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INDEPENDENT COMMISSION AGAINST CORRUPTION

PATRICIA McDONALD SC
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PUBLIC HEARING

OPERATION DASHA

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TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON WEDNESDAY 15 AUGUST 2018

AT 2.05PM

Any person who publishes any part of this transcript in any way and to any person contrary to a Commission direction against publication commits an offence against section 112(2) of the Independent Commission Against Corruption Act 1988.

The transcript has been prepared in accordance with conventions used in the Supreme Court.

10 MR BUCHANAN: Mr Stavis, can I take you back, please, to page 56 in volume 26. Do you recall that this is the file copy, as it were, of the ten-page letter of issues which Mr Flahive advised CD Architects of in relation to the DAs and we were considering the question of when it was sent, amongst other things, as well as its contents; do you recall that?---I do, yes.

What I overlooked was that the ten pages preceding are a copy of a draft of that letter. It commences at page 45 and concludes at page 55. On page 45, can you see that you have given it a tick, as it were, and dated it 5 August 2015?---Yes.

20 If we go over the page, my question is are the annotations in writing your writing, as to page 46?---Yes, sir.

Page 47?---Yes, sir.

Page 48, page 49?---Yes.

Through to, I suggest, page 55?---Yes.

30 The draft at page 55 has you making changes to what you proposed be section 9, "Conclusion", and in place of the second sentence which had been drafted, you proposed that it read to the effect:

An FSR variation would generally not be supported in circumstances where other non-compliances occur, particularly in relation to height, setbacks, separation distances, all of which act as determinants of envelope of the development.

40 Is that right?---Yeah, that appears to be what I've written there.

That ended up in the final version. If I can take you to page 65, under the heading "Conclusion", the second sentence commences:

It is requested that the design be amended in accordance with the issues raised

herein ...

And then the third sentence was as proposed by you?---Yes.

Can I take you then back to page 55, and if you would keep your finger on page 66. Can you see that the draft was for your signature, but you proposed that Sean Flahive sign it instead of you?---Yes.

10 Was that because it was correspondence that you thought Ziad Chanine would not enjoy receiving and you'd like someone else to take the rap for it?---No, it was common practice for the assessing officer to send such letters.

The letter was indeed signed by Mr Flahive - page 66?---Yes.

20 Going back to the draft, the draft is dated 4 August 2015, so that would mean, would it not, that the letter as sent was sent either on 4 August or some date fairly shortly thereafter?---I've got 5 August on page 45. Is that what - - -

Have you? Thank you. No, it wasn't what I was taking you to. Sorry, I apologise. Yes, you're looking at your annotation?---Yes.

30 I'm looking at the draft of the letter that Mr Flahive provided, I suggest, which is itself dated 4 August 2015, page 55. Do you see page 55?---Sorry, at the bottom?

Yes.---Yes. Yes, yes.

So the letter itself must have been dated 5 August, as you correctly point out, or some date shortly thereafter?---That seems reasonable, yes.

40 We've established that exhibit 217 is a calendar entry for a meeting on 7 August of you, Mr Gouvatsos and Mr Flahive with, do you remember, the name Ziad Chanine on the entry, which could have meant that Mr Ziad Chanine was attending that meeting?---Yes.

That would suggest, then, that in all likelihood the letter was sent on perhaps 5 or 6 August?---Yes. I think it was common practice for such letters to be emailed as well as posted, yes.

Can I take you back to volume 26, page 260. Do you remember that we looked at two letters which Ziad Chanine provided you with on Monday, 23 October 2015, after some communications in a concentrated period of time, on Saturday, 24 October, when you said what you needed. That's on page 255. Then on Monday, 26 October, Ziad Chanine provided the two letters. Do you see that?---Yes.

10 The first one starts at page 257 and is Mr Rohan Dickson's letter. The second commences at page 260 and is Mr Yammine's letter. That's page 266.---Yes.

My question is, did you meet Mr Yammine in relation to this matter?---At some stage I did, I believe, yes.

Did you meet him frequently?---He used to turn up with Ziad, yes.

20 To meetings?---Yes, yes.

Did you have an understanding as to who he was in relation to Ziad Chanine?---I believed he was an architect that worked for him, yes.

Did you understand that he was the registered architect of the firm?---No, I didn't know that.

30 Can I take you to page 268 of volume 26, an email from Mr Hargreaves of your department to Mr Black on 29 October 2015. It refers to the two DAs and indicates that the internal deadline for a report to make it to the agenda for the IHAP meeting of 23 November was 4 November 2015. In the third paragraph, it says:

40 *In order to assist in your discussion (particularly regarding SEPP 65 setback compliance) of the impact these two DA's may have on the adjoining site at 15 Close St (being the subject of a draft LEP to rezone that site from RE1 to R4) attached is a copy of our advice to neighbours (including the owners of 212-222 Canterbury Rd) advising them of this rezoning.*

Then can you see on page 269 a copy of the form letter that

was sent to neighbours of 15 Close Street, Canterbury as to exhibition of the planning proposal?---I can, yes.

The date of that letter is 23 October 2014. Can you see that?---I can, yes.

Were you aware that Mr Hargreaves provided that document to Mr Black?---No, I - no, not that I can recall, no.

10 What do you understand, as you sit there today, would have been the purpose of providing it to Mr Black?---I guess so he's fully informed when he's doing his assessment.

But what's the relevant piece of information?---Oh, that there was an intention that 15 Close Street was going to be potentially reclassified from community and operational and to rezone the land.

20 And having regard to the third paragraph and the material in parenthesis at the end of that paragraph, that had been provided to the owners of the sites the subject of the development applications?---Third paragraph on the email?

Yes.---Okay. Yes, yes.

Which indicated that the owners were on notice as to the prospect of an impact on development on their property of the rezoning planning proposal?---I would imagine so, yes.

30 That aspect of the matter would have been unlikely to have assisted the Chanines in their DAs and the argument about the rear setback?---I'm not sure if it would have been an impediment, because at that point in time it was just an intention that a planning proposal was being prepared, but - sorry, can you repeat the question again, if you don't mind, sorry?

40 Yes. The provision of this material by Mr Hargreaves on 29 October to Mr Black would have been the provision of material which would not have assisted the Chanines in obtaining a favourable outcome on their development applications?---I think the rezoning itself, had it gone through, would not have assisted.

You don't think that the owners of the property the subject of the DAs being on notice of an intention to rezone wouldn't have been a relevant consideration when deciding

whether a nil rear setback should be allowed on 212-222 Canterbury Road or whether it should be, instead, as required by SEPP 65, the Residential Flat Design Code, 9 metres?---No, because that was just a notice at that point in time.

Page 274 in volume 26. Can I take you to the bottom of the page. It's an email from Mr Gouvatsos to Ms Nakhle and Mr Hargreaves of 3 November 2015:

10

As you know we expect to have a big agenda for the last IHAP meeting/s so can we please assemble a list asap of what we can expect to go as the internal deadline is this Friday.

There are a number of external consultants that need to also give us reports so we need to chase them up.

20

Can you see that Ms Nakhle responded on 3 November 2015 at 11.46am with a current list of what she described as a wish list of items?---Yes.

Can I just draw your attention to the first four items. It included the Bowermans DA and section 96?---Yes.

The Harrisons DA and section 96; 212-218 and 220-222 Canterbury Road; and 4 Close Street?---Yes.

30

You saw that email and sent an email addressed, "Hi Team" on 3 November, saying that you were aware that two particular properties, which are none of the ones I identified a moment ago:

... may not make the next IHAP meeting, however this is yet to be confirmed ...

Then you asked for an update on that, and you continued:

40

Notwithstanding, it is imperative that the remainder of the applications listed below make it to the next IHAP meeting, no excuses as commitments have been made.

Then you repeated the request to follow up external consultants and then said to Andrew Hargreaves that you

were especially concerned with reports being prepared by Benjamin Black re 212-222 Canterbury Road, as he hadn't responded to your recent request for an update. Do you see that?---I do, yes.

10 When you said in that email "no excuses as commitments have been made", what did you mean so far as concerned 212-222 Canterbury Road?---The best of my recollection, it was commitments that were made to the general manager, or instructions that had come from the general manager.

Had a commitment been made to either of the Chanines?---I believe so, yes.

Do you know by whom - yourself, Mr Montague?---It may have been both of us, yes.

20 Because you had been cracking the whip over them, hadn't you, and saying, "Look, I've got a deadline to meet"?---Yes.

You can see that Andrew Hargreaves responded at the top of page 274 at 7.58 on 4 November saying that he had spoken to Ben the previous day and advised that he would get his reports to "us this afternoon". Can I take you, please, to page 277. Can you see that that's an email from Benjamin Black to you and Mr Hargreaves of 4 November at 5.03pm?---I do, yes.

30 There's an attachment. It's in respect of 212-218 Canterbury Road?---Yes.

He says:

The first of 2 emails with draft assessment reports attached.

40 If you could turn over the page, can you see that from page 278, and I think it's correct to say to the end of the volume, to page 313, was so much of the draft report as Mr Black sent you at that stage in respect of 212-218 Canterbury Road?---Yes.

Can I show you, please, this document. Is that document that I've given you a copy of an email also on 4 November 2015 from Benjamin Black to you and Mr Hargreaves? The attachment this time is in respect 220-222 Canterbury Road

and 4 Close Street. Do you see that?

A. I do see that, yes.

If you go over the page, it's a double-sided copy of the draft officer's report. Can you see that?---I do, yes.

10 MR BUCHANAN: I tender the email by Mr Black to Mr Stavis and Mr Hargreaves of 4 November 2015 in respect of 220-222 Canterbury Road, Canterbury, and the attachment comprising a draft report in respect of the DA for that property.

THE COMMISSIONER: The email from Mr Black to Mr Stavis and Mr Hargreaves dated 4 November 2015 about 220-222 Canterbury Road, with the attachment being the draft report on the DA for that property, will be exhibit 220.

20 **#EXH-220 - EMAIL FROM BLACK TO STAVIS REGARDING 220-222 CANTERBURY ROAD ATTACHING A DRAFT REPORT WITH RESPECT TO THE DA FOR THAT PROPERTY DATED 4 NOVEMBER 2015**

MR BUCHANAN: If you can go to page 313 in volume 26, please, the last page in the volume, and have a look at the last page of exhibit 220. You can see that the recommendation in the case of both draft reports was for approval subject to conditions?---Yes.

30 I would just ask you to note that there's no condition there relating to a rear setback in either case?---That's fair, yes.

In the case of 212-218, if I can ask you to go to page 279 and also pages 291 to 296, my question is: Mr Black had drafted these reports to say that sufficient grounds had been advanced to justify the departure of the proposed development from the permissible FSR controls in the LEP. That's at the top of page 279. Can you see that?---Yes.

40 Then pages 291 to 296 is that part of the report that dealt with the non-compliance in respect of FSR for which there was a clause 4.6 variation sought?---It appears so, yes.

You can see, particularly at page 295, the draft in the middle of the page indicated that - I apologise, I think I've taken you to the front setback aspect of the FSR. I'm sorry, it's the third full paragraph on page 295:

In regards to FSR the particular circumstances of this development are considered to be the provision to mimic the approved built form opposite on Canterbury Road ... to create a significant gateway entrance to Canterbury's southern town centre.

10 Which was the gist of the letter from Mr Dickson, was it not, that had been sent to you by Ziad Chanine?---I haven't had a chance to read it, sorry.

Don't worry about it.---Okay.

20 In relation to 220-222 Canterbury Road, in exhibit 220 - I don't know that the pages are actually numbered, but if I could just take you to the first and second pages, you can see the dot point at the bottom of the first page. The non-compliances are identified, and then the second sentence of that dot point:

Sufficient grounds to justify an exception to the maximum height and floor space ratio development standard has been submitted, such that the requirements of clause 4.6 have been satisfied.

30 Correct?---Sorry, I may not be looking at the right place. Is that on the second page?

Yes, of the draft report.---Yes. The one you handed to me?

Yes.---Yes. So is it the bottom or - - -

No, the top.---Okay.

40 THE COMMISSIONER: It's the dot point that starts at the bottom.

MR BUCHANAN: Of the first page of the report.---Yes, I see it now, thank you. Yes.

I don't need to take you to it. You would expect, given that that's a summary, that there would be material to like effect but in a lot more detail in the body of the report?---I accept that, yes.

Could the witness be shown exhibit 85, please, the calendar meetings folder. Mr Stavis, if you could turn, please, to page 275 in volume 26 as well.---Yes.

First, in volume 26 at page 275, what is that? Is that an email or is that a calendar entry?---To me, it looks like a calendar entry.

10 It's from Jim Montague. The date it bears is 4 November 2015, and the heading is "Meeting: Marwan Chanine (Bechara)", and then in the body it has the name Bechara and a mobile telephone number. Do you see that?---I do, yes.

Can I take you then to page 16 in exhibit 85. Page 18. Wrong page. Can you see that this is a calendar entry for 6 November 2015 and - - -?---Sorry, can I just interrupt? I'm sorry.

20 Yes, sure.---What's exhibit 16? Is that the same - - -

My mistake. I should start my question again.---Sure.

Exhibit 85 is the thin volume.---Okay.

If you could go to page 18 of that.---Yes.

30 Can you see a print there of a calendar entry for a meeting, again "Marwan Chanine (Bechara)", again with Bechara's contact details in it, and that it's for a meeting in the GM's office?---Yes.

With the organiser being Mr Montague?---Yes, I do.

Did you attend that meeting?---I really have no idea, to be honest with you.

40 Did you have a meeting with Mr Khouri and Mr Montague, without the Chanines being present, in relation to Marwan Chanine? That would be unlikely, wouldn't it?---Not that I can recall, no. No.

But you did have meetings with Mr Montague, Marwan Chanine and Bechara Khouri in the general manager's office?---At some point in time, I remember, yes, but I'm not a hundred per cent - - -

Of that date, you can't be sure?---No.

10 But it would be reasonable to read these two calendar entries, the one on page 275 of volume 26 as relating to the same meeting, but postponed, as the one that's recorded in exhibit 85 on page 18? That is to say, it's unlikely that they would have been two meetings; it's more likely one was postponed?---I wouldn't know, but - yeah, I'm sorry.

Did you receive contact from Mr Montague over the rear setback issue?---I believe so, yes.

20 What was that contact or those contacts?---I remember a phone conversation with him about it where he questioned me about the rear setback, and I do recall meeting him in his office to talk about these applications in general around that time, and the rear setback was discussed at those. But as far as the detail goes, I'm a bit hazy on that.

Do you remember you told us on a couple of occasions now about a time when you got a phone call from an angry Mr Azzi requiring you to fix something- - -?---I do recall that.

- - - in relation to this particular development?---Yes.

30 These two DAs. When I suggested to you that it might have been in respect of the condition of a deferred commencement for a rear setback, you were inclined to accept that that was likely to be right?---I accept that.

We hadn't actually got to the stage yet, in going through the drafts, where we've seen a deferred commencement recommended. Do you see that? The two drafts we've seen so far- - -?---Yes.

40 - - - haven't got a deferred commencement in them and haven't got a reference, as it sort of goes without saying, to a deferred commencement condition for amendment of plans to amend as to a rear setback?---I take your word for it, yes.

Can I ask you what is the chronology that you can assist us with as to when people were raising the issue of rear

setback with you? Was it after the deferred commencement condition first appeared in these drafts - and I will take you to them - or did Mr Montague or Mr Azzi raise it with you before the deferred commencement condition appeared in the drafts?---No, I think it was after.

Can I take you, please, to volume 27, page 21. We might need to see whether you have volume 27?---I do.

10 Thank you. At page 21, this is another calendar meeting entry. It's dated 12 November 2015. It has an attachment as to a message about a 10am meeting and it's from Ms Rahme to you and Ms Dawson. If we go to the next page, you can see that a Ms Rizk in Ziad Chanine's office emails Ms Rahme at about 11am on 12 November to say:

I apologise for the late notice but only just realised that Ziad is Off Sick today and won't be able to attend today's meeting.

20

My question to you is: why was a meeting with Ziad scheduled, given that you were at the stage of finalising the officer's report and all the material you'd asked for had been received?---I don't believe that I scheduled it. I think they may have contacted Eva, my PA, for a meeting. I don't recall organising a meeting at that time, no.

30 Why, as you understood it, though, was Ziad Chanine interested in a meeting with you at that time?---I can't recall, I'm sorry.

Was it to make sure that the report was going to be satisfactory, as far as he was concerned?---That I'm not sure about, I'm sorry.

Was there a meeting? Was it rescheduled?---I really don't know if there was.

40 Do you remember having a meeting with Ziad Chanine whilst the officer's report was being finalised and after all of the material that you'd asked for had been received?---I think it's likely that I did, but I don't recall whether that's actually factual. But I do remember at some point in time towards the end of the process, I guess, that I did meet with Ziad about his applications.

And was anyone else there?---I can't be certain, to be honest with you, just thinking back now.

What was the meeting about, apart from the fact that it was about his applications? What was the purpose of the meeting, as you understood it?---I really don't remember.

Was there an outcome of the meeting?---Again, I don't remember, sorry.

10

There's no note on the file of council in relation to such a meeting. Do you know why that would be?---As I've explained before, we weren't vigilant in putting file notes to files, or I certainly wasn't, anyway. So I'm not sure if we actually met, to be honest with you, at that time.

Can you see at page 2 there's an email from Andrew Hargreaves to Ben Black, cc'd to you and George Gouvatsos, dated 10 November 2015 at 3.57pm?---Yes.

20

It says:

Hi Ben

Attached is the first half of the report for 212-218 C/bury Rd. It contains feedback that can be used for both reports.

30

Can you please commence amending both reports to reflect the matters shown attached.

And then at page 3 and following through to page 20 in volume 27 is a copy of a draft report from Mr Black, but it has been annotated. Can you see the handwriting?---Yes.

I apologise that this is in black and white, but nevertheless do you recognise that there is handwriting of you and another person?---Yes, I do.

40

Do you know who the handwriting is of the other person?---It would be either George Gouvatsos or Andrew Hargreaves, I would imagine.

So, for example, just looking at page 14, if you wouldn't mind?---Yes.

In the top right-hand side, that's not your handwriting, or do I have that wrong?---No, no. That's right.

Do you know whose it is?---Like I said before, I don't - it's - - -

We have it on screen and it's in colour. I don't know if that makes a difference.---Not really. It would have either been George Gouvatsos's or Andrew Hargreaves', yeah.

10

But it's your handwriting - - -?---On the left.

- - - on the left, and so in this case we can work out which is yours because it is in red, as was frequently the case in your annotations?---That's right.

The annotation on page 3 of volume 27 under the heading "Summary" is inserted:

20

This report has been prepared by Planning Ingenuity Pty Ltd, an independent external planning consultant on behalf of Council.

Do you see that?---I do, yes.

That's in your handwriting, I think?---I believe so, yes. Yes, it is.

You wanted him to insert those words?---Yes.

30

Why did you want him to insert those words?---Because it was common practice for applications generally that were farmed out to consultants to actually state so in at least the summary.

The question I have for you is, though, when the report has - and we're just looking at the first draft with annotations on it now. If you flick through it, you can see that there is a good deal of changes that are requested by you and/or Mr Gouvatsos. Is it misleading for the report to say that it has been prepared by an independent external planning consultant?---I don't believe so because the notations, if you look through them in detail, are just me asking questions or further clarification on things. So I didn't actually write the report.

40

Well, you did, however, have dealings that resulted in a

change from the recommendation that, as you understood it, was made by Mr Black of refusal, to one which, as we can see here, was one of approval?---I think I said before that I don't believe that I received those reports for refusal. I believe having a meeting with Mr Black where he identified issues and concerns that he had, so - sorry, what was your question? I lost my train of thought.

10 I'm just asking you whether it was not misleading council by telling them that the report had been prepared by an independent planning agency, planning consultant, when, as you knew, there had been substantial input on your part?---No, I don't believe so.

There had, however - I should in fairness to you just give you the opportunity of responding to this - been substantial input on your part by the time it got to council?---In terms of drafting the report?

20 Yes.---Not really, no.

You basically made the report look as if it was the product of a consultant who was in fact independent of you and your staff, when, as you knew it, that wasn't the case?---No, I don't agree with that.

30 You asked Mr Black, if we can go to page 19 of volume 27, please, to insert an argument - I'm looking at the left-hand side of the page - that a proposal which complied with the setbacks, height and landscape controls envisaged on the site would generate an FSR over the maximum FSR permitted under the LEP anyway, and consequently there appeared to be no correlation between the FSR standard and the other controls in the LEP and DCP?---Yes, sir.

40 That was essentially an argument, wasn't it, that the building envelope controls established by setbacks and height controls would allow for a greater building than what the floor space ratio in the LEP would cater for?---Correct.

Now, that argument, I want to suggest to you, was somewhat specious, for these reasons: council didn't have a building envelope control, did it?---Not to the best of my knowledge, no.

It had a number of controls which allowed for a building

envelope?---That's true.

And each of those controls was a separate matter that needed to be considered in its own right?---No, I think they operate in tandem.

What operated in tandem?---The controls. They need to work together.

10 Which controls?---The ones you stated before - the setbacks, heights and so forth.

And FSR, is that what you're saying?---Well, I mean, to a lesser extent the FSR, because if you're allowed a building that's potentially, for argument's sake, 18 metres high, with setback provisions, then you're left with an envelope of some sort.

20 Yes.---So what number is extracted out of that envelope in terms of floor space, to my way of thinking, is inconsequential. It's more a case of what built form is envisaged for the locality.

30 But there must be regard had, must there not, to the controls that both contribute to the envelope and, at the same time, dictate the maximum FSR?---You'll find that if you attempt to design a building at whatever the floor space was at the time, I recall that there was no correlation, or you would not result in a built form that was envisaged for that desired future character of that area, that site being a prominent site and, as you rightly pointed out earlier, a gateway site.

I don't think I pointed that out.---You certainly mentioned it.

40 I pointed out a substantial site on the corner of the railway line below the station.---I think you used the word "gateway" too. I remember hearing it. But, yeah, so you'll find that you would not achieve a built form that was consistent with the desired future character of that area.

I just want to come to grips, though, if I can, with the essential argument that you were proposing be inserted - and was inserted - by Mr Black that the building envelope controls established by the setbacks and height controls

would allow for a greater building than what the floor space ratio in the LEP would cater for. I want to suggest to you that the purpose of the individual controls that, in combination, gave you a building envelope was different from the purpose of the FSR control?---I think that they all work together. I don't agree with that.

10 I want to suggest to you that the purpose of the individual controls was, and remains, to give flexibility to designers to create, ideally, something of architectural merit?---They should be able to achieve architectural merit notwithstanding that.

But that is, is it not, the purpose of such individual controls?---No.

20 And that, in combination, a number of individual controls might allow for a greater building in terms of FSR, but that is not a rationalisation for exceeding the FSR control?---Sure. Look, I haven't read the report, but I'm not sure that that was the sole argument of what they were putting forward in terms of their clause 4.6 submission.

It's your argument, though, that you were inserting into the report that I just want to come to grips with.---Sure.

30 What I want to suggest is that the fact that the FSR permitted by a given building envelope might be greater than is permitted by a combination of the individual control, such as height and setbacks, is not something that justifies an exceedance of the FSR control, let alone one of the magnitude proposed in this case?---In its own right, no, because there are strict criteria, as you know, when considering exceedances in development controls as they relate to the LEP.

Why did you insert that argument, then?---Because it's factual. I said it's - - -

40 But what's the point of it, if you're not trying to persuade the IHAP?---What I've said in there is that it should be noted that, as proposed - a proposal which complies with the setback and height and landscape controls envisaged for the site, an FSR would be generated on site which is way over. I mean, I'm just stating facts.

But what's the point of making that statement unless it is

to persuade the reader to allow an exceedance of the FSR control, for that reason?---So that they're aware that that is the case.

10 What is the point of them being aware unless it is to inform the decision they have to make, and the decision they had to make, as you know at this point in the report, is to justify an exceedance of the FSR control?---Sorry, I'm not quite understanding your question in terms of the decision being made.

One doesn't put material into these reports unless it is to inform a decision that is being made by the reader; isn't that correct?---Well, it's to inform the reader, yes.

Yes.---Yes.

20 To inform their decision. That's why they are reading it, to make a decision?---Ultimately, yes. Yes, sorry.

30 You were trying to make an argument to inform the decision as to the clause 4.6 variance in relation to FSR control that the building envelope controls that were established by the setbacks and height would allow a greater building than what the floor space ratio would cater for, and, for that reason, amongst others, the exceedance should be permitted in this case, the FSR exceedance should be permitted in this case?---Yeah, I was stating a fact. Yes, I agree.

30 No, you weren't stating a fact. You were making an argument, and you accepted that it was an argument up until I drew your attention to what the function is of this material that you were inserting into the report. It's an argument, isn't it?---Okay, yes.

Yes.---Yes.

40 And it's in relation to persuading the reader that the variance in the FSR should be permitted?---Okay, yes.

That was a specious argument, wasn't it?---No.

Because you knew, didn't you, that the building envelope control served a quite different function from the FSR control?---No, I disagree.

No-one drew to your attention decisions of the Land and Environment Court to that effect?---Not that I can recall, no.

And you were never aware of them?---Not that I can recall now, sorry.

10 You inserted this argument into the report because you wanted to assist the applicant in having the application approved on the basis that the clause 4.6 submission would be accepted in respect of FSR?---I honestly believed that statement as being factual, and that's why I inserted it in there.

You inserted it in there because you knew it would assist the applicant - - -?---No.

20 - - - if the reader accepted it?---Look, I don't accept that. I mean, I'm just stating a fact there, that if you apply the controls, it results in a built form that exceeds the floor space ratio stated in the LEP.

But what's the relevance of that unless it is to justify an exceedance of the FSR?---In part, yes. In part.

I want to make it clear to you that that was something that was incorrect and you put it in there to give a leg up to the applicant?---I disagree, I'm sorry.

30 At page 26, you can see, if I have the number correct, the commencement of the next draft by Mr Black of the 212-218 report. This is Mr Black's first revision?---Yes.

If you go to page 45, you can see your argument has been adopted in the last full paragraph on the page, commencing, "It should be noted"?---Yes, sir.

40 That was why you made that annotation on that page in the first draft that Mr Black had provided you, so that Mr Black could incorporate it into his next draft; correct?---I think that's fair, yes.

MR BUCHANAN: Commissioner, I'm going to ask whether it might be an appropriate time to have a short adjournment. I will be asking, to accommodate one of us, whether we can rise at 10 to 4 today.

THE COMMISSIONER: That's fine, but I think just a very short break to stretch backs would be appreciated. We'll adjourn just for five minutes.

SHORT ADJOURNMENT

[3.05pm]

10 MR BUCHANAN: Mr Stavis, if I can take you, please, to page 23 of volume 27. Although it's an email conversation that goes over three pages, on page 23 you can see that it is Mr Black trying, and finally succeeding, to send you an updated version of the report for 212-218 Canterbury Road?---Yes.

That's an email dated 12 November 2015 at 6.37pm. The document itself commences on page 26 of volume 27 and concludes on page 67. Do you see that?---Yes.

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On page 67, can you see that there's a heading for "Recommendation" but no content to it?---Yes.

If you go back to page 27, the second page of the revision, the revised draft, the third dot point on that page reads:

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Subject to compliance with deferred commencement conditions it is considered that the proposed development has been designed appropriately ...

Et cetera. The next dot point says:

The external consultant has recommended that Deferred Commencement be issued in relation to ...

And then (i):

40

Submission of amended architectural and landscape plans increasing the building setback to 3m from the rear boundary adjoining 15 Close Street (excluding basement parking levels).

Do you see that?---I do, yes.

And then in relation to 220-222 Canterbury Road, still in volume 27, page 114, although it's an annotated version, it is an annotated revised version that has come from Mr Black. At page 115, you can see the same material appearing in the third dot point:

Subject to compliance with deferred commencement conditions ...

10 And then (i) in the next dot point:

Submission of amended architectural and landscape plans increasing the building setback to 3m from the rear boundary adjoining 15 Close Street ...

Do you see that?---I do, yes.

20 Just taking the version that is for 212-218 Canterbury Road, if I could take you to page 38 in the compliance table, in relation to SEPP 65 and the design code, you can see in the middle of the table, that part which appears on page 38, that in respect of side and rear setbacks what is indicated is that "Proposed" are:

Nil side setbacks are consistent with Council's desired future character, except for rear boundary, which will require a 3m setback.

30 And then under "Complies" is:

Yes - however see Note 1 following the RFDC table.

Then if you go to note 1, which commences on page 39, at the bottom of the page:

40 *The proposed building currently has a nil setback to this property.*

If we can go over to page 40, at the top of the page there is a draft LEP to rezone the bowling club site from RE1 to R4 high-density residential:

The Planning Proposal has been on public exhibition and is a matter for

consideration in the assessment of this application. It is understood that the planning proposal is nearing finalisation.

Do you see that?---I do, yes.

10 That's part of the material that I was going to draw your attention to when we were considering earlier the question of the status of the planning proposal for 15 Close Street at the stage these two DAs were being assessed?---Okay.

Turning then to the next paragraph:

20 *The proposed nil eastern boundary setback has the potential to undermine the development potential of the bowling club site and is not an appropriate response to the interface between the B2 and (future) R4 zones.*

30 *Rezoning of the bowling club would allow for residential apartment development and as such building separation must be considered. Council has identified a 9m setback to the common boundary with the subject site under a draft masterplan. The masterplan also indicates a through site link adjacent to the eastern boundary of the subject site. In this regard, it is considered appropriate to recommend that the application be approved subject to a deferred commencement condition requiring a 3m setback to the common boundary with the subject site. This would create a 12m separation between the buildings and is considered to be a reasonable compromise given that the LEP hasn't been finalised, but is a matter that requires*
40 *consideration.*

And there's further argument after that. Do you see that?---I do, sir, yes.

Can you provide us with any assistance as to how come that material that I've taken you to appeared in the revision of the report?---No, I'm sorry.

Was there a conversation to which you were party about whether the SEPP 65 RFDC building separation requirements applied and, if so, what the consequence of that was for these DAs?---In all honesty, I don't recall.

Did you inspire any of that material?---Did I, sorry, I missed that last bit?

10 Did you inspire any of this material about the setback requirements of the RFDC, their application to the site and a compromise of a deferred commencement condition requiring a 3 metre setback to the common boundary for the subject site?---I can't remember, I'm sorry.

Is it possible that this all came from Mr Black, that he had identified the issue and that there was then some discussion about what the setback needed to be?---It's possible.

20 Were you involved in any discussions about a compromise of the 9 metre requirement to a setback of 3 metres?---I can't rule it out, but I just don't recall, sorry.

A question is: why did the report not require a 9 metre setback?---I can't answer that. I'm not sure.

30 It should have required a 9 metre setback, shouldn't it?---Well, I'm not sure whether it applied, to be honest with you, and I haven't read the design guides as such, whether it's relevant in circumstances where it adjoins recreational land, which is what it was at that point in time, notwithstanding the fact that it was a draft LEP. So I can't answer that.

Can I take you, then, to page 68. Can you see that this is an annotated version of the first revision to the report for 212-218 Canterbury Road?---Yes.

40 It has your annotations dated 13 November 2015. Do you see that?---Yes, sir.

If I can take you, then, to page 115 and can you see that the same material appears there as appeared in the previous copy that we looked at, except that this time it has been annotated by you, but not changing what appears in the material that is typed in?---I accept that, yes.

So it appears that you didn't have a difficulty with what Mr Black was proposing in this version of the report?---I don't believe I did, no. That's right.

Why is it the case that you didn't have a difficulty then, but you do now?---Well, I mean, I was nonplussed in terms of that rear setback, I remember that, because there was precedent already with an approval two doors down with a nil setback.

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Why did that not appear in this report?---I don't know. It should have.

Is it because you didn't know about that precedent until it was drawn to your attention on behalf of Ziad and Marwan Chanine a little later in the process?---No, I - don't forget I live in the area and I drive through there all the time, so I know that area pretty well. So I knew of that.

20

The difficulty is, Mr Stavis, that doesn't help us understand why you didn't seem to have a problem at the time with this material going in and there being no reference to a countervailing precedent, if you say you were aware of it at the time?---I mean, as I said to you before, I had no problem with having a setback at the rear or having a nil setback from the rear, given the precedent that was set by two doors down.

30

Can you assist us as to why you didn't have a problem at the time with the material going in as drafted by Mr Black as to the requirement for a building separation but that a 3 metre compromise would be appropriate in the circumstances?---I'm sorry, I didn't quite understand your question.

40

We're trying to work out why you tell us that you weren't in support of this at the time and you thought there was a countervailing precedent?---No. No, I said I was nonplussed. I didn't mind whether there be a setback from the rear or a nil - or no setback, because of that precedent. That was my answer.

Why, in that case, was there no attention drawn in the draft report to the precedent?---I have no idea.

Is it possible that the precedent didn't come to your attention until you saw a letter from Sparke Helmore

Lawyers that was provided to you by the applicants?---No, that's not right. As I said, I live in the area and I'm - I've seen that site.

So you can't give us any explanation at all for what would otherwise appear to be your contentedness with what Mr Black was drafting in that regard?---Other than the explanation I've given, no.

10 In this draft, the document continued through to a "Recommendation" heading on page 161. On page 161 there is a blue tick against the deferred commencement condition where it is first discussed on that page. Do you see that?---Yes, I do.

Then if we go over the page to 162, there's a draft for the deferred commencement conditions. Do you see that?---I do, yes.

20 The first one is:

In light of the imminent rezoning, and desired future development potential of the adjoining property at 15 Close Street, Canterbury, the development must be amended to create a 3m setback to its rear/eastern boundary.

Do you see that?---I do, yes.

30

You have annotated it but not in respect of those conditions?---Annotated the document, you mean?

Annotated that page, sorry.---Okay, yes.

But not as to those conditions or as to the fact of it being a deferred commencement consent?---That's correct.

40

That would indicate that you were content at that point with it being both a deferred commencement consent and one of the conditions for that deferred commencement being the 3 metre setback amendment requirement?---Yes, sir.

Can I take you to exhibit 117. This is the business papers for the IHAP meeting on 24 November 2015. I'm looking at the table of contents on page 1. Commencing at page 6 is the report for the 212-218 Canterbury Road DA and at

page 75 the report for 220-222 Canterbury Road. Do you see that?---I do, yes.

If I can take you to page 57 of the report for 212-218 Canterbury Road, you can see that the recommendation was that the DA be approved as a deferred commencement consent and that one of the conditions, indeed the first one, was as we previously saw:

10 *In light of the imminent rezoning, and desired future development potential of the adjoining property at 15 Close Street, Canterbury, the development must be amended to create a 3m setback to its rear/eastern boundary ...*

It goes on, but you can see the condition set out there?---Yes.

20 At page 128 of the business papers is a like recommendation in respect of 220-222 Canterbury Road and 4 Close Street. Do you see that?---I do, yes.

Can I just draw to your attention a different issue now, and that is the question of concurrence authority conditions. If I take you to, I think, page 63, there is commencing there a set of conditions for Roads and Maritime Services in respect of the 212-218 Canterbury Road DA?---Yes.

30 But there do not appear to be any conditions for Sydney Trains in the conditions recommended for this deferred commencement consent?---The only one that I can see, and I haven't gone through this in detail, on page 57, in the deferred commencement conditions, there's a reference at point 2 to Sydney Trains.

Right. Thank you.

40 *As a result of the amended building form, to reflect that as required above, the amended plans will be referred to internal and external bodies, including Sydney Trains, [RMS] as well as Council's Development Engineer and Landscape Architect.*

Et cetera. Do you see that?---Yes, I do.

That's simply an advice as to what's going to happen?---It's not. It's a deferred commencement condition, which means you need to satisfy those conditions in order for the consent to be active and issued.

10 Yes, but when you say "you", the applicant isn't going to refer them; it's council that's going to refer them?---Yes, sorry, that's right.

So it's effectively an advice to the applicant as to what's going to occur. It's not a statement of a condition imposed by a concurrence authority, namely Sydney Trains?---It is a statement of a condition. I think the wording is poor.

20 Mr Stavis, this condition number 2 is consequent upon amended building form?---Correct.

It's got nothing to do with the concurrence issues that were raised by Sydney Trains in that letter that we saw in response to the DA in the first place?---I accept that. I didn't understand your question, sorry.

30 A like situation in respect of 220-222 Canterbury Road and 4 Close Street. At page 134 commences a series of Roads and Maritime Services conditions, but there is no condition, except in all likelihood if you want to refer us to it, a similar condition, as to the necessity for referral to Sydney Trains, amongst other agencies, of the matter after the amendment to the building form?---Yes.

Am I right that 212-218 Canterbury Road was the site closest to the railway line?---I'm not sure, sorry.

40 Can I take you to page 23 in this exhibit. Can you see at the end of the compliance table for LEP controls there is a heading "Clause 4.6 Variation"?---Yes.

Underneath that, it says:

Council has received legal opinion that the extent of non-compliance to a Development Standard is not a relevant consideration in determining the reasonableness of any Clause 4.6 submission.

Do you see that?---I do, yes.

That same passage appears on page 93 in the same part of the report for the DA for 220-222 Canterbury Road - that is to say, after the compliance table for the LEP, under the subheading "Clause 4.6 Variation", appear the words:

10 *Council has received legal opinion that the extent of non-compliance to a Development Standard is not a relevant consideration in determining the reasonableness of any Clause 4.6 submission.*

Why did that paragraph appear in these reports?---I have no idea. I'm not sure if that - - -

20 Well, if you could take it from me, if you could proceed on the assumption, that it doesn't appear in any of the drafts by Mr Black?---Right.

So it only appears once the document turns up in the business papers of council?---Right.

30 Does that suggest that it was inserted at the council end rather than the external consultant end of the process of this document getting to IHAP?---I really don't know, but it may be reference to that legal advice that we've spoken about before in previous - - -

That's the Sparke Helmore advice, are you talking about?---No, no. I'm talking about the legal advice from Chris McEwen. That might be a reference to that; I'm not sure.

Did you write it? Did you write this paragraph, I mean?---I can't - no, I - ordinarily I wouldn't write it, no.

40 What do you mean ordinarily you wouldn't write it?---Like, I don't - I never used to type reports up myself. Staff would do it.

Did you direct that it be inserted or a paragraph to that effect be inserted?---I can't recall, sir, I'm sorry.

The difficulty with it being a reference to the Chris

McEwen SC opinion is that the paragraph in that case is quite wrong, isn't it?---Not necessarily. Chris McEwen did say that it's a matter for council to determine the extent of the variance, from the best of my recollection anyway.

Just excuse me a moment. We'll just see if we can assist you on that.---Sure.

10 Could the witness be given access to volume 20, please. If we could go to page 10, this is the passage that we looked at earlier in these proceedings, which you highlighted:

Clause 4.6 only becomes relevant in the event of breach. Further, the magnitude of the breach may be taken into consideration but does not oblige a refusal of the application.

20 You highlighted that?---Sure.

Are you sure you weren't the person who was responsible for the insertion into these reports to the IHAP and to council in respect of these DAs to the effect that council had received legal opinion that the extent of non-compliance to a development standard is not a relevant consideration?---As I said, I really, really don't recall.

30 It seems, if it was only a coincidence and you weren't responsible for the insertion of that paragraph in those two reports, that you had highlighted the paragraph on that subject at the bottom of page 10 of volume 20 in the copy of Mr McEwen's report that appears there?---Yes. Sorry, what was your question?

40 Well, it's a remarkable coincidence, if you weren't responsible for inserting that paragraph into the reports to the IHAP and to council on the subject of a legal opinion about the extent of non-compliance and whether it's relevant or not, that you had highlighted that paragraph in Mr McEwen's report which is on that very subject?---I don't believe so, sir. As I said, I don't recall, but it was common knowledge that with the abolition of that 10 per cent rule under what used to be known as SEPP 1, which was before clause 4.6, there was no, I guess, control over to what extent a breach can be made in respect of development controls. That was common for most planners. As far as this paragraph goes, I really don't recall that.

10 THE COMMISSIONER: Isn't what is at page 23 contrary to Mr McEwen's advice? At page 23 it is saying it's not a relevant consideration, and Mr McEwen's saying it is relevant; it doesn't oblige a refusal, but it's still relevant. You can take it into account, take it into consideration?---I don't see the words where he says it's relevant. He says, "Further, the magnitude of the breach may be taken into consideration but does not oblige a refusal of the application".

But you would only take into consideration relevant factors, wouldn't you?---I mean, I can't answer that. I'm sorry, I don't know how to answer that. I - - -

It's commonsense, isn't it, Mr Stavis?---I don't think so. It's common - sorry.

20 You don't take into account relevant factors, or take into consideration relevant factors?---?---Of course you do. Of course you do, yes.

By saying it's not a relevant consideration at page 23, that's contrary to what Mr McEwen advised?---Look, I'm not a lawyer, so I'm just - my reading of that - - -

30 Sorry, your reading of, just for the record - - -?---Chris McEwen's legal advice says that it's not a matter for - it should be taken into consideration, but it doesn't oblige a refusal of an application. I just took it to mean that. I didn't delve into the legalities of what he's trying to say. That's how I read it at the time.

40 MR BUCHANAN: The nature and way in which you are giving your evidence on this subject suggests, Mr Stavis, that you believe that you were responsible for the insertion of that paragraph under the heading "Clause 4.6 Variation" on page 23 of exhibit 117. I want to just give you the opportunity of responding to that?---Look, I said I don't recall. I really don't.

You, however, allowed the report to go forward in the business papers to the IHAP in your name?---Yes, sir.

We've seen that you are not a person who allows things to go forward in your name without vetting them, haven't we?---In the majority of cases, yes.

It seems very difficult to understand why you would have allowed that paragraph to go forward unless you were happy for it to appear there?---I don't deny that, no.

10 Were you happy for it to appear there because you wanted to persuade the reader that notwithstanding the quite significant variances in FSR in the case of these DAs, that was not a relevant consideration and they shouldn't take it into account when considering the clause 4.6 submissions?---I can't answer that, because I just don't know.

What other purpose could you possibly have had?---To inform them, I guess.

20 To persuade them not to take the extent of the variance into account when considering whether the clause 4.6 submissions were acceptable?---I don't believe IHAP are persuasive. They make their own minds up. I wasn't trying to persuade them, sir. I was merely trying to make a point, I guess, by allowing it. But I don't recall that paragraph.

30 Can I just point out to you that the reference on page 23 of exhibit 117 to a legal opinion to that effect does not appear in the Sparke Helmore Lawyers letter, to which we'll be coming and which you know the applicants provided you in order to change things after the IHAP report?---That paragraph?

You know that that paragraph does not appear, or any opinion to that effect does not appear, in the Sparke Helmore letter that came later?---I can't recall, obviously.

40 MR BUCHANAN: Commissioner, this might be an appropriate time to adjourn, if it is convenient to do so. I appreciate it's a couple of minutes before 10 to 4.

THE COMMISSIONER: Are you moving on to a new area?

MR BUCHANAN: Yes, a new area - developments in a similar area.

THE COMMISSIONER: All right. We will adjourn until tomorrow morning at 9.30.

THE WITNESS STOOD DOWN

[3.50pm]

AT 3.50PM THE MATTER WAS ADJOURNED ACCORDINGLY

[3.50pm]

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