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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE JERROLD CRIPPS QC, COMMISSIONER

PUBLIC HEARING

OPERATION ATLAS

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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON MONDAY, 25 FEBRUARY 2008

AT 2.01 PM

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THE COMMISSIONER: Yes.

<JOHN RANDALL GILBERT:

[2.01 pm]

THE COMMISSIONER: Mr Gilbert, you're still under oath?
---I understand.

10 MRS NASH: Commissioner, just before you resume, Mrs Nash, I seek your
leave to appear on behalf of Mr Jonovski, and Zeki Esen.

THE COMMISSIONER: They're the councillors?

MRS NASH: Councillors, yes.

THE COMMISSIONER: I think I granted that leave.

MRS NASH: No, I think that was granted to a Mr Quakko.

20 THE COMMISSIONER: Yes it was, they've changed?

MRS NASH: That's correct, yes.

THE COMMISSIONER: Yes.

MRS NASH: Thank you.

30 MR HEMMINGS: Mr Gilbert, with respect to section 94 opposition, was
there a program in the computer with respect to the calculation of section 94
contributions?---Yes, there is.

And Beth Morgan had the authority to determine section 94 contributions?
---Yes.

She had the authority to determine those in relation to the question
development?---Yes, she would have.

40 Would have a look at tab 41, folio 9? You sent an email to Beth Morgan to
Frank Vellar?---Yes.

Dated 4 August?---Yes.

She purports to say "Okay, these are the contributions payable for each
stage, don't have a heart attack. I will be trying to get J G to agree to try to
release of O Correct." Do you recall that?---Yes.

You see that?---I see that, yes.

Did she speak to you following this email about agreeing to changing the condition in the program from payment of construction certificate to payment at the release at the Occupation Certificate?---As I recall, yes.

Why was it necessary to get your agreement?---I believe I have the delegated authority to agree to that.

THE COMMISSIONER: She didn't?---That's correct.

10

Why didn't she have it?---I don't believe it's in her delegations.

What's on her delegations?---To determine money owed to the councils.

MR HEMMINGS: For the section 94 contributions is determination of money payable to the council?---Yes it is.

20

And so she had, I suggest to you the delegation to determine a cash contribution that was consistent with the Contributions Plan?---That's correct.

THE COMMISSIONER: What you're telling me if I'm correct, you say that she didn't have the authority to vary the conditions since it was paid, that's section 94 on occupation instead of on corruption?---That's correct, Commissioner.

Construction commencement, so you believed you had that?---Yes Commissioner.

30

Did you exercise that?---In that circumstances I probably did, yes.

What did they put forward to you that persuaded you that you should give them that dispensation?---It was not so much that one, but others in the City Centre that had been agreed to as well, Commissioner.

40

You mean if someone does something then it might be right or you don't care, so long as it's been done once and keeps on being done?

---Commissioner, it was on or around this time I had had a discussion with the General Manager at the time who had asked me on another one whether I had any concern with, and I indicated I didn't. My view is that the - there is the issue of getting some certainty into development, is often of greater value to a council rather than getting money into it to pay a Construction Certificate stage where the development may not proceed or be delayed. There was greater confidence in the city if you have development occurring, and by obtaining an Occupation Certificate there is an increase potential that the development will in effect take off.

Is that why you're saying you took it as a policy decision that you give people this right to pay the money on occupation as opposed to Construction Certificate?---In terms of the City Centre, Commissioner, yes, and the count section 94(A) plan for the City Centre also requires the Occupation Certificate now.

MR HEMMINGS: Let's go back to 4 August 2004, the Contribution Plan provided the payment as at Contribution Certificate stage, did it not?
---Yes, it did.

10

You had no authority to alter a condition and override the program merely because you thought it was appropriate, I suggest?---No, I believe I had the authority and my delegations that in the financial section that enabled me to do it, yes.

THE COMMISSIONER: Does that mean that you thought that the - this money has to be paid pursuant to a plan, doesn't it?---Yes it does.

20

S.94(B), and do you say that the terms of that plan invested you with the authority to vary?---The plan has capacity for council to vary, yes.

Including when the money is payable?---Yes.

MR HEMMINGS: Can you direct my attention to that?---I don't have it - I don't have a copy of the old Contributions Plan with me.

You're aware, are you not of the council's legal obligation to only determine a section 94 contribution in accordance with the Contribution Plan?---That's correct.

30

Correct me if I'm wrong, my instruction is that the Contributions Plan did not include such a discretion. You think there was?---I believe there was, yes.

Did you advise Ms Morgan in writing as to whether or not she had your concurrence to amend the condition to make it occupation - to the stage rather than construction stage?---I do not recall.

40

You said you had a look at the file, the electronic folder at a later stage, could you find any record of you - - -?---No, I did not.

This practice of allowing developers to change from Contribution Certificate stage to Occupational Certificate stage was something of fairly recent occurrence in or about 2005, was it not?---Yes it was.

Do you know when the first time it happened and which property it was that it was granted?---I couldn't be absolutely sure, but one of them was - would have been the landmark development in Crown Street.

Can you assist me here, my instructions are that one of the developments were that was granted, and I think it was Crown Street, the building has been partially completed, and it's now some years since the work commenced, the council has not yet been paid any section 94 contribution? ---That is my understanding when I left there, yes.

THE COMMISSIONER: What development was that?---I think that was the landmark one.

10

MR HEMMINGS: What is the landmark development?---Residential, mixed use, residential.

High density?---Yes.

Can you recall on that - this is not a memory test, but can you recall approximately when the consent was granted?---Not with accuracy. 2003/2004, maybe a little bit earlier, I'm not sure. Work started around that time.

20

Is it substantially or almost complete?---I believe it is complete.

Is it partially occupied?---Partially occupied, yes.

But not fully occupied?---That's correct.

Because it's not fully occupied, years have gone by and the council hasn't received a dollar in section 94 contributions?---I don't know whether that's the case at this stage.

30

THE COMMISSIONER: But it was when you left?---Yes it was when I left.

MR HEMMINGS: Did you take that into account that that might happen when you decided that it might be appropriate to depart from the Construction Certificate date of payment to Occupation Certificate? ---At the time of agreeing to the one you referred to earlier, being the Quattro one, I wasn't aware that that was the case of this one.

40

THE COMMISSIONER: What are these - I thought these occupation certificates were just given for the development and they weren't given unless the development was capable of being wholly occupied but you can get parts of them, can you?---You can get a partial occupation certificate, yes.

MR HEMMINGS: The condition amendment that you approved, did it say partial or complete occupation?---It was occupation certificate, as I recall.

So the whole building?---Yes.

Do you really think that was reasonable to amend a condition that way?
---If - if the certainty is there, yes, in the development to proceed.

The Quattro development was a massive development, wasn't it?
---Yes, it was.

10 When you agreed with Beth Morgan to change it to occupation certificate, did you give consideration that there might be occupation certificates for part of that development?---No.

Would you go to tab 10.

THE COMMISSIONER: 10?

MR HEMMINGS: Thank you, Commissioner.

20 Folio 10 of the same tab?---Yes.

This is an email from Beth Morgan to Frank Vellar, 8 August. If you go down, "Tessa has been pretty quiet." See that line?---Yes.

"Tessa has been pretty quiet, only one phone call and one email. Rod has chased John re Quattro so you're not forgotten, my dear." In or about 8 August 2005, was Mr Oxley chasing you about the Quattro approval?
---It - it would appear so, yes.

30 Do you know in what way he was chasing you or what he was seeking to have happen?---As I have mentioned earlier, Mr Oxley was always keen to ensure that developments were determined in a prudent, timely manner.

Was he putting pressure upon you to approve the application, in your opinion?---There - there was always pressure on decision making on - - -

Was he putting pressure on you at that stage in August to approve the Quattro development?---Yes.

40 Go to tab 43, please. On 11 August, if you have a look at folios 1 and 2?
---Yes.

There were emails from Beth Morgan to Mr Oxley with a copy to you and Mr Zwicker?---Yes.

She actually copies you other documents. The original message, "Hi Beth, tried to call but no answer at design. I'm currently assessing the Quattro, however this will take some time. I will get a response to you as soon as possible. It is unlikely to be this week. Cheers." Beth Morgan to Oxley

with a copy to you, re Quattro. "Rod, further to the information provided to you yesterday by John Gilbert", can you tell the Commission what information you gave to Mr Oxley about Quattro on or about 11 August? ---As I recall, it would have been information as to what was outstanding for the matter to be determined.

"The draft conditions for Quattro are loaded", that means loaded into the computer I assume?---That's correct.

10 "Except for the RTA conditions. We have just been advised it is unlikely RTA will be providing their comments." If you go over to folio 6, starting at the bottom, Rod Oxley to Morgan re Quattro, "Thanks, well done. A major one out of the way."

THE COMMISSIONER: Sorry, where's this?

MR HEMMINGS: This is folio numbered 6 in the same tab.

THE COMMISSIONER: Yes.

20

MR HEMMINGS: Did you see that?---That's the first time I've seen that.

Beg your pardon?---That's the first time.

That's the first time you've seen that. Did you have a discussion with Ms Morgan about conversation between her and Mr Oxley on 17 August? ---Not that I recall.

30 There was a flurry of telephone calls and emails between you and Mr Vellar on 17 and 18 August, was there not?---Yes, I believe - - -

A large number?---There's a number there that I - that I have seen. Probably some are voicemails. It - it wasn't uncommon for me, if someone rang me, to divert the message to voicemail.

18 August was the date that the application was actually determined and approved, was it not?---Yes.

40 You had a number of calls to Mr Gilbert on that day?---To?
Before and after the approval, I suggest?---To Mr Vellar?

Mr Vellar, I'm sorry?---Yes, that's correct.

Mr Vellar, I'm sorry?---Yes, that's correct.

Before and after?---That's correct.

Why did you have conversations with Mr Vellar on that day?---I don't precisely recall but I do know that I spoke to him in the evening to let him know that the consent was finalised and as I usually do with anyone that I'm involved with, I ask them whether they want a copy posted, whether they want to pick it up or whether they'd like a fax copy and it is most likely that I did talk to him about that as well because I wasn't aware whether Beth had been in contact with him on it or not. And I do that with most applications I'm involved with.

10 Could the witness be shown a copy of exhibit 23. Mr Vellar called you at 3.14, did he not?---Yes, he did.

The determination, if you look further down, was actually at 3.37?---Yes.

And it finished at 4.06, that right?---That's correct, yes.

Who was in the room with you at the time?---It wasn't in my office. That was - it was generated from my PA's computer because my computer, as I recall, wouldn't log me on to that particular aspect.

20

So where were you?---At my PA's computer.

But physically, where were you?---Just outside my office.

Outside your office?---That's right.

What, in the hallway or what?---Well, she's situated just outside the door of my office.

30 Why were you outside the door of your office?---Because my computer wouldn't log on to enable me to generate a signature. It does happen from time to time.

Was Ms Morgan with you?---Yes.

She said she actually made the determination itself in her evidence?
---I - well, I logged on and she, in effect, ticked the box while I was there and then I asked her to check the format of it when she was checking, because the format can change when you log on.

40

Do you keep a handwritten diary of the events of the day at Wollongong City Council?---Generally do, yes.

And you did on 18 August?---I would say so, yes.

Then your handwritten notes of the various things that have happened together with the time that you spoke to people in the council, there's not one mention of the Quattro determination I suggest?

THE COMMISSIONER: You better show it to him.

THE WITNESS: It wouldn't normally be the sort of thing I would write down that I determined it then, no.

Would you have a look at that?---Yes.

Do you recognise that as a copy of your diary of 18 August?---Yes, it is.

10

That's your handwriting?---That is my handwriting.

And you record the times that you speak to various people, including at 3.30 you were having a conference with Leanne Grogan, is that right?
---Yes, that's correct.

Who's Leanne Grogan?---A person from the Australian Industries Group.

Where did you have that meeting?---Well, I've written 3.30pm here.

20

Where did you have that - - -?---I would assume my office.

At 3.37 you were outside your office in the hallway trying to approve the application, is that right?---That - that was correct, yes. That's what it shows on that log.

Was Ms Grogan sitting there watching it, was she?

30 MR SKINNER: Well, with the greatest respect, some careful exploration. I understanding counsel assisting is getting times from exhibit 23. The witness said certain things about who was using the computer. No doubt these times and minutes come out of the computer and I won't suggest - - -

THE COMMISSIONER: What's the objection?

MR SKINNER: The objection is that the question just put is not well founded on the evidence today.

THE COMMISSIONER: I'll allow it.

40

MR HEMMINGS: Let's clarify. The computer tells us, if you look at this document - - -

THE COMMISSIONER: Which document?

MR HEMMINGS: Exhibit 23. This one here, Commissioner.

At 2.35, Mr Vellar called you on the phone, is that right?---I don't have that in front of me.

THE COMMISSIONER: You better show him that.

MR HEMMINGS: 18 August?---Yes.

3.35, Mr Vellar calls you?---Yes, that's what it says.

10 Where were you when he called you?---I can't recall but I would assume my office or nearby.

3.36, Ms Morgan loaded into the computer the contribution fees?---Yes.

Where'd she do that?---I - I don't know.

On your computer?---I would doubt it.

20 3.36, assessment of the application completed by Beth Morgan. That would be the tick off, wouldn't it, on the computer?---I would say so, yes.

3.37, conditional consent started by yourself, is that right?---That's what it shows here, yes.

What did you do at 3.37?---That would be when you would log on.

When you?---When you go in there to - I don't know how it records the time but I would imagine it's when it logs - when you log in.

30 At 4.06, that process was completed?---Yes, that's correct.

Your diary record shows that at 15.30 you were having a conference with Leanne Grogan?---That's correct.

Please explain to the Commission whether your handwritten note of your diary is correct. Was it?---I believe it to be very close, yes.

40 How can you be saying that you were doing these things at 3.37 when you were in conference with Leanne Grogan?---Seven minutes after I was in conference with Leanne Grogan.

Beg your pardon?---It's seven minutes after.

So in that seven minute period you say you completed that conference, did you?---I don't recall the details of when I completed it precisely but I do remember it wasn't a long meeting.

Looking at DA2005412?---Yeah.

Do you know what it was about?---I don't recall, no. I - I think it was - actually, I do recall. It was to do with her home extensions and rural fire services conditions that were requiring conditions that she thought were unreasonable.

10 Why is there no mention of the Quattro development at all on that day?
---Mainly because to me it wasn't something that - other than routine, the finalisation of it, and whereas these other bits and pieces were things that were occurring that I just took notes on.

Was just routine to approve this large development?---It is partly routine, yes.

Now you told me earlier in my examination of you that you'd made no assessment of the SEPP 1 objection on the merits?---I don't recall on the SEPP 1 no.

20 I think you did - - -?---I recall that I said that to you, yes.

THE COMMISSIONER: Sorry, what's the answer?---The answer is correct, yes.

MR HEMMINGS: I suggest to you that if you were going to issue a consent, that was one of the most important matters that you would have to look for to ensure that you had the power to approve the application?
---SEPP 1, yes.

30 There wasn't one, was there?---I don't recall one, no.

Do you now say whether or not you had the delegated power to approve the application?---Did I have the authority to - to determine it?

Yes?---Yes, I did.

Without the SEPP 1 objection?---The - the SEPP 1 objection would be relevant to it, yes.

40 THE COMMISSIONER: Not relevant, it'd be determinative of it, wouldn't it?---Yes, that's correct, Commissioner.

MR HEMMINGS: And there was none?---Not that I recall.

THE COMMISSIONER: How did you think you had delegated authority to grant the development?---Commissioner, I can only say that I cannot recall the SEPP 1 aspect of it on signing off on that.

What are you telling me now, that you might have assessed it under SEPP 1 but you've forgotten?---No, I'm not saying that, Commissioner. I just do not recall it.

I'll mark that last exhibit as exhibit 45, the diary note.

**#EXHIBIT 45 - EXTRACT FROM DIARY OF JOHN GILBERT
18/08/2005.**

10

MR HEMMINGS: Ms Morgan has told this Commission that at that time there was no report, assessment or recommendation in relation to the application itself, do you recall that?---No, I don't recall that but - - -

At the time you proceeded to approve the application, was there in existence, to your knowledge, a report, assessment or recommendation from any officer in relation to the development application itself?---I don't specifically recall one.

20

There wasn't, was there?---Not to my knowledge.

How on Earth could you approve a development of the magnitude of the subject one without a report which assesses the application and makes recommendations?---Commissioner, the - the process of setting up reports for applications was different from all offices and it was an issue that was always of concern to me there and the introduction of a process or a procedures manual was done in 2005 because there were variations like this. Reports can take different formats and often do and it was preferable to standardise reporting and that has been done at the council since 2005, introduced in 2006 because there were variations in the way people assessed and gathered the information.

30

THE COMMISSIONER: That wasn't the question you were asked. The question was "How could you have done that without a report setting out the terms of the assessment". That's what you were asked, not whether someone might have done something- - -?---A report in itself isn't mandatory, as long as - but it is certainly preferable as it walks you through the assessment process under 79C.

40

A hundred million dollar development?---Yes, Commissioner.

Not unusual to assess it without any report?---Preferable to have a report, Commissioner.

Yes, unusual to assess it without any report. Is that what you're telling me? ---Not normal, Commissioner.

So if it was not normal what was it that justified it in this case?---The events leading up to it, the information that had been involved, the meetings that have been in attendance with and information that was provided in general. My involvement in the process of the development.

Well, the impression I get and please correct me if I'm wrong- - - ?
---Certainly.

10 - - -is it somewhere earlier in the piece someone decided this development was going to go ahead and thereafter everyone just worked towards that end?---Is that a mistaken view of what was taking place?---It's a view that could be taken, that's for sure.

What is there that's contrary to that view that you'd like me to consider?
---I don't think there is anything contrary to that view.

MR HEMMINGS: Could the witness be shown exhibit 24?

20 THE COMMISSIONER: What's 24, just- - -

MR HEMMINGS: Exhibit 24 is the conversation between Frank Vellar and a female in relation to Mr Gilbert and Mr Oxley.

THE WITNESS: Yes.

30 MR HEMMINGS: Mr Vellar in the, just before halfway down, he says "None of my applications have ever been signed by her" he's talking about Beth Morgan "None. How much I was concerned about, you know, anyone saying 'My years down the track, Oh, she did me a favour', all right. The application was a huge application, all right, I never ever want it to come back and bite me, you know, for whatever reasons, all right". And he said "John Gilbert under the instructions of Rod Oxley sought permission to go through it and sign off it only if he felt it was practicable for him to sign off". I'll leave the rest in a moment but did you have a conversation with Rod Oxley seeking permission to be the person who signed off on the Quattro Development?---I was instructed to follow through and ensure that the matter was finalised by Mr Oxley, yes.

40 THE COMMISSIONER: By "finalised" you mean approved?---That was the intention I believe, yes.

MR HEMMINGS: Personally?---Sorry?

Personally? You sign off personally?---Well, I don't remember the exact words that we use at the time but it certainly - Mr Oxley wanted me to have carrier of the development, yes.

That's what he did. "In other words it was scrutinized what she had done, all right, how to approve them. Scrutinize whether I was receiving any favouritism, okay". Did you scrutinize the application at all on the date that you had approved it?---Leading up to the date I approved it, yes and also the draft conditions before they were finalised with the exception of the information that wasn't loaded.

10 When you said in your response to the questions asked by the Commissioner earlier "That you only had a supervisory role in the determination of the application generally and you hadn't looked to the merits of the proposal" are you saying something different now?
---No, I'm not.

Did you sign off on the application having satisfied yourself the consent should be issued or did you just merely rely upon the work done by someone else?---I relied on a combination of what was on the system and the advice that was provided to me and what I could see of the outcome and my involvement in the development.

20 Was it your personal decision, notwithstanding all the matters I've put to you today, that it should proceed for determination under delegated authority and not go to the Council?---Was it my personal- - -

Was it your decision?---I don't believe it was the decision that I made but it was an outcome that was - that enabled it to be signed off, yes.

30 After the complaints were made where it became public knowledge that the consent of issue the Ombudsman was involved, was he not?---I believe so, yes.

Well, you know so because he contacted you, did he not?---I don't recall that but it's possible, I have dealt with the Ombudsman on a number of occasions.

In August 2006 you emailed Ms Morgan and asked if Councils were advised, this one was to be determined before it was and I think I've referred to you that email already?---You have before, yes.

40 Did you learn later that Councillor Brown only found out about the approval after the approval?---To my recollection I only became aware of that during the course of this Commission's inquiry.

I just want to make it perfectly clear because I'll be asking Mr Oxley questions later. When there were inquiries from Mr Knowles or Councillor Brown did Mr Oxley make inquiries of you as to the procedures that were adopted to proceed with an approval of this application by delegation rather than by the Council itself?---Not that I recall.

I want to ask you some questions about the North Beach Bathers Pavilion Development. That was a joint development proposed between Council and Mr Vellar, was it not?---That's correct.

Mr Vellar I suggest has given evidence about conversations with you and Mr Oxley about Ms Morgan as being a suitable person to be appointed as the Assessment Officer on that development. Do you remember giving- - - ?---I don't recall but that could be the case, yes.

10 Do you recall a conversation with Mr Vellar about Ms Morgan being appointed as an appropriate person to be the Assessment Officer?

---No, I don't recall a conversation.

Are you saying it didn't happen?---No, I'm not saying it didn't happen, I don't recall it.

Were you instrumental in having her appointed as the Assessment Officer?

---Not that I recall. Normally the allocation of staff that would be by the Assistant Manager for that area.

20

I know it's normal but I'm asking you, did you have any part to play?---Not that I recall, no.

Did you have a conversation with Mr Oxley about whether she would be an appropriate person to be appointed?---Not - not that I can recall but I'm not saying it didn't happen, I just cannot recall it.

Do you know that she was appointed as the Assessment Officer?---Yes.

30 And do you know what year it was that she was appointed - Do you know that she was appointed as the Assessment Officer?---Yes.

Do you know what year she was appointed as the Assessment Officer?

---no, I don't know the year.

Was it 2004?---I would guess 2004, yes.

At some later time she ceased as the Assessment Officer, was she not?

40 ---That's correct, her role changed in the division. She was in an acting role from late 2005 as an Assistant Manager and then was appointed to that position in 2006.

There was no doubt in your mind that once she was acting as the Assessment Officer for North Beach Bathers Pavilion that she was in some sort of relationship with Mr Vellar?---What year?

In 2004, 2005 and 2006?---The same relationship, friendship that applied to Quattro, yes.

This again was a sensitive development proposal, was it not?---It was - yes it was, yes.

Did you think it was appropriate, even if you had no knowledge of a sexual relationship with Mr Vellar, that Ms Morgan should be the Assessment Officer on that proposal?---At the time it seemed appropriate.

10 Did it later seem inappropriate?---The proposal in itself slowed down fairly well because of the heritage issue so it wasn't one of the ones that was on the agenda all that much, but the view would be - remain the same through 2005, yes.

In May 2005 did council receive legal advice to the effect that it had a conflict of interest in one of its officers assessing this application?---I'm not aware of that.

You're sure that you're not aware of any - - ?---I don't recall it, no.

20 Do you have any discussion with Mr Broyd about appointing an external consultant. I remember Mr Broyd wanting to engage in external consulting but I don't recall the detail of it.

Did he give you any reasons?---Not that I can recall.

THE COMMISSIONER: What's exhibit 14?

30 MR HEMMINGS: Would you go to 45, this is the Pavilion's file. Firstly tab 45. I want to suggest to you that's the legal advice received by council. Had you seen that before?---I don't believe so, no.

Thank you. Would you go to tab 48. This is a memo from Peter Coyte, Manager, Property Services and Projects, Wollongong City Council. You know Mr Coyte?---Yes I do.

Mr Vellar has told us that the writing in the front is his writing, WCC highly confidential, but then you'll see some other note "Noted, DRB 25th of the 5th, and then John, Ron and Beth"?---Yes.

40 I suggest to you that that email went to you?---I would say so, yes.

And it refers to the legal advice of 9 May?---Yes it does.

And down the bottom "The council resolves to issue a conditional consent of the required scale for the building to reduce, effectively reduced to first base. The advice was that the company would not have any claim for compensation of Councillor Vellar to refuse the Development Application when (indistinct) not acceptable to the company. Council's legal

representation did express the view that he thought it prudent for council to seek assessment on an independent external consultant in view by what would be conceived as a conflict of interest in council's roles and consent authority". Do you recall seeing that in May 2005?---Not explicitly, but I think I would have, yes.

Go to tab 52, see that?---Yes.

And there's a memo from Mr Broyd, I think it's a memo?---Email.

10

I think it's a copy of an email which was - a copy of a memo that was forwarded on as a - copy of a memo forwarded as an email, was it not?
---It looks to me like it's an email, but - - -

And David Broyd made certificate recommendations about engaging an independent planning consultant, and it came from Diane Ball on behalf of David Broyd to Rod Oxley with a copy to you?---Yes.

20

And Beth Morgan apparently forwarded it on to Frank Vellar on 25 May?
---It would appear so, yes.

Having been made aware of that, why didn't you take Ms Morgan off as the Assessment officer for the pavilions?---I - I cannot recall why.

You should have, shouldn't you?---It would be preferable if the council dev where they're involved to use an independent consultant, yes.

30

Would you go over to 53, Ms Morgan sent that email onto Mr Vellar who responded, and he spoke to R O, Mr Oxley "All okay, tell D B to eff off or he will be chipped" Did you have a discussion with either Mr Oxley or Mr Broyd - discussions which took place between Mr Oxley and Mr Broyd?
---Not that I can recall.

Can you give us any reason why you didn't take Ms Morgan off as Assessment Officer?---No I can't.

You should have, shouldn't you?---As I said earlier, it would be more appropriate where council is involved to use an independent planner, yes.

40

THE COMMISSIONER: Mr Hemmings, it may not be - I never understood this conflict of interest statement when it is the council assessing its own Development Application. The conflict of interest is said to arise where some person in law would be regarded as probably behaving partially.

MR HEMMINGS: Yes.

THE COMMISSIONER: how can that be said of a councillor that is told by the Statute it's got to assess Development Applications including its own?

People might say perhaps they shouldn't, but that's the law, and how can they ever say that sort of conflict of interest? I've never understood that, but I don't think that was - - -

MR HEMMINGS: What you're alluding to is the common problem that council is making Development Applications to themselves when they have a statutory duty to do so, of course they must assess them. There are practices and procedures laid down by the department as to how council should observe the rules of probity and engage independent assessment.

10

THE COMMISSIONER: Yes I know, but when you're talking about propriety as opposed to - anyway, I don't know think that was Mr Gilbert talk, but it's a view lingers in my mind.

MR HEMMINGS: Mr Gilbert, so far as your relationship with Mr Vellar is concerned, you've been to lunch with him on a number of occasions?
---That's correct.

20 I think Mr Vellar said about eight. Did you hear him say that?---No, I didn't hear him say that, but that would be about that correct, I'd agree with that.

Did you have dinner dates with him in the pre-development period on Quattro?---I - I would say yes.

Did you discuss - - -

MR SKINNER: I'm sorry, just one moment. Dinner dates may have a certain ring to it. It was lunch.

30 THE COMMISSIONER: Dinner now. I'll allow the question.

MR HEMMINGS: Did you have dinner dates with him in the evening?
---In the evening? I don't believe in the evening, no.

THE COMMISSIONER: (Indistinct) evening meal or lunch or what.

MR HEMMINGS: How many courses did he have.

40 Mr Gilbert, the period of pre-development application assessment, did you have contact with Mr Vellar in luncheon or dinner engagements solely with him being present?---I don't think I would have anything solely with him being present, no. A - no dinner dates with him, thinking it through.

Did you have luncheon or dinner engagements with him with Tessa present or one of the Sebvell employees?---Not that I recall.

Did you have dinner or luncheon dates with him with Beth Morgan present?
---Yes.

Did you discuss the progress and assessment of the Quattro development on those occasions?---Not that I recall.

You visited his property at Oberon?---That's correct.

Was Ms Morgan present as well?---Yes.

10 When was that?---I can't be exactly sure of the date but about September 2006.

Have you received any gifts from Mr Vellar?---Yes, I received some wine.

Did you declare that?---No, I didn't.

Why not?---I - I don't know.

You do know, don't you?---No.

20 You had a duty to declare it, did you not?---It would have been prudent to have declared it, yes.

THE COMMISSIONER: Well, I think you were asked whether you thought you had a duty to do it?---Commissioner, I don't believe I had a duty but I would have, had I considered it.

I think I'll let that one, as they say, go through to the keeper.

30 MR HEMMINGS: Mr Gilbert, you advised Mr Broyd at some stage of your awareness that Ms Morgan had an intention to leave the council and set up private practice?---That's correct.

Do you know when that was?---It would have been early 2005 if I had to put a date on it.

She said to you, I suggest, that she was going to stay for another two or three months?---She was looking at employment - - -

40 Just answer the question?---Okay, my understanding, she was going to - she was looking at leaving and there was a few months then she was going, yes.

In fact, she stayed beyond that period of time, did she not?---That's correct.

Mr Vellar has testified that you were also discussing leaving the council about this time and going into private practice with her?---I heard that mentioned. That was the first of - of that to me, that was news to me. I was considering leaving but - - -

You which?---I was considering leaving but I wasn't considering going into practice with her, or anyone for that matter.

When were you considering leaving?---Around about the same time. About early to mid 2005.

Why were you considering leaving?---I wasn't enjoying the work environment.

10 Was that because of Mr Oxley's interference?---Not entirely, no.

Partly?---Partly, yes.

A significant part?---It had influence, yes.

Who did you tell that you might be leaving?---I didn't think I told anyone. I can only assume that people probably read it in my attitude.

20 Are you saying that Mr Vellar is telling an untruth?---No, I'm not.

We've seen Ms Morgan's emails, amongst other persons, that Mr Vellar might be a potential client if she left the council. Did you have a conversation with Mr Vellar as to him being a potential client - - -?
---No, I did not.

- - - when you left the council?---No, I did not.

Did you give consideration to that?---No, I did not.

30 Where did you intend to set up practice if you did leave the council?
---I had no intention of setting up a practice. It was an option that would be there. I considered it for about 15 seconds.

In 2006, your diary has a note, I suggest, in which Ms Morgan is - better still, have a look at this document. Do you remember getting a birthday card from Ms Morgan?---Yes, I do.

Is this a copy of the card?---It would appear so, yes.

40 Do you know when you got that?---It'd be my birthday. I don't know exactly what - probably - - -

2006?---2006, yes.

That's about 11 September, is it not?---That's correct.

It says "Secret's out", see that?---Yes.

Do you know what she was referring to there?---Yes, my birthday.

"The secret's out"?---Yes.

It's a secret that you had a birthday?---I discouraged my PA to make any noise about my birthday, yes.

THE COMMISSIONER: I think we're starting to get to the bottom of the barrel here.

10

MR HEMMINGS: You mentioned Bryce Short as one of the employees?
---No, I didn't.

Is Bryce Short an employee?---He was an employee, yes.

When?---From when I was working there until when I left. I believe he's still there. I believe he's still there at the council, Bryce Short.

What was his position?---He was a subdivision engineer.

20

Did he ever make a complaint to you about Ms Morgan's conduct in relation to developers?---Not that I recall.

He was a colleague of Ms Morgan between 2003 and 2007, was he not?
---Yes, work colleague, yes.

Was he involved at any time, to your knowledge, on a construction certificate in relation to Waynote Place, Five Islands Road, Unanderra?
---I believe he was involved, yes.

30

I suggest to you that from 12 May 2006 he approached you concerning Ms Morgan forwarding a copy of documents to applicants for consent. Do you recall that?---I don't recall it.

Would you have a look at that?---Page- - -

Let's go to the first page. He says, he gives his position?---Yes.

40 Paragraph 7, he says his immediate supervisor was Mark Biondich. Is that right?---That's correct.

He talks about knowing Ms Morgan and he then refers to being interviewed by the Commission and then he says he had concerns about her behaviour in relation to three matters. In relation to paragraph 12, Old Springhill Road, Coniston, the five-lot subdivision. Mr Vellar was the developer?---Yes.

Are you familiar with that development at all?---Yes, I am.

Go to the page at 16. He received a call from Tessa Toumey?---Yes.

This was an argument about tree removal. Is that right?---Yes.

Do you have any knowledge of this?---Yes, I have some knowledge on this.

Down the bottom, paragraph 19 “Immediately after talking to Tessa on 14 September I went to John Gilbert’s office”. Did he go to you, see you on 14 September?---I do recall him coming in, yes.

10

“Only he and I were present. I had a conversation with him to the effect ‘Beth is leaking information to Tessa or Frank Vellar and she had to stop it’. And you said “Yeah - yeah, I’ll take - I will take care of it”. Did you say that or words to that effect?---I don’t recall the detail of the conversation but it was along the lines of what’s indicated there by Mr Short and I don’t know whether I said “Yeah, I’ll take care of it”. I do recall him coming in and saying something.

20

In September 2005 that was after the approval in Quattro but it was prior to Ms Morgan’s long association with the Pavilions Development, was it not? ---Yes, that would - yes, that’d be right.

She was leaking (indistinct) at that time?---Yes, she would have been.

There’s an accusation she was leaking information to Tessa and Frank Vellar from one of Council’s employees?---That’s what’s shown here, yes.

30

What did you do about that complaint?---I - I do not recall what I did with that.

You didn’t do anything, did you?---I don’t recall.

Did you tell Mr Broyd?---Mr Broyd wouldn’t have been working there then.

Gone by then, has he?---Yes.

Did you tell Mr Oxley?---No, I wouldn’t have, I don’t think, I don’t.

40

Then there was the Waynote Place one, again, that’s one of the companies associated with Vellar Constructions, was it?---I believe so, yes.

There was a complaint about Ms Morgan, her conduct in relation to the application and paragraph 24. He approached you about the matter? ---Yes.

Made a complaint to you?---I don’t recall- - -

You don't recall?---any complaint.

He said you said "I'm aware of the issue and will do something about it".
You don't recall anything about that?---No, I recall about the earlier one,
about the trees but not this one.

I tender that report.

10 **#EXHIBIT 46 - STATEMENT OF BRYCE SHORT
DATED 11/02/2008.**

MR HEMMINGS: Would you have a look at this statement. It's a
statement from Mark Daniel Biondich dated 15 February 2008?
---Yes.

Have you got that?---Yes, I have.

20 Paragraph 4 he sets out his position at the time he was there and he resigned
his position of Development Manager of Subdivision. "In 2005 one of my
staff, Mr Bryce Short was assessing an application to subdivide land in
Old Springfield Road, Coniston. The land was labelled 2005101. The
developer behind this application was Mr Frank Vellar. He was a developer
in the Wollongong area. At this time I was aware of rumours that one of the
Council planners, Beth Morgan was a friend of Mr Vellar. In September
2001 Bryce informed me he had suspected that confidential information
about DA 2005101 had been passed to Tessa Tohmey, an employer of
Mr Vellar. He particularly informed me that it appeared that Ms Tohmey
30 was privy to an internal file note relating to the proposed removal of fig
trees from the site. Based on the rumours that had been circulating about
Mr Vellar and her I suspect Ms Morgan had provided a file note to
Mr Vellar or his employee". He said "Beth Morgan has no official role in
assessing DA 2005101 It was not her role to assess the subdivision". Is that
right?---I'd agree, yes.

"As far as I'm aware she had no work-related reason to access Council
information relating to this subdivision". Would that be correct?
---Yes, I believe so.

40 "Within a day or 2 of Bryce's information I felt it was my duty as an
employee of Council to inform my manager, Mr John Gilbert of the
situation and when to John's office (indistinct) on any formal discussion of
the matter. No notes were recorded. I didn't recall the exact words I used
but I said to John something to the effect of that 'I believe Beth was passing
on internal file notes to the applicant. If Council has changed its mind on a
matter that we could be liable' - the conversation claims - 'from the
applicant as they may have progressed their development on the information

they received from Beth'. John told me he would look into the matter and I left the issue at that, all right, because I felt I'd carried out my duties and passed the information up, gone up the line of management". Do you recall the conversation?---I don't recall the conversation, no.

So it follows you did nothing in relation- - - ?---No - no, I didn't do anything. I don't recall doing anything on that.

I tender that.

10

THE COMMISSIONER: 47.

**#EXHIBIT 47 - STATEMENT OF MARK BIONDICH
DATED 15/02/2008.**

MR HEMMINGS: I tender a statement by Ron Zwicker dated 11 February 2008. Do you have that?---No, I don't.

20

This document makes a number of allegations against Mr Oxley as well as Mr Gilbert so that I won't tender it at this stage.

Mr Gilbert, do you have a copy now?---I do.

In paragraph 4 he sets out his period of his employment until mid-2006 and then (5) his current employment with the Council as the City Centre Major Development Manager. You don't dispute any of that, I assume?---No, I don't.

30

(6) he sets out his fiscal roles and responsibilities and (7) when he joined the Council from November 2002, the General Manager for Rod Oxley. From October 2003 until November 2007 my immediate supervisor was John Gilbert who was the Manager, Development Assessment and Compliance?---Yes.

And then at 8, "I've known Beth Morgan since November 2002 when I commenced working for council. At the time I commenced employment with Wollongong City Council, Beth Morgan was a Senior Development Project Officer in the team that I managed. Beth Morgan remained in my team until late 2005 except from time to time when she was seconded to act in the role of Assistant Manager, Legal and Administration within the Development Assessment Client Division during which time she did not report to me. In January 2006, Beth was made Acting Assistant Manager of the Administration Team within the Development Assessment and Compliance Division and in that role, Beth Morgan reported directly to the manager Development Assessment and Compliance, John Gilbert." Is that a correct statement?---Yes, that's correct.

40

"After commencing this position, Beth Morgan made inquiries about a development application and related matters on properties involving a developer called Frank Vellar." Do you know about her making inquiries about development applications relating to matters involving Frank Vellar?

---No, I don't.

10 "Mr Vellar is a prominent developer in the Wollongong area. Given that Beth Morgan is now an Acting Assistant Manager, Administration Team, I do not think she had any professional reason to be inquiring about Mr Vellar's developments. I do not recall the particular inquiries concerning properties within the Wollongong City Council local government area."

THE COMMISSIONER: Well, I've read that paragraph. He couldn't possibly - I mean, you're asking him whether this was - this is a discussion she's meant to have had with Zwicker. Is it said that that was passed on to Gilbert?

20 MR HEMMINGS: Can we have a five minute adjournment so that the witness can read the affidavit right through?

THE COMMISSIONER: Yes, then you can just ask him the questions.

MR HEMMINGS: That might make it quicker.

THE COMMISSIONER: All right.

30 SHORT ADJOURNMENT [3.13 pm]

THE COMMISSIONER: Yes. You're still under oath, Mr Gilbert.

MR HEMMINGS: Mr Gilbert, you've had the opportunity to read that affidavit?---Yes I have.

If I can take you - - -

40 THE COMMISSIONER: I'll mark that exhibit. What is it? 48, is it?

MR HEMMINGS: Yes, 48.

**#EXHIBIT 48 - STATEMENT OF RON ZWICKER
DATED 11/02/2008.**

MR HEMMINGS: Can I take you to paragraph 14?

THE COMMISSIONER: When is this meant to have happened?

MR HEMMINGS: I'm sorry?

THE COMMISSIONER: When is this meant to have happened? 14, when?

MR HEMMINGS: This is in 2006, we believe. I'll ask Mr Gilbert.

10 It's talking about in 2004 DA 2291 and an allegation that he advised you to assign the matter to Mr Burgess. It's obviously talking about the Pavilion's development, isn't it?---Yes.

He said he had a conversation with you. Can you recall approximately when that might've been?---Yes I can, but I - I wouldn't have said 2006, I would've said late 2004.

20 Late 2004, thank you. Did he convey his concerns to you in a conversation about Ms Morgan's relationship with Mr Vellar?---Yes he did.

What did he say to you?---He indicated to me that he felt that it was rumoured that Ms Morgan was in a relationship with Mr Vellar.

Did he say what sort of relationship?---No he did not. It was - it was - I remember it fairly well. He basically raised an eyebrow and said that he's - that she was in a relationship with him.

30 Yes. You said that you said that you would discuss that matter with Beth directly in late 2004?---Yes.

Did you?---As I recall, yes.

Did he ask you to reassign that application to Mark Burgess?---No. He - he would do that. It's a task that he would have assigned and he would reassign, that was done by Mr Zwicker.

Did he discuss it with you, though?---Not that I recall, but he didn't need to.

40 He says he hasn't any recollection of you getting back to him. Did you? ---Sorry?

He says he has no recollection of you getting back to him? ---No, I don't think I did.

Would you go to paragraph 16?---Yes.

He refers to the allocation of Beth Morgan to be the Assessment Officer for the future DA on Quattro, and he refers to the conversation that we've

discussed a number of times about appointing a consultant and then he says "I have no recollection of having any such discussion with Mr Gilbert in relation to this issue."

THE COMMISSIONER: What am I meant to make of that? That he might've, but doesn't remember or that he's - - -

MR HEMMINGS: No, he then goes on to say - - -

10 THE COMMISSIONER: It's not normal practice.

MR HEMMINGS: Yes.

THE COMMISSIONER: It's the same thing, though.

MR SUTHERLAND: Mr Commissioner, could I just note? And we can check the transcript, but I frankly thought that Learned Senior Counsel assisting you put to Mr Gilbert earlier in his evidence that Mr Zwicker had denied - - -

20

MR HEMMINGS: No, he had no recollection of it.

MR SUTHERLAND: If it's 'no recollection', I presume it's - - -

THE COMMISSIONER: We just want to know what he's saying here, not that he's denying it, but he's had no recollection and that it's not 'normal practice'.

30

MR SUTHERLAND: No, not 'normal practice' for developers to be consulted.

THE COMMISSIONER: Yes, that's right, yes.

MR SUTHERLAND: I'll abide transcript.

MR HEMMINGS: Let's make it abundantly clear Mr Zwicker said he had no recollection of any discussion with you. Do you have any recollection at all of discussing with him either before or after 19 July?---To the - yes, I do.

40

Yes and what was that?---Early in the morning on that very issue discussed whether we could use Beth - whether Beth would be appropriate for consultancy and briefly discussed the problem of the consultancy, and the Pathway system. There was about a 5 minute discussion very early one morning. It was in my office.

The Commissioner asked you questions about having discussions with developers and having a say in which planners should be allocated.

Is Mr Zwicker's statement correct that it's not normal practice for developers to be consulted?---Yes, that'd be - that'd be a correct statement.

Why was it appropriate with regard to this particular application?

---It probably gets down to the timing of it and the size of it, the number of resources - the staff resources that we had left at the time.

10 Would it be the reverse? That it was so large and so significant that it would've been more appropriate for an independent consultant?---It draws on more resources because of the Pathway system, having to manage the files in and out. We - we were trying that with some consultancy on smaller projects and it was drawing significantly on resources.

With regard to paragraph 17, I think you've confirmed this, so far as the Design Review Panel if you go over the page to page 8, at the end of paragraph 17, Mr Zwicker said, having referred to the potential problems he sent the email to Broyd with a copy to you. I think you said you recall seeing that?---That was shown early this afternoon - earlier today, yes.

20 Paragraph 18 concerning the Design Review Panel, down at the bottom, after a meeting on 17 January, a series of discussions took place between Broyd, yourself, Rod Oxley, and Fay Steward regarding the Quattro proposal and its height. Do you recall that?---There were meetings, yes.

Paragraph 19 in February 2005 a meeting with Sebvell representatives, Vellar, Sebastian, Tohmey, Kay and Councillor Officers Broyd, yourself and Beth Morgan and Mr Zwicker to discuss the status of the proposal and the height and design were discussed at that meeting, is that right?

---Yes, that's correct.

30 Then if you go over to paragraph 26, he makes certain allegations about Mr Oxley's conduct, but I only want to refer to those where your name is mentioned, 26A "Directions made to John Gilbert, Manager of Development Assessment and Compliance and myself to determine Development Application #2000 and 5561 for a large mixed hotel service department in a residential apartment building at 60-62 Harbour Street, Wollongong, on or prior to 15 July 2005, despite the fact that arrangement of traffic and parking matters were still unresolved." Do you recall that?---Yes I do.

40 Is Mr Zwicker's statement correct that there were directions given to you by Mr Oxley and Mr Zwicker in relation to that application?

THE COMMISSIONER: You mean the direction was given by Mr Oxley to Gilbert and Zwicker.

MR HEMMINGS: Yes.

Yes?---Yes, that's correct.

Is that a correct statement?---That - that's an accurate statement.

Was the application approved?---As I recall, yes.

Despite the range of traffic and parking matters that were unresolved?
---Yes.

10 Had it not been for the directions of Mr Oxley would you have approved that application?---I think the - the traffic issues were resolvable and would - would have resulted in a better outcome and I would have pursued that.

Are you saying that you - - - ?---It was approvable, but it would be preferable to resolve the traffic issues.

Under Bf this is directions given to someone else, but would you look down to the 3rd last line, it's 313 to 323 Crown Street, Wollongong, is that the development I was asking about earlier?

20 THE COMMISSIONER: Is that the Landmark, is it?

MR HEMMINGS: The Landmark building?---I couldn't be sure of the address.

Pardon?---I couldn't be sure of the address.

It deals with the problem of the payment of monetary contributions at occupation certificate stage instead of construction certificate stage, does it not?---It does.

30 He's saying "This direction has resulted in the failure to obtain payment of section 94 contributions for one particular mixed use retail commercial office and residential development at 313-323 Crown Street, Wollongong whereby the development that has been built is now partly occupied without the payment of section 94 contributions"?---That's correct.

As I put to you earlier, that's an example of the inappropriateness of making payment at occupation certificate stage rather than construction certificate stage, is it not?---That is, correct.

40 In (c), "Direction to John Gilbert to approve a large commercial premises within an industrial zone at Bridge Street, Coniston pursuant to existing use rights under the Environment and Planning Assessment Act despite the fact that I previously thoroughly reviewed the site history of the site and concluded the site did not continue to enjoy any existing use rights." Pausing there, that particular parcel of land was zoned industrial and the application was a very large commercial premises?---Yes, that's correct.

And commercial premises were prohibited on that parcel of land?
---That's correct.

What followed was a meeting between Mr Oxley, yourself, the property developer and a town planning consultant employed by the developer, is that right?---That's correct, yes.

10 Notwithstanding the assessment by Mr Zwicker that the site did not enjoy existing use rights, in your presence did Mr Oxley give a direction that the application should be approved?---It was a matter of determining whether or not the existing use rights existed. That was a matter for the council to determine and Mr Oxley determined that the existing use - use rights did exist.

THE COMMISSIONER: But it'd also be a question for the planner, wouldn't it?---Mr Oxley was the department head at the time of the Planning Section.

20 Did you think the existing use rights didn't exist?---I felt that the advice that was provided was inadequate to fully determine whether the use rights existed or not, Commissioner.

So what happens then when you aren't prepared to say someone's got existing use rights but Oxley tells you that that decision has got to be made? What do you do, just make it?---If the decision is made that the existing use rights exist, well, then that's - you move to the next step which is determining the application.

30 Even though you think it hasn't existed or it hasn't been established or what? ---Well, it's - it's a - it's a discretion call based on the information provided by the applicant as to whether the use right exists or not. In this instance, while I, as I recall, was probably also of the view that more information was needed, the decision was made that there was enough information there, it was a discussion with the consultant who was also a planner at the time who argued that it did provide enough information and the general manager at the time made the decision that the existing use rights did exist that enabled it then to be determined.

40 Well, Mr Hemmings, you and I both know that people can tie themselves in knots over existing rights.

MR HEMMINGS: Yes, I'll be making submissions as to whether the matter should have been referred for legal advice as to whether it existed.

I want to ask you some questions about Victoria Square in your role of supervising the work done by Ms Morgan?---Yes.

In 2004, was part of that role to acquaint yourself with consents and applications in relation to Wollongong and proposals she may determine?
---And other planners from time to time, yes.

In 2004, were you aware that there was an application lodged for the Victoria Square site?---Yes, I was.

Were you aware at the time the application was made?---I was aware prior to the application being made that it was going to be made.

10

Do you know the site?---I do know the site.

Is it in the city frame or in the city core?---I think - I don't have a copy of the plan here but I think it's been established in the last week that it was in the city frame.

I suggest it wasn't in either?---I thought - I thought it was - I thought it was.

20

You think it's in the city frame, thank you. Do you know whether it conformed to the height limits in Illawarra Regional Plan of 11 metres?
---My understanding is it exceeded the 11 metres.

Pardon?---My understanding is that it exceeded the 11 metres.

It was something like 31 metres high?---I don't recall the exact - - -

Did you know that at the time the application was made?---Yes, you would know that the application was made.

30

Did you know that the floor space ratio was in excess of 3 to 1?---Yes.

Did you know that Ms Morgan appointed herself as the assessment officer?
---No, I did not.

Should she have appointed herself?---It would normally be allocated by the Assistant Manager for that area and that would be Mr Zwicker.

Did you know whether the property was in view of the railway?---Yes.

40

Would that bring into effect clause 32 of the Wollongong LEP?
---It should do, yes.

That involves questions of traffic on the roads, does it not?---Yes.

Do you know whether it went to a Design Review Panel?---I haven't had a lot to do with that application. I - I couldn't say with any certainty. I have not been involved in it other than what - - -

It was a very large development, was it not?---It was a large development, yes.

And you were aware of it?---I was aware of it.

Did you keep track of it?---In the sense of assessment? No.

Why not?---Because I leave that to my assistant manager who I had confidence in.

10

Who was that?---Mr Zwicker.

Were you aware that a SEPP 1 objection would have to be dealt with?
---At some point I was aware of it, yes.

Did you know whether or not there'd been a request for an IPC conference?
---I - I don't recall but that would not surprise me.

20

You didn't investigate that either?---No, I did not.

Were you aware whether or not there were objections to the development by council's own traffic engineer?---Yes, I was.

Do you know whether or not those objections were taken into account and dealt with by Ms Morgan before the application was approved?---I am aware they were taken into account. The degree of and the detail, I don't recall.

30

Do you know whether or not the application was referred to the RTA?
---I believe it was, yes.

Do you know whether the RTA response was received prior to the determination?---No, I'm not aware of - - -

You didn't know?---- - - the information there.

Now, you know Mr Joseph Scimone?---Scimone, yes.

40

His position with the council, apart from a short period of time, was that of a civil engineer, was it not?---When I started there, I don't - he - he was a civil engineer, yes, yes.

Until Mr Broyd left the council, he had no function in relation to the assessment of development applications, did he?---That's correct.

He was not a town planner?---No, I don't believe he was a town planner.

During Mr Scimone's employment, were you aware of any complaints about his conduct with any members directly under your control?---Yes.

Who was that?---Ron Zwicker.

And what was that?---The degree of bullying.

By whom?---By Mr Scimone.

10 THE COMMISSIONER: that was the allegation?---Yes.

MR HEMMINGS: Would you give us some detail of that?---Mr Scimone used to form view and then if the alternate view was put forward there was significant aggro, but - - -

Could you give us any specific topics?---As in developments, or - - -

I'm asking you?---On planning - on planning decisions and interpretation, yes, planning decisions, interpretation and the like, yes.

20

I'm just trying to interpret what you just said so I understand it, Mr Scimone, whilst he had no responsibilities in the area, or planning qualifications?

---No, I'm talking about - he took over as the Group Manager of the Division.

Is that after he become the Group Manager?---Yes.

30 THE COMMISSIONER: That was Mr Broyd's former position?---That's correct, yes. There was a restructure late 2005. Mr Scimone was appointed as the Group Manager.

Were you surprised at that?---Yes.

Why were you surprised?---Mainly because he'd never shown any interest in planning in the past, and it was predominantly a Planning and Environment area.

40 MR HEMMINGS: Do you believe he had the competence to perform the duties to the position he was appointed?---Technically, it isn't mandatory to have a planning qualification to run that position, so one could say that he had the competence to - to run it, yes.

Did he have the competence to make planning decisions per se?

---I don't think he fully appreciated the process of planning decision making.

You said he bullied the planners in relation to way in which they carried out their duties?---There was a degree of bullying, yes.

And they complained to you?---Yes.

Did you do anything about it?---Yes.

What did you do?---I took it up with Mr Scimone one more than one occasion.

Did you go to Mr Oxley?---No, I didn't. I took it up with Mr Scimone, dealt with it directly with Mr Scimone.

10

What did you say to Mr Scimone?---I raised issues with him about his approach to the staff and attitude, and on occasions he gave undertakings to change his ways.

Were any complaints made by Ms Morgan with regard to the conduct of Mr Scimone?---I don't specifically recall any, Ms Morgan wasn't afraid to confront Mr Scimone herself. Whether that occurred, I don't know.

20 Are you sure she didn't have any conversation with you concerning - - - ?
---Not that I immediately recall.

Were any complaints made to you in relation to Mr Scimone's conduct with female staff?

MR STANTON: I object to this question.

THE COMMISSIONER: It can be relevant to this inquiry, Mr Stanton, it's a part of the inquiries concerned with I suppose the way the Planning Department would run is relevant.

30

MR STANTON: That must be extremely tenuous.

THE COMMISSIONER: Mr Hemmings, I think if you're going to ask this question you would have just put a direct question to him, not whether he thinks with some women or not. I think if you want to do this you can put it to him, but you've just got to put it to him by reference to what a particular person might have said, not just generally. I mean it's too vague.

40 MR HEMMINGS: I'm trying to exploit at this stage whether any members of the staff under his control made any - female - made any complaints. I can go through it that way to start with.

THE COMMISSIONER: Over what period?

MR HEMMINGS: Prior to Mr Scimone being appointed to the position.

MR STANTON: I renew my objection. This is really not within your terms.

THE COMMISSIONER: Perhaps if you could just let him finish and then I'll speak to you.

MR HEMMINGS: I propose to ask Mr Oxley about the appointment with Mr Scimone - - -

MR SUTHERLAND: Mr Oxley or Mr Gilbert?

10 MR HEMMINGS: Mr Oxley at a later time as to the appointment of Mr Scimone to the position replacing Mr Broyd, and I wanted to ascertain whether or not staff had in Mr Gilbert's position, had received any complaints from staff about Mr Scimone's behaviour, and then I was going to put that to Mr Oxley.

20 THE COMMISSIONER: Mr Stanton, if you have a look at the scope and purpose of the allegations referred to a number of things, and including, it refers to other associated matters concerned with the running of this department. I think it comes within that category, but if it doesn't, I'll just add that allegation to the investigation, because information has to come to us.

MR STANTON: Other associated matters is a catchy phrase. One would have thought that something (indistinct) and specificity would have been included directly, and it would have been down at the outset rather than as it was - - -

30 THE COMMISSIONER: I take your point. That's why I wanted something specific, but Mr Hemmings, what I might do is this. I think it's almost 4 o'clock now. You can notify Mr Scimone what is that the nature of the allegation alleged against Mr Scimone or being investigate in respect of his conduct, and then we can see what happens tomorrow morning, but Mr Stanton, I should tell you the way this inquiry has unfolded, I think it is not irrelevant for me to determine how Mr Scimone's performance in this division of the council was, and how it was treated.

MR STANTON: That may well be so, Commissioner, and I'd like to have some leave - - -

40 THE COMMISSIONER: You'll get it.

MR STANTON: As opposed to the instalment plan, with no disrespect, particularly given fair notice and valour to deal with it rather on the run sir, if I might say so.

THE COMMISSIONER: Mr Stanton, the obligation under this legislation is to make this available for Mr Scimone when he gets into the witness box,

but I am prepared to make it earlier in view of the fact that you seem to have some doubt as to what it is that's being said, and he will be told that.

MR STANTON: You're very kind, Commissioner, for that. I don't say it lightly. I'm not one to choose my words I'll at ease, but with respect he is entitled as opposed to being given it in the witness box. I acknowledge that you accede that.

THE COMMISSIONER: You'll be still asking Mr Gilbert questions?

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MR HEMMINGS: I'll show him some emails we have here.

THE COMMISSIONER: Please do, and then if necessary, I don't know that it is necessary. We can discuss that tomorrow because I think it may come - yes?

MR HEMMINGS: Do you have any problem coming back tomorrow, Mr Gilbert?---No, I'm available if required, yep.

20 On 30 August 2006 did you have a meeting with Ms Morgan and Mr Scimone to consider Mr Tabak's s.94 contributions on Victoria Square? ---I believe there was a meeting, yes.

Was Mr Scimone's presence due to the fact that he'd by that time been appointed to a senior position in the department?---That's correct.

Do you know whether Mr Scimone was a close personal friend of Mr Tabak?---I knew that he knew him well. I didn't know how well.

30 What part did Mr Scimone take with regard to the question as to whether a contribution required of \$200,000 should be waived?---As I recall, he - as the department head made the decision.

He in fact overruled the staff as to whether Mr Tabak was entitled to a \$200,000 reduction, did he not?---As I recall, yes.

Did you protest?---I was at the meetings. I was in support of the view of the staff at the time, yes.

40 What actually happened at the meeting?---I don't have a clear memory of the meeting.

Do your best?---The views were put forward by the staff on what the circumstances were and Mr Scimone made a decision. It's fairly cut and dry with Mr Scimone. He makes instant decisions.

I put it to you - was he not in opposition to the opinions being put forward to the staff?---As I recall, yes.

Do you know anything about the City Beach Function Centre?---No, it was built before I started at the council.

Do you know whether it was a development carried out by Mr Kollaras?

---My understanding - - -

Or one of his companies?---My understanding is Mr Kollaras was involved, yes.

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Do you know whether or not Mr Scimone had a relationship with Mr Kollaras?---No, I don't.

Do you know anything about a report concerning cleanup of that site?

---No, I don't.

That completes my examination apart from the matters I'll - - -

THE COMMISSIONER: Yes, I'll adjourn today.

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MR SKINNER: Before you adjourn, Commissioner, I've got a short application. Could I hand this up? I'll be brief. I think I can properly submit that that headline published on the internet by the Sydney Morning Herald is perhaps not fair when reporting these proceedings. I know that you can't control the newspaper or the press but I do ask that you (indistinct) another plea to appropriate and fair reporting of these proceedings. It can do a lot of damage to people's reputations if they're not fairly reported.

THE COMMISSIONER: Yes, I'm aware of everything you say,

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Mr Skinner, but I'm not going to give any directions that I can't enforce.

MR SKINNER: I understand but there was some care taken with senior counsel assisting to avoid that sort of inference.

THE COMMISSIONER: Yes, I'm aware of that and I've heard that but I'm not - - -

MR SKINNER: May it please the Commission.

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THE COMMISSIONER: Yes.

THE WITNESS WITHDREW

[3.55 pm]

AT 3.55 PM THE MATTER WAS ADJOURNED UNTIL 10.00 AM,
TUESDAY 26 FEBRUARY 2008

[3.55 pm]