that if the application sought to address Council, it had to make a written request to do so by 4pm that day; Ex WS1, p 245. Mr Cockayne, then manager of administration within the Council, distributed a report to Councillors; Ex WS1, p 247-257. The recommendation was that the application be approved; Ex WS1, p 249 and 255.
636. Mr Francis could provide no explanation for the speed with which the issue was dealt with by Council other than to indicate that it was the general manager, at that time Mr Burgess, who determined what went on the business paper; Ex PH Tr 17.26 and 19.12-16. He could not recall whether the developer complained about being given little notice of the listing of the matter, Tr 17.12.
637. Consent for those changes was forthcoming on 27 March 2008 and the notice of determination of consent was issued on 27 March 2008; Ex WS1, p 250-261.
638. On 18 August 2008 there was a preliminary final inspection¹²⁰ that highlighted a number of matters to be attended to but which stated that it was “Okay to issue interim O.C.”. The matters to be attended to were the subject of a letter from Mr Francis to the builder; Ex WS1, p 273-275. There was a further follow-up site meeting on 21 August 2018 involving Harry, Mr Oueik and Mr O’Neill on behalf of Council.
639. The interim occupation certificate was issued by Mr Francis on 18 September 2008; Ex WS1, p 287-8. The final certificate was issued, again by Mr Francis, on 19 September 2009; Ex WS1, p 283 and 291-2.
640. He could not recall Mr Oueik expressing any urgency in relation to Water Street but said that;
- “when any developer comes for an occupation certificate there is always an urgency to get it completed.” Tr PH 23.16-18.
641. Mr Oueik’s evidence was that at that time he had not entered into any contracts with purchasers on that site; PH Tr 13.23 and did not sell any of the units until 2014, but let them out in the interim; PH Tr 15.22-45. Mr Francis recalls going with Mr O’Neill on one

¹¹⁶ Ex WS1, p 231-235.

¹¹⁷ Ex WS1, p 236.

¹¹⁸ PH Tr 12.19

¹¹⁹ PH Tr 12.27

¹²⁰ EX WS1. 279

inspections between the time of the March 2008 consent and the issue of the occupation certificate “because it was a councillor and the building surveyor:

“....understandably, was, you know, a bit – not concerned but, you know, the protocols for that, so I went with him. I do recall that.

Q. He was nervous about it, was he?

A. Well, just the fact that he wanted to make sure that there was no - he wanted to have that buffer between - between the councillor, who was the developer.”

642. In his report to Mr Brisby dated 21 March 2016 Mr Francis stated the following:

“The site is owned by a company which is in turn owned by Councillor Ronney Oueik. As the direct supervisor in 2008 I was required to issue all paperwork as Council’s Code of Conduct restricts access to Councillors to Manager Level and above. The standard procedure at that time required a peer review of the occupation certificates.

The Building surveyor Mr Peter O’Neill who undertook the inspections was very experienced building surveyor consultant hired through LOGO as Council has a shortage of building surveyors. Mr O’Neill’s status was that he was a temporary employee of Auburn City Council. I do not specifically recall the day of the issue of the Final Occupation Certificate however I do recall that there was real concern regarding fire safety given the issues with a building development known as Auburn Central. In reviewing the files there is a real emphasis on all the fire certification obtained.

Another issue was at the time the certification system was still in a state of transition and certification of staff was not in effect. Due to this transition phase Council staff could still issue paperwork provided staff were experienced. Today all certifiers both private and Council are required to meet the same education and experience standards and are given a rating based on this. Council as a result of Auburn Central development does not undertake any residential flat building work and does not employ any certification staff with a rating that deal with alternate solution for residential flat buildings.....” (Ex WS1, p 385-389)

643. Mr Francis went on to identify the critical issue, in these terms:

“The critical issue for the matter is that the developer changed the roof configuration from a box gutter roof to a standard roof whereby all water runs to an external gutter. This change resulted in a Section 96 modification consent being issued on the 27 March 2008. An amended construction certificate was not received for the new roof.

The final inspection was completed, certificates compiled and 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’ve notice the error. I have always acted in a professional manner and can offer no other reasons that I was relatively new manager at that 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 and honest mistake.” (Ex WS1, p 388-9)

644. The photos attached to Mr Francis’s report are indicative of the damage that occurred during the storm.

Findings

- WS1. There is no basis for this inquiry to look into the cause of the failure of the roof, as outlined in my opening and dealt with during the course of the public hearings. What is in issue is how Mr Francis came to issue an occupation certificate in the circumstances where the built roof was not the subject of a construction certificate.
- WS2. That failure was readily identified when the roof failed in 2016.
- WS3. It was readily identifiable from the Council file; as Mr Francis' report demonstrates.
- WS4. There is no reason why it could not have been identified at the time of the issue of the occupation certificate.
- WS5. The real issue is whether these failures occurred by way of error or something else. In this respect Mr Francis' case is not helped by the fact that he was likely to have been compromised by Mr Oueik in 2006 in the circumstances outlined above.
- WS6. The evidence does not however enable the inquiry to form a view that Mr Francis issued the occupation certificate in the knowledge of the problems with the roof and there is no evidence to suggest that he did so at the direction of Mr Oueik.
- WS7. The speed with which the development consent was dealt with, as outlined above, does seem unusual in the circumstances, as does the call to Mr Oueik when the damage to the roof became apparent, however on balance, the likeliest explanation is, as his report to Mr Brisby claimed, his own human error.
- WS8. That being said, his failure to properly certify the property for occupation certificate purposes was almost certainly a failure to exercise reasonable degree of care and diligence for the purposes of s 439(1) of the Local Government Act.

Part 10: 1A Henry Street Lidcombe

Introduction

645. In late 2013 Warren Jack and his wife Xiaxian Pan purchased the property known as 1A Henry Street Lidcombe. The property is on the corner of Henry Street and James Street and is located to the South and West of the land the subject of the Marsden Street planning proposal.
646. Settlement of the purchase occurred in February 2014. At that time the Jack family were living in rented premises at Drummoyne. At the time of purchase the building had been used as a church (Mr Jack had purchased it from the Salvation Army – it having been their Lidcombe headquarters) and for teaching/training purposes; PH Tr 7.28-41. His intention was to use the premises as an office with two or three staff; PH Tr 15.5 whilst letting church groups use the hall as well. No training as such was to be carried out on the site, Mr Jack's training business involved all the training be carried out at customer job sites; PH Tr 15.18-19.
647. Curiously, despite using Mr John Hajje as his solicitor in the purchase (a witness who was also summonsed to give evidence to the inquiry), he said that he did not make any specific inquiries of your own solicitor as to whether the premises could be used for commercial purposes, Tr 1508.28-30. He explained their reason for that was that he had paid GST on the purchase price and didn't know that one needed you ask their solicitor about that issue, Tr 1508.39. More curious was the evidence that he had, at that time, "no idea about zoning." Tr 1508.44.
648. Mr Attie's phone records show that Mr Jack was calling him from the end of January 2014 right through until 7 April 2014. They also show that on 4 March 2014 Mr Attie and Mr Jack met:

4/03/2014 7:07:28 AM(UTC+11), +61.....883 (Warren Jack)
 Morning Ned. I'm dropping my daughter to school at 8.15 at Gordon then coming right over might get there at 9.30. Morning traffic.
 4/03/2014 7:10:19 AM(UTC+11), +61.....550
 Ok. Corner of fariola and Wetherill st north.
 4/03/2014 7:11:44 AM(UTC+11), +61.....883 (Warren Jack)
 Ok. Thanks
 4/03/2014 9:26:20 AM(UTC+11), +61.....550
 How far ?
 4/03/2014 9:26:42 AM(UTC+11), +61.....883 (Warren Jack)
 Eta 3 min
 4/03/2014 9:26:51 AM(UTC+11), +61.....550
 Ok. I'm here. (EX FTB1, p 172)

649. At that point in time Mr Jack had known Mr Attie for a number of years, having met him in the company of a local pastor, Mr Moon, Tr 1479.42-47 when Mr Attie was Mayor; see generally TR 1480.1-1481.1. SMS and chat correspondence between them goes as far back as November 2013; EX FTB1, p 170.
650. Mr Attie said that not long after the purchase, although he could not be specific as to the date, Mr Jack mentioned the fact of the purchase to him. His said that Mr Jack told him;

"... that he purchased the property. He told me back then it was a large parcel, that he paid \$800,000-odd for it, and he wanted to turn it into, first of all, he said possibly a medical centre for his wife, who had been a doctor in I think, from memory, Griffith, or somewhere in the country, and then at a later stage he came back and said he's got someone who's going to rent it from him for a large amount of money as a child-care centre and the application for that is in council. Then he said he might possibly live there, he might possibly turn it into an office, he gave

me a lot of scenarios, but not at the same time; it was all over a period of time. (Tr 1837.28-39)

Mr Jack's First Development Application

651. On 2 April 2014 Mr Jack applied for consent to demolish and remove a shed located on the premises; Ex WJ1 p 1-10. The sketch on p 10 shows the location of the shed, whilst the aerial photo on p 9 shows the general location of the site. Mr Attie said that Mr Jack asked him for help in relation to that application and that he, *"took him to council, had a meeting with him and the staff, he filled the application in, then he submitted it."* Tr 1838.29-37. Mr Attie identified his handwriting on that application, Tr 1839.5-38. Mr Attie said that he inspected the shed but did not go inside it; 1842.18-22.
652. He said that he helped Mr Jack because, he was a friend and I help all my friends, Tr 1839.42. Mr Attie said that he was not aware that it was being used as a training facility; 1841.5.
653. He said that "probably" at about this time he told me Jack that; "the property is probably zoned residential and - when he was asking me about the different stages of the doctor's surgery, or et cetera, I explained to him what he can generally do with an R2 zone or not." Tr 1840.33-36.

Staff Observe a Prohibited Use

654. On 1 and 11 April 2014 Council staff inspected the premises and observed an apparent prohibited use of the premises. Photos were taken showing signage erected on the Francis Street Frontage of the premises for "IOT Training" Ex WJ1, pp 16-20.
655. On 15 April 2014 Mr Mooney then served a notice of intention to give an order pursuant to s 121H of the EP&AA; EXWJ1 p 21-27 on the basis that the premises were being used to perform tasks, including student enrolments, administration and general inquiries, for the business identified as the Institute of Training and that such a use was a commercial use prohibited under the R2 zoning. Mr Jack accepted that the premises were being used in this way but said he did not know, at least until he received the notice that he needed permission, Tr 1515.38-46. His evidence about the signage in cross-examination seemed to suggest that the signs¹²¹ were erected and paid for by "Helena" who was consulting to him providing student enrolment services, Tr 1516.14-1517.44 & 1518.46-1519.14.
656. Mr Jack was overseas at the time and sought further time to comply. In a text to Mr Attie on 17 June he stated he was in Beirut; EX FTB1, p 172.

Mr Jack seeks Advice

657. Mr Jack said at the private hearing that on receipt of the notice he called Mr Attie for advice. He says that he said words to the effect of;

"I've got a notice I can't operate here. I don't understand it. I've bought this as commercial. I paid GST. I'm paying commercial rates. Why can't I operate my business here as commercial?" (PH Tr 12.26-30)

658. He said that Mr Attie went away and came back to him and said this:

"You've unfortunately got some powerful friends on the next corner who have powerful connections in council. They're also a training school. They are on the corner at the roundabout." (PH Tr 12.35-39)

¹²¹ At Ex WJ1, pp 17-19.

659. He said that Mr Attie advised him to lodge the development application that was rejected on 23 July 2014. At that point in time Mr Jack and his family had no plans to live in the property.
660. On 8 May 2014 there was a further meeting where Mr Attie was to have collected some paperwork:

8/05/2014 4:01:56 PM(UTC+10), +61.....550
 Meeting over yet?
 8/05/2014 4:43:12 PM(UTC+10), +61.....883 (Warren Jack)
 Hey mate I've taken a couple of tables. Please let me know if you can come as my guest.
 Attachments:
[IMG_5648.png](#)
 115367936 bytes)
 8/05/2014 4:53:52 PM(UTC+10), +61.....883 (Warren Jack)
 Glens here
 8/05/2014 4:53:52 PM(UTC+10), +61.....883 (Warren Jack)
 Yes
 8/05/2014 4:54:12 PM(UTC+10), +61.....550
 Can I come to collect the paperwork ?
 8/05/2014 4:55:23 PM(UTC+10), +61.....550
 Glen who
 Status: Sent
 8/05/2014 4:55:54 PM(UTC+10), +61.....883 (Warren Jack)
 Fiddick, kinchie
 8/05/2014 4:56:00 PM(UTC+10), +61.....883 (Warren Jack)
 Livitt, morey
 8/05/2014 4:56:14 PM(UTC+10), +61.....550
 Haha
 8/05/2014 5:05:41 PM(UTC+10), +61.....550
 On my way. 15 minutes. Please have the docs ready. And a small glass of livett (EX FTB1, p 173-4)

661. The reference to tables appears to be a reference to tables at a charity dinner.
662. On 19 May Mr Attie enquired of Mr Jack whether he could do a diploma of urban planning with an RTO which he followed up on 21 May: EX FTB1, p 174.
663. On 30 June 2014 Wil Nino of "Nino Urban Planning & Development" informed Council staff that his organisation had been "engaged to prepare a development application for the use of the premises; Ex WJ1 p 34.
664. On 17 July 2014 Mr Attie and Mr Jack had this exchange by Text:

Sent To +61.....883 Warren Jack* 17/07/2014 8:25:42 PM(UTC+10)
 Sent Ok. I won't finish for another hour.
 Inbox From+61.....883Warren Jack*17/07/2014 8:25:26PM(UTC+10)
 Read Just leaving to go home
 Inbox From+61.....883Warren Jack*17/07/2014 8:25:01PM(UTC+10)
 Read Lidcombe
 Sent To+61.....883Warren Jack*17/07/2014 8:24:03PM(UTC+10)
 Sent Where are u
 Sent To+61.....883Warren Jack*17/07/2014 8:17:26PM(UTC+10)
 Sent Sorry mate. Still in council meeting. (EX FTB1, p 152)

Lodgment of a second development application – Change of Use

665. The following day, on 18 July 2014 an application was lodged on behalf of Mr Jack which was described as an application for, "change of use from church hall to teaching facility and assembly hall"; Ex WJ1, pp 37-43.
666. In cross-examination by counsel for Mr Attie, Mr Jack could not reconcile the reference to teaching facility with his evidence that his business was not going to carry out any teaching on site, Tr 1509.33-1512.21 esp 1512.16. When asked about the use details in the statement of environmental effects, namely,

"Employees: Up to 5 people;

Occupants: Maximum of 50 gathering at a meeting at any time." Ex WJ1 p 49.

he said that this referred to the ongoing use of the church, Tr 1513.33-1514.6.

667. There was further text correspondence on 20 July; EX FTB1, p 152, lines 70-72.
668. The application was refused on 23 July 2014; WJ1 p 57 and on 4 August an Order was issued to cease using the premises for commercial purposes; Ex WJ 1 p 58. Mr Jack said he didn't know why the application was refused other than the fact that Mr Attie told him that, "the four people that run Auburn Council want that block." Tr 1521.18.

Mr Jack seeks further advice from Mr Attie

669. Mr Jack gave evidence that after that application was refused and the order was issued he contacted Mr Attie for advice, Tr 1479.38.

670. At the private hearing his evidence about that conversation was follows:

"He said, don't operate as a business you're going to end up with lots of fines. He said, 'the only thing you can do', because he looked into it, 'the only thing can you do is R2, it's residential'. He said, 'just do the back part, don't change anything structural'. He said, 'do not change', he said, 'you've got an existing big kitchen, update the kitchen, update the bathrooms, don't do anything structural and you will be fine. Providing you don't do that, you're allowed to do it.' He said, 'if you need more advice, call me and I'll give you more advice.'" (PH Tr 15.26-36)

671. He added:

"He said to me that the pastor or the priest from the Salvation Army used to live at the back, so I said, 'If it's an existing residence then you can use it for its existing right.'" (Tr 1844.25-28)

672. He described the conversation in cross-examination in these terms:

"Mr Attie said to me, 'Providing you don't do any structural work, providing you just upgrade the kitchen, you can upgrade the bathrooms because they're all existing; just put up gyprock.' He said, 'Providing you don't touch anything outside or any structural, you're okay to change the interior because this is zoned R2 and you can only live here.'" (Tr 1522.24-30)

673. Mr Attie's account of the advice that was sought by Mr Jack was that Mr Jack explained that he was having a problem with Council staff regarding the commercial use of the site. Mr Attie told him that he couldn't use it is a commercial site. He said that he had not been inside the property at all and that Mr Jack:

".... explained to me there was an existing residence at the back. I said if there is an existent residence, you can use it under existing status, and that was it." (Tr 1843.39)

674. In answer to the proposition that Mr Attie "introduced him to Mr Zaiter to assist him make that application for development consent" Mr Attie said that Mr Jack rang him and said:

"'I need an architect to help me put an application in council.' I said, 'What are you trying to do?' He said, 'I'm trying to fix the problems I've already started.' In other words, he had already started building the works. So I put him in touch with a draftsman to do the plans for him and that was it." (Tr 1844.3-8)

675. Mr Attie denied that Mr Zaiter prepared plans to add a residence at the rear of the premises because that is what he had told Mr Jack to do, Tr 1846.37-40.

676. He denied discussing with Mr Jack turning the back of 1A Henry Street into a small residence of three rooms, Tr 1849.37.

677. It ought be noted that there is no text traffic between the two men from 20 July to 5 September, when Mr Jack made two missed calls to Mr Attie.

The Residential Renovation of 1A Henry Street

678. At the public hearing Mr Jack said that the work took about three or four months to complete¹²² and that the family moved in in around October 2014. When asked why he did the work and then move in without approval from Council, he said that Mr Attie (and no one else) told him that he didn't need an approval, "providing I just do interior work, I don't do any structural - don't touch any structural things¹²³."
679. Between that time (ie the end of July/early August and 8 September 2014) building works commenced on the site which involved converting the rear of the premises (what was originally Hall 2 on the map at WJ) into a residential dwelling.
680. On 8 September 2014 Australian Consulting Engineers Pty Ltd certified to Mr Jack that the internal partition walls that had by then been constructed were "constructed of stud wall frames and non-load bearing" as they were not supporting any section of the existing timber roof frame; Ex WJ1, p 62-3.
681. On the same day, ie 8 September 2014 there was this exchange between Mr Jack and Mr Attie:

Inbox From+61.....883Warren Jack*8/09/2014 12:47:08PM(UTC+10)
 Read Thank you so much
 Sent To+61.....883Warren Jack*8/09/2014 12:44:16PM(UTC+10)
 Sent I'll get a guy to call u and get plans done.
 Sent To+61.....883Warren Jack*8/09/2014 12:41:30PM(UTC+10)
 Sent Send an email to Glenn.francis@auburn.nsw.gov.au saying that the da is being compiled and will be submitted soon.
 Inbox From+61.....883Warren Jack*8/09/2014 10:33:18AM(UTC+10)
 Read Please call me urgent
 Inbox From+61.....883Warren Jack*8/09/201410:32:07AM(UTC+10)
 Read You have missed calls from 0.....883. Missed Call Service is free.

682. It was put to Mr Jack that Mr Attie attended the site after the notice to stop work was issued and told him that he, "had to stop the work and that you needed to get, if you could, a retrospective approval." Mr Jack denied this, Tr 1525.8-11. He said Mr Attie said, "Hurry up and finish and move in." Tr 1525.22. He agreed that Mr Attie introduced him to Mr Zaiter but again denied that Mr Attie said to stop the work.
683. On 9 September Mr Attie was in contact with Mr Zaiter to discuss Mr Jack's situation:

8/09/2014 12:48:21 PM(UTC+10), +61.....550
 Call warren on 0.....883 to get some plans done in Henry street Lidcombe.
 8/09/2014 12:48:32 PM(UTC+10), +61.....272 (Sam Zaiter)
 Would it be possible that you give him a call please Ned.
 8/09/2014 12:48:32 PM(UTC+10), +61.....272 (Sam Zaiter)
 Ty. He's asking me when approval will be forthcoming.
 8/09/2014 12:48:50 PM(UTC+10), +61.....550
 I will later (EX FTB1, p156)

684. Mr Jack said that he came to employ Mr Zaiter as his architect on the recommendation of Mr Attie, who told him that Will Nino had no idea what he was doing; PH Tr 16-23. Mr Attie said to him: "Mr Zaiter works a lot with Auburn Council. He knows what council required. Each council has different requirements. Mr Zaiter is very familiar with all the requirements for Auburn Council." PH Tr 16.30-33.
685. On 9 September 2014, and consistently with Mr Attie's direction, Mr Jack sent an e-mail to Mr Francis stating that a "DA" was being filed and would be lodged soon; Ex WJ1, p 85.

¹²² Tr 1485.36-42

¹²³ Tr 1486.6-14

686. On the same day Mr Mooney and another development control officer, Gay Pandzic, met Mr Jack on site with another person. This followed a previous visits on 8 September and earlier that day where there was interaction between them and the builder; Ex S21, p 8 [14] and [15]. Mr Mooney prepared notes of the meeting, which was to the effect that he raised his concerns about the work that was going on which required development consent. He said, *"a second male with Mr JACK argued that the work didn't require Development Consent. They asked if I had issued a notice. I advised them I hadn't but had been directed to issue an Order 19 to cease all work...."* They then left.
687. Mr Mooney said that during the meeting, Mr Jack held up a phone with the name of Ned on the screen but said that he did not ask why and was not concerned by it, Tr 1616.40-1617.5. He said that it crossed his mind that "Ned" was in fact Mr Attie; Ex S21, [13]. At [16] of Ex S21 he said that he would have been aware of Mr Attie's actual involvement from the time of Mr Francis's e-mail of 5 May.
688. Mr Jack says that he told Mr Mooney that Ned Attie was on the other end of the line but Mr Mooney denied this
689. Mr Attie said that on the last occasion he visited the site, the, "kitchen was incomplete and the bathroom was incomplete and he had - from memory, he was putting down floorboards, timber floors." Tr 1858.39

25 September 2014 - The Lodgment of a third Development Application

690. On 25 September 2014 Mr Jack lodged a further development application. The proposal was described as, "change of use from Salvation Army Church to residence plus home office. No exterior works or additions" Ex WJ1, p 88-93. On the day that the application was lodged, the relevant officer was Fay Ong who made a file note of the circumstances of the lodgement; Ex WJ1, p 94. In summary Ms Ong could not accept the application due to the insufficiency of the information. Ms Ong suggested to Mr Jack that he contact his consultant to prepare a revised statement of environmental effects ("SEE"). Mr Jack then made a phone call and relayed that request. A short time later, it is not altogether how long, Mr Attie walked into the glass room and stating that he had just received a phone call from Mr Jack's consultant. Mr Jack then told Mr Attie that he was missing the SEE. Mr Attie that made a phone call and advised the person to prepare the SEE and then told Ms Ong that the SEE would be filed by tomorrow. The notes continue; "Clr NA advises WJ that he will request Council to hold on to the documents until the SEE is prepared and ready for lodgement and instructs WJ to write a cheque for the DA fee for his application" Ex WJ1, p 94.
691. Mr Attie's phone records are to the same effect (the first message is at the bottom of the extract):

44 Inbox From+61.....883Warren Jack*29/09/2014 7:06:57PM(UTC+10)
Read I'm chasing them up.
 45 Inbox From+61.....883Warren Jack*29/09/2014 7:06:39PM(UTC+10)
Read I might have to put this one on scope as well.
 46 Sent To+61.....883Warren Jack*29/09/2014 7:06:39PM(UTC+10)
Sent Can u get it.
 47 Inbox From+61.....883Warren Jack*29/09/2014 7:06:21PM(UTC+10)
Read <http://training.gov.au/Training/Details/80908ACT>
 48 Inbox From+61.....883Warren Jack*29/09/2014 7:05:23PM(UTC+10)
Read <http://training.gov.au/Organisation/Details/31791>
 49 Sent To+61.....883Warren Jack*26/09/2014 8:18:34PM(UTC+10)
Sent It's fine. I'm lying down now.
 50 Inbox From+61.....883Warren Jack*26/09/2014 8:18:19PM(UTC+10)
Read Ned I won't let you down.
 51 Inbox From+61.....883Warren Jack*26/09/2014 8:18:06PM(UTC+10)

Read Mate I'm waiting. I called him 5 times today and texted him right up to 7pm. Still chasing.
 52 Sent To+61.....883Warren Jack*26/09/2014 8:03:08PM(UTC+10)
Sent Waited for your call. Never came through.
Waited for your message. Never arrived.
Enjoy your holiday.
 53 Sent To+61.....883Warren Jack*25/09/2014 9:28:31AM(UTC+10)
Sent Ok
 54 Inbox From+61.....883Warren Jack*25/09/2014 9:28:23AM(UTC+10)
Read There getting a planner to come down
 55 Inbox From+61.....883Warren Jack*25/09/2014 9:28:13AM(UTC+10)
Read I'm at council
 56 Inbox From+61.....883Warren Jack*25/09/2014 8:57:18AM(UTC+10)
Read Got it. Thanks
 57 Sent To+61.....883Warren Jack*25/09/2014 8:56:33AM(UTC+10)
Sent Gurdeep Singh 04.....928
 58 Inbox From+61.....883Warren Jack*25/09/2014 8:55:57AM(UTC+10)
Read No
 59 Sent To+61.....883Warren Jack*25/09/2014 8:55:23AM(UTC+10)
Sent Did u get it?
 60 Inbox From+61.....883Warren Jack*25/09/2014 8:47:00AM(UTC+10)
Read Certifies details please
 61 Inbox From+61.....883Warren Jack*25/09/2014 8:09:12AM(UTC+10)
 Read You have missed calls from 0.....883.
 Missed Call Service is free. (EX FTB1, p151)

692. These records suggest that Mr Attie's co-operation may have been linked to some assistance that he was providing Mr Attie in relation to some form of training program or documentation. Mr Attie told the inquiry that he was not involved in the application to change the use of the property that was filed on that day, Tr 1842.47-1843.8.
693. His explanation for knowing Mr Zaiter was that their daughters were in the same class together at school, Tr 1843.20.

The Jack Family move in

694. Mr Jack said that he and his family moved into the premises in October 2014; Ex PH Tr 18.21. They did so because that had already given notice at the Gladesville residence they were renting. The reason they did so was on the advice of Mr Attie; PH Tr 18.29-20.22. His wife was not happy about it because they were living on the harbour at that time; PH Tr 20.11.
695. Mr Attie said that he did not know that the Jack family eventually moved into the property, Tr 1842.33. He said that he:

"... knew (Mr Jack) was in the middle of building or doing some works at the back, as he explained to me. There was an existing residence in the back that the priest used to live in, or the pastor used to live in, and he was doing some remodelling work in there."

(Tr 1842.36-40)

696. On 7 January 2015 Mr Attie stated in a text, "I need town planning certificate and journalism and communication certificate"; EX FTB1, p175-6.
697. On 13 February 2015 there was this exchange between Mr Attie and Mr Jack:

16 Sent From+61.....550To+61.....883Warren Jack*13/02/2015 3:18:08PM(UTC+11)
 Sent Fuck u
 17 Inbox To+61.....550From+61.....883Warren Jack*13/02/2015 1:40:53PM(UTC+11)
 Read "Where the fuck are you. I've been ringing you for days call me back. See ya. It's Warren."
 Missed Call Service is free. Call 159 to opt out

698. The development application was determined in 12 March 2014¹²⁴ and refused for a number of reasons, none of which need be set out for present purposes, suffice to say that the application had virtually no prospects of success. Mr Attie said he was unaware of that fact and would not have asked Mr Francis for a report if had known of that fact, Tr 1861.29-31.

Zod

699. Mr Jack gave evidence at the public hearing that before he listed the property for sale he had a conversation with Mr Attie in these terms:
- A. He said, "A guy named Zod is going to come on your door and then it's all over for you. I suggest you sell and you save yourself and your family all this hassle." I said to him, "What's a Zod?"
- Q. And did he answer?
- A. No, there was another fellow there. He said, "He's the guy that walks behind Mehajer, the big guy. He goes around and they take what they want."
- Q. Have you ever met this Mr Zod?
- A. No. (Tr 1502.36-45)
700. He said that the meeting was also attended by a Mr Freddy Argh, Tr 1502.6.
701. Mr Attie denies any such conversation; Mr Attie's evidence was that he knew of "Zod"; whom he described as "like a bouncer, a bodyguard" Tr 1855.41-1856.5.
702. On 17 March 2015 Council received a complaint about commercial use and the fence surrounding the premises and on 29 April 2015 Mr Mooney responded to the complaint and attended upon the site.

1A Henry Street Listed for Sale

703. At about this time Mr Jack and his wife listed the property for sale through Ray White. Their reasons, according to Mr Jack, were that they had had enough; PH Tr 24.38—25-4.
704. Mr Attie said that he did not recall being told that Mr Jack had put the property on the market, Tr 1855.9-18. He did however say that Mr Jack did talk to him about having received an offer for the property which he was considering. He said that he Mr Jack
- "... explained to me that he was receiving an offer of nearly \$2 million, or 1.8, \$1.9 million for the property, and I said, "If you've had a property for a year and you're getting more than double the amount, I'd sell it if I was you." (Tr 1855.30-39)

Council serves two notices of intention to give orders

705. On 30 April Council served two notice of intention to give an order. The first notice¹²⁵ related to the size of the fence and the fact that it had been constructed on a flood affected lot. The second concerned the unauthorized development associated with the residential additions which were referred to as "unauthorized development".¹²⁶
706. On 5 May Mr Francis responded to a request from Mr Attie for a report on the status of the property; Ex WJ1 p 113-4. There was a missed call from Mr Jack to Mr Attie on that day: line 10.

5/05/2015 12:23:29 PM(UTC+10), +61.....883 (Warren Jack)
In at council. You have time for lunch or coffee
5/05/2015 12:25:13 PM(UTC+10), +61.....550
I'm in the city.
5/05/2015 12:25:22 PM(UTC+10), +61.....883 (Warren Jack)
Ok
7/05/2015 6:01:35 PM(UTC+10), +61.....550

¹²⁴ Ex WJ1, p 108-110

¹²⁵ Ex WJ1, p 144-148.

¹²⁶ Ex WJ1, p 149-154.

Bluehavenconstructions@gmail.com
 7/05/2015 6:01:40 PM(UTC+10), +61.....550
 Give to Julie
 7/05/2015 6:12:15 PM(UTC+10), +61.....883 (Warren Jack)
 Ok (EX FTB1, p176)

707. Mr Attie explained that the reasons for seeking the update from Mr Francis was because, "Mr Jack rang me up and said that he's got a problem on the site. He said that two inspectors had come to the property and that his builder had threatened to kill them." Tr 1850.35 see also 1850.40 et seq. That explanation is somewhat confusing and probably in error since the building work on site had ceased by October 2015 and Mr Jack and his family were in residence at that time. Further, there is no reference in Mr Francis's "update" at Ex WJ1 p 113 referring to an altercation involving threats to staff, a matter conceded by Mr Attie at Tr 1851.47.
708. He resisted the proposition that Mr Jack called him after receiving the two notices of intention to give an order dated 30 April 2015¹²⁷ and that Mr Attie the spoke to Mr Francis seeking an update of the situations and with a view to ascertaining Mr Jack's options, Tr 1854.25-1855.1.
709. He repeated that Mr Jack did not tell him about the order, Tr 1862.20-27.
710. Further, Mr Attie said that he didn't read the report in any event, Tr 1857.45 and sought to explain this by reference to the number of e-mail that he received and did not read, some 4,000 before the Council took his e-mails away, Tr 1858.4-6.

A meeting between Mr Attie and Mr Jack in July 2015

711. On 25 June 2015 Council issued orders in the terms of the foreshadowed orders; the order for the fence is at Ex WJ1, p 161-172 and the order for the additions, WJ1 p 173-178.
712. Mr Jack's account at the Private Hearing. Mr Jack's evidence at the private hearing was that a meeting was arranged on 15 July. He described what happened in these terms:

I know we went and met around 8 o'clock in the morning, around 8 o'clock in the morning, we met at the flower shop cafe. 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 chitchat. We finished breakfast. He said to me word to the effect of "We can make in all go away." He said, "They want \$200,000." I stopped, I was taken aback, I said, "What?" He said, "It's not me. They want \$200,000." I then went blank for a little 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're 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 too me." I stood up, there were I quite a

¹²⁷ Ex WJ1, p 144-154

few people around. And in a louder voice I said to him, "I said you can go and fuck yourself." And I walked out." (PH Tr 33.12-34.2)

713. He went on to say that it was the "other three" and that Mr Attie, *"always referred to four of them that run and control everything that happens in Lidcombe and Auburn."* Tr PH 34.4. He said Mr Zraika's named had been mentioned as being one of the four but could not recall any other name. He said that this was the first time money had ever been mentioned; PH Tr 36.8.
714. Mr Jack's account at the public hearing was in these terms:

"We walked into the Flower Shop Cafe, we ordered breakfast. I ordered their \$10 breakfast special and a coffee. Mr Attie ordered toast with a muffin. We walked in, we sat down. They've got a little counter on the left-hand side that they sell flowers. We sat on the first square table, that's a four seater. Mr Attie faced the outside, I faced the inside. We sat down and we ate breakfast. Mr Attie said, "How's the family?" I said, "Oh, they're very good. How are your family?" He said, "Very good." I don't think I've ever met Mr Attie's family, just for the record. Finished breakfast and he said words to the effect, "You've got a bit of a problem", he said, "And I've got a - I think we've come up with a solution for you." I said, "What's that?" He said, "They want \$200,000 to get this approved." I said, "What?" He said, "It's not me." I think I maybe - I can't remember what Mr Attie was saying for 10 or 15 seconds after that, but I remember him saying, "Hey, hey, hey, relax, relax. You've gone white. You're shaking." At that point my breakfast started coming up and I actually stopped myself from vomiting over Mr Attie, which, for the record, I regret stopping it coming up. He said, "Just calm down." I was shaking and I was white. I said what did you say? He said, "It's not me." He said, "Hicham Zraika doesn't approve anything for under \$500,000." He said, "You've got others involved." I said, "Go fuck yourself." He said, "What did you say to me?" I stood up and I said it even louder and I left." (Tr 1497.24-1498.5)

715. Mr Attie's account of the meeting was entirely different. He:
- Said that there was no meeting on 15 July but that they did fact meet on the 10th, having previously caught up with him on the 8th and 9th, Tr 1869.4-7 & 24. He said that that Mr Jack had stood him up on the 15th, Tr 1868.2-8 and that the missed calls were trying to find out where he was, Tr 1868.8. He said that Mr Jack, "sent me a text message on the 8th asking to meet up the next morning. He sent me a text message on the 9th saying, 'Are you free tomorrow for coffee?' and I said, 'Yes'". Mr Attie said that he didn't want to talk to Mr Jack on the 15th, that Mr Jack had organised a meeting and did not show up. His explanation for why he kept ringing his that that he had to, "move on with my day. I can't be sitting there all day waiting for him." Tr 1871.20. When it was pointed out that he did not move on and kept pursuing the issue, twice that night and again on following day he wanted to know, "why he's not answering his phone."
 - Disputed the Jack account that he ordered eggs and muffins and said that did not normally have eggs on his toast and normally ordered the big breakfast, Tr 1877.3-14.
 - He did not recall a phone call setting the meeting which involved Mr Attie saying, "Warren, let's meet for breakfast, I think I've got a solution for you" Tr 1867.18.
 - Mr Jack arranged the breakfast.
 - He did not recall any small talk about the children.
 - He denied saying, "We can make it all go away."
 - He denied saying, "They want \$200,000."

716. As far as the substance of the conversation was concerned Mr Attie said that in early July 2015¹²⁸ he told Mr Jack that to address the issues identified by council at that time, would require;

“....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.” (Tr 1859.3-10)

717. He said that, as far as the costs of that went, *“you wouldn't get much change out of \$200,000.”* Tr 1859.14. He then said that Mr Jack never asked for a plan as to how the issue could be rectified, Tr 1859.18 before changing his evidence to the effect that Mr Jack asked him what he needed to do to fix it. There is no discernible or material difference between being asked to fix something and being asked for some form of plan as to how to fix something and it is not to Mr Attie's credit that he sought to distinguish the two. He then said:

“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.”

718. Mr Attie's phone records sms messages on 8 July 2015:

4 Sent To+61.....883Warren Jack*8/07/2015 8:10:46AM(UTC+10)
Sent See u in 20 or so
5 Inbox From+61.....883Warren Jack*8/07/2015 7:30:28AM(UTC+10)
Read You around fur breakfast or coffee this morning

719. There is also an sms at 8.17 which states, “?????” EX FTB1, p 177.

720. The following day there was this exchange:

9/07/2015 10:26:52 AM(UTC+10), +61.....883 (Warren Jack)
Can we catch up tomorrow morning.
9/07/2015 10:56:26 AM(UTC+10), +61.....550
Yes.

721. Mr Attie's phone records include these messages on 15 and 16 July 2015:

15/07/2015 7:01:22 PM(UTC+10), +61.....550
What is wrong with u
Status: Sent
Delivered: 15/07/2015 7:01:24 PM(UTC+10)
Source file: Ned's iPhone 6/var/mobile/Library/SMS/sms.db : 0x36AD2B8 (Table: message, chat, Size: 115367936 bytes)
16/07/2015 11:08:38 AM(UTC+10), +61.....550
Is it that hard to answer you're phone
Status: Sent
Delivered: 16/07/2015 11:08:40 AM(UTC+10)

722. Mr Jack's phone records (Ex WJ2) show that he received four missed calls from Mr Attie between 8.42am and 11.32 am, the last of which involved Mr Attie leaving a voice message in these terms:

"Warren this is for fifth phone call this morning. Where the are you?"

723. Mr Jack explained that the reason why he did not take Mr Attie's calls was that,

¹²⁸ Tr 1860.13

"I thought he 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." (Tr 1498.23-26)

724. There were further missed calls at 11.32am and 7pm that day before an i-message was sent by Mr Attie in these terms: "What is wrong with you" Ex WJ2, p 4. There was further missed call at 11.08 am that day before another i-message in these terms; "Is it that hard to answer you're phone" (sic.).

Mr Jack's "Complaint" to Mr Hajje

725. Mr Jack gave evidence that he relayed the conversation with Mr Attie to his solicitor Mr Hajje because he was a personal friend and lawyer who he had know for over twenty years. He said; "Mr Hajje knows the problems I've been having with this block. He knows the threats that I've been having. Every time I have a problem I send him an email or I phone him."
726. He said that the conversation happened at around midday, because Mr Hajji was in Court that morning, Tr 1503.43.
727. Mr Hajje's evidence was to the following effect:

"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 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 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 am not sure if it was in that conversation or a subsequent conversation. Ex PH11, 3.45-4.30

The Mooney Jack conversation of 14 July 2015

728. On 14 July 2015 Mr Mooney made a note of a phone call he had with Mr Jack earlier that day; Ex WJ1, p 179. The bulk of the note refers to the need to remove the concrete that had been laid. Mr Mooney also records these statements:

"He said that he had been told various things from different people including people from Council and he was confused. He said he had concreters with him and wanted to get it done. I said that I had issued the Order and that if the work was undertaken in accordance with the order and that if the work was undertaken in accordance with the Order and the amount of concrete removed was around the 235 m² mark I would sign it off.

He asked would the inside be ok then. I said no, I would sign off the concrete; the interior of the building had to be returned to its original condition as per the Order. He asked where he would live. He said he was told it was residential then he was told it was commercial; he has people from council and consultants telling him different things.

I told him the council told him to stop work and the builder as well, but he chose to continue. We are the ones he should have listened to. I said you can take the advice from us to stop as we told you or you can take advice from others that you want to hear. You chose to continue working. He said I will have nowhere to live, where are my three kids going to live. I said I can't answer that, I'm not sure."

729. There is no reference to the sum of \$200,000 in that conversation.

Mr Jack Writes to Mr Mooney

730. On 16 July 2015 Mr Jack sent a letter to Mr Mooney¹²⁹, the theme of which was largely consistent with the conversation recorded by Mr Mooney. In particular it contained the following:

"From the very start of the project I have engaged with licensed builders and trades people with years of experience to discuss what can be done with the project. I had taken advice from numerous sources including an Auburn City Councillor. I was reassured that my plans and works were legitimate and that I was on the right track. I am not a developer and so therefore I had placed my trust in those around me and comforted that my project was fine.

Throughout this whole debacle, I have met with local Councillors and members of council staff to investigate what is permitted on the site and how to rectify any wrongdoings....."

731. Mr Jack said that the reason for this letter was the conversation that happened the previous day. There is however no reference to a sum of \$200,000 in the letter. When asked to explain why it did not refer to the conversation with Mr Attie the previous day he said, "I was scared of him. I've got a family living there. I've had threats from him from bikies, I've had threats of all sorts of things. Tr 1505.17-19.

Conversations with Mr Zraika

732. Mr Jack says that within a week of the conversation on 15 July 2015 he rang Hicham Zraika. There followed a meeting at the same Flower Shop Café. At the public hearing Mr Jack said that the phone conversation was in these terms:

Q. What were the words?

A. Oh, 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 that 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?

¹²⁹ Ex WJ1, p 181-2

A. Because he knew. (Tr 1500.26-1501.10)

733. Mr Zraika's evidence about this meeting was to the effect that Mr Jack expresses his frustration regarding the property, that he couldn't get what he wanted, Tr 1907.17. When asked to put that into words he said:

"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." (Tr 1907.20-23)

734. He said Mr Attie's name did not come up and there was no mention of either \$200,000 or \$500,000.
735. Critically, Council's phone records in respect of Mr Zraika's phone only show two calls to Mr Jack, and they occurred on the evening of 14 July 2015; Ex Gen 25. Mr Zraika could not recall what was said in those conversations, Tr 19019.22-1910.17.
736. This evidence alone suggests that Mr Jack is wrong about the dates and that he has used his phone records to assist him in fixing a date.
737. It is odd that Mr Zraika did not recall Mr Jack repeating his bribery allegation since that would seem to be the only purpose of the two of them communicating at around that time and Mr Jack was, as Mr Hajji's evidence demonstrates quite affected and upset by it.
738. He explained that he had met with Mr Zraika when he was Mayor to discuss the matter. The meeting was arranged with Eddie Sarkis, Tr 1501.23. He could not give any precision as to the time and indicated that the meeting achieved, "no result". Tr 1501.47. At the public hearing he elaborated on the four as being, "Ned Attie, Hicham Zraika, Ronney Oueik and the wedding guy" Tr 1526.3.
739. Mr Mooney responded by e-mail on 5 August 2013 essentially repeating his previous position and reminding Mr Jack of the need to comply with the order; Ex WJ1, p 183.

The Inspection of 12 November 2015

740. On 12 November Mr Mooney attended the site to undertake a compliance inspection in accordance with a notice issued on 11 November 2015¹³⁰. Mr Mooney made a note of the events of that visit which included the following after Mr Mooney had observed that no further rectification work had been carried out and the fence remained in place:

"Mr Jack's friend on site, Mr Raymond YOUNAN spoke; he believed that Mr Jack had been treated unfairly and wanted to know how the matter could be progressed. I explained that it was my understanding that Council had already refused a DA. I said I was not sure but I believed the issue included flooding. I then pointed out the canal to them. He said that we were public servants and it was our job to assist them. I advised I was not a planner but a development control officer and the only advice I could give them was to comply. Both men complained that persons of authority and Council had given them advice. I suggested that if any advice was to be sought it should be from a planning consultant (which Mr Younan was), a lawyer who specialises in local government matters, or Council's town planning staff.

.....

I then explained to Mr Jack that I had done everything I could to stop him from continuing to undertake the works at the premises and he had not complied, leading to the present situation.

Mr Jack alleged that persons from Council and representatives had advised him to do things and he believed they had acted criminally.....

¹³⁰ Ex WJ1, p 189

He then made a allegation he was told that for \$200,000 he could have the matter sorted.....”

741. Mr Mooney took a series of photos on that occasion showing the extent of the residential work and the occupation of the premises by the Jack family; Ex WJ1, pp 192-225.

Penalty Infringement Notice and Prosecution of Mr Jack

742. On 20 November 2015 Mr Mooney issued a penalty infringement notice on behalf of the Council; Ex WJ1, p 231-2. It is to be noted that the notice imposed a fine of \$3,000. The notice was directed to Mr Jack but not his wife.
743. Mr Jack elected to have the matter dealt with in the local Court and Storey and Gough were retained to act on Council's behalf; Ex WJ1, p 233. The matter was originally defended and Mr Mooney prepared a lengthy statement setting out the history of the matter which is annexed to Ex S21.
744. The report from Council's solicitor who prosecuted the matter stated:

"Mr Jack from the Bar table attempted to lead evidence of conversations he had with a former Councillor, Mr "Ned" Attie. According to Mr Jack, the former Councillor had attended the property at 1A Henry Street, Lidcombe on four occasions during the works. To the best of the writer's knowledge Mr Jack alleged the statements to the following effect were made by Mr Attie during these inspections:

1. 'Development consent is not required if you wish to live in the premises.
2. You should not stop the building works.
3. Design changes should be made which will satisfy council, tapped ventures, et cetera should be moved.
4. The premises could either be used as a residence without council consent

The writer objected to this evidence on the grounds of hearsay. The objection was upheld by Magistrate Stafford who invited Mr Jack to seek and adjournment and to issue a subpoena upon Mr Attie if he intended to lead such evidence. Mr Jack refused the invitations and the evidence was not admitted." Ex p 253-4.

745. The transcript of the sentence hearing is in evidence at Ex Gen 17.
746. Mr Jack's explained, at one point, that he believed that he was set up by Mr Attie so that either Mr Attie or someone allied to him would be able to purchase the block¹³¹. His explanation for this was that in 2015:

"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." I'm not a developer. I'm trying to live here with my family. Tr 1526.28-33.

Conclusions and Recommendations

- HS1. The most serious allegations put forward by Mr Jack in his evidence to the Inquiry concern an allegation that Mr Attie demanded the payment of \$200,000 in order for the problems that Mr Jack was facing to go away and the suggestion that Mr Zraika was a party to that. Such a serious allegation warranted the thorough investigation of the matter and in part explains the detail of these submissions.
- HS2. In addition, the allegations also suggest 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.

¹³¹ Tr 1526.10-

- HS3. The Inquiry ought not find that Mr Attie made any threat to Mr Jack in the terms alleged by him. There is insufficient evidence to provide any substantiation of the allegation that Mr Attie sought a bribe. The phone records of Mr Zraika also suggest that Mr Jack cannot be right about the timing of the meeting in any event, since, on his account, there was no contact between him and Mr Zraika until after the critical meeting at the Flowershop Café.
- HS4. There is also no evidence to suggest Mr Zraika ever made a demand of the kind referred to by Mr Jack.
- HS5. What is most likely to have happened is that Mr Attie, as his evidence went, explained to Mr Jack that in order for him to deal with the multiple problems that faced him as a co-owner of 1A Henry Street and nominated the likely costs 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 Hajji, 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 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 Mr Jack's evidence and demeanor that he has some difficulties with the written word.
- HS9. Ultimately however, Mr Jack's rights against Mr Attie in respect of any advice that was given to him by Mr Attie and any loss arising out of advice is a matter for the civil Courts and not a matter for this Inquiry.

Part 11: Parking Related Conduct Matters

Overview

747. Diana Lang, Emma Lain and Mateus Soares were Council Rangers who gave evidence about a number of problems in their working relationship with Councillors, principally Mr Oueik. Stephanie Griffiths, who was the Team Leader of the Rangers for more than 10 years before she was made redundant in October 2014 also gave evidence; Ex S8.
748. Robert Lawrence was the Manager of Compliance until October 2014 when he too was made redundant; Ex S16, [4].
749. At the time Diana Laing gave evidence she was one of four Rangers employed by the Council. She gave evidence that her duties as a ranger required her *inter alia* to regularly patrol all schools in the area. Her evidence was that the school with the worst traffic problems was Al Faisal College. Al Faisal College is located at the Southern end of the block comprising Auburn Road, Helena Street, Harrow Road and Beatrice Street. This is the block immediately to the West of the block that was the subject of the South Auburn Planning Proposal. The site of the school has frontages on both Harrow Road and Auburn Road is slightly South of Auburn Public School which makes up the North half of the Block.
750. Ms Griffiths said that Al Faisal was problematic because it *"is situated between two busy streets with school entrances on both Auburn Road and Harrow Road"* with particular issues associated with the Harrow Rd Entrance; Ex S8, [9]. She added:

"there are large no parking areas outside of the entrances. Some of the parents arrived approx. 20 minutes early to pick up children and parked their vehicles in the no parking areas and waited around for their children to finish school; this caused a problem with the flow of traffic.....It was often a dangerous situation and the Rangers/Parkers attended to speak to the drivers 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." (S8, [9])

751. Mr Oueik's evidence on the question of parking was to the effect that ever since he came onto the Council in 2004, he had received many complaints from residents about parking. He said that when he became Mayor in 2010 his number one initiative was parking in schools, Tr 1074.36-40. He said that he visited every school, most visits being, "with the GM or the planner or the engineer" to speak with the principal or deputy principal, Tr 1075.1-10. He described that the process:

"We spend there about an hour or two, we go through the parking, the difficulty that the parents are having in the schools, and the feedback that I'm getting from the community talk about the footpath and the trees, and I have done that over one and a half year or two years, I've done that for every single school in Auburn LGA which is about 17 schools, and that took me a long, long, long time to do it. (Tr 1075.4-11)

752. He also said:

"Before I start initiating the schools, there was zero parking around all schools. Zero. So the parents basically will double park to drop off their kids and that was very unsafe. They were getting booked all the time. That wasn't the solution for people getting booked, for the parents, mums and dads, to get booked. If you get three fines, you lose your licence and there would be a lot of trouble at home, the husband has to drop off the kids and there was a problem that I was aware at the time and I promised that I would look into, and I did it. When I did all the signs at the schools, everyone was happy. Then the parents faced themselves that they were getting into more trouble than what they were getting into before, and the reason why - actually, the road rules or some rules in the State law, it said if you

park in the school zone area, you have two minutes: you've got to park, you look at the time for two minutes, and then if the kid is not in the car, you've got to take off. In their opinion I've created a problem for them they never had. They never had a problem with that before, but my work and effort that I put in, into the schools, is to create the parking that the parents need, to make it easier for everybody."

753. Mr Oueik denied that he gave directions, either directly or indirectly via staff, about how the Rangers should do their jobs in all schools, Tr 1077.15-24.
754. Mr Brisby said that the issue of parking arose in 2011 or early 2012 when he was director of planning and environment by the mayor and a couple of other councillors. He said that:
- "Councillor Oueik and a couple of other councillors who were receiving major angst from the community that they felt that the rangers were being overzealous, it was just revenue raising; the real issues around schools weren't being addressed and as community leaders, those - the mayor and a couple of councillors asked us to look at it and deal with it." (Tr 494.37-43)
755. He said that Mr Oueik discussed the issue of parking in relation to the two Muslim schools with him, Tr 495.19-21. He could not recall the exact words used by Mr Oueik but says that he would have discussed the matter with Mr Lawrence as the responsible manager. Tr 495.30-36. Mr Lawrence was the manager of regulatory compliance with supervision over the Council Rangers. Mr Brisby said that he asked him if he could
- "...go away, discuss it with his staff and we'll sit down and see if we could work a further way forward to try and deal with the matter as council - I didn't want council to be seen in a bad light with the community. I also had a real responsibility to protect the rangers. The rangers are in a very difficult job. They're often in dangerous situations and if situations were getting overheated in the community, particularly around schools, we needed to provide them some direction and leadership." (Tr 494.45-496.7)
756. He said that he did not recall Mr Oueik using the phrase self-regulating, Tr 496.11. He said the term was used, "in general as a way similar to education of the drivers and parking." He added:
- It's seen more as an education process. We'd still have the rangers onsite, rangers available, moving people around, providing guidance, providing assistance."
757. His explanation for what was happening was as follows:
- "What was happening is the rangers were doing their job and it was always conceded, it was never a criticism of the rangers. The rangers would move in, a mother or a parent would park their motor vehicle, they'd move in and chalk their tyre which, in that environment, became very intimidating and they were trying to handle it and it wasn't achieving anything, what we were doing. We wanted them to educate people, be on site, be seen, not hiding and recording numbers and issuing infringements and taking photos. We were trying to improve both their life, as a professional group, as well as the council's image." (Tr 497.20-30)
758. Mr Lawrence gave evidence at [22]-[26] of Ex S16 to the effect that there was an issue with enforcement of parking offences in and around Al Faisal College and the other Muslim School. He said that Mr Brisby directed him in these terms, "*Ronney says we don't need to fine these people, we need to move them on.*" His recollection was that none of the other schools in the Council are was mentions that when he told Ms Griffiths about it, she said to him, "*Robert, this is not right.*" He said that he directed her to carry out what he had been told by Mr Brisby but could not recall meeting the rangers and parking offices.
759. Mr Burgess gave evidence to the same effect; Ex S11 [179]. He also gave evidence about a conversation with Mr Oueik In May 2012; Ex S11[235]-[239]. Mr Burgess said that, "*he*

wanted Council Rangers to leave the zones alone. His primary interest was Al Faisal College. I did visit the school with him to witness parents parking in private driveways and generally ignoring road rules..."

Al Faisal College – Self Regulating

760. In 2012 there was a meeting of the Rangers where the issue of parking at Al Faisal College was discussed. Diana Lang said that staff were directed by Rob Lawrence that the parking at As Faisal College was now self-regulating and that it would be, "on our heads if pins are issued in the no-parking area"; Ex S5 [8].

761. She also said that she was never given any direction about the only other Muslim school in the area, Amity College, Tr 207.37-208.13.

762. In cross examination by senior counsel for Mr Oueik, Diana Laing disagreed with the proposition that this directions was "*consistent with a desire on the part of the senior officers at the council to reduce an impression that the school was being targeted in relation to parking infringements*" Tr 191.19-23. When it was suggested to her that Mr Oueik had, "worked tirelessly to bring in 'kiss and drop-off zones' outside schools" as a means of resolving the conflict between traffic management/infringement and enabling parents to drop off their children at school, she explained:

"That's what no parkings are for, drop-off and pick-up. They can put an extra sign on it, "Kiss and Ride" for a courtesy for people who don't understanding "No Parking", but "No Parking" is for drop-off and pick-up zones. All schools have "No Parking" outside their schools. Every school in the local area government area has a no parking area." (Tr 192.19-25)

763. She also explained that in a no parking zone, the driver has two minutes to complete the pick-up and drop off and the driver cannot leave the vehicle, ie. they must stay within three metres of the vehicle, Tr 208.17-25. She explained how the zone was enforced in these terms:

"...look, we do allow parents to get out of the car. They can get out of the car, we let them walk up to the fence, but not to go inside the gates. We're pretty lenient, like, you know when we patrol the areas." (Tr 208.32-35)

764. She explained the flexibility of her approach at Tr 208.42- 209.16.

765. She couldn't recall any policy to increase that area, Tr 192.29 but conceded, having been referred to the minutes of the tool box meeting on 18 May 2011 Ex S10, p 68 of the possibility of getting rangers to "back off with the infringement notices and to persuade the engineers to change the signs and the zoning outside the schools" Tr 194.16-24. She did however add that, "the signs have never been changed, they're still the same from the day 2012 till now." Tr 194.21-24

766. Diana Lang was also asked about a record of a toolbox meeting on 17 August 2011, which she attended and which included a Managers Update (Ex S1, pp 69 and 70) in these terms:

"Further discussions on no booking in school zones even if car unattended. RL advises school zones self regulating as advised by Mayor, GM & Director."

767. She said that the reference to school zones was made in error and that the direction only applied to one school, namely, Al Faisal College, Tr 198.7-11. She said:

"I was at the meeting and we only talked about Al-Faisal. We didn't talk about other schools in the area. It was just Al-Faisal College." (Tr 198.15-18)

768. Mr Brisby rejected any suggestion that there was to be a separate enforcement regime for the two Muslim schools in Auburn, Tr 497.37 & 498.6-12. He said:

"What was happening is the rangers were doing their job and it was always conceded, it was never a criticism of the rangers. The rangers would move in, a mother or a parent would park their motor vehicle, they'd move in and chalk their tyre which, in that environment, became very intimidating and they were trying to handle it and it wasn't achieving anything, what we were doing. We wanted them to educate people, be on site, be seen, not hiding and recording numbers and issuing infringements and taking photos. We were trying to improve both their life, as a professional group, as well as the council's image." (Tr 497.20-30)

769. Mr Brisby did however say that:

"The Auburn community with its cultural challenges and diversity relies very heavily on its elected member and generally most of the feedback we get comes through the elected members depending on what cultural group and background they come from." (Tr 498.21-25)

770. He said that it was a "number one" topic and "hot topic" for Mr Oueik, Tr 498.38 & 499.1. Mr Lawrence was asked whether there was, "any directive that went to the parking staff about how certain schools should be dealt with differently from other schools within the local government area?" He responded:

"No, but Al-Faisal was an ongoing issue." (Tr 895.9)

771. When asked to explain he said;

"A. First of all, Al-Faisal expanded its school and it being on a corner, a very busy corner and a roundabout, the bus, and there was another school on the other side or just down from it. It was just a constant area of very little parking and the residents were not - how do I say it? They were not obeying the regulations that were there to drop off and park for five minutes. Therefore, it was just - with the population of the school coming out to the buses and everything else, it was just a very busy school compared with some other schools in the area." (Tr 895.12-21)

772. He agreed that because school was so busy that there was a road safety issue that needed careful management, Tr 895.31 and when asked how the issue of penalty infringement notices were dealt with in the case of Al-Faisal that was different from other schools he said:

"... there were many directions from the general manager regarding trying to alleviate some of the issues, mainly by education, and that was to stop people - to get rangers in on both sides of the school, Park Road, to patrol and to ask people to move on. A lot of rangers then got abused all the time, and things like that. So it was that sort of issue that we tried to deal with all the time, to move them on, rather than PIN them. When I had rangers - and it was very limited rangers - I tried to put two or three on to try to maximise the distance around the whole school." (Tr 895.36-46)

Mr Oueik's Park Road Development

773. Mr Oueik's evidence about his interaction with Council staff concern his development at 6-14 Park Road, Auburn *commenced* with a complaint that he and his foreman felt harassed by the rangers:

"The rangers were there every single day, Mr Commissioner, harassing my foremen every single day. Every single day the foreman tells me 'They're half past six in the morning, 7 o'clock in the morning, 8 o'clock in the morning going, coming, driving.' They were up to something. He calls me every day, 'What's the rangers doing?' I said, 'They're doing their job', till one day the foreman called me, I went there, and

the cars keep getting booked. My understanding when you buy a work zone, which I spend almost \$70,000 on that, 70,000, to make it safe for my workers and the rangers so no-one can bother us, protecting the workers, and I was doing the right thing and I have paid all the money. Right? But in return, instead, the council, the rangers that are working, they have hidden agenda with Irene Simms.

.....

Harassment, whatever you call it.” (Tr 1078.47-1079.28)

774. He said that that in the case of other sites around, him, they did not get any such harassment from the rangers. He asserted that the Rangers were picking on him¹³² because, “they had hidden agenda with Irene Simms to bring me down.”
775. When asked whether this was why he gave directions to staff to see that council rangers and parking officers not attend your sites at all he put forward the Soares confrontation as his justification; see Tr1079.44-1080.46.

The Confrontation with Mr Soares

776. Sometime during 2014 Mateus Soares, who was until his resignation on May 2016, the lead Ranger had a confrontation with Mr Oueik about the site in Park Road, Auburn. The circumstances were as follows:

12. I spoke to Harry Younan, the site manager. I advised Harry that he needed to move the barriers back, relative to the approved work zone. I also reminded Harry that the work zone signs finish at 6pm and all the barriers needed to be put back into the building site at that time.
13. Harry indicated that he was going to comply.
14. Karl and I left the site and were heading back to the depot. I received a call from Robert Lawrence. He said “I’ve got a call from Ronney to meet him out there, can you meet me down there.” I replied that I would.
15. I dropped off Karl at the Depot and returned to Park Road. When I arrived I saw Ronney Oueik standing opposite the development, in front of the school.
16. As Robert Lawrence and I walked toward him, Mr Oueik said words to the effect of, “Keep that fucken ranger away from here.” Robert Lawrence saw me and said, “Just wait there.”
17. I stood about 10-15 metres away. I saw that Mr Oueik was standing over Robert, he was yelling at him and pointing his finger at Robert in an aggressive manner.
18. They both then walked across the road and continued with their conversation outside the development site.
19. Robert walked over to me. Robert Lawrence said, “Sorry, I know you were doing your job. I told him his language was inappropriate.” Robert Lawrence then said that he was going to raise the matter with the General Manager, Mark Brisby.
20. I do not know whether he did or not. (Ex S7, [12]-[20])

777. Mr Oueik’s evidence about this event was in these terms:

“I call Mr Rob Lawrence from my own private telephone - my own private telephone. I said, ‘Rob, can you please come down here, there’s an issue with the work zone and these people are getting booked’; he said, ‘No problem’. I got along very well with Mr Rob Lawrence, very well. Never disrespected him, never disrespected me. Rob came straight away. I looked, Rob’s one side and two other rangers on the other side. I said to him, ‘What the fuck is he doing here? I said to ... ‘no rangers, just come yourself’, because 20 minutes before, or half an hour before, all the workers were fuming. So the reason I didn’t want the rangers there because

¹³² Tr 1079.41

at the same time I was protecting the rangers getting in conflict with the workers there.

.....

I spoke to Rob Lawrence. Rob Lawrence said, 'I'll speak to your foreman'. He spoke to my foreman and off they went. That was it. No more malice." Tr 1080.33-1081.4

778. He said that Mr Brisby never raised with him a complaint from Rob Lawrence, Tr 1081.6-23.

779. Mr Lawrence said that he was "totally supportive of Mr Soares' position: 892.43. He recounted the events in his statement Ex S16 at [27]-[35]. He said in his oral evidence that:

"... there was a complaint. Mr Soares saw me and knowing it was a very contentious issue and there had been fines previously, that's why there were complaints, I decided to go up there. As I got out of the car on the school side of Park Road, Mr Oueik came up on the other side of the road in a hostile manner and asked Mateus Soares to go back to his car and we had words.

780. His account was in these terms:

"I don't want that fucking ranger on this site."

I said, "Calm down, let's talk about it. Move across the bloody road and I'll speak to the supervisor", and I swore back at him..... when I saw him coming at me, I took the ranger - asked the ranger to go back to his car and just stand there and just watch.... I was concerned for the whole situation being - it was right on school time coming out. It was being not a good sight.

781. Mr Lawrence said that he arranged to see Mr Brisby virtually straight away, He said he stormed into Mr Brisby's office, "without being invited, I was wild." He said that he relayed to him what had happened, including the language used by Mr Oueik as well as his concern for his staff.

782. Mr Brisby said that he had a high regard for Mr Soares and never had any cause to discipline him, Tr 499.21-26. He agreed that Mr Lawrence had raised with him "an episode in which he was dealt with by Mr Oueik in quite an aggressive manner" Tr 499.28-31. He said that in response:

"We discussed the matter with Mr Lawrence and felt that the best course of action was that all matters, again because we're dealing with an elected member, that it's very difficult for the staff and to put the staff in the best position, Mr Commissioner, that all matters relating to that construction zone at Park Road be relayed through Mr Lawrence and we could deal with them that way. But I need also to clarify, neither myself nor council's HR department ever received a formal complaint.

783. It was put to him that Mr Lawrence had made a complaint, however Mr Brisby said that he would not categorise the matter as a complaint but rather a matter that Mr Lawrence, "brought it to my attention looking for a resolution." Tr 500.4. He repeated that assertion at Tr 501.27 and seemed to suggest that his response;

"... trying to be proactive, we put in place the mechanism where Mr Lawrence as the senior manager would deal with the site, the complaints there, rather than have exposed rangers staff to an elected member." (Tr 501.28-31)

784. When pressed on the issue, he added;

"Q. Are you saying you would only act in relation to the matter if there was a formal complaint from the staff member?

A. My belief, Mr Commissioner, is we did act and the best way to act was not to have the interaction between those level of staff, being the rangers and an elected member on his site." (Tr 501.37-43)

785. Finally, he made this quite telling admission:

".... In relation to Councillor Oueik's site, it was best felt to deal with - to take out the lower level staffs' 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 could deal with the matter. It made a lot of sense. We didn't get a lot of complaint about the site. The complaint came from the builder."
(Tr 503.15-23)

786. His said his objective was to, "protect the lower level staff, being the rangers, from exposure to councillors. It's a very difficult sensitive situation." (Tr 503.43-45) He agreed that that his staff needed protection from Mr Oueik, Tr 504.18-22.

787. Mr Lawrence said that it was this incident that led to him directing the rangers not to attend Mr Oueik's site, Tr 892.30-35.

788. On 19 March 2014 Mr Lawrence sent the following e-mail to the Rangers:

"Be advise due 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 school.

Robert Lawrence

Manager, Regulatory Compliance." (Ex S1, p 52)

Various observations of infringement at Mr Oueik's sites and follow up action

789. Ms Diana Laing gave evidence that the only vehicles that can park in a work zone are vehicles, "engaged in the construction site". She added, by way of example that:

"... if the vehicle is.... a concrete truck or a vehicle lifting ... materials into the building site, it can be parked there. It's not for workers who are, say, just a normal person who's working inside the construction site to park his vehicle there. It is mainly for vehicles engaged in lifting material or putting materials inside a construction site."
(Tr 203.27-34)

790. When challenged as to the terms and condition of the relevant work permits she gave this evidence:

"There's no conditions on a work zone. A work zone sign is just - that's what it's for. For vehicles engaged in lifting goods or, you know, engaged in working for the work zone. It's not for workmen to park their vehicles in there." (Tr 2014.12-16)

791. She accepted that there is an exception in the case of the picking up and dropping off of passengers, however that issue was not in dispute in any of the instances which were the subject of evidence, Tr 204.21-205.23.

792. On 7 August 2014 Diana Laing attended 6-14 Park Road, Auburn and observed three vehicles illegally parked in the work zone; Ex S5 [12]. Emma Laing's evidence was that construction commenced in February 2014 and that it included an approved work zone. She said that the site manager began to complain about cars being parked in the work zone. She said that she attended the site on a number of occasions where the site manager would point out an offending vehicle. Emma Laing also observed other vehicles parked illegally but which were not the subject of the site manager's complaint. She told him that the other vehicles would have to be moved after which she would issue an infringement notice on the vehicle the subject of the site manager's complaint.

793. She said that 6-14 Park Road was opposite Trinity Catholic College and that there was significant pressure on getting a parking spot in that area and that worker on the site would need to park some considerable distance away to get a parking spot for the day, or else have to pay for parking, Tr 206.44-207.11.

794. Ms Griffiths produced documents which showed that on 9 April 2014 Karl Yousef, one of the Council rangers, attended Mr Oueik's construction site at 6-14 Park Road Auburn in response to a resident complaint. At 7.39am he observed construction occurring before 8am, in breach of the relevant requirement. He took photographs of the scene. He logged his observations and on 9 April, Both Mr Yousef and Ms Griffiths sent an e-mail to Mr Lawrence attaching a copy of the notes and followed up the matter.
795. On 21 June 2014 Diana Laing was passing the site when she was waved down by Mr Oueik in these terms:

"I said, "Do you want me to fine all the vehicles"

He said, "No, only this one (pointing at vehicle BA99EZ White Mitsubishi Station wagon), It has been there for (4) days."

I said, "What about the other 2? (pointing at a silver Honda Sedan AU33ZZ and a Silver Subaru Station wagon BGM90A)"

He said, "No they are workers in the construction site."

I said, "Both of those vehicle (sic) 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? (Pointing at BA99EZ)"

I said, "Yes, I will fine it because it has been here for 4 days and it is not doing work in the construction site."

He said, "I don't care if the cars are not truck (sic) or utes or whatever is allowed in the work zone, I just want you to fine this car (pointing to BA88EZ) and leave the other 2 because they are working inside the site."

I said, "Ok, but if they are from the construction site, make sure they keep coming out to the vehicle to get their tools, because they should really be here."

He said, "Where does it say that those cars (AU30ZZ(sic) and BGM90A) have to be only work cars to be in a work zone."

I said, "In the road rules under 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." (ExS5, [23])

796. As she began to issue the notice she says that Mr Oueik said: "*Don't argue, just do it.*" Ex S5 [24]. Emma Laing then made a note of the relevant work zone regulations and provided same to Mr Oueik. She logged a record of the events on the Council CRMS system; Ex S6, p 108-9.
797. Mr Oueik's account was in these terms:

"I was talking to the foreman. As I'm walking up, as the ranger is always there, she drive past slowly, I wave, she wave and then she stop. I don't know her name, I can't remember. It was nice. I said, "I was going - my foreman was going to call to council but you're here. This car has been here for four days, can you do something about it?" She said, "I'll book it but I'm going to book everything". I said, "Don't

worry about booking, can you ring up the person and have that car removed because it's in the way of the trucks".

.....

She said, "No, the only way I can do it is to book all the cars here." I said, "I'm asking you if you can do something with this car", because other cars they belong to the site. She said, "They can't park here, they're parking illegally". How can they be parking illegally in the work zone where the customer is out of money and I purchased. My understanding - me - in the work zone, cars engaged in the site, they can park there." (Tr 1082.20-41)

798. On 11 August Diana Laing Ms Laing observed a crane blocking traffic whilst unloading building material on the footpath at Harrow Road. On the basis that the site was associated with Mr Oueik she did not issue a ticket but took photos of what she saw (Ex s5, pp 6-9) and on the following days sent the e-mails to Mr Lawrence that are at Ex 5, pp 10 and 11.
799. Within a few minutes of the second e-mail being sent Mr Lawrence sent an e-mail to the Rangers stating, *"as previously directed by e-mail 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"* Ex S5, p 12 & Ex S6, 113.
800. When asked why he sent that e-mail Mr Lawrence said that:

"It was a big site. There were school 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 foremen 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 and 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." (Tr 891.31-47)
801. He said that Mr Francis repeated to him a complaint by Mr Oueik that the rangers were picking on him, Tr 892.20. He said that he did not instruct the rangers to attend until there was the incident with Mr Soares, Tr 892.35
802. Diana Laing also said that on 12 August she was called into the office of Mr Lawrence who challenged her about the tickets in the work zone. Ms Griffiths then joined the discussion and there was a conversation in which she was directed not to go to that work zone any more because it was a site of Mr Oueik. It was suggested to her that there would be repercussions for her if there were any more tickets issued on that site; Ex [13]. Ultimately Mr Lawrence told her that it was out of his hands and that she should just ignore any vehicles in that are. Ms Laing's notes of the conversation are at Ex S5, p 27. A similar message was conveyed to a tool box meeting on 14 August 2014; Ex S5, p 13.
803. On 22 August 2014 Mr Lawrence sent a Memorandum to, Regulatory Compliance" (which included the Rangers) to the effect that:

"Officers to only attend site of a complaint is received from the foreman stating that a vehicle on their site is impeding or obstructing work zone, Other vehicles on site that are not construction personnel are to be assesse as to illegal parking issues....." (9Ex S6, p 114-5)
804. Diana Laing observed other instances of offending associated with Al Faisal college on 25 August and provided Mr Lawrence with photographs of the offending; Ex S5 [18] but said that no penalty notice were issued.

805. Again on 26 August 2014 Diana Laing and Ms Griffiths observed a offending associated with a crane unloading goods over the footpath at 16-20 park Road; Ex S5, [5] and pp 14 -17.
806. Finally on 9 September 2014 Diana Lang responded to complaints from motorists about a crane lifting material from a truck parked in the work zone outside of 43-47 Harrow Road. She observed the load swaying and there being inadequate traffic control on the basis that pedestrians and motor vehicles were passing under the load of the crane as the photos clearly demonstrate; Ex S5, [21] and pp 18-26. These matter were all relayed by e-mail to Mr Lawrence
807. Each of Diana Laing and Emma Laing, together with other staff provided documents to Ms Simms recording their concerns, Tr 193.7 and these are reproduced at S10, p 51 et seq.

Parking Related Matters – Conclusions and Recommendations

- P1. On the evidence outlined above, the Inquiry ought find that:

Schools

- a. Mr Oueik regarded parking as a major area of concern and that is clearly reflected in both the extent to which he referred to the issue in his Mayoral contributions to the local newspaper and his parking plan. The Inquiry's focus however is the way in which Mr Oueik interacted with Council staff and the extent to which he was able to direct those staff in the performance of what are clearly important responsibilities, particularly when it come to the enforcement of parking in school zones.
- b. In the area of schools, there is a clear public interest in transparency and enforcement of the rules regarding parking. Parents are entitled to drop-off and pick-up their children off 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 requirements of the zones 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 two minutes to complete the pick-up and drop off and the driver must stay within three metres of the vehicle, is a 'kiss and drop-off' zone of itself. She said that where drivers over-stayed there were problems with the flow of traffic and that this often lead to a dangerous situation. One can readily imagine that a policy of no enforcement in such a location can readily lead to increased traffic congestion and to double parking. Her response to ask drivers to move on this, viewed objectively, difficult to criticise.
- c. The Inquiry would accept the evidence of Ms Griffiths, Ms Laing that 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.
- d. Mr Brisby referred to that phrase being used as a metaphor for an education campaign, even though he said the phrase was not used by Mr Oueik. He did however say that
- e. The Inquiry would reject that the parking officers were overly officious in carrying out their duties. It was readily apparent from Ms Griffith's evidence that a degree of flexibility was afforded parents in the circumstance in any event, Tr 208.32.

Mr Oueik's Construction Zones

- P2. There does not seem to be any doubt that Mr Oueik had significant difficulties in relation to the way in which Council staff were performing their duties.
- P3. The Inquiry would readily find that Mr Oueik was equally frustrated, if not more so, by parking related matters as far as they affected him personally. Whilst he went so far as to assert that the staff, with the involvement of Ms Simms, were picking on him, there is nothing to suggest that was the case.
- P4. 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. Indeed none of the rangers who gave evidence alleged any conflict with the workers or the site foreman. Mr Soares said that when he raised the matter with Mr Younan at [12] and [13] of his statement, he said he would comply. The only conflict arose when Mr Oueik became involved. It got to the point, according to Mr Brisby that the only way in which the workers could be protected from Mr Oueik was for the staff to be directed away from his sites.
- P5. 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.
- P6. 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.
- P7. The Inquiry would accept the evidence of Emma and Dianna Laing about their interaction with Mr Oueik as well. It bears out his frustrations and was supported by contemporaneous complaints and the referral of the matter to Ms Simms.
- P8. There was and is no excuse for Mr Oueik to treat either Mr Laing or Mr Soares in the fashion that he did. His position on Council did not entitle him to favourable treatment on this or any other matter.
- P9. Mr Oueik's directions were not lawful directions and ought not to have been conveyed to staff.
- P10. That senior management gave effect to those resolutions is not to their credit and is explained in part by the relationship that Mr Oueik was able to foster with each of Messrs Burgess, Brisby and Francis.
- P11. Mr Brisby's solution gave Mr Oueik control over the site and enabled him to complain about non-workers parking in "his" construction zone, and did not, as events demonstrated, afford the Rangers protection from Mr Oueik: they still crossed paths and the results were not satisfactory.
- P12. Mr Oueik's interventions were in clear breach of the Code of conduct and the LGA:
- i. Code 4.32 prohibit 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 official in their public or professional duties to obtain a private benefit.
 - iii. Section 352 and Code 6.2(a) prohibits counsellors from directing counsel 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."

8th Floor

Wentworth Chambers

17 October 2016

Paul G Bolster

Counsel Assisting

Auburn City Council Inquiry

Schedule A, Transcript of Council Meeting 7 October 2015 – The Grey Street Planning Proposal

- 01:46:27 Mark Brisby Item 228/15 requires a division.
(Continuation of Meeting – Procedural matters)
- Clr Lam (Mayor) Item 228/15. We have a speaker, Mrs Ann Mooney.
Mrs Mooney, you have five minutes to address the Council.
- 01:52:30 Mrs A Mooney Good evening Madame Mayor and Councillors. Sorry is that loud enough.
Good evening Madame Mayor and Councillors. I am a local resident, in fact, born in Auburn. This proposal should be refused. It worries the community and local business when blocks of land are bought up and then proposals are made to change the zoning. I don't think this proposal suits the needs of the community at all. It's an area which has zones for medium density residential and industry. There are absolutely no high-rise residential buildings nearby even though the applicant refers to heights on Parramatta Road and I think that it is a bit of a stretch to compare the sight with Sydney Olympic Park with its amenities, railway and buses seven days a week.
The applicant knows that Newington doesn't have this sort of development at all and its newest apartments are right opposite the market place. This site is on a very busy arterial route which carries a lot of commuters and being industrial precinct there are a lot of long and heavy vehicles on the road, couriers etc, who need to do a job. It's the economy.
Naturally the congestion is affected by main roads, namely Parramatta Road and the M4 which is one block away and yet conveniently the applicant doesn't say much about those black spots. Instead they actually try to sugar coat the traffic impacts, I mean literally. Apparently all you need to do is paint the words 'keep clear' at the corner of Grey Street and Carnarvon Street and it won't be so bad. I find this patronising and insulting to say the least.
Still on transport the applicant says are good. Actually 544 bus doesn't run on Sundays. There is the option to ride your bicycle as you won't be near a railway and maybe that is not such a good idea on Silverwater Road, and if you have ever strolled up the road to Maccas at 5pm in the afternoon, there are quite a few dangerous roads to cross with the M4 ramps and Parramatta Road. I have done it. We are told that the proposal will give the community affordable housing. So the applicant is obviously comfortable for aged pensioners, people with disabilities, parents of small kids, people who don't have a car to live in a high-rise on a street that is gridlocked in peak periods, two kilometre walk to a railway, no bus service on Sundays and a lot of busy roads to cross. Seriously, I don't think that's good enough. We are told that we need retail on this site but the newly revamped Lidcombe Centre on Parramatta Road offers K-Mart, Aldi, Woolworths and lots more. It has really good access and parking. It's great for Silverwater residents and I would like to thank Council for making it happen. Really a 7/11 type store under a block of flats just doesn't cut it. This proposal impacts on local residents because it reduces amenity in the

area. It sends a poor message to the business sector due to ad hoc changes, mixing high density homes with industry. The transport is too limited for the less well-off and disadvantaged and we have to make changes to the Local Environment Plan for this to happen. You should definitely refuse this planning proposal. Thank you

- 01:55:49 Clr Lam (Mayor)
Mrs Mooney
Clr Lam (Mayor)
- Any questions from the Councillors. No, Thank you so much.
- Thank you
- We have another speaker Ms Elsie Crameri. Ms Elsie Crameri. She's not. No. Ok.
- Mark Brisby
Clr Lam (Mayor)
- Clr Simms.
- Clr Simms.
- 01:56:18 Clr Simms
- Thank you Madam Mayor, I would like to move for the refusal, for Council not to proceed with the planning proposal as it shows on page 143. So I move that Council resolves not to support the planning proposal application for the following grounds. That:
1. the application does not sufficiently address the reasons for refusal in the Department's Gateway determination. Um, for the ease of recording, it is just as it appears on page 143, if you cut and paste that will, yep. Um, yep the application does not sufficiently address the reasons for refusal in the Department's Gateway determination, given that it has the potential to result in a cumulative loss in employment lands during a period of high residential growth across the local government area.
 2. The application is inconsistent with relevant state and local plans and strategies and does not sufficiently justify the rezoning of the subject land.
 3. The traffic impacts on the broader traffic network, including Silverwater Road, as well as cumulative traffic impacts have not been sufficiently addressed.
- 1:57:25 Clr Lam (Mayor)
Clr Oldfield
Clr Simms
- Councillor Oldfield do you second it?
- I second it
- Thank you madam Mayor. This is substantially the same proposal as went previously went to the Gateway and was refused at Gateway. What was, what had been resubmitted is pretty much the same. I note that the staff are suggesting that we can change the zoning of it and reduce the number of units, but one of the reasons we made Silverwater Road B6 was because, and we changed it from B3, R3 on the other side of the road, was because we came to the conclusion that we believe that Silverwater Road was not a suitable, or a healthy environment to ask people to live on. Um because of the amount of traffic, because of the amount of pollution, noise etc. So whether or not we did the reduced number of units, which the saying is about, if we allowed enough units as it says to make the development sustainable that would be about 178 units or the 250 units that the applicants are talking about, to me a 180 units are still far too many. If we talk about chop chop housing that's one thing, but 180 units at that site, still is, still is an awful lot of people, and as I said all along, Council said from the get go that we didn't think Silverwater Road was suitable for residential development and the um, the Department of Planning would appear from the Gateway determination previously, agrees with that principle. So I agree with Mrs Mooney and I believe that Council should be refusing this application as it is not in the community

interest.
 01:58:55 Clr Lam (Mayor) Clr Attie
 Clr Attie Thank you Madam Mayor, I would like to move an amendment to the motion please.
 Clr Lam (Mayor) Any seconder. To your -
 Clr Attie We will need to put it up first. So the telepathy is working at the moment. I will give Councillors the chance to read it first.
 Clr Lam (Mayor) So this one is the (.....) negative to the motions.
 Clr Attie Well virtually
 Clr Lam (Mayor) is the other one rejected
 Clr Simms This is primarily what the applicant is asking for.

-inaudible-

Mark Brisby - it's not that simple –
 Barry Cockayne - inaudible –
 Mark Brisby - I think(inaudible)
 02:00:33 Clr Lam (Mayor) So Councillor Attie you move this motions.
 (Unknown) An amendment.
 Clr Attie It's an amendment to the motion.
 Clr Lam (Mayor) It's an amendment. Any seconder.
 Clr Simms Can I just ask if the amendment pretty much what the application was
 Mark Brisby Mr Francis.
 Clr Lam (Mayor) To Mr Francis.
 Clr Simms This is the application, that is similar to what was refused at Gateway
 Mr Francis Yes
 Clr Mehajer I will second that.
 Clr Lam (Mayor) Second that.
 Mark Brisby Clr Attie.
 02:01:13 Clr Lam (Mayor) Clr Attie.
 Mark Brisby Clr Oldfield
 Clr Lam (Mayor) Clr Oldfield, your in
 Clr Oldfield Yeah I wouldn't support. I support refusing the application on the basis of inappropriate for residential development, I believe that it's not the right environment around there for residential development. There is a chemical waste incinerator, within the vicinity of that area and it emits atmospheric pollution on a regular basis and you even get residents on the opposite side of Silverwater Road complaining about the pollution on a regular basis. I think the traffic congestion, it says everything, you know the amount of traffic congestion on Silverwater Road; it's just an absolute nightmare. I think, you know where we can, we have got to really provide incentives for industrial land and for businesses to expand and for jobs to be created in our area and this rezoning doesn't allow that. Thank you.
 Clr Lam (Mayor) No one else speak on this, so I put the amendment moved by Councillor Attie. All in favour with the amendment. Please stand. Against. I declare the amendment carried.

Barry Cockayne

Now put the amendment.

2:03.30 Clr Lam (Mayor)

Now I put the amendment as motions. All in favour of the motions.
Against. I declare the motions carried.

AUBURN PUBLIC INQUIRY 2016

Document 2
Written submissions on behalf of
Steve Yang

AUBURN PUBLIC INQUIRY

Auburn City Council Chambers

Before the Commissioner: Richard Beasley SC

Written Submissions on Behalf of Steve Yang

Introduction

1. Steve Yang was elected as a representative of Second Ward within the Auburn City Council at the Local Government elections held in September 2012. The second ward encompasses Lidcombe, Berala, Regents Park, Newington, parts of Silverwater, Wentworth Point, and Sydney Olympic Park.
2. Mr Yang was elected as a representative of the Liberal party and remained a Liberal party member of the Council.
3. Yang remained a Councillor until the suspension of the Council in February 2016 and its subsequent dismissal in May 2016 because of State Government initiated Local Council amalgamations.
4. During his period as an elected Councillor, Mr Yang attended a number of education and training courses made available to him, these include
 - Executive Certificate for Elected Members (20-22 February 2015 & 21-22 March 2015)
 - Community Leadership (19 April 2013)
 - Effective and Fair Meeting Procedures (21 November 2013)
 - Financial Issues in Local Government (19 May 2014)
5. Mr Yang also received an Executive Certificate for elected members Program-Sydney from University of Technology Sydney (20-22 February and 21-22 March 2015) and a certificate from the Northern Sydney Institute (TAFE NSW) in Elected Member Skill Set Workshops (LGASS 00002).
6. Mr Yang was and remains a respected member of the community within the Auburn Local Government Area as well as being a distinguished member of the Korean community in Sydney.
7. Mr Yang has been resident in Australia since September 1989.
8. He is married and has successfully raised a family: one son (born in 1976); and one daughter (born in 1974).

9. He is a qualified engineer (Mechanical Engineer: The Institution of Engineers Australia MIE AUST CP Engineer 317331) and has been the owner and chief executive officer of AUSKO Design and Construction Pty Ltd (ACN 128 324 130) since 2007.
10. In addition, Mr Yang:
 - (a) managed harbour and hospital construction projects in Kuwait and Saudi Arabia between 1979 and 1989 for Hyundai Construction and the government of Saudi Arabia government respectively.
 - (b) managed material department of Hyundai Construction in London, UK in 1978.
 - (c) completed a Professional Engineers Course at Macquarie University in 1990.
 - (d) QA Engineers at Five Ocean Engineering Pty Ltd, 1990 - 1993.
 - (e) Was the Director of Steve Yang Construction Pty Ltd (100 employees), 1994 - 2010
11. Steve Yang sought election to Council so that he could represent his local community.
12. The conduct of councillors, staff, delegates and administrators is governed by section 439 of the Local Government Act (1993) (the Act) which provides, inter alia:
 - (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.
13. Section 8A of the Act sets forth a number of guiding principles intended to guide councils in the way they carry out their functions:
 - (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.

14. Section 232(1) of the Act states that a Councillor's role, as an elected representative is, amongst other things:

- (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.

15. In addition to the specific requirements of the Act, the role of a Councillor is governed by a Code of Conduct. Pursuant to Section 440 of the Act, every Council is required to adopt a Code of Conduct that incorporates the provisions of the Model Code of Conduct published by the Office of Local Government. Auburn Council's Code of Conduct, dated 3 July 2013 [commences at page 22 of Exhibit 01].

Background

1. The submission of Counsel Assisting, at paragraphs 13 and 14, states that there were two "blocks" on Council in respect of tickets/agreements regarding the position of Mayor and Deputy Mayor. Each block consisted of five members and they were respectively: Zraika, Campbell, Simms, Oldfield and Batik-Dundar (block 1) and Councillors Oueik, Yang, Attie, Mahajer and Le Lam (block 2)
2. In September 2015, it is said that the position changed and Mr Zraika became part of 'block 2'. There is evidence before the inquiry that this block 2 was often referred to as the 'super six' and Block one became known as the 'poor four'.
3. Whilst the terms of reference of the inquiry are to inquire into the conduct of the Council as a whole it was clear from Council Assisting's opening submission and his conduct of the matter that the focus of the inquiry was primarily into the conduct of those councillors who comprised the "super six" grouping.

4. Notwithstanding paragraph 19 of Council Assisting 's opening submission that "This inquiry's principal areas of focus will be on the conduct of the 10 Councillors who were elected in 2012". Counsel Assisting and the Investigating Officers from the Office of Local Government had focused their enquiries on the activities of the 'super six'. It is in this context that Mr Yang was subpoenaed to produce documents and subpoenaed to give evidence both at a private hearing and at the public hearing.
5. The sole reason, it would seem, that Mr Yang was subpoenaed in this matter was because of his being part of the 'super six' who were constantly opposed by the 'poor four'. This inquiry appeared to prefer the position of the 'poor four' in each of the matters before it.
6. The written submissions of Counsel Assisting deals with the Inquiry in 11 parts and for consistency this submission adopts this numbering protocol.
7. In respect of each of the 11 parts, we say as follows:
 1. **The 2012 Council, Councillors, Staff, relationships and the termination of John Burgess.**
We note that there are no proposed findings in respect of Mr Yang in relation to this matter.
 2. **The Berala Village Planning Proposal.**
We note that there are no proposed findings in respect of Mr Yang in relation to this matter
 3. **The South Auburn Planning Proposal.**
This matter is dealt with in detail below.
 4. **The Grey Street Silverwater Planning Proposal.**
We note that there are no proposed findings in respect of Mr Yang in relation to this matter.
 5. **The Marsden Street Lidcombe Planning Proposal.**
We note that there are no proposed findings in respect of Mr Yang in relation to this matter.
 6. **The sale of Council land at 13 John Street Lidcombe.**
We note that there are no proposed findings in respect of Mr Yang in relation to this matter.
 7. **The Closure of Francis Street Lidcombe on 15 August 2015**
We note that there are no findings in respect of Mr Yang in relation to this matter.
 8. **40-46 Station Road Auburn, BBC Developments Pty Ltd**
We note that there are no proposed findings in respect of Mr Yang in relation to this matter.
 9. **14-22 Water Street, Lidcombe**
We note that there are no proposed findings in respect of Mr Yang in relation to this matter.

10. **1A Henry Street Lidcombe**

We note that there are no proposed findings in respect of Mr Yang in relation to this matter.

11. **Parking Related Conduct Matters**

We note that there are no proposed findings in respect of Mr Yang in relation to this matter.

The South Auburn planning proposal

1. Mr Yang gave evidence in respect of this matter [XPH 7 TR 5.4] that he moved the motion (which is set out at paragraph 234 Counsel Assisting 's submission) in order to develop the town centre. One should consider that at this time Mr Yang had been a councillor for only six months and was not aware of earlier planning proposals [Ex PH Tr7.11].

2. There is no evidence to suggest that Mr Yang was doing anything other than acting in accordance with his duties as a Councillor in representing the residents and ratepayers of his ward in seeking to develop this part of South Auburn. There is no evidence that he had any discussions with other councillors prior to moving this motion and indeed his evidence was that he did not discuss this motion with any other councillors before he moved it Ex PH Tr 5.9].

3. There is no evidence that Mr Yang had any discussions with Mr Francis or Mr Alvarez in respect of this planning proposal prior to moving it, or indeed at any time.

4. We note Counsel Assisting's proposed finding SA1 that option 1 was not a workable planning proposal and submit that no finding can be made against Mr Yang in this regard

5. We note that at paragraphs 281 and 282 of Counsel Assisting 's submission in respect of Mr Yang's voting history in relation to this matter he states:

"this effect alone gives rise to a serious issue regarding the ability of Mr Yang to comprehend, having regard to his difficulties with the English language, the workings of a process that required attention to detail in that language. In the case of the Auburn planning proposal that required, at the very least, the ability to distinguish between Option 1 and Option 2(a).

6. An assessment needs to be made of the evidence given by Mr Yang and the questions put to him by Counsel Assisting regarding this matter.

7. At page 8, line 43 of Ex PH7 Counsel Assisting put:

Q. The Minutes of Council record Mr Yang voting in favour of Option 2(a). Is that a mistake?

A. (Through interpreter). I agree, I just agree, but I can't remember exactly.

8. At page 9, line 38 - 46 of Ex PH7 Counsel Assisting put:
- Q. Yes. You wanted to pursue Option 1, didn't you?
- A. (Through interpreter). Yes.
- Q. You didn't want to pursue Option 2(a), did you?
- A. (Through interpreter). My memory is Option 1, yes.
9. It was never put to Mr Yang at this time that his confusion around voting for Option 1 or Option 2(a) was as a result of his English language skills.
10. At the public hearing – line 43 page 1334, it was put by the Commissioner:
- Q. You didn't feel you needed an interpreter to, first of all, understand the business papers?
- A. No I understand, yes.
- And at line 1 page 1335:
- Q. And you didn't feel you needed an interpreter to follow what was being said at Council meetings?
- A. No I don't need it; I didn't.
11. Mr Yang's evidence at PH 7 43-46 in relation to his English language skills was that 'I have some understanding, but the meaning of the lawyer wording, wording of the lawyer, in that case I have a difficulty, actually, but normal construction of word and some general English, okay, no problem.'

Conclusion

1. Mr Yang gave evidence fully and frankly at both the private hearing and the public hearing.
2. There is no basis for Counsel Assisting submitting that Mr Yang's English language skills were such that he could not distinguish between options in respect of planning decisions. In my submission, this inquiry has no basis on which to find that Mr Yang's language skills were such that he was not to fully and properly participate in and contribute to the workings of the Auburn Council.
3. There was no evidence put before the inquiry nor any submission made by Counsel Assisting of any wrongdoing by Mr Yang.
4. There is no suggestion that Mr Yang was doing anything other than acting in good conscience in compliance with the Act and in accordance with the terms of the Code of Conduct.

5. There was no evidence put before the inquiry nor any submission made by Counsel Assisting that Mr Yang acted in a way to deliberately benefit other Councillors.
6. There was no evidence before the inquiry nor any submission made by Counsel Assisting that there was any personal benefit obtained by Mr Yang directly or indirectly from any decision made by the council.
7. There was no evidence before the inquiry nor any submission made by Counsel Assisting that Mr Yang had a relevant pecuniary or non-pecuniary interest in any matter that came before the Council.
8. There was no evidence before the inquiry nor any submission made by Counsel Assisting that Mr Yang had any improper relationship with Council staff.



Mark Gardiner
Solicitor, Teddington Legal

Surry Hills, 3 November 2016.

AUBURN PUBLIC INQUIRY 2016

**Document 3
Written submissions of Irene
Simms**

Comments to submission by Counsel Assisting Auburn Public Inquiry

Part 1 Point 12. Despite the 'in principle' agreement, I did not stand for the position of Deputy Mayor in 2014. I offered my place to Clr Semra Batik-Dundar, and she was the candidate.

It is worth noting that the voting pattern of Clr Zraika changed substantially only when he no longer had any 'turns' left..ie he had been supported by us for the position of Deputy Mayor, as well as the position of Mayor. Given his voting record following his election as Mayor, I would NOT have supported him for a major role again... and would have told him this.

There was no 'terms of agreement' when the 5 of us met to discuss the positions of Mayor and Deputy in 2012. This was simply a group of people who supposedly shared similar 'ideals' it seemed, particularly in regard to planning matters. I have never and would never have made my vote 'conditional'. I don't personally accept that it is ethical to compel someone to vote against what they believe is in the best interest of the community.

Part 3. The South Auburn Planning Proposal

It seems to have been overlooked that Clr Yang says that he drafted the resolution without any assistance, or discussing the matter with anyone. (see 237). I would have thought, having heard Mr Yang's grasp of the English language, that it would be accepted that the wording of this resolution could not possibly have been produced by Clr Yang. From the get go I accepted that he was simply the mouthpiece for other Councillors (or others) who wanted this issue back on the table.

Part 5. Marsden St Planning Proposal

It appears that Clr Oueik not only had substantial land holdings in Mark St and several properties in Marsden St, I understand he also owns (or had options on) several properties on the western side of Raphael St as well (the side that was to be rezoned B4) and actually purchased 15 Raphael St (one of the sites of the original Planning proposal)

Part 6. The Sale of Land in John St, Lidcombe

JS9 and the role of Mr Brisby and council staff. The reason why this is our belief is because, when Clr Campbell, during debate on the matter, suggested that there should be at least a second valuation obtained, not one member of the staff panel brought to our attention that there was, in fact, the CBRE valuation attached behind the valuation that was adopted by Clr Attie. Even though we may have been unaware of the CBRE valuation, several senior staff HAD to be aware of it.. yet not one corrected Clr Campbell when he made that statement. (I did read the valuation report but still did not see the CBRE report as I stopped when I got to the attachments which were photographs of the properties, (these followed the ownership of the subject properties) as I thought this was the end of the material and I knew where the properties were and their ownership. I had done searches previously)

Part 8 40-46 Station Rd , BBC Developments Pty Ltd

597 correction: My note says “ Reminded GM that 1) level playing field 2) message sent to compliance staff if law is different for *a mate/councillor* than anyone else

Part 11. Parking related Conduct Matters ...while I support the comments by Counsel assisting that Mr Hon Wing Ho (former Finance Manager) is to be commended for his efforts to put on record his concern as to 'expense claims and payments', I also believe that the Rangers should also be commended for raising their concerns about inconsistencies in applying the rules to and by Councillors. There was no 'personal gain' for these staff in making these matters known. They were merely staff who were very concerned as to what was going on. These women, when they came to me, did so, I assume, because they trusted me to point them in the direction of someone who could help. The Internal Ombudsman had been let go by Mr Fitzgerald Senior, their manager was implicated in what was going on, as was the General Manager. They came to me to try to stop something that they believed was corrupt in the system, and it was immediately agreed that the best forum for them, under the circumstances, was ICAC.

Schedule A. Transcript of Council Meeting 7 October, 2015 – The Grey St Planning Proposal

clarification:1:57:25 Clr Lam (Mayor)

Councillor Oldfield do you second it?

Clr Oldfield

I second it

Clr Simms

Thank you madam Mayor. This is substantially the same proposal as went previously went to the Gateway and was refused at Gateway. What was, what had been resubmitted is pretty much the same. I note that the staff are suggesting that we can change the zoning of it and reduce the number of units, but one of the reasons we made Silverwater Road B6 was because, and we changed it from B3, R3 on the other side of the road, was because we came to the conclusion that we believe that Silverwater Road was not a suitable, or a healthy environment to ask people to live on. Um because of the amount of traffic, because of the amount of pollution, noise etc. So whether or not we did the reduced number of units, which the saying is about, if we allowed enough units as it says to make the development sustainable that would be about 178 units or the 250 units that the applicants are talking about, to me a 180 units are still far too many. If we talk about shop top* housing that's one thing, but 180 units at that site, still is, still (* shop top housing is dwellings usually above one's own shop)

Possible Outcomes: recommendations not made by Counsel Assisting but which I would ask to be considered..

Annual Councillor returns: It should be mandatory for full physical addresses to be recorded, not just Lot and DP number. This allows greater transparency and for those not in the real estate business to be aware of what properties a Councillor or staff member has an interest in

Companies: Full disclosure of any proprietorship in companies. Stating that you 'a director' or a 'shareholder' when you are the 'sole director', or one of only a few, is not transparent.

Property Developers/Estate Agents as Councillors: I believe that the general public believe that there is an obvious conflict of interest where developers and estate agents (management at least) have decision making powers over development. The behaviour of this Council has, I believe, highlighted that issue. I do believe that Councillors should have a role in planning decisions as they are 'local' and better understand local barriers, constraints or possibilities for development. I do NOT believe, though, that there is a place for property developers or estate agents in this scenario. Professor Maurice Daly, when he investigated Tweed Shire Council in 2005 (?), recommended that those with a substantial 'interest in land' should be excluded from standing for local Council.

Whistleblower protection: There needs to be an avenue where staff can report issues of serious

concern when senior staff or Councillors are suspected of improper conduct. Perhaps there needs to be an officer in the Office of Local Govt. appointed to that task, and the phone number should be readily available to ALL Council staff... in staff rooms, noted on pay dockets, for example. Staff who report matters (not because of vexatiousness) need to know that, if they are acting in the best interest of their Council/community, that they will be protected. The issue with John Burgess is an example of the system not protecting the 'whistle blower'. Similarly, it would have been preferable that the Council's enforcement staff had 'someone' that they could readily take their concerns to, outside of the Council, due to their concern that the Mayor, General Manager and other more senior staff were implicated in the issues they were observing at Council.

General Manager contracts should be done at arms length as well. A General manager's employment should not be at the whim of a Council which can hold him/her to ransom, as it were. Once employed, the GM's security of tenure should be subject more to achieving positive improvements such as debt servicing ratios, etc, than the political whim of the Councillors.

This inquiry: Despite a number of adverse findings, there is no recommendation to take any action against any of the former Councillors or senior staff who were implicated in some serious questionable conduct. If the Commissioner accepts the finding that there were some serious breaches, consideration should be given to penalties within the Local Govt. Act for consequences, even if these people are no longer on Council. It is worrying to me that come September, 2017, it appears that each and every one of these former Auburn councillors would be eligible to stand for re-election. If this is the case, then it appears that nothing has been achieved by this Inquiry...there have been no consequences for their actions.

I do generally agree with the recommendations that have been made by Counsel Assisting.

(Former Councillor Irene Simms)

AUBURN PUBLIC INQUIRY 2016

Document 4
Written submissions of Viv May
PSM, Administrator, Cumberland
Council



Office of the Administrator

4 November 2016

The Commissioner
Auburn Public Inquiry
Locked Bag 3004
NOWRA NSW 2541

Dear Mr Beasley

This submission is made in response to the orders made by you on 18 October 2016, and forms the response by me as the Administrator of Cumberland Council since 12 May 2016.

I have worked in local government for 46 years, with some 27 years as General Manager of Mosman Council.

Based on the events I have observed at the former Auburn City Council and more recently at Cumberland Council as well as my experience in local government over many years, I have formed the view that the changes this submissions suggests would have prevented several of the circumstances which were the subject of the Inquiry and may even have obviated the need for the current Inquiry. I also believe that they would significantly reduce the opportunities for corruption that can arise under the present legislative arrangements.

A Wider IHAP Scheme

In my opinion, an opportunity for self-interest or even corruption can arise wherever involved persons make decisions which can deliver significant financial returns to themselves or those they represent.

Councillors are necessarily persons with an interest in their local government area. They often are land owners, and as this Inquiry has seen, can be involved in development as well. A development application often delivers the opportunity for significant financial returns and even where Councillors excuse themselves from decision making, their influence remains.

I believe that decisions on permissible land uses as well as development applications made by Councillors are often influenced by political imperatives, rather than on solid planning grounds. I have seen on many occasions over the years the recommendations of the planning staff overturned on the basis of political motives, which had no basis in good planning.

I propose the removal of Councillors from the determination of development applications under Part 4 of the Environmental Planning & Assessment Act 1979 ("the Act") and that in relation to the plan making process under Part 3, a process be put in place that provides an independent transparent assessment/review prior to recommendation to Council.

I recommend that the Independent Hearing and Assessment Panels (IHAPs) as envisaged under the provisions of section 231 of the Act to take over these functions. IHAPs are made up of persons with particular skills in planning and other relevant professions, who have no personal interest in the local government area. I believe that the IHAPs have worked particularly well in my experience and their decisions have been uncoloured by the politics that could have surrounded the determination of the development applications. As such IHAP should be a compulsory part of the planning process.

In respect of decisions on development applications, I would recommend the introduction of a scheme where the planning staff would retain their delegations to approve or refuse developments where certain circumstances exist. This is usually not the case where there are three or more continuing and unresolved individually expressed objections to the development.

In all other circumstances I would recommend that assessment and determinations under Part 4 are to be carried out by the Independent Hearing and Assessment Panel which is constituted under the provisions of section 231 of the Act by the Council.

The membership of a Panel would consist of four members, two to be drawn from a pool of experts in the respective fields of environment and planning, a rotating community member and a permanent chair with a legal background. The members of the panel are not to include

- (i) Any person who has previously or currently serves as a Councillor on the Council
- (ii) With the exception of the rotating community member, any person who lives in or has an interest in land within the LGA.

The Council would provide staff and facilities for the purpose of enabling a panel to exercise its functions and members of a panel would be entitled to be paid such remuneration (including travelling and subsistence allowances) as the Council may from time to time determine in respect of the member (possibly with guidance from the Minister).

Independence and Reporting

It is an imperative component of a transparent and corruption free system that those officers working within the system feel that they may make recommendations and decisions without fear or favour. Whilst the provisions of s 352 of the Local Government Act ("LGA") provide that staff are not subject to direction by the Council or Councillors as to the content of any advice or recommendation, I would recommend that this provision be strengthened to make it clear that it is the responsibility of all parties that the staff work in an environment where they can make recommendations without influence.

I also note that there are provisions contained in the Model Code of Conduct for Councillors and Staff, which seek to prevent councillors or other staff influencing the work of staff. However, as has been seen in the present Inquiry, those provisions have been overlooked in certain situations. I believe that including stronger provisions for the independence of staff in the Act would highlight the importance of their independence to the effective function of

councils and would provide a stronger foundation to staff who feel that others, often more senior officers, are attempting to influence the carrying out of their duties.

These are the persons at the coal face of the development assessment process, and it is of utmost importance to ensure that they feel that they are protected from the ramifications of making recommendations or decisions which are perfectly reasonable on planning grounds but which may be politically unpopular for those holding positions as Councillors or senior officers.

I would recommend that the provisions of s352 LGA 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 also believe it is essential that a senior member of Council staff be appointed as an internal ombudsman to deal with such matters in a similar way to the appointment of the public officer. This person must be provided with training in privacy and protection of whistle blowers.

This person will be the contact for any staff member who feels that they are being unduly influenced, and will be empowered to deal with and make recommendations to the General Manager for action to resolve the issue.

I recommend that the LGA be amended to enshrine this protection in legislation such that the internal ombudsman is to report to the General Manager unless in the case of a complaint regarding the General Manager, to the CEO, Office of Local Government. The employment of the internal ombudsman may only be terminated by the CEO, Office of Local Government at the recommendation of the General Manager.

Increased Protection of General Manager

The General Manager holds a vital position within the Council. The General Manager is delegated with almost all functions of the Council. Where the relationship between Councillors, staff and the General Manager is functional, the Council can operate efficiently.

However, there are many examples throughout New South Wales including the present case where the breakdown, convenience or compromising of the relationship causes ramifications throughout the Council and its ability to perform its functions effectively.

It is my opinion that the breakdown in the relationship between Councillors and their General Manager often arises where the General Manager makes decisions which might be appropriate for the Council as a statutory authority but are not made according to the political expediencies of the elected councillors. Other circumstances leading to difficulties in the relationship between the General Manager and the Councillors arise from personality differences or conflicts. The ease with which a General Manager can be removed does not encourage the sorting through of differences, rather it enables the emotion of political decision making to shadow the businesslike manner in which the functions of the council should be carried out.

To ameliorate those concerns giving rise to a break down in the relationship between Councillors and their General Manager I would recommend the introduction of a form of statutory protection to be accorded to general managers. I propose that the Regulations 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 a Council.

I believe that this amendment would enable the General Manager to carry out their tasks without concerns as to whether their decision may cause friction or could ultimately lead to his or her sacking from the Council.

In my view, the protection afforded by this change would mean that those elected to serve the Council would be motivated to build and not destroy their relationship with a General Manager, in circumstances where they know they are bound to each other for the term of the contract.

Thank you for the opportunity to present this submission.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Viv May', with a stylized flourish at the end.

**Viv May PSM
ADMINISTRATOR**

AUBURN PUBLIC INQUIRY 2016

Document 5
Written submissions on behalf of
John Burgess

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SYDNEY NSW 2000**

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Commissioner Richard Beasley SC
Auburn Public Inquiry
Office of Local Government
Locked Bag 3004
NOWRA NSW 2541

Our Ref: MM:09329

Your Ref: Darren Sear

9 November 2016

Dear Commissioner

**Edward John Burgess
Auburn City Council Inquiry**

We act for Edward John Burgess in this Inquiry and have been given leave to appear on his behalf.

We have had the opportunity to consider the submissions made to the Inquiry by Counsel Assisting dated 17 October 2016. We are instructed to make the following submission in reply to Counsel Assisting's written submissions.

We note that the submissions make no recommendations or adverse findings relating to our client. On the basis of Counsel Assisting's submissions we do not propose to make any submissions to the Inquiry, apart from the noting the matter outlined below.

Mr Oueik's Construction Zones

We note that on page 139 at paragraph P10, Counsel Assisting states that on the basis of the evidence in relation to parking related conduct matters (Part 11 of the submission):

"That senior management gave effect to those resolutions is not to the credit and is explained in part by the relationship that Mr Oueik was able to foster with each of Msrs Burgess, Brisby and Francis."

We assume, given the context of the statement, that the word "resolutions" is intended to mean "directions", and those directions related to the enforcement of parking restrictions within construction zones adjacent to Mr Oueik's development sites.

Mr Burgess wishes to advise that he was not the General Manager when the issues concerning Mr Oueik's construction zones had arisen. The evidence of Mr Soares and Mr Lawrence is that those issues occurred in 2014. Mr Burgess' employment was terminated in March 2013.

Right to Make Further Submissions in Reply

We understand that other interested persons may wish to make submissions and that such submissions may seek to persuade the Inquiry to make findings and recommendations contrary to those of Counsel Assisting.

Should these other submissions seek to suggest that a finding or recommendation be made against Mr Burgess we seek your assurance that we will be given the opportunity to consider those submissions and make any necessary submissions. Should this not be the case we would ask that you advise us as a matter of urgency so that we may properly advise Mr Burgess.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mantei', followed by a period.

Michael Mantei
Lawyer Director – Planning Law Solutions
Accredited Specialist Local Government and Planning Law

AUBURN PUBLIC INQUIRY 2016

**Document 6
Written submissions on behalf of
Net Attie**

NED ATTIE'S SUBMISSIONS

A. INTRODUCTION

1. The need for this inquiry came about because of disquiet in relation to the Auburn City Council. Some of that disquiet was generated by disaffected members of the Council; some of it was generated by a sensational, lop-sided and inaccurate press account of the events at Auburn City Council. There was public disquiet too. This inquiry has shown that, in fact, there were few genuine problems at Auburn. The problems were *perceived*, not *real*. That said, as explained in Section B of these submissions, there is at least one area where there was a reason for concern which can be fixed.
2. In the end, the evidence in this inquiry has established an *absence* of any misconduct on the part of Ned Attie. On the contrary, once the full story was told this emerged with clarity:
 - There was *no evidence* presented to the inquiry which suggested any misconduct on the part of Mr Attie.
 - Auburn was perceived to have been split into voting blocs – and this perception was generally accurate. But the point is that there is nothing wrong with that. Majority rule is the basis of our democratic system. It will always be the case that the minority will become disaffected because they do not have the ability to control events. There is nothing wrong with this – it is, incidentally, how our federal and State Parliaments work.
 - It became obvious during the course of the inquiry that much of the problem stemmed from disaffection felt by members of the minority bloc – some of whom were willing to make serious claims, with *no evidence* to support the claims.
 - It needs to be made clear – there is nothing inherently wrong with like-minded elected officials meeting, caucusing, and agreeing between themselves to support a particular policy. Strangely, a *perception* this seems to have been one of the matters which most troubled the disaffected minority bloc, even though they engaged in caucusing between themselves.
3. This inquiry was repeatedly described in the press as a “*corruption inquiry*”. Whether that was an apt description is debateable, but one thing emerges quite clearly – there was *no evidence* of any corruption by Mr Attie. In many ways this only reaffirms the positive effect of the present inquiry: If, after an exhaustive examination of the available evidence, the inquiry arrives at the result that there was no corruption, then that is a good thing, not a bad thing.

A.1. The structure of these submissions

4. The substantive submissions of Ned Attie address the seven issues listed below. Although there are eight sections, they are designed to effect three separate purposes. One purpose is to make a recommendation for potential reform in the make-up of local government (see Section C). A second purpose is to answer submissions made by counsel assisting (see Sections B, D, E and F). The third purpose is to condemn the false evidence of a witness – Warren Jack (see Section G).
5. In relation to the second purpose of these submissions it is important to note that we only address counsel assisting's submissions {"CAS"} where he has submitted that a finding be made which could be adverse to Mr Attie. It has been assumed that the submissions of counsel assisting identify all of those matters. If adverse findings outside those submissions are contemplated, then Mr Attie asks he be given the opportunity to address them.
6. The structure of these submissions is as follows:
 - Section B – where Mr Attie outlines a number of essential factual findings which should be made in relation to him and his role on Auburn City Council.
 - Section C – where Mr Attie makes a general submission directed at improving the structure of local government in New South Wales.
 - Section D – in this section Mr Attie addresses a submission made by counsel assisting in submissions on South Auburn {see CAS para SA 20} that Mr Attie should be the subject of an adverse finding. So that it is clear, it is Mr Attie's submission that the Commission *cannot* make such a finding as a matter of fact, law and procedural fairness.
 - Section E – in this section Mr Attie addresses another submission made by counsel assisting that Mr Attie should be the subject of an adverse finding, this one in respect of Grey Street {see CAS para GS 19}. Again, it is Mr Attie's submission that the Commission *cannot* make such a finding as a matter of fact, law and procedural fairness.
 - Section F – where Mr Attie addresses a variety of (in some instances, unusual) criticisms made by counsel assisting. So that it is clear, *no* finding adverse to Mr Attie can or should be made on any of these matters.
 - Section G – where Mr Attie invites adverse findings in respect of Warren Jack.

A.2. Two preliminary questions

7. There are two matters of fundamental importance which must be addressed at the outset.
8. The first preliminary issues arises because, in two places, counsel assisting has asked for the Commissioner to make specific findings adverse to Mr Attie {see CAS para SA 20 and CAS para GS 19}. In each instance the submission is that the Commissioner should *find* that Mr Attie breached a duty imposed upon him by s439(1) of the *Local Government Act*. It should be noted that similar submissions have been made against other Councillors and Council employees.
9. The second preliminary issue relates to the way in which counsel assisting has asked that the finding be framed.

No power to make findings under s439(1)

10. There is *no power* to make either of the two adverse findings against Mr Attie sought by counsel assisting. This is because there is no power to make such a finding regarding a breach of s439(1).
11. As noted by the Commissioner during remarks opening the inquiry, the inquiry is conducted under s438U of the *Local Government Act* and is an {T5.28-5.36}:

... administrative inquiry ... set up to obtain facts and not finally determine legal rights. A public inquiry such as this can only make recommendations to the Minister. Any findings of fact that are ultimately made are expressions of opinion. They bind no-one; nor are any recommendations that might ultimately be made binding on the Minister and the inquiry itself cannot implement recommendations it might make.

12. A finding of a breach of a duty cast by s439(1) does determine legal rights. It would cause reputational damage, a finding which has legal consequences: see, for example, *Duncan v ICAC* (2015) 256 CLR 83 at [13]-[15].
13. It is respectfully submitted that it would be a legal error to trespass into making *findings* that there had been some breach of some duty. It is not even clear whether s439(1) of the *Local Government Act* contemplates the possibility that *any* Tribunal has the power to make such a *finding* – it is true that the section creates a duty, but the legal consequences arising from that are less than clear: cf the specific statutory powers of ICAC to make a finding of this kind considered in *Duncan v ICAC*.

The finding as framed by counsel assisting

14. There are problems with the terms of the finding sought by counsel assisting.

15. In each instance, as it applies to Mr Attie, counsel assisting has asked for a compendious finding in accordance with the words of s439(1) – ie that there was a failure to act honestly *and* a failure to exercise a reasonable degree of care and diligence.
16. The two concepts are obviously quite separate and distinct. Counsel assisting makes no attempt to draw a distinction between these two concepts.
17. It is essential to look at each of the two elements *separately* to see whether each separate finding is supported by the facts.
18. Mr Attie expresses his disappointment that he has been made the subject of a submission that he did not act honestly. Not only is such a finding not open on the evidence, it would involve a serious breach of procedural fairness to Mr Attie:
 - No actual submission is made that Mr Attie acted dishonestly.
 - If an allegation of dishonesty is to be made then, legally speaking, this would require the evidence to show that Mr Attie had a “*knowledge, belief or intent*” which rendered his actions dishonest: *Peters v The Queen* (1998) 192 CLR 493 at [18]. No submissions are addressed to this critical issue.
 - Similarly, if an allegation of dishonesty is made one would expect there was some motive for the dishonest act. None is suggested.
 - Finally, it would be very important to the person that they be given the opportunity to address the allegation of dishonesty in his or her evidence. As demonstrated in more detailed submissions below, this was not done.
19. For these reasons it would be a denial of procedural fairness to Mr Attie to make any finding which suggested any dishonesty on his part.

What should be done?

20. In light of these matters, we would respectfully request the following:
 - That, generally, counsel assisting withdraw any submission that there should be a *finding* of a breach of s439(1) of the *Local Government Act*; and
 - That, specifically, counsel assisting withdraw any allegation of dishonesty against Mr Attie.

SECTION B: ESSENTIAL FACTUAL FINDINGS

21. There are several essential factual findings which *must* be made in relation to Mr Attie:
- Mr Attie is openly pro-development {T1234.9-1235.10}. This has never been a secret: Mr Attie campaigned for election on that platform; moreover Mr Attie succeeded in being *re-elected* on that pro-development platform. Mr Attie's voting patterns have been entirely consistent with the platform to which he adheres, and upon which he was elected. Unlike some politicians, Mr Attie has been honest in his adherence to his election promises.
 - Mr Attie is not a property developer, and has never been involved in any property development in the precincts of Auburn City Council {T1882.18-1882.30}.
 - Mr Attie has never sought or received any advantage – direct or indirect – as a result of his actions as a Councillor at Auburn City Council. It was *not* suggested to Mr Attie that he had sought or received any type of advantage as a result of his deliberations and decisions as a Councillor.
22. Those matters are established *facts*. There are some other observations which we submit should be made in relation to Mr Attie:
- Subject to one matter, Mr Attie gave his evidence in a straightforward and conscientious fashion. The single exception reflects a likelihood that his original recollection in relation to events at Grey Street was wrong (this is dealt with in Section E of these submissions).
 - Mr Attie was an open and honest witness. As part of an open approach to giving evidence, Mr Attie volunteered access to counsel assisting of all of his private telephone records. Considerable use has been made of these, but they reveal no misdeeds. If there was anything to hide, it was not hidden.

SECTION C: A SUGGESTION FOR REFORM

23. The need for the present inquiry was generated by public disquiet in respect of the activities of Auburn City Council.
24. It is submitted that the evidence has established that any problems at Auburn City Council were more *perceived* than *real*.
25. That said, Mr Attie accepts that perceptions are very important. And it is further accepted that measures should be taken designed to eliminate the perception that something has gone wrong.
26. It is plain that the *perception* that something had gone wrong on Auburn City Council was generated from the fact that some of the Councillors (not including Mr Attie) were property developers who developed property within the precincts of the Auburn City

Council. This gave rise to a perception that those Councillors were making decisions which may benefit themselves, or that associations they had been able to make with Council staff or other Councillors enabled them to get favourable decisions. Even if such perceptions were not real, it is easy to see how they would give rise to genuine disquiet.

27. A simple way of controlling this matter would be by changing the law, thereby prohibiting a property developer (or a person who was associated with a property developer – as that is defined in relevant portions of the corporate law) from being involved in *any* property development within the precincts of the Council during the period they were a Councillor. Mr Campbell agrees with this proposal {T745.31-746.9}.
28. The benefit from such a reform is obvious, and – given the reasons for the need for this inquiry – does not require restatement. It is true that there would be a detriment – such a prohibition may be seen as infringing the implied freedom of political discourse, but such an infringement would not be unreasonable nor disproportionate, and is likely to be within constitutional limits: cf *McCloy v New South Wales* [2015] HCA 34.

SECTION D: SOUTH AUBURN

29. Counsel assisting submits that the Commissioner “*would*” find that Mr Attie “*neglected his responsibility under s439(1) of the Local Government Act to act honestly and exercise a reasonable degree of care and diligence in carrying out his ... functions under this or any other Act*”¹ {CAS para SA 20}.
30. This submission should be rejected. A submitted above, such a finding is not available as a matter of law. As explained below, such a finding is not available as a matter of fact and would involve a denial of procedural fairness. In summary, these are the flaws in the submission:
 - No attention is paid to the legal requirements of s439(1).
 - No factual basis for making such a serious finding are provided; the facts do not support such a finding.
 - The essential propositions were not put to Mr Attie – so such a finding would constitute a denial of procedural fairness.
31. We will now elaborate upon each of these flaws.

¹ We take it that the reference to a breach of duty under “*any other Act*” – especially in the absence of the identification of the other Act – is merely rhetorical flourish.

D.1. The legal issues

32. Counsel assisting does not address the legal issues raised by s439(1) of the *Local Government Act*.
33. These are not simple issues.
34. There are difficulties in interpreting s439(1). Is there one duty – in the sense that it is only breach if the person acts both dishonestly *and* fails to exercise reasonable care? Or are there two separate duties – one to act honestly; the other to act with a reasonable care?
35. This issue is raised by us in Section A.2. above. The submissions of counsel assisting fails to address the point. That raises, but leaves unanswered, these questions:
 - Is the allegation against Mr Attie one of dishonesty, or is it an allegation of a lack of reasonable care, or is it both? Mr Attie should not be required to guess or to make assumptions as to the nature of the allegation made against him.
 - Assuming that the allegation is dishonesty – what is the act which supports that finding? None is specified by counsel assisting. It is impossible to answer the submission.
 - Assuming the allegation is a failure to exercise reasonable care – in what respect? A submission that some act failed to constitute reasonable care would suggest that there was some standard applicable, and that Mr Attie breached that standard. Without any specification of what that standard involved (or what constituted the breach) it is impossible to answer the submission.
36. We have already addressed submissions on the “*dishonesty*” issue: there is nothing to support such a finding; no submissions were made by counsel assisting to support such a finding.
37. Assuming that it is enough to satisfy s439(1) to show that the person acted with a lack of reasonable care, then that raises its own problems. Is the test like that necessary to establish mere negligence? Or, given the context, does it require a more serious departure? Is the test objective or subjective? One of the key components in establishing negligence is an ability to demonstrate that which should have been done which would not have constituted a lack of reasonable care: what should have been done here?
38. Presumably, counsel assisting is asserting that to display reasonable care required Mr Attie to vote against the motion. If that is the submission, then it engages a large proposition:

- The Councillors were evenly split on whether the motion should pass or fail. By itself, that fact demonstrates that it would hardly be *unreasonable* to take one side or the other.
 - This is a statutory duty. A finding of a failure to take reasonable care must apply a rule of general application. What is that rule? Would it make any Councillor susceptible to an adverse finding under s439(1) if that Councillor disagreed with the majority view? Take this example: if a Council split on a vote nine to one – does that mean that the single dissenting Councillor must be acting *unreasonably*?
39. These factors demonstrate, that something more must be shown before making such a serious, adverse finding.

D.2. No factual basis

40. It is respectfully submitted that the suggestion that Mr Attie should be made the subject of such an adverse finding in respect of South Auburn comes a little “*out of the blue*”:
- Counsel assisting’s submissions on South Auburn are contained in 13 pages {CAS pp42-55}. Mr Attie is only mentioned in ten paragraphs {CAS paras 235, 291, 298, 308-310, SA 8, SA 9 (implicitly), SA 18 and SA 20}. In most of these cases the references to Mr Attie are only incidental.
 - There is only one oblique reference to the evidence given by Mr Attie {CAS para SA 8} – “*to pick up on Mr Attie’s phrase that it was his position to ‘take what you can get’ it is most surprising that in the case of South Auburn, that did not occur*”.
41. Normally, before a serious, adverse finding is made against a person, one would expect an explanation as to why the person’s evidence should not be accepted. That issue is not addressed by counsel assisting. No submission is made that Mr Attie’s evidence should be rejected.
42. When the submissions directed against Mr Attie are read it can be seen that there is *no evidence* whatsoever to implicate Mr Attie in any misconduct.
43. Earlier reference was made to the absence of a suggestion of a motive. It is notable that counsel assisting does, albeit in an indirect way, suggest that other Councillors may have had a motive {CAS paras SA 7, SA 17 and SA 19}². Those submissions are *not* made against Mr Attie. As it stands, there is *no evidence* to support the existence of any motive on the part of Mr Attie, and *no submission* to support such a finding.

² This is not intended as a submission that an adverse finding can or should be made against those other Councillors

44. Any finding suggesting that Mr Attie was involved in misconduct is unfair because it overlooks entirely Mr Attie's evidence on the point. As the Commissioner would be aware, Mr Attie held a "*pro-development*" preference, and said that he favoured the rezoning a larger part of South Auburn. The motion which was before Council proposed rezoning, but for a smaller area – it was in that context that Mr Attie supported the motion: the alternative being that there be no further rezoning at all:
- Counsel assisting does not submit that Mr Attie's evidence on this point should not be accepted, and only suggests that he found Mr Attie's evidence "*most surprising*" {CAS para SA 8}. Counsel assisting is easily "*surprised*" – on a proper analysis it is not surprising at all. By his vote Mr Attie was securing part of his preference. It is sometimes said that politics is "*the art of the possible*".
45. And, finally, the idea of making Mr Attie the subject of an adverse finding is irrational and unfair. For some reason – which is left unexplained – counsel assisting only seeks adverse findings against Mr Attie, Mr Oueik and Mr Zraika. Yet the fact is that the motion was moved by Mr Yang, and that Mr Yang voted in favour of it:
- We do not suggest any impropriety on the part of Mr Yang, but if there is some rational basis upon making an adverse finding against Mr Attie, why would the same reasoning not apply to Mr Yang?³

D.3. Denial of procedural fairness

46. None of the following propositions were put to Mr Attie:
- That there was any element of dishonesty in the way that he approached his decision in respect of South Auburn.
 - That his conduct was driven by an improper motive.
 - That he overlooked something, or improperly or incorrectly had regard for some factor which might constitute an absence of care or diligence.
47. There was an ample opportunity to ask Mr Attie questions along these lines. Mr Attie gave evidence on three occasions and for a cumulative period longer than any other Councillor. As set out above, the whole of the examination of Mr Attie on the South Auburn issue was brief, and there was never any suggestion made of any impropriety on the part of Mr Attie.

³ This is not intended as a submission that an adverse finding can or should be made against Mr Yang

SECTION E: GREY STREET

48. Counsel assisting has submitted {CAS GS 19} that the inquiry “*would find*” that Mr Attie “*abrogated his responsibility under s439(1) of the Local Government Act to act honestly and exercise a reasonable degree of care and diligence in carrying out his ... functions under this or any other Act*”⁴.
49. As explained in Section A.2., such a finding is not legally available. As further explained in Section A.2. a finding of an absence of *honesty* is not available on the evidence. Other general considerations which apply here have been the subject of submissions in Section D – we rely upon those without repeating them.
50. The balance of this submission addresses the submission that Mr Attie *abrogated* his duty to exercise reasonable care.
51. A factual matter must be addressed at the outset. Much is made by counsel assisting of Mr Attie’s *original* evidence that he had been solely responsible for drafting the amended motion. While it is not submitted that this demonstrated some dishonesty on the part of Mr Attie, the submission lingers – although its purpose remains unclear. So that it is clear, we will set out Mr Attie’s position:
- Mr Attie *accepts* that the *whole* of the evidence supports the conclusion that he prepared his draft of the amended motion using a template proposal provided to him by or on behalf of Mr Sankari. This, incidentally, is exactly what Mr Attie said in his evidence, once he was given the full context {T1238.10-1239.16}.
 - In making that concession Mr Attie acknowledges that an earlier part of his evidence was *incorrect*, but he denies that it was *false*.
 - Once this is understood, it can be seen that the issue goes nowhere. So what if Mr Attie (like many other witnesses, in many other courts, on a daily basis) made a mistake with part of his evidence?
52. The real issue here is whether or not there was any impropriety on the part of Mr Attie in proposing and voting in favour of the amended motion. There is *no evidence* to support a finding of impropriety. It was not put that way to Mr Attie (the closest it got was the suggestion that Mr Attie put the amended motion on the “*direction*” of Fawaz Sankari, which Mr Attie denied). If there was any impropriety it had to involve Fawaz Sankari, yet this was not put to Mr Sankari (and although counsel assisting said he intended to recall Mr Sankari {T1828.7}, he did not do so).
53. These are the essential facts – none of which are contested:
- Mr Attie was avowedly pro-development {T1234.9-1235.10}.

⁴ The flourish – “*any other Act*” – has been commented upon before

- In particular, Mr Attie was strongly in favour of the development at Grey Street: he explained why he supported the development. While she was of a different view, Councillor Irene Simms agreed that these were arguments which could be “*justified by somebody trying to do their best in the interests of Auburn*” {T356.14}.
 - The Grey Street proposal had progressed to the Gateway on one occasion and failed {T1879.15}. Mr Attie did not agree with the Gateway decision {T1878.33-1879.46}. Mr Attie was not bound to change his opinion and agree with Gateway (if he did, that *would* constitute an abrogation of his duty).
 - The original Gateway decision did not mean that an amended version of the proposal – or precisely the same proposal – could not be passed by Auburn City Council and resubmitted to Gateway. It did not mean that Gateway could not change its mind.
 - All that occurred was that, for the same reasons that he supported the *original* proposal, Mr Attie supported the *second* proposal.
 - It is quite obvious – and now conceded – that Mr Attie took it upon himself to put the proponent’s preferred version of the proposal to Council – but that is entirely consistent with Mr Attie’s consistent publicly stated views on this matter.
 - Mr Attie was never seeking a personal benefit, nor did he receive a personal benefit arising out of his support for the Grey Street proposal {T1240.3-1240.15; 1880.6-1880.13}. This evidence – given on two separate occasions – was not challenged.
 - Even though the second proposal passed through Council, that was not determinative. The Grey Street proposal had to be resubmitted to the Gateway proposal {T1880.15-1880.22}. There were multiple checks and balances in place.
54. In all those circumstances it is difficult to see how it can be sensibly suggested that there was some lack of reasonable care on the part of Mr Attie. He supported the proposal; he gave his reasons for supporting the proposal; he moved the amendment; and he voted in favour of it.
55. This is yet another area where it seems that, unless a Councillor agrees with the view of the minority bloc, they should be regarded as misconducting themselves. That, of course, is not the correct test. It also seems that it is assumed that the Grey Street proposal lacked merit – that is obviously wrong – see the evidence of Councillor Simms.
56. Finally, something needs to be said about the fact that the amended motion passed so easily and swiftly through Council. That is hardly surprising. This had been a

contentious issue which had been dealt with on an earlier occasion. Following the refusal of the original proposal at the Gateway process, the proposal had been remitted to Council and hammered out for a second time. By the time the amended motion came to the Council meeting, not only were the issues well-known, but the battlelines were clear. Some Councillors supported the proposal; some opposed it. There were reasonable arguments to support each side. One side won; the other side lost. That is how government works.

SECTION F: SOME OTHER SUBMISSIONS

F.1. Voting blocs

57. There seems to be some criticism of the majority bloc on Auburn City Council because they were in agreement on issues. If this is offered as criticism, then it is misplaced:
- This is a phenomenon which occurs in all democratically-elected bodies – look, for example, at the federal Parliament where individual party members are “*whipped*” (at least metaphorically) to follow the party line.
 - It is quite clear that the minority bloc on Council caucused between themselves. No-one is suggesting that there is anything wrong with that: why (if it happened) is it wrong for the majority bloc to do so?
58. Although there is some *implicit* criticism of members of the majority bloc for agreeing with each other, or for speaking to each other, no *explicit* submission is made that it involved misconduct.

F.2. Relationship between Councillors

59. Counsel assisting seems to be concerned that some of the Councillors had friendly relationships. The Commissioner should not share that concern: it is a good thing, not a bad thing.
60. If it assists in clearing up outstanding issues, Mr Attie will *admit* that he enjoyed friendly relations with each and every other Councillors. In fact, Mr Attie will *admit* that he encouraged friendly relations with each and every member of the Council, including those in the minority bloc. Worse still, he will even *admit* that he is a generally friendly guy.
61. What is much less clear is why this is thought to be a problem.

Mr Attie and Mr Mehajer

62. Counsel assisting submits that Mr Attie's telephone records revealed "*a very close and apparently business connection*" with Mr Mehajer. If so, so what? And the submission is not available: there is *nothing* to indicate they were "*very close*", and *nothing* whatsoever to suggest that they had "*business connection*".
63. In any event, no misconduct is suggested to arise from this – a question might be asked: Why was this submission made?

Mr Attie and Mr Zraika

64. Again, counsel assisting complains that "*Mr Attie and Mr Zraika are good friends*" {CAS para 87, page 17}. So what if they are?
65. In any event that submission is not available. An exchange of friendly text messages does not indicate that people are "*good friends*". It might mean nothing more than each has a sunny disposition.
66. But even if it was true that Mr Attie and Mr Zraika were "*friends*" (or even worse, "*good friends*") is that a problem? This seems to be an *implicit* suggestion that Mr Attie and Mr Zraika might do favours for each other – yet that explicit submission is not made (and that is appropriate because there was no evidence to support it and the proposition was not put to either of them).

F.3. Relationships between Councillors and staff

67. Again, there is an *implicit* criticism that certain Councillors had good close, friendly relationships with members of staff. No *explicit* submission is made that this involved any misconduct on the part of anyone, including Mr Attie. For example, Mr Campbell said that the general manager, John Burgess, worked "*very, very closely with Irene Simms*" {T743.44}. Is that a problem?
68. One must query the utility in investigating a matter like this: will it be a recommendation following this inquiry that it is *improper* for Councillors to enjoy a good close, friendly relationship with the staff of Council?

Mr Attie and Mr Francis

69. These matters need to be addressed so far as they affect Mr Attie:
- Counsel assisting submitted {CAS para 62, page 13} that telephone records indicated that "*an ongoing relationship*" between Mr Attie and Glenn Francis. So what?

- There is a later submission that the exchanges do not suggest “*anything untoward*” {CAS para 65, page 14}. Then why refer to them?

Mr Attie and Mr Brisby

70. Even more surprising are the submissions about the relationship between Mr Attie and Mr Brisby. It is suggested that this was “*a relationship of friendship*” which even involved “*jokes*” being shared {see CAS para 80, page 16}. So what? Is counsel assisting asking for the introduction of a statutory prohibition against humour?

F.4. The dismissal of John Burgess

71. It is not possible to understand the point which is made in respect of this matter – is it suggested that there was some impropriety?
- It must be remembered that the relationship between the Councillors and the general manager is one of confidence.
 - That relationship had broken down. This was an issue which united and divided members of the majority bloc and the minority bloc. For example, Mr Campbell gave numerous reasons why he wanted Mr Burgess’ employment terminated {T742.7-744.16; 745.16}. In fact, it was Mr Campbell who moved the motion to dismiss Mr Burgess {T744.20}.
72. Perhaps this episode provides a good reason as to why that it is *better* for the Councillors to have a good and friendly relationship with Council staff, rather than a poor and mistrustful relationship.

F.5. Marsden Street planning proposal

73. There appears to be an *implicit* criticism of Mr Attie because he moved a motion deferring consideration of the proposal to enable a more complete study to be undertaken {see CAS para 403, page 71}. This criticism is unfair and unwarranted:
- It fails to pay any attention to the fact that the passage of the motion indicated that other Councillors were of like mind.
 - Councillor Sims supported the motion because all it did was allow a broader view to be taken of the whole precinct {T359.34-360.16}.

SECTION G: WARREN JACK

74. Counsel assisting has properly conceded that the evidence of Warren Jack could not be used to make any adverse finding against Mr Attie. While that is commendable, it goes nowhere near far enough.
75. Mr Attie submits that serious adverse findings should be made in respect of Warren Jack:
- Mr Jack is a liar. He lied on oath, and he invented stories implicating Mr Attie and others in serious crimes. That conduct was criminal conduct on the part of Mr Jack.
 - Because of Mr Jack the inquiry had to be reconvened – at substantial public cost, but also at significant personal cost to Mr Attie, Mr Zraika and Mr Mehajer – and others adversely affected by his untruthful evidence.
 - And the fallout is not simply money: as a result of Mr Jack's lies, counsel assisting *put* to Mr Attie that he had committed criminal offences – serious charges, indeed. We do not say that was untoward – obviously counsel assisting thought (then, but not now) that Mr Jack was believable. But it had consequences: matters along these lines were picked and reported in the press as though Mr Attie had been involved in serious criminal conduct – irretrievable reputational damage.
 - There is no excuse for Mr Jack doing this. During the course of his evidence it became transparent that Mr Jack's purpose in telling these lies was to get some advantage for himself in terms of ongoing difficulties he has in a planning issue at 1A Henry Street.
76. We will now set out the basis upon which it is said that it *must* be found that Mr Jack was a liar. These matters operate separately and cumulatively:
- Mr Jack gave quite incredible evidence as to whether or not he believed 1A Henry Street to be zoned as commercial before he purchased them. He said (incorrectly) that he had paid GST on the purchase; this he (incorrectly) said proved that the premises were zoned commercial.
 - Mr Jack gave inconsistent accounts about his intention at the premises. At one stage he claimed that he only wanted to put in a home office (later this became one or two offices). He also said he did not intend to conduct teaching on those premises. This was directly contrary to the development application he lodged {Exhibit WJ1 page 36}. It is obvious he intended to use the premises as a commercial teaching facility. He concreted the garden to create a car park. The Council officers observed that the premises were being used for teaching {see Exhibit WJ1 page 21-22}.

- The story of the erection of the illegal enlarged fence without Council approval is unbelievable. The excuse given was that the fencer, Gary (surname unknown) built a larger fence as some capricious act, contrary to instructions. For free!
- Mr Jack gave bizarre evidence that a sign had been erected on the outside of the premises without Mr Jack's permission by an employee named Helena (no surname). Apparently Helena paid for the signs at her own expense.
- Mr Jack claimed that he had received Council approval prior to commencing the internal construction work within the premises. He said this approval was given by Mr Attie. When the improbability of this was demonstrated he said it was a "set up" by Mr Attie because Mr Attie wanted to purchase the premises.
- Mr Jack's construction work inside the premises was carried out illegally and without permission – and the excuses he gave for that were quite risible. Despite Court decisions, he still lives in the illegal alterations he made to the premises.
- Mr Jack later claimed that his rezoning application was blocked "*because the four people that run Auburn Council wanted ... to purchase the land for themselves*".
- Mr Jack is a conman. He tried to sell 1A Henry Street as a teaching facility. He gave instructions to his real estate agents that 1A Henry Street was commercial. The advertisements included photographs which demonstrated that it was capable of being used as a teaching facility. The same advertising material said that there were three bedrooms in the premises.
- When he was pressed on this, he claimed that this had been the work of the real estate agent, Steve (no surname, but now known to be Steve Duong). Mr Jack said this was done without his knowledge or permission. In fact, Mr Jack claimed that he told the real estate agent that he was not permitted to advertise the property that way. This dragged Mr Duong into a crime. It was common ground that Mr Duong denied that this was so.
- Mr Jack claimed the error slipped through because he did not bother to read the material published by the real estate agent. That is not believable.
- Mr Jack claimed he had received offers (from unnamed, unknown buyers) to purchase the property at values far greater than reality.
- Mr Jack claimed that the Council employee, Jason Mooney, was a "*puppet*" acting on behalf of four unnamed Councillors, or, alternatively, solely on behalf of Mr Attie. This was denied by Mr Mooney and Mr Attie, and their evidence on that particular point was not challenged. Counsel assisting was not buying this rubbish.

- Mr Jack gave evidence that he believed from 14 July 2015 that his life was in “grave danger”. He said he believed he could be murdered. Despite that, he did not go to the police because, he said, that could create “more danger”. Instead, he went to the television show – “A Current Affair”. That went nowhere – “I rang them and they wanted a whole stack of evidence and it all got too hard” {T1569.36}.
 - Meanwhile, although claiming that he thought he might be murdered by them, he continued to meet with Mr Attie and other members of Council on a friendly basis.
 - Mr Jack gave evidence – which turned out to be entirely false – regarding the critical meeting with Mr Attie. This was the “extortion” attempt. It becomes plain that the string of text messages from Mr Attie – to which Mr Jack gave a most sinister complexion – were requests by Mr Attie to find out why Mr Jack failed to attend the meeting at which the “extortion” attempted.
 - There was evidence that after Mr Attie had solicited a bribe and had threatened to murder him, Mr Jack engaged in jocular text messages with Mr Attie.
77. Mr Jack is a conscious, cold-blooded liar. He lied to try to protect himself, especially financially. He lied even though that could damage the reputation of multiple other persons.
78. It is respectfully submitted that it would be a very sad outcome of this inquiry if misconduct of a kind as serious of that of Warren Jack goes unpunished – and even worse if it passes without comment.

Dated: 9 November 2016

AUBURN PUBLIC INQUIRY 2016

Document 7
Written submissions on behalf of
Joseph Malouf

AUBURN PUBLIC INQUIRY

AUBURN CITY COUNCIL CHAMBERS

BEFORE THE COMMISSIONER: MR RICHARD BEASLEY SC

WRITTEN SUBMISSIONS FOR MR JOSEPH MALOUF

1. Mr Malouf adopts the submissions of Counsel Assisting, to the extent that they concern and mention him, and asks that the Commission also take into account the additional matters below.
2. The following points are made arising from Mr Malouf's oral evidence given to the Commission in private hearing on 11 May 2016:
 - a. Mr Malouf was a junior building surveyor at Council, leaving in 2006;
 - b. His employment at Council was his first job, starting in 2001 (T13/27);
 - c. He has never certified anything of a commercial nature since leaving Council, or any project on which Council or a member of Council was the applicant, and has done only one or two small jobs in the area in the nature of granny flats or house extensions;
 - d. He has no relationship at all with a Councillor Oueik and has never spoken to him since leaving Council;
 - e. At the time of his transient involvement with 40-46 Station Street, as a junior certifier with 40-46 Station St, Mr Rajendra Rajbhandry was his supervisor (T13/6);
 - f. The Amended Development Consent issued by Council and stamped on 21 June 2001 showed the formal dining rooms to Units 10,11,23,24,37 and 38 as

enclosed, but not the walls enclosing the other dining rooms that were ultimately enclosed as built (T45-47; T17/1-7; Sheets 11 and 12 Exhibit PH2);

- g. He was asked whether he picked up when issuing the Occupation Certificate on 18 July 2002 whether the formal dining areas on Units 10,11,23, 24, 37 and 38 had been enclosed (fitted with nib walls and doors) and the dining rooms in all corner units had been converted to dining rooms: T17/30-36;
 - h. He just did not pick that up and could not recall what he saw at that time 14 years ago as a very “green” and junior building surveyor in his first job which he commenced just the year before, and did not recollect whether the walls were there or not: T18/28-41; T19/25-27;
 - i. He did not remember the actual inspection or even the day of the inspection: T16/18-24; T19/39;
 - j. At that time he may not have checked to compare the number of 2 bedroom units on the original DA plans with the number as built, as that may not have been a practice that he had developed at that inchoate and formative stage of his professional career: T22/40-47; and
 - k. This was the very first time he had had to certify a building of this complexity: T24/31-33.
- 3. In relation to Recommendations SR1 k-m, which refer to Mr Malouf, it should be noted that Mr Malouf did not issue the Construction Certificate for 40-46 Station St, only the Occupation Certificate on 18 July 2002.
 - 4. The evidence provided to the Commission provides a sound basis for these Recommendations at SR 1 k-m, with that amendment.
 - 5. Mr Malouf would also like the Commission to note a number of additional matters, that are intended to supplement but not cut across the Recommendations of Counsel Assisting:

- a. The ICAC in a letter dated 22 June 2010 indicated that it had determined not to take any action in relation to the matters raised by Mr Burgess (which must be taken to include his complaints concerning Mr Malouf, then a former junior employee of Council). In these circumstances Mr Malouf submits that the Commission's Final Report would avoid any suggestion that Mr Malouf was the subject of an ICAC investigation, which carries connotations that would not appear to reflect the facts of the present case;
- b. Mr Malouf's forthright demeanour in providing his evidence to the Commission, and his ready acknowledgement that (on the assumption that the relevant walls had been there as at 11-18 July 2002), he should have picked them up and his evidence that he would have given his current experience, practices, standards and expertise as an accredited certifier with his own house certification business, but did not at the time, a mistake that he honestly ascribed to his extreme inexperience in 2002 in the certification role and particularly in certifying a building of this complexity;
- c. It was not Mr Malouf who issued the Construction Certificate, but his experienced superior, Mr Rajbhandry, so he did not possess the normal level of historical knowledge of the site that a certifier who had been involved in that capacity at that earlier stage would customarily have had when inspecting for Occupation Certificate purposes;
- d. Given the generality of the Occupation Certificate form at page 19, MFI-B (the Occupation Certificate, second page), it is reasonable to infer that a very junior certifier such as Mr Malouf was then may properly have proceeded on the basis that the exercise required of him was one of very high level and broad brush certification focusing principally on confirming the existence of a DA, and existence of a construction certificate for the building while focusing principally on fire safety compliance as the issue of detail requiring his attention. Mr Malouf's evidence given orally to the open session of the Inquiry supports this analysis, as does the importance of fire safety to the task of issuing an Occupation Certificate given by clause 153(1), *Environmental Planning and Assessment Regulation 2000*.

A handwritten signature in black ink, reading "Clifford R. Ireland". The signature is written in a cursive style with a large, stylized 'C' and 'I'.

Clifford Ireland

13 Wentworth/Selborne Chambers

174-181 Phillip Street

8 November 2016

AUBURN PUBLIC INQUIRY 2016

**Document 8
Written submissions on behalf of
Salim Mehajer**

AUBURN COUNCIL PUBLIC INQUIRY
BEFORE COMMISSIONER MR. BEASLEY SC

SUBMISSIONS OF SALIM MEHAJER

EXECUTIVE SUMMARY

1. Mr Mehajer was elected to Auburn City Council in September 2012 on an Independent ticket.
2. On 9 and 17 June 2016 he gave evidence before Commissioner Beasley's Inquiry into the Auburn City Council.
3. There was no evidence put before this inquiry which tended to suggest that Mr Mehajer engaged in any illegal or improper conduct during his time with Auburn Council. It is respectfully submitted that, particularly in light of the media interest in the Inquiry, a finding ought be made as follows:

There is no evidence capable of supporting a finding that Mr Salim Mehajer engaged in any illegal activity, improper conduct or breach of the Auburn City Council Code of Conduct during his time as a Councillor of Auburn City Council.

Matters of proof

4. The *Briginshaw* principles are applicable to findings which are capable of causing damage to reputation¹ or where there is some suggestion of moral wrongdoing.² Counsel Assisting's Submissions dated 18 October 2016 (CA Submissions) do not mention *Briginshaw*, nor deploy its language. Whilst it may be taken for granted that the *Briginshaw* principles apply, it is important that the principles are not overlooked. The classic statement by Rich J requires "a comfortable satisfaction that the tribunal has reached both a

¹ See Hall P, *Investigating Corruption and Permanent Commissions of Inquiry*, Butterworths, 2001 at p 665.

² *G v H* (1994) 181 CLR 387 at 399 per Deane, Dawson and Gaudron JJ at [16].

correct and just conclusion.”³ Latham CJ said that decisions could not be based upon mere suspicion, surmise or guesswork.⁴ Dixon J held that:

... the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact.⁵

5. It is submitted that the *Briginshaw* approach requires more than the raising of suspicions or the possibility of some wrongdoing. A tribunal making adverse reputational findings must act only on the evidence, and must reach the level of ‘comfortable satisfaction’ described by the Court in *Briginshaw*.

Alleged ‘Relationships’ on Council

6. Counsel Assisting makes a number of high level submissions about the relationships of Councillors on the Auburn City Council. They include the seemingly innocuous submission that, contrary to the evidence, councillors Yang, Oueik, Zraika and Mehajer did in fact “meet”.⁶
7. Cited in support of this proposition is a text message from Mr Attie on 17 August 2013. That text message (which is set out in CA Submissions):
 - a. Is no more than a group invitation to attend a meeting “a little earlier” because “some light breakfast” would be provided.
 - b. Does not prove the attendance of anybody at a pre-council meeting, let alone Mr Mehajer.
 - c. Was not put to Mr Mehajer or any other witness.
 - d. Is not accompanied with any evidence of a response or acceptance by Mr Mehajer.
8. If Mr Mehajer’s evidence about the absence of caucusing with other councillors is to be disproved it is submitted that stronger evidence than a unilateral and unanswered group text from Mr Attie offering some pre-meeting breakfast is required.

³ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 350.

⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 343.

⁵ *ibid* at 368.

⁶ *Para 71*

9. The CA Submissions also seek to demonstrate a “very close and apparently business connection” between Mr Attie and Mr Mehajer. The relevance of such a submission is not readily apparent. Reference is also made to an instant messaging service called ‘Wickr’ which, according to CA Submissions, does not retain the content of the communications of its users. The unstated premise behind the submission is that communications between Messrs Attie and Mehajer were somehow nefarious.
10. One only needs to examine the content of the Wickr reference for an illustration of its benign character. Mr Attie’s text was to the effect that he **could not find** Mr Mehajer on wickr.⁷ There is no suggestion they ever communicated using the service. In any event, according to media reports Wickr is a messaging service used by Australia’s current Prime Minister and Treasurer. Even if there was evidence two local government councillors were using a service used by the highest elected officers in the country, which there is not, it is submitted that this is not probative evidence of any relevant fact.
11. Of the text messages passing between Messrs Attie and Mehajer in Exhibit FTB-1, almost all of them post-date the dissolution of the Auburn Council. Moreover, whilst business matters do appear to be the subject of the texts, the messages are sometimes curt which suggests the relationship was not as cosy as appears to be suggested.
12. CA Submissions make reference to a unilateral message sent by Mr Attie to a group of people which included Mr Mehajer. The message referred to the fact that there was a wedding at which two white Ferraris blocked the entrance to a street in Guildford but that the police, council, media or Councillor Simms were nowhere to be seen. Given the publicity which surrounded Mr Mehajer’s wedding a few months earlier, this message of which Mr Mehajer was but one of a number of recipients, is entirely unremarkable.
13. Finally, and importantly, there is nothing untoward on the face of any of the messages. What is notable from the communications is what is not said, and the communications to which Mr Mehajer is not a party. The difficulties with the submissions made about the communications include the absence of evidence of the parameters used to selectively collate some but not all

⁷ Exh FTB-1 p 142

communications, together with the absence of any questions of any witness about the material.

14. It is submitted that Exhibit FTB-1 has no relevance to any issue before the Inquiry relating to Mr Mehajer.

1A Henry Street Lidcombe

15. The issue for the Inquiry centred around the non-compliant use of 1A Henry Street by a Mr Warren Jack, and his interactions with Council. Part 10 of CA Submissions deal with 1A Henry Street Lidcombe.
16. The evidence before the Inquiry with respect to this issue received some media attention, including press containing adverse imputations against Mr Mehajer. For example, one press article ran the headline:

Auburn council inquiry hears businessman complained of threats from Mehajer clan

17. The reference to hearing from a 'businessman' was a reference to Mr Jack, and Salim Mehajer was expressly referred to in the body of the article.
18. Notwithstanding the adverse press coverage linking 1A Henry Street Lidcombe with Mr Mehajer, Mr Mehajer was not required to give evidence with respect to this area of the Inquiry and there was no evidence which suggested involvement or wrongdoing on his part. So much was accepted by Counsel Assisting who stated to the Commission:

I can say this for the record, so it is crystal clear. There is no suggestion of Mr Salim Mehajer having anything to do whatsoever with any of Mr Jack's allegations in any way, shape or form.⁸

19. Given the adverse press coverage linking Mr Mehajer to this issue, it is submitted it is appropriate to make the following finding:

Mr Salim Mehajer did not have anything to do with any of Mr Jack's allegations or 1A Henry Street in any way, shape or form.

⁸ T 1939

South Auburn

20. Three proposals for the rezoning of land in South Auburn were a focus of the Inquiry. Mr Mehajer declared an interest in relation to those proposals and did not participate in Council's consideration of them. Mr Mehajer's indirect interest was that his sister was a registered proprietor of 84 and 84A Auburn Road. Mr Mehajer, having declared his interest, did not vote or attend any meetings relating to the South Auburn proposal.⁹ Each of the proposals affected 84 and 84A in the same way. They had a differing effect on surrounding properties.

21. Mr Mehajer gave evidence about the South Auburn proposal in his private hearing as follows:

MR BOLSTER: Q. Did any councillor seek to talk to you about this proposal?

A. There's been no discussions with councillors with regards this proposal.¹⁰

22. That evidence was entirely consistent with Mr Mehajer's answers in the public hearing and he denied any discussions with Councillors in relation to South Auburn.¹¹

23. As pointed out in the CA Submissions, the origin of the South Auburn proposal was Mr Yang's 'Option 1' (**Original Yang Option**).

24. The evidence established the complete absence of any relationship between Mr Yang and Mr Mehajer. Mr Mehajer gave evidence that:

I don't understand [Mr Yang]. I don't speak to him. That's the honest truth. I actually don't communicate with Councillor Yang.¹²

25. Given that Mr Yang gave evidence through a Korean interpreter, the evidence of Mr Mehajer is unsurprising. It was also corroborated by Mr Yang.¹³

26. It is submitted that Mr Yang's evidence about matters relating to his time on Auburn Council was both confused and confusing. The language barrier clearly did not help. Mr Yang did give evidence, however, that he was

⁹ PH T 20: 10-12

¹⁰ PH T 20: 27-33

¹¹ T 1283: 3-20

¹² T 1249: 33-35

¹³ PH T 7: 1-11 and T 1464: 5-20

unaware that Mr Mehajer had any interest in the South Auburn proposals.¹⁴ Mr Yang was oblivious to any interest Mr Mehajer held in South Auburn notwithstanding the latter had disclosed an interest. It can hardly be concluded that Mr Yang was somehow acting at Mr Mehajer's behest when he proposed the Original Yang Motion. This is of course important because, as Counsel Assisting recognises in his submission:

The origins of the proposal in its present form lie in a resolution moved on notice by Mr Yang ...¹⁵

27. Two variations on the Original Yang Option were subsequently proposed, which variations were known as options 2(a) and 2(b).

28. The critical point with respect to the Original Yang Option and the variations 2(a) and 2(b) is that the rezoning proposed with respect to 84 and 84A Auburn Road was identical.

29. Counsel Assisting proposes the following finding:

SA7. Once it is accepted that the decision to create [options 2(a) and 2(b)] was from Mr Oueik or Mr Zraika and that there was no planning merit in them, the reason for doing so must be for some other purpose, not a planning purpose but a political purpose.

30. Assuming for the sake of argument that this submission is correct, the 'political purpose' could not have been to confer any benefit on Mr Mehajer simply because the variations proposed by Messrs Oueik and Zraika made no relevant change to the properties at 84 and 84A to the Original Yang Option.

31. Counsel Assisting proposes a further finding:

SA12. The decision to proceed with option 2(a) with its minimal B4 zone would have had an effect on the value of the property which formed the basis of Mr Mehajer (sic) declared pecuniary interest even if there were question marks over the ability of the B4 zoning to be carried into a development.

32. It is submitted that, as stated above, there was no additional benefit to be conferred upon 84 and 84A Auburn Road under option 2(a). The change was to **reduce** the number of properties to be included in the rezoning such that there may have been detriment to others in being excluded but no additional benefit for those who were not excluded from the varied proposals.

¹⁴ T 1347: 33-35

¹⁵ CA Submission par 234.

33. It is also worth noting that there was no evidence of the estimated benefit to be conferred by rezoning, compared with the status quo. The question of degree is not unimportant given the small size and street frontage of 84 and 84A Auburn Road.

34. Notwithstanding the above matters, Counsel Assisting seeks a finding that:

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).

35. Recommended Finding SA 17 is, self-evidently, a finding adverse to Mr Mehajer. The appropriate test is not whether it is 'reasonable to conclude' such a matter but, rather, whether the inquirer can be 'comfortably satisfied' of the existence of the said state of affairs.

36. The suggestion that Mr Mehajer's interest was the motivating force behind option 2(a) is not supported by any actual evidence. Mr Attie, for example, gave evidence as follows:¹⁶

Q. I assume that Mr Mehajer's interest, or the interest of his sister which caused him to declare that he had an interest, had nothing to do with your vote?

A. I only found out that the interest was there at the meeting. I was not aware prior to that meeting that there was any interest by any Mehajer family member.

37. This evidence does not appear to have been challenged, nor was it put to Mr Attie that in supporting the South Auburn proposal he was seeking to advance the interest of Mr Mehajer.

38. Mr Oueik's evidence was:¹⁷

[Mr Bolster] Q. Yes. You knew someone in the Mehajer family owned the property; correct? Well, did that fact enter into your mind when you came to consider how you would vote on proposed option 2(a)?

¹⁶ Attie T 1187: 17-25

¹⁷ Oueik T 1074: 2-9

A. No.

Q. No? It didn't? All right. I want to change topic now ...

39. A high-level suggestion was put to Mr Oueik by counsel assisting that in voting on various planning matters, being Berala, Grey Street and South Auburn, Mr Oueik was influenced by his 'relationship with other councillors'.¹⁸ The following exchange then took place relating to South Auburn:¹⁹

Q. In the case of South Auburn, you say that you acted on the advice of staff, but I want to suggest to you that option 2(a) which you voted for made no sense from a planning perspective and you knew that at the time: correct?

A. No, I was happy with the – I was satisfied with the recommendation.

Q. It has been said against you that the decision to impose 2(a) over option 1, one of the reasons for that was to punish the Bhanin Association for not supporting you, not true?

A. That's not true.

40. Conspicuous by its absence is any suggestion put to Mr Oueik that, in the words of recommended finding SA17, he 'was seeking to advance the interests of Mr Mehajer' in supporting option 2(a).

41. In reaching the required degree of satisfaction one must keep in mind that, in the words of Dixon J, 'circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation'.²⁰

42. This is particularly apposite in the present case because the Inquiry explored in some detail the possibility that the 'limitations' (to adopt Counsel Assisting's phraseology in SA 17) in Options 2(a) and 2(b) were deliberately introduced as political payback to the Bhanin Association. Counsel Assisting expressly acknowledges the existence of a motive on the part of Messrs Oueik and Zraika to act in such a way.²¹ The existence of this motive obviously falls squarely within Dixon J's concept of facts which are 'susceptible of some other not improbable explanation'.

¹⁸ Oueik T 1107: 31 - 19

¹⁹ Oueik T 1107: 33 - 45

²⁰ *Briginshaw* at 368.

²¹ CA Submissions, SA19 (p 55).

43. In summary, proposals 2(a) and 2(b) reduced the B4 area envisaged in the Original Yang Option, but **made no change** to the proposed zoning with respect to 84 and 84A Auburn Road.
44. Given that variations 2(a) and 2(b) treated 84 and 84A Auburn Road no differently to the Original Yang Option, it does not make sense for the variations to have been proposed for the benefit, indirect or otherwise, of Mr Mehajer , or put more correctly to his sister.
45. In any event, there is at least one other plausible explanation, namely political payback of the Bhanin Association.
46. There are other plausible explanations which do not appear to have been explored. The submission made against Mr Mehajer is to the effect that it must have been his interest which motivated the 'limitation' of the B4 zoning on Auburn Road. This submission is based only upon the circumstantial existence of the interest, which had been declared, and not, for example, on direct evidence of communications between Mr Mehajer and Councillors or Council staff.
47. This reasoning is flawed and incapable of supporting the ultimate conclusion. One difficulty with the reasoning is that it would also give rise to other plausible explanations for the proposal. That is, Mr Mehajer was not the only Councillor to declare an interest in South Auburn. As Counsel Assisting points out, Mr Attie declared a non-pecuniary interest in relation to the 15 April 2015 meeting, although the same interest was not declared at the meeting on 20 May 2015.²² Ms Lam declared a pecuniary interest on the basis that her company managed a property in the precinct.²³ Ms Batik-Dundar also declared an interest in respect of the South Auburn proposal on the basis that her clients owned property in the area under Council consideration.²⁴ Mr Yang recalled the declaration of interest but could not recall the details.²⁵ It is understood that Ms Batik-Dundar is a real estate agent. Ms Batik-Dundar did not give evidence in the Inquiry and her absence is unexplained.

²² CA Submissions pars 280 and 284 (pp 48-49).

²³ CA Submissions par 280(b)(p 49)

²⁴ CA Submissions par 284(b)(p 49)

²⁵ T 1463: 16-35

48. Why is one or more of these interests not equally capable of explaining the approach to the South Auburn proposal? Ultimately the evidence rises no higher than the existence of an interest which was properly declared by Mr Mehajer. His evidence about his interest was not seriously challenged and no adverse finding can be made in relation to him with respect to South Auburn.

49. The post-script to the South Auburn issue is recommended finding SA19 which submits that:

SA19 ... although the political background suggests that Mr Oueik and Mr Zraika had a motive to punish the Bhanin Association in respect of a perceived failure to support Mr Oueik [in the 2015 NSW State Election], **there is insufficient evidence to conclude that they sought to influence Mr Francis in the performance of his professional duties so as to confer a benefit upon a third party, namely Mr Mehajer.**

50. Firstly, it was never put to Mr Mehajer that any attempt had been made on his behalf to influence Mr Francis.

51. Secondly, it is inaccurate to suggest there is 'insufficient evidence' of such a conspiracy. There is, in fact, no evidence.

52. Thirdly, it is unclear why such a serious matter is even being raised in the context of South Auburn.

53. Fourthly, the submission refers to the political motive for punishing the Bhanin Association by excluding it from the rezoning. If this was in fact the case, then it provides an explanation for the introduction of Options 2(a) and 2(b). What the submission does not make clear is that Mr Oueik's candidacy for the 2015 State Election and political payback to the Bhanin Association had nothing whatsoever to do with Mr Mehajer. Mr Mehajer should not be mentioned in the context of the Bhanin Association. He had nothing to do with it and there was nothing said in the inquiry to even suggest he did

54. It is submitted that the appropriate finding with respect to South Auburn is as follows:

There is no evidence that Mr Mehajer acted inappropriately in any way with respect to the South Auburn Proposal. He was not involved in the original proposal for rezoning moved by Mr Yang, nor was he involved in the two variations of that proposal being Options 2(a) and 2(b).

John Street Car Park

55. It is desirable to make some general observations at the outset about the issues surrounding the John Street Car Park.
56. The site was, and still is, being used as a multi-storey car park. There is no obvious planning or aesthetic reason why such a site would not be suitable for residential/commercial development. Indeed, such development appears to have been supported by Council staff and at least some Councillors.
57. Clearly there was an openness on the part of Council, at least initially, to offer the site for sale to a private developer. That desire resulted in an open tender process. A company associated with Mr Mehajer was the successful tenderer.
58. The Council entered into a contract of sale with Mr Mehajer's company. Mr Mehajer was not a Councillor at that time and there is no suggestion that the tender process and the contractual bargain was anything other than arms length, above board and on commercial terms. There was an under-bidder who, one can infer, did not offer terms as attractive as those offered by the successful tenderer. A request was made for the details of the under-bidder's tender²⁶ but the evidence was never put before the Inquiry.
59. As often happens with a contractual relationship, the parties can be overly optimistic about the time and cost in which the aims of their bargain might be achieved. So it was with the John Street Car Park.
60. The original contract was conditional upon such matters as development approval, provision for a supermarket and partial commercial use. The achievement of such contractual pre-conditions encountered obstacles and took longer than the parties had hoped. This in itself is unremarkable and a fact of commercial life. Such difficulties usually manifest themselves in delay, and cost to the purchaser.
61. It is not unusual in such circumstances for a purchaser to request more time, or to seek variations to the contractual bargain to accommodate the changing circumstances. Such indulgences in the present case manifested themselves

²⁶ T 1894

in the form of requests for extensions of time, partial substitution of security and contract novation.

62. There is nothing at all wrong or inappropriate in the request or grant of such variations to contractual relationships. Indeed, whilst the requests to accommodate changing circumstances emanated from the purchaser, it would be wrong to assume such changes did not confer a benefit on the Council. This is particularly so in circumstances in which the site was not particularly attractive to the open market. The site became even less attractive to the open market in circumstances in which any potential developer would have been aware of the difficulties Mr Mehajer's company encountered in securing planning approval.²⁷

63. If Mr Mehajer's company was not going to develop the site the chances of the local community enjoying the benefit of shops, commercial premises and the supermarket were low.²⁸ Whilst the JRPP Information Report recommended that the development *as proposed* was not in the public interest because of the excessive floor space ratio, there does not appear to have been any consideration given to the economic benefits or convenience of the development to the local community.²⁹ The author of the report did not give evidence and could not be asked about such consideration.

64. When it came to Council's consideration of any requests, Storey & Gough were asked for advice which more than occasionally was negative. However, it must be borne firmly in mind that commercial and community considerations were for the Council to decide, not the solicitors.³⁰ If Storey & Gough's views about whether to accept or reject requests by the purchaser were relevant beyond strict legal form, then the solicitor with carriage of the file would have been a relevant witness before the Inquiry. No such solicitor gave any statement or oral evidence.

65. The solicitors were only advising on the legal structure of the deal. It was the role, and the statutory duty, of the Council alone to determine whether such matters were in the interests of the local community.

²⁷ See Exh JS-1, pp 147-162.

²⁸ See T 1438: 6-22 (Zraika)

²⁹ Exh JS-1, p 147ff

³⁰ See T 1440: 3-31

66. There is no prohibition on a Councillor having a direct or indirect interest in a contract with Council. Perhaps there should be. But in the event that there was not, the fact that Mr Mehajer's company was negotiating contractual variations with Council was in no way illegal or improper. Indeed, no such submission is made by Counsel Assisting. The focus of Counsel Assisting's submissions is to criticise not Mr Mehajer but the exercise of voting rights by the Councillors who did vote with respect to matters pertaining to the John Street Car Park. For the reasons which follow, such criticism is unwarranted.

The Chronology

67. On 1 March 2011 contracts were exchanged between Sydney Constructions and Developments Pty Ltd (**SCD**) and the Council.
68. Special Condition 14I provided that if development consent had not been granted by 1 March 2012 then **either party** was free to rescind the contract.
69. Special Condition 15 provided that if the development had not proceeded within two years of the development consent being granted then the Council had the option of purchasing the land at the original sale price.
70. On 16 November 2011 Council voted to amend the contract so that each party's right to rescind the contract arose after 18 months, not 12 months.³¹ Councillor Curtin proposed a motion that the request for an extension be refused. This motion lapsed for want of a seconder. Councillor Simms had initially proposed a motion to extend for three months, rather than six, but this did not succeed. It is noted that Councillor Zraika voted in favour of a six month extension.
71. The reason for the extension was because of an 'issue relating to the insufficient width of the vehicular access of Mary Street' and the purchaser withdrew the application 'in order to consider possible solutions to the driveway issue'.³²
72. It may be inferred that those councillors who voted in favour of the 'extension' under Special Clause 14I, including Clrs Simms and Zraika, acted bona fides and cognisant of their duties to act in accordance with the Code of Conduct.

³¹ Exh JS-1, p 33-34

³² Exh JS-1, p 25

73. The effect of the amendment meant that each party's right to rescind would be enlivened if there was no development consent by 1 September 2012, being 18 months from the date of contract.

74. On 20 April 2012 the development application was lodged.

75. On 10 May 2012 the request for an extension was discussed by Mr Mehajer and Council staff. The reason for the request was because part of the SCD proposal included the acquisition of 19 John Street. However, the proprietor of that property had passed away during the negotiations and there were complications in dealing with a property 'subject to a will and complexities'.³³

76. Mr Brisby is recorded as expressing the following at the meeting:

... **seems a reasonable and valid request** but the process needs to be reported to Council for their determination. [Emphasis added]³⁴

77. On 26 June 2012 the request for a further amendment to clause 14I was refused. Councillor Lam was in favour of the extension. The position taken by Ms Lam was entirely appropriate, and had nothing to do with any alleged relationship with Mr Mehajer given the following circumstances:

- a. A previous six month extension had been granted so the purchaser could think about the width of the driveway access. All but one Councillor was in favour of an extension in those circumstances.
- b. A further three months because of an unforeseen complication arising out of the death of the proprietor of 19 John Street gave rise to an entirely reasonable basis for the grant of a further extension.
- c. Mr Brisby was of the view that the extension was 'valid and reasonable', and no contrary view appears to have been expressed by other Council staff at the meeting with Mr Mehajer.
- d. By the time of the request for an extension of time, the development application had already been lodged. SCD was seeking an extension to December 2012 to secure development consent. The speed of that consent was outside the control of SCD and presumably depended in

³³ See Exh JS-1, pp 40, and 42.

³⁴ See Exh JS-1, p 40.

no small part on Council, and the extension was sought well in advance of the deadline.

78. An extension in the circumstances was something about which reasonable minds may differ. It is not open to conclude on the basis of the above evidence that Ms Lam must have voted for some improper purpose. To the contrary. The evidence supports the position that a grant of an extension would have been entirely reasonable in the circumstances.

79. Counsel Assisting recommends the following finding:

JS2 - Of the Council in place [in mid 2012], *only* Ms Lam voted to give Mr Mehajer more time. She did so on the basis of the long commercial relationship between she, Mr Mehajer and his father.

80. It is submitted that the recommended finding JS-2 ought not be made.

81. Further, loose assertions as those made in Recommended Finding JS-4 that there were 'other relationships between [Ms Lam's] business and **the Mehajer business**' are insufficient to base findings which attract the *Briginshaw* standard. The meaning of 'the Mehajer business' is not elaborated upon, and it is submitted that if such a serious allegation be made against Ms Lam, namely that she improperly took into account an irrelevant interest in voting, particulars of why that is so must be set out, supported by cogent evidence. That is not the case here.

82. Counsel Assisting recommends the following findings:

JS5 - Messrs Attie, Oueik and Zraika who were on Council at that time were not, at that time when Mr Mehajer was *not* on Council, so interested in the supermarket that they later professed to be when he was.

JS6 - Thereafter however, once Mr Mehajer came onto Council, Messrs Oueik and Attie and Le Lam supported the extension of time to complete, the granting of more than one fresh contract, the reduction and release of one half of the 10% deposit, and virtually every other request made by Mr Mehajer as a means of retaining an interest in the site.

JS7 - From December 2013 Mr Zraika, despite having voted against Mr Mehajer's requests 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.

83. In short, these submissions suggest that Messrs Oueik, Zraika and Attie were only in favour of the SCD contract or the grant of any indulgences to the purchaser after Mr Mehajer became a Councillor. These recommended findings ought not be made.
84. Firstly, each of Councillors Attie, Oueik and Zraika voted to sell the John Street Car Park to SCD in 2011,³⁵ well before Mr Mehajer joined Council.
85. Secondly, it is incorrect to submit that Mr Zraika had '*voted against Mr Mehajer's requests right up until November 2013*'. Apart from approving the initial contract, Mr Zraika of course voted in favour of the initial six month 'extension' of time for securing development approval, which vote took place in November 2011,³⁶ which again was well before Mr Mehajer joined Council.
86. Thirdly, it is incorrect to describe the substitution of the deposit under the contract as '*the reduction and release of one half of the 10% deposit*'. That is not a fair or accurate characterisation of what occurred. Guarantees were provided in lieu of that part of the deposit which was released.
87. Fourthly, the suggestion that Messrs Attie, Oueik and Zraika were uninterested in a supermarket is based on nothing but speculation. Such a submission is also inconsistent with the pro-development philosophies of those Councillors and their evidence.
88. Fifthly, the Recommended Findings do not engage with the fact that SCD was the successful bidder in an open tender process. The underbidder, at \$5.5 million, was \$1 million below SCD.³⁷ That is a substantial sum of money in the coffers of Auburn Council. As submitted above, the full details of the underbidder's unsuccessful bid were not produced to the Inquiry despite a request for this to occur. It is submitted that the strength of SCD's bid, together with the economic and infrastructure benefits conferred by this development proposal provide **substantial weight** to the legitimacy of any favourable consideration given to ensuring this project did not fall over.

³⁵ Exh JS-1, pp 1 and 22.

³⁶ Exh JS-1, p 34.

³⁷ Exh JS-1, p 244

89. Sixthly, the Recommended Findings do not consider the alternative to the SCD contract. There appear to have been two rational alternatives, namely, putting the property back out to tender, or simply retaining the site as a car park. It is submitted that the Council should have been making every effort to ensure that this Contract progressed to settlement.
90. Seventhly, the CA Submissions in effect seek to draw an inference that the Councillors were influenced by the identity of Mr Mehajer in voting on matters relating to the John Street Car Park. It is noted that Councillor Simms was in favour of granting the contract and at least one extension before Mr Mehajer joined Council, but afterwards appears not to have been disposed to granting any further indulgences. There is no evidence to support any inference that Messrs Oueik, Attie and Zraika voted solely to benefit Mr Mehajer's interest: such a submission is based purely upon speculation.
91. There is evidence, however, that at least one Councillor deliberately voted against Mr Mehajer's interest, apparently out of spite, making it clear the Contract would not go ahead *with Mr Mehajer* at any price. The Code of Conduct required every decision before Council to be made fairly and on its merits. Mr Campbell gave evidence with respect to the John Street Car Park that he was:
- ... against the sale of this property to Salim Mehajer at any price - at any price - and so the difference in valuations at that time was not a big issue for me.³⁸
92. It is noted that whilst the adverse findings against Messrs Oueik, Attie and Zraika are based on no more than suspicion and innuendo, Counsel Assisting has sought no finding against Mr Campbell in circumstances where there is evidence of a breach of the Code of Conduct by his own admission.
93. Eighthly, the CA Submissions refer pejoratively to Mr Zraika having undergone a Damascene conversion. The CA Submissions appear to rely upon the evidence of Mr Campbell as evidence of the genesis for the conversion.³⁹ Mr Campbell was not a credible witness. He showed open animosity towards Mr Mehajer, and was the person who moved a motion calling on Mr Mehajer to resign after his wedding.⁴⁰ Mr Campbell also held a grudge against Mr Zraika

³⁸ Campbell, T 838: 35 - 38

³⁹ CA Submissions JS7, p 90.

⁴⁰ See CA Submissions par 228 (p 37).

because Mr Campbell (as recognised by Counsel Assisting) would have been voted in as Deputy Mayor had Mr Zraika 'voted in accordance with the agreement he had signed'.⁴¹ Mr Zraika had on other occasions voted in accordance with the merits of matters and thus with the Code of Conduct but in in apparent breach of a political pact with Mr Campbell, much to the annoyance of the latter.

94. Apart from anything else, Mr Campbell's evidence about the alleged 'conversion' proves nothing. Mr Campbell provided a statement to the Inquiry which stated:

About 20-30 minutes after the meeting Hicham Zraika, then mayor, returned to the chamber and joined Salim Mehajer. After a lengthy discussion, they emerged together.⁴²

95. Mr Campbell's oral evidence was quite different.

Q. After that meeting there was a dinner in the Lang room which is fairly customary after council meetings; is that correct?

A. That's correct.

Q. Every council meeting, you all get together and have a bite and a catch-up?

A. Yes, the room next-door.

Q. What happened between Mr Zraika and Mr Mehajer after that meeting that you observed, that you saw?

A. I recall that Councillor Zraika sat either next to me or very close to me at dinner and left pretty quickly and later on, maybe 30, 40, 45 minutes, something like that, Hicham Zraika and Salim Mehajer were seen walking together past the door of the Jack Lang room, talking.⁴³

96. The oral evidence of Mr Campbell was that Zraika and Mehajer were seen walking past the door of the Jack Lang room. That is very different to having witnessed a lengthy discussion which could not have been observed from the Jack Lang Room if it took place in the chamber.

97. In any event, it is hardly probative evidence that Mr Zraika's alleged 'conversion' occurred because of something that was said in any conversation with Mr Mehajer. The only probative evidence on that question was the

⁴¹ See CA Submissions par 20 (p 7).

⁴² Exh S13, par 79.

⁴³ Campbell TX 656.35

denial, both by Mr Mehajer⁴⁴ and Mr Zraika⁴⁵ about any such conversation. The suspicions of Mr Campbell, hostile to both men, is not cogent evidence upon which this Inquiry is able to make adverse findings.

98. The alleged conversion is based on no more than Mr Campbell's suspicious (and openly biased) mind. The fact that an elected member of government might change their view with respect to a matter is not without precedent. A recent example is found in the decision of the Premier of NSW changing his opinion with respect to the prohibition of greyhound racing in this state. It is entirely proper that when a member of government changes their view because of the assessment of new information, or further consideration or simply viewing matters in a different light, that they exercise their powers in good faith and vote according to that new assessment. That is good government. Such principles apply as much to a State Premier from the Liberal Party, as they do to Labor Party members of local government. Indeed, Mr Zraika showed not inconsiderable political courage by approaching his task of voting in compliance with the Code of Conduct, which codifies statutory obligations of local government councillors, and not being strait-jacketed by an intra-party agreement to vote en bloc or along a particular line. In summary, the point to be made is that Mr Zraika's voting pattern is not evidence of anything other than him giving genuine consideration to items of business each time they were voted upon.

99. In the absence of cogent evidence, the recommended findings cannot be made, particularly when they raise such serious reputational matters as voting for an improper purpose.

100. Counsel Assisting recommends the following finding:

JS8 - In key respects, the critical decisions made by Council after the 2013 contract was entered into, including the release of the one half of the deposit, the extension of time and the final resolution in December 2015 to enter into a fresh contract after Mr Mehajer offered to build 1,000 m2 supermarket were all contrary to uncontroversial, strong and negative legal advice from Council's long standing lawyers.

101. Under the Code of Conduct, each Councillor must deal with each particular matter on its merits. Whilst legal advice may be sought in relation to rights and obligations under a transaction, or the particular legal form of a

⁴⁴ TX 1245: 18-36

⁴⁵ TX 1412

transaction, a Councillor's function to determine matters as part of Council cannot be delegated to external solicitors simply by asking for legal advice about an aspect of the transaction. Before considering the allegedly 'critical' decisions referred to in Recommended Finding JS8 it is necessary to say something about the context.

102. On 20 March 2013 a motion was put before the Council to enter into the second John Street Car Park contract with SCD. Those who voted in favour of the contract with SCD were Cllrs Attie, Batik, Campbell, Lam, Oueik, Simms and Yang. The **only councillor** who did not want the award of the contract was Mr Oldfield.⁴⁶ The anti-development platform of a number of those councillors who voted in favour of the award is well known. Therefore, it must be assumed that this proposal was, at the time of the award, considered to be in the best interests of the constituents on behalf of whom Council was acting.

103. It is also noted that the Council minutes record the very first pre condition under the proposed terms of contract as being the inclusion of a supermarket. Contrary to the suggestion of apathy on the part of some councillors about this requirement, it was clearly an important consideration to the award of the second contract in 2013.

104. The first 'critical' decision referred to in the Recommended Finding is the 'release of the one half deposit'. This of course is an inaccurate overstatement. The contract itself was based upon the Law Society's standard Contract for Sale of Land in NSW (2005 Edition) together with some special conditions.

105. The deposit was 10% of the purchase price, namely \$650,000.

106. Commonly in contracts for the sale of land in NSW the completion date is '42 days' from the date of contract (ie 6 weeks). Of course, it may be longer or shorter depending on the particular circumstances of the parties. The completion date in the 2013 Contract was governed by the Special Conditions.

107. The purchaser was required to lodge a DA within 6 months of contract, and if consent had not been granted within 18 months of lodgment **either**

⁴⁶ Exh JS-1, p 260

party could rescind. If consent was granted settlement was to take place within 12 months of the consent. Under this initial version of the contract, settlement could take place without any default 2 ½ years from exchange.

108. Obviously the arrangement under this contract contemplated a much longer period between the date of contract and the date of settlement than is ordinarily the case.

109. Any investor worth their salt does not like their money being tied up and unable to 'work' for them. The deposit had been with the stakeholder under the 2013 Contract for more than three months when Mr Mehajer sought a substitution of half the deposit with two personal guarantees, one he was to provide in his personal capacity. In the particular circumstances of the contract, namely that there was an unusually long and uncertain time between exchange and completion, and that Council had an ongoing post-completion interest in the success of the development (ie the benefits to the community), the request is entirely reasonable and was in the interests of Council to accommodate. It was the type of request which arises in the ordinary course of business with this size of development, and far from being 'critical' was actually a relatively minor issue in the scheme of things.

110. Be that as it may, legal advice was sought. The legal advice was provided by email on 12 November 2013. The instructions were recorded as follows:

John Price has advised me that the purchaser has requested the return of half the deposit.

111. The email is silent as to any suggestion of substitution of security. The email then advises against releasing any of the deposit. However, that advice must be considered in light of the instructions. It appears that Mr Gough who provided the advice was not fully briefed. There is no evidence that he provided any advice in relation to the proposal which was voted upon at the Council meeting on 4 December 2013, namely that a personal guarantee be required in lieu of half the deposit.⁴⁷

⁴⁷ See Exh JS-1, p 297.

112. In mid-2015 a proposal was put forward that the contract be 're-validated' and novated to a different purchaser.⁴⁸ There were evidently a number of misunderstandings about the law of contract when this proposal was made, some of which are pointed out in the advice of Storey & Gough to Council in late September 2015 (**S&G Advice**).⁴⁹ Those misunderstandings ought not be criticised. Mr Mehajer had realised that in circumstances in which development approval was not forthcoming, both parties might be able to rescind subject to the parties' contractual rights. What is wrong, in those circumstances, with seeking to restructure the deal and move forward? The answer is clear – absolutely nothing.

113. The S&G Advice pointed out a number of problems with the proposed contractual restructure and the essence of the advice was to put the sale out to tender again. The following points are important:

- a. This was advice about the legal structure of the deal only;
- b. The advice did not consider, and Storey & Gough were not asked to consider, the merits of the matter including:
 - i. The fact that on the previous tender process there was **only one other bidder** who came in at \$1 million less than Mr Mehajer's company;
 - ii. The site was unattractive to the market because it was largely landlocked and limited by two narrow access points, making development approvals even harder for someone who did not have adjacent landholdings.

114. It is interesting to note that Storey & Gough did not recommend ongoing use as a Council car park and saw the only option as putting the site out to tender. This perhaps reflects Council's desire to develop the land. However, the ownership structure of the other properties on that block made development of the site problematic. Mr Mehajer was (or should have been seen as) the most attractive tenderer going forward because his interest in the adjacent sites gave him the ability to undertake a more cohesive development. None of these matters were the subject of the S&G Advice. Quite properly,

⁴⁸ Exh JS-1, p 325

⁴⁹ Exh JS-1, p 328

they were a matter for Council. The short point is, notwithstanding CA Submissions with respect to the 'strong and negative advice of lawyers', the legal advice was only one matter in the mix when the Councillors came to exercise their statutory duty and deal with the question of 13 John Street on its merits.

115. It is submitted that this is exactly what occurred (at least with respect to those who voted in favour of Council continuing a contractual arrangement with SCD).

116. On 13 November 2015 solicitors for SCD wrote to Council making an offer (via a new company A-Link Technology Pty Ltd) to enter into a contract on terms. The critical aspect of the offer was the purchase price, which was structured as being the higher of \$6.5 million 'and the price noted in a (sic) independent valuation of the property by a registered valuer which may be obtained by Council. The valuation must be based on the property's current state and zoning.'⁵⁰

117. That offer sought to acquire the property on commercial terms. There is nothing to suggest that it was not arms length and entirely proper. A company associated with Mr Mehajer was a desirable purchaser for the reasons set out above, and that entity was offering market value which obviated the need for a tender process. By the time the matter came for consideration before Council, some members of the Council were determined to vote against it (as discussed above).

118. On 2 December 2015 a resolution was passed which allowed for the entry into a new contract. Counsel Assisting submits that no reasonable Councillor would have voted in favour of a further contract at that time. Such a finding has adverse reputational consequences for those councillors who voted in favour of the resolution. Care must be taken to apply *Briginshaw*. To that end, applying Dixon J's formula, it cannot be said there are no facts susceptible of some other not improbable explanation. It is submitted that those Councillors did not vote simply to further the interest of Mr Mehajer. There were sound commercial and policy reasons for the contractual relationship to continue, as supported by the direct evidence of multiple

⁵⁰ Exh JS-1, p 397

Councillors.⁵¹ The fact that progress in obtaining approvals had slowed and indulgences were sought along the way by the purchaser which are commonly granted in the ordinary course of business should not have stood in the way of a project which stood to benefit the Auburn community.

119. Counsel Assisting makes a submission that the Contract is at an end. It is noted that this is disputed by SCD and is currently the subject of proceedings in the Supreme Court of NSW.

120. Nothing in this Inquiry has touched upon the legal rights and obligations of the parties under the 2013 contract for the sale of the John Street car park and Mr Mehajer says nothing about those matters.

The closure of Francis Street Lidcombe

121. It is perhaps arguable whether or not this topic falls within the terms of reference. It relates in part to activities undertaken by Mr Mehajer solely in his capacity as a private citizen, and not in his capacity as an Auburn City Councillor. No one has suggested that Mr Mehajer sought to influence the outcome of any application he made because of his position on Council. For that reason, submissions as to the forms he filled out and applications made with respect to his wedding are not related to the proper functioning of Auburn Council. They are perhaps part of this inquiry only because of the intense media interest which followed Mr Mehajer's wedding and which in a causative sense might have contributed to the spotlight being directed towards the Council.

122. The first issue is the road closure. It must be stated at the outset that every effort was made to comply with all council requirements with respect to this process, which included provision of a traffic control plan, traffic officials and proper notification of intention. Indeed one can see from the traffic control plan that the detour to avoid Frances Street results in very minor disruption.⁵² There is a vague suggestion of disgruntled residents, but anyone who has spent any time living in narrow inner city streets knows that often removalist vans will block traffic on a Saturday morning without any permit for just as long

⁵¹ Lam T (Day 7) 729 – 730; Attie T (Day 11) 1218 – 1219, 1241 – 1243; Zraika T (day 13) 1437, 1439

⁵² Exh S 20, p 208

as Mr Mehajer's street closure, so it would be a humbug who would deny a similar indulgence to a groom on his wedding day.

123. But that is not the criticism of Counsel Assisting. Rather, the criticism is that after being denied an initial application for a road closure citing public celebration as the basis, a subsequent application was lodged citing 'feature film' as the grounds. CA Submissions argue that the application was therefore granted on a false premise. This submission cannot be accepted.

124. With respect to the filming approval, there is no requirement that the film be a 'feature film' for road closure to be granted. The pro-forma application itself states: "e.g. feature, tvc, tv series, doco". In reality, feature may have been chosen because it was first on that list of examples, or possibly because of a misunderstanding of what feature film meant.⁵³ But this is not to the point. It is not a statutory requirement that the film be in some narrow movie genre for permission to be granted for road closure for filming purposes. It is worth noting that page 2 in the entry Description of Filming is filled out in handwriting as:

CELEBRATIONS & LANDSCAPE SHOTS⁵⁴

125. There was more than one basis to make the application. It was not proceeding on a false premise to make the application in the manner stated. No adverse finding should be made in respect of the road closure.

126. At FS11 Counsel assisting concludes that "many of the problems associated with the road closures lie in the late notice that was given to Council of the applicant's intentions in the first place ..." This is surprising given that the CA submissions note at 518 that Mr Mehajer first contacted the council regarding the placement of traffic cones in May 2015. Not having heard from the council Mr Mehajer followed this up with an email on 14 July 2015. The first response from the council came on 16 July 2015, i.e. over 6 weeks after the initial request from Mr Mehajer.

127. The issue of the leaflets raises a different issue to the road closure application process. There is no dispute from Mr Mehajer that they should not have been disseminated. However, there is also no dispute that Mr Mehajer

⁵³ See Mehajer T 1301: 1-13

⁵⁴ Exh S-20 p 208

did not issue, nor was he aware of, the leaflets. Given the proximity of this event to his wedding this is hardly surprising. However, CA Submissions argue that Mr Mehajer 'must take responsibility for the actions of those he engaged to perform that work'.⁵⁵ It is unclear whether Counsel Assisting is referring here to moral responsibility or some form of vicarious legal responsibility. This inquiry could only be concerned with the latter. There is no basis for making any finding that Mr Mehajer ought be 'responsible' for the unilateral actions of a third party contractor in disseminating the leaflets.

128. As for CA Submission that street closures should be comparable to development applications, with residents given the opportunity to respond, it is submitted that no such recommendation ought be made. The compliance expense and waste of Council resources to deal with road closures in such a way would far outweigh the relatively minor inconvenience experienced by residents who live in the same street as someone who has a large wedding.

129. The final issue relates to the helicopter landing. This is by far the most serious issue given the safety aspects involved in the use of public space (especially parks and ovals ordinarily used by children) as helipads. Proper protocols should be introduced by Councils in consultation with CASA to determine the appropriate way in which to deal with such an issue should it arise again. For example, it should not be left to an applicant without suitable aviation experience to secure the perimeter for a landing site. In the absence of such proper protocols no criticism can be made of Mr Mehajer, however, and there was nothing in his dealings with Council which was improper or unlawful.

10 November 2016



Sam Duggan
Counsel for Mr Mehajer

⁵⁵ CA Submissions FS9, p 98

AUBURN PUBLIC INQUIRY 2016

Document 9

**Written submissions on behalf of
Glenn Francis, Mark Brisby,
Hamish McNulty and Ian Dencker**

AUBURN PUBLIC INQUIRY

SUBMISSIONS ON BEHALF OF GLENN FRANCIS, MARK BRISBY, HAMISH McNULTY AND IAN DENCKER

Introduction

1. Counsel Assisting makes some very serious allegations against various persons, many of which could have devastating effects upon reputations and ability to earn a living. It should be borne in mind that most witnesses were cross examined without advanced notice of the questions or issues that were to be explored or of the material that would be put to them; and without the ability to reflect and consider such other contemporaneous material as might be available to assist them in recalling events and giving a fulsome answer. Further, much of this was done in private hearing without the evidence of what others had said or provided by way of relevant documentary material being made available.

2. These submissions are prepared in the light of the opening remarks of the Commissioner as follows¹:

This is an administrative inquiry. In essence, it is 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. Any findings of fact that are ultimately made are expressions of opinion. They bind no one...

Given that this is an administrative inquiry, the rules of evidence do not apply. The rules of fairness, however, do.

Additionally, there is the requirement that any finding of fact must be made rationally and in accordance with proper standards of satisfaction that might vary depending on whether the asserted factual matter is adverse to the interests of any person.

3. In relation to the exercise of fact finding and the “*proper standards of satisfaction*”, some guidance can be gained from the following passage in the context of an allegedly fraudulent insurance claim (*Rolleston v Insurance Australia Ltd* [2016] NSWSC 1561 per McDougall J at [33]):

¹ T5.28 to 46

This is a civil case. The onus of proof is, therefore, the civil standard: proof on the balance of probabilities. To satisfy the civil onus, the defendant must adduce proofs that raise a “more probable than not” inference in favour of what it urges; there must be a reasonable and definite inference available on the whole of the evidence; there must be something more than conflicting inferences of equal degrees of probability. And in assessing whether the defendant has satisfied its obligation, the Court must take into account the gravity of the matters alleged, and the “conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct” (*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALR 170 at 171, citing *Rejtek v McElroy* (1965) 112 CLR 517 at 521).

4. Furthermore, in view of the seriousness of the allegations:

...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

It is often said that such an issue as fraud must be proved ‘clearly’, ‘unequivocally’, ‘strictly’ or ‘with certainty’ ... This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better option, the same as upon other civil issues. But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected. [citations omitted]²

5. Further, in the context of the need to put such allegations clearly to a witness, the Court of Appeal addressed the matter thus in *Sgro v Australian Associated Motor Insurers Ltd* at [56]:

[56] In *Ghazal v Government Insurance Office (NSW)* (1992) 29 NSWLR 336 at 344, Kirby P observed, in the context of the manner in which a case

² *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362–363 per Dixon J, cited with approval for instance in *Sgro v Australian Associated Motor Insurers Ltd* [2015] NSWCA 262 at [54]

was run at trial, that it is necessary to fairly confront a person with the suggestion that a case is false or fraudulent. His Honour pointed out that this was once considered a question of fairness but was now accepted to be a basic obligation of procedural justice: *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100; 102 ALR 339 at 108–109, 118–119; *Inzaurrealde v Government Insurance Office of New South Wales* (Court of Appeal, 28 October 1992, unreported) per Mahoney JA; Ghazal at 345.

6. In the context of this inquiry, that would require not only that any matter of potential serious criticism be put clearly to the relevant witness, but also that it be clearly identified in Counsel Assisting's written submissions.
7. These submissions are made on behalf of Messrs Francis, Brisby, McNulty and Denker.
8. As to Mr Dencker, no matter was put to and he was not called to give evidence. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made.
9. Mr McNulty provided a statement³ and was called to give evidence⁴, but no criticism was put to him. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made.
10. In the heading of each Part (taken from the submissions of Counsel Assisting), it will be made clear whether the submissions relate to Mr Francis or Mr Brisby or (if nothing is stated) both.

Part 1: Relationships

(a) Generally

11. Counsel Assisting commences his submissions with an analysis of what he describes as "*Significant Relationships*", in particular between Councillors and Council staff. He sets out contact between them in person both on and off Council premises and by telephone, including by text messages. There appears to be an implied criticism of such relationships, but no express findings or conclusions to that effect are in fact invited.

³ Exhibit S20

⁴ T971.28 to 994.3

12. The submission appears to be rather that where Counsel Assisting wishes to criticise the actions of a particular member of staff that may have benefited or were consistent with the wishes of a particular Councillor, he relies upon the relationship between that member of staff and that Councillor as demonstrating that the actions were influenced by the relationship. That demonstrates flawed logic.
13. First, there is no impropriety demonstrated in the thousands of interactions analysed by Counsel Assisting: there is no smoking gun. In reference to the relationship between Mr Attie and Mr Brisby, Counsel Assisting relies upon *"constant references to each other as "mate""* and the fact that *"jokes were shared"*⁵. Whether in a professional or personal relationship, such practices could not be indicative of anything, let alone some impropriety.⁶
14. Where the interactions are consistent with honest interactions, it is flawed logic to use them as evidence of impropriety. Indeed, the fact that there are so many interactions and yet none of them demonstrate impropriety supports, if anything, an absence of impropriety.
15. Secondly, the extent of the interactions is such that they demonstrate many relationships between Councillors and staff where there is no suggestion of any impropriety in relation to dealings involving those parties. In other words, the existence of the interactions and relationships proves too much and thus does not support any inference of impropriety.
16. For instance, Counsel Assisting describes a relationship between Mr Attie and Mr Brisby⁷, but nowhere in the submissions is it suggested that Mr Brisby did something in order to advance or prefer Mr Attie's interests or wishes in some way; and that section also relies upon dealings involving not only Mr Attie and Mr Brisby, but also Messrs Zraika, Oueik, McNulty and Francis and yet no grand conspiracy involving all of those persons is alleged. Similarly, in the context of the relationship between Mr Attie and Mr Francis, Counsel Assisting relies upon meetings involving Messrs Tannous, Zraika, Attie, Fitzgerald junior, Oueik, McNulty,

⁵ CA submissions para 80

⁶ Indeed the Code of Conduct expressly contemplates and permits invitations to social, cultural and sporting functions outside of the workplace and the exchange of gifts such as bottles of alcohol, ties, scarves, chocolates and flowers (Exhibit O1 at page 33, clause 5.3)

⁷ CA submissions para 80-84

Denker, Francis and Brisby⁸, when again that includes individuals against whom no complaint is made (eg, McNulty and Denker) and suggests a grand conspiracy that is simply not alleged.

17. By way of further example, Mr Brisby gave evidence of having driven Councillors Simms and Batik-Dunbar home; and having been to the homes of Councillors Oueik, Zraika, Attie, Campbell, Mehajer and Lam⁹. Counsel Assisting cites visits by Mr Brisby to homes of Councillors Oueik and Zraika¹⁰, but omits mention of his visits to the homes other Councillors. This selective representation of the evidence demonstrates the flaw in what appears to be an implicit criticism of these interactions as being inappropriate: if any interaction outside of work is indicative of an inappropriate relationship, then it implicates most, if not all, of the senior staff and of the Councillors, including many who have not been the subject of any criticism in the inquiry. Put simply, there is no dispute that there was a good relationship between senior members of Council staff and Councillors, but the evidence does not go beyond that.
18. Thirdly, Council staff and Councillors are part of the same organ, being the Council. They are therefore required to perform their roles and work together, which requires that they have relationships, whether significant or not. Indeed, it is difficult to see how a Council could operate effectively without good and indeed significant communications and relationships between Council staff and Councillors. In the context of such relationships operating in many cases over several years, it would not be surprising if those relationships extended beyond purely matter-of-fact professional relationships, whether to the exchanging of Christmas cards, sharing jokes, meeting in a personal context or otherwise, particularly in the context of senior members of Council staff.
19. Indeed the Council's own internal documentation recognised this. For instance:

[The Mayor and General Manager] represent the right hand and the left hand of the same corporate entity. They are the two sides of the only proper communication channel between Council and its staff, and it is

⁸ CA submissions paras 67 and 68

⁹ T453.28 to 44

¹⁰ CA submissions para 48,53

imperative that they work together as closely and harmoniously as this definition suggests that they should.¹¹

The Mayor needs to have close attendance and counsel of the General Manager, and further, the General Manager cannot effectively administer and manage operation to the most desirable level unless this relationship exists.¹²

There often needs to be personal interaction between Councillors and senior officers, particularly regarding access to and provision of information, to effectively integrate policy making and service delivery.¹³

There have to be a number of communication channels between Councillors and Officers. The proper ones are:

- ...

- To the General Manager - For information requests on adopted policy, statute existence or interpretation, or request for assistance or counsel on meeting procedures, or requests or access to records.
- To the Deputy General Manager/Departmental Manager - For information requests on departmental operational issues, on technical processes or approved works and services on status of previously made complaints or requests for action of any nature.¹⁴

20. Fourthly, there is nothing in the Code of Conduct (or indeed in any other document that was presented to the Inquiry) that proscribes contact of *any type* between Councillors and Council staff. It is curious that there appears to be an implied criticism of these relationships and yet it was not put to a single witness that the contact and the relationships described were of themselves improper.
21. Fifthly, it is clear that there was in fact nothing untoward about such contact and relationships existing. As the elected representatives, Councillors are required to represent the interests of their constituents, first in making decisions and secondly in representing the interests of particular constituents. Thus, an individual constituent might ask his or her Councillor to make inquiries or representations to Council staff on his or her behalf in relation to a planning matter, but the Councillor might also be called upon to make a Council decision in relation to that (or some other related) matter, for which purpose he might seek information from

¹¹ Manual of Standard Procedures at 4.01 - Operating relationship between the Mayor and the General Manager

¹² Manual of Standard Procedures at 4.06.2 - The Other Side

¹³ Provision of Information to and Interaction between Councillors and Staff (Reaffirmed 1 October 2008) at 1.000

¹⁴ Manual of Standard Procedures at 4.09.02 - Communication Channels

Council staff. Mr Okorn gave evidence that such contact was normal and was not untoward¹⁵ and he was not cross examined otherwise.

22. Sixthly, the structure of a Council is that the Councillors are the ultimate decision-making body and the role of the Council staff thus requires that they implement decisions and policies of the Councillors, even if they hold a different view professionally.
23. Thus, for instance, a planning report might incorporate a recommendation with which planning staff disagreed, but which might be consistent with the Councillors' views, and this would not indicate any impropriety. Mr Alvarez accepted as much and was not cross examined to the contrary¹⁶, which included the following:

Q. And so ultimately in preparing reports, it could well be that you were preparing a report recommending a development which, from a planning point of view, you did not support but the councillors wished to go ahead; correct?

A. That's correct, yes.¹⁷

24. Mr Brisby gave evidence to similar effect¹⁸ and put the matter concerning the primacy of Councillors over Council staff thus:

Well, it was a council resolution. My job was to carry out council resolutions.¹⁹

It is a matter for council. It's a planning proposal. The staff had put a recommendation, advice and information there and it's then a matter for council.²⁰

Q. And they are all very qualified people; Ms Cologna, Ms Southwell, Mr Francis, they've all got degrees in planning, it is their area of professional expertise. They put forward that report and those recommendations to council and council says no. Is that an issue that you would deal with as general manager, or you would address, you would investigate, you would explore with the staff, or how does –

A. I'm sorry, I'm not sure - if council resolves - it's not uncommon for a council, an elected council to resolve in a way that's different to council recommendations, it's not unheard of.

Q. You just move on, you deal with the council resolution?

¹⁵ T1688.44 to T1690.26

¹⁶ T950.27 to 951.26

¹⁷ T951.6 to 11

¹⁸ T440.2, T460.4 to 28 and T464.4 to 6

¹⁹ T440.2

²⁰ T464.4 to 6

A. Part of my job description is to implement council resolutions.

Q. You don't go back to the staff and ask them about why it was they put the resolution? It's not something that you want to follow up in any way; is that right?

A. I wouldn't normally, sir, Mr Commissioner. In these scenarios it's not uncommon, it's not uncommon for a complete turnaround or even changes to staff recommendations.

THE COMMISSIONER: Q. In relation to a planning proposal?

A. In relation to any report that's put up, there's changes. We're talking about very experienced senior staff, as Counsel Assisting mentioned; they're generally very accepting. Nobody likes to have their report changed but will accept it in the political process.²¹

25. Seventhly, given the position of Councillors within the Council structure as in effect above Council Staff and the latter being responsible for providing information to Councillors and implementing their decisions and policies, it is difficult to see why Council Staff should be criticised for responding to an approach from a Councillor that is not on the face of it improper. Indeed, Council Staff would be likely to be criticised for ignoring, for instance, a request for information; and in the absence of a policy forbidding such contact, ignoring even a social contact or a jokey e-mail would be unlikely to foster confidence in that staff member or further his or her career prospects.
26. It would be usual that some Councillors would be more active than others in seeking input from Council Staff, whether in relation to particular issues or indeed generally; and again, no adverse inference can be drawn from this.
27. Taking all of the examples set out in Counsel Assisting's submissions in relation to messages between Councillors and Council Staff, should the messages "*Henry street Lidcombe. Help!*"²², "*Did u call me?*"²³, "*Need to see you this morning...*"²⁴, "*Why is the IHAP set up for 2 years when the council will be changed within 1 year.*"²⁵ and "*Good morning. Are u in the office yet?*"²⁶ have been ignored? The obvious answer is "no".

²¹ T459.43 to T460.28

²² CA submissions para 63

²³ CA submissions para 64

²⁴ CA submissions para 66

²⁵ CA submissions para 84

²⁶ CA submissions para 87

28. Counsel Assisting appears to accept that in relation to some of the exchanges and addresses the matter thus:

Whilst it is not suggested that there was anything untoward in these particular exchanges, what they do show is a relationship where Mr Attie regularly sought out Mr Francis to deal with, presumably, Council matters.²⁷

29. This passage, however, raises some significant problems: first, it addresses exchanges set out previously in the submissions (and in particular, it would appear, in paragraphs 63 and 64), but no similar concession is made in respect of the subsequent exchanges, in particular those quoted in paragraphs 66 to 87; and secondly, by the comparison between the first and second parts of the passage, it suggests that the relationship demonstrated by the exchanges was, of itself, untoward, which for all the reasons set out above is simply not supported by logic, the facts or the evidence.
30. There could be no real dispute that there was a good relationship between senior member of Council staff and Councillors, but the selective sampling of interactions and relationships with an implied allegation of impropriety (that is never in fact made explicit) presents a misleading and prejudicial picture.

(b) Visits in person

31. In the middle of the section headed "*Significant Relationships*", Counsel Assisting includes the following:

A theme that emerged during the inquiry were various relationships between Councillors and Staff. A particular matter of complaint was the propensity of a small minority of Councillors to visit the planning department and the offices of Messrs Brisby and Francis²⁸.

32. It is not clear whose complaint this is said to be, but the fact that any particular person may have complained about it does not, of itself, support an adverse conclusion.
33. If it is accepted (which it is submitted it must be on the basis of logic, the facts and the evidence) that contact between Councillors and Council Staff (particularly

²⁷ CA submissions para 65

²⁸ CA submissions para 72

senior members of staff) was not of itself improper, then why should that contact not have been in person; and why should it not have been at Council premises?

34. This is reinforced by the apparent concession by Counsel Assisting, consistent with logic and the facts, that discussions between them (or at least some of them) were likely to have been about "*Council matters*"²⁹. A proper functioning Council would be expected to have close contact and close relationships between Councillors and at least senior members of Council staff; and if this was thought not to be desirable, then there would need to be very clear directions to Councillors not to approach Council staff and for Council staff to ignore any contact from Councillors.
35. Mr Burgess gave evidence about meetings between Mr Brisby and Mr Oueick in the Mayor's office as follows³⁰:

A. Mr Brisby met with the mayor regularly in respect of development matters and met with the mayor over other issues quite regularly, and they had coffee together in the mayor's office or off-site.

Q. Is that normal, for the director of planning or the person in charge of the planning department to meet on a regular basis with the mayor in the absence of either the general manager or the deputy manager of council?

A. That is not irregular because the principal issues in Auburn were always based around development-type issues or housing issues, or whatever the case may be.

36. Counsel Assisting also addressed interactions between Councillors and Council staff earlier in a section headed "*Councillor visits to the Second Floor – Mr Oueik and Mr Attie*"³¹. Mr Alvarez gave evidence concerning visits to Mr Francis' office, which as set out in that section of the submissions, he said were maybe less than once a month in the case of Mr Attie and totalled three or four times over two and a half years in the case of Mr Oueik, but could not give any evidence as to their content.
37. Mr Alvarez expressed the view that "*it's sort of contrary to that separation of powers*", but he was not asked to explain what constituted the "*it*" (including whether this was the fact of contact between a Councillor and a senior member of Council staff, the fact it occurred on Council premises or something else), what were the relevant powers and why they should be kept separate.

²⁹ CA submissions para 65

³⁰ T559.33

³¹ CA submissions para 55-61

38. In the absence of exploring such matters in the evidence, Mr Alvarez's evidence could not be taken to prove anything and, even taken at its highest, could not demonstrate anything improper about the relationships between Councillors and Council staff, let alone any impropriety on the part of Council staff for not ignoring any contact from Councillors.

(c) The cupboards (Mr Francis)

39. Counsel Assisting has addressed the issue of the kitchen cabinets by setting out the evidence given by Mr Francis on this issue in the context of a section on the relationship between Mr Francis and Mr Oueik³², but he has not sought any particular findings in that regard.
40. It appears rather to be presented as part of the background to a submission that they had a good or close relationship (as set out in that section³³), which is really not something in dispute.
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 tradesman and had no further involvement, but Mr Francis' efforts to pay the tradesman 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 tradesman 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 on this issue on the part of either Mr Francis or Mr Oueik.
43. As to the remainder of that section of Counsel Assisting's submissions, addressing Mr Oueik raising issues as a councillor or developer, social interaction between them outside of a work context, the exchanging of cards and gifts or them having coffee, none of this of itself (either individually or collectively) is evidence of any

³² CA submissions para 38

³³ CA submissions para 38-54

impropriety (or indeed is suggested to be) and the comments made in the previous two sections (a) and (b) again apply here.

(d) Generally (Mr Francis)

44. It should be observed at this point that, although Mr Francis relied upon the privilege against self-incrimination, no adverse inference can be drawn from that fact (see for instance *Clayton Utz (a firm) v Dale* [2015] VSCA 186 at [181] to [199]).
45. In any event, Mr Francis volunteered evidence in private hearing³⁴ and in a written statement³⁵ and that evidence must be weighed up together with the other available evidence. Further, it should be noted that Mr Francis made concessions against his own interests (including an oversight on his part in relation to Water Street, Lidcombe³⁶) and indeed volunteered information against his own interests (including the issue of the kitchen cabinets to ICAC and of a cancelled parking fine in the private hearing³⁷), whilst at the same time denying any wrongdoing or that the matters he had raised had influenced the way in which he had acted.
46. The fact that Mr Francis made such concessions and volunteered such information supports his credit in relation to the denials that he maintained. Further, it should be noted that he voluntarily approached ICAC and attended the private hearing without seeking or receiving legal advice; and, even after obtaining legal advice, he volunteered a written statement that was consistent with what he had said in the private hearing.
47. Given the manner in which the Inquiry was opened (and reported at that stage), reinforced by the thrust of Counsel Assisting's written submissions, it would not be surprising that Mr Francis sought to rely upon the privilege against self-incrimination in circumstances where any answer he did give could subsequently be used against him, particularly in circumstances where (as demonstrated by the material in PH3) these matters had caused him significant psychiatric distress. Mr Francis would support a recommendation for section 17 of the Royal Commissions Act 1923 to apply to an Inquiry such as this, which would have allowed him to

³⁴ Exhibit PH10

³⁵ Exhibit S23

³⁶ PH T9.32-38

³⁷ PH T53.39 et seq

answer all questions but with the protection (as is normal in other commissions of inquiry with the power to compel a party to answer all questions) that his answers could not subsequently be used against him in other proceedings.

(e) Record keeping (Mr Brisby)

48. Counsel Assisting has addressed an issue concerning the invoices of Mr Fitzgerald senior in a section headed "*Mr Burgess and Mr Brisby*"³⁸ and as part of the conclusions to that section. No findings or recommendations are sought in that section save in respect of the record keeping in respect of the appointment of Mr Howe and the remuneration of Mr Fitzgerald senior³⁹.

49. The difficulty with this is that these issues were simply not raised with Mr Brisby at all⁴⁰. No adverse findings could then be made, although Mr Brisby would not oppose the making of recommendations defining how such circumstances should be addressed in the future⁴¹.

50. In considering any aspect of Mr Brisby's performance, however, the Inquiry would bear in mind the evidence of Mr Honeyman that in the context of the "*significant*" "*disruptions in the council as a result of losing the previous [General Manager]*"⁴², Mr Brisby:

...had brought the organisation together, for want of a better term, after what must have been a very difficult time when John Burgess had been the GM, and I don't pretend to know anything about all of that, but it seemed that that upheaval would, I would imagine, cause a massive problem for the organisation internally and very possibly between the elected body and the staff. I got the firm impression that Mr Brisby had done a great job in mending those fences, if you like, and getting staff back on track.⁴³

51. In relation to the appointment of Mr Howe, Counsel Assisting does not set out in any evidence upon which he relies, but relies only upon page 6 of Exhibit S9, which is the statement of Robert Honeyman, dated 18 May 2016. That statement contains the following relevant to Mr Howe:

³⁸ CA submissions para 121 to 138

³⁹ CA submissions para 136

⁴⁰ Mr Brisby's questioning is at T426 to 539

⁴¹ As suggested by Counsel Assisting in his submissions para 138

⁴² T293.26 to 27 and 35

⁴³ T288.33 to 42

Services of Bob Howe and reports generated from this service

I was unable to locate any formal reports relating to the engagement of Mr Howe and the work done by him but I understand that a request has gone to Mr Howe to rectify this lack of information and is in the process of being provided.

52. That evidence, of itself, could not found any finding as to the records in relation to Mr Howe, not least since it does not set out the searches and inquiries that Mr Honeyman made nor the results of the inquiries with Mr Howe, let alone any finding adverse to Mr Brisby; and, as set out above, no finding could be made adverse to Mr Brisby in the absence of any matter concerning Mr Howe having been put to him.
53. In relation to the remuneration of Mr Fitzgerald, there is no suggestion that Mr Fitzgerald did not provide proper invoices nor that the work was not done: the complaint is rather that the invoices lacked detail⁴⁴. Even taken at its highest, a failure by Mr Fitzgerald to provide further detail on his invoices could not give rise to a finding (as suggested by Counsel Assisting) that Mr Brisby thereby failed “to maintain transparent and proper files about the work that was performed”⁴⁵. If the lack of detail in the invoices was a matter worthy of criticism, then that criticism should be directed towards Mr Fitzgerald as a former senior member of Council staff and indeed Mr Brisby’s predecessor (although again he was not asked any questions about this matter⁴⁶).
54. In any event, this was not an ordinary external consultant, but rather a former senior member of Council staff and indeed Mr Brisby’s predecessor. In the absence of a specific policy demanding some other action, such as requiring Mr Brisby not to authorise (and indeed the accounts department not to pay) invoices without full detail of the work and hours performed being provided, it would not have been unreasonable for those invoices to be accepted and paid rather than Mr Brisby raising questions of Mr Fitzgerald that (given Mr Fitzgerald would have been aware that there was no such requirement) might not have been well-received.

⁴⁴ CA submissions paras 136 and 137

⁴⁵ CA submissions para 137

⁴⁶ T1303 to 1325

55. Whatever the reasons for the various participants acting as they did, no adverse finding can be made in relation to Mr Brisby in this regard since he was not questioned (and nothing was put to him) about it.

Part 2: The Beral Planning Proposal (Mr Francis)

56. No criticism or finding is invited in this regard in respect of Mr Brisby by Counsel Assisting and nothing was put to him in cross examination⁴⁷. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made on this issue. This part is therefore a response on behalf of Mr Francis.
57. As discussed above, it was Councillors rather than Council staff who were the relevant decision makers on planning matters. Thus, in preparing reports Council planning staff had to take into account not only their professional views but also the views of the Councillors; and if those views conflicted, then their duty was to advance the views of Councillors. There was nothing unusual or inappropriate about such a position⁴⁸.
58. Of the nine maps produced from the Bowral workshop in February 2014⁴⁹, Mr Zraika absented himself due to his conflict of interest:
- a. Map 2 and 3 shows an extension of B2 to the north and south of York Street;
 - b. Map 5 shows R4 to the north of York Street and B2 to the south of York street;
 - c. Map 1 shows an extension of B2 to the north of York Street and is blank to the south of York Street;
 - d. Map 8 shows an extension of B2 to the north of York Street and R4 to the south of York Street.
 - e. Map 4 shows R3 to the north of York Street and is blank to the south of York street;

⁴⁷ T428.30 to T437.28

⁴⁸ See for example the evidence of Mr Alvarez at T950.27 to 951.11

⁴⁹ Exhibit Gen 8

- f. Maps 6, 7 and 9 are blank;
59. At that time, the area immediately to the north of York Street was R3 and the area to the south was R2. Thus of the nine maps:
- a. three were blank;
 - b. in relation to the area north of York Street;
 - i. four suggested an extension of B2;
 - ii. one suggested a change to R4;
 - iii. one suggested no change;
 - c. in relation to the area south of York Street;
 - i. three suggested an extension of B2;
 - ii. one suggested a change to R4;
 - iii. two were blank.
60. It is difficult to ascertain any consistent pattern or preponderance of views from these maps; and it must be borne in mind that, in addition to the completion of these maps (or not as the case may be) there were also oral discussions, in relation to which no witness was able to give a clear account (which is not surprising given that it occurred two and a half years prior to the hearings in this inquiry).
61. Five supported a change to the north of York Street and four to the south; and in both cases the most popular zoning where change was recommended was to B2. That could be said to justify change to one, both or neither of the north and south of York Street or some compromise position; and if there was to be a change to the north, then perhaps this made a change to the south more desirable.
62. In any event, Ms Cologna prepared a proposal that was a combination of R4 and B2 to the north of York Street; and R4 and R3 to the south⁵⁰. It should be noted that this was not consistent with the views of any one Councillor and so represented a composite picture, or perhaps a compromise. In any event, it is not suggested that it was inappropriate.

⁵⁰ Exhibit O1 page 71

63. By the time that the proposal for the area south of York Street to be B2 was introduced on 9 July 2014, there had been a further Council briefing in June, which both Mr Francis and Ms Cologna attended. Incidentally, the reference in paragraph 182 of the submissions of Counsel Assisting to what Mr Francis had said should in fact be a reference to Mr Campbell, the relevant exhibit relied upon being Mr Campbell's statement.
64. Thus, in preparation for the Council meeting on 16 July 2014 Mr Francis and Ms Cologna had available to them the maps prepared by the Councillors together with the content of discussions at the Bowral workshop and the June Council briefing.
65. At paragraph 201 of his submissions, Counsel Assisting suggests that Mr Francis "*directed*" Ms Cologna to make the change to York Street, but this overstates the effect of her evidence and omits the leading nature of the question⁵¹:

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

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

66. When a similar question was put earlier in a non-leading way, the response was different⁵²:

Q. Again I am not concerned about the justification. Was it Mr Francis that said, "Make that area B2 in the map that we take to council on 16 July"?

A. Look, we would have had a discussion about should it be R4 or should it be B2, and we've ended up with going with B2.

67. When questioned further in a non-leading manner, the response was to similar equivocal effect⁵³:

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 that 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 three Councillors had shown that on their annotated map, so it certainly came from the February workshop.

⁵¹ T136.19 to 24

⁵² T133.36 to 41

⁵³ T157.4 to 23

Q. So then is it 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 that. 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.

68. If, as Counsel Assisting submits, there was no planning justification for this change, then it would have been apparent to Ms Cologna and indeed one would have expected her to have raised some objection with Mr Francis. Her evidence, however, was to the contrary⁵⁴:

Q. What was then put forward at the July meeting –

A. Yes.

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

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

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

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

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

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

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

A. Yes, that's correct.

⁵⁴ T157.25 to 158.8

69. Further, there were changes to Ms Cologna's proposal following the Bowral workshop to both the north and south of York Street by the time the matter was presented to Council on 16 July 2014: immediately to the north of York Street became B2 rather than three strips of R3, R4 and B2 respectively; and to the south became B2 and then R4 rather than R4 and then R3⁵⁵.
70. The change to the north was not criticised (or indeed explored in the evidence), but appears to have a logic of simplifying the position. It was introduced at least by the time of the first draft of the report to the meeting of 16 July 2014 that was prepared on 8 July 2014⁵⁶ and it appears to be accepted by Counsel Assisting that it was present at the time of the June Council briefing⁵⁷.
71. Once the B2 zone had been extended up to York Street, it could not be said that extending it to the south was on the face of it obviously unjustifiable⁵⁸. By reference to the map on page 92 of Exhibit B1, a rezoning of the land south of York Street (d) might have seemed odd if the land to the north (c) was R3/R4/B2 (with B2 extending to a point on its southern end) as contemplated by Ms Cologna on page 71 of Exhibit O1, but it could not be said that the extension to B2 to the area south of York Street (d) was not at least consistent with the existing B2 zone extending down and up to York Street.
72. The sequence of events then was that:
- a. maps were prepared by Councillors at the Bowral briefing that included proposals by several members for B2 to be extended both up to and beyond York Street;
 - b. Ms Cologna prepared a proposal with changes to R3/R4/B2 north of York Street and R4 and then R3 to the south;
 - c. that proposal was then altered to simplify the area immediately north of York Street to B2, which was then presented to the June briefing, and no criticism is made in that regard;
 - d. the matter was the subject of significant debate at the June briefing;

⁵⁵ Compare page 71 of Exhibit O1 with page 92 of Exhibit B1

⁵⁶ Being item c of the proposed rezoning paragraphs a to m as set out in paragraph 194 of Counsel Assisting's submissions and as confirmed as being in the first draft in paragraph 196; see page 92 of Exhibit B1; and as confirmed by Exhibit Gen 26

⁵⁷ CA submissions at para B20

⁵⁸ Again compare page 71 of Exhibit O1 with page 92 of Exhibit B1

- e. a change was then made for the area south of York Street to be B2 and then R4.
73. Ms Cologna does not support the submission that this second change was made at the direction of Mr Francis nor that it was unjustifiable nor indeed that it was inconsistent with the views being expressed by the Councillors as she understood them (following the June briefing, which she had attended). She accepts that it may have been in response to comments from Councillors at the June briefing, which is supported by the introduction into the report that went to Council of the words "*Further discussion and verbal amendments made to plan*" in respect of that briefing⁵⁹.
74. Thus, either (as Counsel Assisting submits⁶⁰) an unidentified Councillor directed Mr Francis, who in turn directed Ms Cologna to make a change in respect of the area south of York Street to B2 without any justification from a planning perspective or deriving from the discussions of Councillors but in order to benefit Mr Zraika; or the change was arrived at by Mr Francis (and indeed Ms Cologna) on the basis of the discussions with Councillors.
75. There is no direct evidence to support the former:
- a. no witness or document provides any support;
 - b. Ms Cologna did not support it in her evidence and if it could not be justified from a planning perspective or from the comments of Councillors, then one would have expected her to have at least raised some query in this regard of Mr Francis, to have had a clear recollection of her concerns and when presented in the inquiry with the evidence now available, to have adopted the position for which Counsel Assisting now contends;
 - c. none of the participants in the Bowral workshop or the June briefing had a clear recollection of the precise content of their discussions, which is not surprising given that those events occurred over two years ago;
 - d. an adverse inference cannot be drawn from Mr Francis' claim of the privilege against self-incrimination and in any event he provided an account

⁵⁹ See Exhibit B1 at page 85

⁶⁰ CA submissions paras B1 to B23

in his private hearing and a statement, in both of which he denied any wrongdoing⁶¹.

76. In reality, all that Counsel Assisting can rely upon is a submission that the change was so obviously unjustified that there must have been this conspiracy to benefit Mr Zraika (involving Mr Francis but apparently not Ms Cologna).
77. For the reasons given above, that submission is not borne out by the evidence, noting that it was not supported by the two planners (Mr Francis and Ms Cologna) and no expert evidence was adduced on this issue. In any event, however, given the grave seriousness of the allegation, the Commissioner could not find the “*exactness of proof*” required rather than “*inexact proofs, indefinite testimony, or indirect inferences*”⁶², particularly bearing in mind that “*the conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct*”⁶³.

Part 3: The South Auburn Planning Proposal (Mr Francis)

78. No criticism or finding is invited in this regard in respect of Mr Brisby by Counsel Assisting and nothing was put to him in cross examination⁶⁴. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made on this issue. This part is therefore a response on behalf of Mr Francis.
79. As can be seen from the plans of the area⁶⁵ and the Council resolution of 17 April 2013⁶⁶, the relevant block was originally zoned R3 as part of a larger R3 area abutting a B4 area to the north, but was then to be rezoned B4 on its western side and R4 on its eastern side. MG Planning was engaged and provided a report that supported this rezoning⁶⁷. It appears clear that none of the Council staff (including in particular Mr Francis, Mr Brisby, Ms Cologna and Mr Alvarez) supported this rezoning proposal and in particular the rezoning of the western side to B4.

⁶¹ See Exhibits PH20 and S23

⁶² See the discussion of *Briginshaw* in the first section above

⁶³ See the discussion of *Rejcek v McElroy* in the first section above

⁶⁴ T437.28 to T445.43

⁶⁵ Exhibit SA1 page 283 and following

⁶⁶ Exhibit SA1 page 6

⁶⁷ Exhibit SA1 page 69 at 111 (with relevant plan being at page 79)

80. Ms Cologna gave evidence about the rezoning proposal thus:

A. ...Look, I wasn't supportive but I was acting on a resolution of council and the fact that we'd had two previous gateway determinations.⁶⁸

Q. Is this a fair way to put it - neither of you [or Mr Francis] liked the proposal but considered yourselves bound by the resolution to progress it?

A. That's correct, yes.⁶⁹

81. In further answers to Counsel Assisting, Ms Cologna gave the following evidence⁷⁰:

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

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

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

A. Yes.

82. In cross examination, she gave the following evidence⁷¹:

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

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

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

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

Q. You considered the position of compromise -

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

⁶⁸ T139.2 to 4

⁶⁹ T139.13 to 16

⁷⁰ T142.17 to 28

⁷¹ T158.10 to 38

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

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

83. Mr Alvarez's evidence was that he disagreed with all of Options 1, 2(a) and 2(b), which he raised with the staff at his level, but his only discussions with Ms Cologna and Mr Francis in that regard were as set out in his statement⁷². His statement demonstrates that Mr Francis suggested a reduction in B4 to 90 Auburn Road (which became option 2(a)) and it was then Mr Alvarez who suggested the alternative of a reduction to 100 Auburn Road (which became option 2(b))⁷³. Further, Mr Alvarez did not suggest that an alternative be included for the removal of B4 from that block entirely.
84. Counsel Assisting relies upon the evidence of Mr May as supporting a proposition that staff should not make recommendations with which they disagree⁷⁴. Although Mr May has extensive experience as a General Manager, this was only at Mosman Council, in relation to which his evidence was:
- ...Now, at Mosman if a planner didn't agree with the council, they reminded the council all the time.⁷⁵
85. It was not suggested that Mr May had any planning qualifications or experience; and his experience as a General Manager of one Council could not establish the relevant standard for all planners across all Councils (or even planners in, as here, a different Council). Furthermore, it is inconsistent with the evidence of the planning staff in this Council, including in particular Ms Cologna and Mr Alvarez (and indeed Mr Brisby as a General Manager with planning expertise⁷⁶), who accepted that the role of Council planning staff was to carry out Council resolutions, which might well require them to prepare reports and recommendations that were not consistent with their personal views⁷⁷.
86. The criticism of Mr Francis is that he did not include a proposal that did have merit, namely for the removal of the B4 portion entirely and instead recommended

⁷² T954.30 to 47

⁷³ Exhibit S17 at paras 20 to 23

⁷⁴ CA submissions para 313

⁷⁵ T72.5 to 6

⁷⁶ T427.11 to 18

⁷⁷ See the discussion in paragraphs 22 to 24 above

Option 2(a), which had “*no rational professional planning basis*”⁷⁸; and Counsel Assisting submits that he thereby did not exercise a reasonable degree of care and diligence in carrying out his functions⁷⁹.

87. The fact is, however, that Council had explicitly resolved on 17 April 2013 to introduce the B4 zoning on the western side of the block instead of R3. To include an option to remove the B4 zoning entirely would then have been contrary to that resolution. The evidence of Council staff⁸⁰ was that they were required to implement Council decisions, even if they disagreed with them personally. To fail to include a recommendation that would in effect reverse a previous Council decision could not then be said to be a breach of Mr Francis’ duties.
88. Further, it is of note in this regard that, even though they were in possession of the same facts at the time, neither Mr Alvarez nor Ms Cologna suggested at the time that an option for removal of the B4 entirely should have been included in the report (let alone recommended as the preferred option).
89. Options 2(a) and 2(b) were then a compromise between the preferred positions of Council for there to be B4 along the western side of the block and the preference of Council staff (which was not consistent with the previous Council decision) for there to be no B4 at all; and Option 2(a), which was closest to the position of Council staff, was recommended after an extensive comparison in the report to Council⁸¹.
90. Not only does that make sense as a matter of logic, but Ms Cologna understood it as such at the time. Further, she did not suggest at the time that Option 2(a) and 2(b) should not be included or that Option 2(a) should not be recommended; and when giving her evidence to the inquiry she maintained the position that Mr Francis acted appropriately and in particular she did not adopt the position for which Counsel Assisting now contends.
91. If there was, as Counsel Assisting contends, “*no rational or legitimate planning basis*” for Options 2(a) and 2(b)⁸² and indeed “*no rational professional planning*

⁷⁸ CA submissions paras SA1 to SA20 in particular at SA17

⁷⁹ Ibid at para SA16

⁸⁰ As referred to in paragraph 85 above

⁸¹ Exhibit SA1 at pages 24 to 29

⁸² CA submissions at para SA4

basis” for Option 2(a) to be recommended⁸³, then one would have expected Ms Cologna to have at least raised some query in this regard of Mr Francis at the time, to have had a clear recollection of raising such concerns and, when presented in the inquiry with the evidence now available, to have adopted the position for which Counsel Assisting now contends.

92. Even Mr Alvarez, who was very critical of all the options, did not suggest at the time that an option for the removal of all of the B4 should have been included; and indeed when he was presented by Mr Francis with Option 2(a), as discussed above it was he that suggested the inclusion of the alternative of Option 2(b).
93. Counsel Assisting seeks to rely upon Mr Francis’ claim of the privilege against self-incrimination in this regard⁸⁴. As discussed above in the Introduction section, no adverse inference can be drawn from this; and insofar as Counsel Assisting suggests that there is no explanation for how Mr Francis came to recommend Option 2(a)⁸⁵, this is simply not correct. He referred to each of Option 2(a) and 2(b) having “*less impact*” of the B4 rezoning in both his private hearing and his statement⁸⁶; it is clear that on that basis, Option 2(a) then had less impact than Option 2(b) since it included less B4 zoning; and the relative merits of the proposals were discussed in the report⁸⁷, as noted in his statement⁸⁸.
94. In the light of all the evidence, and in particular the position taken by Ms Cologna and Mr Alvarez and the evidence of all the Council staff, the criticisms suggested by Mr Francis of Counsel Assisting cannot be made out.

Part 4: The Grey Street Planning Proposal

95. No criticisms or findings are invited in respect of Mr Francis or Mr Brisby in this regard by Counsel Assisting and nothing was put to either of them in cross examination. In the circumstances, no findings can be made against either of them and no adverse comment concerning their actions can be made on this issue.

⁸³ CA submissions at para SA17

⁸⁴ CA submissions para SA15

⁸⁵ CA submissions para SA15

⁸⁶ Exhibit S23 at para 50

⁸⁷ Exhibit SA1 at pages 24 to 29

⁸⁸ Exhibit S23 at para 52

Part 5: Marsden Street Planning Proposal (Mr Francis)

96. No criticism or finding is invited in respect of Mr Brisby in this regard by Counsel Assisting and nothing was put to him in cross examination⁸⁹. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made on this issue.
97. Counsel Assisting raises issues as to Mr Francis' "*interventions*" in the process regarding this issue⁹⁰. He raises the inclusion of Options E and G, both of which were initiated by Council staff. He questioned Ms Cologna concerning whether Option G should have been referred back to the consultants AECOM, but this is precisely what had occurred with Option E.
98. There was no evidence suggesting that Option E was not justifiable on a planning basis (and indeed the evidence was to the contrary⁹¹); it was referred back to AECOM; and it was not rejected as being unjustifiable by AECOM. In those circumstances, there could be no criticism of the substance of including Option E nor of the process by which it was presented to Council.
99. In relation to Option G, Ms Cologna gave the following evidence in relation to this issue⁹²:

51. Alternative scenario G was discussed by Mr Francis and myself. Alternative scenario G was a combination of a number of scenarios proposed by AECOM in their report. Mr Francis and I were both of the position that the land fronting East Street should retain its industrial zoning, to provide a transition of land use between the town centre and the cemetery (that is, a buffer between these uses), and so that some industrial land could be retained in this location. AECOM's position was that this location was suited to a B4 and R4 Zoning, and that development could take advantage of view of the trees within Rookwood cemetery. In terms of the remainder of the precinct, I was of the view that it could be rezoned either B4 or R4, given how close it was to Lidcombe Station. I recall Mr Francis had a similar view. Both of these zones could permit a similar scale of development in this location. In the end Mr Francis suggested that we recommend the area be rezoned B4 because a slightly larger area of B4 zoning might increase the likelihood of a supermarket

⁸⁹ T445.43 to T450.42

⁹⁰ CA submissions paras MS14 to MS17

⁹¹ As acknowledged by Counsel Assisting in his submissions at para 422 and see Exhibit S17 at para 8

⁹² Exhibit S3 at paras 46 to 55

being provided. The lack of a supermarket within the Lidcombe Town Centre has been a long-standing issue for the Lidcombe community, and whilst 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. I did not discuss this matter with Mr Brisby, and I am not aware whether Mr Brisby and Mr Francis discussed this matter, other than for Mr Francis to provide Mr Brisby with a status update, which would be standard practice.

52. My memory is that the B4 zoning for the majority of the Marsden St precinct evolved from discussing AECOM's report and that the reason for it was the proximity of the precinct to Lidcombe station – that is within 400m radius of the station. I was happy for this aspect of Option G to go forward on that basis alone, given that this is consistent with the State planning framework of facilitating housing within walking distance of public transport. In the AECOM report it notes that 400m radius is approximately a 5 minute walk (AECOM Study pg 19). Had the proposal been further from the station, for example over 800 metres radius from the station, I may have had a different position on this.

100. In examination by Counsel Assisting, Ms Cologna gave the following evidence⁹³:

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

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

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

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

101. In cross examination, Ms Cologna gave the following evidence⁹⁴:

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

⁹³ T144.8 to 25

⁹⁴ T158.40 to T159.17

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

Q. Yes.

A. Is that what you meant?

Q. Yes.

A. Yes.

Q. Do you consider that you acted inappropriately at the time or is it more a case of "I could have acted that way but" –

A. Look, it's more of a case of a hindsight thing. The Scenario G that we recommended in the report was an amalgam of scenarios that AECOM had presented. It was not one that they had exactly presented, but it was an amalgam of ones they had presented. They had looked at an option of a large B4 area, so I didn't think it was - I don't think it's inappropriate that we didn't go back to them. In hindsight, yes, we would have gone back to them.

102. The purpose of setting out these extracts from Ms Cologna's evidence at length, in respect of which importantly she was not cross examined otherwise, is to demonstrate that Option G was not some wholly different, let alone unjustifiable, scenario introduced in order to avoid the outcomes that had been considered by AECOM. On the contrary, it was a "*combination of a number of scenarios proposed by AECOM*" and "*an amalgam of scenarios that AECOM had presented*"; and it was not a direction from Mr Francis to Ms Cologna, but rather a proposal that emerged from their joint discussions and which was supported by them both and became their joint recommendation.
103. In the Council meeting on 18 June 2014 at which all of the Options were presented, the Council staff report made clear that Councillors were being presented with the scenarios from the AECOM report together with an additional Option G⁹⁵, as is confirmed by the Council resolution noting the AECOM findings and the additional Option G proposed⁹⁶; and this is also made clear in the Council staff report for the Council meeting of 17 June 2015⁹⁷. Furthermore, the AECOM report was also provided to Councillors⁹⁸. Thus the provenance of Option G and the fact that it had not been provided to AECOM for their comments was clear to Councillors.

⁹⁵ Exhibit MS1 at pages 184, 186 and 195

⁹⁶ Exhibit MS1 at page 213

⁹⁷ Exhibit MS1 at page 213

⁹⁸ Exhibit MS1 at page 186

104. Although Ms Cologna accepted that she could have gone back to AECOM and sought their comments on Option G, her evidence was only that she would have done with the benefit of hindsight and she maintained that she and Francis did not act inappropriately in not doing so at the time.
105. The Inquiry did not then hear any evidence that Option G was inappropriate or unjustifiable; or any evidence (whether, for instance, from appropriate experts or Auburn Council policy documents) to suggest that Mr Francis and Ms Cologna acted inappropriately in putting forward Option G in the manner in which they did. In the circumstances, no adverse finding could be made against them in this regard.
106. There appears to be a suggestion in Counsel Assisting's submissions that "*the results of the voting and recommendations of staff may have been different*" had "*the full extent of the relationship between Mr Oueik and Mr Francis*" been disclosed and known⁹⁹. It is important to note, however, that there is no submission that Mr Francis' actions in relation to Marsden Street were motivated by a desire to assist Mr Oueik; and in any event, there is no evidence to suggest that Mr Francis was even aware that Mr Oueik owned property in the relevant area and such evidence as there is, is to the contrary¹⁰⁰.
107. Although Counsel Assisting does not set out what is intended by "*the full extent of the relationship*", that must encompass not only the issue with the kitchen cabinets, but also not only every personal interaction but also every professional interaction. Since reference is made to the recommendations of staff and the voting of Councillors, this in turn must encompass (since it is not suggested that Mr Francis was aware of any link between Mr Oueik and this particular development) a disclosure by Mr Francis to every member of the planning staff and every Councillor of every such past interaction at every point where a planning matter was before Council staff or Councillors.
108. This entirely disregards the fact that there were "*relationships*" between other members of staff and Councillors that were not disclosed in this way; there was no Council document requiring or even suggesting that such relationships and interactions should be disclosed; it was never suggested to any witness that

⁹⁹ CA submissions at paras MS15 to MS17

¹⁰⁰ Exhibit S23 at para 15

relationships or interactions between staff and Councillors should be disclosed (either generally or even limited to particular developments in which a relevant Councillor might have an interest); it was never suggested to any witness that he or she believed that there should have been such disclosure or that his or her actions would (or even might) have been different with such disclosure; and it would be entirely unworkable.

Part 6: The Sale of Council Land at 13 John Street, Lidcombe (Mr Brisby)

109. No criticism or finding is invited in respect of Mr Francis in this regard by Counsel Assisting and nothing was put to him in cross examination. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made on this issue.
110. In relation to Mr Brisby, Counsel Assisting notes that it was suggested by at least one witness that there was an attempt on the part of Council staff to bury the valuations, but explicitly (and obviously correctly) he does not adopt that suggestion in his submissions¹⁰¹.
111. Although Counsel Assisting notes that the valuations were provided “*at the last minute*”, he observes that Mr Simms and Mr Campbell (who gave evidence that they were not aware of the second valuation) were determined to vote against any proposal whatever the value.¹⁰²
112. Further, it should be noted that Mr Campbell’s evidence went further than that and was that since he was determined to vote against the motion, he was not very interested in the figures, which he accepted were available and there for him to find if he was interested¹⁰³; that he “*probably glanced at [the figures] at the meeting*” but only thoroughly read the valuations subsequently because he was not very interested in them at the meeting¹⁰⁴; and that he could have insisted

¹⁰¹ CA submissions para JS9; and per Mr Campbell, although it is recorded in the transcript as “varied” rather than “buried” – T828.25 to T836.42 and in particular at T830.4 to 8, but correctly recorded as “buried” at T830.13

¹⁰² CA submissions para JS9

¹⁰³ T833.23 to 39

¹⁰⁴ T834.25 and T833.5 to 30

upon further time to read the documents more thoroughly had he wanted to do so¹⁰⁵.

113. In any event, nothing was put to Mr Brisby concerning this issue and thus no finding can be made against him and no adverse comment concerning his actions can be made on this issue.

Part 7: The Closure of Francis Street, Lidcombe on 15 August 2015

114. No criticisms or findings are invited in respect of Mr Francis or Mr Brisby in this regard by Counsel Assisting and nothing was put to either of them in cross examination. In the circumstances, no findings can be made against either of them and no adverse comment concerning their actions can be made on this issue.

Part 8: 40-46 Station Road, Auburn, BBC Developments Pty Ltd (Mr Brisby)

115. No criticism or finding is invited in this regard in respect of Mr Francis by Counsel Assisting and nothing was put to him in cross examination. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made on this issue. This part is therefore a response on behalf of Mr Brisby.
116. There is no dispute that Mr Brisby was liaising with Deacons about the potential prosecution; that Mr Burgess was dealing with ICAC in relation to the matter; and that Mr Burgess was Mr Brisby's superior.
117. The fact that Mr Brisby's evidence was that Mr Burgess was responsible for commencing the prosecution and Mr Burgess' evidence was that it was Mr Brisby's responsibility does not mean that one of them is to be rejected. It is entirely conceivable that each believed his position as stated and that there was some confusion, which was never identified and resolved.
118. Counsel Assisting places reliance upon Ms Simms' note of a meeting that she attended¹⁰⁶, which records that Mr Brisby was to prosecute¹⁰⁷. Although it is clear

¹⁰⁵ T838.30 to 35

¹⁰⁶ CA submissions at para 597 and SR2

on the face of the note that Mr Burgess attended that meeting with Ms Simms, there is nothing to suggest that Mr Brisby was present and indeed the heading “*Confidential – JB re illegal building works with Clr Oueik*” and the conclusion “*Reminded GM that...*” would suggest that he was not.

119. Unsurprisingly, given that the meeting occurred in July 2009, being more than seven years ago, Ms Simms had no independent recollection of the content of that meeting¹⁰⁸. She described it as a meeting between her and Mr Burgess¹⁰⁹ which a conversation between them¹¹⁰ and it was not suggested to her that Mr Brisby was present.
120. Although Mr Brisby gave evidence that he was present at a meeting with Mr Burgess and Ms Simms when Mr Burgess spoke to her about this issue¹¹¹, Ms Simms accepted that she may have had other conversations about this issue¹¹² and thus Mr Brisby may have been referring to a meeting on a different occasion. Mr Burgess’ evidence is consistent with Mr Brisby having been present on a different occasion¹¹³:

Q. Sitting there, do you have any recollection either way as to whether Mr Brisby was present when you discussed this issue, that is, the issue of who would carry out the prosecution, with –

A. I would expect that at the time he would have been in attendance. Whether it was at that specific meeting or not I don't recall, but he may well have been there.

121. Whatever the case, it is more likely in the light of Ms Simms’ evidence, and in particular the absence of anything in her note suggesting that Mr Brisby was present, that he was not present during the discussion between her and Mr Burgess recorded in that note.
122. Further, Ms Simms’ note does not record the precise content or context of what was said; and it records her understanding rather than that of Mr Burgess. Thus, for instance, it may be that Mr Burgess conveyed to Ms Simms that Mr Brisby would manage and pursue the prosecution, but he conveyed to Mr Brisby

¹⁰⁷ Exhibit S10 at page 22

¹⁰⁸ Exhibit S10 at para 8, T341.40 to 42 and T388.24 to 39

¹⁰⁹ T343.28

¹¹⁰ Exhibit S10 at para 8, T341.34 and T388.15 to 17

¹¹¹ T532.27

¹¹² T388.41 to 45

¹¹³ T563.15 to 21

separately (or at least Mr Brisby understood) that Mr Burgess would handle and initiate the matter, albeit that Mr Brisby would then run the prosecution (as Mr Brisby gave evidence to the Inquiry¹¹⁴).

123. Mr Burgess was unable to assist either in relation to the content of the meeting with Ms Simms or, more importantly, with what he said to Mr Brisby¹¹⁵:

Q. In fact you don't have a recollection - and once again I can take you to what you have said, but I will just put it to you straight so we can get to the point. You don't have a recollection ever of saying to Mr Brisby, "You are responsible for the prosecution of this matter"?

A. I don't have specific recall of saying specifically that.

124. Indeed, it would make sense in the context of a potential prosecution of an elected Councillor for the matter to be dealt with at the level of the General Manager (here Mr Burgess), particularly bearing in mind that he was also dealing with ICAC in relation to the issue. Further, given that Deacons provided further advice in October 2009, being after the meeting with Ms Simms, one might expect that at the very least Mr Burgess as General Manager would be involved in reviewing the matter in the light of that advice, which supports Mr Brisby's evidence that his understanding was that it remained in the hands of Mr Burgess.
125. Yet further, if Mr Burgess had in fact delegated Mr Brisby to pursue the prosecution and this was not done, then one would have expected Mr Burgess to have pursued the matter with Mr Brisby, particularly given the issue's sensitivity, Ms Simms' exhortation (as recorded in her note) that Councillors were not to be given preferential treatment and the fact that Mr Burgess continued to deal with ICAC in relation to the issue.
126. Yet further, Mr Lawrence (Council's then Manager of Building Compliance) gave evidence that since the matter related to a Councillor, the matter was taken "*to the next level*", being to Mr Burgess¹¹⁶.
127. In the light of the matters set out above, it is surprising that Counsel Assisting levels criticism at Mr Brisby, but not at Mr Burgess or Ms Simms. When regard is had to their positions as superior to Mr Brisby¹¹⁷, ultimate responsibility must lie

¹¹⁴ T470.3 to T489.46 and T524.24 to T537.5; and in particular at T533.20 to T534.2

¹¹⁵ T629.28

¹¹⁶ T904.5 to 42

¹¹⁷ The General Manager being responsible for the actions of all staff and the Mayor being responsible for the actions of the General Manager – see for instance the Council Manual of Standards at 4.04 to 4.07

with them and is reinforced here by their actual involvement and knowledge on this issue.

128. It is of note that although Counsel Assisting submits that Mr Brisby failed in his duty to comply with Mr Burgess' direction to prosecute Mr Oueik, he does not assert that Mr Brisby had some improper purpose or was improperly influenced. He is correct not to do so since there is simply no evidence to that effect and in any event such a serious allegation could not be established to the *Briginshaw* standard (as discussed in the Introduction section above).

129. Thus, the Inquiry is faced with choosing as to whether:

- a. Mr Brisby was directed to commence the prosecution but, without any reason, failed to do so; or
- b. Mr Brisby understood that Mr Burgess was dealing with the issue of the prosecution as well as the ICAC investigation (either because Mr Burgess had said so or due to a misunderstanding).

130. It is submitted that the latter is more likely and that in any event this Inquiry could not be satisfied as to the former, either generally or to the *Briginshaw* standard. In the case of any doubt, the Inquiry would be satisfied that Mr Brisby was a witness of truth, which would reinforce the conclusion that Mr Brisby understood that Mr Burgess was dealing with the issue of the prosecution. Further support for this can be gained from the High Court's reference to the "*conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct*"¹¹⁸.

Part 9: 14-22 Water Street, Lidcombe (Mr Francis)

131. No criticism or finding is invited in this regard in respect of Mr Brisby by Counsel Assisting and nothing was put to him in cross examination. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made on this issue. This part is therefore a response on behalf of Mr Francis.

¹¹⁸ See the discussion of *Rejtek v McElroy* in the Introduction section above

132. Although Counsel Assisting posits the question as to whether Mr Francis issued an occupation certificate by way of human error or “*something else*”, ultimately his submission is that the “*likeliest explanation is...human error*”¹¹⁹, with which Mr Francis obviously would not cavil.
133. It should be noted, however, that:
- a. the reference that “*Mr Francis’ case is not helped*”¹²⁰ misrepresents the nature of this inquiry: Mr Francis has no case to advance and nothing to prove; as set out in the Introduction above, no adverse inference can be drawn from his claiming the privilege against self-incrimination; and he has volunteered that he made a mistake in his memorandum to Mr Brisby¹²¹, his private hearing¹²² and his statement to this inquiry¹²³;
 - b. the reference to Mr Francis being “*compromised by Mr Oueik in 2006*”, being presumably a reference to the kitchen cabinets, is not accepted and should be rejected (for the reasons set out above); and in any event even if it were accepted that Mr Oueik provided a benefit to Mr Francis in relation to the kitchen cabinets, that of itself (and without more in relation to the events surrounding the specific property) would not provide the “*exactness of proof*” required rather than “*inexact proofs, indefinite testimony, or indirect inferences*”¹²⁴, particularly bearing in mind that “*the conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct*”¹²⁵.
134. The fact that Mr Francis accepted an error on his part in relation to the certification does not, however, necessarily lead to a conclusion that it “*was almost certainly a failure to exercise reasonable degree of care and diligence for the purposes of s439(1) of the Local Government Act*”¹²⁶.
135. It is not every error that will constitute a failure to exercise care and diligence; and this Inquiry should not single out this error on the part of Mr Francis when it has not investigated all of the dealings of the Council to identify all potential breaches

¹¹⁹ CA submissions para WS5 to WS7

¹²⁰ CA submissions para WS5

¹²¹ Exhibit WS1 at page 385 to 389

¹²² Exhibit PH10 at T9.32 to 38

¹²³ Exhibit S23 at para 33

¹²⁴ See the discussion of *Briginshaw* in the first section above

¹²⁵ See the discussion of *Rejcek v McElroy* in the first section above

¹²⁶ CA submissions WS8

of section 439, particularly bearing in mind how a criticism singling out Mr Francis might be reported and perceived. This is reinforced by the fact that no improper motive is suggested in relation to this aspect and no systemic failure or appropriate recommendation identified.

136. Finally, it appears that the matter is the subject of litigation and this Inquiry should therefore be slow to make any findings or criticisms save to the extent that they are necessary in identifying serious failings, systemic problems or appropriate recommendations, none of which are present in relation to this issue.

Part 10: 1A Henry Street, Lidcombe

137. No criticisms or findings are invited in respect of Mr Francis or Mr Brisby in this regard by Counsel Assisting and nothing was put to either of them in cross examination. In the circumstances, no findings can be made against either of them and no adverse comment concerning their actions can be made on this issue.

Part 11: Parking Related Conduct Matters (Mr Brisby)

138. No criticism or finding is invited in this regard in respect of Mr Francis by Counsel Assisting and nothing was put to him in cross examination. In the circumstances, no findings can be made against him and no adverse comment concerning his actions can be made on this issue. This part is therefore a response on behalf of Mr Brisby.

(a) School parking

139. Counsel Assisting submits that the Inquiry should accept that “*directions were given to the rangers about enforcement in and around Al Faisal College and that it was treated preferentially and that the sources of these directions was Mr Oueik*”¹²⁷. Although this is put as a criticism against Mr Oueik, it does not reflect the evidence.

¹²⁷ CA submissions para P1(c)

140. Counsel Assisting presents the evidence as if the only significant issue with parking was in the vicinity of Al Faisal College, which is in Auburn, and that Mr Oueik obtained preferential treatment for it¹²⁸. This, however, presents a selective picture and misrepresents the totality of the evidence.
141. There is no doubt that there were difficulties in relation to parking in the vicinity of Al Faisal College and that it was raised with Council staff by Mr Oueik. There could be no criticism of that and indeed it is part of a Councillor's role to raise problems or issues of concern in the community. There is then no doubt that Council staff were looking for a solution to that issue, which would be part of their role and could not be the subject of any criticism.
142. The real issue then is whether Al Faisal College received improper preferential treatment. It should be observed, however, that merely because a local solution was sought that was not applied across the whole of the Council area does not mean that there was improper preferential treatment: a particular local problem may require a particular local solution.
143. No attempt was made in the evidence to investigate whether a particular local enforcement regime around Al Faisal College was justified in the light of the particular problems that were being experienced in that area: the fact that a particular parking officer might have believed that it was not right could not be probative of anything in the absence of a comparison of the regimes and problems across the whole of the Auburn Council area.
144. In any event, it is clear that no different regime was in fact applied.
145. On 29 March 2011 Matthew Andrew sent an e-mail directive to all Council staff rangers on 29 March 2011¹²⁹ 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.

¹²⁸ CA submissions paras 749 to 759

¹²⁹ Appendix A to Exhibit S8, being the statement of Stephanie Griffiths, referred to in the transcript as Appendix 8 rather than A – T906.11

If the vehicle is unattended and the driver now where to be seen infringe as normal. Mark and the schools have asked that this to be done over a 4 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.

146. When shown this e-mail direction, Mr Lawrence gave the following evidence¹³⁰:

Q. Mr Lawrence, you were asked some questions earlier about giving directives about school parking policy. This was such a directive; correct?

A. Yes.

Q. That was a directive that applied to all the schools within the local government area; correct?

A. Yes.

147. Ms Griffiths gave evidence that this direction continued at least until she left the Council¹³¹. It is apparent from Appendix A to her statement¹³² that she responded to the e-mail of 29 March 2011 the following day at length and her evidence then was that the general direction *"was repeated in team meetings and was directed mainly at the no parking zones at Al Faisal College"*¹³³.

148. A Toolbox Meeting Record Form for 18 May 2011¹³⁴ records the following:

- MB – Mayor currently has schools as big issue. Continue with parking at schools (SG discussions on parking signs @ schools). Mayor working with engineers looking at changing signs. Kiss & drop issues discussed at school zones.

and for 17 August 2011¹³⁵ records the following¹³⁶:

- School zones – SG request email exactly what MB wants Rangers/parking officers to do in drop off zones.

¹³⁰ T906.19 to 26

¹³¹ T234.32 to 34

¹³² Appendix A to Exhibit S8

¹³³ Exhibit S8 at para 13

¹³⁴ Exhibit S10 at page 68

¹³⁵ Exhibit S10 at page 69

¹³⁶ Ibid at the top of page 70

- Further discussions on no booking in school zones even if car unattended. RL advises school zones self-regulating as advised by Mayor, GM & Director.

149. It is clear on their face that these discussions, which included describing the regime as “*self-regulating*”, related to parking around schools generally rather than only Al Faisal College (which was not even mentioned in the records for those meetings) and Mr Lawrence accepted that the reference to school zones applied to all schools in the municipality¹³⁷.
150. Ms Griffiths gave oral evidence that there was an oral directive given by Mr Lawrence specifically in respect of Al Faisal College, but there was no difference in content between Mr Lawrence’s oral direction and the e-mail direction of 29 March 2011¹³⁸.
151. Ms Diana Laing gave evidence that at the toolbox meeting on 17 August 2011, they “*only talked about Al-Faisal*”. This is inconsistent with the contemporaneous note of that meeting (as set out above), which refers to schools generally; and that note should be preferred to a witness’ recollection of the contents of an unremarkable meeting that occurred nearly five years earlier. It may be that she understood that there was a particular focus on Al-Faisal, which would not be surprising given that there was a particular problem there, but that does not mean that there was a direction applied only to that school, giving it preferential treatment. She did not suggest that she did not receive the e-mail direction of 29 March 2011, which as set out above clearly applied to all schools.
152. There could be nothing wrong with the fact that a direction that applied across all schools was discussed and indeed repeated in the context of a particular school where there was a particular problem: the direction remained in place across all schools and so there was no preferential treatment; and the direction as it applied across all schools is not the subject of any criticism.
153. Further, when questioned by Counsel Assisting, Mr Lawrence gave the following evidence in relation to which, importantly, was not challenged¹³⁹:

Q. Let me ask you this: at any time when you were manager of regulatory compliance, was there any directive that went to the parking staff about

¹³⁷ T900.33 to 36

¹³⁸ T236.6 to 23

¹³⁹ T895.4 to 896.18

how certain schools should be dealt with differently from other schools within the local government area?

A. No, but Al-Faisal was an ongoing issue.

Q. What was the issue with Al-Faisal?

A. [the witness explained the issue]

...

MR BOLSTER: Q. Was there any different policy –

A. No.

Q. – as far as Al-Faisal was concerned, compared with other schools?

A. No.

154. It was put to Mr Brisby that there was “*a separate enforcement regime for the two Muslim schools in Auburn*”. This was inconsistent with the evidence of Ms Griffiths and Ms Laing, who referred only to oral discussions in respect of Al Faisal College, but in any event he denied it emphatically¹⁴⁰ and it is submitted that (even without recourse to the other evidence that supports him) he was a witness of credit and in relation to this issue gave full and frank evidence¹⁴¹.
155. The evidence, in particular the e-mail of 29 March 2011, the written records of the toolbox meetings on 18 May and 17 August 2011 and the unchallenged evidence of Mr Lawrence, demonstrates that this was correct.

(b) Mr Oueik’s construction zones

156. In relation to this issue, Counsel Assisting submits as follows:

“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.”

157. The relevant facts are set out in the evidence of Mr Soares¹⁴², Mr Lawrence¹⁴³ and Mr Brisby¹⁴⁴:
- a. Mr Oueik complained to Mr Lawrence about the parking enforcement on a construction site;
 - b. Mr Lawrence attended the site and spoke to Mr Oueik;

¹⁴⁰ T497.32 to 37

¹⁴¹ T495.18 to T499.1

¹⁴² Exhibit S7

¹⁴³ Exhibit S16 at paras 27 to 34 and T907.5 to 13

¹⁴⁴ T499.9 to T504.34

- c. Mr Oueik told Mr Lawrence (in the earshot of Mr Soares) that he did not want “*that fucking ranger*” (being Mr Soares) on the site;
 - d. Mr Lawrence calmed Mr Oueik down and told him that the area would be patrolled;
 - e. Mr Lawrence believed that Mr Soares was upset and said that Mr Oueik had spoken inappropriately and that he would raise this with Mr Brisby;
 - f. Mr Lawrence discussed the matter with Mr Brisby, who responded that any matter concerning the particular site was to be relayed through Mr Lawrence rather than via the parking officers on the ground¹⁴⁵.
158. Mr Brisby was cross examined at length by Counsel Assisting on this issue, but his evidence was clear that he did not regard this as a complaint but rather a matter for which a solution was required; and he put in place a solution whereby in order to protect staff interactions would be dealt with directly by Mr Lawrence as the Manager of Building Compliance¹⁴⁶.
159. There is no suggestion that the enforcement regime was changed in respect of this site nor that Council acceded to Mr Oueik’s stated desire for Mr Soares to be kept away from the site. Mr Brisby suggested a solution that did not alter the substantive position from Mr Oueik’s point of view in respect of the parking enforcement regime, but ensured that if there were some further issue, such as a recurrence of the incident involving Mr Soares, it would be brought to the attention of, and dealt with by, Mr Burgess.
160. It is submitted that this was a reasonable and appropriate response for the reasons given by Mr Brisby. Even if the Inquiry takes the view that it might (or even would) have acted differently, it should not substitute its view for that of Mr Brisby as an experienced member of Council staff and the then General Manager. In any event it is submitted that he was a witness of credit whose account and reasons for acting as he did the Inquiry would accept.
161. It is of note that no further incident was reported to Mr Brisby¹⁴⁷, which suggests that the solution worked or at least no different solution (or an escalation of the previous solution) was required. Further, it was not suggested that Mr Soares

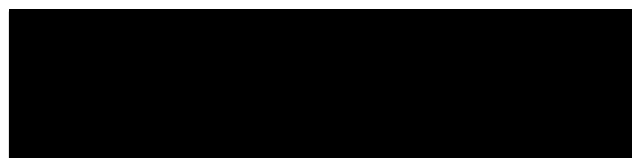
¹⁴⁵ T907.5 to 13

¹⁴⁶ T499.9 to T504.34

¹⁴⁷ T504.31 to 34

raised the matter further with Mr Lawrence or Mr Brisby or that he was unhappy or dissatisfied with the response of Mr Lawrence or Mr Brisby; and Mr Oueik's comments and demeanour were in fact directed to Mr Lawrence, who did not suggest that he was unhappy or dissatisfied with the response of Mr Brisby and did not raise the matter again.

162. It is of note that although Counsel Assisting invites the Inquiry to engage in a semantic debate as to whether Mr Lawrence's reporting of the incident to Mr Brisby constituted a complaint and although he criticises the solution that Mr Brisby put in place, he does not suggest what alternative solution Mr Brisby ought to have adopted and importantly did not put to Mr Brisby that he ought to have taken some other action (either generally or supported by reference to some Council complaints policy document). In those circumstances, the Inquiry could not criticise Mr Brisby for taking the course of action that he did adopt.



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9 November 2016.

AUBURN PUBLIC INQUIRY 2016

Document 10
Written submissions on behalf of
Le Lam

AUBURN CITY COUNCIL PUBLIC INQUIRY

SUBMISSIONS ON BEHALF OF LE LAM

The broader picture

1. With all the negative publicity surrounding the 2015 Auburn City Council (“**the Council**”), it is important to make a few preliminary observations based on the evidence given by Hamish McNulty who was the Deputy General Manager Direct Services at the time of suspension of the Council. The evidence is relevant in a general way to terms of reference 2 and 4 of the Inquiry relating to the carrying out of Council functions and community confidence in the Council.
2. First, Auburn is one of the most culturally diverse areas in Australia. That in itself presents a special challenge to the Council. The Council responded “very well” to those difficulties: **T 991.20-30**.
3. Second, the Council won a number of awards in that area: **T 992.38**. Most recently in 2015, the Auburn Council won the Excellence in Diversity Award in the NSW Government Excellence Awards: **T 993.3**.
4. Third, major capital works were carried out successfully during the course of the term of the last Council. A major upgrade of the Auburn town centre was completed in mid 2014, bringing improved amenity in the town centre for both residents and visitors: **T 990.28-991.15**.
5. Last, the Berala Community Centre was completed in mid 2015, bringing much needed community facilities to that under serviced area: **T 991.32-43**. The redevelopment of the Ruth Everuss Aquatic Centre was undertaken and was more than 50% complete at the time of the suspension of Council: **T 991.45**.

6. These submissions next deal with matters directly concerning Ms. Lam where the submissions of Counsel Assisting have made comment in relation to her conduct.
7. As no questions were asked of Ms Lam in relation to the Grey Street or Marsden St proposals, Ms Lam's role in respect of those proposals is not addressed in these submissions.

Alleged failure to disclose pecuniary interests

8. Paragraph B 26 of the written submissions of Counsel Assisting (CA) states:

“Consideration should be given to initiating an investigation pursuant to s. 462 of the *Local Government Act* regarding 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”

9. Any pecuniary interest that Ms Lam had in 150 Woodburn Road can only arise through s. 443(1)(c) of the *Local Government Act* 1993 (“**the Act**”), on the basis that she was a member of a company which had an interest in 150 Woodburn Road.
10. The submission that Ms Lam had a **pecuniary interest** should be rejected for a number of reasons.
11. First, any interest that Ms Lam had was not a pecuniary interest within the meaning of s. 442 of the Act. That section provides:

442 What is a “pecuniary interest”?

(1) For the purposes of this Chapter, a "**pecuniary interest**" is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person.

(2) A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to

influence any decision the person might make in relation to the matter or if the interest is of a kind specified in section 448.

12. The complaint made against Ms Lam is based upon the fact that Combined Real Estate was managing leasing agent for a shop owned by the Chan family at 150 Woodburn Road Berala.
13. 150 Woodburn Road Berala was a commercial shop in the heart of the village which was zoned B2 Town Centre from the outset, as Counsel Assisting's Submissions ("CAS") confirms at [219].
14. That B2 zoning of No. 150 was not recommended to change in any subsequent proposal.
15. In order to constitute a "pecuniary interest", there first of all has to be a "*reasonable likelihood or expectation of appreciable financial gain or loss to the person.*" s. 442(1).
16. There was never a proposed rezoning in respect of the land at 150 Woodburn Road and accordingly there was never any possibility of a financial gain or loss (let alone a *reasonable likelihood of appreciable financial gain or loss*) in respect of that property. It follows that Ms Lam at no time had a pecuniary interest in 150 Woodburn Road and there was nothing to disclose. If Ms Lam herself at any time held a view that there was a pecuniary interest, then that view was incorrect.
17. Counsel Assisting has not identified in his submissions any reasonable likelihood or expectation of appreciable financial gain or loss for Ms Lam. Indeed, none was ever suggested to Ms Lam in cross examination. That is probably because in circumstances where there was to be no change in zoning for the relevant shop, there could be no "reasonable likelihood or expectation of appreciable financial gain or loss."
18. Even if No. 150 had been in an area that was to be rezoned, the existence of a management agreement (in respect of leasing the shop) could not fairly be said to

result in any “reasonable likelihood or expectation of appreciable financial gain or loss” to Ms Lam.

19. Alternatively, any interest that Ms Lam had in the matter was “*so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter*”, so as to fall within the exception contained in s. 442(2) of the Act.

Even if there was a pecuniary interest, it did not have to be disclosed

20. Section 448 (g) of the Act (which was applicable at the time of the Berala rezoning but has since been repealed in 2016) contained an exception to the general obligation of disclosure. The subsection relevantly provided at the time the following:

448 What interests do not have to be disclosed?

The following interests do not have to be disclosed for the purposes of this Part:

(g) an interest in a proposal relating to the making, amending, altering or repeal of an environmental planning instrument other than an instrument that effects a change of the permissible uses of:

(i) land in which the person or a person, company or body referred to in section 443 (1) (b) or (c) has a proprietary interest (which, for the purposes of this paragraph, includes any entitlement to the land at law or in equity and any other interest or potential interest in the land arising out of any mortgage, lease, trust, option or contract, or otherwise), or

(ii) land adjoining, adjacent to or in proximity to land referred to in subparagraph (i),

if the person or the person, company or body referred to in section 443 (1) (b) or (c) would by reason of the proprietary interest have a pecuniary interest in the proposal,

21. As the proposal to alter the instrument did not effect a change of the permissible use of the land at No. 150, then, by virtue of the exemption in s. 448(g) of the Act, had Ms Lam owned the land at No.150 at the time, she would not have had to make any disclosure: *Mehajer v Director-General of the Department of Local Government* [2016] NSWSC 143 at [87].

22. It would be a bizarre result if Ms Lam was required to make a disclosure in circumstances where her business was simply the managing agent for the property, whereas if she had owned the land, she would not have been obliged to make any disclosure.

Other reasons as to why it would not be appropriate to recommend an investigation

23. Even if it be thought that there is a possible failure to declare a pecuniary interest in relation to the agency agreement, there is no utility or public interest in any further investigation in relation to a possible breach for the following reasons.

24. First, any “pecuniary interest” was, at best, tangential and any possible breach of a reporting requirement could best be described as a minor one.

25. Second, Ms Lam is no longer a Councillor as the Auburn Council no longer exists. She did not stand for election as a Councillor for any new Council in the recent elections. The sanctions for a breach are found in s. 482 of the Act. NCAT can counsel, reprimand, disqualify or suspend a councillor or former councillor. There is little utility in making any order reprimanding or counselling Ms Lam and no utility in suspending her as she holds no office.

26. Third, as Ms Lam herself pointed out in the following exchange (at T 678.25), Berala was a rezoning of the whole of the town centre:

Q. I will go back a step. You managed a property in Berala that was the subject of the Berala rezoning proposal; correct?

A. The Berala is the whole precincts, different from the South Auburn such that Auburn is particular spot rezone of those block.

Q. Do I understand from that answer that you didn't believe that you needed to declare an interest because Berala was a much bigger planning proposal?

A. For the whole precinct.

Q. The whole --

THE COMMISSIONER

Q. It covered the town centre as distinct from spot rezoning?

A. Yes, the town centre.

27. Ms Lam's view as expressed above is both understandable and reasonable.

Applications for a spot rezoning are usually brought before Council because of an application made by a person with a property in a relatively small area who will benefit from the rezoning, whereas town precinct rezonings are at a broader, public level, proposed by Council rather than an individual and are designed to for the benefit of the broader community.

28. It is noteworthy that this "whole precinct" approach is in some respects recognised in s. 451 of the Act, where pursuant to s. 451(4), disclosure is not required for a proposal to amend an environmental planning instrument, where the amendment applies to a significant part of the Council's area.

Reply to paragraph [99] of CAS

29. In this paragraph, CA submits that Ms Lam "...eventually conceded that the business was hers and that she managed the property."

30. There was no "eventual concession". Ms Lam has always acknowledged that she is an owner of the business. The statement of management related to the company, which she part owned, managing a certain property. At no stage did Ms Lam resile from her stated position that she dealt exclusively with sales and was not involved with strata management.

Reply to paragraph [103] of CAS

31. It is necessary to respond to paragraph [103] of CAS. There CA submits that Ms Lam's evidence of lack of involvement and detailed knowledge of the strata management side of the business is doubtful because of the fact that in respect of the

South Auburn Planning Proposal, she *“disclosed a non pecuniary interest and abstained from voting on the basis that the same business managed a property within the area affected by the re zoning”*.

32. That submission should be rejected.

33. The submission is based upon the incorrect assumption that Ms Lam became aware of the firm’s possible interest in the South Auburn matter through her involvement in or knowledge of the property management side of the business. The submission wrongly implies that Ms Lam became aware of the conflict because of her knowledge of the property management arm of the business.

34. Ms Lam was in charge of the sales side of the business: T 675.1-10. Ms Lam knew about the South Auburn property because she had been asked to sell it: T 676.1-27. At T 676.3 she said:

“That one of the units that came to my knowledge that owner asked me to put on the market, so that was one of the units that I did have involve with” (sic)

35. That evidence:

- a. provides no foundation for a submission that Ms Lam’s evidence that she had no involvement in the management/leasing side of the business should not be accepted; and
- b. is consistent with Ms Lam’s evidence that she ran the sales side of the business and had virtually nothing to do with the strata management/rental side of the business.

The Berala issue generally

36. Ms Lam had long had an interest in improving the whole town precinct of the Berala Village. She was of the view that the Auburn town centre and the Lidcombe town centre had been looked after quite well and wished to improve Berala: T 676.43-677.6.

37. Ms Lam gave evidence that Mr Francis and Ms Cologna were putting forward a case for rezoning of Berala: T 691.40.

38. Mr Francis gave evidence that it is good planning practice to obtain a transition in zone: Ex. S 23 at [22].

39. Ms Lam eventually supported a rezoning of the South side of York Street to B2 as recommended by the Council planning staff in the report circulated before the meeting of 16 July 2014. At T 699.18-23, she gave the following evidence:

Q. What convinced you to support the zoning of B2 in that area ?

A. When I have a look again with B2 and across the road B2, it just gradually sank into R4 so gradually- like, six level to four levels and then down to single houses, four step, that why I went along with that.

And at T 699.39:

“....so it’s gradually stepping down, so it could be reasonable to allow that.”

40. Ms Cologna gave evidence that one could argue for R4 or B4 or B2 for York Street: T 133.36.46.

41. In circumstances where Ms Lam was following a recommendation from the Council’s planning department prepared by experienced planners, it is difficult to be critical of her support of the proposal which did result in a transition in zone.

The sale of the John Street car park

42. The gravamen of the complaint against Ms Lam in respect of the John Street car park is that she made decisions in relation to the contract for sale to a company associated with Salim Mehajer for no reason other than a desire to benefit Mr Mehajer’s interests.

43. Any actions taken by Councillors in relation to this matter that were allegedly favourable to Mr Mehajer are explained by the desire of Councillors to obtain a 2,000 sq.m supermarket for Lidcombe.
44. The background to the situation was explained by Ms Lam at T 713.37 -714.4; 729.43-730.38.
45. The Council owned the car park. Often rubbish was dumped there and often the Council received complaints in relation to it. The car park had no street frontage other than very narrow entrance and exit points. Council wanted to buy the corner block next door on the corner of Mary Street in order to redevelop the car park. It was unable to do so and lost the chance to redevelop the site. Similarly, anyone else who purchased the car park would have problems redeveloping the car park because of its access problems and its relatively small area. The car park was only really able to be developed by someone who owned an adjoining property. Council therefore decided to sell the car park and put the funds released by the sale to better use for the community.
46. Lidcombe had no supermarket. There are many benefits to having a supermarket in an area the size of Lidcombe. A supermarket allows residents to do their shopping conveniently in the local area, brings people to the town centre every day and brings trade to other shops. It revitalises a town centre: Lam at T 738.3-20.
47. With that in mind, Council imposed a special condition in respect of the sale of the car park requiring the purchaser to obtain development consent for a supermarket.
48. Two tenders were received for the sale. One for \$ 5.5m and one for \$6.5m. The winning tender was from a Mehajer company Sydney Constructions & Development Pty Ltd (S C & D): Ex. JS 1 p. 243-244; see also evidence of Mr Attie at T 1230.30-1231.30. That company owned an adjoining block, which no doubt explains why it was interested in purchasing the car park. No criticism can be made of the Councillors for accepting the highest tender and selling the car park to a Mehajer company. At the time, Salim Mehajer was not on Council.

49. Ms Lam said that the special condition in relation to the supermarket was contained in the contract from the beginning: T 721.12. Despite challenging Ms Lam's evidence that the supermarket special condition was in the contract from the outset: T 721.1-12, CA now clearly accepts that this was so: CAS at [449].
50. The imposition of such a condition in the contract was far from favourable to the purchaser and very favourable to the community. Indeed, as it turns out, the condition was impossible to fulfil (Lam T 732.7) unless the adjoining block was incorporated as part of the development, as the car park was only of a slightly larger area than the size of the proposed supermarket.
51. It was the difficulty in fulfilling this onerous condition that led to representations being made by the purchaser to vary some of the terms of the contract.
52. Put simply, the only way that the Council was going to get a supermarket for Lidcombe was if it was prepared to make some concessions to assist the purchaser of the car park in making that occur. Ms Lam was in favour of extending the time for completion because she wanted the supermarket: T713.12-40. Ms Lam also supported the refund of half of the deposit so as to enable the plans to be put in: T 723.33. Those plans of course included the supermarket. See also T 716.30-35.
53. Other Councillors shared Ms Lam's view. Mr Zraika also thought that the request to return half of the deposit should be granted so as "*....to make sure that DA goes through and have a supermarket in that area.*" ; CAS [477].
54. If the contract to purchase John St had been terminated by the Council, then that would mean the supermarket would not be built, as the only way it could be built is if the development was undertaken by the owner of an adjoining block: T 738.28-46.
55. Furthermore, the car park had a particular value to an adjoining owner because of the increased development potential which attached to an amalgamated site. There was no valuation evidence to suggest that a resale of the site to a non neighbour would have achieved the previous sale price of \$ 6.5m paid by the purchaser. In fact, it is apparent from the McGee's valuation, that without amalgamation, the site may well have been worth significantly less than the \$ 6.5m paid by the purchaser. The McGee

valuation says that if amalgamation was not possible, and the car park was valued in isolation, a significant discount on the \$ 6.9m valuation for 13 John Street was warranted: **Ex. Gen 9 p. 59** at [10.2.3].

56. The CBRE valuation of 13 John Street was based on an assumption that the site could be developed for mixed use purpose despite not having street frontage but only access handles off John St and Mary St: **Ex. Gen 9 p.77**. There was no basis for that assumption. It renders the CBRE valuation of little utility.
57. It follows that had the contract for the sale of the car park to SC & D been terminated, the price obtained for the car park may well have been significantly less than the amount paid by SC & D.

Findings 13 John Street

58. Paragraphs 450-451 of CAS state:

On 22 May 2012 the purchaser sought to extend the settlement date; Ex JS1 p 41-2. On 26 June 2012 Council resolved by 8 votes to 1¹ to refuse a request to extend by 3 months and 16 days the period of time in which to obtain the DA and effect settlement. Of the 2012 Council, Messrs Oueik, Attie, Simms and Zraika all voted against the extension which was against the recommendation of staff; Ex JS1, 46-8.

Le Lam was the only member of the Council to vote in favour of the resolution. She explained her reasons for doing so on the basis that having imposed the condition that required a supermarket to be built, the Council was obliged to give time to enable that to occur, Tr 680.7-11. She said that at that time she did not know that Salim Mehajer was involved in that business, Tr 713.10, but did give evidence of the relationship with Mr Mehajer's father, Tr 709.37-711.2. She said that she first met Salim Mehajer when he ran for the State election (709.15) when he was handing out how to votes, Tr 709.22.

¹ Ex JS1, p 74

59. There are two important matters to note from the above extract from CAS. The first is that Ms Lam's vote in favour of an extension of the contract took place on 26 May 2012, some three months before Mr Salim Mehajer was elected to Council in September 2012. The second is that Ms Lam's vote in favour of an extension was in line with the recommendations of Council staff.
60. The Council papers circulated before the meeting of 20 June 2012 referred to the reasons for the requested extension. In summary, the reasons were that Development Consent had not yet been obtained because of the fact that No. 19 and 21 John Street needed to be involved in the Development Application: **Ex JS1 p. 46-47.**
61. Importantly, the report from staff noted that interest was payable in relation to the extra time requested. The report concluded at **Ex. JS 1 p. 48:**
- "Under the circumstances, the request by the Purchaser is considered reasonable".**
62. In paragraphs JS1 to JS4, CA criticises Ms Lam's support for the John Street car park, making the unwarranted assertion in JS 2 that she gave Mr Mehajer more time "*...on the basis of the long commercial relationship between she, Mr Mehajer and his father.*"
63. CAS then submits at [JS3] that "*Her failure to declare an interest and abstain until November 2015 was a clear breach of the Code of Conduct given her relationship with Mr Mehajer.*"
64. There is simply no basis whatsoever for the submissions made in paragraphs JS 2 and JS 3. Those submissions should be rejected for a number of reasons.
65. First, there was no evidence of any "long commercial relationship between Ms Lam, Mr Mehajer and his father".
66. The evidence discloses that although Ms Lam had known Mr Mehajer (Senior) for many years as "*he is a local resident*": **T 690.20**, there was no long commercial relationship.

67. On 30 September 2011, Mohammed and Aiyal Mehajer signed Strata Management Agency Agreements with Combined Realty in relation to the development at 46-50A John Street Lidcombe: Ex Gen 28 p. 21-35, and 52-56 John Street Lidcombe: Ex Gen 28 p. 36-50.
68. Combined Real Estate was engaged to set up the strata corporations at that time before the AGM was called: T 687.39-44. Ms Lam's unchallenged evidence was that her company earned \$ 153.00 per year from each owner to manage the strata: T 686.24-31.
69. Thus, as at 20 June 2012, the "business relationship" had existed for less than 12 months in respect of two blocks of units.
70. The way in which such Strata Management Agency Agreements work, is that those initial agreements with the developers subsist only until the first AGM of the Owners Corporation is held by virtue of the *Strata Schemes Management Act 1996* (NSW). Thereafter, the incoming Management Committee decides who shall perform the role.
71. There is no evidence that Combined Real Estate managed these two blocks of units after the first AGM. Even if that had been shown to be so, the business relation that then exists is one between the Owner's Corporation and the Agency, not between the original developer and the Agency.
72. It follows that the two Agency Agreements cannot constitute "a long commercial relationship." Further, there was no evidence as to when Minh Hua and Mr Mehajer entered into a business partnership and for how long it lasted.
73. Second, there is no reason to dispute Ms Lam's evidence that she was not aware of those Agency Agreements or the business partnership at the relevant time when the matter came before Council, and only became aware of the relationship between Minh Hua and Salim Mehajer after the 31 October 2015 article.
74. The interest that was disclosed by Ms Lam after 31 October 2015 was a non pecuniary one based on the fact that her brother in law was in partnership with Mr

Mehajer: **Ex. JS1 p. 369.** That is consistent with Ms Lam's statement that the newspaper article on 31 October 2015 referred to the fact that Ms Lam's business partner had also been a business partner of Cr Mehajer. Ms Lam says that the first Council meeting which dealt with 13 John Street after the 31 October 2015 article was on 18 November 2015 and on that occasion she did declare a non-pecuniary interest: Statement of Le Lam dated 10 June 2015 **Ex. S 14.**

75. In order to constitute a breach of the Code of Conduct for failing to disclose a pecuniary interest relating to Combined Real Estate or Min Hua, it is necessary that Ms Lam have actual knowledge of the interest: see s. 443(3) in combination with s. 443(1)(b)&(c). In short, you cannot disclose something that you don't know.
76. Third, Ms Lam has explained satisfactorily why it was she was in favour of giving the purchaser more time to complete.
77. Objectively, it is clear that the contract price was \$1m higher than the losing tender. Performance of the contract by the purchaser who owned adjoining property was the only way that Lidcombe was going to get a supermarket. That is why Ms Lam supported the extension of time: **T713.12-40.**
78. Last, to the extent that it is suggested that the two Management Agreements or the business partnership between Mr Mehajer and Minh Hua gave rise to a "pecuniary interest" under the Act, such a submission should be rejected.
79. There was no "reasonable likelihood or expectation of appreciable financial gain" to Ms Lam within the meaning of s. 442(1) of the Act. None was suggested to her. Further, the existence of two Management Agreements in 2011 and/or the existence of the business relationship between Minh Hua and Mr Mehajer would fall within the exception under s. 442(2) of the Act in that any interest is so remote that it could not be reasonably regarded as likely to influence any decision that Ms Lam might make..
80. It is most surprising that the submission in CAS paragraph JS2 is made in circumstances where Council staff made the recommendation to extend the time under the contract which Ms Lam then followed. This is particularly so when in other aspects of the Inquiry, Councillors are criticised for failing to follow the

recommendations of Council staff. Counsel Assisting is invited to reflect upon the seriousness of the submission made in paragraph JS2, its lack of foundation and to withdraw it in his reply submissions.

81. It appears that in paragraph JS4, the reference to “Mr Francis” is intended to refer to Mr Mehajer. CA makes the submission in paragraph JS4 that Ms Lam’s evidence that she was unaware of the relationship between Mr Mehajer and her brother in law (until November 2015) ought not be accepted.
82. There is simply no reason to reject Ms Lam’s evidence that she was unaware of the relationship between Minh Hua and Mr Mehajer before publication of the newspaper article. The evidence is not inherently improbable. It was not suggested that the business arrangement that Minh Hua had with Mr Mehajer related in any way to the business of Combined Real Estate. There is no evidence to contradict Ms Lam’s evidence. It was not even suggested to Mr Mehajer by CA that Ms Lam might have been aware of the relationship. Ms Lam was not her brother-in-law’s keeper.

Paragraph 514

83. In paragraph 514, CA makes the following submission (re South Auburn) in relation to Ms Lam’s declarations of interest at the meeting of 2 December 2015:

“It is to be observed that Ms Lam did not declare an interest despite having previously declared an interest owing to the same business managing property in South Auburn and, more critically, despite having declared an interest arising out of her relationship with Mr Mehajer.”

84. This implied criticism of Ms Lam in relation to the South Auburn proposal is based on an assumption that the interest originally declared (in April 2015) still existed more than seven months later on 2 December 2015 and that the property did not sell. That assumption is unlikely to be correct.
85. Ms Lam declared an interest in South Auburn on 15 April 2015 because, although Combined Real Estate was managing the relevant property, the property came to her

attention when it was to be sold and the owner asked her to put it on the market: T 675.43- 676.13. There is no evidence that Combined Real Estate was still managing the property at the time of the meeting on 2 December 2015. It was never suggested to Ms Lam that the property did not sell or that she should have declared an interest on 2 December 2015.

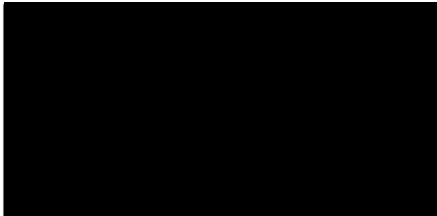
86. There is simply no evidence of a continuing interest that Ms Lam was required to declare in respect of South Auburn on 2 December 2015.

Generally


87. Ms Lam gave her evidence before the Inquiry in an honest and forthright manner. She responded directly to questions asked in an appropriate manner. She has at all times acted in accordance with her duties as a Councillor and Mayor of the Auburn City Council

88. It is submitted that no adverse findings or comment should be made in relation to Ms Lam's conduct in respect of any of the matters before the Inquiry.

Dated November 2016



GREG McNALLY SC
Counsel for Ms Lam
Level 9 Wentworth Chambers



AUBURN PUBLIC INQUIRY 2016

**Document 11
Written submissions of a Council
ranger**

From: [REDACTED]
Date: 9 November 2016 at 12:26:21 am AEDT
To: [REDACTED]
Subject: Submissions to the Protection of employees giving evidence at Public Inquiries

Darren

I am a ranger working in the Local Government sector. I am requesting that recommendations be put in place for the protection of employees giving evidence at a public inquiry or any name mentioned by a witness giving evidence at a public inquiry.

Having experienced the aftermath of a public inquiry I was suspended from my work place for " breaching the code of conduct". There was no investigation to take place. My suspension was taken from the evidence of a witness at the public inquiry.

I believe that I came forward in good faith to report corruption within the work place and that Council found a loop hole to victimize me within their " Code of conduct policy". My health and well being has suffered since the public inquiry and I believe that there should be a duty of care stated in the legislation for witnesses to be able to return to their workplace without a forceable risk of harm from their organization.

There is also a need for an independant panel and a change to legislation so that witnesses who are discriminated against by their organization can at least have a support network that can investigate complaints. If an investigation has taken place and the organization has breached this legislation then the organization should be prosecuted for not complying. This might inturn prevent organizations from unfair treatment of witnesses.

With these protective measures implemented in legislation, I believe more witnesses will come forward and speak up about corruption. By introducing new protective legislation for witnesses this will provide a workplace free from discrimination and harrassment.

AUBURN PUBLIC INQUIRY 2016

**Document 12
Written submissions on behalf of
Ronney Oueik**

AUBURN PUBLIC INQUIRY

Before the Commissioner, Richard Beasley SC

Submissions on behalf of former
Councillor Ronney Oueik

Authored by:
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**AUBURN CITY COUNCIL PUBLIC INQUIRY
SUBMISSIONS ON BEHALF OF
FORMER COUNCILLOR RONNEY OUEIK**

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CHAPTER 1

1.1 Executive Summary

1. The evidence adduced during the Inquiry was insufficient to establish:
 - a. That there was a group of councilors that included former Councillor Ronney Oueik ("**Oueik**") who voted as a block on resolutions coming before ordinary meetings of Auburn Council ("**the Council**") to further the private interests of members of that group;
 - b. The existence of a relationship between Oueik and former Councillor Salim Mehajer ("**Mehajer**") such that Oueik was influenced to vote on resolutions coming before ordinary meetings of the Council to favour the private interests of Mehajer and not on the merits of those resolutions;
 - c. The existence of a relationship between Oueik and Mehajer such that Mehajer was influenced to vote on resolutions coming before ordinary meetings of the Council to favour the private interests of Oueik and not on the merits of those resolutions; and
 - d. The existence of a relationship between Oueik and former Councillor Le Lam ("**Lam**") such that Lam was influenced to vote on resolutions coming before ordinary meetings of the Council to favour the private interests of Oueik and not on the merits of those resolutions.
2. The evidence adduced during the Inquiry was insufficient to establish:
 - a. That Oueik had attempted to secure favourable treatment from Mark Brisby ("**Brisby**") by the provision of gifts benefits or hospitality of any kind;
 - b. That Brisby was compromised in the performance of his duties as a Council employee by any conduct of Oueik;

- c. That Oueik had attempted to secure favourable treatment from Glen Francis (“**Francis**”) by the provision of gifts benefits or hospitality of any kind; and
 - d. That Francis was compromised in the performance of his duties as a Council employee by any conduct of Oueik.
3. By the “kitchen conversation” Oueik was not attempting to secure favourable treatment from Francis.
4. Oueik did not make or offer to make a gift of a “kitchen” nor did Oueik tell Francis he had done him a “favour” in relation to the installation of the kitchen.
5. Francis was not influenced by his relationship with Oueik:
 - a. To introduce options 2(a) and (b) and recommend option 2(a) in the South Auburn Planning Proposal;
 - b. To give Oueik favourable treatment in relation to the re-zoning of the Marsden Street Precinct, and in particular introduce options E and G into the planning proposal or recommend Council adopt option G; and
 - c. In the assessment accompanying DA/2005D and that amended DA and counter signing the occupation certificate;
6. In relation to the certification process applicable to DA/2005D and the roof plan amendment at 14- 22 Water Street, Oueik believed this was dealt with by an external consultant.
7. Parking:
 - a. Oueik was active in trying to find a solution to the parking problems that existed at all schools in Council area;
 - b. Oueik did not give council staff including the rangers directions or apply pressure to secure favourable treatment for Al-Faisal College;

- c. The incident at 6-14 Park Road site was an isolated event that arose from a conflict between the parking rangers and the foremen responsible for the site. The dispute that was caused or was exasperated by over zealous conduct by the rangers; and in the circumstances Oueik's was entitled to complain to the manager, Lawrence, about the conduct of the rangers and to defend workers engaged at the site.

8. South Auburn Planning Proposal:

- a. The evidence adduced during the Inquiry was insufficient to establish that Oueik spoke to Francis and influenced Francis to recommend option 2(a); and
- b. There was no evidence adduced that would establish that there was a relationship between Oueik and Mehajer such that Oueik was influenced to vote on the resolution PP3/2013 at the ordinary meetings of the Council held on 15 May 2015 and subsequently to favour the private interests of Mehajer's sister (the owner of 84 Auburn Road) and not on the merits of that resolution.

9. Marsden Street Precinct:

- a. The re-zoning of the Marsden Street Precinct, was an appropriate planning outcome achieved after a proper re-zoning process;
- b. Options E and G were more likely than not generated by Colonga to achieve a compromise between what had been recommended by the consultant planners AECOM and the retention of some IN 2 zone in East Street that she favoured; and
- c. Francis was not influenced in performing his duties as execution planning manager by his relationship with Oueik.

1.2 Recommendations

10. The positions of mayor and deputy mayor not be filled by a ballot of councillors, but by popular vote for each electoral term.
11. The Council develop and implement a comprehensive policy in relation to “whistle-blowers”.
12. Disclosures requirements under s.449 of the LGA be subject to a requirement of continuous update and be available “on line” from the Council website.

CHAPTER 2

Relationships

Chapter 2.1 Oueik

13. Oueik was first elected a councillor in 2004.
14. He served two periods as Mayor:
 - a. September 2010 to 2012 – 2 years;
 - b. September 2014 to 2015;
15. Oueik was suspended in February 2016.
16. Relevant to the nature of the relationships Oueik formed, with John Burgess (“**Burgess**”), Brisby and Francis, is the type of person that Oueik is.
17. Francis’ observations of Oueik were; T1809(2-13):

A: The mayor, Mr Oueik, would always help anyone regardless of their stature, or any resident. He didn't - he helped everybody.

Q: Was it your observation of him that that was typically part of his personality, to offer help when he observed people with difficulties or problems?

A: He was a very caring and generous person, yes.

Q: Was it your observation of him that he was very popular amongst the constituents that you saw him with?

A: Yes, that would be the case.'
18. Relevant to how Oueik voted on planning issues, in particular re-zoning resolutions that increased population density, is that he was unashamedly pro-development and a member of the Liberal Party.
19. His pro-development, political views were well known when he ran for election as a councillor in 2004, 2008 and 2012.

20. When Oueik was elected as a councillor it must have been well known to the Auburn electors that he was a successful property developer in Auburn who desired to bring more development to Auburn.
21. This contrasted with Tony Oldfield ("**Oldfield**"), Simms and to some extent former Councillor George Campbell ("**Campbell**") who wished to maintain the status quo. Former Councillor Oldfield opposed all development in Auburn and wished to see Lidcombe and Berala locked in the past.

Chapter 2.2

Relationships between Elected Councillors

2.2.1 Oueik and the "Super Six"

22. Clearly there were two groups on Council - those opposed to development and those who favoured development.
23. Neither group was right or wrong. Each was entitled to hold their views.
24. The division in Council lead to deals being done in relation to the appointment of the mayor and deputy mayor. In some instances the deals were coupled with agreements about approaches to zoning amendments. Campbell and Oldfield and Campbell and former Councillor Hicham Zraika ("**Zraika**") made written agreements on how recommendations for re-zoning would be voted on.
25. It is for this reason that Oueik recommends that mayors be directly elected by popular vote for the whole council term and not by elected Councillors on a yearly cycle.
26. Within Council there were also divisions along party lines. For example Campbell is a member of the Labor party and a supporter of the local State MP Labor member Luke Foley. Whereas Oueik is a member of the Liberal party and stood against Foley at the last election. Campbell has a vested political interest in the destruction of Oueik's reputation and for this reason any evidence he gives against Oueik should be treated with great caution.
27. Frustration on the part of Simms arising from being in the minority also calls in doubt her relationships with employees of the Council.

28. With the exception of Campbell's vote in favour of the re-zoning of the Marsden Street Precinct, in relation to the zoning matters the Councillors voted consistently with their publically expressed political views. This particularly applies to Oueik who made no secret of his pro-development views. In the 2012 election, Oueik stood on a pro-development platform and received the most votes of all the Councillors who stood for election.
29. The voting patterns of Oueik and other pro-development councillors should not be seen as some kind of self interested conspiracy but merely reflective of their political views.
30. Each of the councillors of whom it was claimed was a member of the "super six" denied discussing planning and re-zoning resolutions coming before council, with other councillors outside the council chambers:
 - a. Oueik: PH6 T23(30) - T25(46) and T1126(9)-(20);
 - b. Former Councillor Ned Attie ("**Attie**") PH5 9(39)-10(1), PH5 47(13)-50(45) and T1233(29)-1234(7);
 - c. Lam: T703(46) - 707(13);
 - d. Mehajer T1290(37) - 1291(6), T1292(7-15), PH9 21(25)-(28), PH9 23(38)-(42);
 - e. Former Councillor Steve Yang ("**Yang**"): PH7 19(6) – 21(10);
 - f. Zraika: T1444(43) - (44). Former Councillor Irene Simms ("**Simms**") was cross-examined by Hopper at T406(7)- T407(17) to establish that Zraika voted with Simms the majority of the time.
31. It is more likely that it was the non-developer councillors who voted as a block and caucused in relation to zoning resolutions as is evidenced by the written agreements made between Campbell and Zraika and Campbell and Oldfield; See Ex Gen 6 and S13 at page 76 and the evidence of Campbell at T808(2-7).

2.2.2 Oueik and Mehajer

32. There is insufficient evidence to establish there was a relationship between Oueik and Mehajer that would cause Oueik to vote on resolutions relating to re-zoning land located in South Auburn to benefit Mehajer's sister and not on the merits of the resolutions.

33. There is no evidence of a social relationship between Oueik and Mehajer.

34. Oueik did not attend the Mehajer wedding; Evidence at T1126(22)-T1126(46):

Q. I want to ask you now a couple of questions about Mr Mehajer. What kind of relationship did you have with him when you were a councillor?

A. Before council, on council, after council, not much at all.

Q. How would you describe it as?

A. Very minimal.

Q. Very limited?

A. Nothing; didn't even go to the wedding.

Q. Did you ever have occasion to discuss with him matters that were before the council in which he had a private or business interest?

A. Again, please?

Q. Did you ever have occasion to discuss with him outside the council meetings matters that were before the council that dealt with his private or commercial interests?

A. No.

Q. Did that also apply in relation to your private or commercial interests?

A. No.

35. The submissions of Counsel Assisting at page 56 [SA17] and [SA19] have no basis and should not be accepted.

2.2.3 Oueik and Lam

36. There is insufficient evidence to establish that a relationship existed between Oueik and Lam that would cause Lam to vote in favour of resolution to rezone land because that would benefit Oueik's commercial interests.
37. Exhibit Gen 28 does not establish that there was a relationship of influence between Oueik and Lam. This document contains an agreement dated 23 June 2010 between St Hilliers Pty Ltd (a company owned and controlled by Oueik) appointing Combined Strata Management Pty Ltd, a company that Oueik understood was owned and controlled by the strata manager, Minh Hua - Lam's brother-in-Law. Such an appointment was made more than 6 years ago and would have been of limited duration.
38. An agreement under which a strata manager is appointed by a developer owner must be ratified by the lot owners at the first Annual General Meeting of the Owners Corporation.
39. At T684(2-6) and T684(8-22) Lam gives evidence that companies controlled by Oueik appointed Combined Strata Management as strata manager at 40-46 Station Road (in 2001) and 48 St Hilliers Road (in 2010). These were hardly significant commercial agreements of the type from which the inference would be drawn that were entered into by Oueik to acquire influence or that they had that consequence.
40. Oueik through his companies has carried out several developments since 2010 (for example, 6-14 Park Road Auburn) Combined Strata Management was not appointed as strata manager to these developments, suggesting that Oueik was not, by a continuous pattern of commercial conduct endeavouring to create a relationship of influence over Lam.
41. The submissions of Counsel Assisting, particularly [100], should not be accepted.

Chapter 2.3

The Relationships between elected Councillors and

Senior staff/employees of Council

2.3.1 Oueik and Brisby and Brisby's role in the "kitchen conversation"

42. Brisby described his relationship with Oueik when he was general manager as a '*...good working relationship*'; T451(5-8). He said he '*...wouldn't define it as a personal relationship, but we had a close relationship*'; T451(11-12).

43. At T480(10-17), Brisby agreed he had a close relationship with Oueik, when Oueik was Mayor, but said '*...it was more a working relationship than friends and this type of relationship was very important as part of his job in a political environment.*'

44. At T513(5-18), Brisby said he had a similar relationship with Oueik and Attie, Simms and Zraika when each was mayor. At T513(19-22), Brisby said:

"Q: Is it your evidence that you regarded it as an important part of your duties to develop such a relationship with the elected councillors?"

A: I think it's critical, yes."

45. It was in the context of Brisby building relationships with elected councillors that he and Oueik went to see Francis' house in 2006.

46. Oueik says at T1045(8): "*...I was new to council, Commissioner.*"

47. Brisby says at T451(28-30), "*we*" meaning Brisby and Oueik went to see Francis' house as Francis had just purchased the house and was commencing renovations.

48. Brisby says he cannot remember the date or what was said; T451(24-35).

49. Brisby says he went to the house just out of personal interest as Francis had purchased a new house; T453(5-6).

50. Brisby cannot remember whether he or Oueik suggested the visit; T453(20-22). His evidence is:

"Brisby: I don't recall who suggested to who, other than we agreed we'd visit as a courtesy to have a look at his new house."

51. Brisby can however remember it was Brisby who drove them to Francis' house; T453(12-16). This would suggest that the visit was Brisby's idea.
52. Francis says he invited Brisby to visit; Ex PH10 T45(42), it is therefore likely that it was Brisby who invited Oueik to accompany him to Francis' house.
53. Although he cannot recall the conversation about the renovations between Oueik and Francis he was able to recall that the conversation between Oueik and Francis took place in his presence; T451(31-35).
54. His evidence concerning his response to the conversation; T511(33-35) to T512(1-12) is as follows:

"Q: You said in your evidence you have no recollection of the terms of the conversation?"

A: Not in perfect terms, no, I wouldn't.

Q: Do you recall whether the conversation between Mr Oueik and Mr Francis took place entirely in your presence?

A: It would have.

Q: In the witness box today, do you have any recollection of Mr Francis saying something improper to Mr Oueik?

A: No.

Q: Is it the case that if he had said something improper you would have remembered it?

A: Yes.

Q: And made a note of it?

A: That's right.

Q: Do you recall, sitting in the witness box today, whether Mr Oueik said anything improper to Mr Francis?

A: No.

Q: *If that had occurred, is that something you would have remembered or made a note of?*

A: Yes.”

55. The Commissioner should not accept as truthful the evidence of Burgess quoted in the Submissions of Counsel Assisting; at [76]. Burgess was bitter about the termination of his employment with the Council and attributed part of the cause of his termination at Oueik; T602(1-14).

56. He made a false allegation in his statement made on 24 May 2016; Ex S11 at [125], that Oueik had made claims against Council staff that they were biased against “Sam the Paving Man”.

57. He said he had no recollection of the conversation he claimed he overheard between Brisby and Oueik about Oueik’s developments when cross examined at; T619(43-47) and T620(1-12).

2.3.2 Relationship between Oueik and Francis and the “kitchen conversations”

58. Francis described his relationship with Oueik as a “colleague, work colleague relationship; T22(13-17), Ex PH10, Ex S23 page 13 [65].

59. Oueik described the relationship at T1042(12-21) as a professional relationship and not a personal relationship.

60. Both Francis and Oueik gave evidence that there were two main conversations concerning the kitchen. Oueik says there were only two conversations.

61. Francis is confused as to whether there were more than two conversations - compare: PH10 T46(30-31) to Ex S23 [59].

62. It is more likely that there were only two conversations.

63. The first occurred at Francis’ house when Brisby was present and the second occurred at Oueik’s house after the renovations to the kitchen had been carried out.

64. Francis gives two versions of the two conversations. One in his evidence at the private hearing held on 10 May 2016; Ex PH10, T46 and a second in his statement dated 30 May 2016; (Ex S23 [59]).

65. There are differences in the two versions of the conversations.

66. Given that 10 years have elapsed since the conversations occurred it would not be possible for Francis or anyone to remember precisely what was said.

67. One of the differences is at Ex PH10 T46(22-31), where Francis says:

"He never raised it again and I never raised it either."

68. Whereas at [59], page 12 of Ex S23, Francis says:

"I pressed the issue with Councillor Oueik on a number of subsequent occasions."

69. Another difference is at T46(28), where Francis says (using the word 'gift'):

*"...that it's a **gift** and it's - there's no strings attached,..."*

[Emphasis Added]

70. Whereas at [59], page 12, Francis says (using the word 'favour'):

*"Oueik ...told me not to worry about it, that he had done me a **favour**..."*

[Emphasis Added];

71. Oueik denies saying either version.

72. The differences are explained by the fact that Francis simply cannot remember what was said.

73. Both versions of the conversation referring to "gift" and "favour" are inconsistent with what Francis says Oueik said to him in the first conversation, namely (Ex S23 [57]):

"...Oueik mentioned to me he had a number of people who did work with him who could assist..."

And:

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

74. Oueik gave his version in a frank and forthright manner. Oueik's recollection of the first conversation at Francis' house is at T1044(9-44), and is as follows:

Q: You have been told that he says in his statement and at the private hearing that he and Mr Brisby went to – that you and Mr Brisby went to his house at Bexley in 2006. Do you remember that?

A: Yes.

Q: When you visited Mr Francis's house, you saw that he was doing work on a newly bought and fairly run-down old house; correct?

A: I wouldn't say run-down, but it's a property that he just bought him and his missus, yes.

Q: He told you it was a deceased estate that he'd bought and he was going to install his family there as a residential home; correct?

A: I don't recall that.

Q: You don't recall that?

A: No.

Q: You went into the kitchen, didn't you?

A: We went through the whole house.

Q: Did he show you where the kitchen was going to be?

A: I can't recall that.

Q: You can't recall that?

A: It's 10 years ago.

Q: And you offered to provide him help with tradesmen to do work on the house?

A: I was building my own house at the time and then in conversation, nothing forward – not like – there's no bad meaning behind it. Just in conversation, "If you need help" – sorry – "assistance or tradesmen, I've got people working on my house..."

And at T1045(8-13):

A: *I was new to council, Commissioner.*

Q: *Why would you do that for Mr Francis at that time?*

A: *I didn't think that I was doing anything wrong at that time..."*

And at T1046(5-47):

Q: *What assistance did you offer Mr Francis?*

A: *A tradesman, like contact.*

Q: *What sort of tradesman?*

A: *Kitchen maker and I can't recall the others.*

Q: *Did you have a particular kitchen tradesman in mind?*

A: *The guy who was working at my house.*

Q: *Yes. What was his name?*

A: *I can't recall now.*

Q: *You can't recall his name?*

A: *Long time ago. I can't recall.*

Q: *Did he do work on your recent house that you built in Kenthurst, is it?*

A: *No.*

Com: *Did he work for a company or just a sole trader?*

A: *Just a small company.*

Q: *Had he done any other work for you before?*

A: *I think he did a job for me in – it must be in 2000 or something.*

Q: *2000. He did work for you in 2000 and he was doing work on your home in 2006; correct?*

A: *Yes, 2005-6.*

Q: *You suggested to Mr Francis that he could do work at Mr Francis's house; correct?*

A: *Yes.*

Q: *All right. Did he make kitchen cabinets?*

A: *Yes.*

Q: *Did you speak to him and ask him to make kitchen cabinets for Mr Francis or did you put him in touch with Mr Francis?*

A: *In touch."*

And T1047(2-39):

"Q: *Did you ask him to call Mr Francis or did you ask Mr Francis to call him?*

A: *I can't recall.*

Q: *You can't recall?*

A: *(Witness nods).*

Q: *And you know that he built kitchen cabinets for Mr Francis, don't you?*

A: *Yes.*

Q: *Did you see them?*

A: *The –*

Q: *The kitchen cabinets that he built for Mr Francis?*

A: *I'm not sure.*

Q: *Did you pay this gentleman for building the cabinets for Mr Francis?*

A: *No.*

Q: *Why didn't you?*

A: *Because what I said to Mr Francis at the time, in company – and Mr Brisby was there as well. Just had a conversation, we having coffee and all my background is always in the building industry, always. I started with tiling, plumbing, gyprock, electricians and as you go, so I become qualified licensed renovations, bathrooms and kitchens, and I have done that for many, many, many years and after that I went to the building industry and I start building small houses, duplex and as we get older, we get bigger.*

Q: *All right.*

A: And the conversation was, Mr Commissioner, I said, "I can assist with tradesmen but you would have to pay them directly." That was the conversation. I was very insist on that and that was it."

75. It is clear both on the recollection of Francis; See his Statement of 30 May 2016 [57] and PH10 T44(11-19), T45(37-38) and Oueik, that during the first conversation, Oueik was not intending to give Francis a kitchen and Francis was not expecting to receive a free kitchen.

76. The second conversation occurs when Francis arrived at Oueik's house, unannounced.

77. Oueik's recollection of the second conversation is at T1046 to T1051:

Q: Some time 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's 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 that time. I said, "I said to you before you will pay them directly"; that's it.

Q: He had \$2,000 in cash?

A: I didn't see that.

Q: You didn't see it?

A: No.

Q: He said he wanted to pay you there and then, didn't he?

A: He did; he said he wanted to pay me.

Q: And he raised it with you on a number of occasions after that; correct?

A: I can't recall that.

Q: *You can't recall that? You eventually got angry with him when he kept raising it with you, didn't you?*

A: *The way I understood it - maybe I said it too quickly. I thought he was trying to pay me money at the end; that's why I got angry at him. Not as in "angry angry", I mean --*

Q: *Why would he be wanting to pay you money, Mr Oueik, for what reason?*

Q: *I object to that. That is asking this witness to speculate on someone else's state of mind.*

Commissioner: *I will allow it.*

Q: *Why did you think he was wanting to pay you money?*

A: *Because the work that was done at his house. I said to him - I can't remember the exact words, Mr Commissioner, but I think some people think that these workers they belong to me. They don't belong to me and I said it very clear that you pay them directly and I hardly knew him back then that well and that's it, nothing more to it.*

Q: *You told him that you had done him a favour and that he should stop worrying about it; correct?*

A: *Never said that.*

Q: *You told him to stop bothering you about it; correct?*

A: *I never said that.*

...

Q: *Sitting there today, you have no recollection of the number of times that Mr Francis sought to raise the issue of payment for the kitchen cabinets with you?*

A: *Can I have that question repeat, please?*

Q: *Sitting there today, do you have any recollection of the number of times that Mr Francis sought to raise the issue of payment for the kitchen cabinets with you?*

A: *No.*

Q: *Do you recall, though, that he appeared anxious about it whenever he raised the topic with you?*

A: *My recollection, Mr Commissioner, was raised once in my house and that was it.*

Commissioner: *When was that, do you remember?*

A: *In 2006.*

Commissioner: *All right.*

Q: *He came to your house, did he?*

A: *Yes.*

Q: *How did he know where you lived? How did he know?*

A: *How?*

Q: *How? Had he been there before?*

A: *Yes, he seen my house. It was under construction.*

Q: *This was your old house. It was under construction, was it?*

A: *Yes.*

Q: *Was it in the Auburn local government area?*

A: *It was only down the road.*

Q: *Was he there on any council business related reason?*

A: *No, I was just doing my house, like, building my house, and he just pass and have a look.*

Q: *So you asked him to come and have a look at your house back in 2006?*

A: *Yes.*

Q: *And he asked to pay you for the kitchen cabinets; 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."

78. On either version of the conversation there was a misunderstanding between Oueik and Francis.
79. The Commissioner should accept Oueik's version of the second conversation, as his version is more consistent with the terms of the first conversation.
80. Oueik made it clear from the outset that Francis had to deal directly with the tradesmen, including paying them. It is logically consistent he would repeat that position when Francis offered to pay him for the cupboards.
81. It may be unnecessary for the Commissioner to resolve which version is more accurate. It will be sufficient for the Commissioner to find that Oueik did not make a "gift" of the kitchen to Francis nor at any time did Oueik form the intention to make a "gift" of the kitchen to Francis or make a gift for the purpose of attempting to influence Francis or in some way.
82. The Commissioner should find that Oueik's version of the conversation is more likely than that of Francis, and further that Oueik's conversation was entirely innocent, in the sense not entered into, so that Oueik could ingratiate himself to Francis or attempt to gain influence with Francis.
83. Further, the Commissioner should accept Francis' evidence that no advice given by him in relation to South Auburn, Berala Village or the s.96(1A) application for Water Street was influenced by the "gift" of the kitchen; Ex PH10 T48(45-47) and T49(1-11).

84. It was not put to Francis in the private hearing that his recommendation to include scenarios E and G in the Marsden Street Precinct Planning Proposal was influenced by the “kitchen”.
85. The Commissioner’s ruling; at T1766 – T1773, in relation to Francis’ claim of privilege precluded this issue being the subject of further evidence. In particular counsel appearing for Oueik could not challenge Francis on [59] of Ex S23 and the assertion that there were more than two conversations; T1813(25) to T1814(1-7).

Chapter 2.3.3

The relationship between elected Councillors and senior staff/employees of the Council

Gifts

86. The Code of Conduct does not preclude the giving of token gifts.
87. Token gifts and benefits includes under Part 5.3(d) “*ties, scarves, coasters, tie-pins, diaries, chocolates or flowers*”.
88. Brisby was asked about giving and receiving gifts from Oueik; T452(25-47) and T453(1):

“Q: Did Mr Oueik provide you with gifts at Christmas time and on birthdays?”

A: Yes. We exchanged gifts, yes.

Q: What sort of gifts did you receive from Mr Oueik?

A: Normal gifts you would receive on birthdays and Christmas.

Q: Such as?

A: Chocolates, a tie. Generally in regard to Mr Oueik, I'd purchase a Christmas gift for his two young children.

Q: What were those gifts?

A: Christmas toys.

Q: Did any other councillors give you gifts?

A: No.

Qr: When did Mr Oueik start giving you gifts at Christmas time?

A: Oh, probably during the term, his first term as mayor.

Q: When did that begin?

A: Late 2010, early 2011."

89. This conduct is not in breach of the Code of Conduct and is merely consistent with common courtesy.

Oueik's Evidence regarding Gifts:

90. At T1053(1) to T1055(4):

"Q: the practice that I understand existed between you and Mr Francis of giving Christmas and birthday gifts to one another. Do you recall being informed of some evidence Mr Francis has given about that fact or that matter?

A: There has been Christmas gift, yes.

Q: You gave him or you have developed a practice of giving him a Christmas gift every year?

A: It started when I was mayor 2011-2012.

Q: And it was --

A: Because I was - sorry.

Q: You can finish.

A: I was mayor straight for two years and that's, like, the relationship within the professional organisation, that would be automatically developed with the staff that you deal with them most of the time for the interests of the community.

Q: Do you say that you gave gifts, the sort of gifts that you gave to Mr Francis, to other members of staff?

A: Similar.

Q: Similar? Well, who were the members of staff that you gave gifts to on a regular basis?

A: For the best of my recollection, Mr Commissioner, will be my personal secretary, the PA - the mayor's secretary, at Christmas, will be the person who takes the - is involved in the Mayoral Column too and the GM and --

Q: Mr Francis?

A: -- a few others. No, Mr Brisby as well, some of the engineers and then - the people that I was heavily involved with, they give present, I give present. It was just chocolates and stuff that my wife packed, not me.

Q: Mr Francis gave you presents, didn't he?

A: Not personally, he gave to, like, the kids.

Q: Didn't he give you a book about architecture?

A: If you say so.

Q: No.

A: I can't recall, to be honest.

Q: It's not whether I say so, it is your evidence?

A: I can't recall, to be honest.

Q: He gave you toys for your children?

A: Yes.

Q: He gave you toy cars, chocolates?

A: Yes.

Q: A gift from Disneyland?

A: Yes, when he was --

Q: He did that not only at Christmas but on your birthday as well?

A: Yes.

Q: No-one else from staff gave you presents like that, did they?

A: May I explain it to you, Commissioner? It's sad to say that I've had a son which was born with asthma, bad asthma, and he was basically in hospital three times a week and then Mr Francis, he knows about the situation, always complaining, like, I'm always in hospital, my son always in hospital, and he was - actually, he was given just cars more than others, like, you know, but mainly Christmas and birthdays, or when my son get out of the hospital.

Q: If you could just go back to my question. No other members of staff gave you or your son gifts of that nature, did they?

A: Mr Francis did. The previous GM did - I mean, Mr Burgess, when my son was born, we received the most beautiful flowers I have ever seen in my life and my wife still talk about it.

Q: We will talk about Mr Burgess later.

A: You're asking me, sorry.

Q: Are you saying that the only members of staff at Auburn Council that gave you gifts were Mr Francis and Mr Burgess?

A: And Mr Brisby and my PA and the --

Commissioner: It's all right, take your time.

A: The woman who does the column for me.

Q: I am sorry, the column?

A: The column, the mayoral column.

Q: The media person?

A: The media person.

2.3.4 Other Social contact between Oueik, Brisby and Francis

91. Francis said at T22, Ex PH10 and Ex S23, by virtue of his role within the Council and the fact that senior Council employees are required to spend time with Councillors in order to provide them with active and fulfilling roles he spent a lot of time with Oueik either at work or dealing with work business outside work. This Francis explained was not particular to Oueik.
92. It is clear that Oueik took his constituency work very seriously and enthusiastically. He chose a van for his mayoral vehicle. His practice was to visit troublesome development sites, eg unauthorised granny flats with Francis.
93. Both Brisby and Francis had coffee with Oueik from time to time, about once a month and they generally talked about the "...politics, council kids"; T22(27-29) Ex PH10.
94. Oueik sent Francis emails containing advertisements for real estate.

95. Both Brisby and Francis visited Oueik's new house on two occasions. Nothing turns on this conduct. Oueik was undoubtedly proud of his house and it is likely he wanted to show it off to Brisby and Francis.

Chapter 2.4 - Parking

96. There appear to be a number of separate allegations made against Oueik relating to parking and the relationships between Oueik with council staff, notably the parking rangers, that are raised by the Inquiry:
- a. First that Oueik used his position as mayor to obtain favourable treatment for the Al-Faisal College. Al-Faisal College is a Muslim school located in Harrow Road;
 - b. Secondly, that Oueik abused parking rangers at a development site at 6-14 Park Road Auburn, in which Oueik had an interest and used his position as mayor to obtain favourable treatment at that site; and
 - c. Thirdly, Oueik, when mayor, procured the cancellation of PINS for friends. This allegation emanated from Burgess and quite properly was not pursued by Counsel Assisting as there is no substance to the allegation.
97. In addition to the allegations made against Oueik, the Inquiry should also consider the conduct of Simms and the parking rangers in relation to the allegations made against Oueik.
98. This is the subject of submissions not to deflect attention from the conduct of Oueik, but because the conduct raises serious matters that come squarely within the "Terms of Reference".
- 2.4.1 The claim that Oueik used his influence as mayor to secure favourable treatment for Al-Faisal College**
99. There is no substance to the allegation that Oueik sought to use his position as mayor to obtain favourable treatment for the Al-Faisal College in relation to parking.

100. Ex Gen 4 described as the “Oueik Parking Plan”, shows that Oueik was seeking to obtain a comprehensive school parking plan that covered every school in the local area.
101. The newspaper articles from the “Auburn Review Pictorial”, the locally circulating newspaper marked MFI10 (Oueik has requested these articles be accepted as an exhibit), establish that since Oueik was first elected as a councillor in 2004, he as a politician sought to improve the parking conflicts that affected all schools in the Auburn Local Area.
102. The problem that Oueik was trying to address was intractable and had arisen from changing social circumstances:
 - a. First, unlike in prior years the modern parent often picks up young children from school by car;
 - b. Secondly, many schools require that parents pick up young children from inside the school gates; and
 - c. Thirdly, an assiduous parking ranger will issue a PIN to a mother when she leaves her car to go inside a school to collect her young child. This is because the “no parking zones” located outside schools limit the “pick up” time and the distance a mother may travel from her car when in such a zone to 2 meters T208(17-47).
103. Unlike every other Councillor, Oueik tried to address these problems. He should be praised for his efforts and not be the subject of condemnation.
104. In a mayoral message published in the Review Pictorial on 21 September 2010, a week after he was elected mayor on 15 September 2010, Oueik says:

“In order to help local mum and dads. Council will be undertaking a traffic study in the next year to see whether the implementation of more-drop off and pick up zones around schools are possible.”

105. In a message published on 1 March 2011, Oueik says:

“Drop Off Zones at Local Schools.

I am very concerned for the safety of our children. As promised, I have commenced visiting all 17 schools throughout Auburn LGA (7 State and 10 Private) with a view to consulting with the school head on how to resolve this problem and where to install the appropriate school drop off zones.

The 7 State Schools in the area comprise of Newington Public School, Auburn North Public, Auburn Girls High, Auburn West Public, Berala public; Lidcombe Public.

The 10 Private Schools in the area comprise of: Auburn Adventist, St Johns Primary, Sule College, Trinity Catholic Senior, Al Faisal College, St Joseph the Worker in Auburn, St Joachima Lidcombe, St Peters Chanel. Trinity Catholic and Christian Community High at Regents Park.

I receive many complaints from local parents about the difficulty they are encountering with safely dropping off their children at schools in the area. Through my personal consultation, you can be assured that I will achieve the best result for the safety of our young school children”.

106. The concept of the ‘Schools self regulating’ appears to have originated from either Brisby or Rob Lawrence (“**Lawrence**”) and they in turn were responding to a request by the schools in the local area to have a ‘self regulating period’ over a 4 week period. This is explained in the evidence of Stephanie Griffiths (“**Griffiths**”) at T242(10) to 244(1).
107. The parking rangers submitted a complaint to the Independent Commission Against Corruption (“**ICAC**”) that included their allegation that the “*Rangers were warned not to patrol the ‘No Parking Zones’ outside the Al-Faisal College.*”
108. The complaint by the parking rangers to ICAC is a request that ICAC investigate “corrupt conduct” by Oueik within the meaning of s.9 of the *ICAC Act*, 1988 NSW; Ex S10 page 84.
109. The various complaints were sent to ICAC by Simms on 27 October 2014.

110. ICAC advised Simms that ICAC did not propose to take the complaint any further; T367(1-8).
111. The complaint to ICAC concerning Al-Faisal College was unwarranted and demonstrates over zealotness by the parking rangers in relation to their conduct directed towards the Al-Faisal College and Oueik.
112. The few contemporaneous documents available to Oueik, the "Toolbox Meetings minutes" for 18 May 2011 and 17 August 2011; attached to Ex S10 Simms' statement dated 23 May 2016, establish that the claim made by the parking rangers to ICAC was incorrect.
113. The Minute of 28 May 2011; at Ex 10 page 68, records a meeting attended by "Stephanie G" who is Stephanie Griffiths and "Viola A" who is Viola Avez and "Rob L" who is Rob Lawrence states:

"MB – Mayor currently has schools as big issue. Continue with parking at schools. (SG discussions on parking signs @ schools). Mayor working with engineers looking at changing signs. Kiss and drop issues discussed at school zones.

RL to further discuss with MB if comments can be made to traffic committee & if we can get copy of minutes".

114. Lawrence, the Manager in charge of the parking rangers in 2011, agreed at T900, that the minute of the meeting held on 17/08/2011, at Ex S10(70), was a reference to a policy applicable to all schools in the municipality and not a reference to a particular school; T900(33-36).
115. As his Messages in the "Auburn Pictorial Review" make clear, at this time Oueik was working on a plan to resolve the parking issues at all schools in the local area.
116. The minute is consistent with that endeavour.
117. It is very unlikely that the minute does not record accurately what was said at the meeting, particularly as the procedure in the subsequent meeting was to review and confirm the accuracy of the minutes of the previous meeting. The minutes of the Toolbox Meetings were kept by Susan Frusker who was an

- administration officer who had the specific duty to keep the minutes; T246(1-17).
118. The evidence given by Diana Laing at T197 and T198(7)-(11), that the Toolbox Meeting minutes were inaccurate, namely, that the direction only applied to Al-Faisal College, is unlikely to be correct.
 119. Paragraphs 8 and 11 of Diana Laing's statement made 25 May 2016, Ex S5, are of doubtful veracity.
 120. In her complaint to ICAC, a copy of which is attached to Ex S10 the statement of Simms, there are attached the minutes of the Toolbox meetings held on 18 May 2011 and 17 August 2011; see pages 68-70.
 121. The meeting held on 18 May 2011 was attended by Brisby, Lawrence, Griffiths, Matthew Andrew and the "Rangers team". The same attendees referred to as attending the meeting alleged in [8] of Diana Laing's statement. She attaches no other minute with those attendees. As the complaint she and the other parking rangers were making to ICAC was very serious it is likely that if a further minute existed it would have been included with the complaint.
 122. As noted above, the minutes of the meeting record that the direction was not limited to the Al-Faisal College and that there were other topics discussed.
 123. Diana Laing also gave unreliable evidence at T191(46-47) to T192(1-45), when she says she was not aware that one of the policies that Oueik brought to his office as mayor of the Council was to try and resolve the parking problem outside schools and that he was particularly active in that area. His policy is recorded at the "Toolbox Meeting" held on 18 May 2011; Ex S10 page 68, and was regularly the subject of the Mayoral Message printed in the local newspaper.
 124. The reference to "(Al-Faisal)" in the "Review of minutes from last meeting section" does not detract from what is recorded in the "Managers update" section of the minutes; at Ex S10 page 69-70.

125. Ms Laing's attitude to Oueik is clear from her demeanour when giving answers at T194, after having been confronted with the Toolbox Meeting minutes.
126. Ms Laing has plainly exaggerated and falsified her complaint to ICAC and the evidence she gave to the current hearing. The only reason she has to engage in that conduct is to harm Oueik.
127. For this reason the Commissioner should treat Ms Laing's evidence and the other parking rangers, as they appear to be acting in concert, with the greatest of caution.
128. Lawrence stated in his evidence; T896 (8-18), that there was no different parking policy applicable to Al-Faisal College than to the other schools in the area.
129. The Commissioner should accept the evidence of Lawrence and the evidence of Brisby; at T490 and 491 (set out in Schedule 1 to these submissions) in preference to that of the parking rangers. In particular that it was not Oueik that raised the phrase "self regulating" and that Oueik and the managers were trying to find a solution to resolve the conflict between the parking rangers as regulators and the parents as members of the community trying to pick up and drop off their children at school.
130. The Commissioner should find that the parking rangers were not accepting of the political context in which Oueik was operating as an elected representative trying to solve a community problem that had been specifically brought to his attention; T191-194.

Chapter 2.4.2 – 6-14 Park Road Auburn

131. There is only one instance where Oueik spoke harshly to the Council staff and that was the Park Road incident.
132. There is no issue that Oueik (or his company Apartments on Park Pty Ltd) purchased, at considerable cost, a work zone permit for the development project at 6-14 Park Road.

133. It is not a breach of the Code of Conduct for a councillor to speak to a manager in relation to a matter in which he or she has a private interest.
134. It was not improper of Oueik to speak to either Francis or Lawrence in relation to his concerns about the regulation of the work zone for which he had paid at 6-14 Park Road Auburn.
135. A conflict had been brewing at the site since February 2014 between the site foreman and the parking rangers. There is a suggestion that the parking rangers may have been overzealous at the Park Road site; T892(2-8).
136. On 19 March 2014, Lawrence issued a directive that all dealings with the site should be directed in the first instance to the manager who would direct appropriate complaints or concerns raised; Ex S10 page 52.
137. The parking rangers were of the view that a vehicle could only be parked in a work zone if there were goods being loaded and unloaded from that vehicle; Ex S10 page 53.
138. On 7 August 2014, the site foreman at Park Road made a complaint to customer service at the Council that cars were parked in the work zone; T218(17-24). Apparently the illegally parked cars were interfering with a delivery of concrete. The complaint was passed from the customer service section to Francis who directed the complaint to the relevant manager Lawrence. Lawrence says Francis requested Lawrence to investigate the complaint T891(30-47).
139. Lawrence, who was the senior manager, directed the parking rangers to attend the site to deal with the vehicles that were illegally parked in the work zone and were interfering with the site.
140. The parking rangers responded by attending the site and issuing PINS in relation to vehicles of the workers working on the site but not loading or unloading goods; statement of Emma Laing, Ex S6 page 3 and 108-109, complaint to ICAC by the parking rangers; Ex S10 pages 53 and 58.

141. After the PINS were issued Oueik rang Lawrence to complain about the conduct of the parking rangers.
142. Lawrence accepted that when Oueik rang him he rang Lawrence as manager of the parking rangers.
143. He also accepted that when Oueik was speaking to him in robust terms he was speaking to defend the position of his foreman and workers; T903(4-11).
144. On 7 August 2014, it was Diana Laing who issued three PINS to the vehicles of workers parked in the work zone at 6-14 Park Road. Her conduct appears to have been inconsistent with the direction given by Lawrence.
145. She did not reasonably deal with the issue of what the parking rangers were actually asked by Lawrence to address.
146. Her conduct was highly provocative. In view of the past issues at the site she must have known that she would cause problems by issuing PINS to workers engaged at the site.
147. Laing's conduct is consistent with the conclusion that the parking rangers set out to deliberately cause trouble at the Park Road site to create material to support a complaint by them to ICAC.
148. Within days of the incident at Park Road the parking rangers visited Simms with the documentation to support their complaint to ICAC.
149. On 18 August 2014, Viola Azer and Diana Laing visited Simms at her home; T365, to discuss preparing something for ICAC; T366(1-10).
150. The foreman and Oueik believed workers at the site could park within the construction zone; see Ex S6 [23] to legitimately park at the site.
151. The difficulty that appears to have arisen is that Oueik and his manager Harry had a different view as to what was permitted in a work zone than the parking rangers; See Ex S10 page 58, an internal memorandum created by Emma Laing on 21 June 2014.

152. The difference of opinion was reasonable as the parking rangers may not have been correct in their interpretation of what was permissible in a “Work Zone”¹. Ms Diana Laing did not know the regulation she was enforcing in work zones or the wording of that regulation; T205(7-12), T203-204. She had not checked the actual conditions that applied to the particular work zone; T204(7-16). Emma Laing was no better informed; T211-212.
153. Although Oueik’s language was unacceptable, his frustration at the conduct of the parking rangers is wholly understandable.
154. Oueik accepts that he used inappropriate language when he spoke to Lawrence on 7 August 2014.
155. As to Parking:
- a. Oueik used his best endeavours to solve the parking problems experienced by all schools in the area. This was consistent with his political obligations as he saw them;
 - b. Oueik did not give any directions to any employee of the Council in relation to parking;
 - c. Oueik did not influence the Council Officers to discriminate in favour of Al-Faisal College;
 - d. Apart from the schools issue, there is a single instance of a confrontation between Oueik and the parking rangers;
 - e. The Park Road conflict is explained by strongly held views on each side; and
 - f. The initial allegation, made by the parking rangers that Oueik was involved in the cancellation of PINS, is refuted by the evidence and undermines the veracity of their allegations.

¹ The relevant regulation was Regulation s.181 of the *Road Rules 2014*

Chapter 2.5 - Simms

156. The Commissioner has expressed the opinion that compliance with the Code of Conduct is squarely within the terms of reference; T181(1-16).
157. The *Public Interest Disclosures Act* 1994 (NSW) provides a specific mechanism for “whistle-blowers” to provide information relevant to the conduct of local councils. Section 12B provides that a council employee (as a public official) can make a disclosure to the local government investigating authority (the Director General under s.429A of the LGA).
158. On 18 August 2014, Viola Azer and Diana Laing visited Simms at her home; T365(2-9), to discuss preparing something for ICAC; T366(1-10).
159. On 27 October 2014, Simms provided the document given to her by the parking rangers to ICAC; EX S10 page 103. She kept a copy of some of the documents; T366(2) to T367(27). The documents Simms retained included those attached to her statement; Ex S10.
160. On 4 September 2015, there was a further meeting between the parking rangers and Simms.
161. ICAC advised Simms that ICAC did not propose to take the complaint any further; T367(1-8). However, Simms retained the documents given to her by the parking ranges. She still had the documents when she made her statement; Ex S10 on 23 May 2016.
162. The documents contained internal Council documents including directives issued by Lawrence; Ex S10 (pages 52, 55, 56, 61 and 66).
163. Lawrence gave evidence that the documents attached to Simms’ statement that had been given to her by Dianna Laing and Emma Laing were exclusive to his department, definitely not for general publication and documents that definitely ought not be in the possession of a Councillor; T901(19-32).

164. Of the document at Ex S10 page 52, Lawrence said in evidence; T901(19-32):

“Q. Did you regard that document as a confidential document of Auburn Council?”

A. I regarded the document meant for rangers, parking officers and the team leader of the rangers, yes.

Q. Only? Exclusively?

A. Yes. It's not to do with any other department, yes.

Q. And not for general publication?

A. Definitely not.

Q. And certainly not a document that ought to be in the possession of a councillor, correct?

A. Yes, definitely.”

165. The Commissioner could find that Simms obtained and retained copies of internal council documents that contained confidential information and were not available for perusal or use by the elected Councillors; Eg Ex 10 page 58 and this was a breach of the Code of Conduct.

166. Simms' explanation of her conduct for speaking with the parking rangers, receiving and retaining confidential council documents and not advising the parking rangers that it was inappropriate for them to take their complaint to an elected councillor is at given at T371(2) to T373(22) and was to the effect that corruption overrides all other obligations.

167. There is nothing improper about elected councillors contacting senior management staff of the Council to obtain information needed to assist them perform their functions as elected councillors.

168. During this period Simms was in regular contact with representatives of the media as part of a campaign to publically raise issues concerning the Council.

169. Simms contacted Francis to obtain information so that she could pass that information on to the press, particularly the Sydney Morning Herald.

170. In the period prior to February 2016, Simms was in constant contact with Leesha McKenny, a journalist employed at the SMH; Ex S10 Pages 42-44. Simms was on first name terms with McKenny; T347-375.
171. Simms did not tell Francis the information she was obtaining from him was in answer to a request from the SMH, nor that she was providing the information once obtained to the SMH; T391(1-40); T411-412.
172. Obtaining information for this purpose had nothing to do with Simms fulfilling her role as an elected councillor.
173. How can the Commissioner be satisfied that Simms did not provide to the media information that she had obtained from Council staff that was confidential to the Council and would not have otherwise been released to the media or that the information was not used by Simms for political purposes?
174. The vice is that at the same time Simms was receiving and encouraging the parking rangers employed by the Council to provide her with confidential information and documents that were the property of the Council she was providing information to journalists concerning the conduct of the Council. She was also engaged in a political contest against Oueik and the other pro-development councillors.
175. The conflict of interest is obvious. It is no answer for Simms to say that she was responding to an allegation of corruption and that overruled the other obligations she had as an elected councillor, namely to behave in accordance with the obligations imposed on her under the "Code of Conduct".
176. What Simms should have done is to have advised the parking rangers, by reason of the obligations imposed on her under the Code of Conduct, that she could not receive their complaints and could not pass on their complaints on their behalf to ICAC. She should have advised the parking rangers to go directly to ICAC or to take advantage of the *Public Interest Disclosures Act 1994* (NSW).

177. The Code of Conduct contains the following obligations:

***"Part 6 – RELATIONSHIP BETWEEN COUNCIL OFFICIALS
Inappropriate interactions***

6.7 You must not engage in any of the following inappropriate interactions:

(a) ...

(b) Council staff approaching councillors and administrators to discuss individual or operational staff matters other than broader workforce policy issues..."

***PART 7 ACCESS TO INFORMATION AND COUNCIL
RESOURCES***

Use of certain council information

7.8 In regard to information obtained in your capacity as a council official, you must:

(a) only access council information needed for council business

(b) not use that council information for private purposes

(c) ...

(d) only release council information in accordance with established council policies and procedures and in compliance with relevant legislation.

...

7.14 You must be scrupulous in your use of council property, including intellectual property, official services and facilities, and must not permit their misuse by any other person or body.

2.6.1 Response to the Submissions of Counsel Assisting Re the kitchen conversations and the relationship of influence between Oueik and Francis

178. The Submissions of Counsel Assisting at:

a. [SA6] to [SA20];

b. [MS15], [MS16] and [MS18]; and

c. [WS5].

should not be accepted.

179. The inclusion of [36] in the Submissions of Counsel Assisting without Oueik's denial of Francis' version of the conversation is an unbalanced description of the evidence.

2.7 Suggested findings that should be made by the Commissioner

180. It is open to the Commissioner to make the following findings:
- a. There is insufficient material from which the Commissioner could find that the relationship between Oueik and Francis was one of influence;
 - c. The Commissioner should accept Oueik's denial and find that Oueik did not say the words "it is a gift" or "favour" attributed to him by Francis;
 - d. Oueik did not make a "gift" of a kitchen to Francis;
 - e. The kitchen conversations were innocent in the sense that they were not in breach of the Code of Conduct or engaged in for the purpose of attempting to secure influence;
 - f. The Commissioner should find that the evidence given by Francis is unreliable; and
 - g. The Commissioner should accept Francis' evidence; at T48(45) to T49(11), that Francis was not influenced in any decision or recommendation made by him in relation to South Auburn, Berala Village zoning or the s.96(1A) certificate for Water Street, by his relationship with Oueik. He was not asked about Marsden Street.

CHAPTER 3

3.1 The facts and circumstances surrounding the Berala Village Planning Proposal:

181. Apart from drawing the Commissioner's attention to the following evidence, Oueik makes no submissions in relation to this part of the Terms of Reference.
- a. Flood: PH6, T20(7-28); T1025(25-29)(39-42); T1030; T20(22-28);
Oueik's denial of influence: T1031(8-14);
 - b. The opinion of Oueik for voting in favour of the Berala Village Proposal; PH6, T20(7-28); T1025(25-29)(34-42); T1030; T20(22-28);
 - c. The denial of influence; T1031(8-14).

3.2 The Facts and circumstances surrounding the Grey St Planning Proposal:

182. Oueik makes no submission in relation to this topic.

CHAPTER 4

South Auburn Planning Proposal

4.1 Background

The “South Auburn Planning Proposal” relates to an area bounded by Auburn Rd, Beatrice Street, Helena Street and Susan Street. The proposal related to the rezoning from R3, medium density residential to part B4 mixed use and part R4 high density residential and to amend the corresponding maximum permissible height of buildings and FSR controls.

4.2 Details and History

183. At its ordinary meeting held on 20 October 2010 Council resolved to:
- a. Prepare a planning proposal to amend Auburn Local Environmental Plan 2010 (“ALEP”) in accordance with the *Environmental Planning & Assessment Act 1979* Section 54 and Department of Planning and Infrastructure (“DP&I”) guidelines to rezone the properties that front Auburn Road eastern side from Beatrice Street to Helena Street from R3 to B4 and amend the Local Centres part of the ADCP 2010 accordingly.
 - b. Prepare a planning proposal to amend ALEP 2010 in accordance with the *Environmental Planning & Assessment Act 1979* Section 54 and DP&I guidelines to rezone the properties that front Susan Street from Beatrice Street to Helena Street from R3 to R4 residential and amend the Residential Flat Buildings part the ADCP 2010 accordingly.
184. A planning proposal was submitted to DP&I on 10 September 2012.
185. The Planning Proposal reference was PP5/2011.
186. Gateway Determination to proceed subject to conditions (including preparation of an urban design, traffic and transport and accessibility studies) from DP&I was received on 11 October 2012.

187. A report providing an update to Council on Gateway Determinations issued by DP&I for three Council initiated planning proposals including PP-5/2011 was considered by Council on 31 October 2012.

Council Meeting 31 October 2012

188. On 31 October 2012 Council resolved “*that in respect to Planning Proposal PP-5/2011, no further action be taken in respect to this matter*”; [item 211/12].

Council Meeting 17 April 2013

189. PP-5/2011 next came before an ordinary meeting of Council held on 17 April 2013.
190. Lam declared a non-pecuniary interest and Mehajer declared a pecuniary interest in the matter and each left the Chamber before the consideration of the matter and remained outside the Chamber during all of the discussions and did not vote.
191. Mehajer declared a pecuniary interest because his sister owned number 84 Auburn Road.
192. The Council resolved on the motion of Yang, seconded Oueik that in respect to the planning proposal PP5/2011 action be undertaken to:
- a. Re-zone the land on the eastern most 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 western most side of Susan Street (between Beatrice and Helena Streets), Auburn from R3 Medium Density Residential zone to R4 High Density Residential;
 - c. Amend the ALEP 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.

193. The proposal was retitled PP-3/2013.

194. There was a division on the motion and carried on the casting vote of the Mayor. The voting was:

For: Councillors Attie, Oueik, Yang and Zraika.

Against: Councillors Batik, Campbell, Oldfield and Simms.

Ordinary meeting of Council 15 April 2015

- 195. For the ordinary meeting of council held on 17 April 2013, the executive manager of planning, Francis, prepared and presented to council a report in relation PP5/2011 (the “**15/4/2015 Report**”).
- 196. The report dealt with the amendment to the zoning height, FSR and development controls for the land bound by Auburn road, South Street, Beatrice and Helena Street Auburn.
- 197. The 15/4/2015 Report described a number of alternatives for the rezoning. The options are described at Ex SA1 pages 24-26 of the Report.
- 198. Two alternative options that were similar to then current proposal of B4 and R4 but with reduced areas of B4 Mixed use and increased areas of R4 High Density Residential Zone.
- 199. The alternative options may have triggered the need for a new Gateway Determination and re-exhibition of the Planning Proposal.
- 200. The two options referred to in the report are found in the table form part of the 15/04/2015 Report at Exhibit SA1 pages 10-12.
- 201. One of the contentious matters under consideration by the Inquiry is the genesis of option 2(a) and 2(b).

202. The evolution of the recommendation of option 2(a) is discussed in the submissions of Counsel Assisting at [269]-[272].
203. The first version at Ex Gen 27, pages 1-28, contains the recommendations at page 2. The recommendations were essentially that the Council should give the staff directions.
204. The table of options is at pages 23-24. Option 2(a) has the mixed B4 zoning ending at 86-88 Auburn Rd.
205. Version 2 is at pages 29-50. The recommendation is at page 23.
206. The table of options is at 51-52. Option 2(a) has the mixed use ending at 86-88 Auburn Rd.
207. Version 3 is at pages 57-84. The recommendation is at pages 57-58. The recommendation is a modified option 2(a) with the mixed B4 ending at 86-90 Auburn Rd. The rationale for the inclusion of 90 Auburn Rd is found at Ex Gen 27 page 105, as follows:
- “The lot at 90 Auburn Rd has been included in this option because it forms part of a larger ownership parcel and potential development site which includes 86-88 and 90 Auburn Rd and 23, 25 and 27 Susan St. Not including the lot in the B4 mixed use zone would isolate it from the larger parcel, making redevelopment difficult.”*
208. The properties from 74 to 88 and 94 to 100 are commercial in nature and as stated above are subject to existing use rights. The Church of Christ is situated at 90A Auburn Road, which comprises two lots. The next properties along the road heading south are 94 to 100 Auburn Rd. 102 Auburn Rd is a residential old style walk up flats (3 stories) and so to are 104 and 106 Auburn Road.
209. Bhanin Association owns the commercial properties at 94 to 100 Auburn Rd Auburn.
210. Version 4 is at pages 85-111. The recommendation is at 85-90. Option 2(a) remains with the B4 mixed-use ending at 90 Auburn Rd. The table of options is at page 107-108.

211. The sign off box provides for the author, the Manager, Executive Manager and the General Manager to sign.
212. The Executive Manager initials appear in the sign off box at the end of Version 2, page 55. Version 2 had the same recommendation as Version 1.
213. There is nothing in the evolution of the 15 April 2015 report that supports the submission of Counsel Assisting that the decision of the planners to recommend adoption of option 2(a) came from influence from Oueik, Attie or Zraika.
214. The correct position appears to be that the recommendation arose from a decision not to proceed with a recommendation that asked Council to give the staff direction in relation to the various options set forth in the table of options at pages 23-24 of the Ex Gen 27 and to instead put forward a firm recommendation to draw the B4 boundary at 90 Auburn Rd. The recommendation to make the B4 area end at 90 Auburn Road appears to have been made at the time of the second draft and is explained at Ex SA1 page 24.
215. If one looks at at the report of MG Planning and in particular the site analysis at page 89 and the diagrams of the various options at SA 1 pages 283-285 it is easy to see why a Councillor or a competent planner would recommend less B4 along Auburn Road. A full rezone to B4 with a height of 21 mtrs and a maximum FRS and R4 with a height of 16 mtrs and maximum FSR in Suzanne would have produced a future development with massive bulk.
216. When on 15 April 2015, the motion for South Auburn Planning Proposal came up for consideration Councillor Attie declared a non-pecuniary interest in the matter and Councillor Lam and Mehajer declared a pecuniary interest. Simms and Campbell moved a resolution 057/15 that no further action to be taken in respect of PP5/2011 and the motion was carried Ex SA1 page 364.
217. The voting on the resolution was:
- For: Clr's Campbell, Oldfield, Simms and Yang
- Against: Oueik, Zraika.

218. At the ordinary council meeting on 20 May 2015, there was moved a motion to rescind the motion carried on the 15 April 2015. Zraika and Yang gave notice of the rescission motion.
219. The motion was moved by Zraika and seconded by Oueik; Ex SA 1 page 412 and passed by a majority.
220. The Council then resolved by division on the motion of Zraika, seconded by Oueik:
- a. *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.*
 - b. *That Council has reviewed alternative rezoning options presented in this Council report and resolves to progress reducing the B4 Mixed Use zone on the east side of Auburn Road to between Beatrice Street and 90 Auburn Road (comprising all lots from 74-78 to 90 Auburn Road, inclusive) and applying R4 High Density Residential to the remainder of the subject land including the following associated actions:*
 - i. *That Council undertakes any necessary notification or amendments to studies as required.*
 - ii. *That after any required statutory notification or amendments to studies that Council adopt (approve) and make (finalise) the Auburn Local Environmental Plan 2010 (Amendment No 13) and associated Auburn LEP 2010 maps as per Planning Proposal PP-3/2013, in accordance with section 59(2(a)) of the EP&A Act 1979;*
 - iii. *That Council staff progress the legal drafting and production of associated Auburn LEP 2010 maps for Auburn Local Environmental Plan 2010 (Amendment No 13) accordingly;*
 - iv. *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 13), if adopted, on behalf of the full Council;*
 - v. *That Council staff send the adopted Auburn Local Environmental Plan 2010 (Amendment No 13) to the Department of Planning and Environment for notification (gazettal); and*
 - vi. *That Council staff prepare amendments to the Auburn Development Control Plan 2010 to incorporate the new B4*

*Mixed Use zone within the boundary of Auburn Town Centre,
after notification of Auburn Local Environmental Plan 2010
(Amendment No 13)*

For: Councillors Oueik, Attie, Yang and Zraika.

Against: Councillors Campbell, Oldfield and Simms.

221. On 6 August 2015, Council received a revised Gateway determination and LEP delegations; EX SA1 page 417.

Page 417 of Ex SA1

222. At the ordinary meeting of Council held on 2 December 2015, Council received a final report from the executive manager of planning. This report is at Ex SA1 page 417.
223. On 2 December 2015, Council resolved by division, after a debate to adopt (approve) and make final draft ALEP 2010 consistent with the South Auburn, by then called PP-3/2013. The motion was moved by Zraika and Yang:

For: Councillors Lam, Attie, Oueik, Yang and Zraika.

Against: Councillors Campbell, Oldfield and Simms.

Pecuniary Interest of Salim Mehajer

224. Mehajer declared a pecuniary interest because of his sister's ownership of the property at 84 Auburn Rd, Auburn; T1276(12-15).
225. It is submitted by Counsel Assisting that there existed a relationship between Councillors' Oueik and Mehajer such that Oueik would support a resolution to amend the ALEP 2010 consistent with the South Auburn PP-3/2013 and so as to benefit Mehajer and not consistent with the merits.
226. As noted earlier, there is no evidence to suggest that there was a close or personal business relationship between Oueik and Mehajer or Mehajer's sister.

227. Oueik gives evidence that he had a minimal relationship with Mehajer and never discussed council matters nor did he attend Mehajer's wedding (T1126.23-46)

Q: I want to ask you now a couple of questions about Mr Mehajer. What kind of relationship did you have with him when you were a councillor?

A: Before council, on council, after council, not much at all.'

228. Furthermore, there is no evidence to suggest that Oueik even knew Mehajer's sister.

229. There were discussions between Oueik and Mehajer concerning the nominations for Mayor; evidence of the conversation is at T1290(29-45). There is nothing improper about councillors discussing amongst themselves the election of Mayor and Deputy Mayor.

Q: When you voted on this, at the previous election when you were deputy mayor, Mr Oueik had supported you for deputy mayor; correct?

A: Yes, he did.

Q: Had he nominated you?

A: I'm not sure who nominated me, but he supported me.

Q: Before that election you and Mr Oueik and Mr Attie, Ms Lam and Mr Yang, maybe not all together and all at once, but the five of you had discussed amongst yourselves, perhaps, tell me if I'm wrong, who of the five of you would be put up for mayor and who would be deputy mayor?

A: It was just normal discussion. We had that, yes.

Q: You sought, do I take it, from them, their support for your candidacy as deputy mayor?

A: Yes."

230. This exemption is dealt with in the Councillors code of conduct at [3.9] and [3.12], are in the following terms:

"3.9 You must not participate in binding caucus votes in relation to matters to be considered at a council or committee meeting.

...

3.12 Clause 3.9 does not apply to a decision to elect the Mayor or Deputy Mayor or to nominate a person to be a member of a council committee."

231. It was specifically put to Mehajer; at T1301(37-42), that because of his relationship with Oueik he had voted to support the Marsden Street re-zoning, so as to suggest an improper relationship between the two councillors.

232. This was denied by Mehajer:

"Q: I want to suggest to you that your voting when it came to the Marsden Street proposal was influenced by your relationship with Mr Oueik?

A: Incorrect. Because if you see my pattern and my history of the way I vote, that's not out of the ordinary, so...'

233. However no questions were asked of Mehajer about the nature and extent of his relationship with Oueik. The issue was not raised in the private hearing.

234. The conclusions reached by Counsel Assisting in his submissions at page 56 (SA17, SA18, SA19. and SA20) that Oueik was influenced to vote in favour of the South Auburn Planning Proposal by reason of his relationship with Mehajer, is without substance. It is also without merit as no rational analysis of the evidence is given to support the conclusions.

235. Oueik was asked at T1074(1-6) if the fact that a member of the Mehajer family owned the property at 84 Auburn Road entered his mind when he voted on option 2(a) and he said "No".

236. It was not put to Oueik that he was influenced by the existence of some arrangement with Mehajer, to the effect that each of them would vote in each others' interests on planning proposals and not on the merits of those proposals when he voted for option 2(a) in the South Auburn Planning Proposal.

237. It is reasonably clear that the reason why the boundary of the B4 was drawn at 90 Auburn Rd is the explanation at page 105 of Ex Gen 27 and because to re-zone the whole of the area facing Auburn Road B4 would have led to excessive over development.

238. Although the rule in *Brown v Dunn* does not apply in administrative inquiries it is still not reasonable to make such a serious allegation without putting the allegation directly to the persons against whom the allegation is made.
239. Oueik would be unaware the allegation made in Submission SA17 to SA 20 until served with the Submissions of Counsel Assisting.
240. In the circumstances the Commissioner should not accept the submissions at SA17 to SA.20.
241. On the evidence adduced during the hearing the involvement of Oueik in the South Auburn Planning Proposal was limited to his participation in the resolutions at the ordinary meetings of council and to following the recommendation made by Francis.
242. Oueik was examined quite unfairly by Counsel Assisting.
243. It was put to Oueik by Counsel Assisting that before the recommendation came to Council, Oueik and Zraika said to Francis that there needed to be a reduction in the B4 zone on Auburn Road.
244. Oueik said he did not recall such a conversation; T1063(35).

“Q: You see, before it came to council Mr Francis says that he has a recollection of you and Mr Zraika telling him that there needed to be a reduction in the B4 zone along Auburn Road?”

A: I don't recall that.’

245. Presumably the question asked by Counsel Assisting relates to the final version of the 15/04/2015 Report, however the question is far from clear.
246. At transcript T1064, it is specifically put to Oueik that Francis gave evidence that he and Zraika raised with Francis the reduction of the B4 zone on Auburn road before Francis prepared option 2(a) and 2(b).
247. Oueik said he did not recall such a conversation; T1064(21-23).

“Q: Mr Francis says that he has a recollection of you and Mr Zraika raising with him reducing the B4 zone along Auburn Road?”

A: I don't recall that, Mr Commissioner.

Q: And that occurred before he prepared options 2(a) and 2(b)?

A: I don't recall that.'

248. It was also put to Oueik that he said to Francis that he wanted the B4 zone to end close to 90 Auburn Road. Oueik says he did not recall that conversation; T1064(25-28).

"Q: I want to suggest to you, Mr Oueik that you made it clear to Mr Francis that you wanted the B4 zone to end close to 90 Auburn Road?

A: I don't recall that.'

249. The proposition contained in the questioning by Counsel Assisting of Oueik that Francis had specifically said Oueik had raised with him prior to compiling the 15/04/2015 Report and making the recommendations on 15 April 2015 that there be a reduction in the B4 area end at 90 Auburn Road was incorrect. Francis never gave the evidence attributed to him.

250. The evidence that Francis actually gave appears; at page 10 [53] of Ex S23 and is as follows:

"A: I do not have any specific recollection of the views of individual Councillors, save that I have some recollection that Councillor Zraika or Councillor Oueik may have raised a view that the extent of B4 should be reduced and that Councillor Zraika suggested to me that the B4 controls, namely SFR and height, should be the same as the Auburn Town Centre. I do not recall what was said within the Council chambers regarding the reduction and the extent of the B4 zoning.' [Emphasis Added]

251. This evidence was a qualification of his earlier private hearing testimony that reads as follows; T27(34-47) & T28(1-37):

"Q: Are you sure, Mr Francis, that it was your idea to propose the limited section of B4 along Auburn Road that was ultimately adopted by council?

As: I'd like - I would have liked it to be - to have it removed into R4, but reducing it was put up as an option towards it. There was some talk within the chamber about having it reduced, but -

Q: Was that before or after you put forward your proposal to the meeting of April 15?

A: Probably before.

Q: Before?

A: There was some --

Q: Who wanted it reduced?

A: There was a number of councillors talking about it.

Q: Did Mr Oueik discuss that reduction with you before you did your report for 15 April?

*A: He was - he and Ned Attie and Hicham Zraika, they were, I think, concerned about the amount of B4 in that area, **but they certainly didn't influence my recommendation.***

Q: What were their concerns about there being too much B4 in that area?

A: I think it - I think, from their perspective, it may have been just too far away from the town centre. Probably with the exception of Hicham Zraika, I think. From memory, I don't think he had an issue with that.

*Q: **Do you recall discussing a reduction of the B4 area with Mr. Oueik at any stage prior to doing your report for 15 April?***

*A: **Not that I can recall**, but certainly I was not happy with it and I probably mentioned it to him in passing or – that I wasn't happy with it.*

Q: You weren't happy- what did you mean by you were "not happy with it". You weren't happy with any B4?

A: I just think that that B4 zone in that area extends past a clear definable boundary in Beatrice Street, and having come into the job after, I mean, a lot of it had already been completed and on its way, I had a chance to look at it and address it.

Q: Well, correct me if I'm wrong: you say your personal preference, based on your experience as a town planner over many years, was no B4 in the block; correct?

A: That would be, yes.'

[Emphasis Added]

252. Francis in his statement Exhibit S23 makes it reasonably clear that the idea of reducing the area of B4 zoning and putting option 2(a) and 2(b) emanated from him.
253. This is consistent with him wishing to reduce the B4 to a minimum in the face of the MG planning report that, as noted above, recommended rezoning the whole area facing Auburn Road to B4.
254. In fact, in his statement of 30 May 2016 (Ex S23), Francis says:

"Para 50: MG Planning had provided one alternative for consideration by Council, being the large scale B4 rezoning.

In discussions with staff from the Strategic Unit, we identified what became options 2(a) and 2(b), each of which provided less impact.

I was particularly concerned that the Town Centre was expanding beyond a defined limit and accordingly considered it appropriate to provide the Councillors with an opportunity to reduce the B4 area while still complying with the resolution to rezone the area.

Para 53: ... I do not have any specific recollection of the views of individual Councillors, save that I have some recollection that Councillor Zraika or Councillor Oueik may have raised a view that the extent of B4 controls, namely SFR and height, should be the same as the Auburn Town Centre. I do not recall what was said within the Council chambers regarding the reduction and the extent of the B4 zoning."

255. Francis specifically denies at the private hearing being influenced by Oueik in relation to the alleged "gift" and South Auburn zoning; Ex PH10 48(45-47), 49(1-12):

"Q: You don't think the gift had anything to do with any of your advice to council in relation to the South Auburn zoning?

A: No, sir.

256. The Commissioner should make a specific finding that outside Oueik's participation in ordinary meetings of Council, Oueik had no influence in relation to the introduction of options 2(a) or 2(b) or the option approved by

Council on 2 December 2015 or the recommendations put forward by Francis and ultimately adopted by Council.

Bhanin Association

257. Nothing adverse arises against Oueik from the allegations of the Bhanin Association and the Mustafa Hamed evidence.
258. For reasons explained above the Commissioner should give no weight to the evidence of Campbell in relation to Oueik and the Bhanin Association.
259. The evidence of Hamed at T1001-1003, to the effect that Oueik asked Hamed's opinion whether to run as a Liberal candidate for the NSW State elections in the seat of Auburn borders on the absurd.
260. Oueik denies the suggestion he sought Hamed's support ; The denial is at Ex PH6 31(24-47) and 32(1-9).

Q: Did you seek his support when you were thinking of running as the Liberal candidate for the state seat of Auburn?

A: No.

Q: You didn't?

A: No.

Q: Did you seek the support of anyone else from the Bhanin Association...

A: No.

Q: ...for the same purpose; is that right?

Com: He said "No".

Q: You know that the Bhanin Association did not support you during the state election; correct?

A: They did.

Q: They did?

A: Yes.

Q: How did they do that, Mr Oueik?

A: The community does not belong to the Bhanin Association. We're talking about the community. The community did support me, that I'm aware of, for the state election, the last election.

Q: But the formal position of the association was that it supported Mr Foley?

A: Good luck with him, but I'm saying the community did support me.'

261. Hamed, a communist and a member of the Australian Labor Party, was philosophically and politically opposed to Oueik. At no stage would Oueik consult with Hamed on an internal liberal strategy especially an item of such personal ambition.
262. There is no foundation in the suggestion that Oueik voted to reduce the B4 area to "punish" the Bahnin association or that Oueik was out to punish the association.
263. Hamed's evidence is that he did not speak to Oueik about the B4 Zoning but only with Oldfield and Campbell; T1008(8-16).

"Commissioner: Were you ever given an explanation as to why originally it was proposed to have a commercial B4 zoning down the entirety of Auburn Road, which included the association's building, and why it was changed to leave you with a residential zone?"

A: We didn't discuss any of this with Ronney or Hicham after this happened, but we spoke with Tony and with George. Not only us, even the church people and the people in Susan Street.'

264. If Hamed did say to Oldfield the reduction in B4 was a punishment from Oueik, it was probably Campbell who put it in Hamed's mind that Oueik was somehow connected to the reduction in the B4 area.

265. Campbell's evidence of the conversation is, however, more general. He says that Hamed said to him that the reduction in the B4 area was a punishment for the Church and the Association; T1006(23-24).

"A: Yes, I told him, it's a punishment for the church and for the association."

266. Campbell's evidence at T667.32-36 is doubtful:

"Q: When you say "not falling into line", what were his exact words about what the punishment was for?"

A: That we were being punished - as far as I can remember, that we were being punished for not supporting Ronney Oueik in the state election, words to that effect."

267. However, it is unlikely that Hamed said that the association was being punished for not supporting Oueik.

268. Campbell's own note; Ex Gen 24, does not record that Hamed said Oueik was punishing the Association.

269. When the evidence is closely examined it is reasonably arguable that Campbell has exaggerated the evidence to damage Oueik. Indeed, Hamed does not make the specific allegation in his evidence.

270. What Hamed says is that the association was unhappy and felt as though they were being punished by all the Councillors; T1005(5-21) & T1007(30-46):

"Commissioner: At one stage there was a proposal that the Auburn Road go to a commercial zoning the whole way, but ultimately your association building was left with a residential zoning."

A: Okay. Even if I do accept this, the people in - the rest of the people in the association which I am representing them, they're not going to agree on this, they're not going to be happy with it."

Q: They were unhappy that the commercial zoning didn't go right down the street?"

A: Because at first it was going to include all of them."

Q: Yes."

A: *As if they're - we are being punished. As a punishment.*"

271. And:

Q: When you used the word "punishment", why did you use that word?

A: *Because at the beginning we were included in that zoning where we could have eight or nine levels, but then when they changed it, as a community we felt as we are being punished. It's normal to feel like that.*

Q: Do I understand it this way: because of the change, you felt that someone was punishing you, punishing the organisation?

A: *Yes.*

Q: Was that the only way in which the decision made any sense to you as the secretary of the association?

A: *Not only me. The whole community understood it that way."*

272. Even though Counsel Assisting [294] referred to an assertion by Oldfield (not corroborated by any other evidence) that Hamed said the words attributed to him, at the public hearing Hamed was not asked whether he said the words attributed to him by Oldfield. For this reason, little reliance can be put on Oldfield's assertions.

Small Parcel of Land Remaining was Not Rational?

273. Oueik gave evidence as the most experienced individual in Council in having developed numerous properties in the municipality. At T1071(25-45), Oueik expressed that it could be developed.

Q: I want to suggest to you there is no B4 zone that small in Auburn?

A: *There is.*

Q: That small?

A: *Yes.*

Q: All right.

A: *If you look at the map of Auburn, then you will see it and understand it for yourself.*

Q: You see, you couldn't do a proper B4 development on a site that small even if you owned all of the lots, could you?

A: Of course you can.

Q: Mr. Oueik, that's not true, is it?

A: You're asking me?

Q: Yes.

A: I'm telling you, my honest opinion, yes, you can."

274. Counsel Assisting did not follow up the reason for Oueik's opinion. His opinion may have been connected with the B4 site Oueik was actually developing in Kerr Street Auburn.

275. Oueik was asked similar questions during the private hearing ;T33, T34 and T35. In fairness to Oueik he may not have understood the questions at T33, T34 and T35. In fact, at T34(35-36), he states:

"A: No. Mr Commissioner, I don't understand the question, to be honest."

276. Oueik tried to explain why he voted in favour of option 2(a) at the hearing on 16 June 2016 at T1061(40-47):

'Q: Can you then explain to me why you voted to agree to option 2(a) which reduced the B4 zoning along Auburn Road to the lands from 74 to 78 Auburn Road to 90 Auburn Road?

A: Mr Commissioner, if I may? We go off the circle². Firstly, we trust the judgment of our staff. Everyone has an opinion, Mr Commissioner. I have an opinion, the Commissioner has an opinion, you have an opinion, I'm sure everyone in this room have an opinion. My understanding at...".

277. And continuing at T1062(1-22):

"A: ...the time, it still is, the facility of public transport here, you will have 400 for B4, extend that another 400, which is for R4, and then it become...

Commissioner: R2, probably, after that, is it?

² This is a reference to the 400 metre radius circle

A: R3, B4, R4, R3 and A2, whatever. It is like an umbrella, down, down, down, down.

Q: Further away from the station?

A: From the station. The most important thing of the station, anywhere you go in the State, station in the middle, there is a circle, in every planning proposal that you see there's a circle, 400 metres, B4, 800 metres, R4, 1,000 metres, R3, then become 2A, which is normal residential to protect the residential. The way I've seen it in the report back then, the way I was convinced, there is no difference between 16 metres and 21 metres, 5 metres, and the applicant there they have commercial, existing commercial and if you do have an existing commercial and you were to lodge a DA under the existing commercial, you can still take advantage of - use the commercial into your development. It doesn't matter what".

278. Alvarez explains the planning theory that Oueik was attempting to refer to; at T933(24-38):

"Q: And we've seen an 800 metre radius in South Auburn. What's the significance of 800 metres in the Auburn context?

A: All of these radius radii tend to originate from metropolitan strategy and general planning principles, but I believe the reason why 800 metres is considered more appropriate in the Auburn context is that Auburn is a larger town centre than the Lidcombe town centre and it - the Auburn train station has better services, although either one is fine, it's just that when you're within 400 metres it's quick, it's approximately a five-minute walk for an adult, but with 800 metres it's more like a 10-minute walk for an adult, so it's still considered within that catchment radius that is good planning practice and the department also advocates."

279. Oueik accepted the recommendation of council staff as they were the planning experts and the recommendation was consistent with planning principles as he understood them. It was reasonable for Oueik rely on the planning staff. At T1061(43-47) Oueik states '*...we trust the judgment of our staff.*'

280. If one is to summarise his decision, it would read as follows:

- a. Oueik did not support the status quo option as he generally supported development particularly in what he believed was an '*existing use rights area*';

- b. Option 2(a): Oueik supported this option as it:
 - i. Followed the recommendations made by the planning staff; and
 - ii. Was a reasonable middle ground approach between two differing positions and is otherwise in line with the Council resolution and ;
 - iii. Those properties that did not fall within the B4 zone in Option 2(a), such as the properties owned by Bhanin Association were the beneficiaries of a commercial-in-flavor existing use rights position.
 - c. Option 2(b): Oueik did not support this as it would have led to large scale development too far away from the city centre and would have looked out of sorts with the surrounding residential aspects Auburn Road as it led up the slope where the residential properties were located.
281. The resulting development (particularly as to height) would have scaled down as you headed south up Auburn Road.
282. What Oueik was trying to explain was that Auburn Road rises up as one moves south and visually the B4 would have otherwise progressed nicely to meet the existing the 3 storey flats on the hilly end of Auburn Road. The net effect being that the street would have structures of the same height; see T1062(24-47) to T1063(1-22):
283. Oueik did not see the Bhanin Association as being prejudiced as they had existing commercial use rights on the exiting older style commercial premises at 94, 96 ,98 and 100 Auburn Road.

“Q: You are talking about existing use rights, are you?”

A: Existing use rights, so there's no loss of the Bhanin of the commercial.

Q: Well, the Bhanin's wanted commercial because it significantly increased the value of their land. It would have enabled them to sell their land to fund their organisational purposes; correct?

A: That's not what it's - no-one's spoken to me about that, but can I just give further explanation, ... In my understanding, sir, they are not losing the commercial because they already have an existing commercial. When you have an existing commercial and you lodge another planning council, you still have the right to use your existing commercial and between B4 and R4 there's only 5 metre difference.

Q: They did not have any existing 21 metre height use rights, did they?

A: 21?

Q: 21 metre height use rights, did they?

A: 21 to 16 is not big difference, only a level, one level.

Q: One level?

A: Yes.

Q: What is a level worth, Mr Oueik? What is it worth in increased value from R4 to B4?

A: What's a level worth? I don't know.

Q: It is a significant increase in value, isn't it?

A: Yes, but the way that I looked at it, it's good within the town centre - the train station and a school drop".

284. Oueik is correct about the existing commercial use rights and what he says makes perfect sense.

285. Furthermore, Oueik did not propose a change to the recommendation, as the other alternative to a B4 / R4 mix would have been to have an R4 zone throughout.

286. Again, this would not be a suitable result in a pre-existing commercial section of Auburn Rd, where an R4 zone would force the development of only residential buildings in a pre-existing commercial zone.

287. As noted earlier, The submission of Counsel Assisting that there was no rational or legitimate planning basis for Francis to recommend the options 2(a) and/or 2(b) for consideration, is to do an injustice to Francis; he was responding to what he understand was required of him by the councillors, namely options to reduce the area of B4 rezoning in response to the Urban Planning Report.

288. Glen Francis said at T 28(40-43) at the private hearing:

"A: ...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."

289. Ultimately, the executive planning report was presented to the Councillors and Oueik voted with the recommendation.

4.3 Response to the Submissions made by Counsel Assisting.

290. There is no reliable evidence to support the submission of Counsel Assisting that option 2(a) or 2(b) originated with Oueik. Accordingly the Commissioner could not draw a conclusion along the lines posed by Counsel Assisting, where he states:

"Q: Once it is accepted that the decision to create these options was from Mr Oueik or Mr Zraika and that there was no planning merit in them, the reason for doing so must be for some other purpose, not a planning purpose but a political purpose."

291. There is no basis for a finding, in relation to the South Auburn Planning Proposal, that Oueik neglected his responsibility to act honestly and exercise a reasonable degree of care and diligence in carrying out his function pursuant to S.439(1) of the LGA as submitted at SA 20, quite the opposite.

292. For the reasons noted above at [261], Counsel Assisting has misstated the evidence of Francis. Counsel Assisting suggests the following interpretation of the comments made at by Francis at his private hearing; Ex PH10, T28(7-10):

"261. At his private hearing Mr Francis said that three Councillors; Messrs Zraika, Oueik and Attie wanted a reduction in the B4 zone along Auburn Rd, which they communicated to him..."

- a. The transcript actually reads as follows; at Ex PH10, T28(5-10):

"Q: Did Mr Oueik discuss that reduction with you before you did your report for 15 April?"

A: He was - he and Ned Attie and Hicham Zraika, they were, I think, concerned about the amount of B4 in that area, but they certainly didn't influence my recommendation.

- b. In essence, the evidence shows that Oueik, Attie and Zraika showed concern (as opposed to 'wanted') and they certainly did not influence the recommendation made by Francis.

293. In relation to [267], reference is made to Ex PH10, T35, T5-13 to support the following submission:

'267. It is true that Mr Francis did not, at that time, propose recommending any particular option, however for present purposes it is remarkable that he omitted to include the option that he regarded, as a professional planner, represented the best outcome for the site. This is all the more strange given that he did not, "feel intimidated about putting up (his) preferred option to council."

294. The two references do not marry up. Accordingly, [267] is an unsubstantiated submission.

295. The submission at [312] is curious. Oueik is correct that the land owned by the association had the benefit of existing commercial user rights. Although, the Bhanin Association premises (94, 96, 98 and 100) lie in a medium density residential zone, the premises are utilised for commercial purposes. The Bhanin Association has been at those premises since 1979; T1000(17-19).

296. In relation to [SA4], there was a rational basis for Francis to propose options 2(a) and 2(b). Those Councillors who were in favour of a re-zone to B4 expressed the view that the B4 area should be reduced. Options 2(a) and 2(b) was a legitimate response to that opinion.

297. In relation to [SA6], the submission is contrary to the evidence. Francis says was not influenced in making those recommendations by anything said or done by Oueik.
298. Counsel Assisting appears to have taken the approach to Francis' evidence that he can rely on his evidence when it suits a proposition Counsel is contending for and then ignore the evidence when it does not suit Counsel's submissions.
299. As noted, Francis he does not give any evidence of any specific conversation with Oueik. Oueik denies having spoken to Francis about options 2(a) or 2(b).
300. Francis' evidence should be accepted when he says that 2(a) and 2(b) were generated by him. In relation to [SA7], [SA8] and [SA9], this submission is nothing more than speculation and ignores the actual evidence.
301. In relation to [SA10], Counsel's submission is incorrect. Francis does not say that the smaller B4 zones were Oueik's idea.
302. In relation to [SA11], the submission is not correct as the executive manger planners report dated 15 April 2015 at SA1 and commencing at page 7 expressly highlights all the options and the reasons for and against each of the options and draws attention to the recommendations of Urban Design Study that the whole of the area along Auburn Road be rezoned to B4. So quite properly all options were before the Councillors for their consideration. What Francis was doing in his report was responding to the direction from Council that he 'come up' with options for a reduced B4 area. Accordingly, it was not that he could not put forward a recommendation that the whole area be rezoned B4 or R4, he considered it was his obligation was to respond to the request made to him by council. There was nothing improper in this.
303. In relation to [SA13], Counsel Assisting misunderstands what Francis was actually asked to do.

304. The 15/04/2015 Report makes it clear that Counsellors were not bound to accept the recommendations from the planning department but could read the analysis of all the options at SA1 24-26 and exercise their own separate judgments.
305. Council plainly had before it all the two options including do nothing, that is adopt the Simms, Oldfield and Campbell position or rezone the entire block to R4.
306. If the planners put forward the option to re-zone to R4 only, it could be contended that this would have been inconsistent with a proper planning approach and it inconsistent with the Sydney Urban Strategic plan - that has at its core B4 Zone within 400 metres of transport hubs namely train stations in major urban centres such as Auburn.
307. In relation to [SA14], this submission is incorrect.
308. In relation to [SA15], this submission is incorrect – he gave an explanation in his a statement in S23.
309. In relation to [SA17], Counsel Assisting's submissions are completely unjustified and not supported by evidence. There is no reliable evidence that option 2(a) emanated from Oueik and there is no evidence that Mr Mehajer stands to benefit from option 2(a). The property at 84 Auburn Road was owned by Mehajer's sister. There is no evidence that establishes a relationship with Oueik and Mehajer such that Oueik would influence Francis to act inconsistent with his duties as Manager of Executive Planning for the benefit of Mehajer.
310. In relation to [SA18], there is no reason not to accept the evidence of Oueik. He voted on the resolution to adopt the amendments to the AELP 2010 on the basis of the recommendations put forward to by Francis on 15 April 2015. Particularly as the 15/04/2015 Report purported to be a recommendation by the whole of the planning department of council.

311. In relation to [SA19], there is no evidence to establish the proposition that Oueik voted in favour of options 2(a) to “punish” the Bhanin Association.
312. In relation to [SA20], Counsel Assisting’s contention should be rejected.

4.4 Suggested findings

313. Ultimately, nothing arises from the rezoning of the South Auburn Planning Proposal which reflects on Oueik . Oueik should not therefore be found to have neglected his responsibility under s439(1) of the *Local Government Act* (“LGA”) to act honestly and exercise a reasonable degree of care and diligence in carrying out his functions under this or any other Act.

CHAPTER 5

Marsden Street Precinct Planning Proposal

5.1 Background

314. The Marsden Street Precinct Planning Proposal is an area bounded by Railway Street, East Street, Mark Street and James Street, Lidcombe. The area is dissected by Marsden Street and Davy Street, running east - west, and Raphael Street, running north – south (the “**Marsden Street Precinct**”).
315. The area is immediately adjacent to Lidcombe railway station, a major railway station on the Leppington Line.
316. The area contains many “run-down, older style houses”, particularly in Mark Street.
317. Oueik has been, over a period of many years and through companies controlled by him, purchasing properties in this area. This is because he is smart and he reasonably anticipated that in the light of the well publicised NSW State Government Planning Policies it was inevitable that at some stage the area would be rezoned to B4.
318. Urban consolidation is the central housing policy guiding the future of residential development in the existing urban areas of Sydney.
319. This strategic direction is confirmed by the Sydney Metropolitan Strategy 2005 (“**Metropolitan Strategy**”), The Metropolitan Plan For Sydney 2036 and the Sydney Sub-regional Strategies published by the DP & I.
320. These strategies include a significant focus on the need to provide additional higher density housing combined with high density mixed use in close proximity to transport hubs in major urban in order to meet the needs of Sydney’s growing urban population.
321. The wider urban planning strategy suggests that the appropriate location for urban consolidation is within well connected town centres, with good access to employment, transport, retail, health, leisure and cultural facilities.

322. This is indicated by the overriding objective of the Housing Strategy, which states that:

“Over three quarters of new housing will be located in strategic centres, smaller centres and corridors within walking distance of shops, jobs and other services concentrated around public transport nodes”.

323. A component of the strategic urban policy is concentrating higher density residential development around transport nodes.
324. This objective reflects the Transit Oriented Development approach, which encompasses the features of a mixed use town centres with proximity to major public transport links.
325. The Sub-regional Strategies provide one quantitative stipulation for the location of higher density housing that it is situated in close proximity to public transport nodes and defined as:
- a. 800 metres from a rail station;
 - b. 400 metres from a high frequency bus service in the morning peak.
326. The re-zoning of the whole of the Marsden Street Precinct as recommended by Option G to predominantly B4 mixed use completely responds to the Metropolitan Strategy.

5.2 History and Detail

327. The Commissioner helpfully summarises the background history of the rezoning of the Marsden Street Precinct; at T1767(35)-1769:

“The Marsden Street planning proposal originated with a planning proposal submitted to council on 18 July 2013 that was prepared by CBRE Town Planning for Robert and Helen Kelman, who were the owners of 15 Raphael Street and 21 to 23 James Street, Lidcombe.

The original planning proposal sought to have the site zoned from IN2 light industrial to R4, which is high density residential. At the time that the original planning proposal was submitted to council, the majority of the site was a warehouse.”

328. The application made by the Kelman's for the Council to amend the ALEP came before Council on 20 November 2013 at a meeting of the Planning Committee of the ACC.
329. At the commencement of the general manager's Report, prepared for the meeting on 20 November 2013 (Ex MS1 page 10), under the heading "Disclosure of Interest", councillors' attention is specifically drawn to their requirement to disclose direct or indirect pecuniary interests, non-pecuniary conflicts and the manner in which non-pecuniary conflict of interests should be managed by councillors.
330. Part 4 of the Code of Conduct in relation to conflict of interests states:

"PART 4 CONFLICT OF INTERESTS

4.1 A conflict of interests exists where a reasonable and informed person would perceive that you could be influenced by a private interest when carrying out your public duty. (Emphasis Added)

4.2 You must avoid or appropriately manage any conflict of interests. The onus is on you to identify a conflict of interests and take the appropriate action to manage the conflict in favour of your public duty. (Emphasis Added)

4.3 Any conflict of interests must be managed to uphold the probity of council decision-making. When considering whether or not you have a conflict of interests, it is always important to think about how others would view your situation.

4.4 Private interests can be of two types: pecuniary or non-pecuniary."

331. On 3 August 2013, well prior to the meeting on 20 November 2013, Oueik filed a disclosure form under S.449 of the LGA for the period 30 June 2013 to 30 June 2014. In this disclosure Oueik discloses the following pecuniary interests in relation to the Marsden Street Precinct:
- a. *"Company Director, director and shareholder, Apartments on Mark Pty Ltd", and*
 - b. *"As a Director of Apartments on Mark P/l, I have an interest in 4, 6, 8, 10, and 14 Mark Street, Lidcombe."*
332. Simms had looked at Oueik's disclosure; T348(14-15), and was aware of his property interests. It is unlikely she had not discussed this with Campbell.

333. It is nonsense for Campbell to suggest, as he does at [71] of his Statement of 23 May 2016 (Ex S13), that he was '*...unaware of the extent of his [Oueik's] investment in the area*', a statement adopted by Counsel Assisting at [447]. All Campbell had to do was look at Oueik's s.449 disclosure, which more than likely than not, he had.
334. Prior to the meeting on 20 November 2013, Oueik declared a non-pecuniary interest and stayed out of sight and did not participate in any way in the meeting.
335. Oueik explains his conduct; at Ex PH6 T7(20-33):

A: But normally, with council, if anything's surrounding the block, we declare.

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 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.

Q: Right.

A: And I have done that.'

And T1037(21-41):

Q: ...the other properties you own are on the other side of the zone in Mark Street to the west?

A: Yes.

Q: And there are a number of properties that you own there and you already owned those at the time this matter first came to council; correct?

A: 2011.

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.'*

336. Oueik's conduct is completely consistent with Part 4 of the Code of Conduct.

Oueik's Evidence

337. Oueik denies he had the idea that Attie would be moving a motion to look at the area more broadly for the purpose of B4 or B2. Oueik's evidence T1038(35-47) is:

'Q: Wasn't it the case, though, that when you declared that interest, you had an idea that Mr Attie would be moving a motion to look at the area more broadly for the purpose of B4 or B2?

A: *No.*

Q: No? You had no knowledge of Mr Attie's motion when you declared your interest at the commencement of the council meeting?

A: *No.*

Q: No knowledge of it?

A: *At all.'*

338. Oueik said he did not speak to Attie prior to the meeting and was not in the Council meeting; Ex PH6 T7(35-44):

'Q: Had you had a discussion with Mr Attie prior to this meeting on 20 November about council looking at a broader rezoning of that Marsden Street area?

A: *No.*

Q: Are you aware that he moved a motion at that council meeting calling for precisely that sort of study to be carried out?

A: *I wasn't in the council meeting and I had no discussion with Mr Attie.'*

339. Oueik has no recollection of speaking to Francis about the re-zoning of the Marsden Street Precinct; T1051(7-11):

Q: All right. We will move on to another topic. Do you say that in the case of Marsden Street, you didn't discuss with Mr Francis at all the Marsden Street planning proposal?

A: No, not that I can remember, no. '

Attie's Evidence

340. Attie was asked whether if he had spoken to Oueik prior to the November meeting. Attie's evidence is at Ex PH5, T43(34-44):

Q: All right. It's not something you discussed with Mr Oueik?

A: No.

Q: At any stage before that meeting?

A: No.

Q: You see, when that meeting was - at the start of that meeting when declarations of interest were called, Mr Oueik declared an interest and absented himself.

A: If that's what happened, then, yes. '

341. The following was also put to Attie; Ex PH5, T46(10-12):

Q: Before the meeting - before the meeting - did you discuss this alternative scenario G with Mr Oueik?

A: No. '

342. Attie said; at Ex PH5, T46(30-39), that he supported the re-zoning because it was consistent with his philosophy:

Q: Do I take it, consistent with your pro-development philosophy, that you supported B4 because it was something that was needed in that particular area; is that right?

A: Correct. We also discussed the fact that the industrial section should be retained along the cemetery -

Q: Yes.

A: -- because from my understanding and association with Chinese investors and developers, they don't like looking at cemeteries. '

343. At the conclusion of the meeting on 20 November 2013, the Council resolved to defer the consideration of the amendment of ALEP at 21 and 23 James 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 to 400 meters from Lidcombe railway station".

344. This position taken by the Council is completely sensible and consistent with the Metropolitan Strategy.
345. On or about 6 February 2014, the Council retained AECOM Australia Pty Ltd ("AECOM") to prepare a report responsive to the 20 November 2013 resolution.
346. On 21 March 2014, a draft of the report was provided to the Council, at Ex MS1 page 133.
347. On 24 March 2014, the draft was "client reviewed" by Monica Cologna and Jorge Alvarez on behalf of the Council; at Ex MS1 page 133.
348. Both Cologna and Alvarez are experienced town planners and were the planners responsible for development of the recommendations concerning the Marsden Street Precinct.

Cologna's Evidence

349. Cologna was the manager of strategic planning.
350. Cologna was the planning officer who had primary responsibility for developing the recommendations for the site.
351. Cologna signed off on the report to Council; Alvarez' statement Dated 10 June 2016, Ex S17 at [11].
352. It was specifically put to Cologna by Counsel Assisting that she was the planner with responsibility for the site; at T144(2).

353. At T942(39-44), Alvarez, when cross-examined by Watson, agreed that Cologna was a very solid town planner and completely honest:

Q: Would you agree with this, that she is an impeccably qualified, very solid planner?

A: Yes, I'd say so.

Q: And completely honest?

A: I believe so, yes.'

354. Cologna held the view that a higher density zoning such as B4 zoning was appropriate for that part of the Lidcombe precinct that was within the 400 metre radius.

355. At T123(16-34), the following evidence was given:

Q: B2 is an objective for high-density residential I'd say, I think.

A: Yes, B2 is basically local centre, but you can have --

Q: You can have high-density?

A: You can have high-density in that, yes. The B2 zone is typical of centres like Regents Park and Berala: they're small, village sort of local centres. Auburn and Lidcombe, for example, are town centres; you would expect they'd have a much higher density, Bankstown's B4 zoning; Regents Park, for example, has the B2 zoning and then you've got smaller order centres again that have the B1 with local centres; there's much more convenience, much smaller scale. Does that --

Q: Yes. And B4 is to encourage high-density residential?

A: It's mixed high-density residential. It's primarily there to encourage a broad range of uses that you'd expect in a town centre, including high-density residential.'

356. Cologna's particular concern was to maintain the IN2 zoning as a buffer fronting East Street. Francis was not of the same view. In his statement made 10 June 2016 Alvarez says:

"Paragraph 8.

The reason provided by Glen Francis was that more B4 zoning should be added to the scenario and that the IN2 "buffer" should remain. In my view, scenario E was not a bad planning outcome

because of the proximity to the railway station. However, it could create amenity conflict with the R2 low density residential zone to the south of James Street. I requested that AECOM include this scenario."

357. Alvarez considered the IN2 zoning unnecessary. Alvarez' says in his statement dated 10 June 2016 Ex S17 page 2:

"Paragraph 13.

In my view, the best planning outcome would be scenario F. The alternative scenario choosen [sic], Scenario G, is very similar to scenario E which I was instructed to instruct the consultant to include in their study. I personally don't see the reason behind having a "buffer" zone of IN2 along East Street, because I don't believe a buffer is required between a residential zone and the Rookwood cemetery which has similar amenity and use as a large park. Additionally East Street is not a busy road that residential uses need to be buffered from."

358. As Cologna says in her statement, there were two schools of thought. At [48] of her statement dated 27 May 2016; Ex S3, page 7, Cologna says:

"Paragraph 48

The two schools of thought were to have residential along that strip or to continue with the existing industrial buffer that had developed over time. The advantages and disadvantages of each school of thought were discussed by planning staff, including Mr Francis and myself. Option G was developed by staff to maintain the existing industrial zone fronting East Street, ie consistent with AECOM scenarios A, B and C."

359. But at T144(27-47), Cologna was specifically asked about extending the B4 zoning to Marks Street. She said:

'Q: Did you pay much attention to the competing zonings for the residential land along Mark Street and, in particular, the block bounded by Mark Street and James Street, to the north-east of them?

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

Q: AECOM didn't recommend that, though, did they?

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

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

And at T145(1-27):

A: *Yes.*

Q: *And then they pointed out the consequences of having quite a lot of retail space in that precinct.*

A: *Yes.*

Q: *That precinct had always been or was, until that point in time, R --*

A: *I think it was - no, sorry, it had a residential zoning.*

Q: *Sorry, I should know this. The existing was R4.*

A: *The land south of Marsden and Day Streets, yes.*

Q: *The reason why they proposed R4 in their preferred option F is set out on page 179 of the bundle; correct?*

A: *Yes, that's correct.*

Q: *When option G was identified, was there any talk amongst the planning staff that it go back to AECOM for their views?*

A: *I don't recall any discussion of that, and I certainly didn't think that at the time.*

Q: *With hindsight, ought that to have happened?*

A: *Yes. With hindsight, yes, it would have been good to have that discussion with AECOM.'*

And at T158(40-46):

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

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

And at T159(1-17):

Q: Yes.

A: Is that what you meant?

Q: Yes.

A: Yes.

Q: Do you consider that you acted inappropriately at the time or is it more a case of "I could have acted that way but" ...

A: Look, it's more of a case of a hindsight thing. The Scenario G that we recommended in the report was an amalgam of scenarios that AECOM had presented. It was not one that they had exactly presented, but it was an amalgam of ones they had presented. They had looked at an option of a large B4 area, so I didn't think it was - I don't think it's inappropriate that we didn't go back to them. In hindsight, yes, we would have gone back to them."

360. Cologne was clearly of the opinion that Option G was a good planning outcome and that it was not necessary to have that view considered or confirmed by AECOM.
361. It is also clear that the planning outcome (that is, to recommend option G) came about as a result of an open, intellectual and robust discussion in the planning department of the Council and that the discussion focussed on appropriate planning considerations.
362. In her statement of 27 May 2016, Cologne states the following; Ex S3 page 7-8:

"Paragraph 51

Alternative scenario G was discussed by Mr Francis and myself. Alternative scenario G was a combination of a number of scenarios proposed by AECOM in their report. Mr Francis and I were both of the position that the land fronting East Street should retain its industrial zoning, to provide a transition of land use between the town centre and the cemetery (that is, a buffer between these uses), and so that some industrial land could be retained in this location. AECOM's position was that this location was suited to a B4 and R4 zoning, and that development could take advantage of view of the trees within Rookwood cemetery. In terms of the remainder of the precinct, I was of the view that if could be rezoned either B4 or R4, given how close it was to Lidcombe Station. I recall Mr Francis had

a similar view. Both of these zones could permit a similar scale of development in this location. In the end Mr Francis suggested that we recommend the area 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 long-standing issue for the Lidcombe community, and whilst 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. I did not discuss this matter with Mr Brisby, and I am not aware whether Mr Brisby and Mr Francis discussed this matter, other than for Mr Francis to provide Mr Brisby with a status update, which would be standard practice.

Paragraph 52.

My memory is that the B4 zoning for the majority of the Marsden St precinct evolved from discussing AECOM's report and that the reason for it was the proximity of the precinct to Lidcombe station - that is within 400m radius of the station. I was happy for this aspect of Option G to go forward on that basis alone, given that this is consistent with the State planning framework of facilitating housing within walking distance of public transport. In the AECOM report it notes that 400m radius is approximately a 5 minute walk (AECOM Study pg 19). Had the proposal been further from the station, for example over 800 metres radius from the station, I may have had a different position on this."

363. It was never suggested to Cologna that scenarios "E" or "G" emanated solely from Francis, or that either was in some way inappropriate.
364. Alvarez says that most of his direction came from Cologna and that Francis would have been briefing Cologna; T930(18-19).

'Alvarez: Well, most of my direction would have come from Monica rather than from Glenn...'

365. The Report from Council's planning department made it clear that option "G" had been generated internally.
366. Alvarez says; T928(41-42), that at a meeting attended by him, Cologna and Francis, Francis suggested that we include a scenario with more B4 and that Francis' direction would have been "*There should be more B4 on there*" but that he could not remember the exact words.

Events After 28 May 2016

367. On 28 May 2014, the final report was provided to the Council.
368. The preferred scenario recommended by AECOM was a combination of R4 High Density Residential and B4 Mixed Use zoning; See: Ex MS1 at page 179.
369. The AECOM Report notes; at Ex MS1 page 162, that many of the parcels in Mark Street have been consolidated into a “single ownership”.
370. On 18 June 2014, at an ordinary meeting of the Council, a report of the Executive Manager Planning, Francis, was tabled that contained the following Summary and recommendation; Ex MS1 page 184.

“SUMMARY

AECOM Australia Pty Ltd (AECOM), as a consultant to Council, has undertaken an urban design and planning study for the Marsden Street Precinct, Lidcombe in accordance with Council’s resolution of November 2013. The consultant has produced a draft report outlining the findings of study and presented a number of scenarios and recommended preferred scenario for rezoning of the precinct. An alternative rezoning scenario (Scenario G) has also been included in the report. Council may also consider alternative scenarios (ie in addition to Scenarios A-G) for the precinct.

This report recommends that Council note the consultant’s report and recommendations, the alternative scenario G, and prepare a Planning Proposal to the Department of Planning and Environment to rezone the study area as per Scenario G.

RECOMMENDATION

- 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 (ie all within 400m), 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 B4 Mixed Use zone."*

371. Both Oueik and Mehajer declared a pecuniary interest and left the meeting.

372. After the report was tabled Attie (seconded by Yang) moved a motion to adopt the recommendations. Page 199-200 of Ex MS1 contains the resolution moved by Attie:

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.*

373. Simms and Oldfield moved an amendment to Attie's motion that the Council rezone the study area as per Scenario F.

374. A foreshadowed amendment was then moved by Campbell, seconded by Simms.

375. The foreshadowed amendment contained the following; page 200 Ex MS1:

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 F, subject to the properties fronting Mark Street being rezoned to B4 with a 19 metre height limit and the properties fronting East Street remaining*

zoned IN2, 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.

- 376. Campbell and Simms therefore both supported the extension of the B4 Mixed Use zoning to the properties owned by Oueik's companies.
- 377. Both amendments were lost.
- 378. Both amending motions were lost and Attie's motion was carried on a majority vote of Zraika, Attie, Batik, Lam and Yang.
- 379. On 30 September 2014, the Minister for Planning through his delegate, determined that the Marsden Street Planning Proposal, that is scenario G, should proceed subject to various conditions.
- 380. On 17 June 2015, the Council by unanimous resolution voted to adopt (approve) and make (finalise) the ALEP, effectively making a change to that plan to incorporate scenario G.
- 381. The Marsden Street Precinct Planning Proposal was gazetted following the passing of the resolution on 2 December 2015; page 351 of Ex MS1.
- 382. There is valuation evidence that this may have considerably increased the market value of all properties which now had the benefit of a B4 mixed use zoning.
- 383. There is also evidence that on 16 April 2016, the property known as 24 Railway Street was sold for \$24,000,000.00 subsequent to that property being re-zoned to B4 Mixed use. This is part of the valuation report in Ex MS1.

Campbell's Anomalous Position

- 384. For the reasons explained above the Commissioner should treat Campbell's evidence, to the extent that it relates to Oueik, with caution.

385. In view of the disclosure made by Oueik and Campbell's political activities, Campbell should not be believed when he says he was not aware of the extent of Oueik's interest in properties on the Marsden Street precinct.
386. Campbell is a member of the ALP and an endorsed candidate for the Auburn Council elections.
387. On 25 September 2013, Campbell made a written agreement with Zraika (see Ex GEN6), who was then a member of ALP and a contender for pre-selection as the ALP candidate for the state seat of Auburn. Zraika was the endorsed ALP candidate at the council election; T648(42-47).
388. The contained the following commitment. *"That the Labor councillors will only support developments consistent with the Local Environment Plan and DCP, and will not vote to amend the LEP unless there is an overwhelming public interest to do so"*.
389. At the Council meeting on 17 June 2015, Campbell voted to adopt and approve the recommendation to amend the ALEP consistent with option G; Ex MS1 page 290.
390. In relation to the matters being inquired into by the Commission, the only instance where Campbell voted contrary to Simms and Oldfield.
391. It follows from Campbell's vote that he considered there was an *"overwhelming public interest"* in favour of the amendment.
392. Campbell did not declare a non-pecuniary interest prior to voting on 17 June 2015.
393. Contrary to the assertion of Campbell in [70] of his statement made on 23 May 2016 (Ex S13), the CFMEU was a holder of significant land in the Marsden Street Precinct, approximately 20% of the whole precinct, including 10-12 Railway St, Lidcombe and 6-8 Railway Street Lidcombe.

394. Under the Code of Conduct a non-pecuniary interest is defined as:

“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 of the Code of Conduct requires disclosure of non-pecuniary interests and

4.12 disclosure of non-pecuniary interests where those interests conflict with a public duty.”

395. Paragraph 4.23 of the Code of Conduct notes that Councillors should note that political donations to a registered political party or a group by which a Councillor is endorsed, may give rise to a non-pecuniary interest.

396. In 2015, the CFMEU was a significant donor to the ALP in NSW.

397. By reason that the adoption of option G had the potential benefit to the CFMEU, Campbell should have declared a non-pecuniary interest and absented himself from the Council meetings during which the re-zoning of the Marsden Street Precinct was considered.

398. Either, he voted to support the interest of the CFMEU or he considered the re-zone on its merits as it had *“overwhelming public support.”*

5.3 Response to Submissions of Counsel Assisting

399. The submission of Counsel Assisting at [MS4] is without foundation. There is no reason for the Commissioner to not accept Oueik’s explanation as to why he declared an interest; his conduct is explicable in view of the wording of Part 4 of the Code of Conduct and the introductory words to the 15/04/2015 Report.

400. Further, both Oueik and Attie denied speaking to each other about Attie’s motion.

401. The submission at [MS6] is simply wrong when one has regard to Oueik’s disclosures under s.449 of the LGA.

402. It is fanciful to submit, as does Counsel Assisting, that Francis was responsible for the inclusion of scenarios E and G because he was influenced to do so by Oueik as a consequence of the conversation that occurred about the kitchen in 2006.
403. Firstly, Oueik denies he spoke to Francis about the AECOM Report; T1039(6-11).
404. Secondly, Francis was not questioned at the private hearing about the Marsden Street Precinct Planning Proposal.
405. Thirdly, there were plainly lengthy discussions amongst the Council planners about which recommendations to make.
406. Thirdly, Francis states that he did not consider, at any part of the approval process, that any benefit that might flow to Oueik; (See [15] of Francis' statement, Ex S23). In fact, Francis states:

"I now understand that Councillor Oueik had property located within the area covered by the proposal and in an area that was rezoned. At the time of the proposal considered I was that Councillor Oueik owned property in the Auburn Council area, but I do 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." [Emphasis Added]

407. The submission at [MS12] is unwarranted and unnecessarily insulting.
408. There was no evidence that Oueik has taken steps to develop the properties. He said he had not prepared any plans for the development of the properties; Ex PH6 T5(32-34):

'Q: Have you prepared any plans for the development of those properties?

A: No.'

And at T11(47) to T12(1):

'Q: You have done nothing in relation to the Mark Street properties?

A: No.'

409. Oueik was also asked when he purchased the properties he “*proposed to develop then in due course*”, to which he answered “No”. T5(15-27) at PH6 is reproduced here:

Q: You bought the properties in Mark Street when they had an R4 zoning; correct?

A: Yes.

Q: And you proposed 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.'

410. He said his practice was to “...*I sit on properties for a long, long time.*” This was a perfectly reasonable and truthful answer.
411. In the light of Oueik’s s.449 LGA disclosures, it is not correct to assert the Council, i.e. the councillor’s and the staff, was ignorant of Oueik’s interests.
412. The submission at [MS19] appears to overlook the current disclosure requirements that are extensive.
413. There is no basis for a “rectification” of the changes to the ALEP as gazetted.
414. Any alteration to the ALEP, after persons have acted in good faith in reliance upon its lawfulness would have the potential to cause great injustice, particularly if property has been purchased on the basis of the current zoning, which appears to be the case with 24 Railway Street or mortgages obtained on the basis of the existing values.
415. The amendment to the ALEP achieved by the adoption by option G is a good planning outcome. Even Counsel Assisting supports this position; See MS1 of his submissions.

416. The Commissioner should accept that Cologne's opinion that retention of IN2 along East Street is a sound and well reasoned opinion.
417. Once the IN2 area is maintained it is consistent the Metropolitan Strategy to rezone the remaining area B4 by reason of its close proximity to Lidcombe railway station and the Lidcombe town centre.
418. The planning process including the consideration by the Councillors, the public exhibition and the Gateway determination is entirely sound and robust and should not be disturbed

5.4 Suggested findings

419. The rezoning of the Marsden Street Precinct in accordance with the resolution of Council passed on 17 June 2015 and subject of the notice in the NSW Government Gazette on 2 December 2015 is a good planning outcome.

CHAPTER 6

The facts and circumstances surrounding the development application approval process, certification process and the construction and development of the residential flat building at 40 – 46 Station Road Auburn

420. The Development at Station Rd was finalised long before Oueik was elected as a Councillor in 2004.
421. There is no evidence to suggest that Oueik had any knowledge of the manner in which (and whether) he could or could not be prosecuted in regards to any alleged non-compliances with the Development Consent.
422. The Commissioner should not make any findings regarding Oueik and Station Rd.

CHAPTER 7

Response by Senior Staff and Employees of Council following ... in relation to Station Street Property which revealed possible non-compliance with the Development Consent

423. Oueik makes no submissions on this topic.

CHAPTER 8

13 John St Lidcombe

424. Oueik makes no submissions on this topic.

CHAPTER 9

Roof at 14 – 22 Water St Lidcombe

425. At T1120(11-20), Oueik gave evidence that all of his development applications, while he was on Council were dealt with by external consultants. He was not challenged on this evidence. This included the Water Street Development Application and the Amended Development Application. This was in line with Council protocol at the time was to outsource the approval process to third parties so that the consent involving an elected councillor was beyond criticism.
426. Francis only signed the construction certificate following the s96(1A) variation of consent. Indeed, Francis acknowledges that there was a *deficiency in the supervisory processes* and that it was an *oversight* on his part; Ex PH10, T9(12-38):

Q. The change to the roof that was approved from a development perspective - that is, just 96(1A) of the Act; that was just a development consent or a variation to the development consent - would not have authorised the construction of those particular changes, would it?

A. No.

Q. What was needed after that development consent was either a fresh construction certificate or an amended construction certificate which made reference to construction plans for the roof; correct?

A. Correct.

Q. So at the time of that approval in March 2008, there had been an approval for the roof as it was originally intended, but there had been no construction approval for the roof that was proposed in March 2008?

A. That's correct.

Q. You now recognise that that was a deficiency in the supervisory processes that council had to apply to this development?

A. Yes.

Q. And you say that it was an oversight on your part?

A. Yes.

427. Francis acknowledges that he was not influenced by Oueik in that regard; [33]
of the Statement of Francis dated 30 May 2016 (Ex S23), where he states:

“The fact that I overlooked the need for an amended construction certificate was not deliberate and was not done in order to assist Councillor Oueik.”

CHAPTER 10

The facts and circumstances surrounding the termination or resignation of the former General Manager of the Council Mr John Burgess

428. Burgess

- c. Oueik supported the dismissal of Burgess because Oueik formed the view he had lost the confidence of the Councillors;
- d. Oueik was entitled to hold those views.

CHAPTER 11

The facts and circumstances surrounding the engagement of Mr Peter Fitzgerald as acting General Manager of the Council following the termination of the employment or resignation of Mr Burgess and the subsequent engagement of Mr Fitzgerald as a consultant to the Council

429. Oueik makes no submissions on this topic.

CHAPTER 12

Interaction between the elected Councillors and the Office of Local Government concerning the termination of employment or the resignation of Mr. Burgess

430. Oueik makes no submissions on this topic.

CHAPTER 13

The facts and circumstances surrounding the development application approval process for the property located at 44 John Street Lidcombe

431. Oueik makes no submissions on this topic.

CHAPTER 14

Whether any legislative change is appropriate or desirable in respect to any of the sections 441-459 of *Local Government Act 1993*

432. Oueik suggests that the disclosure regulations be modernised:

- a. Disclosure document should be “on-line”;
- b. Councillors should be obligated to continuously update the disclosure;
- c. Councillors should not be required to make discretionary disclosures, instead councillors should make specific and more accurately drafted disclosures; and
- d. Councillors should be required to detail accurately any related entities and indirect real property ownership.

CHAPTER 15

The conduct of Council meetings and the interaction of elected Councillors with members of the public at those meetings

433. Oueik makes no submissions on this topic.

CHAPTER 16

Terms of Reference 3 regarding whether the elected Councillors command the confidence of the Auburn LGA community

434. Oueik makes no submissions on this topic.

Schedule 1

T490 - Brisby gave the following evidence:

Q. The last thing I want to deal with you is the issue of parking compliance within the area around Al-Faisal College and other schools in the Auburn local government area. Was there a period of time in 2013 where directions were given by council staff to the parking officers and rangers about how people ought be booked in relation to particular schools?

A. I do recall issues around schools, but it predates 2013.

Q. Does it? Well, when did the issue about parking enforcement in schools arise, as you recall it?

A. To my recollection, it would have been approximately 2011, maybe early 2012.

Q. How did that arise?

A. It was raised with myself in the previous position, director of planning and environment, by the mayor and a couple of other councillors.

THE COMMISSIONER: Q. Who was the mayor then?

A. Councillor Ray Oueik and a couple of other councillors who were receiving major angst from the community that they felt that the rangers were being overzealous, it was just revenue raising; the real issues around schools weren't being addressed and as community leaders, those - the mayor and a couple of councillors asked us to look at it and deal with it.

Q. Overzealous in relation to schools or overzealous generally?

A. They always had a comment they were overzealous generally, but the matter before us, Mr Commissioner, was about schools.

MR ROBSON: Did the witness use the expression the real issues weren't being addressed? I couldn't hear what he said.

THE COMMISSIONER: When he said there was angst, when there was a complaint from the community about rangers

being overzealous, I said was that overzealous generally or in relation to the schools, and the answer was there was a feeling that they were generally overzealous but this context was about schools.

Q. Is that right?

A. That's correct, Commissioner.

MR BOLSTER: Q. Did you discuss the issue of parking in relation to the two Muslim schools in the local government area with Mr Oueik?

A. He raised them with me, yes.

Q. What did he say about parking enforcement in relation to those two schools?

A. That he'd received feedback from the general community that he felt council, through its parking rangers, were being overzealous, and the real issues weren't being addressed.

Q. Do you remember the exact words that he used?

A. No. Sorry.

Q. Did you discuss the matter with Mr Lawrence after you spoke to Mr Oueik?

A. I would have, as Mr Lawrence was the responsible manager.

Q. What did you tell Mr Lawrence?

A. I asked for him - I relayed the concerns of the mayor and a couple of other councillors.

THE COMMISSIONER: Q. What was Mr Lawrence's position again?

A. The manager of the regulatory group for compliance and if we could - if he could go away, discuss it with his staff and we'll sit down and see if we could work a further way forward to try and deal with the matter as council - I didn't want council to be seen in a bad light with the community. I also had a real responsibility to protect the rangers. The rangers are in a very difficult job. They're often in dangerous situations and if situations were getting overheated in the community,

particularly around schools, we needed to provide them some direction and leadership.

MR BOLSTER: *Q. Do you recall the phrase "self-regulating" being raised by Mr Oueik?*

A. Not by Mr Oueik.

Q. Do you recall that phrase being raised by anyone in connection with parking and the Muslim schools?

A. It was a term we were all using in general as a way similar to education of the drivers and parking.

Q. "Self-regulating" in that context means that you don't enforce against them, you let them take care of it themselves; is that correct?

A. It's seen more as an education process. We'd still have the rangers onsite, rangers available, moving people around, providing guidance, providing assistance.

Q. You told Mr Lawrence, didn't you, that the mayor, Mr Oueik, said, "We don't need to fine these people, we need to move them on."

A. I don't recall that.

Q. You don't recall that?

A. No.

Q. That was the gist of what you were told by Mr Oueik, wasn't it, "We don't want to enforce against people infringing for parking offences at these schools, you want to talk to them"?

A. We wanted to provide education in certain areas rather than - the general feel we were getting back was that the issuing of fines day after day after day wasn't dealing with the issue. The issue is a couple-fold. One is we need good solid traffic movement around there, as well as safety, but we never - the real issue was the "No Parking" areas that come into play. If maybe I can explain a little bit further, Mr Commissioner?

Q. Sure.

A. It is the "No Parking" ones that get angst. It's usually mothers that have young children, kindergarten kids, kindergarten, year one, year two, they often have

another toddler, maybe one or two in the car, in a car seat. They get - the "No Parking" during the school pick-up and drop-off hours relate to two things you can do to drop and pick up your child, is you get - excuse me. I may not be exact on this. I think you're allowed to park your car and only leave your car for three metres.

THE COMMISSIONER: Three minutes.

MR BOLSTER: Q. Three minutes?

A. Three minutes and you can only go two metres, or it could well be the other way around. A lot of - some of the schools, and I know when we checked our files, require you to go onsite to pick up your kindergarten, year one, year two, I'm not sure where it finishes. Mothers often have another toddler they can't leave in the car. What was happening is the rangers were doing their job and it was always conceded, it was never a criticism of the rangers. The rangers would move in, a mother or a parent would park their motor vehicle, they'd move in and chalk their tyre which, in that environment, became very intimidating and they were trying to handle it and it wasn't achieving anything, what we were doing. We wanted them to educate people, be on site, be seen, not hiding and recording numbers and issuing infringements and taking photos. We were trying to improve both their life, as a professional group, as well as the council's image.

MR BOLSTER: Q. I want to suggest to you that Mr Oueik made it clear to you that there was to be a separate enforcement regime for the two Muslim schools in Auburn, different from all the other schools, and that was not to enforce those issues; is that correct?

A. Mr Commissioner, that's totally incorrect.

Q. You say you're completely unaware of any special rule for the Muslim schools in Auburn compared to all the other schools in Auburn?

A. I'm not aware of any direction, unless it was done by somebody else.

Q. Mr Oueik spoke to you about his intentions in relation to parking problems, didn't he?

A. He and a couple of other councillors raised the issue of the council being seen in a very, very poor light around an issue of the schools; that the rangers were seen as

zealot and overachieving, intimidating, and that wasn't what we were about.

Q. You've seen the evidence from the rangers who say that they were given directions about enforcement at Al-Faisal College and the other Muslim school in Auburn which suggested they be given special treatment. You've seen that, haven't you?

A. I haven't seen where anyone spoke about special treatment, but I'd say it's incorrect.

THE COMMISSIONER: Q. The feedback about the rangers being overzealous, was any of that recorded in writing? Were people writing in –

A. No. It was –

Q. -- or is it hearsay?

A. Just the way of explaining it a bit, Mr Commissioner, about the Auburn community. The Auburn community with its cultural challenges and diversity relies very heavily on its elected member and generally most of the feedback we get comes through the elected members depending on what cultural group and background they come from. The feedback from a number of the councillors, that included the mayor, he was the leader of the councillors at the time, was that council was seen in a poor light and the occurrence of fining a driver day after day, often twice a day, for something they did –

Q. This is him reporting back through his discussions with residents?

A. A number of residents, yes.

MR BOLSTER: Q. How many times do you say the mayor, Mr Oueik, raised the issue of parking?

A. During that period it was, as I said, a number one topic.

Q. It was something that he felt strongly about, as you perceived it?

A. I perceived he felt strongly.

Q. And he raised it, what, on a weekly or a fortnightly basis?

A. *I couldn't quantify exactly, Mr Commissioner, on where that is and isn't, but it was a hot topic at the time.*

Brisby T512

Q. *You were asked some questions about difficulties arising, particularly in 2011, concerning the issuing of parking infringement notices outside schools. Do you recall that?*

A. *Yes.*

Q. *Do you recall, during the period of time when Mr Oueik was mayor, that he attempted to develop a whole parking scheme for the Auburn municipality that dealt with the school problem?*

A. *Yes. He had a view that he tried to move called a "Kiss & Drop" off zone to replace the "No Parking".*

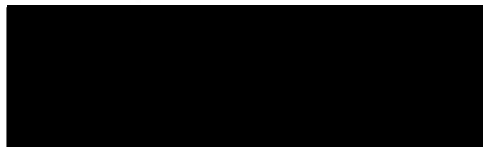
Q. *That was something that he was developing in response, as you understood it, to what was being represented to him by the various schools in the area?*

A. *Yes. Well, to me it was the schools and the general community that - there was the feedback from Mayor Oueik and a couple of other councillors from the constituents that was painting the council in a bad light. It made the rangers look unprofessional and just zealous and it looked like they were targeting people and not achieving anything, and, as community leaders, the mayor and the elected councillors wanted to address that.*

Q. *Do you recall he developed and represented to the council, that is to say the council officers, a plan to cover the entire municipality, all the schools in the area?*

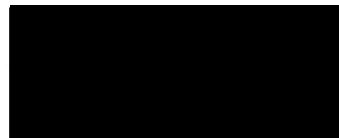
A. *I was aware of it, but under the old council structure, that side of traffic engineering wasn't in my department.*

Q. *You described your relationship with Mr Oueik as being a good working relationship..."*



Scot Wheelhouse SC

11 November 2016



Tom Zreika

11 November 2016

AUBURN PUBLIC INQUIRY 2016

Document 13

**Written submissions of Tim Hurst,
Acting Chief Executive, Office of
Local Government**



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Grant Gleeson

Mr Richard Beasley SC
Commissioner
Auburn Public Inquiry

AuburnPublicInquiry@olg.nsw.gov.au

Dear Commissioner Beasley

I refer to correspondence from your office of 20 October 2016 inviting the Office of Local Government (Office) to provide any information in relation to the submission from Auburn Public Inquiry's Counsel Assisting, Mr Paul Bolster. I appreciate the additional time in which to provide this information.

Councils are established under the *Local Government Act 1993* (LG Act) as autonomous legal entities. Councils and council officials are therefore subject to a detailed governance framework and regulatory regime established by the LG Act. I note, however, that the submissions of Counsel Assisting should be considered in light of legislative reforms recently introduced by Government in the *Local Government Amendment (Governance and Planning) Act 2016* (the G&P Act). The *Local Government and Elections Legislation Amendment (Integrity) Act 2016* (the Integrity Act) is also relevant to some aspects of the submissions. It is important that any recommendations arising from the Inquiry take these recently enacted reforms into consideration, particularly as a number of these reforms have been developed following a long process of stakeholder consultation.

To support this general observation, I make the following specific comments about some of the proposed findings and recommendations made in the submissions. For ease of reference, my comments are organised in relation to each section of Mr Bolster's submissions.

Part One: The 2012 Council: purchasing protocols

I note in relation to future practice improvements that the G&P Act includes a new Part 4A to the LG Act headed 'Internal Audit'. Once commenced, Part 4A will mandate that councils are to appoint an Audit Risk and Improvement Committee (s428A) to keep under review, amongst other things, compliance, risk management and financial management. It is anticipated that these new internal audit arrangements will provide a mechanism for significant improvement. The Office of Local Government will be developing regulations during 2017, in consultation with the local government sector, to support the implementation of these new arrangements.



Part Two: The Berala Planning Proposal

Disclosure of details of interests

A proposed finding is suggested at clause B27 that the LG Act be amended to require members of council and staff to fully disclose conflict of interests, including the identification of particular properties or interests 'as opposed to the mere existence' of an interest.

The LG Act, the Local Government (General) Regulation 2005 (Regulation) and Model Code of Conduct (Model Code) contain numerous obligations concerning the disclosure of interests. The scheme created by the LG Act mandates that declarations contain the nature of the interest in a matter which should provide sufficient specificity for that interest to be clear. The disclosure of interest form that is required to be submitted by councillors and designated persons each year also requires that all real property in which a person has an interest is disclosed on that return as well as, among other things, company directorships, loans and gifts.

The Office's self-help guide for the completion of the returns (accessible on the Office's website at

<http://www.olg.nsw.gov.au/strengthening-local-government/supporting-and-advising-councils/directory-of-policy-advice/pecuniary-interest>)

provides guidance to council officials in completing these returns. That guide sets out what is meant by interests in real property and the nature of interests that are required to be disclosed. It provides specific guidance in relation to other information that is required to be included on the disclosure form.

I can advise that the Office is currently undertaking a review of the Model Code of Conduct and Procedures for the Administration of the Code. Circular 16-42/3 of 3 November 2016, accessible at

<http://www.olg.nsw.gov.au/news/16-42-review-model-code-conduct-and-procedures-administration-model-code-conduct>

sets out the parameters of that review. Should you make recommendations in your report in regards to relevant matters then these will be taken into account in the review of the Code and Procedures.

Conduct in relation to planning proposals

The proposed recommendation in clause B29 appears to be a corruption prevention measure, the effect of which would be that councils generally should not deal with spot re-zoning proposals. I note that in introducing the *Local Government and Elections Legislation Amendment (Integrity) Bill 2016*, the Minister's Second Reading Speech foreshadowed future legislative and Code amendments to introduce continuous disclosure rules and to require planning decisions involving councillors' interests to be made by a person or organisation that is independent of the council. I refer you to the Minister's Second Reading Speech made on 21 June 2016.

I note, however, that if the kinds of interests identified in the Inquiry relevant to this proposed recommendation can properly be characterised as significant non-pecuniary conflict of interests, then affected councillors already have an obligation to manage the potential conflict by not voting. I respectfully draw your attention to the decision of the NCAT in *Meineke v Acting Chief Executive, Office of Local Government* [2016] NSWCATOD 135 at [40].

Casting votes and voting against interest

Planning matters require decision-makers to make decisions required of them under the *Environmental Planning and Assessment Act 1979* (EP&A Act) with an open mind, on their merits and with due regard to the requirements of the planning legislation. While the EP & A Act allows councils to exercise planning decision-making functions it is unclear why the casting votes of mayors should be treated differently according to their manner of election, as is contemplated in B35. I also note the G & P Act increased the minimum term of councillor-elected mayors to two years.

Thank you for the opportunity to make this submission. Should you require any further information regarding any of the above please do not hesitate to contact me.

Yours sincerely



Tim Hurst
Acting Chief Executive
Office of Local Government

17/11/16

AUBURN PUBLIC INQUIRY 2016

**Document 14
Written submissions on behalf of
Hicham Zraika**

The Auburn City Public Inquiry **Submissions on behalf of Hicham Zraika**

Introduction

Terms of reference

1. Whether the Council and its elected representatives have complied with applicable laws, the 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 have fulfilled its and their legislative duties, powers and functions.
2. Whether the relationships between councilors are conducted properly to ensure that individuals do not receive favorable 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 fulfill the charter, provisions and intent of the *Local Government Act 1993*, and otherwise fulfill its statutory functions.
4. Any other matters that warrant inquiry, particularly those that may impact on the effective administration of Council functions and responsibilities, or the community's confidence in the Council being able to do so.

Hicham Zraika

Former Councillor Zraika was nominated as a person of interest and was represented throughout these proceedings.

Background

- Mr Zraika joined the Labor Party in 2000 and remained a member until the internal Labor Party Tribunal expelled him on 25 November 2015. That decision is currently under appeal. Presently, Mr Zraika holds no public office.
- Mr Zraika was an elected councillor with official NSW Labor Party support from 2004 until 2015.
- In 2011 - 2012 he held the position of deputy Mayor.
- He held the position of Mayor of Auburn Council on two occasions, 2009 – 2010 and 2013 – 2014.
- Whilst on Council Mr Zraika could be described as being a member of the NSW Labor Party's "*right faction*".
- While Mr Zraika was on council in 2015 he was earmarked for pre-selection for the relatively safe NSW parliamentary seat of Auburn.
- Prior to his anticipated nomination, he was asked to stand aside for Mr Luke Foley (a member of the NSW Labor Party's '*left faction*'). Mr Zraika did stand aside in the interests of the party and Mr Foley received pre-selection and was elected to parliament.
- Mr Zraika accepted the decision to by-pass him for nomination on this occasion. He remained on council as an endorsed Labor party member of council with a pro-development and pro-business political leaning.

- Throughout his terms on council, Mr Zraika was a small business owner (a physiotherapist practice) and resident within the Berala village in the Auburn Council Area.

Political Environment During Hicham Zraika's Council Service

- During the period Mr Zraika was on council there appeared to be two loosely affiliated voting blocks. One was pro-development and one was not. Mr Zraika fell into the first category.
- This is not unusual in a political entity. An important and relevant factor to this inquiry is that Mr Zraika voted consistently in support of a progressive, pro-development, pro-business agenda. He consistently encouraged any reasonable investment in Auburn Council Precincts.
- Throughout his service, Mr Zraika's political stance, in this regard, was well known on council and well known in the wider community.

Allegations

- Reading between the lines '*Term of Reference 2*' could be said to allege that; a 'cosey' conspiratorial relationship existed between Mr Zraika and other pro-development councillors to vote in a block in order to benefit each other's personal and family financial interests.
- This is certainly the way the allegation has been couched by media outlets.

- There should be no doubt that any findings made by this inquiry against Mr Zraika will cause significant damage to his reputation and effectively put an end to any future ambition of public service or office.

Evidence against Mr Zraika

- There is nothing but speculation and unfounded allegations by politically motivated conspiracy theorists to suggest that former Councillor Zraika was anything other than an effective, consistent and ethical councillor who acted in the best interests of Auburn Council and its constituents.

Specific areas of this Inquiry Touching on Mr Zraika

1. Proposed Berala Rezoning

No finding is sought by Counsel Assisting against Hicham Zraika in relation to this matter, although it is of importance to Mr Zraika as it involves his declared interest in property.

- Paragraph B21 of Counsel Assisting Submission's, should not be included in the final report as it infers something untoward in the rezoning of the Berala Village for the purpose of conferring a benefit upon Mr Zraika.
- There is no evidence that anybody unduly influenced Mr Francis or any other council staff member to change any proposal in order to benefit Mr Zraika.

- There is no proper basis to infer corrupt conduct benefiting former Councilor Zraika, and if such an inference is allowed to stand it will have a damaging effect on Mr Zraika's reputation.
- While the final Berala rezoning proposal passed by council was not the option favored by council staff, Ms Cologna (a senior town planner) agreed in her evidence that the rezoning, as passed by council, was consistent with State Government Strategic planning proposals around railway stations.
- Paragraph 141 of Counsel Assisting Submission's, if adopted in the final report, should be amended to include a statement that there was also evidence of significant public support for the Berala Planning Proposal. That support can be seen by examining public submissions made to council.
- Mr Zraika acted in accordance with the Council Rules and Laws at all times. He never received a personal benefit.
- He did not seek re-zoning in respect of Berala, and there is no evidence to any satisfactory standard that Mr Zraika ever used his influence on any council staff member or councillor to benefit himself in relation to the Berala Rezoning.
- Mr Zraika's conduct was appropriate and reasonable and can be summarized by former Councillor Simms' evidence, who appeared to have no allegiance to Mr Zraika. See evidence of Simms Page T405.40 and following

Q. Yes. You would agree that you have no knowledge of anything done by Mr Zraika that was untoward in relation to the Berala planning process; would you agree with that?

A. No, that's right.

Q. And that he always acted properly in council meetings in relation to that proposal?

A. Every time we've dealt with Berala Council, Zraika declared - whether it was a briefing or a workshop - a workshop he didn't declare anything, he just didn't come in for that part of the briefing.

Q. And you agree that that's entirely appropriate -

A. Absolutely.

- Counsel assisting seemed to make much of the fact that Mr Zraika was actually declaring an interest or potential interest. He seemed to be implying that Mr Zraika was declaring an interest because he knew in advance that there would be a rezoning that would include his property.
- In Mr Zraika's private hearing on 10 June 2016, Counsel Assisting attempted to pin down Mr Zraika by saying he was declaring a conflict of interest and having him agree with a definition of what a Conflict was.

- Clearly a conflict of interest includes a potential conflict of interest, which is how Mr Zraika treated the proximity of his home and business premises to the areas being discussed by counsel for potential rezoning.
- Mr Zraika relied upon the 400m radius identifying the Berala town centre and mark up in Figure 1 at page 6 of the Berala Village Draft Study.
- On any reasonable analysis, Mr Zraika had a potential conflict, as he could not know which way council would lean. For abundant caution he declared an interest and abstained from meetings, discussions and voting. No reasonable person could have or would have done more or less in the circumstances.
- To be criticized for that by Counsel Assisting puts Mr Zraika in a “*dammed if he does, dammed if he doesn’t*” position.
- In addition, such criticism could be taken that Counsel Assisting has a pre-conceived theory or conclusion and was working backwards to try to fill in the holes in order to support that theory, rather than conducting a fair and open-minded investigation.
- Mr Zraika told the Inquiry under oath that he never spoke to any person, councilor, council staffer or any other person about the Berala rezoning (T Pages 6 & 7 of the Private Hearing) and there is no evidence to even suggest that his assertion was untrue.

- Paragraph 182 of Counsel Assisting Submission's should not be included in the final report, as it rehashes a hearsay recollection by Mr Brisby of an opinion by Mr Francis that Francis was shocked by the rezoning proposal as it would give Mr Zraika a "*massive windfall*".
- What Mr Francis is said to say in paragraph 182 is contradicted by what he actually says under oath in his private hearing, and is recorded at paragraph 180 of Counsel Assisting's submission.
- That there is virtually no weight that can be placed on this obviously prejudicial material in paragraph 182 and there is no credible evidence before the inquiry of the quantification of any windfall, massive or otherwise.
- Furthermore, Ms. Cologna gave evidence that the final zoning change came from Mr Francis but Mr Francis refused to answer questions on why he did this. See paragraphs 201 & 202 of Counsel Assisting's Submissions.
- Paragraph 227 of Counsel Assisting's Submissions should not be included in the final report as it infers that Mr Zraika gave untruthful evidence about him not having discussed the Berala Rezoning with Mr Attie.
- Counsel Assisting relies upon text messages said to be from Mr Attie to Mr Zraika but there is no reply from Zraika and there is no depth to the text or agreement that Attie is voting for the proposal to assist Zraika. There is no evidence that Zraika was even aware of the text.

- The inference of dishonesty leveled at Mr Zraika in paragraph 227 lacks foundation and fairness.

Conclusion

- No criticism should be made of Mr Zraika in the Inquiry's final report over the Berala rezoning.
- Mr Zraika seeks a finding that he acted in accordance with council rules and there is no credible evidence to suggest that he sought to influence any person in an effort to enrich himself by voting in a particular way to rezone the Berala Township.

2. The South Auburn Planning Proposal

Counsel Assisting seeks a finding that Hicham Zraika breached Section 439(1) of the *Local Government Act*

- Counsel Assisting recommends an adverse finding against Mr Zraika in that he neglected his responsibility under S.439(1) in agreeing with the planning proposal recommended by Mr Francis, a senior staff member of Auburn Council and advisor to Council.

Hisham Zraika's Evidence

- It was Mr Zraika's view as far back as his first term on council (in 2004), that the Auburn town centre needed to be expanded. (T Page 8 of Mr Zraika's Private hearing on 10 June 2016)

Q. You recall that was the original proposal moved by Mr Yang back in 2013?

A. Yes.

Q. Did you support that proposal at the time?

A. Yes.

Q. Why did you do that?

A. Well, I supported that option - if you go back – let me give you a bit of history, Commissioner. If you go back when - at the inception of this idea, it happened I think it was May, it was a matter arising out of an agenda item before council to study, prepare and recommend the following. I supported that at the time and continued supporting that because we needed to expand the

town centre and there was an argument about the expansion of the town centre of Auburn. I recall on my first term of council within the LEP, they were trying to remove some sections from the other side of the railway line where the mosque is.

THE COMMISSIONER: Q. I am sorry, this is preparing the 2010 LEP?

A. I think so, yes.

Q. When did you start in council, 2008?

A. 2004, so my first term was between 2004 and 2008. I think it was around '06, around that time, there were discussions about the LEP and if you see on the other side of the railway line, there was a recommendation or a suggestion to remove that from the actual - to reduce density there, keep it as it is. So there was an argument before the council in relation to this proposal to expand the town centre on this side, this way, and that's why I saw it fit and supported it.

MR BOLSTER: Q. I take it you have consistently supported a rezoning of that block --

A. Correct.

Q. -- in accordance with option 1 from those earlier proposals?

A. Yes.

Q. Going back, how far did your support for option 1 go?

A. Well, since its - I can't give you the exact dates, but since the start.

Q. And then when it came back to council and staff were recommending clawing back the B4 zone to about a third, I assume that you had some difficulty with that?

A. Well, I just saw the recommendation by the staff and I took - I thought, okay, if that's what they wanted, I'll support it.

Q. Do you normally look closely at what staff report and advise to council in advance of a council meeting?

A. I read the reports to the best of my capability, yes.

Q. Had you discussed this particular change to option 1 with any other councilors before the council meeting?

A. No.

Q. You didn't discuss it with Mr Oueik?

A. No.

Q. Mr Francis has given some evidence that there was some talk on the floor of council, that means from councilors, about pulling back the B4 zone. Do you recall that talk?

A. Not from my end, no.

Q. You weren't a part of that?

A. No.

Q. Do you recall Mr Oueik being a part of it?

A. I don't know which talk he's talking about, to be honest with you, but I don't know which - where the discussion he's talking about took place. I don't know.

Q. Let's just clarify.

A. Yes.

Q. Your evidence is this, that no-one spoke to you about this change to option 1 --

A. Until I saw it --

Q. -- until you saw the council report?

A. Definitely, yes.

Q. When you saw the council report, you saw what the staff were suggesting and you accepted their advice?

A. Definitely, yes.

Q. And you didn't discuss the issue with other Councilors, you acted on the basis of the advice from staff?

A. Correct.

Q. Correct? What I am suggesting to you is this, that Mr Francis, who was the author of that report

A. Correct, yes.

Q. -- has given some evidence that there were members of council who suggested that reduction in the B4 zone along Auburn Road?

A. It wasn't me.

Q. It wasn't you? And I'm asking you do you recall any such talk at council?

A. I don't recall that at all.

Conclusion

- There was no inconsistency or shift in Mr Zraika's position of support for town centre expansion from the beginning to end of his involvement with it.
- Mr Zraika's evidence was consistent, persuasive and reasonable.
- Mr Zraika relied upon the advice of Mr Francis in the South Auburn Planning Proposal and was entitled to do so in the circumstances.
- There is no proper basis to conclude that Mr Zraika neglected his responsibility under S.439(1) and no adverse finding should be made against him.
- As pointed out by Mr Zraika in his evidence, this proposal had its genesis back on 20 October of 2010 as part of a 10-point proposal. This was years before Mehajer was elected to Council.

- Paragraph SA1 of Council Assisting's Submission is flawed and should be amended, as it fails to recognize that the South Auburn Planning Proposal was a continuation of a 2010 resolution.
- In addition, staff briefings were put before council on this matter, and there is no evidence that any person that the final proposal lacked merit.
- Paragraph SA6 of Council Assisting's Submission is flawed and should be amended, as there is no credible evidence that the recommended option for South Auburn "*Lacked Merit*".
- In addition, staff briefings were put before council on this matter, and there is no evidence that any person put forward that this proposal lacked merit.
- Paragraph SA17 of Council Assisting's Submission is flawed and should be amended, as it fails to recognize that Mr Zraika had always supported a B4 zoning even before Mehajer had any interest in any relevant property.
- Paragraph S19 of Council Assisting's Submission is flawed as it relies upon speculation and theory with no actual evidence to support it. S19 should not be adopted as a finding in the final Inquiry Report.

Conclusions

- Paragraph SA20 of Council Assisting's Submission requesting a finding against Mr Zraika that he had neglected his responsibility under Section 439(1) of the *Local Government Act* is made without proper basis, and amounts to nothing more than speculation. It should not be included in the final report.
- It is submitted that there is insufficient evidence to support such a finding in these circumstances when consideration is given to the application of the test in *R v Briginshaw*. With the inference being that, Mr Zraika, a person who has held public office in the past and wishes to hold public office in the future, has effectively used his influence to conspire with others to corruptly confer a benefit upon another elected official.
- There should be no adverse finding made against Mr Zraika in relation to the South Auburn matter.

3. Marsden St

No Adverse finding is recommended against Hicham Zraika regarding this matter however comment should be made at this point about the conduct of former Councilor George Campbell.

- Close examination of Campbell's evidence is particularly important when his evidence forms a significant basis of Counsel Assisting's recommended findings against and criticism of Mr Zraika.
- Mr Campbell's evidence needs to be scrutinised with great care. He has a clear political and personal motive to tailor his evidence to do damage to those he believes are his political opponents.
- Paragraph 441 of Council Assisting's Submission is misleading as it has failed to highlight Mr Campbell's departure from the agreement about not voting for a further increase in density and rezoning.
- Paragraph 445 of Council Assisting's Submission is misleading in that he seems to blindly accept the explanation given by Mr Campbell attempting to justify his position by voting out of character on rezoning in order to enrich the CFMEU.
- Campbell's explanation that the CFMEU only owned a small parcel of land did not appear to stack up to cross-examination or the presentation of title search of the relevant premises and the extent of the holding by the union.

- It is well known that the CFMEU is a left wing Labor Party affiliated Union. George Campbell is a left wing Labor Party member as he acknowledged under cross-examination. Mr Campbell is clearly happy to vote to spot rezone when it suits his political agenda but critical others when he perceives it does not meet with his opinion of what serves the greater good.
- Paragraph 447 of Counsel Assisting's Submission referring to Mr Campbell's evidence clearly indicates that Mr Campbell would have changed his vote if he had known to extent of Mr Oueik's ownership. It reflects the mindset that he votes not on merit but ownership and petty jealousy.
- Mr Campbell's motives and evidence should generally be examined with great care and accepted with caution.

The Inter Labor Party Feud with George Campbell

Mayoral Elections

- There was a loose power sharing arrangement that did not contravene any rule, regulation or law.
- There was an agreement that Mr Zraika would support Mr Campbell for deputy mayor 2015.
- Mr Zraika would not support Campbell because their personal and political relationship had become toxic due to constant undermining of Mr Zraika by Mr Campbell.

- Clearly Mr Zraika could not bring himself to support Mr Campbell because he believed he was a person of questionable character.
- Obviously Mr Campbell would have, and did take this personally, and would have been angry about it. Notwithstanding, his attempt to play this down in the witness box under oath and divert the point to his objective selfless concern about Mehajer "*getting a leg up*" by the vote.

At Page T 799 of the transcript, Mr Campbell stated in evidence:-

Q. He is a member of the Labor Party right faction, or he was when he was a member of the Labor Party? You would put him into the right faction of the Labor Party; correct?

A. Yes.

Q. And you would seat yourself at the left faction of the Labor Party, wouldn't you?

A. Yes.

Q. You have given some evidence or been asked some questions about the exhibit GEN6, which is a document signed by yourself and Mr Zraika back in 2012; correct? It is the case, is it not, that when Mr Zraika went back on or did not honor that written agreement in September of 2015 supporting you for deputy mayor, you felt betrayed by him, didn't you?

A. In a sense, yes. I think that my overwhelming feeling was a betrayal of an agreement, a betrayal of the group, a betrayal of principles.

Q. It was, in effect, your '*Kirribilli*' agreement, wasn't it?

A. No, I wouldn't say that.

- It is submitted that Mr Campbell is not a witness of integrity or credibility. He is a 'so-called' whistleblower or informant acting only in his own personal interests and the interests of the NSW Labor party left.
- Mr Campbell was the only councillor who so obviously voted outside his publically stated beliefs and ideology when he decided to vote in favour of a spot rezoning that would directly and significantly enhance the financial position of the CFMEU.
- While it may not be the role of legal representatives for a person of interest to direct the inquiry to examine the political motives and double standards of it's witnesses; it is submitted that the issue of George Campbell's motives and credit should not be ignored or glossed over in any final report by this inquiry.
- Mr Zraika seeks a finding that the evidence of Campbell was politically motivated, selective, employed double standards and lacked credibility.

Additional Issues

- Paragraph 310 of Counsel Assisting Submission's, should not be included in the final report as the rehashing of George Campbell's evidence of what was allegedly said to him by Mustapha Hamid is uncorroborated 2nd hand hearsay and of no value to this inquiry on any issue.

4. 13 John St Lidcombe – (The Car-park Sale)

No adverse finding is recommended against Hicham Zraika but criticism of him as a witness is made by Counsel Assisting relating to the partial return of a deposit and this requires rebuttal.

- Hicham Zraika consistently took the view a development of that car park was in the interests of the people of Lidcombe.
- It was a correct and justifiable view on the information he had before him throughout the process.
- The eventual development if and when undertaken would have provided a supermarket and a significant upgrade to the site. These are obvious benefits to the residents of the local area.
- Persons connected to the Mehajer family had an interest in the property.
- Persons connected to this group and the Mehajer family also owned the site next door, which provided additional vehicular access.
- Due to access issues with the original car-park site it was worth more to that investor than any other investor as a matter of basic economics and common sense.
- Mr Zraika had voted against some requests by Mr Mehajer relating to that site however in December 2013 he voted to allow Mr Mehajer as a director of Sydney Constructions and Developments Pty Ltd to extend the contract and reduce the deposit held by council from 10% to 5%.

- Paragraph 477 of Counsel Assisting's Submissions accurately sums up the position of Mr Zraika on why he voted in favor of the return of part of the deposit held by council.
- In consideration for the reduction of deposited funds held, Mr Mehajer was required to put a personal guarantee in place in the event of a default on the contract.
- The release of 5% of the deposit did not and could not alleviate the existing responsibility and liability of Sydney Constructions and Developments to pay the full 10% deposit in the event that the vendor failed to complete the contract. In effect the council was in no worse position by releasing half of the deposit money back to the vendor in the circumstances.
- This freed up some funds enabling the Mehajer group to devote more resources to the Development Application in order to get the project over the line.
- This course was of direct benefit to the people of the local area as they were seeking a local supermarket.
- When pressed on the issue of the partial deposit return by Counsel Assisting during his evidence, Mr Zraika stated that he took some ad-hoc advice from a solicitor friend on the issue of the 5%, that in these circumstances the Council would be no worse off and it was "*doable*".
- There is no evidence of a "*Sweetheart deal*" or benefits to any other councillor.

- Mr Zraika's support for the partial return of the deposit is nothing more than an example of practical decision making in the circumstances.
- Counsel Assisting's criticism at Paragraph JS7, Page 90-91 of his submissions that, Hicham Zraika's explanation as to why he voted in support of reducing the deposit as being "*hardly credible*", infers that Mr Zraika is being untruthful. There is no proper basis for that submission and it should not be adopted in the final report.
- Nothing in the decision made by Hicham Zraika did anything to disadvantage the council.
- In addition, at JS5 of Counsel Assisting's submissions; it is incorrect to assert there was no prior interest in a supermarket as part of the car park development by Mr Zraika. He supported the car park development proposal in back in 2010, and the condition then was to provide a supermarket.
- Counsel Assisting's criticism of Mr Zraika at JS12, page 91, where Counsel Assisting states that Mr Zraika's view that Ms Simms was attempting to get the best deal for council "*does him no credit*" is unfair and is properly explained by Mr Zraika in his evidence which is recorded in part at paragraph 511 of Counsel Assisting's submissions.
- No adverse finding or commentary should be made against Mr Zraika as a result of his conduct or his evidence in respect of the John Street Car Park matter.
- Mr Zraika has much to loose by way of reputation and community standing if any adverse finding is published no matter how loose or unsupportive the basis of it.

- *The Briginshaw* principles should be applied when consideration is given to any potential adverse findings against Mr Zraika, due to the serious nature of the allegations and potential consequences.

5. 1A Henry St Lidcombe

No adverse finding is sought by Counsel Assisting against Hicham Zraika however; Mr Zraika seeks to address some of the evidence of Warren Jack and the way the some of the submissions of Counsel Assisting are couched on this issue.

- Paragraph 737 of Counsel Assisting's Submission incorrectly represents the evidence of Mr Zraika.
- It is clear in his evidence at the public hearing that he never used the words 'I don't recall' in response to allegations by Jack, and put to him by Counsel Assisting. Mr Zraika was clear in his responses to the Jack allegations. He stated that he denied the fact that Warren Jack ever raised any such issues of bribery with him.
- Warren Jack stated that he did not actually believe Mr Zraika was seeking a bribe, and stated in evidence that he believed Mr Zraika to be an honest person.
- Warren Jack was not cross examined as legal representatives for Mr Zraika were informed by counsel Assisting that no adverse findings would be sort as a result of his evidence.
- Notwithstanding, at Paragraph 737 of Counsel Assisting's submissions he submits that *"It is odd Mr Zraika did not recall Mr Jack repeating his bribery*

allegation” There is no proper basis for the submission. Warren Jack's evidence was not credible on any reasonable standard and it denied by Mr Zraika.

- Any further public mention of Warren Jack’s allegations or his evidence will only provide more fuel for additional sensationalised media reporting and additional reputational damage to Mr Zraika.

Evidence of Hicham Zraika

- Mr Zraika denies all hearsay allegations put forward by Warren Jack.

Conclusion

- The allegations of Warren Jack and his subsequent evidence on the issues suggesting misconduct by Mr Zraika were so bizarre and so lacking in any credibility that they should not be mentioned in the Commission’s final report, other than to say that Mr Jack gave evidence before the inquiry. His evidence was uncorroborated, lacking in credibility and is not relied upon to support any finding or recommendation.
- Just as a message needs to be sent by public inquiries denouncing unethical behaviour by persons of interest (if evidence exists of it), equally, a message should to be sent that inquiries, such as this, are not a forum to air petty grievances and make serious allegations with no proper evidentiary basis.

Final Remarks

- Mr Zraika was born in Auburn. He lives and works in Berala as a physiotherapist.

- He was a member of the NSW Labor Party and Elected to council in 2004 served 3 terms until the council was dissolved.
- He is a person of good character, and prior to the commencement of this inquiry he enjoyed an excellent reputation in the community.
- There has been no evidence heard in this inquiry that would allow a finding against him to sully that reputation.
- There should be no adverse findings or criticism made against former counselor Hicham Zraika in the Inquiry's final report.

David G. Price
Counsel For Hicham Zraika
Sir Owen Dixon Chambers
18 November 2016

AUBURN PUBLIC INQUIRY 2016

**Document 15
Supplementary written
submissions on behalf of Hicham
Zraika**

The Auburn City Public Inquiry **Supplementary Submissions on behalf of** **Hicham Zraika in Reply to Ms Irene Simms and** **Mr Tim Hurst**

Introduction

Mr Zraika supports and adopts the submissions made on behalf of former Councillors Attie, Mehajer and Oueik where they intersect with matters that affect him directly or indirectly as a result of the criticisms of him suggested by Counsel Assisting.

In particular, Mr Zraika adopts the submission of Mr Watson, Senior Counsel for Mr Attie who asserts that this Commission of Inquiry has no power to make a finding under Section 439 of the *Local Government Act* for the reasons articulated.

In addition, Mr Zraika wishes to make some brief submissions addressing some further matters raised by Ms Irene Simms and Mr Tim Hurst.

Criticisms of Hicham Zraika by former Councillor Simms

Former Councillor Simms states in her email to the Inquiry *“it was worth noting that the voting pattern of Clr Zraika changed substantially only when he no longer had any ‘turns’ left.....”*

This criticism is so general it is meaningless, however, it should be pointed out in a general response, that Mr. Zraika continued to vote for Ms. Simms, Mr George Campbell and Ms. Semra Batik-Dundar for mayor and deputy mayor until council was disbanded (with the oblivious exception of George Campbell in September 2015, for the reasons Mr. Zraika has already explained to the Inquiry).

Tim Hurst

Mr Hurst appears to have ignored the point; that a community elects a council of representatives is to make decisions on its behalf.

Just as State and Federal Governments do, Local Government Councils are required to make decisions, at the Local Government level, in the best interests of the people who actually vote them in.

If a Council Member is elected on a platform for progressive development and pro-business they are entitled to vote that way even against advice from the administrative/bureaucratic organization that they sit above. That is the essence of the democratic political system.

If this happens to displease the majority of voters, then elected officials are held accountable at the polling booth on Election Day.

In Part 2 of Mr Hurst's submissions which focus on the '*The Berala Planning Proposal*' he seems to suggest that limits should be placed upon Councilors to decide matters in strict accordance with advice tabled by Council staff. This defeats the purpose of a having an elected council, and merely adds another layer of useless bureaucracy to the Local Government decision-making process.

Reference is made, and support is given by Mr Hurst at Page 2 of his submission under the heading "**Disclosure of details of interests**" to CA's Submission at B27, which is read as follows:-

B27. *"The Local Government Act should be amended to require Members of Council and Staff to disclose the full extent of any conflict, identifying particular properties or interests, as opposed to the mere existence of pecuniary or non-pecuniary interests."*

Mr Zraika asserts that disclosures in this form already existed at Auburn Council from the time he was first elected to Council and that he had fully declared any interest he had in property in the quarterly Section 449 disclosures in the quarter immediately following his two property purchases in Berala. These declaration were submitted to Council specifying exactly what he owned and where it was located. Furthermore, this disclosure is readily accessible to Council staff and the general public under the FOI process.

Reference is made and support is given by Mr Hurst at Page 2 of this submission under the heading "**Conduct in relation to planning proposals**" to CA's Submission at B29, which is read as follows:-

B29. *"Spot re-zoning proposals that involve the possibility of any Councillor, regardless of whether they have disclosed an interest or not, obtaining a benefit to an independent panel such as either the JRPP in the same that development applications made by Councillors are now dealt with or a transparent." (sic)*

It appears that some typographical errors exist within Recommendation B 29, notwithstanding, it should be pointed out that Berala was not a "*spot re-zoning*" scenario. It should be fairly and more accurately be described for what it was, a '*town centre study*'.

Conclusion

The Commission of Inquiry should make no finding adverse to Mr Zraika as a result of any allegation (direct or implied) made against him by former councilor Irene Simms.

Mr Zraika gave evidence before this Inquiry without objection and under oath on two occasions. He was an open, accurate and truthful witness.

There is simply no credible evidence placed before this Inquiry to support any adverse finding in fact or law against Mr Zraika.

David Price
Counsel For Hicham Zraika
Sir Owen Dixon Chambers
28 November 2016

AUBURN PUBLIC INQUIRY 2016

**Document 16
Written submissions of Tony
Oldfield**

Auburn City Council Public Inquiry

Submission Tony Oldfield

1. There is a high community expectation that there will be some concrete outcomes from the Auburn Public Inquiry.
2. For too long Auburn City Council has had a public reputation (not only media hype) that money talks and a majority of former Councillors directly represented the interest of property developers.
3. It must be said that this perception predates the Council elected in September 2012.
4. Large scale developments such as Auburn Central attracted accusations of corruption and mismanagement and former Councillor Curtin was investigated by ICAC.
5. The witness statement of former General Manager John Burgess alludes to the chaos on Auburn city council when he took the job of General Manager. He refers in his statement also to the way former Councillors Ned Attie and Ronnie Oueik took it upon themselves to deal directly with planning staff and by pass normal protocols.
6. The fact that Auburn Central and the reception centre development in New Street, Lidcombe posed a public fire safety risk and in both cases these buildings were given occupation certificates by Council Officers is a situation for grave concern and shows there is something very wrong with the system of Local Government.
7. For the Auburn City Council Public Inquiry to have public credibility it should recommend that members of the community who have a significant conflict of interest in decisions made by Council and where they can potentially make large amounts of money from Councils decisions should be excluded and ineligible from standing for public office at a Local Government level.
8. Former Councillor Salim Mehajer poses this question in point 66 of his submission where he points out there is no prohibition on Councillors having a direct or indirect interest in a contract with Council. Perhaps there should be.
9. Councillor Lam illustrates the need for action to exclude Real Estate interests from being elected to Council when she argues against the alleged failure to disclose pecuniary interests paragraph 8 – 26 in her submission. The premise is that 150 Woodburn Road, Berala was the only property where Le Lam had an interest with the Chan family. If you visit Woodburn Rd, Berala today you will see a vacant shop front formally Ming's Computer shop with a Combined Real Estate sign in the Window and I am aware of 3 other properties owned by the Chan family in Woodburn Road.
10. I am also aware of a number of residential properties owned by the Chan's and within the border of Campbell St, Brixton Rd, Burke Ave and Hyde Park Rd. It seems Le Lam has a greater interest than just 150 Woodburn Rd and this should be investigated.
11. Le Lams' submission also avoids mentioning her leading role in amending the original Berala Village Study.
12. Le Lam moved and Salim Mehajer seconded amendments on two separate occasions to the Berala Village Study. She was the voice on Council for the economic interests of Andrew Chan and Tony Constantidis, people with significant financial interest in the rezoning decision.

13. The conflict of interest was raised publicly in the Battler publication and it was suggested Le Lam not vote on the rezoning.
14. There are winners and losers out of rezoning particularly in our town centre, one not often recognised is a layer of our local businesses are priced out of the market, they cannot afford the new expensive rents that come with new developments. They close their doors and are forced out of business, often these people are locals and they are part of the glue that holds our communities together. These people are part of the public interest that Le Lam and other former Councillors choose to ignore.
15. I would like to refer to section 24 in Salim Mehajers' statement where he writes there is a complete lack of relationship between Mr Steve Yang and Mehajer but avoids the reality of a collective relationship where on numerous occasions Ronnie Oueik would prompt or physically raise Steve Yang's arm to make sure he voted the right way on their motions or amendments, also often Ned Attie would speak on behalf of Steve Yang or translate his spoken English.
16. Lastly, I would like to address comments in the Administrator, Mr Viv May's submission that proposes to remove Councillors from the determination of development applications. I don't believe that this would solve the problem of conflict of interest as we have already witnessed where some Councillors exerted inappropriate influence on staff members to get the outcomes they wanted.
17. Also Councillors are elected by their communities to represent their views on development and over development and if residents are unable to have a voice on deciding development applications we are denying residents a basic democratic right to decide over their local environment.

AUBURN PUBLIC INQUIRY 2016

Document 17
Written submissions of George
Campbell

Auburn City Council Public Inquiry

Submission by George Campbell

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- P.14 Response to submission of Geoffrey Watson on behalf of Ned Attie
- P.14-15 Response to submission of Viv May
- P.15 Response to submission of Rangers

N.B. Many comments, especially those in response to the first submission below are relevant to following submissions

Response to submission of David Price on behalf of Hicham Zraika

Page numbers refer to Mr Price's document.

P.5 Mr Price denies that Hicham Zraika ever used his influence to benefit himself in relation to the Berala rezoning. However, the benefit to him from this rezoning was part of the pattern whereby a group of councillors voted as a bloc in favour of a range of council matters that delivered benefits to other members of the group. On occasions that he failed to join in initially, he did so for a rescission vote - if one was necessary.

P.7 Hicham Zraika's declaration of a conflict of interest could not be seen as necessary because the Council resolution, moved by Le Lam, that rejected the **Berala** Village Study recommendations and called for a further report favouring more intensive development clearly was in relation to the *then* town centre plus surrounding areas. The resolution did not refer to a 400m radius. Admittedly, the term "surrounding areas" is an imprecise one and York St could, at a stretch, be regarded as falling

within that description although, at the time, that was not envisaged. Hicham Zraika demonstrated not only “abundant caution” in declaring a conflict of interest well in advance of the surprise rejection of the Berala Village Study recommendations, but a gift of prescience as well - given, not merely the distance, but the strange direction of the extension to the village centre.

P.17 Mr Price claims, in reference to me that, “He has a clear political motive to tailor his evidence to do damage to those he believes are his political opponents.” This is an unsubstantiated assertion and it is reprehensible that Mr Price has descended to personal attacks in an attempt to discredit me. The purpose of my evidence is to make public the facts as I know them and to so encourage others to contribute their information to the jigsaw puzzle - so that lessons may be learned for the future.

The corruption on Auburn Council with the increasingly blatant culture of “you scratch my back and I’ll scratch yours” and increasing displays of arrogance by some became a public scandal that demanded exposure.

My “political motivation” in this context was to take the opportunity of enhanced public attention to attempt to clean up the council and restore public confidence in Auburn Council and local government generally. I am not motivated to do any more damage to anyone than is necessary to complete the job of cleaning up the council.

In my experience, political opponents and allies swap places depending in the issues. This Inquiry has necessarily been focused on matters of contention, perhaps giving the impression that Auburn Council was something of a battlefield. It is too easy to overlook the amount of goodwill that existed across the council and the amount that was achieved through cooperation among councillors who nevertheless were “political opponents” on other issues. The majority of resolutions passed by Auburn Council were unanimous. There was nobody on Council who I always voted with and there was nobody who I never voted with. The cultivation of enmity would have been self-defeating.

Mr Price’s insights into my “clear personal and political motives” are ill-informed and reckless.

P.17 I did not vote “out of character” in relation to the **Marsden St Planning Proposal**. I voted in accordance with the principles that I explained in a post to Facebook Auburn 2144 in response to a challenge. I reproduced this in my sworn statement to this Inquiry. It is simplistic to imply that all planning proposals are the same and that a councillor should vote either for all or against all. I have already pointed out that the north-east corner of the subject land is across the road from Lidcombe railway station - one of the busiest in Sydney and a junction on the main western rail line. This is in sharp contrast with the relative isolation of the Silverwater, South Auburn and even to the Berala PP, as well as to a number of planning proposals that have not been examined by this Inquiry.

To have opposed B4 rezoning at the Lidcombe site would have been tantamount to saying that there should be no B4 zoning anywhere. I nevertheless moved a doomed amendment to reduce the height and floor space ratio south of Marsden St to equal the maximum LEP height and FSR for R4 buildings in order to have minimum impact on nearby R2 housing. When that was defeated, I opposed the rezoning motion altogether. It passed and was eventually approved by State authorities and returned to Council for implementation.

At this point, I voted for approval. I certainly had mixed feelings but what tipped the balance in favour was the fact that on the other side of the street but stopping well before the James St corner, was an approved high-rise development being constructed and, more importantly, I accepted the argument that B4 buildings could not be built down as far as James St or actually around the corner into James St in the foreseeable future because reasonably new 3-4 storey blocks already occupied that space and would not be demolished. Further along, on the other side of James St, is industrial. One of my major concerns with high-rise is the amenity rights of existing neighbours. My concerns in that regard were satisfied. I continued to be concerned about the overall impact on density and traffic in the Lidcombe area but could not justify holding out for no change.

Weighing up the pro and cons of a concrete situation and considering what planning principles apply is what councillors should do. It is inconvenient that this process is inconsistent with the hackneyed image of me as a narrow-minded ideologue that Mr Price (and Mr Wheelhouse) are desperate to portray. The real world just happens to be nuanced.

P.17 The allegation that I acted to enrich the CFMEU is totally unfounded, irresponsible and a slur on my reputation. It should be withdrawn.

P.17 Mr Wheelhouse's waving around of documents purporting to be title searches in the closing minutes of the Friday, 10th June session was cheap theatrics. He asked me to authenticate these documents then whisked them away with the adjournment without allowing me to focus on them. He presented me with an unclear map of the Marsden St precinct and asked me to confirm his version of CFMEU's property holdings. Expecting this issue to be continued when the hearing resumed on Tuesday 14th, I inspected the site over the long weekend, by which time he had lost interest in clarifying his claim re the extent of CFMEU property.

Apparently underlying Mr Wheelhouse's bizarre behavior was a desire to have accepted the assumption that I should have prior information regarding these matters. I did not and was not able to either confirm or deny his claims. I have never done a title search in relation to matters that have come to Council and Auburn Council did not provide this information. In fact, it regarded titles information in its possession as confidential - not even available to councillors. Mr Wheelhouse's theatrics should be treated with contempt.

P. 18 Mr Price says that I am "clearly happy to vote to spot rezone when it suits his political agenda". This choice of words is derogatory spin. He does not say what that "political agenda" is but appears to hope that the reader will infer negative motivation. On the basis of one example (a flawed one) he has chosen to use the present continuous tense which implies habitual behaviour. Where are the other examples to justify the present continuous tense? Is Mr Price attempting to subliminally create a negative image of me?

My political agenda in relation to planning matters is to ensure that development is consistent with sound town planning principles and the needs of the people - particularly the protection of amenity. The Labor Party went to the last Auburn Council election with a political agenda to oppose inappropriate high-rise and, in general but not absolutely, spot rezoning. Every ALP leaflet featured, in large print, the words "NO LABOR CANDIDATE IS A DEVELOPER OR REAL ESTATE AGENT". Our political agenda in relation to development was very clear and was a talking point at the booths.

It has been suggested by Mr Price and others that I was not consistent regarding spot rezoning. Spot rezoning is generally regarded as rezoning of one person's/organisation's block of land and is usually initiated by an owner or developer. I regard it as usually a request to Council by vested interests to help them make a lot of money. Rezoning immediately boost land value and are done by the council on behalf of the community - but windfall profits flow to private interests. The community does not even get a commission!

Comprehensive rezonings occur when the LEP is reviewed every few years. Appropriately, a plan is drawn up for the whole Local Government Area (LGA) and any rezonings are decided in relation to each other. Although the increased values are still privatised, the community should benefit from rational integrated planning.

Spot rezoning can sometimes be justified (eg to remove anomalies) but are generally a cause of higgledy piggledy development and often reflect who has influence on Council. While the Marsden St proposal arose out of an owner-initiated small project, it became an opportunity to plan the future of a substantial area of land - in other words somewhere between a common spot rezoning and large scale LEP-type planning.

It is worth noting that in my first term on Council (2004-2008) I supported and actively argued for the unanimous ALP position of putting on public exhibition a proposal to allow up to 15 storeys on three carefully selected areas near Lidcombe Station, including one within the Marsden St precinct. After public controversy, we agreed to reduce the height and a unanimous Council decision eventuated.

P.18 **Mr Price falsely claims** that:

Paragraph 447 of Counsel Assisting's Submission referring to Mr Campbell's evidence clearly indicates that Mr Campbell would have changed his vote if he had known the extent of Mr Oueik's ownership.

Mr Bolster did not say that. Hicham Zraika did in his oral evidence. Mr Bolster actually said:

He said that had he known of the extent of the interest or exactly where the property were located, he may have taken a different view.

The precise words in my evidence were:

I was not aware, however of the extent of his investment in the area. If I had known that, I may have taken a different view of what the purpose of the rezoning was and voted differently. I did not know exactly where on Mark St his property was located.

Mr Price is either deliberately misrepresenting both Mr Bolster and myself in order to damage me or he has accepted **Mr Zraika's false evidence** without bothering to check the words that I actually used.

Either way, his behaviour is unprofessional.

In my evidence, I did not speculate how I would have voted if I had had access to such crucial information. I clearly said that I *may have* taken a different view of the purpose of the rezoning and voted differently. Mr Price pretends to believe that "may have" means "would have". There would have been other options. Facing such a dilemma, I may have seen fit to seek advice from outside the Council, eg OLG, ICAC, LG NSW.

The different view that I *may have* taken: That Ned Attie's over-zealous enthusiasm for this proposal was aimed at helping his close Liberal Party colleague, Ronney Oueik, to exploit their inside knowledge and influence on Council to amass a fortune and the latter would owe him a debt of gratitude. Sound far fetched? I can't prove the above but **the political link between Ned Attie and Ronney Oueik** - both on the same Council, both in the same political party, inseparable on development issues (Ronney Oueik is heavily dependent on Ned Attie to run his case when the former is out of the chamber with a conflict of interest), participating in joint election campaigns, sharing electoral fundraising and expenditure, close personal friends - **is much more real than the very tenuous link that Mr Wheelhouse and Mr Price have tried to establish between me and the CFMEU.**

Mr Price's claim that I would have changed my vote because of Ronney Oueik's property interests contradicts his claim that my vote was motivated by a desire to enrich the CFMEU. Does he believe that I would have sacrificed my alleged leftwing agenda to enrich a left trade union in order to torpedo a

political rival's get-rich-quick plan? Where does that leave my sinister political agenda? He can't have it both ways. Which is it? In fact, his psychic powers have failed him completely. Neither is correct.

Planning and development decisions should be made on the basis of sound town planning principles and public sensitivities. It could be argued that it would be better if councillors did not know the identity of owners or other persons with interests in any land subject to their decisions. If this were possible, they could avoid all danger of bias. To cultivate a deliberate disregard for identity even when it is known is another way to avoid or minimise bias. This would be my preferred approach but the knowledge that some councillors use positions of public trust to further their own personal and business interests presents a challenge. To avoid any councillor or councillor's friend ever benefiting from a decision would mean that many sensible decisions of great benefit to the community would not be taken. My dilemma is at what point is a critical line crossed? I was not alarmed that Ronney Oueik owned a block or two in Mark St as it appeared to be a very minor part of the precinct. If the full extent of his holdings had been made known, I could not have pretended that it made no difference, particularly given the over-zealous advocacy of his partner, Ned Attie, on a mission.

The Wheelhouse/Zreika and Price submissions unrealistically suggest that I ought to have had (and even that I actually *did* have) full knowledge of the Oueik and CFMEU holdings in the area. Setting aside the matter of whose responsibility it was to do the research/supply the information (mine? Council staff's?), the question of what should be done with that information is unclear. Abandon merit and town planning principles? Vote to enrich or deny wealth to parties whose identities are known? Or should all disinterested councillors declare a non-financial conflict of interest to avoid the perception that they are voting for or against a councillor colleague's financial or political benefit?

P.18 Mr Price draws the following conclusion from his false evidence:

It reflects the mindset that he votes not on merit but ownership and petty jealousy.

This malicious conclusion should be rejected.

P.18 Mr Price claims that **Hicham Zraika** could not support me because of a toxic personal and political relationship.

Political Background Hicham Zraika and I were first elected to Council in 2004 along with two other long-serving Labor Councillors. During that 4.5 year term, we worked very closely together. Historical tensions existed between our two colleagues and, together, we strove to make sense of that. In fact the closest relationship of trust among the four Labor councillors was between the two of us - at least until one of the other councillors left the Labor caucus.

I was not re-elected in 2008. Hicham Zraika was returned as one of three Labor councillors. He had a serious falling out with each of the others. Initially I tried to mediate but I was too remote from the fray and was not able to make headway due to the level of distrust and the nature of the disagreements. The main complaint of the other two was his refusal to consult with them in favour of working with the Liberals.

I did not fall out with Hicham and was able to distance myself from the antagonism because I had not been part of events. I continued to have friendly relations with all three. Hicham and I were very much at odds over his massive branch-stacking campaign which was aimed at ousting Barbara Perry from State parliament and taking the seat. Until late 2012, he always denied that he wanted to do this - accusing her of paranoia and smearing his intentions. Despite this major disagreement, we continued to maintain good relations.

We worked well together in the lead-up to the 2012 elections. With great difficulty, I had managed to persuade three candidates to enter a preference-swap deal with Labor. They initially resisted the arrangement because of Hicham's voting record on development and his close association with the Liberal Party. After several meetings, they finally accepted his assurances on development issues and, in particular, his born-again commitment to uphold the principles that Labor Party candidates had agreed to uphold as contained in the document adopted by the ALP Municipal Assembly and tabled at this Inquiry. Two of those candidates were elected - Irene Simms and Tony Oldfield.

I led the formation of the loose group of four that reached a four-year agreement on mayoral and deputy mayoral elections. It was also agreed to consult (not caucus) regularly in relation to coming meetings etc. Suspicion of Hicham Zraika and his closeness to the Liberals gradually built as did concern at his increasingly pro-development voting pattern.

At the same time, Labor Party members were becoming increasingly agitated about his branch-stacking with phantom members. He was by now quite open about ousting Barbara Perry. I did not hide my opposition to Party membership rorts but my overriding responsibility was to preserve Labor unity on Council for as long as possible.

Mr Price has tried to make much of left-right factional conflict in the Labor Party. There has been no such thing in the Auburn area this century. Hicham Zraika was well known to be associated with the right wing of the Party and appeared to be well connected at the State level. My political orientation is leftwing. But there was no left-right factional conflict locally.

The only real intra-Party division has centred around two rightwingers, Hicham Zraika and then sitting MP, Barbara Perry. On the surface, it was about the State seat of Auburn. At a more fundamental level, it was about the integrity of Party membership - phantom members, dodgy branches, falsification of attendance and minutes books and so on. For Hicham Zraika, the goal of becoming an

MP became a personal obsession that justified all means. I supported Barbara Perry because I believed that, not only had she served the community well, but stood for Labor Party values - including opposing the debasing of Party membership by massive branch stacking.

Mr Price accuses me of "constant undermining of Mr Zraika". In terms of his parliamentary ambitions, I always supported the sitting member, Barbara Perry - regardless of her rightwing orientation - on the basis of merit. Mr Price's simplistic claims of left-right conflict are not supported by this reality. I continued to cooperate as much as possible with Hicham Zraika in his role as councillor while being opposed to his rorting of Party rules. In politics, one must separate issues and deal with them on their merits.

As the 2013 mayoral election drew near, I warned Hicham that both Irene Simms and Tony Oldfield had told me that they believed that he was in breach of the agreement and could not vote for him. I told him that he had no chance of being mayor unless he listened to their concerns, gave the necessary undertakings and that he had to mean it. At the last minute, he gave the necessary assurances and signed a written undertaking for Tony Oldfield. This has been tabled at the Inquiry. We feared that Hicham would betray us once he became mayor and no longer needed our votes. For that reason, I asked him to sign a written confirmation of the mayoral agreement and his commitment to local Labor Party policy re rezonings. This has been tabled at the Inquiry.

By that time, Hicham Zraika no longer wanted to continue our Labor consultations prior to council meetings, saying that it was enough for us to meet with the others. Once he became mayor he stopped attending pre-meeting consultations altogether and associated more openly with the Liberals. It was my role to organise the group's consultation meetings prior to Council meetings, which I did with text messages. I continued to include him in the group texts for about eight months after he ceased attending or responding to messages.

Despite his incremental defection, he and I maintained cordial relations and were able to have discussions when necessary. Although never close personal friends, we had visited each others homes irregularly and have enjoyed wide-ranging conversations. Like me, he appeared to value a continuing positive relationship. We both accepted that we sometimes agreed and sometimes didn't. Similar cordial relationships existed across political lines within the Council.

2015 Deputy Mayoral Election. When he refused to take a stand against Salim Mehajer's excesses, new tensions appeared. At a function on Wednesday 16th September 2015, I checked with him (as I always did) that he would support the mayoral/deputy mayoral election agreement. He assured me he would. I always ensured that signatures were on mayoral/deputy mayoral nomination forms. When it was Hicham's turn to be nominated for mayor or deputy mayor, I was first to sign. When I was a candidate for mayor and deputy mayor, I presented him with the form to nominate me. Impotantly, this symbolised that something was still left of Labor Party unity on Council

The election was on 23rd September. Hicham Zraika, having nominated me to be deputy mayor and having voted in the mayoral election, hurriedly left the room just before the deputy mayoral election was held. Liberal Steve Yang, who was under pressure from his Korean backers to break with Mehajer, refused to vote and the vote was tied. Salim Mehajer's name was drawn from a box. Hicham Zraika's absence made that possible. Steve Yang had made it clear to his group that he could not support the disgraced Mehajer. There was not sufficient ill-feeling between myself and Hicham Zraika for his dramatic action which he, having a few weeks earlier returned after a six-month suspension from the Party, knew was likely to result in expulsion from the Party. There was clearly something very big at stake and it involved his group's obligations to one of its members - Salim Mehajer. The fabrication of a toxic relationship with an unhinged leftwing factional warrior is a fanciful cover.

P.19 Whether or not Hicham Zraika believed I was of questionable character is known best to him. He is quoted elsewhere as saying that I lacked leadership qualities. This negative judgement of me had apparently occurred to him in the 15 minutes or so since he had signed my nomination form - which is not credible. There are times when those kinds of judgements are relevant. This was not one of them. The rules of the Labor Party required both of us to support each other in such things as mayoral and deputy mayoral elections and to operate as a team. There is no opt-out provision on the basis of belated judgements of character. In politics, one doesn't necessarily get to choose who one has to work with. The choices are made by others and one must make the best of it. Party members and voters have the right to expect teamwork.

P.19 Mr Price expresses cynicism re my reaction to the result of the deputy mayoral election. He is correct to say I was angry. His mistake is to try and portray this as entirely personal. At the time, I was engaged in a campaign to persuade the government to take action in relation to Auburn Council. At the centre of this was the behaviour of Salim Mehajer and the damage being done to the Council by him and his group. Hicham Zraika was part of that group but had, till that time, abided by his obligations regarding mayoral and deputy mayoral elections. The deputy mayor takes the chair when the mayor is not available. The chair has a casting vote when the ordinary votes are deadlocked. Members of the Liberal/developer group often have to leave the chamber due to frequent conflicts of interest. When that is the mayor, they need the meeting to be chaired by a deputy mayor whose casting vote may be essential to their or their mates' business interests. That is the main reason why my group saw holding the mayoral or deputy mayoral position as so important.

An additional reason on this occasion was that it was totally unacceptable to the Auburn community that Salim Mehajer should continue in this position. Like other councillors, I had been deluged with emails about it. Auburn Council was a laughing stock and Council's failure to do anything about it brought the whole council into disrepute. I was outraged at his re-election and the fact that it had been facilitated by Hicham Zraika's cavalier disregard for Labor Party rules.

It was of minor importance that the title of deputy mayor did not pass to me personally. It was important that Hicham Zraika betrayed the trust of the group and deceived us. He had led me to

believe that his vote could be relied on and I had passed on this assurance to the others probably with a comment re their needless paranoia. If he had advised me in advance that he would not vote for me, I would have been happy to resolve the matter by stepping aside for either Irene Simms or Tony Oldfield. However, he was clearly under an uncomfortable obligation to give Salim Mehajer a leg-up.

P.20 Mr Price claims that I have been acting “only in his own personal interests and the interests of the NSW Labor Party left” but does not show how my actions benefited my personal interests. If I’d been driven by self interest, I might have accepted an offer by Ronney Oueik after the 2012 election for a two-year stint as mayor. I rejected the offer after considering who I could best work with to achieve benefits for the community and, of course, my obligations to my then Labor Party colleague. The type of self-interest alluded to by Mr Price is contrary to my values and my purpose in politics. My self esteem is based primarily on adherence to my core values.

Mr Price cannot produce any evidence that I was pursuing “the interests of the NSW Labor Party left”. He does not identify what those interests are. If he means ideals related to improving the lives of the poorer and less advantaged members of the community, an extension of human rights and public services over private wealth, he would be right. But he is insinuating something more sinister and should be disregarded.

P.20 Mr Price claims that I voted outside my publicly stated beliefs and ideology. I have clearly stated the factors that I took into account in relation to the **Marsden St** proposal. Mr Price has had an opportunity to read them but has failed to engage with my reasoning let alone refute my reasons. He refers to my ideology without saying what he thinks it is.

I strongly support the concept of urban consolidation. I believe that high-density development can be properly planned. That would require appropriate infrastructure especially access to reliable public transport, open space, and other amenities. Such development should value aesthetics. Proper planning does not equate to cramming as many people as possible into an area in order to generate maximum profits. It involves placing density in the right locations and respecting the rights and amenity of established residents. This is the relevant part of my sinister ideology.

I certainly did not decide to “**directly and significantly enhance the financial position of the CFMEU**”. Nor do I believe that any other councillor who voted for the rezoning was so motivated - not even Hicham Zraika, then a member of the Labor Party. Mr Price has no reason to single me out for this ridiculous accusation other than to try to discredit me as a witness.

P. 22 **John St Carpark Deposit Refund.** In claiming that “council was in no worse position by releasing half the deposit money back to the vendor in the circumstances”, Mr Price is ignoring the written evidence presented to the Inquiry that Council’s solicitor and council staff warned, on the basis of references to specific court cases, that public money would be put at risk. The truth of that risk

remains unaffected by the fact that disaster did not eventuate. Hicham Zraika's unnamed "solicitor friend" may or may not have had the same information available to him/her. We'll never know, but councillors did not have the benefit of the "solicitor friend's" written considered opinion.

P.22 Mr Price says there is no evidence of a "sweetheart deal" or benefits to any other councillor". However, the 13 John St carpark resolution is an example of a councillor obtaining a financial benefit from a controversial council decision pushed through by the group of six. Another example of that is the Berala rezoning decision - involving the same group. Hicham Zraika initially opposed the 5% refund decision but changed his mind to support rescission.

P.23 Re Irene Simms' participation in debate on a new contract for the sale of the carpark, there is nothing unusual about seeking to minimise the impact of a decision that one totally opposes by means of negotiation or amendment. It is normal practice and perfectly legitimate. Sometimes one successfully moves an amendment then opposes the motion. For an experienced politician to deny this is dishonest and mischievous. Irene Simms' opposition to the sale was perfectly clear. On this occasion, I took a different approach. I was too disgusted with what was happening and only participated to insist that a second valuation be obtained. When I was ignored, I returned to the role of disgusted observer.

Response to submission by Scot Wheelhouse and Tom Zreika on behalf of Ronney Oueik

Reference numbers used here correspond to those in the Wheelhouse/Zreika document.

Chapter 2.2

26. "Campbell has a vested political interest in the destruction of Oueik's reputation." This is not motivates me and I do not believe that Ronney Oueik would say that unless the words were put in his mouth. Despite our obvious political differences, we always maintained a cordial relationship and cooperated in areas of common concern and often engaged in friendly conversation - even as recently as during the Public Hearings in this Inquiry. After the tied ballot for the position of mayor in 2014 when he won by a draw from the box, he took the mayoral chair and publicly expressed regret that my name had not been drawn. Whatever one might make of this, it did not reflect personal antagonism.

After the 2012 election, he had offered a deal that would have seen me as mayor for two years with the other two years for the Liberals. Since then, on many occasions, he told me that the third year was available for me to be mayor if I wanted it.

Following the Salim Mehajer wedding events, I consulted him about my intention to move motions aimed at dissociating Council from Mehajer's behaviour and rescuing Council's reputation. He agreed but at the first Council meeting he tied his reputation and his fate to Mehajer. He was always aware of my view that developers and real estate agents should not be on councils but did not take it personally.

As with Hicham Zraika, I do not wish him any unnecessary pain as a result of this Inquiry, but I do believe that, as long as he makes money from development, he has a standing conflict of interest and should not be on the council. He also confided in me some of his concerns regarding being a candidate in the State election. This is not consistent with the hostile type of relationship depicted in the Wheelhouse/Zreika submission. Political rivalry exists during election periods but in the case of Ronney Oueik, mutual respect prevailed.

31. It could be misleading to say that the non-developer councillors voted as a bloc in relation to zoning resolutions. I would accept that description as long as it is not meant to imply that an enforceable obligation existed. The members of the group never caucused on zoning resolutions (or other matters) as claimed. Information was shared on matters of interest, support was sought by whoever wanted it and was given on a strictly voluntary basis. Any attempt at compulsion would have killed off the group quickly. Common but not identical views and values held the group together. We consulted, we didn't caucus. Apart from each person valuing their independence of judgement, caucusing on development issues is illegal.

The "written agreement" referred to here is a re-affirmation by myself and Hicham Zraika of our commitment to local ALP policy, part of a longer list of items that we, along with other candidates, had accepted as the platform for the election. That written statement was an assurance that each of us stood by the commitments that we had made. There was no question of it being legally enforceable - it was not meant to be. Likewise, there was no remedy available under Party rules for failure to adhere to it. In fact, both ALP policy and State legislation forbids caucusing on development resolutions. Obviously any candidate for future pre-selection would be judged by individual preselectors on what they were perceived as standing for. This is not inconsistent with what I have said above. Caucusing should not be confused with consultation.

165-176. **The role of Irene Simms in assisting staff members** to bring information of wrongdoing to the attention of the authorities is commendable and, if it is not adequately supported by the Code of Conduct and legislation, this should be rectified. It is part of the duty of a politician, whether local, state or federal, to bring suspected abuses of power to the attention of not only enforcement authorities but also the public who we are elected to serve and have a right to know.

This is accepted practice in democratic countries like Australia. If she had failed to assist, she may have been seen as complicit and discouraged staff from honest reporting.

If information regarding suspected abuses of power is classified as confidential, this would be matter of public concern.

Irene Simms acted in good faith and for a honourable "political purpose".

261. **Mustafa Hamed** is not a member of the Labor Party and confirmed that when asked at the Public Hearing.

263. Mr Hamed did not say he spoke with myself and Tony Oldfield. He said "we". A careful reading of the transcript clearly indicates that "we" is the Bhanin Association, which was represented by Faydi Saddik.

264. I certainly did not "put it in Hamed's mind that Oueik was somehow connected to the reduction in the B4 area." This is reckless and baseless speculation. The meeting referred to by Mr Hamed was not even attended by himself. In his evidence he said, *"And Faydi was a person who represented us and they told him we are against the whole thing."*

The meeting, on 29/10/15 was attended by myself, Tony Oldfield, Faydi Saddik of the Bhanin Association and a representative of the Church of Christ. Far from putting things in Mr Hamed's mind (when he wasn't even there!) I and Tony Oldfield listened to the representatives of both organisations telling us of their experience. It was a revelation. Their stories were fully compatible. Four of us were at the meeting. The possibility of me, under those circumstances, of prompting Mustafa Hamed, who wasn't even present, what to say to Tony Oldfield is absurd but reflects the sloppiness in some of these submissions in which certain morally bankrupt lawyers know what conclusions they want to arrive at and make unsubstantiated allegations and speculations that lead in that direction. The conclusion they are after is that I have no credibility as a witness.

265. I did not use these words. The transcript of the evidence clearly attributes them to Mustafa Hamed spoken by him at the Public Hearing.

266. Again, I did not use these words. The transcript shows they are the words of Mustafa Hamed spoken by him at the Public Hearing.

268-9. Correct, I did not say that Hamed said that Oueik was punishing the Association because, at the time of writing, I was unable to accurately recall who had said this to him or even if he had named that person. The claim that "Campbell has exaggerated the evidence to damage Oueik" is ridiculous in the light of the fact that I refrained from naming Ronney Oueik - or anybody - due to my uncertainty. Where my memory failed me, I had to leave a gap. I refrained from guessing. Under similar circumstances of a gap in knowledge, Mr Wheelhouse, like Mr Price, simply fills it with unsubstantiated speculation. I don't, and I don't appreciate those who are habitually reckless with the truth assuming that I operate in the same way. Unlike them, I value my credibility.

It is quite possible that I used the passive because that's the way I heard it. Another possibility is that the vague word "they" rather than a name was used.

332. "It is unlikely she (Irene Simms) had not not discussed it with Campbell". I do not recall her doing so and do not believe that I had any awareness of the extent of Ronney Oueik's land in the area as early as 2013.

333. I was not in the habit of looking at other councillors' 449 disclosures. They were not very accessible. They could only be viewed by appointment with Barry Cockayne who closely supervised the viewing. He refused to photocopy the disclosures in full but would copy what he regarded as a reasonable number of pages - which wasn't much. He allowed written notes to be taken. What we now know highlights that the failure to make them available online was inexcusable. Last year, I did manage to get a full set of the latest disclosures, by appointment. **Disclosures should be brought to the attention of councillors when they are relevant to Council business.**

It is mischievous speculation for Wheelhouse/Zreika to suggest that I had seen Ronney Oueik's disclosures.

334. Certainly by the time Council voted on Marsden St, I knew Ronney Oueik owned property in the area but had no knowledge of the extent. I understood it to be one or two houses in Mark St. In an apparent attempt to influence my vote, he told me that he wanted to build a supermarket. As the corruption scandal unfolded late last year, I became aware that he had been buying up or obtaining options on many properties.

376. It is true that "*Campbell and Simms both supported the extension of the B4 Mixed Use zoning to the properties owned by Oueik's companies*" but it is only part of the truth and, so, is misleading. It would be more accurate to say "*Given the numbers, Campbell and Simms accepted the inevitability of the extension of the B4 Mixed Use zoning to the properties owned by Oueik's companies and tried by means of an amendment to reduce the height and FSR of the inevitable B4 development south of Marsden St to that of R4 Residential Flats*". The effect of this would have been R4-scale development with retail/commercial permitted on the ground floor. The rest of the truth is that neither I nor Irene Simms were aware of the full extent of Ronney Oueik's interests. I recall that her knowledge and/or suspicions of the Marsden St situation were more advanced than mine. I have a clear recollection of

being shocked later in the year after investigations undertaken by *The Australian* revealed much more than Irene Simms had found in Oueik's 449 disclosures.

391. My conclusions about the Marsden St proposal are fully explained above including my reservations. They rely heavily on the unique location and the fact that its scope was more akin to a partial LEP review than to an isolated spot rezoning.

393. Mr Wheelhouse claims that the CFMEU owns 20% of the Marsden St precinct. He has backed down from his public hearing claim of 25-30% when he waved around documents that purported to substantiate his claim. He failed to answer my question about where on his unclear map were the boundaries of CFMEU land. That failure was probably due to the adjournment but when my cross-examination resumed the following Tuesday, he failed to clarify the matter. His documentation may be correct - I don't know. His rubbery statistics, in the absence of calculations, should be regarded as mere assertions calculated for effect. But the crucial point here is that, whatever the extent of the CFMEU's holdings, it is irrelevant because:

(a) I had no way of knowing

(b) I had no obligation to the CFMEU

396. **I had no knowledge of CFMEU donations to the Labor Party.** There were no donations to the Party locally. Since I gave evidence at the Inquiry, I've conducted Google searches that reveal media reports of donations to the Greens but not to the Labor Party. I have not been able to find evidence on the ALP website that the CFMEU is an affiliated union but that would have been a reasonable guess.. Some unions are, some are not. My union, the NSW Teachers Federation is not. I do not try to keep track of these matters as they are not very relevant to me. That the CFMEU should donate to Labor comes as no surprise because that is what unions do.

The conclusions that Wheelhouse/Zreika draw from this are absurd. The idea that a donation from the head office of any trade union to the Labor Party could carry any obligation for a Labor Party member to vote to deliver a benefit to that union as a by-product of a local council decision in which the union was not even a party is far fetched.

400. Mr Wheelhouse and Mr Zreika are stretching credulity, after proposing their convoluted Campbell-ALP-CFMEU corruption theory, to suggest that Ned Attie and Ronney Oueik did not even communicate with each other about the Marsden St proposal. Ned Attie pushed the proposal with boundless zeal and Ronney Oueik bought up properties and acquired further options - clearly with a view to make a fortune. His oral evidence to the Inquiry that he, a major developer, had no intention of developing the properties defies belief. He told me before the council vote that he would build a supermarket if the rezoning went through. I assumed he was talking about his known Mark St block. I also assumed that he thought he was pressing the sensitive "Lidcombe-needs-a-supermarket" button that had for some time worked for Salim Mehajer. For the record, I took no notice of his remark and

there was no further discussion. Nobody with any knowledge of how Auburn Council worked could take seriously the claim of no communication between the proponent of the rezoning and the major beneficiary when they were close friends, in the same political party and on the same council sharing the same political interests.

Response to submission of Greg McNally on behalf of Le Lam

My reference numbers refer to the paragraph numbers of Mr McNally's submission.

16. It is true that a rezoning of **150 Woodburn Rd Berala** wasn't proposed and, therefore did not happen. This is because that property was *already* zoned B2. The Le Lam resolution that was adopted by Council involved a review of the Berala Village Centre Study with a view to an intensification of the B2 zone. Rather than rezone the B2 zone to B4, B2 was redefined for Berala to greatly increase the height and FSR limits - to seven storeys. The extension of the upgraded B2 zone to take in the Zraika properties was in addition to the intensification of B2 but part of the same exercise.

Le Lam, a real estate agent and the mover of the controversial resolution, could not have been ignorant of the fact that a huge increase in the allowable height and floorspace would inevitably result in an appreciable increase in the value of her interests.

25. Cumberland Council elections have not been held yet. That is why she she has not stood for re-election. Like all councillors, she should be held responsible for any wrong-doing. Persons with serious adverse findings against them should not be permitted to run in 2017. If they are allowed to run, the voters need to warned of their record.

28. Incorrect. S.451(4), now repealed as a result of the campaign against abuses on Auburn Council, allowed a councillor with a conflict of interest in regard to a motion to amend the LEP in relation to a "significant" area of the LGA, to participate fully in decision-making - **but only after completing a *Special Disclosure form***. The word "significant" was not defined in the legislation, thus encouraging councillor-developers to find a legal opinion that served their purpose. Auburn Council was first off the mark and the appearance of two conflicting legal opinions was resolved in favour of open slather for certain councillors to vote on how much profit they would like to make. S.96 applications flowed in from all directions for amended approvals to uncompleted projects.

To the best of my recollection, Le Lam did not complete a *Special Disclosure* under S.451(4) and does not appear to have claimed to have done so. Her defence here is seriously flawed.

42-43. It is incorrect to suggest that there would only have been an issue if Le Lam had voted for the sale of the carpark "for no reason other than a desire to benefit Mr Mehajer's interests." Mr McNally is setting a ridiculously high bar in order to make it easy to establish that Le Lam did not breach it. A conflict of interest may exist whether or not a councillor has more than one reason for their vote. Whether or not she wanted a 2000 sq metre supermarket in Lidcombe, her business relationship with Salim Mehajer meant she had a conflict of interest.

Would Mr McNally argue that Salim Mehajer did not have a conflict of interest because he wanted to ensure Lidcombe got a supermarket?

53. Other councillors who belonged to this voting bloc also benefited from its votes.

Response to submission of Sam Duggan on behalf of Salim Mehajer

My reference numbers refer to the paragraph numbers of Mr Duggan's submission

91-92. Mr Duggan falsely claims that I voted against the sale of the Council carpark at 13 John St to Salim Mehajer "apparently out of spite", failed to make the decision on the basis of merit and that "...there is evidence of a breach of the Code of Conduct by his own admission."

I voted on at least two occasions for extensions of time for Salim Mehajer to comply with his contractual obligation. My reluctant support was based on the need for a supermarket in Lidcombe which was a condition of the sale. [It is worth noting that this need arose following the closure of Lidcombe's only major supermarket because Salim Mehajer owned that site and wanted to build high-rise units on it]. It became increasingly difficult to believe he would ever comply with the contract and appeared intent on extracting an endless series of concessions from the Council.

I lost faith in Mehajer and came to see that Council was increasingly being used to deal with the business interests of developer-councillors. The abuse of public office to obtain a refund of half of his deposit along with his successful attempt to restrict debate to closed sessions of Council, his initiation of defamation action against me (dropped after I made it public) for daring to openly oppose the deal,

his potentially corrupting influence on the Council through deal-making with people who needed his votes for their purposes were factors that influenced me. I became interested in other supermarket options for Lidcombe and other possible uses for the property such as an multistorey carpark or a park.

There was no breach of the Code of Conduct either by my "own admission" or otherwise.

93. My "animosity" was directed towards Salim Mehajer's behaviour as a councillor, a prominent public figure and role model. I acknowledge the difficulty of differentiating these from the personal under the circumstances. However, in support of my motion calling for his resignation, I emphasised that I did not bear personal animosity. I offered him and his wife my sincere wishes for a very happy marriage and emphasised that my need to pursue what I regarded as inappropriate behaviour did not imply personal ill will. Council meetings were recorded and I would be happy for this recording to be examined if the Commissioner sees it as relevant.

94-96. Mr Duggan claims that my written statement and my oral evidence are "quiet different" and "very different" in relation to Hicham Zraika' meeting with Salim Mehajer in the council chamber. The words might not be identical but there is no inconsistency. Mr Duggan quotes both accurately but cannot find words in either my written or oral evidence to justify his false allegation that I had

claimed I had "witnessed a lengthy discussion" which he correctly points out "could not have been observed from the Jack Lang Room if it took place in the chamber".

Mr Duggan is acting on the basis that when you can't argue against the facts, argue against a false representation of them.

I never claimed to have witnessed the discussion. Having seen Hicham Zraika leave the Jack Lang room in a hurry and head in the direction of the council chamber (I did not see him enter the chamber but the only other door in that direction leads to either the library or the town hall and would not have been used), I saw him and Salim Mehajer walk together back past the Jack Lang Room, conversing. I was with Tony Oldfield. We both saw it and discussed this phenomenon. Hicham Zraika had been gone at for least half an hour. Irene Simms later told myself and Tony Oldfield that, during that period, she had returned to the chamber to get something she had left behind and that Hicham Zraika and Salim Mehajer were in there alone together.

Their group submitted a rescission motion. Within a few days, Hicham Zraika told me that he was supporting rescission. He said he had changed his mind and that we had wrongly discriminated against Mehajer because he was a developer.

I have truthfully described the sequence of events. I do not claim to have overheard the conversation or to have used x-ray vision to see through the wall separating the two rooms.

Mr Duggan's false representation can only be regarded as a dishonest attempt to damage my credibility. His motive for so doing is obvious.

Response to submission of Anthony Cheshire on behalf of Glenn Francis, Mark Brisby, Hamish McNulty and Ian Dencker

My reference numbers refer to the paragraph numbers of Mr Cheshire's submission

17. Mark Brisby has never visited my home. He has driven there to pick me up and drop me off when we have been going to or returning from meetings of WSROC. This has happened on a small number of occasions. It has been common practice among councillors and senior staff to share cars to both reduce costs and to have an opportunity to talk.

112. Correct. I had no reason other than curiosity to be interested in the figures until there was a decision to sell the property and that Ned Attie wanted it to be based on the McGee valuation. That did not happen until the December meeting - where the valuations were not available. I interrupted him with an insistence that if there was to be a sale (a tender process or auction was not being considered), there should be more than one valuation. **Neither Ned Attie, the General Manager or any staff or councillor suggested that there already was a second valuation.** I have never been told why.

At the staff Xmas party on 24th December, I told Mark Brisby about a persistent journalist who was convinced that there was a second valuation. He confirmed that there was. Irene Simms and Tony Oldfield were present. We were stunned and went home to study the document - that by then I had already read thoroughly. The CBRE valuation, attached to the McGees document, was a mass of figures in a grid that required interpretation. There was no Council document that compared the two sets of figures.

Response to submission of Geoffrey Watson on behalf of Ned Attie

My reference numbers refer to the paragraph numbers of Mr Watson's submission

27. Mr Watson's proposal to prohibit a property developer or a person who is associated with a property developer from being involved in any property development within the precincts of the Council during their period on Council is most welcome. But what I have proposed is that developers and real estate agents be banned from being on any council.

I believe that my proposal is superior because of the danger that developers would have an incentive to hide their property interests through opaque company structures. There would also be difficulties arising from associations and interests than cross council boundaries. The advantages to a developer of being on a council include access to inside information re the planning intentions of both staff and other councillors, and the ability to influence them. There is a community of interest among developers and real estate agents. Just as a developer who is absent from the chamber due to a conflict of interest has his/her interests looked after by another in a quid pro quo arrangement, a similar set of arrangements could cross council boundaries especially among neighboring councillors with close political affiliations.

A complete ban would be neater, clear-cut and more readily enforceable. It would be much more likely to restore public confidence in local government than a compromise solution with loopholes.

The restoration of public confidence must be a major goal of this Inquiry.

28. There are precedents for banning some categories of persons from being councillors on the basis of their occupations. Section 275 of the Local Government Act bans NSW and Commonwealth judges, members of State parliament as well as employees of the same council.

Response to submission of Viv May

My reference numbers refer to the page numbers of Mr May's submission

P.2 Mr May's concerns about political interference, as he sees it, in the development application process are valid and do need to be addressed. However, councillors are the democratically elected representatives of the people - who do have a stake in the developments in their own community.

Councillors are accountable directly to the community every four years and indirectly between elections. Council staff and IHAP members are not and their decisions should be subject to democratic scrutiny.

While there is no shortage of evidence that corrupt decisions can be made by politicians, non-elected officials are also susceptible. Planning staff necessarily have even greater contact with developers than most councillors. History shows that corruption tends to thrive more in undemocratic environments. The money to go to where the decisions are made. It is important to have effective checks and balances and full transparency. Corruption risks can be minimised by making it clear that abuses of power are almost certain to be discovered, that *genuine* whistleblowers will be protected and valued and that councillors have reasonable protection from vexatious defamation actions.

P.2-3 Mr May raises important issues related to the integrity of staff recommendations to Council. While general managers and staff must accept that their recommendations to Council may not be accepted, it is of absolute importance that they give frank and fearless advice. There must be no grounds for a councillor to suspect that recommendations have been tailored to meet the expectations of one or more councillors. As Mr May has said elsewhere, the professional views of staff should not be removed from consideration because councillors disagree. Dissenting staff members should also be able to have their perspectives presented to Council without them fearing repercussions within their own hierarchy. The practice of councillors involving staff in Council debates by means of Dorothy Dixers should be stopped.

P.3-4 Mr May's recommendations to protect general managers from inappropriate pressure from councillors lack balance and are likely to have unintended consequences. While current provisions may be inadequate to ensure what he seeks to achieve, the general manager does need to have the confidence of the Council. There can be difficulties in ensuring the implementation of Council resolutions, the provision of information, the integrity of legal advice etc. Such matters must be enforceable, not only by the Council collectively, but individually. The Office/Division/Department of Local Government has a poor record in holding a general manager to account. Mr May's recommendation could lead to improved performance in some cases but to dictatorial tendencies in others. An untouchable general manager working in cahoots with one or more councillors would not be in the public interest.

Response to submission of Rangers

Notwithstanding other matters of grave importance, the most courageous witnesses to face the Inquiry were the rangers. They put their jobs on the line and subjected themselves to enormous stress to draw attention to serious matters. The writer of this submission has been suspended,

apparently for cooperating with the Inquiry. Others have been intimidated into resigning or taking “voluntary” redundancy either before or during the Inquiry. This is an absolute disgrace and I believe that the Commissioner should utilise whatever powers he may have to ensure that the rangers who have suffered as a result of a willingness to give evidence to the Inquiry and provide information receive justice, and that those responsible in Cumberland Council be appropriately dealt with.

George Campbell

(Former Auburn Councillor)

1/12/16.

AUBURN PUBLIC INQUIRY 2016

**Document 18
Written reply submissions of
Counsel Assisting**

AUBURN PUBLIC INQUIRY

Auburn City Council Chambers

Before the Commissioner: Richard Beasley SC

Reply Submissions of Counsel Assisting

Part 1: Introduction and Preliminary Matters

Section 439 of the Local Government Act 1993 (NSW)

1. Section 439 of the LGA is in these 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.
2. It is clear from the language of the section that section 439 contains two requirements. The first is to act honestly and the second is to exercise a reasonable degree of care and diligence in carrying out functions under the LGA or any other Act.
 3. Given that the obligation applies to councillors as well as staff it is important to note that councillors and staff have different obligations under the Act in any event. It must therefore follow that the scope and standard of care must depend upon the responsibilities of the participant. This situation is akin to the fiduciary obligations owed by a director to a corporation, which are moulded to the character of the particular relationship between the director and the company¹.
 4. In the case of Councillors the scope and extent of the obligation, ie the standard of care expected of them, is to be informed by:
 - a. The role of the Councillor, which is prescribed in section 232 of the LGA is *currently*² in these terms:

¹ *United Dominion Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; [1985] HCA 49, at 11 (Mason, Brennan and Deane JJ) see also *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [179] in which the Full Court observed that the actual functions or responsibilities assumed by the fiduciary determine the subject matter over which his or her obligations extend, at least for the purposes of deciding whether there is a conflict of interest and duty or a conflict between duties.

² *Local Government Amendment (Governance and Planning) Act 2016* (NSW); Sch 1 [7].

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.

b. During the life of the Council elected in 2012, section 232 was in these terms:

232. What is the role of a councillor?

(1) The role of a councillor is, as a member of the governing body of the council:

- to provide a civic leadership role in guiding the development of the community strategic plan for the area and to be responsible for monitoring the implementation of the council's delivery program
- to direct and control the affairs of the council in accordance with this Act
- to participate in the optimum allocation of the for the benefit of the area
- to play a key role in the creation and review of the council's policies and objectives and criteria relating to the exercise of the council's regulatory functions
- to review the performance of the council and its delivery of services, and the delivery program and revenue policies of the council.

(2) The role of a councillor is, as an elected person:

- to represent the interests of the residents and ratepayers;
- to provide leadership and guidance to the community;
- to facilitate communication between the community and the council.

c. The code of conduct prescribed by s 440 of the LGA; Ex O1, pp 22-43.

5. It follows that the standard of care to be expected of councillors is defined by their role exercising an elected, representative role of governance in keeping with these broad obligations. This clearly implies a subjective dimension and hence must account for differences of approach to matters of policy.
6. That being said, there are clear minimum standards in section 439 that cannot be derogated by reference to electoral mandate or mere opinion. The fact that the section is framed in terms of "reasonableness" is of considerable significance and must import an objective standard of care and diligence. In this respect comparisons between state and federal representation are inapt.
7. For example, a combination of the duties to represent the "interests of residents and ratepayers" and "reasonable degree of care and diligence" would clearly militate against a councillor becoming the mouthpiece of a developer in relation to a development that was inconsistent with the "policies and decisions of the governing body".
8. This is particularly relevant in the case of Mr Attie and Grey Street. Mr Attie knew that the motion that he moved on 7 October was clearly inconsistent with a policy and decision of council, namely the Employment Lands Strategy, a revised version of which was adopted by Council as recently as May of that year. He also knew that he was putting forward the

developer case and in so doing was representing the interests of the developer. His ongoing reluctance to admit to doing the developer's bidding in moving that motion shows, as previously, an awareness on his part that his conduct was in breach of s 439. Being pro-development is no answer to abandoning the obligation to exercise the appropriate level of care and diligence expected of an elected councillor.

9. By contrast, a professional strategic planner is employed by Council to provide *professional* advice. The professional is not a representative and performs different functions both under the Act and as an employee of Council. The professional strategic planner operates like all professionals do, with an obligation to exercise professional skill care and diligence in carrying out his or her responsibilities.
10. In the case of Mr Francis, this issue arises in the context of making recommendations that were contrary to his own views as a professional planner.
11. The inescapable conclusion in his case is that he was, for reasons he is not prepared to explain, prepared to recommend proposals that were contrary to his professional views and did so (at least in the case of each of South Auburn and Berala) at the direction of a minority of Councillors not so as to implement decisions of Council as a whole, but so as to facilitate the position taken by a minority of Councillors.

No findings of Dishonesty are Sought

12. It is accepted that where findings have been proposed in relation to former Councillors and staff, section 439 has been referred to in a *global*, or as Mr Attie puts it, a "compendious" sense. Particular proposed findings are addressed in the context of the particular matter under investigation. It should however be emphasised that wherever it has been suggested that there has been conduct amounting to a breach of ss 439(1), the breach in question concerns the obligation to exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act.
13. It is also accepted that the inquiry is an administrative inquiry and the findings that are made by the Commissioner will be expressions of his opinion on those matters and not determinations of any right or rights.
14. It is in that context, not as a means of determining legal rights, that the findings sought have been made.

The Elected Mayor

15. Mr Oueik's submission at [25] to the effect that mayors be directly elected by a popular vote for the entirety of the Council term has some merit.
16. Variations on that proposal might be that in the case of a two ward Council, it might be more representative to have the leading vote getter in each ward each serve a two year term as Mayor, with the relevant runner up from the other ward as Deputy Mayor. In that way each ward would have either a Mayor or Deputy Mayor at any one time.

Mr Zraika as a Pro-Development Councillor

17. Mr Zraika's submissions assert that he was "pro-development." Leaving aside that the phrase pro-development could mean any one of a number of things, it is clear that Mr Zraika made political commitments in the terms set out in Ex Gen 6 to those whose support he required in order to obtain the office of Mayor. One critical commitment was to the effect that he would only "*support developments consistent with the (LEP) and DCP, and will not vote to amend the LEP unless there is overwhelming public interest to do so.*"
18. More specifically, in the case of Berala (dealt with specifically below) he made a commitment to Mr Oldfield (Ex O1, p 76) in terms that he agreed to support:

"1. all the recommendation included in the Berala Village Study; including but not limited to the recommendation on building heights and re-zoning. We both understand the importance of the implementation of this study to a service deprived community and both of us will use our votes as Councillors to ensure that Council enacts on all the findings in the study

2. existing height limits and development controls. We both commit to oppose spot re-zonings such a Jenkins Street, Regents Park and similar re-zonings that are outside the current LEP and DCP.

We both accept that support means not abstaining or being absent from Council meetings that determine either of the above....."

19. On no view, could these commitments be described as "pro-development", even allowing for the breadth of that term.

2014 Mayoral Election - Correction

20. Contrary to my original submissions, Ms Simms did not stand for Deputy Mayor in 2014, instead offering her place to Councillor Batik Dundar³. This was contrary to the agreement referred to in [7] and recorded in Ex Gen 6. Nevertheless, the key point remains; for that election the votes were deadlocked at 5 all and Messrs Oueik and Mehajer were elected on the drawing of lots.

Mr Francis' Relationship with Mr Oueik

21. Mr Oueik's position in his written submissions is to the effect that the circumstances surrounding the kitchen cabinet were nothing more than a misunderstanding. This submission ought be rejected given the circumstances in which Mr Francis came to disclose his concerns about the matter to the ICAC *before* he gave his evidence to this inquiry as was clear at his private hearing Tr 43.18-42:

"Have you had the assistance of Mr Oueik in carrying out any building work that has been for your benefit?

A. Personally?

Q. Yes.

A. In terms of that question, I - I'm not sure whether I can answer that, in terms of it being under direction from the ICAC.

Q. What's the direction from the ICAC?

A. It's not to disclose an interest of - an interest - a disclosure made by myself to the ICAC. Unless - unless you think it is, and -

MR BOLSTER: I don't know.

THE COMMISSIONER: I think for the purposes of the Commission, unless I had something from the ICAC, I think you have got to answer the questions that you are asked here.

THE WITNESS: Sure. Then I have made a disclosure to the ICAC regarding a kitchen that was installed at my house, when I --

22. It is to be recalled that Mr Francis' evidence, at the time of the private hearing on 10 May 2016, was that Mr Oueik;

"... came to the house for a visit and then said he'd - he could do these things to help us out, to - and it - "And it's all above board and you pay these people directly."
(Ex PH10.35)

³ See submissions of Ms Simms.

23. Whilst it is accepted that there are differences in the accounts of Mr Francis when it comes to the number of conversations that he had with Mr Oueik about the matter, this is explained by the fact that he gave his evidence to the private hearing without notice of the fact that the issue would be raised. Thereafter, once represented, he volunteered to make a detailed statement on the issue. The differences that Mr Oueik cites are minor and it was to have been expected that he would recollect further detail of the events.
24. More generally, it is hard to accept that Mr Francis was simply mistaken about such an important matter. It was obviously a matter that had played on his mind for almost 10 years and prompted him as late as this year to make a disclosure to the ICAC about that very issue.
25. Mr Oueik seeks to extract something from a difference in Mr Francis' accounts, which focus on the word "gift" as opposed to "a favour", however there is little to be achieved by a semantic analysis of the precise words used. The critical feature is that Mr Francis made a significant disclosure against his own interest, and confirmed receipt of a not insignificant benefit received that was never previously declared. If there were a simple misunderstanding as is now alleged, it would have been easy to fix at the time. That it was not, that it was sitting there in the background as Mr Francis was promoted over time, eventually achieving the significant issue of Executive Manager Planning and being a key player in virtually all of the key planning decisions that were under scrutiny in this inquiry, is a matter of some considerable concern.
26. Further, the fact that Mr Brisby could not recall anything improper being said by Mr Oueik does not assist Mr Oueik's submission given that Mr Brisby admitted that he had a poor recollection of the events and secondly, by reason of the fact that the impropriety was only confirmed when Mr Oueik resisted Mr Francis's subsequent overtures to make a payment for the works (all of which occurred in the absence of Mr Brisby).
27. For largely the same reasons, the submission at [41] and [42] of Mr Francis' submissions that he and Mr Oueik were at cross-purposes over the "issue" ought not be accepted. That presupposes that Mr Francis misunderstood the events of 2006 over a 10-year period in which he and Mr Oueik had an obviously close working and personal relationship. No misunderstanding is evident in the statement he prepared with legal advice; Ex S23.
28. The very same reason why it is submitted, on Mr Francis's behalf at [46] of his submission, that his credit is enhanced by his concessions and the volunteering of information at his private hearing, only serves to re-enforce his recollection of what occurred in 2006 and his enduring concern about it. The fact is that it was improper for Mr Oueik to effectively gift the cupboards to Mr Francis and Mr Francis clearly understood the impropriety.

Mr Burgess and Mr Brisby

29. Mr Oueik submits that Mr Burgess ought not be accepted when it comes to his various concerns about Mr Oueik, however the problem with that submission is that Mr Burgess made detailed records in his diary of his various concerns, as previously outlined. Mr Alvarez also referred to the propensity for Mr Oueik and Mr Attie to visit staff, and in particular Mr Brisby and Mr Francis.
30. When all of the evidence is looked at, the kitchen cabinet, the visits to staff, the visits to Mr Oueik's home and the gifts shared between them, it is very clear that Mr Oueik had a much closer relationship with Mr Francis and Mr Brisby than one might in the ordinary course expect. It is hardly remarkable that Mr Burgess would have concerns about that and seek to document those concerns.

Part 2: The Berala Planning Proposal

Mr Francis' Submissions

31. Mr Francis's submission about how Ms Cologna's "proposal" developed (following the 2014 Bowral workshop and in advice of the June 2014 Council briefing) is incorrect insofar as it suggests that it was a proposal *from* Ms Cologna or indeed a proposal that she favoured or indeed recommended. As one of the authors of the Berala Village Study, it is clear that her professional view was in keeping with that study, ie that there should be no change.
32. As is explained at [176] - [179] of the principal submissions, the "proposal" was a summary of the position taken by those councillors *who wanted change*, not a proposal that reflected either the views of the broader Council as a whole or represented the professional opinion of Council staff. It was, as Ms Cologna said, "an option for Council to consider"; Ex S3 [34]. Issue is taken with the evidence of Ms Cologna that the change to the B2 zoning South of York Street came from Mr Francis on the basis that it had been a matter that was discussed at the June briefing. The problem with this submission is that there was no evidence that the issue was discussed, let alone agreed at that briefing. If it had been discussed, one would have expected Councillors to recollect as much, particularly those Councillors who were hotly opposed to any change let alone a change of such magnitude on the very edge of the radius. As for agreement, it is implausible in the extreme that agreement would have been reached in those terms. In this respect it is to be recalled that Ms Cologna's drafts of the Executive Manager Planning's Report did not refer to any such agreement: this was only added later. Any agreement can only relate to the "agreement" between the three councillors who had marked B2 on their Bowral maps.
33. At [70] et seq of Mr Francis's submissions there is a reference to the a difference between the "suggested zoning scenario" put to the June briefing (Ex 01, pp 71 and 72) and the Executive Manager Planning's Report that was prepared following that meeting and was eventually put to Council in July, Ex G27 pp 21 and 22. In short the difference is that area c that is referred to on p 21 of EX G27 is B2 (see Ex B1 p 148) whereas the bottom left hand corner of it was R4 in the scenario that went to the June briefing.
34. It is true that this difference is not addressed in the evidence, however to the extent that the submissions seek to justify the subsequent B2 zoning for the land South of York Street, it is to be noted that that change did not occur until much later, ie in version 11 on 9 July 2014 as outlined in my earlier submission as [195] et seq.
35. Given that the change appears in the very first draft Executive Manager Planning's Report (unlike the change South of York Street) it can be inferred that there was some other discussion about it at the June briefing but whether or not it was agree. The critical thing however is that the change does not seem to be related to the submit supports the All of this tends to suggest that the B2 change made by Mr Francis.

Mr Zraika and Recommendation B21

36. Mr Zraika asserts that recommendation B21 should not be accepted by the Inquiry. That recommendation was directed to the finding that needs to be made as to how it was, and why, critical changes were made to the proposal that ultimately went forward to, and was adopted by Council in July 2014.
37. The circumstances in which that occurred are set out in detail at B1 to B20 and there is no point in repeating them in detail here. It is however important to note that the word "corrupt" does not appear in the submissions in relation to Mr Zraika at all. No submission is or was made that he acted corruptly.

Mr Zraika's declaration of interest

38. Mr Zraika's decision to declare an interest in relation to the Berala Study at a time when the study, if adopted and implemented, would have had no impact whatsoever on his interests, remains a mystery.
39. There is certainly no evidence that he did so with any intention to gain any direct benefit for himself, however it is hard to reconcile his declaration of interest and subsequent abstentions with his political commitments about redevelopment set out in Ex Gen 6 and the specific commitments about the Berala Study that are set out in Ex O1, p 76, outlined above.
40. Undoubtedly, he would have been justified, indeed compelled, to declare an interest once it became clear that there was a possibility of a re-zoning affecting his land; but till then, it is hard to see how his interest could have reasonably given rise to any conflict.
41. It is said that a potential conflict arose because he, "*could not know which way Council would lean,*" but until the Council briefing in the Jack Lang Room in June 2014, within 12 months of the commitment embodied in Ex O1, p 76) there was no proposal on the table that involved any benefit. Until June 2014 there was no proposal that leant towards and as far as York Street.

Mr Zraika's "benefit"

42. For the record, the second sentence of [182] of the principal submissions contains an error in that the source of the evidence referred to is Mr Campbell, not Mr Francis. The context makes that clear in any event. This would seem to clear up the misunderstanding upon which the submissions made in the first three dot points on page 8 of Mr Zraika's written submissions.
43. There is however evidence of the potential value to Mr Zraika of the re-zoning; see Mr Ferdinand's report referred to at [232] of the principal submissions and Ex FTB1, pp 129-135.

The Attie/Zraika Text Messages

44. The phone records referred to on page 8 of Mr Zraika's submissions (see [227] et seq of the principal submissions) are not used to support any finding of dishonesty by Mr Zraika. They do however demonstrate that Mr Attie knew of his ongoing interest in the issue right through until September 2015. It is true that there is no evidence that Mr Zraika did not respond via SMS, however the fact that a week earlier he had both sent and received messages to Mr Attie about Council business casts some doubt on the evidence that he never met with other Councillors to discuss Council business outside of the Chamber.

Ms Lam's pecuniary interest

45. Ms Lam submits that she did not have a pecuniary interest in the Berala Planning Proposal on the basis that although her business was the managing agent for the premises at 150 Woodburn Road the B2 zoning recommended in June and July 2014 would have had no effect on that site as already had the benefit of a B2 zoning. Alternatively, she says that the discloser
46. Leaving aside the fact that Ms Lam had only months earlier declared a similar interest in the case of South Auburn, the submission should be rejected since the planning proposal did seek to make *significant* changes to the existing B2 zone within the village centre. In short the planning controls that affected 150 Woodburn Road increased the height limit from 14m to 21m with a corresponding increase in the FSR to 3:1, Ex B1, pp 92-93.

47. This was made clear in the additions to the conclusion to the Revised Berala Study that is referred to at [203] of my written submissions:

“This study recommends that Council’s current planning controls in Auburn Local Environmental Plan 2010 are modified to include small expansions of 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 shops.”
(Ex B1 p 155)

48. Both the original and revised Berala Village Study state at [2.7];

“The maximum permissible height within Berala’s main street area (B2) is currently 14 metres. Berala’s main street area currently has a maximum floor space of ratio of (FSR) 1.4:1.” (Ex B1, p 46 and 117).

49. Ms Lam’s alternative argument, which is to the effect that she would not, at that time, have had to disclose an ownership interest by reason of the former s 448(g) of the LGA, should also be rejected, since she did not, in fact, have an ownership interest within the area under consideration. She points to an anomalous situation arising, however it is to be recalled that the anomaly was in fact the terms of s 448(g) as they were prior to their repeal following the decision cited.
50. Ms Lam, as the most experienced member of the Council, certainly didn’t make the argument she now makes when asked why she did not declare an interest; Tr 676.29-677.10.
51. It is not a bizarre result that Ms Lam ought declare in such circumstances: the bizarre result, now corrected was that Mr Mehajer did not have to in the circumstances of his case.
52. Finally, at [31]-[35] of her written submissions, Ms Lam seems to be making the point that her declaration in the case of South Auburn only arose because the owner asked her to put the property on the market and that because of that she came to have an involvement with it. If that be the case it is odd that her disclosure in the case of South Auburn expressly to the management of the property not its sale.

Part 3: The South Auburn Planning Proposal (PP-3/2013)

Mr Zraika's Submission

53. Mr Zraika's Submissions are to the effect that:
 - a. there was no inconsistency in his support for the original extension of the Auburn Town Centre;
 - b. he only agreed to vote for option 2(a) on the basis of the advice of Mr Francis; and
 - c. there was no evidence that the final proposal lacked merit.
54. He makes the point that Mr Yang's 2013 resolution that led to the proposal was, in effect, merely a new incarnation of a previous proposal. It is to be noted that Mr Yang, on the other hand says that when he moved the motion, he had been a councillor for only six months and was unaware of the earlier proposal; Yang written submissions, p 5, [1] see also Yang PH Tr 7.11.
55. Each of Mr Zraika's propositions suffer from the fact that:
 - a. Mr Francis's evidence, which was to the effect that the reduction in the size of the B4 zoning along Station Road came from members of Council, and in particular Messrs Oueik, Attie and Zraika; which of them is not clear. It is true that Mr Francis later sought to qualify this evidence as to the source of the reduction, however that does not detract from the force of the evidence, when first given.
 - b. This is particularly powerful evidence in the context of:
 - i. Mr Francis' view as a planner was that there ought be no B4 in the block at all, as set out at [247]-[249] of my original submissions.
 - ii. Mr Brisby sharing that view, see [236] of my submissions.
 - iii. Mr Alvarez's evidence about it; see [239]-[242] and [253]-[260]
 - c. The evidence, previously referred to in does in fact support the proposition that there was no legitimate planning purpose in establishing such a small pocket of B4 in that area.
56. It is not credible to suggest that despite his own professional preference as a planner, despite the advice from staff, and despite the position of the general manager, that Mr Francis *created and recommended* options 2(a) and 2(b) and that each of Messrs Oueik, Attie, Yang and Zraika simply followed that advice.
57. Emphasis is placed fact that the earlier drafts of the report that included options 2(a) and 2(b) simply proposed them as options, without recommending any one of them – entirely consistent with Mr Francis putting options forward that came from Councillors as opposed to the strategic planning unit.

Mr Attie's submission

58. Criticism is directed towards the submission regarding the two limbs of s439(1). The broader aspect of that provision has been dealt with above.
59. In answer to paragraph 35 of Mr Attie's submissions; references to conduct in breach of s 439(1) do not involve any allegation of dishonesty against Mr Attie in relation to South Auburn. That is clearly recognised at [36] of Mr Attie's submissions.
60. Rather it is submitted that when all of the evidence is considered, if one accepts Mr Francis's evidence that it was Mr Attie along with Mr Zraika and Mr Oueik who raised the issue of reducing the size of B4 in accordance with option 2(a), such conduct involved the former Councillors in failing to act with the requisite d.

Mr Oueik's submission

61. Mr Oueik submits at [213] and [214] that there is no evidence that option 2(a) came from any one of Messrs Oueik, Attie and Zraika. In this respect, the submission made in answer to Mr Zraika on this topic are repeated.
62. At [214] Mr Oueik makes the submission that the *"recommendation"* to go with option 2(a) came from *"a decision not to proceed with a recommendation that asked Council to give staff direction in relation to the various options and instead to put forward a firm recommendation to draw the boundary at 90 Auburn Road"*. It is then said that this is explicable on the basis of the *"report of MG Planning and in particular the site analysis at page 89 and the diagrams of the various options at SA 1 pages 283-285."*
63. The diagrams of the options at Ex SA1, pp 283 to 285 did not form any part of the MG Planning report. The conclusions and recommendations of MG Design made no reference to option 2(a) or option 2(b) Ex SA1, pp 111-115. The plans at Ex SA1, pp 283 to 285 were simple a representation of the recommendation in Mr Francis's report, being attachment 6 to the report, Ex SA 1, pp 30 and 281.
64. With respect, it is not clear from the MG Planning Report, nor is it clear for any of the other planning evidence before the inquiry, why a Councillor or competent planner would recommend less B4 along Auburn Road. The submission would seem to be that it was a legitimate better to have smaller areas of "massive bulk" than massive bulk along the entire length of Auburn Road. The critical point of course is that the option that had most to commend it from a planning proposal, a position that Mr Francis, Mr Brisby and Mr Alvarez all adhered to, was to have no B4 in the block at all, yet this was not put forward as an option let alone recommended.
65. It was clearly put to Mr Oueik that he made it clear to Mr Francis that he wanted the B4 zone to end close to 90 Auburn Road, however Mr Oueik had no recollection of that; Tr 1064.25-28. The analysis of the evidence of Mr Francis on this issue at [250]-[256] does not account for the fact that Mr Francis's own preference as a planner was to have no B4.
66. It is not correct to say that Mr Francis came up with the idea to reduce the area of B4. As he said that the private hearing, which is relevantly reproduced at [251] of Mr Oueik's submissions, Mr Francis wanted to "have it removed into R4" and that before he put forward his proposal to the meeting on 15 April there was talk "within the chamber", ie from Councillors about having it reduced. The relevant Councillors were Messrs Oueik, Attie and Zraika. It could not be clearer, in these circumstances, than that the reduction did not come from the planning staff but from the Councillors stated. Furthermore, if it was Mr Francis's idea, why then did he say that he was "certainly not happy with it" and why then did he say that he probably mentioned to Mr Oueik in passing that he was not happy with it.
67. The attack on Mr Hamed and his evidence at [259]-[261] is quite difficult to understand, but it does show a level of animosity towards Mr Hamed on the part of Mr Oueik that supports the other evidence of Mr Oueik's antipathy towards the Bhanin Association. There is no suggestion that the consultation between the two of them extended to "internal liberal strategy" rather the discussions seemed to be at a personal level, one friend to another, about the commitment involved in making the decision to run for parliament. Mr Hamed's evidence on this issue was quite credible and it was not challenged, nor was he asked any questions by counsel for Mr Oueik; Tr 1012.
68. At [273]-[279] of Mr Oueik's submissions, a point seems to be being made that Mr Oueik, as a fairly experienced developer and builder could have carried out a "proper B4 development" on a site as small as that would have been established by option 2(a). But Mr Oueik did not say that that was the reason why he voted for option 2(a); in that respect his evidence was clear and is set out in [312] of my written submission.

69. Finally, the submissions at 287 which is to the effect that Mr Francis in recommending option 2(a) was doing "*what he understood was required on him by the councillors*" is not far from the facts. The submission does not identify who the Councillors were, but it is clear that it did not involve Oldfield, Campbell, Simms, Batik-Dundar (none of whom wanted a change at all), Yang (who proposed option 1 and voted against option 2), Lam (who seems to have not played a role in this matter) and Mehajer (who was conflicted and took no part). That leaves Messrs Attie, Oueik and Zraika; a minority of three. If the submission is that Mr Francis was giving effect to what was required of him by those three Councillors, it ought be accepted.

Ms Lam's submission – Council Meeting on 2 December 2015

70. At [83] of Ms Lam's written submissions, issue is taken with the criticism of her failure to declare an interest at the meeting on 2 December 2015 when Council considered the final adoption of the South Auburn Planning Proposal.
71. That criticism is pressed on the basis that:
- a. by that time, on any account, Ms Lam clearly had knowledge of the business relationship between Minh Hua and Mr Mehajer;
 - b. on the same night Ms Lam declared that very interest and did not take part in the debate and vote on the 13 John Street sale on that basis.
 - c. Mr Mehajer had a clear interest in the proposal then under consideration and had himself declared an interest; yet
 - d. Ms Lam took part in the debate and voted in support of the finalisation of the option 2(a).
72. The criticism is not based on the earlier interest declared vis a vis the property managed by Combined Real Estate, but rather on the failure to declare the same interest that she did for 13 John Street.

Mr Yang

73. No finding is sought against Mr Yang in relation to putting forward Option 1 back in 2013, however the record clearly shows that he had some considerable difficulty in understanding what was before Council at any particular time. The events surrounding the April and May 2015 Council Meeting where the South Auburn Planning Proposal, together with the way in which he was able to give his evidence to the Inquiry, demonstrate that most clearly.

Mr Francis's Submission

74. In answer to paragraphs [86] & [87] of Mr Francis' submissions, the critical failure on the part of Mr Francis was that he had, as a professional strategic planner a duty to proper & reasonably based planning advice regarding the options that he considered that Council should consider. This is to be distinguished from the obligation to implement proposals that Council has determined ought be implemented.
75. After Council had resolved on 17 April 2013 to split the block into two zones, one R4 and one B4, it was Mr Francis who put forward to Council 2 further alternatives; neither of which were consistent with the 2013 resolution. This was not the implementation of the earlier resolution but rather an attempt to change/modify it.
76. If one accepts, for the sake of argument and contrary to the submission that the source of these alternative options were Councillor driven, ie that they were Mr Francis's idea; it can be seen that Mr Francis was taking it upon himself to put forward options significantly different to the earlier resolution. This is the opposite of implementation. In these circumstances, he cannot be heard to argue that he was merely implementing what Council

had already decided. He went a great deal further, not only creating two new options, but also recommending one of them when neither option was consistent with his own view as a professional strategic planner. Viewed in this context, ie that Mr Francis felt himself free to put forward *and recommend* a view different from the 2013 resolution, there was no reason why he would not also put forward his own professional view, namely limiting the block to R3.

77. One might understand why he might merely present, as the original draft of the report did, the new options as merely that, ie options for Council to consider, but to *recommend* an option that he did not support, that Council had not voted for and without putting forward the other options previously discussed which he did recommend, represents a failure to comply with his duty to exercise a reasonable degree of care and diligence in carrying out his or her functions under s 439(1).

Part 4: The Grey Street Planning Proposal

Mr Attie's submission

78. No submission of dishonesty is or was made against Mr Attie regarding his conduct in relation to Grey Street. The submission is that Mr Attie abrogated his duty to exercise reasonable care when it came to moving the motion and it is that submission that is engaged in paragraphs 50 – 56 of Mr Attie's submissions.
79. The fact that Mr Attie was so reluctant to concede, accept and admit that he did not play any role in the drafting of the motion that he himself moved and that he was in fact doing the bidding of the developer, demonstrates knowledge of the impropriety of acting as the conduit whereby the developer got what it wanted. This is re-enforced by the fact that the motion proposed was in *exactly* the same terms as the motion that Ms Crameri included in her second e-mail to Mr Sankari.
80. That a majority of Councillors agreed with him without any meaningful debate or attempt to take advice on the issue is one of the more bewildering actions of the Council. Collectively, the majority who voted in favour of the proposal were hardly "active and contributing member of the governing body" and could not on any view be seen to have made a "considered and well informed" decision on the matter.
81. Mr Attie's submissions at [56] suggest that by the time the motion was before the Council on 7 October 2015, "the issues were well known" and the "battle-lines were clear."
82. That is not the evidence. At no stage had the issue of amending the Employment Lands Strategy been identified in any Council debate. The prospect was not alluded to in the Council Report that assessed the revised proposal.
83. If the issue were as clear as Mr Attie claims, then he himself might have been able to draft or construct his own motion that gave effect to his position; ie the position that he sought to portray when he first gave evidence on 9 June at his private hearing and 16 June at the first public hearing on which he gave evidence.

Part 5: Marsden Street Planning Proposal

Mr Oueik's and Mr Francis' submissions

84. In answer to the submission at [399] of Mr Oueik's submissions, the submission is repeated that given the small scope of the planning proposal as it was on 20 November 2013, there was no basis for Mr Oueik to declare an interest. The proposal only extended to and sought

- to bring their zoning into line with the rest of the precinct. Mr Oueik's interests could not have been affected either way. Reference to the introductory words to a report dated 15 April 2015 as explaining the decision makes no sense as by that stage the relevant decisions had all been made. The report that was before Council on 20 November 2013 (Ex MS1, p 27 et seq) made no reference to the need for any broader re-zoning – it was a spot rezoning to enable industrial land to be zoned R3, in keeping with the rest of the precinct.
85. An awareness of Mr Attie's motion, which is referred to in [403] of my written submission might have given Mr Oueik a basis to declare an interest, but he was not aware of that, and Mr Attie said that he simply moved that motion off the cuff.
 86. The criticism in Mr Oueik's submissions about the lack of awareness on the part of staff and councillors of Mr Oueik's interest in the precinct cannot be dismissed in the way that is suggested in [401] and later at [412]. Whilst Mr Oueik had disclosed, the fact is that if the other relevant witnesses are to be believed; staff and certain Councillors were wholly unaware of the extent to which Mr Oueik had holdings in the area covered by the AECOM report. Thus, although there may have been a general disclosure, there was no specific or detailed disclosure at the time of debate and refusal.
 87. The submission at [415] seems to suggest that option G is a good planning outcome. That is incorrect. Elements of it were recommended by AECOM and supported by Ms Cologna; in particular the industrial zone on the East side of the precinct, which largely preserved the status quo.
 88. It is however to the west of Raphael Lane and South of Marsden Street itself that problems with Option G arise.
 89. In this respect, and particularly having regard to the submission made on behalf of Mr Francis at [102] that it was made up of elements proposed by AECOM, it is to be recalled that the critical feature of Option G, B4 for that entire area and including the lands owned by Mr Oueik, was not put forward by AECOM in its original draft report and was only included as an option at the specific direction of Mr Francis. It is to be recalled that that report was the result of the resolution on 20 November 2013
 90. The reasons why Mr Francis was not content the first AECOM report and directed were matters about which he was chose, as was his right, not to give evidence. The fact remains however that:
 - a. Mr Francis had a relationship with Mr Oueik, a relationship that was completely different to any other relationship he had with any other Councillor; contrary to the submission made on behalf of Mr Francis at [107] and [108].
 - b. He did not disclose to Council that he had directed AECOM regarding the inclusion of scenario E in their final report; see [409]-[419] of my earlier submissions.
 - c. He recommended option G in the face of the independent report of AECOM which did not, and which identified a number of flaws with options G as far as the proposed B4 zoning was concerned; Ex MS1, p 175.

Part 6: The Sale of Council Land at 13 John Street Lidcombe

Ms Lam's submissions

91. A premise of the submissions made on behalf of Ms Lam and others was that "any actions taken by Councillors in relation to this matter that were allegedly favourable to Mr Mehajer are explained by the desire of Councillors to obtain a 2,000 m² supermarket for Lidcombe."
92. This is not borne out for a number of reasons:
 - a. Had Councillors wanted to proceed with the contract that had a requirement for a 2,000 m² supermarket, one might have thought that they would have afforded the time sought by the purchaser in May/Jun2012 at which point the contract dated 1

March 2011, and which had given the purchase. Their votes on that occasion suggest that although that wanted the supermarket, they were not prepared to extend time to enable that to occur.

- b. Something clearly changed when Mr Mehajer was elected to Council: but even then, at least from October 2012 to March 2013 (see [454]-[460] of my earlier submissions) a majority of the Council had had enough. By that stage the problems with the proposal, and in particular car parking and access were well and truly understood; see [456]-[457].
93. It is true that all councillors, except Mr Oldfield, voted in favour of the fresh contract on 20 March 2013 (EXJS1, p 257-260) following the fresh offer by Mr Mehajer provided on the day of that meeting; Ex JS1, 238-9. It is to be noted that staff on that occasion made no recommendation as to what should occur; Ex JS1, p 243. In the case of Campbell, Simms, Batik, and (at that time) Mr Zraika) this was probably because they did want to give Mr Mehajer one last chance to deliver on his promise, however subsequent events show that he was never able to do so.
 94. Ultimately, following Mr Zraika's change of position on 4 December 2013, there was a slim majority of councillors who, the record shows, were prepared to afford Mr Mehajer's company every indulgence he sought despite the well known problems with the project; in this respect I refer to the detail in my earlier submissions.

Ms Lam's relationship with Mr Mehajer - Suggested Finding JS2

95. It is accepted that the second sentence of JS2 overstates the evidence. It is accepted that the staff recommendation at that time was to the effect that a 6 month extension was reasonable in the circumstances, Ex JS1, p 46 however that can be little doubt that Ms Lam's relationship with Mr Mehajer played a role in her decisions on the John Street contract over the years in which this matter was under consideration by Council. The evidence of the relationship between Ms Lam and Mr Mehajer is clear and at least partly explains Ms Lam's.
96. Mr Mehajer submits at [87] that it is speculative to assert that Messrs Oueik, Attie and Zraika were uninterested in the supermarket misstates the submission at JS5. That submission was to the effect that Attie, Oueik and Zraika who said that a supermarket was one of the reasons why they afforded lengthy extensions to Mr Mehajer after he was on Council were not as interested in granting even a small extension of time beforehand.
97. A similar submission is made at [90] in answer to which:
 - a. The issue of getting a supermarket was important to Councillors, and this in part explains why there were moments in which Council did afford Mr Mehajer further time, however as time passed and it became obvious that there were significant impediments to a supermarket being delivered, particularly when Mr Mehajer sought to reduce the size of the supermarket to 1,000 m² it was
 - b. The clearest evidence of Mr Attie and Mr Oueik's desire to assist Mr Oueik is to be found in the circumstances surrounding the execution of the rescission motion in advance of the December 2015 meeting.

Part 7: 40-46 Station Road Auburn, BBC Developments Pty Limited

Correction – The Occupation Certificate for 40-46 Station Road

98. Mr Malouf is correct to point out at [3] of his written submissions that he did not issue the construction certificates for the development and that in fact they were issued by Mr Rajbhandry
99. Correction – Ms Simms' File note. The note should read, the change being underlined in the last line:

“*Confidential – JB re illegal building works Clr Oueik

raised issue re the illegal building works (told of these a few months ago – 2 bedders converted to 3 bedders Station Road PRIOR to sign off by Council. Paid Sect 94 as 2 b/room & then built & fit out as 3 b/room.

GM says discussions are ongoing with Deakins re legal considering conversion were done: apparently, prior to sign off by Council. Assures that Oueik will be treated as any other applicant. Mark Brisby is to prosecute for illegal building works.

Reminded GM that 1) level playing filed – 2) message sent to compliances staff if law is different for a mate/councillor than anyone else” (sic)

Part 8: 1A Henry Street Lidcombe

Mr Attie's submissions

100. It is not proposed to respond to Mr Attie's submissions regarding Mr Jack other than to repeat the submissions previously made.

Mr Zraika's recollection of his Conversation with Mr Jack

101. Mr Zraika makes the submission that my previous submissions do correctly represent his evidence regarding his recollection of the allegation of a bribe.
102. It ought be noted from the outset that there is no submission critical of Mr Zraika in any way.
103. The issue raised him in paragraph 5 of his submissions concerning [737] of my written submissions concerns the observation that it is/was;
- “... odd that Mr Zraika did not recall Mr Jack repeating his bribery allegation since that would seem to be the only purpose of the two of them communicating at around that time and Mr Jack was, as Mr Hajji's evidence demonstrates quite affected and upset by it.
104. Mr Zraika's evidence on this issue is clear and ought to be accepted; Tr 1907.30-1908.10.

Part 9: Parking Related Conduct Matters

Al Faisal College

105. In defence of the evidence of Diana Lang, it is to be observed that she and a number of the other rangers expressed concerns to Ms Simms and the ICAC about there being a different method for enforcement of parking issues around Al Faisal College and that this all occurred before the Council achieved the level of notoriety that arose following the events of August 2015. That being said, it is also highly unlikely that the minute takers would record any directive about Al Faisal getting special treatment at the direction of Mr Oueik. Mr

Lawrence's evidence, as outlined at [770]-[772] of my earlier submissions, shows that Al Faisal represented a unique challenge and was an ongoing issue.

106. The evidence of the Rangers cannot be discounted. It is highly unlikely that they would concoct a claim about favourable treatment when none was directed. Their evidence on this issue ought be accepted. It is to be noted that it is consistent with the clear evidence of favourable treatment that Mr Oueik's companies were afforded when it came to their work sites.
107. Further, the criticism of Ms Laing "unreliability" at [123] of Mr Oueik's submissions on the basis that she was unaware of Mr Oueik's parking policies is most unfair. That a ranger in her position was or may have been unaware of Mr Oueik's parking policies is not a matter about which she can be legitimately criticised. Her evidence did however establish that Mr Oueik's policies did not seem to change the signage, ie that the signs remained as they were in 2012, non parking zones, which did in fact amount to kiss and drop off zones.

6-14 Park Road Auburn

108. The thrust of Mr Oueik's submission on this issue would seem to be that once Mr Lawrence gave his directive about the way in which Mr Oueik's construction site should be patrolled; it was the staff who issued PINS in a manner "inconsistent" with that direction. With respect, that submission glosses over the critical matter, namely that by attacking Mr Soares in the manner which does not seem to be disputed, Mr Oueik was able to obtain an advantage that enable his staff to park within "his" construction zone in breach of the condition of that zone, with apparent impunity. When Ms Laing has the temerity to issue PINS within that zone she is then criticised for acting contrary to that directive.
109. Attributing the difficulties to the "different view" on the part of Mr Oueik and his manager as to what was permitted in a work zone is not credible. Mr Oueik was the Mayor with the policy focus on parking, as the Inquiry heard at length, and the suggestion that he was mistaken about what could and could not occur within a work zone is simply not credible. Taking the remaining submissions at [155] of Mr Oueik's submission in turn, and for the reasons already stated both above and in my principal submissions:
 - a. Although Mr Oueik had an interest and used his best endeavours to solve parking problems across Auburn Council, he had a particular focus on Al Faisal College for reasons made clear by Mr Lawrence. It presented a particular challenge and the solution to that was that it be dealt with differently to other schools. Al Faisal was the subject of directions from management, ie given by Mr Lawrence, that it be treated differently on the basis that it was "self-regulating".
 - b. In the case of Park Road, Mr Oueik gave the clearest indication to Mr Lawrence that no rangers were to come to his site and Mr Lawrence and Mr Brisby. This was an inappropriate descent into operational matters in circumstances where Mr Oueik had a clear personal interest. It is particularly unfortunate that senior Council staff, and in particular Mr Brisby, saw this as the most effective way for confrontation to be avoided between Mr Oueik, his staff and the Council Rangers.

Miscellaneous Matters – Law Reform

Whistle-blower Protection

110. The submissions of Ms Simms concerning whistle-blower protection are largely supported.
111. It is an unfortunate postscript to this inquiry that a number of the Council Rangers who reported their concerns to then Councillor Simms and who gave evidence at the inquiry have been suspended.

8th Floor

Wentworth Chambers

13 December 2016

Paul G Bolster

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Auburn City Council Inquiry