

Attachment I

Class 1 Appeal Hearing Transcript
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IN THE LAND AND ENVIRONMENT COURT
OF NEW SOUTH WALES

COMMISSIONER WALSH

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TUESDAY 5 NOVEMBER 2024

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**2023/00440488 - BILLYARD AVE DEVELOPMENTS PTY LIMITED ATF
BILLYARD AVENUE DEVELOPMENT TRUST v THE COUNCIL OF THE
CITY OF SYDNEY**

Mr R Lancaster SC for the Applicant
Ms F Berglund for the Respondent

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COMMISSIONER: Thank you. Let's start with appearances, the applicant, please?

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LANCASTER: May it please the Court. I appear for the applicant, Lancaster.

COMMISSIONER: Lancaster, and for counsel?

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BERGLUND: May it please the Court, Berglund for the respondent.

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COMMISSIONER: Thanks, Ms Berglund. Thanks everybody for trying to accommodate the accommodation arrangements. I might say, we've set up the Court, next door I believe, for people to go and listen if there's no room for them in here, and I appreciate everyone's attendance here this morning. I've got a few things I want to say at the start. I've got some notes to help me with that.

35

This matter comes to me after I was appointed to conduct a s 34 conciliation conference. This is very different today to a conciliation conference. Conciliation, conciliated agreements are settings where the Court really follows an agreement that's been reached between the parties. This is slightly different and I'll come to that in a moment. At the commencement of the conciliation I undertook a site inspection and also had the opportunity to hear from a number of speakers. I also had the chance to view from a number of properties and I formally need to ask the parties, do I take it that you're happy and agree with the evidence that was gathered during the conciliation being admitted into these proceedings?

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LANCASTER: Yes, Commissioner, thank you.

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BERGLUND: Yes, Commissioner.

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COMMISSIONER: Thank you. Okay. What's occurred here is the matter's come before me for hearing but with an application from the parties, that's the applicant and the council in this case, for final orders to uphold the appeal and

consent to the application. It's the case that expert evidence has been filed now in support of this position. This is not a conciliated agreement though. It remains a hearing for the Court to make a determination on. So the Court's role in consent orders matters is clear from the Practice Directions. There
5 remains a requirement for the Court to determine whether it is lawful and appropriate to grant consent having regard to the whole of the circumstances. The role I'm bound to undertake is to consider the evidence and submissions objectively.

10 Know that I take this role very seriously. A decision will be made after this occurs, after this consideration of the evidence and submissions. No decision has been made yet. I will look at the agreed evidence from the parties with a critical eye and I'll be asking them some questions; I have some for myself from my own view as well, but also in regard to some of the submissions from
15 the objectors, but I'll be hearing the objectors' submission with a critical eye as well. I know there's a number here today to speak.

For those that aren't familiar with Court proceedings, I'll just give a bit of an outline about how we move through the day, and there's time to continue
20 tomorrow if that's needed. We will start with the tendering of documents from either side. This brings the material that I have surrounding me into evidence for the hearing. I'll be interested to hear some brief opening submissions from the parties on why they'd come to this conclusion for consent orders. This would be an outline only. I'll mention now, there's a couple of issues with the
25 documentation that I've received, although it's not been tendered yet, I'll just mention it now while I'm speaking.

One is the Darnley Hall submission in the supplementary bundle, I'd like to get a copy of that in colour if I could. The version I have is black and white. Some
30 of the material that's represented in the submission requires a colour version. I'd also like to have a PDF of the view sharing report that was part of the joint report of the experts. This just simply assists in you can magnify PDFs a little bit there in terms of interpreting documentation.

35 In terms of the objector evidence, we then after, say the formalities of openings, move into the objector evidence. I will have more to say on that in a little while. Let me just leave that for the time being, but there'll be a period where we hear from objector evidence. What I'm thinking at present is there might be merit in my calling the experts in sequentially with the submissions,
40 the lay submissions. What I mean by that is, I'm generally thinking along these lines. If I'm hearing a topic, particularly if it's about say view loss, from one property, I might hear from the experts immediately after that. If I then have some further questions from the lay persons, I might call them back. So there could be some musical chairs exercise going on as we move through the
45 evidence today.

I am also intending to have a session just with myself and the experts that are appointed in the proceedings, knowing those experts have duties to assist the Court under the civil procedure legislation. After the evidence is heard, then
50 there's a period where I hear the closing submissions from the parties. That

5 would be the conclusion of the proceedings. It's not impossible that I might want to look at some of the view loss aspects personally again. I don't think I need to now, but it's not impossible that I change my view on that in terms of some individual properties. Other than that, I think we move on. So perhaps, Ms Berglund, I can ask you to commence.

10 BERGLUND: Yes. Thank you, Commissioner. I will tender the council's exhibits first. However, Mr Lancaster has helpfully prepared a tender list which covers both the applicant's and the respondent's tenders and it might be convenient for me to refer to that as well.

COMMISSIONER: That's good. Appreciate that.

15 BERGLUND: The respondent's tenders actually start on the last page, if I could take you there, and we do have copies if any of these are not on the Court file.

20 EXHIBIT #1 STATEMENT OF FACTS AND CONTENTIONS FILED 30/01/24
TENDERED, ADMITTED WITHOUT OBJECTION

COMMISSIONER: I can read these on if you like; is that okay?

BERGLUND: That would be quicker.

25 COMMISSIONER: So I have a list - I've got the respondent's tender list here. Exhibit 1 is, as I've mentioned, the statement of facts and contentions filed on 30 January.

30 EXHIBIT #2 AMENDED STATEMENT OF FACTS AND CONTENTIONS
FILED 11/09/24 TENDERED, ADMITTED WITHOUT OBJECTION

EXHIBIT #3 RESPONDENT'S BUNDLE FILED 16/10/24 TENDERED,
ADMITTED WITHOUT OBJECTION

35 EXHIBIT #4 JOINT EXPERT REPORT FILED 01/10/24 TENDERED,
ADMITTED WITHOUT OBJECTION

40 EXHIBIT #5 CONSENT ORDERS FILED 29/10/24 TENDERED, ADMITTED
WITHOUT OBJECTION

EXHIBIT #6 RESPONDENT'S SUPPLEMENTARY BUNDLE FILED 30/10/24
TENDERED, ADMITTED WITHOUT OBJECTION

45 EXHIBIT #7 SUPPLEMENTARY JOINT EXPERT REPORT FILED 04/11/24
TENDERED, ADMITTED WITHOUT OBJECTION

I don't have a copy of that yet.

50 BERGLUND: We will provide one.

COMMISSIONER: The list of submitters to speak is eight, which I have here as well.

5 EXHIBIT #8 LIST OF SUBMITTERS TO SPEAK, ADMITTED WITHOUT OBJECTION

BERGLUND: I have two additional matters. One is the order in which I was proposing to call the objectors, although that may be superseded by what you have said this morning, Commissioner.

10 COMMISSIONER: I have a bit of a view on that, let me know what you think.

BERGLUND: I propose to hand it up in basically groups by building. This document also includes the page numbers in the council bundles to which you can find the written submissions of those submitters. It could be an addendum to exhibit 8 just as easily as a separate exhibit.

COMMISSIONER: Okay. This is marked an addendum to eight.

20 EXHIBIT #8 SUPPLEMENTED BY ADDITION OF PROPOSED ORDER TO CALL OBJECTORS, ADMITTED WITHOUT OBJECTION

BERGLUND: There are also, Commissioner, finally, revised consent orders which were filed on 4 November 2024, so that was yesterday. It may not have made it to the Court file yet but I have a copy to hand up. I understand the material difference was corrected plan numbers, drawing numbers. Those are the council's tenders and we will attend to obtaining the coloured document and PDF document which the commercialisation has requested.

30 EXHIBIT #9 REVISED CONSENT ORDERS FILED 04/11/24, ADMITTED WITHOUT OBJECTION

COMMISSIONER: Thank you. Mr Lancaster.

35 LANCASTER: Thanks, Commissioner. Can I confirm your copy of yesterday's supplementary joint expert report has copies of the plans attached? I have a full colour copy if that - but perhaps you already have one.

40 COMMISSIONER: It looks like it. Yes, I believe I do.

LANCASTER: By reference to the tender list that Ms Berglund handed up, our proposed tender documents are set out in the first three and a bit pages. The approach we have taken is to list all of the tab annexures to the original Class 1 application and have struck through those that were subsequently superseded by the successful amendment applications. I tender those.

COMMISSIONER: Look, I can read these on again if you like; is that okay?

50 LANCASTER: Thank you, Commissioner. Thank you.

5 COMMISSIONER: Yes. I will mark, for the Court's purposes, exhibit A as being the Class 1 application filed on 5 December 2023, but only insofar as these tabs are concerned: tab 1 is the DA form; tab 21 is a document prepared by the blueprint; tab 22 DA engagement snapshot; tab 23 quantity surveyor's report; tab 24 fire engineering advice; tab 26 design report; tab 29 Urbis response document; tab 34 acid sulphate soil review; tab 35 construction noise management plan; tab 36 public art plan; tab 37 existing building drawings.

10 LANCASTER: Commissioner, can I interrupt? I think you missed in the list tab 7 and tab 19, which are both tendered.

15 COMMISSIONER: Sorry. Yes. Tab 7 was the acoustic assessment report, and I missed tab 19 as well which was the preliminary detailed site contamination investigation.

LANCASTER: Thank you.

20 EXHIBIT #A TABS 1, 7, 19, 21, 22, 23, 24, 26, 29, 34, 35, 36 AND 37 OF CLASS 1 APPLICATION FILED 05/12/23, ADMITTED WITHOUT OBJECTION

25 EXHIBIT #B MATERIAL FROM NOTICE OF MOTION, AFFIDAVIT OF EMMA KATE WHITNEY DATED 26/08/24 AND EXHIBIT EKW1 TO AFFIDAVIT TENDERED, ADMITTED WITHOUT OBJECTION

30 COMMISSIONER: Only insofar as this material is concerned. I'll put it the other way. Striking out the following: tab 1 schedule of amendments; tab 2 amended architectural drawings; tab 3 amended landscape plans; tab 7 amended cl 4.6 request; tab 9 addendum view sharing report; and the rest of the documentation in that exhibit forms exhibit B. Then exhibit C in these proceedings is the material in the notice of motion and affidavit of Emma Kate Whitney dated 14 October 2024. Shorthand version EKW2 in toto. So that material is all included in exhibit C.

35 EXHIBIT #C MATERIAL FROM NOTICE OF MOTION, AFFIDAVIT OF EMMA KATE WHITNEY DATED 14/10/24 AND EXHIBIT EKW2 TO AFFIDAVIT, ADMITTED WITHOUT OBJECTION

40 Then I have for exhibit D amended notice of motion and affidavit of Emma Kate Whitney dated 23 October 2024, consolidated into exhibit EKW1. Exhibit E then is the applicant's submissions on jurisdictional prerequisites, 4 November 2024, which I don't believe I have yet. Is that right? I don't think I've got that, do I?

45 LANCASTER: I think I filed yesterday afternoon, but they may not have made it to the file, Commissioner. I can hand up a copy.

COMMISSIONER: It hasn't turned up yet.

50 EXHIBIT #D AMENDED NOTICE OF MOTION AND AFFIDAVIT OF EMMA

KATE WHITNEY DATED 23/10/24 TENDERED, ADMITTED WITHOUT
OBJECTION

5 EXHIBIT #E APPLICANT'S SUBMISSIONS ON JURISDICTIONAL
PREREQUISITES FILED 04/11/24 TENDERED, ADMITTED WITHOUT
OBJECTION

10 EXHIBIT #F FURTHER UPDATED CLAUSE 4.6 VARIATION REQUEST
BUILDING HEIGHT DATED 04/11/24 TENDERED, ADMITTED WITHOUT
OBJECTION

LANCASTER: That's the applicant's tenders, thank you, Commissioner.

15 COMMISSIONER: Can I just get a brief outline on the changes since the s 34
report? I'm not sure who's best to do that. Are you happy to do that,
Mr Lancaster?

20 LANCASTER: Yes. Would it assist if Mr Smart took you through that series of
amendments since the s 34?

COMMISSIONER: Yes, look, but I'm not looking for evidence now, I'm really
looking for an outline of the changes, and perhaps if someone from the
applicant and someone from council could both just sit in the box, we could
swear them in now though. Too hard to select one, is it? Ms Pressick, I think
25 if you just come forward, unless you think someone else is preferred.

<WILLIAM JOHN SMART, SWORN, AND JULIA PRESSICK,
AFFIRMED(10.20AM)

5 LANCASTER: Mr Smart, please tell the Court your full name.

WITNESS SMART: William John Smart.

LANCASTER: Your business address?

10 WITNESS SMART: 14 Stokes Avenue, Alexandria.

LANCASTER: Your occupation?

15 WITNESS SMART: I'm an architect.

LANCASTER: You have participated with other experts in a joint town
planning and urban design experts report dated September 2024 filed on
1 October, and also more recently a supplementary joint report dated
November 2024?

20 WITNESS SMART: That's correct.

LANCASTER: Thank you.

25 BERGLUND: Ms Pressick, could you please state for the Court your full name
and your occupation?

30 WITNESS PRESSICK: Julia Pressick. I'm an urban designer at the City of
Sydney.

BERGLUND: Did you participate in a joint conferencing process with the other
experts in this matter which led to both a report dated 1 October and also a
supplementary report dated 4 November?

35 WITNESS PRESSICK: I did.

BERGLUND: Annexed to the first of those reports is a copy of your resume; is
that an accurate reflection of your experience and qualifications?

40 WITNESS PRESSICK: it is.

BERGLUND: Thank you.

45 COMMISSIONER: Look, is it easy for me just to ask the question, can you
give an outline of the changes since I was last involved I guess?

WITNESS SMART: Shall I start? Yes.

50 COMMISSIONER: You can take me to some drawings or just give me a
general outline.

WITNESS SMART: Yeah. I do have some drawings here that might help.

COMMISSIONER: Yes.

5 WITNESS SMART: Because since we received the objection from Olivia
Ross, we went back to examine in detail the surveys and there'd been about
seven surveys completed to add progressive information, mostly directed by
the council to seek more information outside of our boundary. So the original
10 survey that was undertaken in principle established a height plane from within
the boundary and at the corners of the site. And then we progressively--

COMMISSIONER: I just want to shortcut this. I've read that document, it's
come in recently, about the changes to the levels. I didn't think that was the
only time that was mentioned in that particular submission you referred to, but
15 look that's understood. I'm really interested in the physical changes to the
building that had occurred.

WITNESS SMART: Okay.

20 COMMISSIONER: Yes. That's all. At this point.

LANCASTER: Can I draw attention perhaps to the schedule of amendments
in exhibit C, the most recent amendment motion? It may be that Mr Smart
could address any physical changes to the buildings by reference to that
25 schedule of amendments.

WITNESS SMART: The amendments in the DA process?

30 LANCASTER: Yes. This is back in the 14 October amendment.

WITNESS SMART: Okay. So the amendments we've made to the building
are - and we've reduced the number of apartments from 22 to 20. We set back
the front façade to Billyard Avenue by 1 metre and then narrowed the building
by 400 millimetres. The balconies were reduced in--
35

COMMISSIONER: I might just ask a couple of questions on the way through.
When you say you reduced the number of units, where did they come from?

40 WITNESS SMART: They were taken off the top of the building and then out of
the back of the building as well.

COMMISSIONER: Yes.

45 WITNESS SMART: The balconies were reduced in depth from 2.4 metres and
the splay is reduced further increasing the setbacks to Billyard Avenue. On
the Onslow building, the balconies were pushed further back to be within the
change of height plane on that side, and on both buildings the corners of the
balconies were chamfered. On the Onslow building the setback to the street
was increased and the setbacks to the south-eastern side were increased as
50 well, on the upper levels. They were increased by 1.6 metres, taking it from

3 metres to 4.6. The western setback was increased by 1.7 metres, from 3.3 to 5 metres on the upper levels. Building services were changed to remove the roof top plant and replace that with a geothermal system.

5 The top of the building was cut back on the Onslow building to increase the rooftop terrace, of which half is now communal and half is private. It was all previously private. Additional basement was increased to add communal open space into the basement area. The northeast corner of the Onslow building
10 was cut back to improve solar access to number 12 Onslow Avenue, and on the Billyard building, we also cut back, removed a bedroom essentially, to improve solar access to 23 Billyard Avenue. Planter boxes were lowered not the outside of the building and planter boxes were integrated into balconies to improve privacy to the sides of - from the balcony spaces. That's probably the main ones through there.

15 COMMISSIONER: Okay. Is that what you said, Ms Pressick?

WITNESS PRESSICK: It is. I'll just add a couple of things. One of the things we were concerned about was making sure there were no works over the
20 boundary, and so the applicant has introduced a retaining wall adjacent to 23 Billyard wholly within their site, to make sure that there's no rock bolts needed or anything required to hold the land at the boundary. So that's happening wholly within the site, and there are some new details about that. As Mr Smart said, one of the things we were focussed on is overshadowing of the
25 neighbours, and so we worked with the applicant to ensure that each living room does retain compliant solar access. There were changes, as Mr Smart said, about reducing bulk in the balconies and removing a bedroom to make sure that sun is - it mightn't be at exactly the same time of the day, but it's maintaining that compliance. They're impacts but they're compliant.

30 COMMISSIONER: Okay. Anything arise with those submissions?

LANCASTER: No.

35 <THE WITNESS WITHDREW

COMMISSIONER: We'll move into the objector evidence. I suppose what's on my mind in terms of listening to the submissions, there's quite a number, it's going to take a bit of time, is how do we use the time effectively. There's some
40 specialist, I can't call them experts in the courtroom at least, but some I'm sure paid consultants here. I'd like to allow them to be done fairly early so that they can move on if they need to, et cetera.

As I said before, I'd like to arrange it in terms of groupings of buildings. I know
45 some of the submissions are not about the buildings detail, they go beyond that; the affordable housing's the one that just comes to mind to me now. In a way I'd like those to be differentiated from each other when I call on at least some responses from the experts. I'll be intending to get the experts to respond to some of those, I suppose, more universal questions about the
50 development a bit later when I ask them questions myself. Ms Berglund, did

you have an idea on the order?

BERGLUND: Yes, Commissioner.

5 COMMISSIONER: One more point. It's just whether - I know Mr Daintry's here now, he apparently is in some other proceedings today. If it makes sense for him to come on early, that makes sense too.

10 BERGLUND: Yes. Commissioner, this is what I was proposing; this is actually set out in the document that I think became the second page of exhibit 8. This does a group by documentation. You will see that the first person on the list, handwritten in, is Mr Daintry. There is also a lay objector who is actually the last person on this list, it's just over the page from 21, the Billyard Avenue, who is the only person from that building who I understand has to go early. I was
15 proposing to call Mr Daintry first, then call Ms Crone, because they are the two that I have been informed need to go, and then come back to the remainder of the speakers from 12 Onslow and 13 Onslow Avenue.

20 COMMISSIONER: Mr Daintry's involved in a few of the buildings though, isn't he?

BERGLUND: I understood it was 12 and 13 Onslow.

25 COMMISSIONER: That's his only - you can deal with that when he comes on. You're thinking you'd like him to speak about 13 Onslow first up?

BERGLUND: Yes.

30 COMMISSIONER: Then we'll be able to sort the rest out later. I read Ms Crone's submission just recently, and I'm happy for her to come on first if that makes sense, whichever. If Mr Daintry comes on first, that's good too.

35 BERGLUND: From my perspective, I think it would be neater if I call Ms Crone first because then we are grouping by building if Mr Daintry doesn't mind.

COMMISSIONER: Yes.

40 BERGLUND: Can I explain, when I call you, you should come to the witness box and you'll be sworn in and I'll then ask your name and your address, and then you can address the Commissioner on what your concerns are. I call Kate Crone.

<KATE CRONE, SWORN(10.30AM)

COMMISSIONER

5 Q. Before you start, Ms Crone, I just want to say something to really all of the
lay speakers. What's of assistance to me is how what you say can assist in
my evaluation of this DA. I'm interested in what's occurred since the s 34
10 conciliation conference when a number of you spoke there as well and why
you think, with the changes that it's still not satisfactory from your point of
view. I'm not interested in things that might've happened with people
misrepresenting themselves, et cetera. That doesn't help with my evaluation.
I am interested in things that do help the evaluation. I have got a good recall
15 of what happened last time on the site inspection, I believe, and some
photographic evidence that some of you have submitted I that regard. That's
my general, I suppose, thoughts, but otherwise I'm very happy to hear what
you've got to tell me. Thanks, Ms Crone.
A. Thank you.

20 Q. I know your submission goes to some of those larger issues, but not only
that, and so what you'll find I sometimes do at the lay objections is call the
experts in to explore that topic a little bit, but with your larger topics, I won't be
asking the experts now about that, but I will likely ask them later. Thank you.
A. All right. Thank you for your time today. So I suppose that in light of the
25 amendments in section 34 there's still a couple of issues that we, at
21B Billyard Avenue are concerned with. One is the cracking and damage
potential that with the complete demolition of two large buildings, the massive
excavation, enormous drilling and work done to the existing rock shelf at 21C,
that our building will be impacted. As you know, our building is significantly
30 older. We spent considerable money in our upkeep and maintenance, and the
proposed buildings at 21C Billyard will need anchors below our building and
I'm concerned for the stability and impact on the structure of our building.

When you have that amount of coring and anchoring needed underneath the
many surrounding blocks of this proposed new development, my query from
35 our block is how long are we protected from potential ongoing dilapidation,
stress fractures. Is it a - I don't know if there's a standard seven years or more,
or less, so there's a question there. Sometimes it takes several years for
dilapidation reports to actually occur within the building to show that the impact
of a development.

40 We're still concerned about the new entrance, that the car park entrance
exiting in 10 Onslow Avenue will move to 21C Billyard Avenue and that will
directly change the whole traffic flow on both streets. It also impacts on the
number of car spaces available in a very challenging area for car parking and
45 trying to accommodate for the residents. So currently it's just one car space
per household, which is usually agreeable but there's still not enough space.
It's taking away a streetscape and as well as just impacting the current
residents. The entrance also just runs the entire length of our building and that
impacts half of our building and our residence, because the way 21B is
50 structured, we are three levels. Half our apartments are on the side, on the

western side of 21C.

5 We noted with the waste management that the proposed overflow of bin storage is now saying that it's going to be kept in-house, it becomes a temporary bin storage area. Just querying how temporary is that? Is that something that's going to come up just the night before collection? Because currently the collections with that property is on Onslow and Billyard, and it seems to be that it's all going to come out of Billyard Avenue with the new format. So this storage, even in a temporary sense, still affects living spaces, 10 bedroom spaces and kitchen spaces on three levels in our building.

15 It's good to see that there is a little setback that's been put there, but we are still concerned about the air flow and the nature ambient light to half of our building. Also the air flow, because our building's set back into a rock face, so air flow's really important to us, so a setback is important but we still have concerns there. That's what I wanted to speak about today, and thank you for your time.

20 COMMISSIONER: Thank you. Ms Crone, I don't think I have any other questions for you. Do the parties have any questions for you. Do the parties have any questions?

LANCASTER: No, thank you, Commissioner.

25 BERGLUND: No, Commissioner.

WITNESS: All right. Thank you.

30 COMMISSIONER

Q. Thanks Ms Crone. I've noted about three points that I will be asking, but they'll go in with some other questions that I ask the experts later. It'll include that, for example, how the--

35 A. I think the biggest one is the coring and the anchoring underneath our buildings.

Q. Yes, so one is the construction aspects, the other thing is more, but the other thing was the point you raised about how long is this temporary storage of the bins that's now intended. Okay. Thank you.

40 A. Thank you.

<THE WITNESS WITHDREW

45 BERGLUND: I propose to call Mr Daintry next, Commissioner. I think he's speaking for more than one building, so perhaps we can call him first. My understanding was both 12 Onslow and 13 Onslow.

50 COMMISSIONER: Yes. For the experts, I'm just letting you know that those two questions I'll be asking them, that's not the only submission that raises concern about construction dilapidation aspects, so I'll capture those later.

BERGLUND: Yes. Thank you, your Honour.

<BRETT DAINTRY, SWORN(10.36AM)

COMMISSIONER

5 Q. I'm not sure how we do this, because on one hand we like to deal with the matters building by building. Mr Daintry; how many buildings are you involved with with this one?

A. Number 13 which is "Meudon".

10 Q. Yes.

A. And number 12 which is "Darnley Hall". Commissioner, obviously today I was meant to be in other proceedings, so I - Gilbert + Tobin, who represent the owners of apartments 8 and 10 at number 13, have instructed Ms Jennie Askin to speak in more detail, and I don't propose to duplicate that.

15 Q. Okay.

A. In relation to Darnley Hall, the owners of Darnley Hall, the company title, likewise prepared in some detail, assuming I wouldn't be here. On 28 October, I wrote, addressed to you via council, a letter, five pages, and I have copies of that and they are colour. So if I may, I've got a copy for--

20 Q. Before you go on, is that the document where you refer to Dropbox links?
A. Yes.

25 Q. Do you have those documents in the links? I tried to search them. I think I found them all in the bundles, although I want to ask you one question about them?

A. (No verbal reply)

30 COMMISSIONER: Can I first confirm this document's okay for me to have?

BERGLUND: It is. It is also in the supplementary bundle.

35 WITNESS: I have a copy for the applicant and a copy for the Court, and I'm holding council's copy at this point in time to read from. Commissioner, I did note a Dropbox email this morning came up requiring me to grant access for some reason to a link. I think that's been resolved.

COMMISSIONER

40 Q. I can't access Dropbox.

A. Okay. Well, I'll leave it to--

45 Q. At least not unverified ones. Where it's a trusted source, not that I'm saying you're not, I can't let that onto the Court system.

A. I understand, Commissioner. In relation to annexures 1, 2, 3 and 4, annexure 4 was a survey which was tab 23 survey plans by Beveridge Williams. They should be in evidence.

50 BERGLUND: I understand this is in the supplementary bundle which is

exhibit 6.

SIMPSON: Six, and the earlier ones are in the main bundle.

5 COMMISSIONER: So, yes, look, I know this series of annexures in
Mr Daintry's submission, annexure 1 I have, that's the letter to the
Commissioner dated June this year. Annexure 2 I located in the bundle.
Annexure 3, I didn't - I searched for it in the bundle at that date and I think I
10 So this is in council's bundle. Annexure 4, the survey, I don't know which
tab 23 is being referenced there.

Q. So to you, Mr Daintry, it's really three and four; when you say Meudon
15 submissions, do you know was that under a different name; because there's
no Meudon submissions in the bundle but there are a large number of
documents of that date?

A. That's the titling I adopted, Commissioner, but they were submissions that
were made on 8 August 2024.

20 Q. A series of submissions from you?
A. Yes.

Q. Okay. Well, I've got those two.
A. The purpose of those links, Commissioner, to Darnley Hall submissions
25 and Meudon submissions is that within those submissions are the Urbaine
view loss analysis that was commissioned by the owners of both those
buildings.

30 COMMISSIONER: So I do have that anyway, don't I, in the bundle, sorry, the
supplementary bundle?

BERGLUND: Yes. That's tab 23 of the supplementary bundle.

35 COMMISSIONER: Okay.

Q. What about the survey?
A. Well, the survey was located at tab 23 of a bundle and it's a survey
prepared by Beveridge Williams on behalf of the applicant, and that,
Commissioner, is the survey I reviewed when also reviewing figure 1 in this
40 correspondence address to you on the 28th.

Q. I can see that in the documents here. Tab 23 is a quantity surveyor's
survey in terms of exhibit A.
A. Registered surveyor.

45 Q. Is what you're referring to there, looks like 28, tab 28's the survey plans by
Beveridge Williams?

A. You need to - I can provide a date on that survey if it helps the parties.

50 COMMISSIONER: Yes. There's a tab 26 that's now part of the evidence. In

exhibit B is another survey dated 5 July 2024.

5 BERGLUND: Commissioner, which survey are we talking about, are we talking about the applicant's survey or are we talking about a specific survey that's been prepared for an--

COMMISSIONER: It looks like it's the applicant's material. Beveridge Williams is the applicant's survey according to some documents here.

10 BERGLUND: All right. So the survey is then in exhibit A.

WITNESS: The survey to which I referred was revision F of a detailed survey, height and level survey, by Beveridge Williams - and I'm looking for the date, Commissioner.

15 LANCASTER: Commissioner, that reference seems to appear in exhibit B at tab 26.

20 COMMISSIONER: Yeah. That's the one I'm referring to. That's in the evidence now.

Q. Provided it's the revision F did you say and it's filed July 2024?

A. Yes.

25 COMMISSIONER: Okay, so I've got the documents you're referring to.

BERGLUND: Tab 26 of exhibit B.

30 COMMISSIONER: Good.

Q. So we're concentrating now on Darnley Hall and we'll hear various submissions in regard to Darnley Hall now, starting with Mr Daintry.
A. Okay. Commissioner, Darnley Hall is number 12 Onslow Avenue, and I am not going to repeat, of course, everything that was said on site as we travelled
35 throughout both number 12 and number 13. And you did take a view, an extensive view from all of those properties. My submission to the Court in relation to Darnley Hall is that the loss of views from Darnley Hall range between moderate and severe.

40 It is the applicant's case, as I understand it, and the section 4.6, not the updated one we haven't seen or the supplementary joint expert witness report, we haven't seen any of that, but it's my submission that it's certainly moderate to more than moderate. It's not minor or negligible in many aspects. In relation to the uppermost unit in Darnley Hall, it has - that's unit 12 - a northerly
45 view over to Fort Denison, an iconic view, and the view loss analysis that 4.6 seems to rely on says that that's a minor impact. That encapsulates number 12.

50 In relation to the units that we visited in number 13, units 8 and 10, the impact, again, is I submit more than minor or negligible, it's in fact moderate to severe.

And if one accepts that the impacts are moderate or greater, then an impact of that nature caused by non-compliance can be considered unsatisfactory. Commissioner, I submit to you that if you read clause 4.3 of the LEP carefully, which has the view sharing clause in it, that the applicant has not adequately made out justification in their clause 4.6 for the exceptions to height that they seek.

There is a detailed discussion in the evidence about whether you rely on Bettar or you rely on Merman. Bettar, of course, is interpolation across the site. Merman is, of course, measuring it from the lowest existent point on the site. Whether you measure it one way or the other, in my submission, Commissioner, is irrelevant, as it exceeds the height in both circumstances.

Commissioner, I have pointed to on page 2 of my last submission errors. I would imagine that the supplementary joint expert witness report and I believe exhibit F, the updated 4.6 that we haven't sighted, in some form and acknowledgement of errors that have occurred in relation to the method and interpolation of levels across the site. The result of that, Commissioner, is that if you interpret the levels the way it was before, or has been previously submitted to the Court, then that distorts the height plane across the site to the advantage of the applicant by providing a lower height plane under Bettar than you otherwise would receive, or achieve. In any case, I repeat, whether you measure it the Bettar way or the Merman way, it's at least a full storey above the maximum height.

Commissioner, it's impossible for objectors to understand what's in a joint expert witness report they haven't read. It's impossible for me today to make submissions in relation to a clause 4.6 or section 4.6 I haven't sighted, but I direct you to the last page of my written submission, page 5, and I'll repeat. Whether one adopts Bettar or Merman, the proposal still breaches the HOB to a quantitatively significant extent. The exact quantum of the exceedance has not been accurately established. It may well be in the supplementary joint expert witness report, because the applicant has used elevated RLs as the basis for the interpolation across the site.

Qualitatively, the view loss is between moderate to devastating. The exceedance of the HOB is a disbenefit and unacceptable amenity impacts to numerous neighbours. It's not just one neighbour, Commissioner, it's several neighbours that experience a moderate to at least severe, if not devastating. The exceedance of the HOB is, in my opinion, Commissioner, results in a building that's a full storey too high. Thank you.

COMMISSIONER: Are there any questions for Mr Daintry.

LANCASTER: I just have one question.

COMMISSIONER: In terms of questions to the lay witnesses giving evidence today, you should note that they come through me first. This evidence here isn't provided having regard to the Civil Procedure Act, so I may limit some of the questions, but go ahead, Mr Lancaster, let's see how you go.

LANCASTER: Mr Daintry's evidence, when he went through and specifically identified a couple of the apartments identified in his view that there were moderate to severe impact on views, and then at the end of his submission he did refer to his written assessment of devastating, and I was going to ask of him what view did he identify as devastating.

COMMISSIONER: Yes, that's a fair question.

Q. So I think you said two devastating.

A. Yes.

Q. Are there any units you'd like to refer to that you think it is devastating?

A. The one that's particularly devastating, Commissioner, is unit 12 at Darnley Hall. In relation to that view in particular, which is a view from a study at the uppermost level that you attended, to the north, that's an iconic view and it would be obliterated.

Q. Are you saying that's devastating to the unit or to the room?

A. To that view. That view from that specific room is a devastating view loss in particular.

<EXAMINATION BY MR LANCASTER

Q. Is that the only view loss you assess as devastating?

A. Yes. The only view loss, Commissioner, that I would assess as devastating that is the result of a non-compliant element of the building. There are other views that are lost which are unavoidable consequence of complying with all the controls.

LANCASTER: I don't have any other questions, thank you, Commissioner.

BERGLUND: I have no questions.

COMMISSIONER

Q. Thanks Mr Daintry.

A. Thank you, Commissioner. Am I excused?

COMMISSIONER: You're excused.

<THE WITNESS WITHDREW

BERGLUND: I would propose, Commissioner, to continue to call the residents from number 12 Onslow Avenue first, so I call Olivia Ross.

<OLIVIA ROSS, SWORN(10.52AM)

5 BERGLUND: Commissioner, before Ms Ross starts, I have a colour copy, the colour copy that you requested in relation to Ms Ross's submission and I have a copy of the letter.

WITNESS: This is also the update of my submission.

10 BERGLUND: Yes, she can hand that up. That's fine.

WITNESS: That's the update of mine in colour, Commissioner, in case you don't have it in your folder.

15 COMMISSIONER: Thank you. This is Darnley Hall, the organisation's submission.

BERGLUND: In any event, that is the colour copy you asked for, Commissioner.

20 COMMISSIONER: Just for my own system here, I'll note--

WITNESS: Commissioner, this is the--

25 COMMISSIONER: Sorry. Just give me a moment.

EXHIBIT #10 COLOUR VERSION DARNLEY HALL SUBMISSION
OTHERWISE INCLUDED IN EXHIBIT 6 TENDERED, ADMITTED WITHOUT
OBJECTION

30 So it could be understood that that particular content in exhibit 6 is now struck out and is replaced by exhibit 10.

BERGLUND: Yes, that's correct, because that's the colour copy.

35 COMMISSIONER: Great. Thanks. Now I've got another document here in a green folder, this is Ms Ross's colour version and I might do the same thing, I'll just replace this exhibit 11, the submission of Ms Ross I now have in colour and I am striking out Ms Ross's submission otherwise included in exhibit 6.

40 EXHIBIT #11 COLOUR VERSION OLIVIA ROSS'S SUBMISSION
OTHERWISE INCLUDED IN EXHIBIT 6 TENDERED, ADMITTED WITHOUT
OBJECTION

45 LANCASTER: Commissioner, may I see the content of that exhibit?

COMMISSIONER: Sure. You've got another document?

50 WITNESS: This is my presentation. I thought we would be in a small room so I'm going to have to just tell you when to turn the page.

COMMISSIONER: All right. You don't have a copy of this, do you?

5 BERGLUND: I'm not sure what that is. Can I just clarify? Ms Ross, the document that you handed up in a green folder, was that your submission dated 29 October 2024?

WITNESS: No. It's updated.

10 BERGLUND: Does it replace your submission?

WITNESS: Yes.

COMMISSIONER: Do you have any other copies of it?

15 WITNESS: I don't seem to, Commissioner, I'm sorry.

COMMISSIONER: Do you happen to have an electronic version of it accessible?

20 WITNESS: Yes, and I have emailed them to Andrew about 20 minutes ago. Sorry.

BERGLUND: I will need to get that printed.

25 COMMISSIONER: So there's another?

WITNESS: I do not have a digital version of this one yet.

30 COMMISSIONER: The presentation. Right. Okay. Now, I think we deal with this on the run so to speak, if that's okay. So if there's anything that arises that's a concern, we'll just deal with it then. There's this other A3 document that's been handed to me as well by Ms Ross. She's indicating it's a presentation document.

35 WITNESS: Yes.

COMMISSIONER: You mean kind of like a PowerPoint presentation idea?

40 WITNESS: Yes, and my talk will not make any sense without it, Commissioner, you have to be viewing it.

LANCASTER: We haven't seen either of those documents before just now. I am content to try and deal with it on the run, but it will be difficult if we can't refer to it while Ms Ross is giving her.

45 COMMISSIONER: Yes, it will be. Even if something arises in the giving of the evidence, I'm happy to hear the objection or the concern.

50 LANCASTER: Yes.

COMMISSIONER: We will have to arrange copies of this, which the Court can organise. We can do that at lunchtime, say, or during the break.

5 LANCASTER: Commissioner, if you would take the objection, if you're going to hear from Ms Ross immediately, take the objection subject to any difficulty it causes me leading to an objection to any part of it.

COMMISSIONER: Yes. May I have that A3 folder again?

10 LANCASTER: Also the last nine or so pages of the green folder document are in addition to what's been in the materials to date.

15 COMMISSIONER: Yes. Again, this is for everybody here that aren't used to the Court process. It's just really important in terms of procedural fairness for everyone to have all the documentation to be able to review it, evaluate it, criticise it. I think I need to have a break now or call someone else on and I photocopy this during the break, provide copies to you.

20 BERGLUND: Commissioner, there are two more residents from 12 Onslow and one from 13 Onslow; I'd be content to call them and take a break and get copies in the--

COMMISSIONER: Yes.

25 BERGLUND: Apologies, Ms Ross.

COMMISSIONER: Ms Ross, I won't swear you in again, but that's what will need to occur; I'll hold this for the time being.

30 WITNESS: Thank you, Commissioner. I did have another copy but I realised there were mistakes in it.

35 COMMISSIONER: Mr Simpson, you've got a copy - sorry, do you know if you've got it, that PDF document yet?

SIMPSON: No. Commissioner, I'm having problems getting access to the Court system.

40 COMMISSIONER: Just hold on a sec, please, court officer. Can I just see you for a sec?

SIMPSON: I do my best to overcome my technical hiccup at the moment. Maybe while you adjourn.

45 WITNESS: This is a copy.

COMMISSIONER: That's the same document, is it?

50 WITNESS: Yes.

COMMISSIONER: Well, it's a bit easier to reproduce that one. I think we will still do this, Ms Ross, so you'll have to come back on.

WITNESS: Of course.

5

COMMISSIONER: We'll organise copies of both of those.

LANCASTER: Thank you.

10

BERGLUND: Thank you, Commissioner.

COMMISSIONER: So need two more copies of that. Thanks. Yes, just the A4 version will do. Colour. You can sit down, thank you.

15

<THE WITNESS WITHDREW

BERGLUND: For the moment I will call Rosie Fairbairn-Watt.

20

FAIRBAIRN-WATT: With respect, Commissioner, mine isn't technical, a technical submission, so if you prefer to deal with all the buildings in - and I think on what you've said earlier I need to rewrite a little bit.

COMMISSIONER: Yes. Okay. So you'd rather come on last?

25

FAIRBAIRN-WATT: At the last.

COMMISSIONER: Yes. Look, I don't really have a problem with that. I think that makes sense in a way. I've read a lot of documentation that's been prepared by you. Is there anybody else from Darnley Hall?

30

BERGLUND: Yes. I call Dr Maryanne Dever.

<MARYANNE DEVER, AFFIRMED(11.01AM)

COMMISSIONER

5 Q. Ms Dever, thank you.

A. Commissioner, you did mention earlier the points about affordable housing. I do have some points about that. Do you want me to present this now?

10 Q. Yes, I do. That's fine, thank you.

A. Okay. Thank you. This presentation, I am replacing Dr Lisa Adkins. Lisa Adkins is an economic sociologist at the University of Sydney and has worked in that area for three decades, and I'll be drawing on some of her work here. I speak on two things today. I speak on the impacts of the proposed development on the area, and also on ourselves as residents. I want to stress, I'm not opposed to new buildings. Had the proposed development at 10 Onslow/21C Billyard been sympathetic to the suburb as a heritage conservation area, addressed the pressing housing needs of the city and been in line with existing planning controls, I don't think we would be here. I will speak on two specific issues. The social impacts for the suburb, and impacts on current residents.

In terms of social impacts for the suburb, the developer's website is filled with statements about community. If you've had a look at it, you will know. They say things like, "We're community inspired. For us, property development should create a connection between people and place", and yet I've not seen any but the most minimally required engagement with community and the issues that concern us. The proposed development will result in a net loss of homes. Across the period of seeking approval for this DA, the planned number of new apartments, as we heard this morning, has shrunk. Now the existing 28 apartments on this site will be replaced by only 20 new dwellings, a 28% reduction.

It's difficult to see how the applicant can maintain that this proposal is compliant with the LEP land use zone objective "to provide for the housing needs of the community" when it creates a net reduction in housing supply in the midst of a housing crisis. This is not in keeping with the City of Sydney's commitments in Sustainable Sydney 2030-2050 to being a city where everyone has a home. The existing building provided for comparatively affordable housing and a high level of rental accommodation. This proposal is for a limited number of luxury apartments. For the interests of the Court, Fortis agents are currently quoting two-bedroom apartments starting at 5.2 million and rising to three-bedroom apartments for 11 million with a view; that is not counting the penthouses.

Across this suburb, successive DAs such as this seek to remove the housing stock that provides for the needs of young people, older people, creatives, essential workers. This constitutes a form of social cleansing as these groups are effectively forced out of the area. Something I have personally witnessed in recent weeks, as residents of 10 Onslow and 21C Billyard have packed up

and left. Some of those people had lived in those buildings for decades. It's hard to see how, in practical terms, the affordable housing contribution of a meagre \$1.47 million set out in the proposed conditions of consent goes any way to remediating this situation. I will move on now to speak about impacts on current residents.

This DA subordinates the wellbeing and amenity of a great number of current residents to the projected amenity of a limited number of as yet unknown future residents. Residents in immediately adjacent buildings have consistently communicated throughout these proceedings the negative impact of loss of solar access, radically reduced setbacks to boundaries, overshadowing, increased noise, loss of privacy and loss of views. The specifics are in their multiple submissions and they're available to the Court and so I won't repeat them here.

The negative impacts result from the fact that the proposed development does not comply with height regulations, or with the LEP 2012 principles for the bays; specifically principle C, "maintain view corridors to Sydney Harbour and parks", and E, "maintain buildings within a landscape setting. New buildings should be positioned in the middle of lots and surrounded by gardens and informal tree planting". So dramatic are these impacts that even ahead of a decision on this DA, existing residents in adjacent buildings are moving out and selling up. Effectively unhousing the homed. Today from my kitchen window I could see yet another billboard going up advertising an apartment in 8 Onslow for sale.

This is also the case for myself and my partner. We love our apartment in Darnley Hall, and we've carefully renovated over the last two years. But we are now actively looking for a new home, forced out by what we see as a devastating diminution in our amenity. So, Commissioner, how is this okay? The opportunity was there for developers or their architects and designers to engage at the outset with affected local residents, and this did not happen. Before the original DA was lodged, no attempt was made to ascertain the function of specific rooms in our apartments and any impact on view or light from planned design elements.

As a result, specific rooms facing 10 Onslow Avenue, in my apartment, and other apartments in the same building, have been repeatedly misidentified in terms of their function, incorrectly labelled as secondary living areas. The devastating impacts on amenity have therefore been discounted. For example, one room in my apartment, facing 10 Onslow Avenue, is consistently labelled a laundry. It is in fact part of my sunlit kitchen, dining room, in which I spend the majority of my time. My efforts to highlight this as a primary living area have gone unheeded and this error has allowed for the underestimation of the negative impacts on my amenity, and this is the case repeatedly for apartments up and down Darnley Hall. That the actual function of rooms is mislabelled and the impact therefore diminished by identifying them as secondary living areas.

What we now face is this, in my apartment. The distanced between my

kitchen, dining room and the wall of the existing building, which is currently 10.15 metres back, will reduce by almost half, to only 5.96 metres. Similarly, the setback from Onslow Avenue footpath at the nearest point to my windows will reduce from 4.31 metres to only 1.95 metres. This latter change in particular will result in the complete removal of our view from those windows along the streetscape to Elizabeth Bay House. So we will no longer be able to see Elizabeth Bay House, a view that has been enjoyed from our apartment in Darnley Hall for almost 100 years. Equal or greater view loss of Elizabeth Bay House affects apartments 8, 10 and 12 above me.

Yet, if we turn to the Planning NSW Apartment Design Guide, which sets out design standards for apartments, it specifies that plans should:

"provide access to light, air and outlook for neighbouring properties and future buildings

provide for adequate privacy between neighbouring apartments

retain or create a rhythm or pattern of spaces between buildings that define and add

character to the streetscape"

It is hard to see how the proposed building meets these standards by reducing setbacks, reducing solar access, increasing overshadowing and diminishing outlooks for neighbouring buildings.

As will be evident, the majority of concerns we have as residents stem from the proximity of the proposed development to existing buildings. This is nowhere more concerning than on the question of excavation, something that has also already been raised this morning. The revised plans provide, in our view, inadequate assessments of the likely impacted deep excavation on surrounding buildings. I think the Court should seriously consider whether the proposed deep excavation can and should be undertaken at all, in light of potentially irreversible damage to existing adjacent buildings such as Darnley Hall, which as noted is nearly 100 years old.

Finally, there is no proportionality in what is being proposed. For example, the benefits of the non-compliance with height regulation of the proposed buildings will be enjoyed only by single sets of residents in the topmost apartments of each new block. While the negative impacts of the resulting reduced solar access will be experienced by every single resident in Darnley Hall and many in adjacent buildings, which has already been extensively documented. In summary, we think the DA should be refused in light of the deleterious impacts on existing residents. If, however, you are of mind to proceed, I have created here a list of additional conditions that we think should be in the conditions of consent and I am happy to provide those to you this morning.

COMMISSIONER: Yes. I'd like to get a copy of that. I don't think that's in the submissions. That's new material?

BERGLUND: Yes. We haven't seen it. I have no objection to it being handed up.

COMMISSIONER: Okay.

5

Q. What I'll ask you to do when you sit down is just give that to Ms Berglund and we'll sort out the documentation. Before you go though, I had just looking for the reference you made to - you referred to a number of principles, principle C relating to maintaining view corridors; what was that document again, was that the locality statement?

10

A. It's the LEP 2012 and its principles for the area known as the Bays, and that was--

Q. It's the Bays statement?

15

A. --principles C and E.

Q. Rather than in the LEP instrument itself, sorry, if you don't - aware of the terminology, that's a supplementary document that was concerned with the bay area; that's right?

20

A. Yes. Specifically, yeah, it's--

BERGLUND: It's in the Sydney DCP, we'll find the reference in the bundle.

COMMISSIONER: Yes. I am aware of the document, I just was looking for that pointer. Any other questions?

25

LANCASTER: No, thank you.

BERGLUND: No, thank you, Commissioner.

30

COMMISSIONER: So thanks for that evidence, and if you could just hand that document to Ms Berglund, I'll deal with that.

<THE WITNESS WITHDREW

35

BERGLUND: Commissioner, that leaves us with Ms Ross remaining from 12 Onslow Avenue and there is additionally one extra resident from 13 Onslow Avenue; if you would like me to call him now?

40

COMMISSIONER: Yes, I'm just wondering if there some other person whose submission is fairly isolated that we could just deal with. What I'm thinking is I'd rather not do 13 Onslow now because there's a few other submissions. There's a number - there's two people, at least, wish to speak on that I think.

45

BERGLUND: It looks like 8 Onslow Avenue, Harry Hughes, is the only speaker from that building. I'd be happy to call him if he's in this room; I'll just check.

COMMISSIONER: I think we met Mr Hughes on site. That makes a lot of sense to me, yes.

50

BERGLUND: If he's in this Court and on the overflow Court, I'll call Harry Hughes, please.

COMMISSIONER: Thank you.

5

<HARRY HUGHES, AFFIRMED(11.14AM)

COMMISSIONER

5 Q. Thank you, Mr Hughes.

A. Commissioner, similar to others, I speak to both one technical issue but also the social impacts as well. Are you happy with that?

Q. Yes.

10 A. Right. Commissioner, I believe a significant and unresolved issue is the actual building height of the proposal at the 8 Onslow Avenue side. I would say based on the information that we have available to us, which was the same survey plan that Mr Daintry referenced, I believe it's exhibit B, tab 26, it indicated a number of inconsistencies in the ground level measurements which
15 raises concerns about the accuracy of the clause 4.6 justification submitted. I'd like to say that the proposal appears to rely on the Bettar approach, using extrapolated ground points to calculate the building height. Council has indicated in correspondence with us that this Bettar method was slightly modified to account for the site's sloping topography and built-out nature.

20 However, inventing a new method of measurement that departs from established case law raises concerns. The Court has consistently upheld specific approaches for determining ground level and creating a modified and frankly arbitrary measurement method, simply because it is convenient, could
25 result in a misleading height assessment. I'd like to point out that, as was noted in *Ricola v Woollahra Council* [2021], the exact extent of the development breach must be clearly and accurately identified. If this unverified measurement method has been used, it does not fulfil this requirement, leaving the full impact of the breach unqualified.

30 I'd like to say that clause 4.6 requires a rigorous and accurate assessment, which is essential for the Court's jurisdiction to approve the variation. However, the reliance on misleading terrain model, and that includes assumed and incorrect elevation points, fails to represent the original hillside contours.
35 Concerningly, we believe this obscured building height is being used to justify other non-compliances with other planning controls, such as reduced site setbacks. This results in compounding impacts that stem from the original non-compliance and, in our view, makes it all the more unacceptable.

40 We also submit that even if the clause 4.6 were accurate, there remains little to no environmental planning rationale to permit the additional height exceedances. Even if we accept the height figure, this does not inherently render impacts such as view loss and solar access acceptable. The question remains whether the extent of the impact caused by this height breach aligns
45 with reasonable planning outcomes, particularly when viewed in the context of a development that exceeds height standards without substantial or public benefit justification.

50 I would also like to point out that the decision in *Bondi Residents v Waverley Council* [2024] further supports this position. The judgment clarified that

development standards, such as height, are maximums, not entitlements, and that compliance with one standard does not justify breaches of others. The orderly and economic use and development of land presumes compliance with all applicable development standards. There is no assumption that every site can or should meet the maximum. On this basis we respectfully urge the Court to scrutinise the height measurements closely and ensure that transparent and accurate data forms the basis of any approval. Only by accurately analysing these measurements can the Court be fully satisfied that the implications and the clause 4.6 variation meet the jurisdictional pre-requisite.

Finally, I'd like to talk about the significant loss of affordable housing posed by this development. As has already been mentioned, the site accommodates 28 units, many of which provide accessible and moderately priced housing options within Elizabeth Bay. This proposal seeks to reduce the dwelling count to just 20 units, which is a 28% decrease and this will be replaced with primarily three-bedroom luxury units. I'd like to say that this decrease does not align with the social and economic needs of the community, where affordable housing options are already dwindling.

The City of Sydney has recently exhibited a new planning proposal that aims to prevent developments reducing the net number of dwellings by more than 15%. Although this policy is still under consideration, and may not technically apply to this proposal, we strongly submit that the rationale behind it remains valid. Loss of affordable housing supply is a relevant consideration under the social impacts and public interest components of s 4.15 of the Environmental Planning and Assessment Act. Here the redevelopment reduces housing supply and affordability which threatens to detract from the social diversity and accessibility of an inner city neighbourhood. This is precisely the type of redevelopment that the City of Sydney's draft planning proposal seeks to curb and we believe, on social impact and public interest grounds, cannot be approved.

In conclusion, we strongly urge the Court to consider the serious concerns raised regarding the height discrepancies and the social implications of the proposed development, the inaccuracies in the height measurement undermine the integrity of the assessment process, potentially leading to the true impacts of the development not being assessed. Moreover, the reduction in affordable housing is contrary to the needs of the community and will result in unacceptable social and economic impacts. Thank you for your time and attention.

Q. Thanks, Mr Hughes. Did your written submission include the citations to those two cases that you mentioned?

A. No. Just my oral submission just then.

Q. Do you have them there?

A. I do have the pinpoint if you'd like.

Q. Yes.

A. So for *Ricola v Woollahra Council*, that's at 106.

Q. Yes, so this is the address you give me; how do you spell Nicola?

A. That's R-I-C-O-L-A.

Q. Yes. Okay. I can find that.

5 A. Yep. And the other one was Bondi Residents v Waverley Council [2024].
That was at 44.

Q. I can find that. Now, I thought it was your written submission that raised a
concern about the wall height.

10 A. Mm.

Q. Are there any other submissions you'd like to make on that?

15 A. Apart from the written one, I do believe the conditions of consent, or the
proposed ones, have somewhat addressed that, but other than that the written
submission is fine.

COMMISSIONER: Yes. Okay. Any questions for Mr Hughes?

BERGLUND: No, thank you.

20

LANCASTER: No.

COMMISSIONER

25 Q. Thanks, Mr Hughes.

A. Thank you.

<THE WITNESS WITHDREW

30 COMMISSIONER: Look, I think we can have a break now and it looks as
though we have now provided you with a copy of the documents?

BERGLUND: The court officer has provided each of us with a copy of
Ms Ross's two documents, yes.

35

COMMISSIONER: There is the document that was just handed down by the
last witness.

BERGLUND: The conditions?

40

COMMISSIONER: Yes. So I can perhaps get copies of those done now too,
and one for each of us.

BERGLUND: We'll just get them back so we can get copies.

45

COMMISSIONER: We had Lisa Adkins nominated to speak but that last
speaker spoke in--

50 BERGLUND: Yes. Maryanne Dever, D-E-V-E-R, I believe it was,
Dr Maryanne Dever. That's it, the conditions of consent; there are actually

three copies here. That's all right. I will hand one up to you, give one to Mr Lancaster.

5 COMMISSIONER: Okay. Thanks, Dr Dever for that. So if we could come back at quarter to. Thank you.

LANCASTER: Thank you.

SHORT ADJOURNMENT

10

COMMISSIONER: Okay. Thanks everybody for responding so quickly to that. We've moved from Court 11B to Court 11A, for the record, because of a problem. Look, I'm just thinking in practical terms that it might be better to do things this way, I'm worried a little bit about costs and consultants, et cetera, 15 for the lay persons giving evidence. We've heard some evidence with regard to Darnley Hall, and there's two other speakers, I think they won't be brief given the notes that we've received, also from Darnley Hall. I'm tending to think we should push that to the last of the lay evidence and that we hear now from the other three properties where there's specialist evidence, if you like, to 20 come on.

BERGLUND: I was going to suggest the same--

25 COMMISSIONER: Were you going to suggest the same thing?

BERGLUND: --thing, Commissioner. I was, yes.

COMMISSIONER: You're happy with that as well?

30 LANCASTER: Yes. Thank you, Commissioner.

COMMISSIONER: Right. Look, I can't see any really negative sort of views being expressed from the audience here, but that's what we might do, it will allow the experts that have been engaged by the lay people to perhaps leave 35 and in that sense it might save some costs, et cetera.

BERGLUND: Thank you, Commissioner. That would mean our next witness is Jennie Askin.

40 COMMISSIONER: Yes, just before we do, I've got a couple of other things that I'm not sure where I'm up to. Did I get a copy of the conditions that were suggested by Dr Dever?

45 BERGLUND: Yes. You did.

COMMISSIONER: I wonder what I did with that.

50 BERGLUND: It's only one page. There will be an additional document handed up. Dr Dever has emailed a copy of her submission to my instructing solicitor, so we'll be handing that up in due course, but the conditions of consent is a

one-page document, the heading is "Notice of Consent Order Hearing for Billyard Avenue Developments" and then underneath it it says, "5 November 2024 - Dr Lisa Adkins 6/12 Onslow Avenue, Elizabeth Bay"; it's one page.

5 COMMISSIONER: Okay. So that will come on as exhibit 13, is that fair to say?

BERGLUND: Yes.

10 COMMISSIONER: I'll leave that place marker. I'd like to have a look at that over lunch if I could. I expect I'll be asking some questions.

BERGLUND: It's been sent to us electronically, I'll see if we can get a copy before lunch.

15 COMMISSIONER: Yes. The reason is I'd like - if I have the experts on the Court, the parties' experts on before that, I'd like to have it with me.

20 BERGLUND: We'll see if we can get it printed before lunch, thanks, Commissioner.

COMMISSIONER: Okay. Yes, Ms Berglund.

<JENNIE ASKIN, SWORN(12.08PM)

COMMISSIONER

5 Q. Okay. Ms Askin, what would you like to tell us?

10 A. Thank you, Commissioner. I am here today representing the owners of unit 8 and unit 10 of 13 Onslow Avenue, which is located opposite the subject site. I would just like to preface before going any further that I was not involved with the section 34 conference and have just become engaged recently. My
15 concern lies with the severe impact on views from the living areas of these units as a consequence of the breach in the height standard. A clause 4.6 has been submitted with the amended plans and it seeks to justify this breach. There is a dispute as to the full extent of the breach given that the height has been measured using the two methodologies Bettar and Merman. Irrespective of which methodology is used, there is a breach in the height control.

20 Clause 4.6 sets out the tests in terms of justifying a height variation and it is my contention that these tests have not been met, and therefore consent cannot be granted. The proposal is not consistent with objective C of clause 4.3 of the LEP, which is to promote view sharing. The breach in height will impact on a highly valued view that is of a land-water interface and is gained over the front boundary of number 13. This view is from the main habitable space of 8 and 10 and has not been included in the view analysis prepared by the applicant. A view analysis from that internal space was provided at my submission to
25 council; that's dated 22 October 2024, and that was prepared by Urbaine. Therefore in this instance it cannot be said that compliance is unreasonable and unnecessary as compliance is required to achieve objective C, which is view sharing.

30 The variation states that compliance with the number of storeys controls is a sufficient environmental planning ground. The proposal on the Onslow side is eight storeys, the DCP specifies a height of six storeys; therefore, this is not a sufficient environmental ground. Compliance with flood protection is also mentioned as a sufficient environmental planning ground. This necessitates
35 raising the building by 500 millimetres, yet the breach in accordance with Merman is 5.3, and in accordance with Bettar is 2.6. The proposal will impact on an existing view providing levels above the height limit. This does not promote view sharing, and insufficient justification is provided in the clause 4.6. The proposal is merely seeking to take more of the view.

40 The proposal also needs to be assessed in terms of clause 6.21C, which is Design Excellence in the Sydney LEP. I not that the consent authority is to have regard to whether the proposal detrimentally impacts on view corridors. It is my contention that the proposal will impact on the view corridor from number
45 13.

50 To conclude, the clause 4.6 variation has not demonstrated the matter that is required to be demonstrated under clause 4.6(3)(a). The proposal is not consistent with objective C of the height standard to promote view sharing. I also question the sufficiency of the environmental planning grounds when

having regard to the impact on views. Therefore, it's my contention that consent cannot be granted as these tests have not been met. Thank you.

5 COMMISSIONER: Yes. Okay. So Ms Askin, I seek to find your submission.

BERGLUND: Yes. I believe this is the most recent.

10 WITNESS: It's the only submission that I've prepared and it's dated 22 October 2024.

BERGLUND: That is in the supplementary bundle which I think was exhibit 6 and it's at folios 111 to 118.

15 COMMISSIONER: This one I think is the supplementary bundle, it's been removed.

BERGLUND: It was a casualty of the moving process, Commissioner.

20 COMMISSIONER

Q. So you're concerned that you've raised it - your submission was in regard to units 8 and 10, that's right, is it?

A. That's correct.

25 Q. Sorry, this is another one where a colour copy would be useful - a colour copy of the submission would be useful. Do you know if you've got one there I can see?

A. Yes, I'm happy to pass over my copy. Actually - yes, that has the opening.

30 Q. If you could perhaps show that to the parties.
A. Okay.

35 Q. I don't know if you've looked at this, Ms Askin, but one of the things that I was interested in with regard to the properties at 13 Onslow was the side setback, so on the northern side, did you look at that by any chance?

A. When you say the side setback of the subject development and whether there's, sorry, a view caught or down the side?

40 Q. Yes?

A. Yes. No. I was purely looking at the view across the top of the building.

45 COMMISSIONER: Okay, so I'm just going to replace this document, the colour document with the other material that I have. Perhaps you can just return that to the council. I've just done a replacement in the council's bundle. Are there any questions for Ms Askin?

LANCASTER: No, thank you.

50 COMMISSIONER

Q. Okay. Thanks Ms Askin.

A. Thank you.

<THE WITNESS WITHDREW

5

BERGLUND: Moving through the consultant planners, Commissioner, if it's convenient, I call Tony Moody.

10 COMMISSIONER: Thank you. While Mr Moody is coming forward, I do now have this document, I think, from Dr Adkins with me, so I'm just leaving that as a placeholder.

EXHIBIT #13 CONDITIONS OF CONSENT FROM DR MARYANNE DEVER,
ADMITTED WITHOUT OBJECTION

15

BERGLUND: Thank you, Commissioner. I note that Mr Moody's submission was in relation to 15-19 Onslow Avenue.

20 COMMISSIONER: Yes. I'm making sure I understand where we're up to here. In terms of the idea of hearing I guess the unit blocks together, okay, so instead of that, it seems to me practical enough to do it the way both of you are suggesting, that we hear from Mr Moody and there's another expert at least.

25 BERGLUND: Yes. Ms Richter. Then we'll go back to dealing with the buildings by groups.

COMMISSIONER: Yes. Then we can go back. That seems practical to me.

<TONY MOODY, AFFIRMED(12.17PM)

COMMISSIONER

5 Q. Thanks, Mr Moody.

A. Commissioner, I have made two submissions. The first submission was back in October 2023 in response to the original 10 October, and a second submission on 8 August in relation to the amended plans. I don't wish to canvass concerns relating to view loss from individual units within my client's building. The residents are obviously well aware of their units and they can give their own evidence on that point. I wish to raise one issue of significant concern and that is a view loss from the communal open space area of Elizabeth Bay Gardens. Firstly, I can say, without doubt, I consider that the communal open space area of the Elizabeth Bay Gardens is one of the highest standards of communal open space that I have experienced professionally.

Secondly, the proposed development will, no doubt, result in a significant reduction in the view corridor from the communal open space. Commissioner, you had the benefit of viewing the communal open space area. I should add, firstly, that the Court is obviously aware of the value of communal open space. The value of communal open space is expressed in a range of documents, including the Apartment Design Guide, the SEPP Housing 2021 and the council's planning controls. Simply put, communal open space is a vital part, particularly in high density residential areas, to provide a breathing space and landscaped area of people in high density buildings.

Of particular concern is the fact that a number of these units, not the majority I should stress, have no balcony and no aspect. That places the occupiers of those units wherein communal open space is a viable part. I'm not seeking to diminish the value of the communal open space for the other remaining residents. Of essential feature, for example, in the Apartment Design Guide, where it says good "good design must consider outlook and privacy from communal open space areas", in circumstances of the current application, you are faced with an application which will significantly reduce the corridor views from my client's communal open space area of not only parts of Sydney Harbour, and also parts of Clark Island, which I should add, is a heritage item.

When standing in the communal open space area there are no other water views from the communal open space area and in my respectful submission the Apartment Design Guide and the SEPP Housing 2021 speaks of principles that one must provide or maintain outlook from communal open space area. The proposal does not provide such outlook.

Commissioner, there was a reference this morning, you asked a question about one of the speakers spoke about the bay's locality of the DCP. It is my experience that when one has a DCP but the council formed express provisions relating to a particular area within the council area, it places greater weight on those locality statements or the provisions within each locality statement. In other words, the provisions have been prepared unique for that locality statement. The speaker, in my view, and I expressed it in both my

objections, referred you to principle C, and in s 2.4.6 - I have copies here if Commissioner requires - wherein it states that, "developments must maintain view corridors to Sydney Harbour and parts" it's a clear and unequivocal statement that it must maintain view corridors.

5

Principle J states that, "new building forms with narrow street frontages", and in the applicant's own statement of environmental effects it is acknowledged that this is a narrow frontage site, "and building separations are encouraged to provide views to harbour and sky". Those two principles, in my view, have not been satisfied with the kind of proposed development. Simply put, when one is standing or enjoying the communal open space area on my client's property, there will be a significant reduction of the corridor views. Because it is a corridor view, it becomes even more important in my respectful submission, which is highlighted by the fact of the DCP controls for that specific locality.

15

I also consider that the diminution in the corridor view, and that's arising out of the proposed extension of the proposed southern wall, closer to the adjoining property to the south, that extension not only has a diminution of the corridor views from my client's communal open space area, but it also diminishes the views of that corridor view from people walking along the public footpath. I have rarely seen an area with such positive qualities in the inner suburbs, but a fundamental part of that quality is those corridor views as one walks down, particularly to the state heritage item. This proposal will have a significant diminution in those corridor views from people walking along the footpath.

25

Commissioner, there are other points that I've raised in my submission but that's my fundamental point of objection against this proposed development and it arises out of the proposed extension southward, closer to the southern boundary compared to the existing setback. Thank you, Commissioner.

30

Q. I think your written submission remarked that the view analysis or view impact analysis didn't consider this.

A. Correct.

35

Q. Did you quantify it at all? Like, in photographic evidence or otherwise?

A. Yes.

Q. It's in your submission, is it?

40

A. It is in a submission. I had the larger scale, kindly provided by one of the residents, and you will see the, if I can, southern wall as opposed to the existing southern wall, and subject to the agreement of the residents, I'd be happy if they're called - I will get copies if you wish.

Q. I'd like to have it.

45

A. Yes. You can see, Commissioner, essentially the southern boundary setback is in the order of 8 metres as I recall, at the front building, and it's been reduced to something in the order of 3 to 4 metres. Now, as to whether that impacts on particular residents' units, I'd leave that for other speakers.

50

Q. Yes. So if you'd give us a copy of that, we'll take a photocopy of it.

Yes. I will, I will get the copy, thank you.

COMMISSIONER: Unless someone objects to that, okay.

5 BERGLUND: Did you say that was an enlarged photo from the one existing in your submission?

WITNESS: Correct.

10 BERGLUND: We'll find the page that it's in the bundle so we can. We think it's page 475.

WITNESS: That's it.

15 BERGLUND: It's just a larger version.

COMMISSIONER: Is that volume 1?

20 BERGLUND: Yes. Volume 1 of the bundle.

SIMPSON: Volume 1.

COMMISSIONER

25 Q. That was an earlier version of the plans?

A. Correct, Commissioner. I should add that, as I understand it, and I may be corrected, the setbacks to the southern boundary have been maintained at the lower levels; the only increased southern boundary setback is at the upper levels. So the view loss is as per.

30 COMMISSIONER: Sorry, 475 did you say?

BERGLUND: Yes.

35 COMMISSIONER

Q. I would still like to have the A3; that just might be a bit more - handy.

A. Commissioner, I have an extra copy if you wish.

40 Q. No, I've got the A4.

A. I'm sorry.

Q. The A3 document.

A. Yes. We'll get a copy of it for the Court.

45 Q. Well, I can - I've got a copier just here if we can just do it.

A. All right. My apologies.

50 BERGLUND: Do you want to check this as well?

COMMISSIONER: Better have a look first. No, sorry, if you can just show the parties first, thank you.

5 WITNESS: As I said, Commissioner, it doesn't change the southern boundary setbacks at the lower levels.

COMMISSIONER: Now, we'll do that a little bit later, but I'll mark that now. Any questions here for this gentleman?

10 EXHIBIT #14 A3 VERSION COMMUNAL OPEN SPACE VIEW FROM
15-19 ONSLOW AVENUE, ADMITTED WITHOUT OBJECTION

LANCASTER: No, Commissioner.

15 COMMISSIONER

Q. Okay. Thanks very much.

A. Thank you, Commissioner.

20 <THE WITNESS WITHDREW

BERGLUND: Is it convenient to call the next witness, Commissioner?

25 COMMISSIONER: Yes. I'll just make one other remark. Earlier on I said that I might ask those making submissions for further points of clarification. That's not likely to happen, but if it does, and I still wish to, I can do that by arranging that separately. So the experts that are here now don't need to stay, they can - by experts I mean appointed consultant specialists by the lay persons making submissions don't need to stay, but it's possible that I might call you
30 back for some further commentary later. It's unlikely but it's possible. Okay. So who's next?

BERGLUND: Natalie Richter.

35

<NATALIE RICHTER, SWORN(12.31PM)

COMMISSIONER

5 Q. Thank you, Ms Richter.

A. Commissioner, thank you for the opportunity to provide a further submission. I speak to number 23 Billyard Avenue, which adjoins the site directly to the south. If I may, I will offer some graphic aids to accompany this submission, containing photographs of the sun coming into apartments and
10 some extracts from the elevation shadow diagrams and a floor plan of one of the units. I've got three copies.

BERGLUND: Can I ask if this is from existing submissions or is it new material?
15

COMMISSIONER

Q. Yes.

A. This is based - I've marked up some elevation diagrams that--
20

Q. This is new, is it?

A. Yes.

Q. Is it just one sheet?

A. No. There should be a whole bundle.
25

Q. Did you say you had three copies?

A. Yes. There. The other two copies are here. Thanks. Number 23 is--

30 COMMISSIONER: Hold on. Just allow the parties to have a look at this documentation for a moment.

LANCASTER: There's no difficulty with that from our perspective, thank you.

35 BERGLUND: Was this the Commissioner's Commissioner?

LANCASTER: No, that's my copy.

COMMISSIONER: I'm not sure if I've got them in the right order. Could you
40 give this back to the witness?

Q. It seems to be sort of jumbled around a bit.

A. Okay. Yes. Thank you.

45 COMMISSIONER: If you could staple that for me. No objection?

BERGLUND: No. No objection.

50 EXHIBIT #15 NATALIE RICHTER SPEAKING NOTES AND PLANS,
ADMITTED WITHOUT OBJECTION

COMMISSIONER

Q. Yes.

5 A. Thank you. Number 23 is severely impacted by the scale and lack of
compliance of building separation in terms of outlook, privacy, solar impact,
excessive scale, noise and potential structural issues given the proximity and
depth of excavation. The applicant's solar access assessment misrepresents
impacts. The key north facing side living area windows of number 23 are
10 adversely impacted by worsened solar loss. The living room windows are the
ones I've marked on that elevation plan. These windows bring in sunshine and
the diagrams indicated that the front section towards Billyard Avenue will be
further impacted, as I've marked.

15 Living area windows at the front of the building will be impacted in the
afternoon and residents are concerned that these front north elevation living
room windows have not been assessed in the assessment or the material that
we have seen. The proposed living areas at number 23 Billyard Avenue do
not have dual aspect windows for the purposes of sunshine, as is suggested in
the plans. The front windows do not provide the same amount of sunshine as
20 detailed. In the applicant's survey, the impacted elevation of number 23 is the
northern elevation. The windows along the northern elevation of number 23
provide sunshine through the day, well into the floor plans as shown in our
photos.

25 Commissioner, you were able to see in June the effect of the available
sunshine in and on the amenity and to the health of these occupants through
the rooms of the apartments. If you could please refer to the photographs and
the floor plan that I have included in the bundle. The older style building was
clearly designed to face this direction. Three of the apartments only face the
30 northern side, facing the sun. The current solar access provides health and
amenity to living areas and drying for units and bathrooms. Without external
open space areas, internal amenity and solar access is of high value.

35 The applicant's statement does not address the planning controls that require
that the properties that are already challenged are not reduced by more than
20%. We have not seen an assessment of this and the latest submission does
not appear to address the Apartment Design Guide. If solar access is
compromised, the Apartment Design Guide indicates "building separation
should be increased". Please refer to the extract that I have included in the
40 bundle from part 3B-1 of the Apartment Design Guide. The ADG and planning
controls require a development to preserve solar access and outlook for
neighbouring properties. We are of the view that the current documents
should not be relied upon to be sure of the impacts created by this over scaled
development.

45 The solar details provided with the latest set of August plans compare the
current proposal with the original, proposal. When the original plans did not
address solar for number 23 from the outset, the improvements are only minor
and a compliant development should be assessed in terms of reasonableness
50 to exiting residents and to fulfil the intent of the planning controls. The August

elevation or solar diagrams indicate that their LEP non-compliant height, shown in darker blue, would in fact cast additional shadow in winter over some windows and the north facing roof of number 23, which will constrain the ability to provide solar power. Please refer to the elevation of shadow diagrams which show the darker shading.

The height and scale further constrains the opportunity for number 23 to mitigate solar and light impacts via providing solar panels to offset the increases in energy costs of needing to heat, cool and light the southern existing adjoining units. The latest statement refers to the impact on existing solar access to the rear courtyard common open space area of number 23 as being inconsequential, which is inaccurate. Additional shadow is demonstrated on the plans to be cast over the courtyard and this is a common open space which contains established plantings and a communal drying area which is, of course, important for an older style apartment building.

The excessive scale tangibly impacts on views for some properties and impacts unreasonably on visual scale solar access, natural light and privacy for number 23. So we submit that the clause 4.6 variation is not considered justified and conflicts with all planning controls, including the objectives of the height and scale controls, and clause 4.6 in the context of significant neighbour and area impacts. This does not result in a better planning outcome, and balanced planning grounds are not provided in which to justify such breaches of the height standard as well as the building setback and separation controls.

A development which significantly exceeds height does not comply with benchmark apartment separation controls and has minimum front setback. With such incongruous scale, it does not fairly address solar access protection, should not be considered acceptable in relation to the tests to be satisfied under clause 4.6, and we request that this proposal is not supported due to the impacts and the inaccurate information. The proposal fails against aims, as has been discussed by others, of clause 4.3, relating to the maximum building height, which is to ensure the height of development is appropriate to the condition of the site and its context, to ensure appropriate height transitions between new development and heritage items, and buildings in heritage conservation areas or special character areas.

It is very clear that the building is much larger than its neighbours on Billyard Avenue and the proposal significantly breaches the height limit. As other speakers have said, there is contention in relation to the measurement of the height. Thank you for your consideration.

Q. Is that material that you've read from there new or is that in your written submission?

A. That's my preparation for today. So - but it's all included in previous submissions.

Q. The content or the particulars, the detail; it's recast some?

A. It's re - yeah.

Q. Can I get a copy of that as well?

A. Sure.

Q. Is it okay literally to give me that copy and I'll get it back to you after--

5 A. Sure. I've got some notes written on it, so it's probably not the nicest version, but.

Q. You don't mind?

10 A. That's okay with me, yep.

Q. Okay. Now, in terms of the drawings that you've given me as well, that's exhibit 15, if I look at the first sheet, it's got a red 201 on the front of it; know what I mean - I'm sorry, you don't have it?

15 A. Yes, so the circled living - I didn't--

Q. Yes, the circled means what?

A. These are the living room, really key living room windows that face north, which currently have a lot of sunlight, which are not - don't appear to be addressed in the solar access assessment.

20 Q. I can see there's some windows marked as living room on that sheet, are you talking about the ones further say to the right on the drawing?

A. Well, I guess--

25 Q. Do you need to look at it?

A. Possibly. Thank you. So it's these ones that I've circled that haven't been addressed.

COMMISSIONER: Do you want to approach?

30 Q. I'm not sure which ones you mean.

A. These - these ones here where the building clearly overshadows these windows. They're - living rooms and they have to - it's not been assessed.

35 Q. There's a line of, looks like, four windows, you're saying are relevant.

A. So there's two, these are two, and then these are kitchen windows and then there's bathroom and bedroom windows with - so we've argued are very important as well, but if we're focussing on living rooms, the two at the end.

40 Q. Just the two living rooms?

A. Yeah.

Q. And the other two are kitchen and bathrooms?

45 A. Yes.

COMMISSIONER: Okay. All right. I think I get the gist of it. So any questions?

BERGLUND: Not from me, Commissioner.

50

<EXAMINATION BY MR LANCASTER

5 Q. One question. There's a page in the bundle, exhibit 15, that has what's called an example floor plan, and my question is whether Ms Richter knows from her own experience that those floor plans apply to each of the floors or whether that's just speculation.

A. That floor plan applies to two units, yeah.

10 Q. Two of the units?
A. Mm-hmm.

Q. You don't know if it applies, or there's a different floor plan for some of the other units?
15 A. I would need to check, is it the kind.

Q. Which two levels does this example floor plan apply to?
A. One and two.

20 COMMISSIONER: At the bottom of that sheet it says 11/23.

LANCASTER: The first level above ground and second level above ground; is that? All right. Thank you.

25 COMMISSIONER

Q. Ms Richter, we're going to take a copy of your notes, if you can just wait around, lunch will be not too long, so then we'll give it back to you then. I've got this document. I'll need to ask the experts some questions about this. We've only got enough copies for ourselves so I guess we need to copy this as well. So I might get a number of copies, maybe I'll get another two copies, maybe another four copies of this document.
30 A. Mm-hmm.

35 BERGLUND: When you say this document, is that the pictures? We were provided with a copy of those.

COMMISSIONER: You already have a copy?

40 BERGLUND: Yes.

COMMISSIONER: Beforehand.

BERGLUND: It was marked exhibit 15 I think.

45 COMMISSIONER: Yes. I just marked it exhibit 15 but I'm talking about the experts when I ask them questions about it later, they won't have a copy, will they?

50 BERGLUND: No, they're using my copy, no, you're quite right, Commissioner, it would be helpful if we could have-

COMMISSIONER: I'll make another few copies of that. So that's exhibit 15 and we'll try to make four good copies of that at lunch and return your notes, which I'll attach to exhibit 15.

5 EXHIBIT #15 SUPPLEMENTED BY THE ADDITION OF NATALIE RICHTER
FURTHER NOTES, ADMITTED WITHOUT OBJECTION

WITNESS: All right.

10 COMMISSIONER: I think there's only one more.

BERGLUND: There are no more town planners to speak. There are more residents to speak but that's the end of the consultant planners.

15 COMMISSIONER: Give me a moment. Look, I'm worried about time as well generally. Would it be practical for us to hear now, for example, from Ms Crone - we've heard from Ms Crone, haven't we?

20 BERGLUND: Ms Ritchie is the only speaker for 34A Billyard Avenue.

COMMISSIONER: Sorry, Ms Ritchie. Okay. Right.

25 BERGLUND: Then Mr Sutton is remaining for 13 Onslow; we've already head from Jennie Askin in relation to that. The others, there's more than one speaker from each building.

COMMISSIONER: Right.

30 BERGLUND: I would suggest that Ms Ritchie might be an appropriate person to hear from before lunch.

COMMISSIONER: Yes.

35 BERGLUND: Is she here? Okay. It appears she's not here. That would suggest the next, Mr Sutton, who is the remaining speaker in relation to 13 Onslow.

40 COMMISSIONER: Yes. Okay. Probably rather do that after the break. So I think we will have a break if that's all right. Come back at quarter to. Anything else before we do?

BERGLUND: No. I don't think so.

45 COMMISSIONER: Right. Thank you.

<THE WITNESS WITHDREW

LUNCHEON ADJOURNMENT

50 Okay. Thank you. What I thought we might do now is call on the experts from

the parties to respond in regard to a couple of things. I think we're in a position now where I can hear from them with regard to the two Billyard Avenue properties next door, and also perhaps Mr Hughes as well, at least with regard to the question of the wall height.

5

LANCASTER: Yes. All right.

COMMISSIONER: Is that okay? Perhaps you could start if you like, Mr Lancaster, call your experts on.

10

LANCASTER: Yes. Can I ask three of my experts to come up; are you interested in the--

COMMISSIONER: I'm interested in particularly the experts that prepared the joint report. If someone else needs to come on, that's fine. I think council has three; don't they?

15

BERGLUND: No, we have two. I have an urban designer and a town planner and I'll call both of them.

20

COMMISSIONER: Yes. Okay. So your three might be able to sit in the front and the council in the back.

<ANDREW HARVEYJANE MAZE-RILEY AND JULIA ERRINGTON,
AFFIRMED, AND WILLIAM JOHN SMART, ON FORMER OATH, AND JULIA
PRESSICK, ON FORMER AFFIRMATION(1.48PM)

5 LANCASTER: Ms Maze-Riley, could you state your full name and your
business address and your occupation?

10 WITNESS MAZE-RILEY: My name is Jane Maze-Riley. My business address
is 123 Pitt Street. My occupation is view expert.

LANCASTER: Thank you. Mr Harvey, could you do likewise, please?

15 WITNESS HARVEY: Yeah. Hi. I'm Andrew Harvey. I'm a consultant town
planner from Urbis. Our street address is 123 Pitt Street, Sydney. Thank you.

LANCASTER: And I reintroduced Mr Smart to you again, this morning, I think
Commissioner. If that can stand on the record?

20 COMMISSIONER: That stands on the record, that's fine. Now, I don't know
that the council has a microphone there; do you? We have a roving mic.
Maybe you can - what I might suggest to you is if you, I think, dislodge it and
they can have it on the table, if that works. Easier said than done.

25 BERGLUND: Thanks very much. If that's working. Ms Errington, can you
please state for the Court your full name?

WITNESS ERRINGTON: Julia Errington.

30 BERGLUND: What's your occupation and business address?

WITNESS ERRINGTON: I'm a planner with the City of Sydney, and the
business address is 456 Kent Street, the city.

35 BERGLUND: Thank you.

COMMISSIONER: Thank you, and Ms Pressick has already been introduced.

BERGLUND: Sorry. Ms Pressick, I'm reintroducing her.

40 COMMISSIONER: Yes. That's fine. Thank you. Look, I'll just say a couple of
things at the start. The topics of excavation and, I supposed, potential for
anchoring, et cetera, the age of the buildings, I'm setting that aside for now
because it probably applies to most of the neighbouring properties. So here I'd
45 just like to hear from you with regard to 8 Onslow Avenue, that's where
Mr Hughes comments. At least in his written submission he remarked on the
wall. Some of his other wider issues also setting aside for the time being that
this was in regard to the side wall that he had concerns about its proposed
height.

50 After that I'll ask you about the evidence of Ms Crone in respect of 21B

5 Billyard. Again, less the wider issues. This is more about the bin storage topic. How temporary, in particular, is the question I have for you on that one. With regard to 23 Billyard, it's examination of the commentary from Ms Richter and I'd like to ask you if anything changes in regard to your views generally on any of the matters that were raised by the objectors, but I'll be asking you in particular about those submissions in respect of overshadowing, et cetera.

10 Maybe, in terms of Mr Hughes I might just start. With that, what's happened with the side wall; he said his comments in writing remain the case. Has anything changed or not? He had a comment, I think that the wall was perhaps 3 metres high or quite high on his shared boundary?

WITNESS SMART: Is it a boundary wall; a boundary fence?

15 COMMISSIONER: Yes. It seemed to be a boundary wall. In the courtyard in the rear; we did go there in the site inspection. Do I need to read that out?

20 WITNESS ERRINGTON: I think I can - it's referred to in our joint report in (bb). Sorry in - sorry. In the response to submissions. It's page 43, point (bb) in the joint report.

COMMISSIONER: This is exhibit 4?

25 LANCASTER: Exhibit 4.

COMMISSIONER: Yes.

30 WITNESS ERRINGTON: I think there was concern in elevation. He was concerned I think with the height of what the heights that will look like from the front elevation, but that portion of the wall is the same height really as the existing fence, at 21.4. Then going on to point 3, the middle portion where the 8 Onslow building is set back from the boundary is 1 metre above the exiting neighbouring ground level and slopes to match the neighbouring ground level. Then the northern portion of that boundary wall is, yeah, 1.32 metres lower
35 than the existing wall that's currently there.

COMMISSIONER: So I open up now DA 460H; is that a useful one to look at?

40 WITNESS SMART: 460 is the best, and section H.

WITNESS ERRINGTON: The wall proposed is shown in grey.

COMMISSIONER: With green looks like landscaping in front; is that right?

45 WITNESS ERRINGTON: Yes.

50 WITNESS SMART: On this side, and then the darker grey wall is the neighbour's building, built to the boundary in two portions, one on the left and one on the right of that section H. In between those two portions is where the wall is about a metre above their courtyard and then the wall to the left

adjoining with Onslow Avenue is the same as the existing height at 21.4. Then the one to the right of that wall, up into the change in level and the building is the lowered wall 1.3 metres high.

5 COMMISSIONER: I can understand that drawing. So you're, I guess, telling me you're seeing that as a reasonable interface. The record doesn't pick up when you nod your head.

WITNESS ERRINGTON: Yes.

10

WITNESS PRESSICK: Commissioner, if you wanted a three-dimensional view, the views from the sun, particularly the marked views, give you a three-dimensional reference between the buildings. DA 817. You'll see that as it's swings around - and 818 as well. You can three-dimensionally see the relationship between the two sites.

15

COMMISSIONER: All right. Maybe you can try to explain that a bit further, Ms Pressick.

20 WITNESS PRESSICK: I was just pointing out that--

COMMISSIONER: So if I've got 818 open, I can see--

25

WITNESS PRESSICK: Yes, the 818. If you have a look say at 11am up in the top left-hand corner, you can see the relationship between the two sites where there's the yellow for the subject site and then the green. You can see that they're very, very similar and that there is a low wall between them. Then you've got the number 8 steps that step down. From there you can kind of just make them out.

30

COMMISSIONER: Yes. Okay. I've got that. Any questions or comments arising?

LANCASTER: No, thank you.

35

COMMISSIONER: Under the topic of the in storage and it's adjacency to 21B, are there any conditions that might control the timing of that?

40

WITNESS ERRINGTON: Yes. Condition 68, waste and recycling management. At 68(iv), to the timing of when the bins are to be transferred to the temporary holding storage area.

COMMISSIONER: How long is it?

45

WITNESS ERRINGTON: The day of collection they are to be transferred to that space and the condition required, but they'd be removed there within 24 hours.

50

COMMISSIONER: Thank you. Onto the submission by Ms Richter in respect of 23 Billyard. Sorry, I'm assuming there's no questions there?

LANCASTER: No questions.

BERGLUND: No, Commissioner.

5 COMMISSIONER: This goes to all of the evidence that you might hear or
have heard in the lay submissions. You're aware your duty is to assist the
Court here. If anything changes in terms of your opinion, it's the time to say it.
So I'm just going to ask you now if anything you heard there with that
10 submission causes you to review your opinions that might be stated already.
Generally I do want you to take me into the arguments put there, and so let's
perhaps start with that. I'd like to start with the council. If you could perhaps
kick off with the topic.

15 WITNESS PRESSICK: Commissioner, if you turn to DA 835, sorry, actually
834, 834 is at 9am. These are elevational views. Solar access diagrams.
Ms Richter was pointing out the living rooms which were the two front
windows, which are highlighted on these drawings as living rooms.

20 COMMISSIONER: Yes.

WITNESS PRESSICK: You can see the shadow of the building is in green
and purple and then a little bit later on they're still in blue.

25 COMMISSIONER: Yes.

WITNESS PRESSICK: You can see from 9am, 10am, 11 - this goes in
15-minute increments, so I'll just say the hourlies because it will take too long.
From 9am, 10am in the bottom left-hand corner, and then over the page 11am
in the mid top, so that's already two hours that those living room windows are
30 not affected at all by shadow, so that's compliant as far as the DCP is
concerned. Those windows continue to receive sun and to receive compliant
sun to the front to three of the windows, until 2pm. So they get what the DCP
would consider compliant sun from 9am to 2pm. There are also the street side
35 windows which do receive solar access which is demonstrated in the views
from the sun, for which I'll find the reference, but they're not impacted.
Commissioner, DA 811.

COMMISSIONER: Yes.

40 WITNESS PRESSICK: You can see that the front windows, there are three
front large sort of rectangular front windows, they're the ones on the - you can
see six actually, but the three on the right-hand side are the living room
windows that Ms Richter showed us in a plan.

45 COMMISSIONER: Yes.

WITNESS PRESSICK: Those are not impacted and you can see at 9am
until - I would say it starts to get oblique at 12.45 but those windows continue
to receive sun. Those windows alone provide compliance but we also, as
50 pointed out, the side windows also provide compliant solar access, beyond

compliant solar access.

5 COMMISSIONER: I think one of the points raised was that some of the units only have one boundary that is north oriented, but you're saying that's okay, anyway, because of the original shadow diagrams you've pointed to; is that right?

10 WITNESS PRESSICK: While the proposal is having some overshadowing on the building, looking into each individual unit along that boundary, they are maintaining two hours, which is compliant with the ADG and also the DCP, all maintaining as existing. So where, say, the living room window only receives one hour and three-quarters, the proposal retains at least that one hour and three-quarters. I can, I guess, draw your attention to the joint report again, it's at page 25 E. We've sort of, I guess, looked in detail at the individual units, 15 what they currently receive and then what is retained.

WITNESS HARVEY: I think, Commissioner, if I could also add to that, ..(not transcribable)..section 34 we have made quite a significant amendment to the floor plan as well to enable better solar access, which William might be able to 20 take you to given that this issue was raised initially.

COMMISSIONER: Yes. Does this still affect 23 Billyard?

25 WITNESS HARVEY: Yes.

WITNESS SMART: It might be looking at drawing 807. So a lot of what we'll talk about now is units 6 and 7 marked on there and they're coloured in blue, the living rooms.

30 COMMISSIONER: six and seven, yes, so they're towards the rear?

WITNESS SMART: Yes, and they're about a metre and a half from the boundary sort of on the north-western side of the building. So we're really looking at sun impacts later in the morning and towards the afternoon, and if 35 you go to perhaps start with the views from the sun which start on page 11, you can see that the existing building is the same actually, but the building impacts those as it moves through the day, and then what happens is late in the afternoon which you will see on the right-hand side of 812, and then on 813, they come into the sun in the afternoon. So there's no sun in the 40 mornings but in the afternoon they have sun. That is shown in elevation starting on page 834 and the blue-coloured windows on the right we're talking about through here. In this diagram, green is new and existing shadows, so the same shadow as before, and purple is increase in shadow. If you go through there, the upper two levels maintain the same amount of sun that they 45 had before, a number of minutes. Then what happens in the lower levels is they've had sun in the morning, they had 15 minutes, and that was at 9am and it goes into shadow at 9.15. In the revised design it gets its sun from 1.45 until about 2.15.

50 WITNESS PRESSICK: This is explained further on page 27 of the joint report.

5 We've I guess looked at each individual unit along there which they're the most affected because they're deep in the floor plate, so it's - and the plans are amended to remove a bedroom to really scoop out a portion of the form of the Billyard Avenue building towards the rear, just to get that slot of sun coming through in the afternoon to ensure that further impacts weren't recreated.

10 COMMISSIONER: Yes. Okay. So it's not as if - you're not indicating this is new sun they don't receive now, you're just trying to counter the fact that the building otherwise brings some of the shadow, and you're concern is to achieve the DCP controls?

WITNESS PRESSICK: That's right.

15 WITNESS SMART: Yes.

COMMISSIONER: Is it the Onslow building that's causing the afternoon shading or still the Billyard building?

20 WITNESS SMART: Onto number 23?
COMMISSIONER: Yes.

25 WITNESS SMART: It does come in, just very late in the day. At 3pm it's causing some overshadowing there. On the most right-hand side, but that shadow starts at 2.15 from the Onslow building. The rest of it's the Billyard building. The light green is where more sun comes into the units in these diagrams.

30 COMMISSIONER: Okay. I'm going to have a quick skim over the notes I took. If there's anything that I've forgotten, I'm happy to hear those topics raised, but just give me a moment anyway. You can take note of the queries as I mention them and give me your response. There was mention of the idea that the planning controls say no reduction if there's less than 20%, that's one question. The courtyard is overshadowed and the drying area is relevant.
35 They're the technical points I'd like you to respond to if you could.

40 BERGLUND: Commissioner, I have one additional one noted which was from Ms Crone from 21B Billyard Avenue and that was to do with potential cracking and damage to the building.

COMMISSIONER: If I could hold that with the excavation, et cetera.

45 BERGLUND: That's fine, it was just my only other note from the Billyard Avenue.

COMMISSIONER: Yes. Okay. So those couple of queries. The planning controls say 20%, for example

50 WITNESS ERRINGTON: That you must not reduce existing non-compliant by more than 20%.

COMMISSIONER: I'm not sure exactly what the control is, yes.

5 WITNESS ERRINGTON: Yes. That is the control. Where they're not compliant, where they're not receiving their required two hours, currently, that you should not reduce the amount that they're receiving by more than 20%. That's to living rooms and private open spaces, Commissioner. And..(not transcribable)..that's not - the building is compliant with that. It's design gardens, I think, in the ADG, and the building is compliant with that.

10 COMMISSIONER: So it's not a DCP provision?

WITNESS ERRINGTON: Well, there is solar access requirements which--

15 WITNESS PRESSICK: Not 20%.

WITNESS ERRINGTON: --not the 20%.

WITNESS PRESSICK: The 20% is an ADG consideration.

20 COMMISSIONER: You comment to that in your written notes; is that covered?

25 WITNESS PRESSICK: As Ms Errington pointed out before, Commissioner, each of the apartments we discussed what solar access they have and that currently under their proposed - so we do go through it systematically and we don't report, and that indicates that there's a..(not transcribable)..action if you go through each and every one. It begins on p 25 E and it's broken down into building as well.

30 COMMISSIONER: In regard to the courtyard and drying area.

WITNESS SMART: In relation to the courtyard off the back of 23, there is no increase in overshadowing to that courtyard in winter. In fact, there's a slight reduction in overshadowing to the courtyard in winter.

35 WITNESS PRESSICK: At page 27 of our joint report we go through each building and their communal open space, and the impacts. They're all outlined and assessed against development control.

40 COMMISSIONER: Okay. I can look at that.

WITNESS SMART: Then the shadow studies are on DA 820 and 821, 822, 23, 24 and 25, and 26.

45 COMMISSIONER: What about the drying area?

WITNESS SMART: Yep.

COMMISSIONER: What's happening with the drying area?

50 WITNESS SMART: The drying area? It - it--

COMMISSIONER: Does it increase overshadowing there?

WITNESS SMART: There's no increase in overshadowing. In fact, there's a slight reduction.

5

COMMISSIONER: Did that change from the s 34 meaning? Because I remember we - I didn't know that was the case when we - I thought it was the opposite when we inspected in.

10

WITNESS SMART: We have reduced the size of the building, so the building is shorter and set back more so that it would get more sun now.

15

COMMISSIONER: I have some other questions, more going to the general topic of cl 4.6 contravention matter, but I will hold those for now. Are there any other questions?

20

BERGLUND: Not from me. There's some conversation going on behind me about the wording of the control, but we'll find that and go to it later. I think we can wait.

COMMISSIONER: That doesn't affect the experts now?

BERGLUND: No, it doesn't.

25

COMMISSIONER: I think I can temporarily excuse them now, and we'll get back to the objections. Thanks, all.

<THE WITNESS WITHDREW

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BERGLUND: I would propose that we next go to - we have one remaining speaker from 15-19 Onslow Avenue, if that's appropriate. I propose to call Mr Gazy. Just trying to go back to the groupings of buildings.

<MARK GAZY, AFFIRMED(2.16PM)

WITNESS: Commissioner, I've got some new evidence, or new submission. I've got three copies.

5

BERGLUND: Sorry, Commissioner, I couldn't hear that. I don't know if it's the--

WITNESS: It's - there's some new - it's a new submission.

10

COMMISSIONER: Ms Berglund is just clearing the mike. It is a new document.

BERGLUND: I can hear Mr Gazy now. I just couldn't hear his opening remark.

15

WITNESS: Yep. That submission - there's - the topics aren't new, but the framing and the evidence inside is - is new. So I'm just - there's some - and some blow-up images that I will go through as part of it.

20

COMMISSIONER: Just give me one moment. Unless there's a problem, I will mark this.

BERGLUND: I haven't seen it before. It's been handed to me.

25

LANCASTER: Of course, I haven't seen it before, but I don't anticipate there will be a difficulty.

BERGLUND: Yes, I agree. I think we were up to - the last one I noted was 15. Your question was, did you miss 12. I don't have a 12 written down, so possibly.

30

EXHIBIT #16 MR MARK GAZY'S SPEAKING NOTES TENDERED,
ADMITTED WITHOUT OBJECTION

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COMMISSIONER: I've marked it, but I accept there might be some objections later, depending on what its content includes.

Q. Thanks, Mr Gazy.

40

A. Thank you. Yes. It's Mark Gazy, the owner of 6C, 15-19 Onslow Avenue, the apartment building directly south of the subject site known as Elizabeth Bay Gardens. I'm an architect with over 25 years of experience. I've been involved in numerous City of Sydney Design Excellence Competitions for multiple - for multi-residential buildings, winning a number of them; and a registered design practitioner under the Design and Building Practitioners Act. For some - just for some context, I have submitted three previous submissions regarding this development. We - I had never been contacted by the applicant during the design of the building, and nor was Elizabeth Bay Gardens even considered in the original view analysis report. There are many concerns I have for this development, and the poor precedent that this will set. I will go

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through these concerns very quickly, and then focus on two that are more important for me, in particular.

5 Firstly, the absolute minimum site setbacks that this will create privacy and amenity issues to the neighbours and its own residents. The minimal setbacks create a bulkier building, which causes further impacts to view sharing. The applicant has tried to address the privacy screen - privacy concerns with a privacy screen detailed of hit and miss brickwork. This is a pretty poor detail that will not provide any screening. The sheer fact that it's called "hit and miss" 10 means that bricks are left out, allowing you to be able to see directly straight into the neighbours' - neighbouring windows. As well as, from the occupants' wellbeing, it will feel - it will feel like a cage-like space, because the bricks are hard up against the window frame.

15 The secondary bedrooms to the Onslow Avenue building - the "O1 Stack" of apartments - has a recessed lightwell with windows that are 3 metres apart and look directly into each other. How can both rooms be occupied without blinds being drawn? What standard of amenity is this setting? I believe the floor-to-floor heights of 3.1 is unrealistic, and not allow sufficient construction 20 tolerance to achieve the required ceiling heights; drainage; thermal insulation, particularly where there's external spaces above habitable areas. This occurs on many floors, and will require additional height to achieve these design and building standards. I have asked the applicant to provide detailed drawings to prove the 3.1 floor-to-floor heights can be achieved, in my previous 25 submissions, but these have never been addressed. As this could impact the height of the building, I sort of request that this is adequately demonstrated by the applicant prior to any approval. The breach of the height limit, which has been discussed by a number of the previous submissions; the inaccurate calculation of the ground floor level that one of the other applicants has 30 brought up recently; the loss of view from the public domain to Onslow Avenue to the harbour, which is identified in clause 2.4.6(c) of the DCP that views should be maintained; and the loss of view from communal open space of Elizabeth Bay Gardens, which impacts all 78 of our apartments, which was elaborated on previously earlier.

35 But what I would like to focus on today is the view loss from my apartment, and the excessive bulk of the building along Onslow Avenue streetscape, particularly when viewed from Elizabeth Bay House. Firstly, the upper level built form along Onslow Avenue creates a two-storey high, almost-blank 40 façade when viewed from Elizabeth Bay House, that dominates the streetscape and the character. Clause 2.4.6(b) of the DCP states, "Development is to respond to and complement heritage items and contributory buildings within heritage conservation areas, including streetscapes and lanes". The existing built form along Onslow Avenue 45 streetscape has a gradual and step transition of height from 8 Onslow Avenue up to 12 Onslow Avenue. However, the proposed height of the development is approximately 1 metre higher than the eave height of 12 Onslow Avenue, and although this might sound reasonable, in an elevational view you might think that creates some variation in height, and that is consistent with other buildings 50 in the neighbourhood.

But unlike, say, in Martin Place, you never perceive this building in a true elevation. You experience the building obliquely from the street level, and as you come up the hill from Elizabeth Bay House, this upper level built form of the proposed development is overbearing, dominating, and is out of scale and character of the adjacent context. This is demonstrated in the following perspectives, and I will get you to look at the first blow-up view. You can see that's from the applicant's design report, and it's an existing view from Elizabeth Bay House, and you can see the stepping nature of the three existing buildings. If you go to the second page, which is the proposed view, and you can see this upper level, two-storey, blank façade. It - you don't perceive the stepping nature of the built form, and it dominates the streetscape. However, if you remove the top floor - and the third is just my very quick photoshopping skills, so it's not accurate, but it gives a very good indication. As soon as you remove that top level, it becomes a much more respectful building in the streetscape. It's not a two-storey blank wall, which could almost be a plant room up there, and it far better represents the character of the area.

I will now turn - I raise my concerns about the issue view loss. As I mentioned previously, Elizabeth Bay Gardens has not even been considered by the applicant in the original DA submission with regards to view loss. Most of the residents were not even contacted prior to the submissions to be notified of their intention to develop on the site, me being one of them. This lack of notice to the residents has meant that there are at least five more apartments, I believe, that will have significant view loss and have not been considered. These are units 4C, 4D, 5C, 5D, and 6D. A quick Google search of the last real estate photos of unit 4D show the water views they have, and the subject site in the foreground of those water views, which is the next image on the deck of larger images that I've blown up. It doesn't take much to find out what views there are from those apartments. It's the beauty of the internet.

Q. This one is 4D?

A. That one's 4D, yes. Sorry, I haven't labelled it. It's just - it's labelled on the--

Q. With the red flowers on the right-hand side.

A. Correct, yeah. It's labelled in my submission letter. There are also many errors in the view analysis report relating to Elizabeth Bay Gardens. Here are just four: figure 14, label 11E is actually a unit, 12J; figure 14, labelled 8C, is actually unit 9D; figure 14, labelled 3D, is actually unit 4E and 4F; figure 23 does not represent a northern view from unit 3D. It is actually a northwest view facing away from the subject site. But now, Commissioner, I want to focus on the really big errors in this report relating to my apartment, unit 6C. Figure 36, which is the next image I have in the blow-up report, and this is directly from their report, and it's - it has the caption of "View north, seated. Unit 6C balcony unaffected". However, they have falsely misrepresented the view, cropping the image. If you go to the next view - so, Commissioner, if you remember when you visited my apartment on the day, there's no obstructions to my view from the balcony. So the next image is a photo I've taken from my balcony, and you can clearly see the envelope of the existing building and the lift

overrun. My estimate of the proposed building envelope is shown in red and would approximately impact about 70% of the water view. It's not unaffected.

5 Similarly, they have incorrectly stated that the master bedroom view would be unaffected. Refer to figure 37 in their report, which is the next blow-up image. You can clearly see the lift overrun and the existing building in the image, and the proposed building is approximately 1.1 metres higher than the lift overrun. My estimate of the proposed building envelope is shown in red and would
10 impact approximately 80% of the water view. Commissioner, these are not unaffected views. They are not even minor impacts to view - to loss of view. They are just false and misleading statements from the applicant.

If we look at the figure 34, which is the next view in my set of the view analysis report, the image they - the image they actually modelled, the image indicates
15 about 75% of the water view would be lost to the proposed built form. As shown below, this is a significant view loss, so, sorry, it's in my letter. So their tenancy assessment of negligible view impact is based on the premise that views from other areas of the dwelling are unaffected. Now, as I have just demonstrated, this is clearly an incorrect statement, and therefore their
20 assessment of negligible impact, I believe, is incorrect. Combine this with the potential view loss from units 4C, 4D, 5C, 5D and 6D, I don't believe there is sufficient evidence to conclude that the proposed development has a negligible view impact to these units in Elizabeth Bay Gardens.

25 Commissioner, it appears that the applicant is rushing to get the DA submitted and has pushed through this proposal through the Court system that has not been fully understood and has not fully understood the impacts of their design on the neighbouring context, and as such have made several errors in their documentation that has meant council has not been able to properly assess
30 the application. For the reasons I've stated above, the proposed development is not in the public interest. The top floor apartment is a two-storey apartment that is to the benefit of a couple of occupants that will receive uninterrupted panoramic water views while it significantly impacts many more. It will significantly impact the loss of views to several units in Elizabeth Bay Gardens,
35 while the excessive bulk and scale of the upper level, when viewed from Onslow Avenue, is not complementary of the streetscape and the character of the heritage conservation area, and the application should be refused.

40 However, Commissioner, if you are considering approval with amendments to the application, I have enclosed my proposed amendments as an appendix to this document. Thank you.

Q. Thanks, Mr Gazy. Just give me a moment for a sec. I want to ask you one question to save you really returning.

45 A. Yeah.

Q. I can recall, I think, in the joint report prepared by the experts, a response to your concern about floor-to-ceiling heights and the like. Did you see that, by any chance?

50 A. No.

COMMISSIONER: If anyone knows where that is, I'd just like to ask Mr Gazy to respond to that.

SPEAKER: Page 20.

5

COMMISSIONER

Q. So what I might do is just ask you to quickly have a look at this and then return it to me and let me know what you think, rather than my reading it out? It's the topic "Adequacy of floor-to-floor heights."

10

A. Yeah. So I haven't read all of it. I got to the point 17. What's changed significantly since the ADG is the Design and Practitioners Act, and the requirements for waterproofing and step downs to balconies and external areas, has significantly made it harder to achieve 3.1. And it's typically now getting closer to 3.2, particularly when there are non-habitable rooms above a habitable space. So to achieve, you know, all the insulation requirements for basics, the waterproofing requirements, fire rating. You know, you used to be able to have thin slabs through fire engineering, thin slabs. You could - it's much harder to do that now. So, you know, I'd like to see a drawing. I'd like to see several drawings, showing how drainage is going to be achieved and how those ceiling heights are going to be achieved. It's great to have these kind of generic statements, but much harder to prove it in real life. Yeah.

15

20

Q. Okay. Thank you. Can I have that document back.

25

COMMISSIONER: Any questions?

LANCASTER: No questions, thank you.

30

BERGLUND: No, thank you, Commissioner.

<THE WITNESS WITHDREW

COMMISSIONER: So that's the extent of the submissions from Elizabeth Bay Gardens; is that right?

35

BERGLUND: Yes. That's right.

COMMISSIONER: So we'll call the experts back, I think, and deal with that.

40

<WILLIAM JOHN SMART, ON FORMER OATH, AND JULIA PRESSICK,
ANDREW HARVEYJANE MAZE-RILEY AND JULIA ERRINGTON, ON
FORMER AFFIRMATION(2.36PM)

5 COMMISSIONER: So, first of all, interested in the initial submission from
Mr - town planning expert--

LANCASTER: Tony Banks.

10 BERGLUND: Moody.

COMMISSIONER: Yes, Mr Moody, and his comments in regard to the private
open space and the reduction in the view corridor. Can I get some feedback
on that from you? I generally like to start with the council, and then you can
15 follow up, if you've got other points, if that's okay.

WITNESS PRESSICK: Commissioner, the replacement building is slightly
wider than the existing building, and that is evident on drawing - in one
minute - DA03. The existing building DA003..(not transcribable)..let me know
20 when you're there.

COMMISSIONER: Yes.

WITNESS PRESSICK: The existing building is depicted in an orange shade,
25 and the proposed building in a blue shade. You can see on each side
boundary there is some change, although in places the existing building is
almost as wide in parts of it, but not across the - as long on the façade as the
middle thing. But what does remain is approximately a 3 metre corridor on
either side of the building. This is fairly characteristic with the side setbacks in
30 the locality, and so while some - there is a reduction of some of that view
between buildings, it does remain to a reasonably large degree, or at least a
moderate degree.

COMMISSIONER: The view corridor.

35 WITNESS PRESSICK: The view corridor.

COMMISSIONER: That's from the communal open space. Is it similar from
the - is there anything different in terms of that comment you make now in
40 regard to the public domain itself? Is the same effect or--

WITNESS PRESSICK: Well, again, it's the same thing, effectively, in terms of
what you see now. You'll see a little less of it, because the building is wider,
but you will still see - there is still a 3 metre slot, either side of the building,
45 approximately 3 metre slot, either side of the building, through which you can
see what you can see now, the same - the same type of view, but reduced.

COMMISSIONER: The 3 metre setback or slot - sorry, it's not a setback to the
boundaries; that's total, you mean?

50

WITNESS PRESSICK: It's a setback to the boundary.

COMMISSIONER: A setback to the boundary.

5 WITNESS PRESSICK: Yeah.

COMMISSIONER: I can see the plan, but in some instances there's a considerable setback further to the south, that is between the existing buildings to the south and the boundary.

10

WITNESS HARVEY: Yeah.

15 WITNESS PRESSICK: Yes. I mean, I brought you to this one, because it does - it's quite helpful in that it has a lot of dimensions on it to show you the difference between existing and proposed, in terms of those side setbacks. And if you look at the existing building, say, on the - a lot of the objector's have called it the southern boundary, so I call it the southern boundary, although that's not what it's referred to throughout the document, so that gets a little confusing, but it's on the 33 Billyard and - and hall side of the building. The
20 existing building does get down to - in point - 2.6 - it's according to this diagram. Whether that's on the actual building or not, you know, that's the - but the overall footprint depicts it does narrow down there, but there are other places where it's further up towards Onslow, where it's more like - it says
25 4.6, with those blades of the building.

25

And then close up to the street, it's 7.5. But really the view corridor is closed down by the outermost part of the building. It's more consistently 3 metres now.

30 COMMISSIONER: I'm just going to open up that A3 - if I can locate it - the A3 figure. So what I'm just clarifying now, Ms Pressick, when you say the view corridor's defined by the outer edge, if you like, of the existing buildings now--

WITNESS PRESSICK: Yes.

35

COMMISSIONER: --if I look at this diagram, it doesn't seem to suggest that I can - ink that that, say, 3.3 metre setback of the existing building at Billyard does affect the view. Is that fair comment? It looks to me as though it's--

40 WITNESS PRESSICK: From - yeah--

COMMISSIONER: --the upper level--

WITNESS PRESSICK: --from that angle--

45

COMMISSIONER: Sorry?

WITNESS PRESSICK: --definitely--

50 COMMISSIONER: Finishing--

WITNESS PRESSICK: --I agree.

COMMISSIONER: Just finishing. Yes. You agree. Okay.

5 WITNESS PRESSICK: From that angle, definitely, yeah. Yes.

COMMISSIONER: So it's more, from that angle it's the foreground building. That Onslow Avenue building.

10 WITNESS PRESSICK: Absolutely. It looks - from that photo, it looks like you're seeing the front of the building at - it doesn't look like you're seeing all the way down. Do you know what I mean? It looks like it's a slightly rotated view, perhaps, because your leading edge is definitely the front of the building. The front of the Onslow existing façade is the leading edge to that
15 view.

COMMISSIONER: Okay. The 3 metre number, itself - was that any significance DCP-wise?

20 WITNESS PRESSICK: No. It's significant from a deep soil perspective. When it gets to the Billyard set - set back to 23 Billyard - that boundary - there's a minimum 3 metre dimension for deep soil.

COMMISSIONER: Okay. Anything to add?

25 WITNESS MAZE-RILEY: No. Only that I would suggest, Commissioner - this is an indicative view. I don't know who's produced it, and I can't verify any accuracy about it, and looking at the dimensions following Ms Pressick's description on the same architectural drawing, the narrowest part of the
30 existing view is 2.672. In relation to the Billyard building, it's the existing, and the proposed at the same location is 3.027, so in fact, it's slightly wider at that narrowest point at the moment.

COMMISSIONER: Are you differing in your opinion of what you see from the
35 communal open space? What I thought Ms Pressick just said was that the Billyard building isn't the thing that influences the view corridor from this spot, up on the--

40 WITNESS MAZE-RILEY: No, I do--

COMMISSIONER: --communal open spaces--

WITNESS MAZE-RILEY: I do agree with that. I apologise if I have confused--

45 COMMISSIONER: Right. The concern I have - that's not so relevant to this image. It's more the foreground building, or Onslow Avenue building; that's right?

50 WITNESS MAZE-RILEY: Yes.

COMMISSIONER: The setback at present is 3.2 - sorry. The setback at present is 5.3, say--

WITNESS MAZE-RILEY: It's 4.6.

5

COMMISSIONER: --and that changes to 3. That's the different, isn't it?

WITNESS MAZE-RILEY: Yes. 3.27.

10

COMMISSIONER: Okay. Good. That's clear. We move on to - nothing else to say on that? Maybe not?

15

WITNESS SMART: I do - I just had one thing to add to that, and that is that if you measure the cone of the angle from different areas, the cone of view from the Elizabeth Bay Gardens public open - private open space reduces by about 20% the cone of view when taken from the extremities of the new building versus the old one.

20

COMMISSIONER: Have you got that calculated somewhere?

WITNESS SMART: I've just marked it up on the drawing here.

COMMISSIONER: Just then?

25

WITNESS SMART: Yeah. I did it earlier today.

COMMISSIONER: I need to have that in evidence if that's something you wanted to--

30

WITNESS SMART: Yep.

COMMISSIONER: --do. Can I just have a look at what you've done?

WITNESS SMART: Yes. That's the existing building on the first page.

35

COMMISSIONER: Okay. So you're going the other way.

WITNESS SMART: It's just taking the extremities of the building and drawing the cone of angle; and on the page before that, you can see what it will be.

40

COMMISSIONER: I'll get a photocopy of that. Nothing else? If we move on to the queries raised by Mr Gazy. I guess I can ask you directly now, I think. His comments in regard to that streetscape presentation from the north. Have you seen his images? You probably don't have them, do you? You can have mine.

45

LANCASTER: I can provide my copy, Commissioner, if it helps.

50

COMMISSIONER: That would be good, if you can both share, perhaps. The topics, if I can just, sort of, try to organise them. One is the idea of the

5 presentation of the building. The next, I might just indicate the topic as some
internal design concerns. Your suggestion about the lightwell and the
relationships between building around the lightwell. The topic is the impacts
on unit 6C itself, and then the extrapolation of that to some of the other units,
and that's view loss. I think what Mr Gazy was saying is that the façade to
Onslow - the two blank storeys on top - were a concern, essentially because of
the - he referred to the term "oblique view" that one takes as, I think, walking
from the north to the south, and that's the first two drawings, I believe. He had
as a third drawing, something that was one storey lower. Maybe I will let the
10 applicant start this time, if that's okay, building design-wise.

15 WITNESS SMART: Just starting with the 10 Onslow, the building facing - the
proposed building facing 10 Onslow. The first thing I'd like to note is this is
where the planning controls for height change. That is, at the northwest
boundary on there. They go from 15 metres to 22 metres, so it's the point of
which it's in, I guess, the urban design strategy and controls changes height.
The presentation we've designed is that we have a four-storey presentation to
the street, or Onslow Avenue, and set back from that, on the southern and also
on the western elevation, we have the building set back another metre and a
20 half on the western side, and about 2 metres on the southern side. So that
kind of breaks up the bulk, so as you come up Onslow Avenue, you're looking
up to see that higher element. In total height, all of that façade is below the
22-metre height limit, and it's about 2 metres lower than 12 Onslow Avenue in
terms of the street. To further break down the maths through there--

25 COMMISSIONER: Just before you leave that, did you say all of this building
meets the 22-metre control? All of this side?

30 WITNESS SMART: This façade, yes.

COMMISSIONER: Is that right? The height diagrams. Is the contravention
further to the east?

35 WITNESS SMART: To the northeast.

COMMISSIONER: Yes, northeast.

40 WITNESS HARVEY: I think we're saying, at Onslow, the four-storey floor, and
then there's a two upper set back level that--

COMMISSIONER: Can I have a drawing? What's going on?

WITNESS HARVEY: Sorry. I'm just looking at the diagram in our clause 4.6.

45 COMMISSIONER: Beg your pardon?

WITNESS HARVEY: Page 7 of our clause 4.6 variation.

50 EXHIBIT #F DIAGRAM AT PAGE 7 OF CLAUSE 4.6 VARIATION, ADMITTED
WITHOUT OBJECTION

COMMISSIONER: This drawing also seems to indicate part of the building does contravene, doesn't it?

5 WITNESS PRESSICK: Commissioner, I - overstepping, yes. Part of it does. I think there might have been confusion because the Onslow façade doesn't, so the front façade doesn't, but the side façade, you're right. It does.

COMMISSIONER: Both side façades.

10 WITNESS SMART: That's right.

WITNESS PRESSICK: Slightly, yes.

15 COMMISSIONER: Yes. Okay.

WITNESS SMART: And then, sort of to reduce bulk, the material has changed so that the lower portion is a darker brick, and the upper portion is a lighter brick to that area.

20 COMMISSIONER: But one view might be - this presents quite dominant in that image, but this might be a selected view. For example, if you're walking along the street, you wouldn't see it so much. I'm not sure how you would see it from across the other side of the street, but what you're telling me now is that, essentially, you're looking to rely on the height controls in regard to the
25 street front itself. But then you're seeing it as a reasonable design response to just adopt that for the first part of the building - the Onslow building--

WITNESS SMART: Yes, that's right, so that--

30 COMMISSIONER: --and you've included some design provisions to the first six levels, or if you like, four levels to the street - they're a different building material, and the upper levels are also set back further from all boundaries, really.

35 WITNESS SMART: That's right.

COMMISSIONER: Okay. What does the council say about that?

40 WITNESS PRESSICK: Commissioner, I think it's worth noting that the controls don't envisage a step transition at this site, in terms of the Darnley Hall and 8 Onslow, but the controls have the same height in - height in metres controlling the LEP of 22 metres between - at Darnley Hall and the subject site, and the same height in storeys - six storeys. So the controls envisage a similar scale and form of building between those two buildings. The controls also give a
45 very generous FSR to this site, of which the building only uses up 57-and-a-half per cent of.

COMMISSIONER: You're saying the premise that there's a stepped approach as the appropriate streetscape response is trumped by the controls, or do you
50 think the stepped approach isn't appropriate?

5 WITNESS PRESSICK: I guess, by taking another storey off, it's sort of - it's trying to step the building down to number 8, rather than acknowledging that the controls step up at that point, and so they seem to envisage that a larger form that is its equivalent to the scale of Darnley Hall is what is envisaged as a feature character. I'm not talking about the minor steps that the proposal is doing to, kind of, break down the scale of - I'm talking about taking off a level versus not taking off a level.

10 COMMISSIONER: Okay. Anything else on that topic? Thank you.

BERGLUND: Commissioner, is there any chance of--

COMMISSIONER: No.

15 BERGLUND: -- ..(not transcribable)..

COMMISSIONER: Sorry, no. Onto Mr Gazy's other topics. Just to make clear to those still present, so this is litigation we're involved in now. There's certain rules we have to abide by for procedural fairness, and I need to stick to those, and I'm sorry, but there's no opportunity for comments to come from those that are listening in. All I can hear is evidence from experts that I call on or the parties' own submissions that are directly involved in the litigation.

20 But we've got another topic to turn to now. That's the internal design features. Do you recall that you mentioned a couple?

25 WITNESS SMART: Yeah. I might start just with talking about the slots in the building, and they're on the sides of the building. And they're - they always open on to the same apartment, so a slot is generally about 3 metres wide by one and a half metres deep, and they occur in the sides of the building, and it gives bedrooms facing across the slot the ability to open a window that's not facing directly towards the boundary, because the slot is screened from that.

30 COMMISSIONER: Can you show me a drawing that demonstrates that?

35 WITNESS SMART: Yeah. It's on drawing, say, 108 would be a good starting point. In that you can see, on the top half of the page, unit L02.01.

40 COMMISSIONER: Sorry, I've got DA108. Which--

WITNESS SMART: So the unit on the--

COMMISSIONER: L02?

45 WITNESS SMART: L02. So in that one you can see the slot is the indent in the façade that runs along the top of the page. And then there's a bedroom window that looks toward the south and one that looks towards the north, but they're always within the same unit, so you never have the privacy issue of looking from one unit to another. And then there is some details of the hit and miss brickwork. In that same unit, you can see, away from the slot, there's a

screened window. Those windows are only operable for cleaning, but not for ventilation. And a detail of the screen is provided on DA500, and the screen is made from angled bricks that direct the view out, but on an angle, at a 45-degree angle, but not straight across to the opposite side.

5

And that principle for how the screen is designed is for both sides of the building and both buildings, so it's on the Billyard building and also on the Onslow building. There's one slot on the Billyard building and sort of one and a half slots on the Onslow building, because it stops off at lower levels.

10

COMMISSIONER: So if I look at this visual of the elevations, the slots are at this angle that you've shown in DA500?

15

WITNESS SMART: Yeah. They would point toward the north, away from the street.

COMMISSIONER: Sorry. Hit and miss, I mean.

20

WITNESS SMART: Yeah. The hit and miss.

COMMISSIONER: If I move on to the view loss from the units at 15 to 19 now. So who's - could you explain it? Fire away.

25

WITNESS MAZE-RILEY: Would you like me to answer anything in particular?

COMMISSIONER: So I think there was some evidence presented - you've got this little bundle here now, don't you?

30

WITNESS MAZE-RILEY: Yes. Yes.

COMMISSIONER: Go to it.

35

WITNESS MAZE-RILEY: Perhaps I could start, Commissioner. Perhaps I could start to address some of these--

COMMISSIONER: Yes, start away.

40

WITNESS MAZE-RILEY: The residential building at 15 to 19 Onslow Avenue, I understand was invited to attend some engagement - early engagement sessions, as I understand it. We were requested to inspect views at objected residences, so we did inspect views at four dwellings at that building, including Mr Gazy's residence at number 6C. We inspected those view in the company of the City of Sydney.

45

COMMISSIONER: Sorry, which places, sorry?

WITNESS MAZE-RILEY: We inspected views at Elizabeth Bay Gardens, including Mr Gazy's unit. We went to four units in that building.

50

COMMISSIONER: 6C.

WITNESS MAZE-RILEY: Yes, 6C. It's in the joint report.

WITNESS HARVEY: I think it's page 22.

5 WITNESS MAZE-RILEY: 3D, 6C and 8C and 11E were inspected from that
residential flat building. Mr Gazy's unit was selected for modelling, given its
relative height in relation to the proposed development. So we assessed and
agreed it would probably be affected because of the level it was at. In
10 Mr Gazy's apartment, we inspected views from the locations directed by him,
including seated and standing views from the balcony and from the dining
room, and from his dining room table, and also, I think, in the report we have
represented a view from the master bedroom. The modelled view is a seated
view from the dining room table, which I recall he said was a view he enjoyed,
which is why it has been modelled.

15 You'll note, Commissioner, when we stood in the room, that there's quite a lot
of intervening tree canopy that does screen the view. Nonetheless, there's a
photomontage that shows where the development sits, and the extent of its
height, et cetera. I would just comment that the view loss from this dwelling is
20 incurred via a side boundary view. The features lost are just open water. It's a
single feature, when in tenacity terms it's not as highly valued as a combination
or a whole view, a combination of features, so, technically speaking, from the
whole dwelling, when you consider all views available, it is of a minor nature,
the view loss experienced.

25 COMMISSIONER: So do I understand that the image at figure 36 here--

WITNESS MAZE-RILEY: I believe that's from our report.

30 COMMISSIONER: You think this is the seated view?

WITNESS MAZE-RILEY: That's a view that Mr Gazy has zoomed in, by the
look of it, taken from part of the image that's perhaps in my report. I'm not sure
where that's from.

35 COMMISSIONER: So what I'm imagining is that - and I can recall; I think we
were there, weren't we - that the preceding view that I just showed you, which
was a drawing in exhibit 16 that has a label to it, "Figure 36, view north, seated
from unit 6C balcony, unaffected." It's followed by another drawing that's
40 labelled, "Uncropped view from balcony, seated." It might be thought that the
preceding view might be, for example, further back towards the person taking
the photograph.

45 WITNESS MAZE-RILEY: It may be. I think it's just a zoomed-in version,
actually, because it's a much closer - if you compare the size of the white
buildings in the image, you'll see that the first view is significantly larger, so it's
a zoomed-in version of the same picture.

50 COMMISSIONER: And when you say it's reasonable in terms of consideration
of all of the views available from the dwelling, can you explain more to me what

other views are available from this dwelling?

5 WITNESS MAZE-RILEY: Certainly. So the RFE formerly presented Onslow Avenue, so that it would make its Onslow Avenue boundary its front boundary. So there are views available to the east, to Onslow Avenue. They may not be as scenic, but the fact is that they are there, so there are views from rooms that face Onslow Avenue. Obviously living room views are to the north, similar to the balcony view that we captured and Mr Gazy has also focused on. There are views from the bedroom, which is behind this balcony view, so further west. And as I will just reiterate, the views available across the side of the unit are to the north. Almost all of them remain available and unchanged, including the most scenic parts of it. The part that's lost is heavily screened and includes water only, which would be of less value, in Tenacity terms.

15 So when all things are considered, the extent of view loss for this dwelling is low, comparatively, to many others and many other cases, and including in Tenacity itself, in that judgment. If I could just elaborate, Commissioner, if you'd indulge me. The judgment in Tenacity by Roseth himself, talks about view loss and the extent and how he gets to his own rating, his own view, in fact, rating. In that matter, all of the views from a dwelling at ground, level 1 and level 2, from all living areas, were completely obliterated, from three levels of a whole dwelling, leaving only views to the top floor, the uppermost floor, from a standing position, available. That was in relation to a magnificent view, which he characterised as being a view that was composed of many things, a combination of things, a whole view. And in that matter, Roseth, Senior Commissioner Roseth himself only reached "severe". So I take that as guidance when I'm rating views carefully, to keep everything in perspective.

25 COMMISSIONER: So I'm just looking at the view sharing report. That was appendix D to the joint report, I think, which was exhibit 4.

30 WITNESS MAZE-RILEY: I'm not sure.

35 COMMISSIONER: All I want you to do is take me to the area where the unit 6C in this block 15 to 19 is considered.

WITNESS MAZE-RILEY: In the joint report?

40 COMMISSIONER: In the view loss analysis.

WITNESS MAZE-RILEY: Yes, sorry.

COMMISSIONER: It was appendix D to the joint report.

45 WITNESS MAZE-RILEY: It is at page 26 and 27.

COMMISSIONER: Anything from council on this?

50 WITNESS MAZE-RILEY: I would say I think I concur with Jane's, I guess, discussion within the view analysis report, and really, I guess, looking at

Tenacity in relation to view sharing. It is a change, there is a change proposed, but because there is retained a quite wide, I guess, scenic view, I guess I concur with it rating in that it is still sharing of views in this particular instance.

5

COMMISSIONER: The other topic was--

BERGLUND: Sorry, Commissioner. I have one question of clarification on that topic that you're just moving on from. I don't know if this will be appropriate. If the experts could have in front of them p 26 of the view analysis, which is annexure D to the joint report. It's been raised with me as to whether, in figure 23, the apartment in question is actually in - sorry, I can't see the orientation on this, but let's say the top left corner. So it appears that, in figure 22, the apartment is shown correctly, and that in figures 24 and 25, the view from 6C is shown correctly, but a query has been raised as to whether the location of the view angle and the apartment on figure 23 is actually correct. I'm not sure that anything flows from it, but we should make sure that we clarify.

WITNESS MAZE-RILEY: Thank you for the question. The view location is located on a plan, so obviously, there's potential for a minor error, but it is located as per the survey data for the view place as provided by the surveyor who attended at the time and surveyed by tripod and camera. So in taking that data - x, y and z data - we have tried to locate it as accurately as possible on a location plan.

BERGLUND: If I could perhaps just clarify the question slightly differently to one of the council experts. Is there any question that figures 24 and figures 25 are in fact representative of the relevant views from unit 6C?

WITNESS ERRINGTON: From my attending of the site, I believe that they are accurate photographs from that particular unit.

COMMISSIONER: Is the concern whether--

BERGLUND: The concern is whether--

COMMISSIONER: --there's an error?

BERGLUND: --figure 23 accurately shows the view location. It's a query about the precise location of unit 6C within the building. My submission would be that if figures 24 and figures 25 are accurate reflections of that view, then figure 23 doesn't materially affect the fact that 24 and 25 are still accurate representations. I could approach with the diagram that's been drawn, but I'm not sure how to explain it verbally.

WITNESS MAZE-RILEY: You're correct.

COMMISSIONER: I'm not exactly with you.

50

BERGLUND: Sorry. Ms Maze-Riley is saying I'm correct.

5 WITNESS MAZE-RILEY: Commissioner, I think the question is, is the location - is the icon we have used to locate the view place sufficiently accurate so as to demonstrate the views that are shown below. My answer to that is, yes. It is an indicative location based on a survey data, so it's as close as we can possibly show it, and it's only to indicate that we were in the dining room when the captions and all of the material and written words support that, anyway.

10

COMMISSIONER: Is it about the location of the icon?

WITNESS MAZE-RILEY: Mm.

15 BERGLUND: It's about the location of the icon - sorry. The query that's been raised with me is that the icon appears to be in a part of the building which is not actually apartment 6C. I'm not sure how to explain it other than to approach.

20 COMMISSIONER: I'm happy to approach. I'm not with you, I don't think.

BERGLUND: Looking at the blue square that's been drawn on figure 23, Commissioner, the resident of 6C has raised that that blue drawing is the outline of his apartment. The view icon appears to be in a different apartment.
25 My only question is to clarify whether that has any material impact on the two photographs below. If it doesn't, then it doesn't matter.

COMMISSIONER: Okay. When I look at figure 22, I understand this to be the northern façade of the building.
30

BERGLUND: Correct.

WITNESS MAZE-RILEY: Yes.

35 COMMISSIONER: Unit 6C is at the western side?

BERGLUND: Correct.

40 COMMISSIONER: The icon is shown - it looks like it's shown in the eastern area.

WITNESS MAZE-RILEY: Yes. It's slightly out of place, in that case.

45 COMMISSIONER: When you "slightly", it's in the wrong spot. It should be down here; is that right?

WITNESS MAZE-RILEY: Yes, so it makes no material difference at all to the images that are shown that are from the correct location.

50 COMMISSIONER: That's okay. So the icon is wrong, but what I understand

your presentation to be is that the relevant places the photographs were taken in unit 6C which is to the west?

WITNESS MAZE-RILEY: Yes.

5

COMMISSIONER: They're somewhat similar to that location and orientation?

WITNESS MAZE-RILEY: Correct.

10

COMMISSIONER: At the icon, so it shouldn't shift.

WITNESS MAZE-RILEY: Yes. Yes, that's correct.

15

BERGLUND: Thank you, Commissioner. That clarifies that point. That was the only question I had arising from that.

20

COMMISSIONER: The next thing is a more general question about the relevance for anything that's coming forward in this oral evidence from, in this case, Mr Gazy, for the other units more generally. The units above, I think, or below, he was suggesting might have similar view loss concerns. I think he mentioned 4C, 4D, 5C, 5D, and 6D. What's the story there? Are you saying that you inspected the units that you were told to inspect?

25

WITNESS ERRINGTON: Correct. We did inspect views from an upper level unit, at level - level - unit 11. Obviously, views from units above Mr Gazy are less affected because they're significantly higher; and below, there's no view above or beyond the subject site that could be affected.

30

COMMISSIONER: Is there anything else on that?

WITNESS ERRINGTON: No, I don't.

35

COMMISSIONER: I think that's it, isn't it? Any more questions for these experts?

BERGLUND: Not on this property, no.

COMMISSIONER: Okay. Thanks.

40

<THE WITNESS WITHDREW

45

BERGLUND: Commissioner, just to manage the rest of the time that we have available this afternoon. I do note we have three residents remaining who wish to speak. Two are from 12 Onslow Avenue, and one is from 13 Onslow Avenue. I think it would be - I think it's important that we get the lay objectors heard today, notwithstanding the helpfulness of the approach that's been taken to date.

50

COMMISSIONER: Yes. I'm happy with that approach.

BERGLUND: I would propose to call - I'm just raising this with you to see if it's convenient, to call Mr Sutton from 13 Onslow first, and then Ms Ross and Ms Fairbairn-Watt from 12 Onslow. Is that convenient?

5 COMMISSIONER: Okay, sounds good to me.

<LESTER SUTTON, AFFIRMED(3.19PM)

WITNESS: Firstly, Commissioner--

5 COMMISSIONER

Q. Yes. Over to you.

A. Thank you very much for coming to visit our home. It's very much appreciated, and I appreciate the other residents that are here supporting this application. Where to start? Like a number of other people, it's been a moving feast, and as I get more information, and as I learn more, I revisit my application so I wasn't sure whether these would even get printed off. I had one of my papers print them off, because I work from home. It's along exactly the same theme - you won't be surprised - as the previous one. However, I also - because I wasn't sure of that - when I got up at 5 o'clock this morning - when I woke up, I looked out the glass door from my bedroom, lying in bed, and it looks straight at 10 Onslow Avenue, framed by the - by the sky. I realised, of course, that that had previously be to only a sky view, and that's a minor view, so that wasn't really worth it. But I then walked down onto my balcony, and of course, that's where the main view from our residence is, and I wrote this, which I'd prefer, if I may, to read it out to you, and I will leave these. I can pass them on. It's got pictures in it. I can pass these two copies, one to you and one to the applicant, if you want. Because they're - but they're very similar. You won't see much surprise in other ones.

25 Let's start at the beginning. Why am I wearing medals? It's to exemplify that as a career intelligence analyst, I spent the majority of my 28-year regular and 12-year reserve service in rooms without views, for security reasons. My service to my country included operational tours in East Timor, Kuwait, and when 9/11 occurred, and I was in the Green Zone in Iraq. None of them particularly pleasant places. None of them with particularly pleasant views. That's why it was important when we left the military to find something to be the rest of our lives - where we're going to spend. My wife was a real estate agent, and we thought we actually had got this right. The interiors of our home situated directly opposite the proposed development was designed by multi-award-winning architect, Wendy Lewin to optimise the limited, primarily between the buildings, water views of our level from our ground floor location. Whilst she may not have consulted with her husband, multi-award-winning architect, Glenn Murcutt, on her design, I am confident she would have appraised him of it.

45 Let's now analyse the history of view sharing assessments impacting our forever home in a heritage building in a heritage neighbourhood. For just the penthouse extension, which was previously approved, our view towards it was only regarded as peripheral and partially obscured. Council assessed this view impact to us as "minor", as water views - and there's a picture diagram to the location that the council actually referred to - luckily for us, from the living-dining room and balcony are retained. So that was one of the justifications for us having a minor impact. So what about the initial Urbis VSR for this monolith that replaces the entire building with something wider, deeper

and taller? I said, our home was not even mentioned. In the second page, you will see even the picture of our building, Meudon, totally amidst the ground floor. It's gone. Not even - not even present, and not mentioned.

5 What about the latest VSR? Like everyone else, "minor", based on highly
inaccurate and misleading analysis. As you will see here, we've got
pictures - you've seen it before - in the VSR. Here's a picture of my wife on the
balcony. Happy to pass - I've got another picture - around, and as you will see
10 in this picture, luckily, in the latest VSR, the bottom floor of the building is
actually included. That's her in a very bright pink dress. Enjoying the direct,
not-highly-filtered, view towards the land-water interface at Yarranabbe Park,
Darling Point, not from a first floor, recessed and enclosed balcony, but entirely
the opposite, or on a side boundary. In conclusion, Roseth in Tenacity states,
"Taking it" - a view - "all away cannot be called view sharing, although it may,
15 in some circumstances, be quite reasonable."

So what are the special circumstances that exist that justify the reverse Robin
Hood proposed of taking away our existing main, highly valued views towards
the park-harbour interface at Darling Point and giving them to a building that
20 already enjoys panoramic, exceptional harbour views? In our opinion, my wife
and I, these special circumstances remain unexplained. The architects for the
previous penthouse extension, Cracknell & Lonergan, sold to the council that
the design excellence of their proposed extension would substantially
improve - "substantially improve the overall building aesthetic", and council
25 agreed. This is in stark contrast to Urbis's contention that from a - quote, from
a heritage perspective, there is no known way to adapt the building to such a
way that it makes an improved contribution to the established character,
setting and significance of the locality and the heritage conversation area.

30 Maybe Fortis, Commissioner, could consult with Cracknell & Lonergan to first
explore what could be done to improve the existing building. I mean, our
building's almost 100 years old. This one is 1960s and brick; I don't think it's
got concrete cancer. Rather than us all suffer the inconvenience of tearing it
down and rebuilding it. Commissioner, thank you. That ends my talk. I should
35 pass on, though, sorry, one thing I forgot to do is I didn't quite understand this
idea, the view corridor thing about being only marginally affected. I mean,
these are the pictures I got from the view sharing assessment, showing my
view. And I understand it changed by 200 millimetres since these were taken,
but I think it sort of shows to me that there is significant impact, from their own
40 diagram, what's proposed.

Q. Thanks, Mr Sutton. I don't have any questions for you.

45 BERGLUND: Commissioner, subject to any objections from Mr Lancaster, I
should tender the documents that have been handed to you by the witness.

EXHIBIT #17 MR SUTTON'S SPEAKING NOTES ALONG WITH A3 IMAGES
TENDERED, ADMITTED WITHOUT OBJECTION

50 COMMISSIONER: So a copy of the handwritten notes - I'll also include that

with the speaking notes, and we'll give you a copy of that at the conclusion of today's proceedings.

<THE WITNESS WITHDREW

5

BERGLUND: I call Olivia Ross.

<OLIVIA ROSS, ON FORMER OATH(3.28PM)

COMMISSIONER

5 Q. Now, I've got - you're using this document?

A. Yes. Do you mind if I look at my slides on my laptop?

Q. No.

10 A. Excellent. So - well, I guess we're all here because we know that you, Commissioner, need to be satisfied that the written requests adequately address the matters required and that it has to be consistent with the objectors. And the crux of our arguments are that the request does not adequately address them. There are substantial provable errors, and, once investigated, there are a lot of assertions without much evidentiary foundation to them. Since the statement of facts and contentions, very few of their most
15 fundamental concerns really have been addressed, and then, on top of that, when I started to investigate, I found truly significant unexplained mistakes, most of them in their favour, significant omissions that were in their favour, and questionable choices that were in their favour.

20 Now, to start with, if you flip to the first page in the A3 document, they don't want to use the Merman standard; right. To which they've provided two reasons that I could work out. One was about a missing tooth in the flow of the buildings, and, secondly, that if they did, it would - the development potential
25 would be artificially and considerably limited, and there will also be wildly differing existing levels on that land at multiple points. So - all right. Now, is it possible for it to be artificially constrained, if those constraints are the rules that should be abided by? And the development potential - I mean, everything will be constrained - the development potential of anything is constrained by the
30 rules. At that point, we could say its development potential is constrained that it can't be ten storeys high or 15 storeys high.

Now, by wildly different, they say, "Oh, there'll be wildly different floors" if they used the Merman standard. Please flip to the next page over, and you'll see
35 their drawing of the Merman standard. Now, okay, there are a few different levels on this document, but compare it to what they're saying they want to use instead, and I would contend that there are a lot more differing levels on what they want to use, than on the Merman standard.

40 Now, this is going to be an exceptionally important diagram. I'm going to come back to it, but just again on their anti-Merman reasoning, they talk about the missing tooth, that there will be a missing tooth in the landscape. Now, if you flip to the next picture, this is the current building, and this is the slope of the street. Flip to the next one over; that is my illustrator edited image. That is
45 one storey lower. Now, that is one storey higher than what is there now, one storey lower. That still appears to slope down the street, no missing tooth that I can see. Now, flip again to the red one, and that is what they want. Okay, definitely not a missing tooth, but I don't - I personally don't believe that's
50 better.

Now, moving on, now, put it together, I feel that their anti-Merman argument is essentially circular. Because they don't want their buildings lower, they can't use Merman, because it would make their buildings lower. Now, by one storey. So that would be the consequence that they are desperately trying to avoid, no compromise over one storey. And from what I can tell, there's no other anti-Merman arguments that they introduce in their 4.6. Now, it gets a little bit more interesting, because I found another assertion regarding the methodology of their preferred precedent, and this is where they said that the - Bettar is the original and therefore leading precedent. I didn't think that was how precedents worked, if there was one that superseded it, but the thing is they say, "Okay. There's limited ground around the building at a number of points onsite, from which the existing ground level can be determined."

Now, yeah, that might make it difficult, but then I'm thinking, "Well, isn't that an argument for using Merman, because it is a much smoother and simpler diagram?" But even if not using Merman, I found - and I questioned, why not use the ground levels that are there? So the surrounding buildings and the infrastructure are more than a century old, and they rest either side of walls that were constructed in about the 1860s. I did try to look at the really old diagrams from Elizabeth Bay House and its gardens, but it seems to be 1860s, 1870s. So the ground around the building appears to have been the ground for a very long time.

Now, I asked about the ground because I found evidence that they measured from the tops of walls. Now, if you look at the next diagram over, there's an extract, and then there's another extract of the 8 Onslow Avenue boundary. Now, I looked at this, and I was like, "Okay, that's kind of interesting. What does TW mean?" Because I'm not a surveyor, Commissioner. And then I looked and I looked, and I was like, "Hang on a second. That - I think that means top of wall." Then if you look at their - back to their extrapolation diagram, you will see that those are the numbers that they have used for those points. Keep flicking forward, and you will see. I have highlighted them in yellow.

Q. So, just on this point, I think it's the case that the applicants agree with your arguments there; is that right, essentially? In terms of the levels?

LANCASTER: Yes, identification of some of the spot levels in the survey that were used for the height plane analysis were incorrectly noted.

COMMISSIONER: So, really, this has been picked--

WITNESS: That's fine.

COMMISSIONER

Q. Okay

A. I'll just keep going. Keep flicking forward, and you will see again, it happened on the southern boundary.

Q. Which one's that, sorry?

A. Please keep flicking forward, Commissioner. You'll see another example. There is first this image, and then that image. Maybe just one more over.

5 Q. Back?

A. No, sorry, keep forward. Forward one more. And if you - do you see a big red line and then - no, keep going, Commissioner, please, Sorry. We're looking for this one.

10 Q. These two.

A. There we are. Those two, yes. Now, that is the southern boundary. That is the south-east of 10 Onslow Avenue. So the Hills Hoist is right down there, in this green area, and now I know that you visited the site, and I just thought, "That's kind of interesting again, 5.24 TRW, 14.92 TRW. That's so weird, and why are these other numbers so low?" So I looked, and again I was like, "Oh, gee." I think that these measurements on this extrapolation diagram have been taken from pretty close to the tops of the wall. Now, these are the photos that they have in their design report, and that shows the evidence of where they took these points from. This is page 76 of the design report; it has the acronym SDS.

Now, if you keep flicking again, here is the architectural diagrams at the time - the latest ones that I had, and I also found more measurements for top of wall, highlighted in yellow and green, and you will see the green says, "EXG on subject site", which is also interesting, because that is definitely 14 or 15 RL. That is lower than that. That is approximately 12 metres, and that is important. I will come back to that later.

Now, go back to the extrapolation diagram, which is one more flip, one more over, please, Commissioner, and now you should have a diagram that has many more colours on it.

Q. Yes.

A. Okay. So this is where I started to ask more questions. I'm like, "Okay. So 14.75, 15.08." We're starting to draw this really interesting zigzag, as well. But flip over, and that's where I have lined them up. That is back down in the Hills Hoist area, and that is just an example of the difference. It is more than 3 metres, an entire storey, and I don't have any qualifications to work out whether it should be counting from the 9 metres or the 12 metres, but those are all on the survey, and they are all the ground level on the adjoining property. If you flip one more time, you will see the weird zigzag that these numbers form. Now, again, have one more look at this extrapolation diagram, because 11.82 is right there. It's one of the biggest numbers on the entire diagram of theirs.

Q. It's the next diagram?

A. Yes. 11.82. Courtyard. And then, they've also got one which is 12.64, and it says, "planter", and I don't know if that was measured from inside a pot plant, or inside a - maybe a brick, or a stone planter, but yes. That's also, sort of down towards the courtyard. The reason why I included that green line before

on the architectural drawing - the "XG" on the existing subject site - is because I noticed that that 11.82 was pretty--

Q. Which drawing are you on now?

5 A. Sorry. We - I am now just talking, but we are about to look at this one, Commissioner. Again, the Merman one.

Q. The next - yes, okay.

10 A. I thought this was interesting because I was, like, 11.82. That is roughly where I thought the Merman level was, right? But then I checked on their diagram, and it says 10.82. I was, like, why does it 10.82? That isn't where I thought it was last time I looked. Now, I don't think they got this right, either. I - now this wouldn't be in my favour, if it is a mistake, but I think it's a pretty consequential mistake. I always thought that the floor level for Merman was
15 supposed to be measured from the lowest excavated point. That is what Brett told me. The lowest excavated point under this area that they've labelled as 10.82, is not 10.82. It's 12.1, and this is also on their surveys. If you keep flipping, we're now looking at this one. This is from their survey. This is probably Rev F; yes, it is. This is a slice through the heart of 10 Onslow
20 Avenue, and if you see down into the basement, that is not 10.8. That is approximately 12. Then again, I went to their surveys, and I looked, and we're now looking at this diagram, also from Rev F in the survey. If you look, 10.82 - I'm sorry, the printer didn't make this super legible - but 10.82 is approximately these measurements along the right-hand side, but if you have
25 a look, wherever it says, "FL", in smack bang in the middle of this survey, they are all approximately 12.1, and you should see little "12.1 FL"s all over the place.

30 I just - I just kept asking questions as I went through all of this, for the community group; for myself; for my building. How do you make - how do you make a mistake like that? The error makes Merman look worse, and more unreasonable that it is, and it sacrifices more than a metre off their entitlement under that standard. I've already tried to work out what their arguments are for
35 not using it, and they've just - this just makes it look worse. We just keep on going. We're going back to the extrapolation diagram versus the survey, and the architectural drawings versus the survey. This is the extract of one of the architectural drawings. This is a 460F. That was the latest one that I had. Everything that is in red on this diagram I can't find in a survey. In fact, this is a summary of all the errors that I found in their measurements, just in the last
40 13 days. So we're now looking at the image that says, "Labelled issues in a detailed better height extrapolation". This was just me poking around, trying to work out where things came from. To summarise, we have the two yellow ones at the top which are measured within 2 centimetres of retaining walls. We have a not-marked height. We have two that are missing. One doesn't
45 exist on a certified survey, or anywhere else I could find. The other one just doesn't exist in one of the submitted surveys. Then we have two more that aren't marked. Then rotating clockwise, we have two more that were taken within 20 centimetres of a top of a retaining wall. Then we have two more that don't exist in certified surveys. Then we have the actual ground, and then we
50 have more that aren't marked. That was just me - that was just me, trying

to - trying to find out.

I'm just ending this portion on the errors that I have found in the height measurements, and this is the summary of what I found. Architectural drawings that contain measurements that aren't in the survey, and aren't on the extrapolation diagram. Extrapolation diagram contains measurements that aren't in the survey and aren't on the architectural drawings. Architectural drawings and surveys show ground levels that aren't used in the extrapolation diagram. Extrapolation diagram includes some points that are within 2 centimetres of being surveyed as the top of a wall; and extrapolation diagram marks points, but doesn't provide measurements for them. It also means that there are three versions of this information across those documents. My question that I just kept asking myself is, how exactly was that calculated, because I was trying to work it out, and I could not.

Through intensive investigation, I was able to find three of those missing red numbers. They were hidden back behind a high-resolution snapshot of the extrapolation diagram inside that SDS document, tab 7. It's not an official survey. It is hidden - literally hidden - behind that image, the one that I have shown over and over again. The one with all the lines and the drawings on it, and you can see - if you zoom in really, really far on a good computer - you can see those measurements hidden in the background behind these documents, but they're not on a survey so I don't know where that came from. One of the numbers, by the way, remains - is a complete mystery. I do not know where it came from whatsoever. It exists nowhere that I could find. I understand they're saying that they've fixed it, but, you know, up until this point, I guess, it hasn't - it hasn't been fixed and it hasn't been right. I raised this with council nearly two weeks ago, right before we were told that this - it was going to be up to you, Commissioner - so - now, I'm just, like, have they had the benefit of these numbers that weren't visible or checkable for 18 months, and I have to presume that it was super hard for me to find it, and they weren't fixed up until now, it means that council didn't know about it, and you didn't know - the Court didn't know about it up until super recently.

So I guess, I'm just wondering, are they going - are they going to come back now and say that they didn't gain any benefit from this mistake, and the anchoring of the standard being higher than it should have been; the floor level being set higher than it should have been? Because this was a point that I made in the Darnley Hall submission, that you're - I just have to be very careful of psychological anchoring, wherein an advantage ends up being given unreasonably to one side because they set the anchor in their favour. Yes. Here we are. This is page 2 of the Darnley Hall submission:

"Some of these mistakes, disputes and errors were fixed in subsequent filing and drawings, but many survived up to the most recent documents we can access, and these kinds of mistakes can taint the entire process from the beginning. This is because mistakes or omissions can anchor the reasonableness of a request in one party's favour, unjustifiably, and make any reversion to the mean seem harsh when it is, instead, accurate."

5 I found this just deeply concerning, and the fact that I had, at the 11th hour,
found these mistakes, and it was not serious enough to halt the proposed
agreement? I hate to say this, but it made this process feel performative. It
may not - logically, no, and I understand we're still going through it, but it made
me think, these are not - these are not inconsequential mistakes. At least,
that's how I felt, and the fact that this just kept on rolling forward with inertia, it
just - it made me feel not seen, I guess; and it made me feel that any degree of
inaccuracy would be ignored if it could be part of some box-ticking exercise. I
know that's not logically true, but how many of these errors can be made
10 before it is too many? Before the entire application just - too - too mistake-y to
keep going, right? Three completely unknown measurements? Seven? If half
the measurements were taken from the tops of walls? If a fifth of them were
taken from gutters or first floor windows? I just - it made me just go very
disappointed. So my question at the end of this section is, why are there so
15 many mistakes in this document, in this 4.6 height variation request and its
extrapolation, right?

I have this here. This is the comparison of the Urbis view sharing with
council's view sharing, from DA 2019 665. I actually have a printout of this
20 whole document, Commissioner, if you wanted to refer to it, but I have
extracted the relevant portions.

Q. Sorry, hang on. What's this document?

25 A. This is from council. This is the document that the local planning panel
produced for the penthouse - the top of the penthouse in--

COMMISSIONER: This is in the bundle, isn't it?

30 LANCASTER: Yes.

COMMISSIONER: Yes. It may not be in colour, though. This one is colour.
Just give me one sec.

35 WITNESS: Of course.

EXHIBIT #18 LOCAL PLANNING PANEL MEETING DATED 12/08/20
REGARDING DA 2019665, ADMITTED WITHOUT OBJECTION

40 BERGLUND: Yes. It's also on folio 37 of the supplementary bundle of
documents which, from memory, was exhibit 6. You can mark it separately if
you like. I'm just--

COMMISSIONER: I'll mark it just because it's colour. Yes.

45 WITNESS: Okay. So now. I guess I have - I have issues with the - council's
acquiescence to the 4.6 because I believe it goes against their own published
findings. I'm going to be looking through this document. I'm not sure how to
refer to - how should I refer to it? Previous DA?

50 COMMISSIONER: The one you've just given me?

WITNESS: Yes, what--

COMMISSIONER

5 Q. You can just call it "exhibit 18", if you can remember that?

A. Sure, of course. Exhibit 18. This was a view assessment conducted by council for a much smaller DA that was going to go on top of 10 Onslow Avenue in 2020. It was just a single-storey box that set close to the elevator shaft, not visible from the street. I'm going to compare what is in that
10 document with what is in the current documents. If you just have a look at the next sheet, that is just the summary of everything being minor or negligible in the current - in the current view sharing assessment. Everything that was assessed "minor" or "negligible". Keep flicking, and the next thing that you see should be an edited version of figure 14. Is it this?

15 Q. Yes.

A. Now, this is Elizabeth Bay Gardens. Now, so this highlights where - purple highlights where the developers visited and did not model. Green is the one they did model, and the two in red are the ones that council visited and
20 modelled last time. Now, I will just say - at this point, I'll just say, referring to, I think it's exhibit 14, which is the indicative Elizabeth Bay Gardens view being blocked. So I remember making that, like, example document with the early days of the community group, and it is just illustrative and indicative, and it was there as - just as a request to say, "Hey, look. They really should model the
25 gardens."

Now, if we keep going, they ended up visiting five sites, and now Mark sort of--

30 Q. Because you go on, so this marking of figure 14--

A. I was just making a note of that. That was why it was done. They did not - they visited--

Q. Just let me finish the question. So where you've marked this figure 14. Where is figure 14? In what document? It doesn't seem to be exhibit 18;
35 something else, is it?

A. Sorry. So in this one. And then I was just saying, down here in the gardens, so they visited the gardens, but didn't model it.

40 Q. What I'm asking you now is what's the source of this page?

A. That is from - that is an edited diagram that comes out of exhibit 18.

Q. So you've added something to exhibit 18?

A. Yes, I did. Yes.

45 Q. Now I understand.

A. Sorry. And I was just referring back to exhibit 14, when we made it, it was - because we believed that the view from the gardens was important. Now, so the current view sharing report says that the impact of the development is minor or negligible to everything; however, it is pretty easy to
50 find nothing if you're not looking. So it's easy to claim no impact on something

if no evidence is provided. So if you look at exhibit 18, figure 34, that is from unit 5D. And it says this is what council said last time, they said that - with a description of what's been missed, Garden Island headland, portions of Sydney Harbour - that the extent of the impact is moderate.

5

Then the next page over, we have unit 4D. And then the description from exhibit 18, page 36. Again they describe what's going to be missed, and the impact is moderate. These views were not modelled in the current view sharing report, and I think we just heard that it was said that they wouldn't be affected, but I didn't believe that, I still don't believe that, and I think it conflicts with what council said last time.

10

Now, in the view sharing report - we're moving on to another - slightly other issue - they claim that they have modelled the worst view. I have highlighted from the view sharing report, page 16. They say, "Urbis has prioritised dwellings identified as those potentially most affected and selected a directly oriented or worst case view."

15

Q. Which page are you on now?

20

A. A few forward.

Q. Page 16 of the exhibit 18, is it?

A. No, I'm sorry. Keep going, through my presentation. I'm sorry. I'm getting nervous.

25

Q. It's okay. So is it the page that has, at the foot of there, D2019 665?

A. If you please keep flicking forward.

Q. Keep going.

30

A. You're looking for a highlighted yellow in the middle of a bunch of text.

Q. This has figure 10, view sharing page 16 at the bottom?

A. We want--

35

Q. This helps me, on the record, to find it.

A. So we're looking at - this is - I'm talking about figure 14, view sharing page 16. Keep going, maybe.

Q. No, it's the right one.

40

A. Sorry, you are there. You are there. I'm sorry. Now, they say that they have selected a directly oriented or worst case view. Now, if you flick the page over, you should be looking at figure 48. That was its original caption in exhibit 18. And it says, "Existing view from living dining room of unit 8 of 13 Onslow Avenue." Yes?

45

Q. Yes.

A. Then flick one more over, and this is from the current view sharing report. This is unit 8, same room. Now, these are supposed to be the same view, and I have put them side by side, and I have highlighted in red the boundaries of where they overlap. I would contend, Commissioner, that council's view that

50

they selected is worse. Moving on, we have - this is from the view sharing report, page 40. You can see the subject site right in the middle of the view, and it says, "Unaffected."

5 Q. So, look, it's happening a bit too quick.

A. I'm sorry, Commissioner.

Q. I need to try to understand you. So here, on this page, it shows both of those views?

10 A. Yes. And the--

Q. So you have to let me ask the question first. So figure 17 of this view sharing report, page 42 - just to let you know, what happens here is I go back and then I look at documents. I have to really retrace it. So this is me, at least for the record, making note of what you said and how I can connect it up with everything else. So you've got here figure 17, Urbis view sharing report, page 42. That's this current report?

A. It is the current one that we are referring to for this development right now.

20 Q. Yes. Okay. And that's part of the joint report. And then you've got figure 18 to the planning panel. Now, when I look at that, one's closer to the window, and one's further back, isn't it?

A. Yes, but the assertion was, in Urbis's view sharing, is that they select the worst view, and I'm simply saying I don't believe the view they selected is the worst one.

25 Q. So you're saying, for example, if they went closer and further to the--

A. And they actually looked at the subject site--

30 Q. --to the right, it would have picked up more of that line you're looking at. Whereas when I look--

A. So--

35 Q. Sorry, just let me finish. So when I look at what they have shown as the worst spot, it's, I guess, prioritising the view to the - if you like, maybe it's the north-east, and you're saying there should have been more attention given to the view that's more directly to the east; is that fair?

A. Yes.

40 Q. I'm with you; go on.

A. I presumed that the guidelines for how these photos are taken would have been very similar, but I don't know.

45 Q. Yes, it - not always adopt the same position, but the idea of understanding the whole view is important in this territory.

A. Then if you flick one more page over, this should be the original - the original label in the Urbis view sharing report was figure 51, and it says, "View north-east, seated, from unit 6 apex area, unaffected." And this is a very simple contention of mine. I think that's affected.

50

Q. So just before you - to get my references right. It says here "Figure 51" at the top, and then it says, "Figure 19" below.

A. 19 is my one.

5 Q. That's just your own.

A. I'm sorry. Yes. So that I can try to not lose track of where they're from. I'm sorry, Commissioner. I'm not - I'm new to this.

Q. That's fine.

10 A. Figure 51 is its label in the Urbis report.

Q. That's good. That's better for me to understand. Thanks.

A. Yeah, I'm sorry. I did consider chopping out the label, but the label was important. I wasn't sure how to cite it without being confusing.

15

Q. No, it's good you put those original labels in; that's useful.

A. Now, flip one more over, and you should have a composite image.

Q. Yes.

20 A. Now, what I'm about to show is a series of images that are taken from the balconies to the east of Darnley Hall. Now, the first one is unit 5, and all of these photos have come from Urbis's view sharing report. Now, again, this is a location contention. If you look to the bottom left, you will see where they have positioned their little green person and its eyeballs. I simply contend
25 that's not possible if you look at the parallax of the roof. So the roof of the building in front is to the right, which is simply not possible. So I have drawn the red lines, and I've indicated where the chimneys are. So this photo must have been taken to the left of the top of that roof. That means it was taken quite far to the north of that balcony, not from the middle of it. And I will show
30 why that's important in just one second. And again, this is all around the idea that what was selected was the worst view or the worst impact.

If you flick to the next page, this is from unit 7. And again I contend that the same thing has happened on this floor. Then go one more page over. Now,
35 these units are all stacked in a line, so 11, 9, 7 and 5 are all stacked on top of each other. Now, this is a combined analysis with parallax. Now, I believe, with red, little red dot, I have indicated kind of where, based on the parallax, I think relatively those photos were taken. So there's a little red dot. And you may have to look at the images just for a little bit to work out what I'm saying,
40 because it actually took me quite some time to work it out, because I was like, "Why is this white building in the distance that I have labelled in yellow? Why is it not in the same place? Why is the little peninsula that I've highlighted in red not in the same place? And the tree is not in the same place?"

45 So the only way I could work out how that was possible is if unit 5 was taken very, very, very, very close to the top of their balcony, the northernmost point of their balcony. But if that was done, then that downplays the significance of their view loss, because - this is back to unit 5, two pages earlier - because, if you walk further down their balcony, south, then of course the elevator overrun
50 on the new proposed 21 Billyard Avenue will be more in the middle of their

northern harbour views. So this is, I would contend, a much better case.

Q. I understand your point.

A. Thank you. I'm sorry. I spent ages working out how I could explain it.

5 Now, to my personal view loss, I'm unit 12. I'm also the chairman of the building, and I've tried to organise this community group. That's why I tried to talk about a few different things to cover it, but this is from me personally. Now, in 2020, council came and extensively photographed every - all of my north-facing windows. Now, and they concluded that, despite it being a much
10 smaller development, and it really only obscured the view from my toilet and wardrobe and laundry, they said - and I think I have this big - they said, "The proposed addition will have a severe impact on views from the master bathroom, and the proposal will completely obscure existing views from this room to Sydney Harbour, including Fort Denison."

15 So then this is the next one over, the rainbow looking impact page. That is from the current Urbis view sharing report. And then just as an indicative photo, this was taken by me from, I think, the toilet. But, look, I was just going to say - so they're saying in the current development that the complete loss of
20 pretty much all my north façade views, all of them, 100%, from what I can tell, is going to be minor. And if I just had to summarise the inaccuracies that I found in my report - I didn't even know about Mark's one - of the view sharing report, I've got the loss of north-eastern harbour views, due to the elevator shaft on Billyard, is minor, the complete loss of view from unit 3, 12 Onslow wasn't modelled, the loss of Garden Island views, north, from a kitchen across
25 the balcony, not modelled, the loss of Elizabeth Bay House views from unit 6, 8 and 10, not modelled, the most affected units in Elizabeth Bay Gardens - I don't think they were modelled, the view from Elizabeth Bay Gardens community gardens, not modelled.

30 Now, this is one I found at the eleventh hour, and I was really surprised, because what about the views of the harbour from the public street? And I was like, "Okay, what did they say about this." Inside the view sharing report, I found this highlight. And it says that this was supposed to assess impacts on
35 private domain views, and the public domain views have been prepared and assessed by Urbis in the public view analysis dated October 2023. And I was like, "Okay. Cool." Where is this report? Because I couldn't find it anywhere. The only thing submitted to be downloaded from October 2023 was a 3D model.

40 Now, that said, the statement of facts and contentions says this about the loss of public views from Onslow Avenue. They say:

45 "The existing public view of Sydney Harbour from Onslow Avenue will not be adequately maintained due to the spacing between the proposed and neighbouring buildings being reduced. As such, the proposal does not adequately address the planning principle established in Rose Bay Marina [2013] or section 3.2.1.2 of the SDCP, which requires that buildings should not impede and should
50 improve views to Sydney Harbour from the public domain."

And that is in the statement of facts and contentions, page 28. And then I just have proof that that report wasn't available for me to get.

5 Now, I know there's been some statements about how the architect - the new architectural drawings change the setbacks and the sizing and everything else, but when I've looked at them, they just don't seem to be changing much. So, for example, an improvement from, let's say a gap - yes, okay, there was a gap here of four - okay, it was originally 4,529. This was in architectural drawing revision D. And now, apparently, it is 4,530. I think that's 1 millimetre. And
10 then there's three - yeah, okay, there was one that was 3,244, and now it's 3,228. I think that's an improvement of 4 millimetres. And I guess - I don't know - I don't feel like that's very substantial.

15 So the bottom line that I have about the 4.6 variation request and its associated documents, it appears to me that if - that nothing is an impact because a lot of things were missed, and nothing is causing a problem because they weren't noticed, but is that true? And that's what I've just tried to find out over the last couple of weeks. Because the worst impacts to us all are currently being caused by non-compliance. The non-compliance that we know
20 about is already causing us a lot of grief, to our views, to setback, to shadowing and so on. But do we know that it's right now?

25 So, look, I'm sorry, Commissioner, I know that I've gone on and on. I found - I was hoping you would be able to just impose some reason on this process. So I just - I found their arguments to be kind of weak, and I found so, so many mistakes. And I feel mean saying this, but I kept finding so many mistakes that I had to stop, because I didn't have enough time to put them all in.

30 Q. So what I'm going to ask you to do now is - I didn't see that note where you mentioned a series of view loss concerns you had or particularly units that you thought were unsatisfactorily dealt with. I don't think that's in here, is it?
A. It is in my other one.

35 Q. Which is the other one?
A. So it is in the Darnley Hall submission and my Olivia Ross submission.

Q. Is it the blue or the green folder, sorry? The green folder? Yes.

40 BERGLUND: We think it's in the supplementary bundle, Commissioner, which is exhibit 6.

WITNESS: Also, the ones that I submitted today are the updated ones.

45 COMMISSIONER

Q. So I guess about or maybe it was only five minutes ago, you read off a series of--

50 A. My list. That was sort of just a summary of all my submissions up till this point, Commissioner, plus--

Q. So what I'm talking about is you read off a list of units where you thought, other than the worst case, was examined or something to that effect?

A. Not modelled. Yes. That was an amalgamation of the submissions that I've made previously, and--

5

Q. So have you written that anywhere yet that's on the record? Like, otherwise, I'd just like to get a copy of it.

A. Of course.

10

Q. I thought you read it.

A. Well, it's in my terrible scribble. Would you mind if I just gave you a list that is just a summary?

15

Q. I don't know if that's practical. I'd rather just have it tonight so I can give it to the parties.

A. Sure. Hang on. So it is in the Darnley Hall submission from today.

Q. Yes.

20

BERGLUND: Where do we think that is? We think that's exhibit 6, p 17; is that right?

COMMISSIONER: Exhibit 6, p 17--

25

BERGLUND: If that's the submission from the directors of Darnley Hall, to which Ms Ross is referring, dated 29 October 2024.

WITNESS: No, no. I have the new one from today, because I updated it yesterday.

30

BERGLUND: Okay. We haven't seen that.

COMMISSIONER: What did you do with that when you updated it? Did you give it to council, or?

35

WITNESS: I have emailed it, and you've got it.

COMMISSIONER: When did I get it?

40

WITNESS: Today. Sorry, Commissioner, I worked on this until the 11th hour.

BERGLUND: Can I just clarify. Is this the one that says, "Submission of Olivia Ross"? Or is it a different document?

45

WITNESS: No, no. It is--

BERGLUND: Okay. We haven't seen this.

WITNESS: It is the one that just says - it starts with, "To council and Court".

50

BERGLUND: Okay. We don't have that.

COMMISSIONER: Sorry. Do you mean the large - no. Where's that?

5 BERGLUND: We don't have it.

LANCASTER: We haven't seen that one.

10 COMMISSIONER: You gave it to me, you say?

WITNESS: Yes, Commissioner. There's a blue folder, there's a red folder, and there's a green folder.

15 COMMISSIONER: Yes. I've got the blue and the green. I've got a red--

WITNESS: It's probably the red one, then.

20 COMMISSIONER: Okay. Here's the red folder. This isn't in evidence yet, I don't think, is it?

BERGLUND: No. I haven't seen it.

COMMISSIONER: First of all, in terms of my direct question, it's in here, is it?

25 WITNESS: Yes.

COMMISSIONER: Perhaps you could point it out to us?

30 WITNESS: It starts on page 9. That's where I talk about unit 3. Then page 10 talks about 6, 8 and 10. Then there's the errors - parallax errors. But then it keeps going - omissions, page 15--

COMMISSIONER: So it's the topic, "view issues" that starts at page 9?

35 WITNESS: Yes, yes, yes.

COMMISSIONER: I'll just hand this to the parties. It's getting late.

40 WITNESS: Yes, of course. I'm sorry, Commissioner.

COMMISSIONER: What I'm hoping to be able to do is just mark this, and perhaps I can leave it - we can do two copies, at least, for you--

45 LANCASTER: We certainly haven't seen that before just now.

BERGLUND: Yes.

COMMISSIONER: Yes. Would you like to have a look at it overnight?

50 LANCASTER: Yes, thank you.

BERGLUND: Yes.

5 COMMISSIONER: What I might do is do a number of copies of it, and I'm likely to want to ask the experts some questions about it, so if a copy could be provided to them, as well. So we might do six copies. Perhaps just wait around for a short time. I think this is black and white.

10 WITNESS: I have emailed a soft copy to dasubmissions@cityofsydney and to Julia and Andrew, but they would have only got it while they were here, so.

LANCASTER: What time was that?

15 WITNESS: I will - I mean, I'll double check that it's left the inbox, but it would have been at about 9:30.

LANCASTER: Is this the Darnley Hall one, or--

20 WITNESS: Yes. Yes, it would have come from directors@darnleyhall.com.au - I will double-check that it's actually gone, sorry.

LANCASTER: Yes. I've got one here at 10:35. Okay. I can send it around.

25 COMMISSIONER: You can just circulate that to all concerned, if you like. That's good.

MFI #1 DOCUMENT PROVIDED BY MS OLIVIA ROSS

30 I haven't marked these other documents, either, that you haven't seen until today. I guess I'd like to be able to mark them. Any concerns with that?

LANCASTER: No.

BERGLUND: No.

35 EXHIBIT #19 A3 BUNDLE AND SPEAKING NOTES FROM MS OLIVIA ROSS' EVIDENCE, ADMITTED WITHOUT OBJECTION

40 COMMISSIONER: I believe this blue folder is really just an A4 version of exhibit 19.

WITNESS: Yes.

COMMISSIONER: Anything else?

45 WITNESS: This is pretty much it. I was - sorry.

COMMISSIONER: There's plenty there. That's--

50 WITNESS: Yes. Look--

COMMISSIONER: That's something I will be looking at, and I will be asking you some questions about it.

5 WITNESS: I was just hoping that there would have been a compromise. A golden mean. So this is the second-last image that is in that folder. This is a little edited version of the building. It is one storey shorter. It doesn't have the elevator shaft. It's a little bit skinnier; has a little bit of a bigger setback; and then the very last image in red is what they're asking for.

10 COMMISSIONER: Sorry. Is this in the A3 folder?

WITNESS: In the big A4 folder, yep. It should be at the very end. Is it that?

15 COMMISSIONER: For my copy, the last drawing is a survey.

WITNESS: It should be in there, but just so you can see it quickly.

COMMISSIONER: Have you got this?

20 BERGLUND: I believe it's on the email that's been sent, but I haven't seen yet.

WITNESS: This is another copy. The one that is a sort of a grey colour. So the grey one is a compromise I was hoping, but perhaps we could have discussed, and the red is what they want. That's it, Commissioner. I am so
25 sorry I took so long. Thank you so, so very much for listening to all of it.

COMMISSIONER: Thank you. Just give us a second. Just sit down, if you don't mind.

30 WITNESS: Of course.

COMMISSIONER: I have found these plans. They are in the A3 folder. They're not towards the end. They're, maybe, ten or 15 pages back, but I do - I think it's with the documents that you have. So you can give that back to
35 Ms Ross. I'll mark these drawings. This is the compromise drawing, I can see you've mentioned.

Now, are there any questions for Ms Ross?

40 LANCASTER: No, there aren't.

COMMISSIONER: I'm not your Honour, as you well know.

45 BERGLUND: No, there are no questions. Commissioner, there's one more resident, who is Ms Fairbairn-Watt, also from Darnley Hall.

<THE WITNESS WITHDREW

50 I've just obtained instructions that she expects to be five to ten minutes. It's a matter for the Court whether we can accommodate that.

COMMISSIONER: I'd be happy to do it, if that's the case. I'm just looking around at the court officers; is that okay?

BERGLUND: I call Ms Fairbairn-Watt.

5

<ROSIE FAIRBAIRN-WATT, SWORN(4.21PM)

COMMISSIONER

5 Q. Okay.

A. Thank you, Commissioner. I just have to make a note. So my name is Rosie Fairbairn-Watt. I'm the owner and resident in unit 9, 12 Onslow Avenue, Elizabeth Bay, but I also own Elizabeth Bay Gardens. I want to concur with the views expressed by Dr Dever, Mr Daintry, Mr Hughes, especially Mr Gazy, and especially Olivia Ross. Darnley Hall shares its views. It shared its views in 1972, when it was designed by Dr John James. The City of Sydney archives, archives and history, has allowed us access to all the submissions that were made by Darnley Hall at that time. If and when this goes ahead, and the two buildings are demolished, we'll then be able to see exactly what views we shared in 1972, because we want to question whether a developer can come back for a second time and take more views from us. And we also want to know why there was no community consultation with the developer.

Council didn't seem to accept our assertion by our heritage architect that it was a contributory building, nor that it be retained and upgraded. The only problems with the existing buildings are a few small leaks and the car parking spaces perhaps aren't quite big enough for today's cars. I think our side views should be safe under Furlong, but I'm worried if council doesn't adhere to its own height restrictions, it gives no confidence to us about building codes.

And I wonder - there's been talk about the bins. I wonder if you could ask the new owners to store them where the original DA approved them to be stored, not at the front door of number 10 Onslow Avenue.

So over 266 people made submissions, but it's more than that, because Olivia's just added a few more, and so have I. So of those 266, there were 245 against and 21 in favour. Of the original ones in favour, at least 14 were by Fortis employees, as I have told you before, but--

35 Q. Yes. Don't tell me that again.

A. After the re-notification, there were six more positive submissions, this time by people showing they lived in or were associated with the subject site. Each asked for their names to be redacted. So this is a diagram of the affected buildings, 27 affected buildings, but there were 16 I was unable to allocate, so it may be that there are more buildings. So I did a detailed submission about the submissions that came in after re-notification. Am I allowed to hand those up?

Q. Likely. I'll just have a look at it first.

45 A. I can only afford two copies.

Q. So are you saying these are the submissions, or you've summarised the submission?

A. No, they are the submissions, and I've highlighted the reasons why I believe they are all written by virtually the same person.

Q. So you're still - the focus here is on those making supportive submissions, is it?

5 A. Yes. There were only six of them. There was one that contained a number of inaccuracies, and when you said you didn't want to hear any personal remarks, that's why I'm not going through them now.

Q. What we'll do is, when you're concluded, I'll just - we'll work out what can come in as your speaking notes, onto the record, so for the time being maybe you can just hold that for me.

10 A. So there's been well over 2,000 pages written to council, but really there's only been one genuine supportive submission. So we're hoping that council will listen to us, the community. As the submit - there's no-one said what - their submissions said, you know, "Oh, this building is just what the community - what the area needs." They don't say how it'll benefit the
15 community. They don't say what is impressive about the plans. They don't say what the tremendous benefits to the community will be. So those submitted from at least 27 buildings, which was broken into about 108 households in well over 2,000 pages.

20 Over 30 people after the re-notification wrote to council for the first time so there were lots of people in this period that then started listening to information about this. All the buildings were concerned about the loss of light, solar, building design, the noise from the pool, the loss of the 52-year-old mature trees and we also paid a lot of money for our 29 professional reports. I have
25 been asked to ask whether the shadowing reports are correct, because we are not so certain about that.

Olivia applied to the Land and Environment Court, to council, and I applied to council under the GIPA Act and we were both given different information. She
30 was given later plans and reports that I wasn't, and I asked for them but I was told I couldn't have them. We also asked for council's updated statements of facts and contentions but that was - and notes, and that was denied as well. And without them, how are we able to make informed decisions and comments?

35 We are really concerned about the loss of affordable housing from August 2024. If the building isn't complete until late 2026, that's a loss of 28 units by 112 equals 3,136 weeks' rental accommodation in a time of acute accommodation shortage. And will the building be finished on time?

40 Mark Gazy and Tony Moody spoke about the 78 residents in EBG. I'd like to remind you that there are 28 car parks in that building that are owned by people who live outside the building, at least 28, and those owners use the Elizabeth Bay pool and gardens. So you've got another 50 people with
45 families who use those gardens as well as the 78 owners of the apartments in the building. As is the case with any particularly hotly contested non-compliant development, there is an increased risk of failure to complete putting lenders and those who have paid deposits at risk.

50 So the next thing I'd like to talk about is the heritage wall. My submission to

council on 22 October showed the surviving rock work, garden staircase, surviving newel post from the garden and grounds of Elizabeth Bay House. This wall extends from 6 Onslow Avenue in front of 8 Onslow, front of the driveway on 10 Onslow, across the boundary between 23 and 12 Onslow Avenue to the heritage protected grotto beside 18 Onslow Avenue. Is this wall on the subject site proposed - so it's number 2, proposed conditions of development consent, design modification to match adjacent stone wall and planter. Is that what you're talking about, or is it this? This is what needs preserving. This is on the subject site. Last time, when section 34 was done, you went in and we weren't allowed to go in.

Q. So I'll just say for the record, Ms Fairbairn-Hall is showing a series of--
A. Fairbairn-Watt.

Q. Fairbairn-Watt, I beg your pardon.
A. That's fine.

Q. Series of photographs showing stone block wall, I might--
A. Yes, which is part of the Elizabeth Bay heritage, and this what they call a planter? That's a newel post. You know, like it's early 1800s. This wall has to be preserved at all costs. You know, it's part of our heritage. I couldn't find anything about it in Number 4..(not transcribable)..final landscape plan. I also note the - under 2, proposed conditions of development consent, sites in the vicinity of the heritage item and buildings within the heritage conservation area, it talks about I think dilapidation reports and Elizabeth Bay House at 7 Onslow Avenue isn't included. The Museum of History New South Wales submitted specifically that it was worried about dilapidation to the top floors of its building when the car park was being dug.

Even before Fortis started working on its offsite office in Elizabeth Bay Road, it was advertising apartments in the proposed but hotly contested development. Look at the Wentworth Courier on 28 August 2024. This is without owning the property or having DA consent. Fortis put up signs in front of 10 Onslow and 21 C saying "Now Selling." But if you don't own something, how can you sell it? Mikaela Whitbourne's "Now Selling" story in the Sydney Morning Herald prompted the removal of these signs, including the ones that had been slashed in Billyard Avenue. However, Fortis was still, on 11 October, actively marketing. Fortis still didn't own the property, nor has DA approval. Commissioner, how can they do that?

Q. Can we get back to the topic? You know what I am thinking there, I think, Ms Fairbairn-Watt.

A. Fortis, however, did exercise its call on the last possible day and contracts were deemed exchanged. It was due to settle on 8 October but didn't. Owners of 10 Onslow and 21 C had to wait for their money until Thursday 18 October. A locksmith arrived the next day. Saturday 19 October, two visitors to the site were told, "Yes it's been approved. Just has to be ratified by council on 5 November." The second one said, "No, we don't have a DA but we will have it in two weeks." How can they do that?

Q. Look, I need to interrupt you. It's nearly 4.30, or after--

A. I've got two lines to go.

5 Q. So I'm interested in the topics that relate to the evaluation of the DA and not the behaviour of other people, okay? So please come back to the topic.

10 A. Has the developer complied with the 41 pages of statement of facts and contentions? I concur - my final thing is I don't understand - it's really important to get this right because the building is going to be there for so long. I don't understand, with so many inaccuracies, why we can't - why it's even being considered. The neighbour, Ruth Ritchie, who wasn't able to be here today said, "The fabric of this Royal society should be hand washed and protected, not chucked in a hot wash and shrunk in the dryer." Nobody wants this building except the developers and poor chumps who buy into the project. Thank you, Commissioner.

15

Q. In terms of those documents, I'd like to have what you've read from if that's possible.

A. It's--

20 Q. Too much - hand written notes?

A. Yes. I hoped--

Q. But you've - what you've given me is what so far?

A. So would you like this?

25

Q. I'd like the stone wall photos.

A. Those. The submissions about - the submissions made to council after re-notification and I could hand up the full speech that I was going to make today but you won't like a lot of it. So I could re-write that tonight. I mean, you can take a copy of it, but--

30

Q. What's noteworthy? The commentary you make that I'm not interested in, I just don't read it, all right? So I'm happy to have that written document unless you really don't want to give it to me.

35

A. Can I - well, can change some of the stuff you don't want to read.

Q. Yes, I know, but I won't read it - don't read it.

A. Ay, that's fine.

40

Q. So give me that written submission.

A. Can I get a copy back so I can--

Q. Pardon?

A. Can I get a copy back for my records?

45

Q. Yes.

A. Thank you.

50

COMMISSIONER: So what we will do is I will - let me just think. I would just like the parties have the photographs of the stone wall, because I will probably

ask a question about that and that can just be handed down by the court officer. With your written submissions - so the stone wall photos - I will just do it for now, I will mark that as information as well as MFI 2.

5 MFI #2 STONE WALL PHOTOS

WITNESS: There is one more, sorry. I thought there was seven.

10 COMMISSIONER: And then the speaking notes of Ms Fairbairn-Watt, I'll now mark as exhibit 20.

EXHIBIT #20 SPEAKING NOTES OF MS FAIRBAIRN-WATT, ADMITTED WITHOUT OBJECTION

15 But just noting I will be striking through the things I don't regard as being relevant to the evaluation of the DA. One of the reasons I say that is in proceedings like this, sometimes personal attacks are made, et cetera. It's always reasonable to just be circumspect in relation to that. I like to give persons a right to respond. So those that might be mentioned there, I won't be
20 taking any value judgment at all in regard to that commentary.

Okay, so MFI 2, I've got these. Now, all I'll do with that is I'll just ask that you give that to the council experts in particular--

25 BERGLUND: Sorry, Commissioner is that--

COMMISSIONER: Do you have that already? This is the stone wall photos.

30 BERGLUND: No we don't have those.

COMMISSIONER: I just want to ask a question about it.

BERGLUND: Yes, but we are happy for them to be shown to the experts tomorrow.

35 COMMISSIONER: Yes, so you can just hand all that. That can go - and you can give that MFI back to the council. And the experts from the applicant's side might just look at that as well. If you can give it back to the court officer this afternoon, that's fine too. It doesn't take too long. Then the speaking
40 notes from Ms Fairbairn-Watt I can now mark as exhibit 20, is that right?

WITNESS: And you've got the submissions, too.

45 COMMISSIONER: Your written submissions that have already been lodged with the council are on the record as part of--

WITNESS: The one that I've just done isn't with council.

50 COMMISSIONER: You've already submitted that to council?

WITNESS: No, not the one that I've just given you today.

COMMISSIONER: Sorry, this is - this is the one you've put a lot of written notes on, this ..(not transcribable)..

5

WITNESS: That's my speaking one. I had two copies of this and I now only have one. So I thought that it had gone over there. You've got one? She's given it to--

10

COMMISSIONER: Sorry, wait a sec. So I thought - this is the notes you were originally going to speak to, right?

WITNESS: No, that's--

15

COMMISSIONER: No.

20

WITNESS: --totally on the submissions, it's dated today, 5 November. It's totally on the submissions made for the re-notification and it's about those six submissions that I didn't read it all out to you. I only read you the facts today, from my speaking notes.

25

COMMISSIONER: That's right. Now, so my intention with this document is to mark it for information as well, and I did want to have the applicant and the council have a copy of it. There happens to be two copies. It doesn't matter.

MFI #3 ADDITIONAL SUBMISSIONS PROVIDED BY OBJECTOR
MS FAIRBAIRN-WATT

30

The reason I'm not marking that into evidence yet is you've done your own critical appraisal that in a sense synthesised it. So it's good if I give the parties a chance to look at that before I admit it, okay? Thanks very much.

WITNESS: Thank you.

35

<THE WITNESS WITHDREW

COMMISSIONER: All right, so I guess that is it for now. So we come back at 10.00 in the morning.

40

LANCASTER: Thank you.

COMMISSIONER: Anything else before we finish that I have forgotten or you'd like to say?

45

BERGLUND: I don't think so.

COMMISSIONER: All right, okay, thank you.

50

ADJOURNED PART HEARD TO WEDNESDAY 6 NOVEMBER 2024

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IN THE LAND AND ENVIRONMENT COURT
OF NEW SOUTH WALES

COMMISSIONER WALSH

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SECOND DAY: WEDNESDAY 6 NOVEMBER 2024

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**2023/00440488 - BILLYARD AVE DEVELOPMENTS PTY LIMITED ATF
BILLYARD AVENUE DEVELOPMENT TRUST v THE COUNCIL OF THE
CITY OF SYDNEY**

15

COMMISSIONER: Housekeeping?

LANCASTER: I can return MFI 3 which I had the original of. That was the
objector analysis of the positive--

20

COMMISSIONER: Critique of the - yes.

LANCASTER: The positive responses to the application.

25

COMMISSIONER: That's right. So I can mark that then as exhibit 21. That
was Ms Fairbairn-Watt prepared that, wasn't it?

LANCASTER: Yes.

COMMISSIONER: So that's the critique of supportive submissions, I guess.

30

**EXHIBIT #21 CRITIQUE OFF SUPPORTIVE SUBMISSIONS, ADMITTED
WITHOUT OBJECTION**

There was the stone wall as well, wasn't there? Is it MFI? I want to ask a
question of the experts about that so I'll mark that if that's okay.

35

BERGLUND: Yes, that's fine.

COMMISSIONER: So exhibit 22 is the photos of the stone wall.

40

**EXHIBIT #22 PHOTOS OF STONE WALL, ADMITTED WITHOUT
OBJECTION**

Now, I have Ms Richter's speaking notes. We marked that exhibit 15, did we?
Looks though that's the case. Do you have copies of that?

45

BERGLUND: I'm sorry, I didn't - whose speaking notes?

COMMISSIONER: Ms Richter.

50

BERGLUND: I think that was - yes, they were exhibit 15 I believe. We need to

raise some of those matters with the experts as well.

COMMISSIONER: Beg your pardon?

5 BERGLUND: We'll need to raise some of those matters with the experts as well but we'll come to that in due course.

COMMISSIONER: So I'll just attach that to the overshadowing diagrams that were also with Ms Richter's speaking notes?

10 BERGLUND: Thank you, Commissioner.

COMMISSIONER: I think that's all for the MFIs, isn't it?

15 BERGLUND: That's all I'm aware of.

COMMISSIONER: I had a few things I just wanted to say at the start. I don't have a lot of questions for the experts. First of all, I'm assuming we've finished the objector evidence now?

20 BERGLUND: Yes, we are, Commissioner.

COMMISSIONER: But I do have a few. The questions I have for the experts are - there's some to do with the visual analysis. On the visual analysis, I've got a PDF version of the update, the update of the height planes but I'd really like a PDF of the original view analysis if that's available. So that's appendix D to the joint report.

LANCASTER: I'm told it was emailed yesterday, of the original.

30 COMMISSIONER: To Commissioner Support?

BERGLUND: Yes.

35 COMMISSIONER: What I did get by email was the update, the briefer document under 16 pages. Did I get the other one as well?

BERGLUND: Yes, in the same email.

40 COMMISSIONER: I haven't located it yet. I wanted to ask the experts a couple of questions about the RLs on site. I have some questions about the issue raised to do with loss of dwellings and/or affordable housing, the excavation topic, and the noise impact topic especially to do with the elevated communal open space. What is clear enough to me now, and I need to tell
45 you this now in case we - I'm hoping we can organise this today - I do want to have a look at a couple of the viewing spots. So the ones that I'm interested in looking at unit 6C in Elizabeth Bay Gardens. This one and the next one particularly because the visual analysis shows the wrong location just directly of itself - there's that one. There may be nothing arises for these two here I'm
50 talking about first of all.

5 The second one was unit 7 or 5, and both if they're available, in - sorry - I'm talking about the property just to the south of the site, Darnley Hall. Unit 7 or 5, the reason I want to look at that is when I was understanding the evidence of Ms Ross, I did pick up - agree with her, at least on the basis of the photographic evidence, that the pitch line of the rooves in the foreground would suggest the point shown in the visual analysis for the outlook was incorrect. That may not be true but I just need to go and have a look at that. I can explain that more directly when I have the experts up perhaps.

10 The third one is I would like to see unit 2 mainly because I just can't recall it. I want to ask the experts a question about the more elevated units. The question I asks them about that will be really it's a counterpoint for the objector evidence to suggest the apex of those units is a key point. I can see in the visual analysis there's support for the idea that there's wider views than just the
15 apex. I just want to ask them some questions about that. I don't think I need to view from the higher units.

BERGLUND: My instructing solicitor will make some inquiries about the logistics about--

20 COMMISSIONER: Time-wise, it could just happen like this, that we have the experts in now. That might last an hour or so, and then we do the site inspection. Really, with the site inspection I could almost - I'm not saying this literally but I could almost do it unaccompanied. I don't need to hear anything
25 on the site inspection; I just want to see things. That's what I think, anyway. So I don't need a lot of people attending.

BERGLUND: We'll just make inquiries about the availability.

30 COMMISSIONER: Availability, yes. It would be brief.

BERGLUND: In respect to those units which are owned by people who gave evidence yesterday. We know who to contact; otherwise, we'll need to make a call.

35 COMMISSIONER: So the other things I want to do on the site inspection - and this is really not to do with private ownership - I want to have a look at the streetscape again. What would assist me there is a better understanding of the urban design report. So when the experts come in, they can just maybe
40 take me to that so I'll just have something to cross-reference during the site inspection. I'm not sure that it's fair but that's what I - in terms of not hearing anything from the experts or otherwise, that's what I'm thinking at the moment like just in terms of getting through the matter, and then we're back to hear the submissions in the afternoon. So I'm not sure how long that will take but if we
45 start at after an early lunch, maybe we could certainly complete today, do you think?

BERGLUND: Yes.

50 LANCASTER: There's, yes, no question of that.

COMMISSIONER: So can we call the experts together again, please.

<ANDREW HARVEYJANE MAZE-RILEY, JULIA PRESSICK AND JULIA ERRINGTON, ON FORMER AFFIRMATION, AND WILLIAM JOHN SMART, ON FORMER OATH(10.13AM)

5 COMMISSIONER: Thanks all. You know you're still under oath. I just needed to get a bit of an understanding of the envelope markings and drawings. For example, if I go to page 28 of the view sharing report - that's appendix D of the joint report - that's just the one I happened to have opened up. Just give me a moment.

10 WITNESS HARVEY: Sorry, Commissioner, can we just get one of our documents.

15 COMMISSIONER: Sure, yes. I got a document at 11.43 which was the addendum "better height plane of the update". Do you have the update report. It's appendix C I think to the most recent joint report. I do have that electronically. I think the same markings on that document. Do you have that?

20 LANCASTER: Commissioner, we have an email at 10.51 yesterday morning that attached the view sharing PDF, I think.

COMMISSIONER: It's not appendix C; that's appendix D?

25 BERGLUND: Yes, it's in a link.

COMMISSIONER: That's my problem, okay. So I'm going to use appendix C for the purpose of these inquiries. If I go to - it's page 7 of 16 in the PDF. Is it page numbered? Got that one?

30 BERGLUND: Is it this document, sorry, sir, or the original view sharing?

COMMISSIONER: No. This is the more recent one that updates the Bettar.

35 BERGLUND: So the photo montages?

COMMISSIONER: It looks like it's seven pages into the document, not counting the cover sheets.

40 BERGLUND: Are we looking at a photo on the page?

COMMISSIONER: The photo montage that shows the--

45 BERGLUND: Unit 8 at 13 Onslow; would it be that one?

COMMISSIONER: Yes. That's it, VP9. So it's just to understand the different colouring, et cetera. When I look at this I am sort of struggling to understand the building itself.

50 BERGLUND: I'm happy to explain if that would help you.

COMMISSIONER: Is it better if you approach. Like I might need you to point to things. Let's do it this way. I'm going to come down and you might just stand around that corner there.

5 BERGLUND: Commissioner, so I had two versions of..(not transcribable)..as you're aware, that is three, and partly in the interests of time that was..(not transcribable)..this is from..(not transcribable)..at--

10 COMMISSIONER: So all I'm interested in is this question. Where's the other one in the building? How do I understand that, and what do the different colours mean?

15 BERGLUND: The full height of the proposed building is up to this..(not transcribable)..line, and that's here. It's before..(not transcribable)..line of the building up here - especially this colour I mean - but up here is a..(not transcribable)..coloured..(not transcribable)..to help identify which..(not transcribable)..the yellow is the approach element that's already existing.

20 COMMISSIONER: Yes.

BERGLUND: The pink, there's an area identified as an exceedance in relation to a Merman AP application, and the blue..(not transcribable)..Bettar. That was amended last week, and so we have - this is that updated version I think. You will see a tiny area of purple just in the corner. That is the result of the
25 minor inconsistencies along the..(not transcribable)..boundary which I think ranged from two and four millimetres.

SPEAKER: 20 and 40.

30 BERGLUND: Sorry, 20 and 40 millimetres. So in recap, that..(not transcribable)..that boundary. It's resulted in that purple, Commissioner, a change which ..(not transcribable)..

35 COMMISSIONER: So where's the Bettar? We've already confirmed I think earlier that there's a contravention Bettar on this side. So how is that indicated? On both sides.

40 BERGLUND: The Bettar is in blue and then alteration of the Bettar is just that little bit of purple.

COMMISSIONER: So the tie line is that line?

BERGLUND: Yes, correct.

45 COMMISSIONER: And where's the ..(not transcribable)..

BERGLUND: It's the pink.

50 COMMISSIONER: Do they cross ..(not transcribable)..

BERGLUND: They do. It's the bottom of the..(not transcribable)..so that's the forward leading edge, and this is the closer edge ..(not transcribable)..

5 SPEAKER: It's the pink plus the blue. And then the yellow is the approved penthouse apartment that was never constructed.

COMMISSIONER: Yes, I see.

10 BERGLUND: Looking at Bettar, this pink line would be the compliant building form - the top pink line, yes.

15 COMMISSIONER: So with the changes - I can do this in the box - that's great, thank you. So I'm not sure if I mentioned this one, but I do want to take you to the changes that occurred over the last week or so in terms of the floor plane, and the implications, but before I get to that I've got a question about the reference to modelling of the public domain implications, view lost-wise. I think it's in page 24 of your joint report. I didn't mention this in my opening but my intention was if I can, just to look from the garden as well, Elizabeth Bay Gardens, and also just that public domain corridor. So on page--

20 BERGLUND: Excuse me, Commissioner, which garden?

25 COMMISSIONER: Elizabeth Bay Gardens. Isn't that what it's called. Just the communal open space there.

BERGLUND: We're just checking that we've got access to everything that you want to see.

30 COMMISSIONER: So page 24 there's reference to public views from the street:

35 "Public views from the street were modelled from the streetscape in other sensitive public domain locations and Harbour. All view impacts were found to be low and acceptable."

But that's not documented; is that right? Or where is that?

40 WITNESS MAZE-RILEY: It has been documented and it was submitted to the City of Sydney - I'm not sure why it's not present today - in a separate public view impact report where those views were assessed against Rose Bay.

COMMISSIONER: So is that in the documents? Who's tendered that? Anyone know?

45 WITNESS MAZE-RILEY: It was a separate report.

COMMISSIONER: It's probably already with me. I just don't know where it is.

50 LANCASTER: I just need a moment to find the attachment. Can I come back to that? I just can't identify the reference at the moment.

5 COMMISSIONER: Yes, that's okay. I am sure it's in one of these documents. I don't need it right now but I'll be having a look at that. I'd be aided by the documentation later. So in terms of these levels, when I see the changes, it looks as though a level that was 15.08 coming down to 11.8, and a level that was 14.74 went down to 11.08, I guess I need to know a little bit more about how you do the calculations for the height plane generally, so let's open that diagram if you can take me to it which shows the cross-sections along this side. Where is that again? That's in the most recent joint report, which I guess - and that's exhibit 7 I think.

10 BERGLUND: Six I think the joint - no, sorry, seven. You're correct. Six was the bundle; seven was the joint report.

15 WITNESS PRESSICK: DA06, Commissioner.

COMMISSIONER: Okay. So when you work out the height plane, is one level assumed in a north/south direction across the site? I'm not saying there's anything wrong with that. I'm just trying to understand how the height plane's constructed?

20 WITNESS SMART: The height plane's constructed by taking point levels just outside of the boundary on principally the long sides which are east and west, and then joining the points across the site in a straight line because the whole of the internal has been built out.

25 COMMISSIONER: So, for example, this one that's near the height plane demarcation line where the changes occur, is the height plane angled there between 14.7 and whichever the number is?

30 WITNESS SMART: Yes.

WITNESS PRESSICK: To create contours, Commissioner, you know you have to have two points, so they're not always that they have to go to create that contour line, you don't - they have to be the same RL along both sides so if you don't have the same RL, as I understand it, surveyed on that site, you have to pick a point between two survey points on the other side that correlates. Does that make sense?

35 COMMISSIONER: Look, I need to be on top of this. Obviously I should know this. So the height here is 22 metres, right?

40 WITNESS SMART: Yes, for the upper portion.

COMMISSIONER: So you're adopting an existing ground level that's - you're saying it's like a contour plan but it's using just the dotted lines you've shown here on DA006.

45 WITNESS SMART: Yes.

50 COMMISSIONER: It's using - so one way to do a contour plan is to just - well,

the simplest way to do it is you just look for points between marks and then you draw the lines?

WITNESS SMART: That's what we've done, yes.

COMMISSIONER: That's what you've done.

WITNESS SMART: We've progressively added more and more information as we could get access to neighbouring properties, and then we plotted the best that we could along each of the neighbouring boundaries and then joined the lines across that in a three dimensional plane, so it's kind of a - it always joins the levels directly across in the most direct way.

LANCASTER: Can I ask one question related to that? Is it fair to say that the plane generally, is than an angle sloping down from north, the higher, to the southern boundaries, the lower?

WITNESS SMART: It slopes down the length of the site and also across the site.

LANCASTER: Across the site, yes.

WITNESS SMART: And the plane slightly contours because it's always drawing straight lines between the sites in three dimensions.

COMMISSIONER: So this is one - if I could simply understand it - is that the line for the height plane demarcation line that I can see now on the next drawing, DA007, it's just showing the relation of points RL L8 and RL 14.7 or something like that. So that would be this point here which is immediately - really it's on the height plane demarcation line. It looks like it's shown as 14.7 - no, sorry, it looks like it's shown as 13.77.

WITNESS SMART: That end point 77 is to the left. 13.77 is at the - is the right dot there just slightly to the right of the demarcation line, and 14.72 is to the left of that. So these demarcation lines are showing the ground plane, and then we form the height plane by lifting that same elevated plane up 22 metres on the left side.

COMMISSIONER: Yes, and you've done that just a number of times in accordance with the dotted lines?

WITNESS SMART: Yes.

COMMISSIONER: Okay, that's straightforward to understand. So when you did this change over the last little while, the contravention along the southern boundary would have increased by a couple of metres or 3 metres or so?

WITNESS SMART: On the boundary it's 3 metres, and then because you're pulling the plane up to the other side--

COMMISSIONER: So increase by 3 metres. So before that, was it - sorry - was it breaching it or not?

5 WITNESS SMART: It was slightly breaching. The building was slightly breaching.

SPEAKER: At that point, yes.

10 WITNESS SMART: It was breaching by .3 metres, and on the facia line at that point.

15 COMMISSIONER: If I'm looking at DA007 here, I know we're offset off the boundary a fair bit, but what I need to understand is this seems like a big change, 2 or 3 metres. It could even be more. Let me do the calcs. So it's 15.08 down to 11.8. So that's a good 3 metres, and the next one is 3.7 metres, 3.6 metres. Now, how do the height plane diagrams change to reflect that?

20 WITNESS SMART: So if you go to DA007, that shows the amended height plane through there, and if you look at the demarcation line you can see it sloping upwards towards the western side, and then you can see the building protruding by the new amount through there. And then if you turn to the next page, DA008, it dimensions all of those protrusions above that height plane. So that the blue - the blue dimensions are the ones that have changed, and
25 the red ones remain unchanged. And on the facia line, the increase is 1.5 metres above the height plane. It was .3 and it's now 1.8. And then further back, if you project from that highest point at that corner which is the top of the balustrade, that element is 2.5 metres above the height plane at that corner. And that does complete three of them, or four.

30 COMMISSIONER: Now, I think what I'm trying to understand here is it doesn't sound like that corresponds with the 3 metre change, but--

35 WITNESS SMART: Yes. The reason--

COMMISSIONER: Just let me go on. I can see that it's set back off the side boundary, and it's set back off the demarcation line, and that's the way the numbers come out. Okay, I get that.

40 WITNESS SMART: Because I guess the non-compliance is at the demarcation line.

45 COMMISSIONER: Yes. So when you say you looked at the levels - I think in the joint supplementary exhibit 7 you say that you're now very happy with the levels, or essentially happy with the levels.

SPEAKER: Yes.

50 COMMISSIONER: I think that's all I need to ask about visual analysis. Anything arise for the parties?

BERGLUND: Not from me.

LANCASTER: No, thank you.

5 COMMISSIONER: So next on to loss of dwellings and affordable housing and
such matters on page 28 of your document. It's exhibit 4. This is the original
joint report responding to the objections. So I'm on page 28. It seems like this
is a legal submission, but I see it written down here. I'll just kind of explain to
10 you why I see it that way. Look, I understand the dwelling mix topic. I
understand here what you say SEPP Housing but I'll be asking the lawyers
later whether SEPP Housing even has anything to say about this. I'm not sure
that it does but I'll hear from them about that.

15 You say there's no current planning mechanism to retain it. I'm interested in
why you think that. It's as if you're saying there's always a need for a planning
mechanism to make evaluated decisions. So maybe you can let me know a bit
about why you say that. Then I think it's probably for me to ask the lawyers
about this forthcoming LEP, but maybe I will ask the Council some questions
and I think you can respond on that front.

20 First of all, on that sort of principle - look, even before I say that, in terms of the
dwelling mix topic in your response here, I saw somewhere that there was an
argument that there's a public interest for the change because of a number of
one-bedroom dwellings in the locality, or something like that. Did I not read
25 that? I think there's something - perhaps it's in the clause 4.6 or something like
that, to say there is a positive thing about the dwelling mix compared to the
wider setting. I can hear that and note that as a public interest consideration,
but then let's keep moving now on to this topic of there's no current planning
mechanism to retain the existing buildings. Maybe you can explain what you
30 mean by that?

WITNESS HARVEY: Sure. I think in response to a number of submissions
that have come through - and this is the part of our joint report where we
respond to this - I think a number of the submissions were drawing reference
35 to Council's draft policy which talks about a change where they don't want to
see a reduction in more than 15% of the total number of dwellings. So I think
our joint report was really touching on maybe less so about there being a
planning mechanism but more so that there's a preferred mix by the applicant.
There's no current requirement in the LEP to mandate how the number of
40 dwellings is arrived at.

I guess we'd separately say in relation to that that - I guess a number of these
comments also seem to go to a broader issue around affordability, and I think
as part of this, the current mechanism within Sydney LEP around affordable
45 housing, which is probably quite unique to other councils, is mandating a 3%
contribution that's spent towards affordable housing in the rest of the LGA
which circa just under \$1.5 million. So, Commissioner, I guess from my
perspective, when we say there's no planning mechanism, I guess I would
question that we have been working with an applicant who has a mix that they
50 believe is the right mix in terms of the demographic.

There is a reference elsewhere in the joint expert report around ABS data which talks about the current mix of dwellings in the area because there are a lot of comments I think raised by the submissions around a loss of dwellings, and particularly smaller dwellings that may be on the site at the moment. I
5 guess when you look at the ABS data which was just something we drew attention to - and I'll just go to that in the joint report.

COMMISSIONER: The page number, please?

10 WITNESS HARVEY: Yes, sorry, 41. So it was really around - if you look at the current composition of dwelling mix, the number of three or four-bedroom apartments - essentially 90% of the housing stock is studio - studio one and two-bedroom units. I guess the remainder, which is a fairly small amount, is larger apartments which respond to the needs of a different part of the market.
15 I don't know if that answers your question.

COMMISSIONER: I think so. So you've indicated there that Council has a policy at the moment for making an affordable housing contribution. It's saying that there's some future document about nothing more than a 15% reduction,
20 but you're also saying you think this meets the demographic demand?

WITNESS HARVEY: Yes, I do.

COMMISSIONER: I'm not saying all development has to meet a particular
25 demographic demand either, but I'm just interested in the topic.

WITNESS HARVEY: I think I'd just also add to that the Council's draft policy came out after our application was lodged.

30 COMMISSIONER: I think that's something to do. So is that - I'm not sure if that's what the story is. I haven't really looked at that so--

WITNESS HARVEY: I can talk to that if you would like.

35 COMMISSIONER: Okay, talk away.

WITNESS HARVEY: So that it went to a Council meeting in December 2023. That was supported at that meeting. It then went to a subsequent - it was granted a gateway determination by the Department - sorry, I'm just going to
40 my notes.

SPEAKER: 5 April.

45 WITNESS HARVEY: April, and it went on exhibition formally and came off on 23 August. So in response the number - the public submissions about us not considering it, I mean at the time we lodged application it wasn't even a draft policy, and it hadn't even been put to Council.

COMMISSIONER: Now, it's been on exhibition?
50

WITNESS HARVEY: Exhibition, yes.

COMMISSIONER: So what's section 4.15 say about that?

5 WITNESS HARVEY: Well, I think that's a bit difficult when we've lodged an
application, and I think the Council is still reviewing those submissions, so from
my understanding yes, it's a draft instrument that's been on public exhibition
but at the time of lodgement, it wasn't. I think in terms of the reduction from 28
10 to 20, look, we from a planning perspective - I mean, my understanding is I'm
not sure what - what else we could have done in that respect. I mean, as I
said before, I think we're in agreement that that mix - there is no mix
requirement as well at page 28. So I'm not sure if Council want to add
anything further to that.

15 COMMISSIONER: Yes. Anybody else like to comment?

WITNESS ERRINGTON: Yes. I mean, I agree, yes, the mechanism currently
is to require that affordable housing contribution, and I guess looking at it,
there is a mechanism within the Housing SEPP to retain low rental dwellings
20 when they're non-strata buildings, and that's quite clearly set out but in this
case because - and because it is a strata building, I guess looking at it there is
a mechanism for when - when it is a certain type of development but for this
particular type of development that mechanism isn't available within the
Housing SEPP.

25 And then in terms of, yes, looking at the reduction of dwellings policy, my
understanding is that there is also a savings provisions written into that policy
which, you know, for development applications that are currently lodged will
not need to abide by that policy.

30 COMMISSIONER: Thanks. Anything else on that?

WITNESS PRESSICK: The only other thing I'd add, Commissioner, I'd take
you to appendix E of our joint report which is the design excellence
35 assessment under - and I apologise, there's no page numbers on this
document - but under (d)(iii).

COMMISSIONER: So this is the original joint report?

40 WITNESS PRESSICK: That's right.

COMMISSIONER: Exhibit 4. Which appendix?

45 WITNESS PRESSICK: E, assessment of the proposal against clause 6.21(c)
of SLEP 2012.

COMMISSIONER: So I'm just trying to find it. Is it appendix E - do you know if
it's after the plans? Have you done it electronically?

50 WITNESS PRESSICK: It will be after the plans, yes.

LANCASTER: Immediately after the visual assessment document.

5 COMMISSIONER: I'm really struggling here but that's okay. So just, for example, like I can't find any tabs in the bundle here. Landscape development application plans, is it before or after that?

WITNESS PRESSICK: Just pardon me just one moment.

10 COMMISSIONER: Sorry, appendix E was it? Yes, I've got it.

WITNESS PRESSICK: Yes, correct. And it's on the fourth page. You'll see the word "heritage" underlined at the top of the page.

15 COMMISSIONER: Yes.

20 WITNESS PRESSICK: Under our controls, the existing building is identified as a neutral item, and has been assessed by our heritage officer as not making a contribution - a positive contribution to the established character setting or significance of the Elizabeth and Rushcutters Bay HCA, and therefore demolition of the building is supported under those controls.

25 COMMISSIONER: Just while we're on that topic, I might raise the stone wall that was mentioned in the objecting submissions. Is there a status to that that I need to know about from your point of view?

WITNESS PRESSICK: So Commissioner, this - do you want to talk, William?

30 WITNESS SMART: Just I think that probably - probably the place to start is if you have survey sheet 3 of 11, version F or D.

COMMISSIONER: Sorry, which exhibit do you know? Are we in your joint report again?

35 WITNESS SMART: I think it's the--

WITNESS PRESSICK: It's in the drawing SEPP.

COMMISSIONER: Are you in the supplementary bundle or where are you?

40 WITNESS SMART: I'm not sure where the surveys are found but I can get it off the floor plans. So if you go to drawing VA101.

45 WITNESS PRESSICK: It won't be in the supplementary bundle, Commissioner. It's in the original planning SEPP.

50 COMMISSIONER: Original planning SEPP. So will I start at exhibit D, perhaps? So I'm looking at the notice of motion exhibit from 26 August 2024; is that the place to start? That's when there was I think major changes or some changes. I've got a set of plans here. It looks like it's the revision G plans.

WITNESS PRESSICK: In the bottom left corner, Commissioner, does it say, "DA Issue 09"?

COMMISSIONER: DA Issue 09?

WITNESS PRESSICK: I think it would be in red writing in the very bottom left corner.

COMMISSIONER: No. This one it says, "filed 27 August". Do you see a date on it?

WITNESS PRESSICK: Ours don't have that stamp unfortunately but--

COMMISSIONER: So can you see a date reference anywhere on the sheet?

WITNESS PRESSICK: So in the issue over on the left-hand side it says, "preliminary, not for construction that has issue", and it has a little list of - it's (i) DA issue 09, 23/10/24". Is that what you just said?

COMMISSIONER: No. So it's more recent than that?

WITNESS PRESSICK: Yes.

LANCASTER: It might be in exhibit 7 I think, Commissioner.

COMMISSIONER: That would be in exhibit 7? So I've got 9A in exhibit 7.

WITNESS PRESSICK: That's not a full set, Commissioner. It won't have that plan.

LANCASTER: I'm sorry, I misdirected you.

COMMISSIONER: That's all right, we'll get there.

WITNESS PRESSICK: They're attached to the - no, it's actually after the ones attached to the joint report.

COMMISSIONER: So why wouldn't it be in exhibit 4? That's the actual joint report.

WITNESS PRESSICK: It's not though.

COMMISSIONER: That's issue 8. Look, maybe we can approach.

WITNESS SMART: Probably a good place to start is - this is the latest survey and I've just highlighted the wall that we're talking about here. The red line is the boundary and the wall is built over the boundary until about here where it goes orange there..(not transcribable)..and all of the wall is contained, and the work that..(not transcribable)..Council has added a new retaining wall in front of that.

5 WITNESS PRESSICK: So Commissioner, we were concerned because the wall straddles both properties we were very cognizant of the fact that the applicant won't be able to touch that wall or really underpin that wall or do anything to reconstruct that wall. So there - so we want a retaining wall where that proposed wall starts to really excavate from there, there needed to be a new wall built in - wholly on the subject site to maintain the integrity of the wall without any works to it.

10 WITNESS SMART: And that's the wall hatched. There's a stone wall here running along. That's 23 Billyard Avenue in the background, and all the wall is retained under here. This is where we excavate deeper and the geotech has confirmed that that's built on to rocks so we'll cut the rock face down and expose the rock face, and then we build a new retaining wall in this area which was added to the design after consultation with Council.

15 WITNESS PRESSICK: As we understand it, that cutting will be wholly on the subject site, and we have a condition of consent that speaks to no works are to occur until..(not transcribable)..et cetera.

20 COMMISSIONER: All right. So I think I understand that but I'll have to actually mark it as an exhibit. I'd just like to confirm - I know it came up in the objector evidence - but there isn't anything I can recall in the evidence that suggests there's a problem with the existing building of itself. That's not argued, is that right? Like it's not as if it's falling down or there's a structural problem? There's evidence from some of the objectors to say that that's not the case and I don't recall seeing anything contrary to that.

25 WITNESS PRESSICK: No.

30 COMMISSIONER: Just more on excavation, neighbours' old buildings and so on, could you please - maybe it's building by building - just give me an outline about how that's intended to be managed, mindful of conditions, et cetera. I don't know how much of its design or how much of it I need to ask the Council directly. Who do you think? Who is best to answer that?

35 WITNESS ERRINGTON: Yes, I mean--

COMMISSIONER: I'm mindful - just before you do.

40 WITNESS ERRINGTON: Yes.

COMMISSIONER: I'm mindful that one of the pieces of objector material did include a specialist geotech report. When I read that, I thought that was mostly about consent conditions more than there's a fundamental problem, but I needed that to be confirmed by the others.

45

WITNESS ERRINGTON: Yes.

50 WITNESS HARVEY: Sorry, Commissioner, my understanding that the geotech report prepared by the submissions, there was a further geotech

report by our consultant, Morrow Consultants, in response to that which is particularly about - because I'm not an excavation or a geotech expert - but around the number of bore holes that were tested on site and levels.

5 WITNESS PRESSICK: That's appendix S, Commissioner, attached to the original joint report.

COMMISSIONER: That was your geotech's response?

10 WITNESS HARVEY: Correct, yes.

COMMISSIONER: So did that change the number of bore holes?

15 WITNESS HARVEY: My understanding is that the extent of bore holes that have been tested at this stage, they have accepted, and to do further would be very difficult given the existing building on the site, but I think the opinion which we say at page 37 from Morrow is that - that the geotech opinion letter does not present any issues that should prevent the determining of this DA and there's a number of conditions set around that.

20 WITNESS ERRINGTON: Yes. So in terms of this type of excavation does occur through the city, from what we've recommended and in terms of protection for adjoining properties is a number of conditions, so within the draft conditions - condition 63, effective excavation on adjoining properties, which
25 talks to similar to condition 95, excavation and construction methodology requiring a detailed methodology to be submitted to the Council prior to CC. Condition 64, effective vibrations on adjoining properties ensuring that the vibrations do not - would not exceed a particular limit. The use of - condition
30 94 as well, use of a geotechnical engineer to ensure that as this excavation occurs, that a specialist is - well, a specialist, geotechnical engineer, is on site to monitor how that's being undertaken and ensure that it is undertaken in accordance with the geotechnical report that was submitted.

35 Condition 93, requiring a dilapidation report of all of the adjoining properties to ensure, I guess, you know, prior - prior to is viewed so that no damage occurs; and then, condition 66, sites in the vicinity of heritage items and buildings within the HCA is also recommended for protection of the adjoining buildings. And these are generally standard conditions for this type of excavation. Use of
40 a geotechnical engineer, condition 94, is an additional protection measure in this instance.

COMMISSIONER: So the survey plan highlighting the rock wall I'll mark that exhibit 23.

45 EXHIBIT #23 SURVEY PLAN HIGHLIGHTING THE ROCK WALL, ADMITTED WITHOUT OBJECTION

LANCASTER: Commissioner, I did find the reference for that. It's from
50 exhibit B, tab 26.

COMMISSIONER: Exhibit D?

LANCASTER: B.

5 COMMISSIONER: B, thanks. Just while we're talking about plans, I'm just not sure what the plans before the Court are in regard to the application. I know there was some amendments I think included in exhibit 7. Is there an intention to amend the application or is that you don't need to?

10 LANCASTER: Don't need to, in my submission.

COMMISSIONER: Is that because the only change was to do with the height plane interpretation?

15 BERGLUND: If it's of assistance, Commissioner, when we get to the consent orders, the plans which are the subject to the application are set out in the consent orders.

COMMISSIONER: Right.

20 BERGLUND: And the conditions I believe.

LANCASTER: Commissioner, would it assist if we produce for you a consolidated clean copy of the plans that will be referred to in the conditions?

25 COMMISSIONER: Yes, I think that would be good. I may have to - I'll just have a look over everything before I finish with the experts, but the next topic I had here is noise impact, and I know there was another specialist report prepared in the objector submissions there, so I'm looking for your feedback on that. Maybe Council can start.

30 WITNESS ERRINGTON: Yes. So this specialist report that was commissioned talked to the fact that the applicant's noise report didn't go into detail about talking level for a certain - particular number of people on the rooftop. It has, though - the applicant's noise report did specify a number of conditions that they believed would ensure noise criteria not - not exceeded on adjoining properties, and that was really talking to hours of use of those communal rooftop areas. So these conditions, I guess, that were recommended within the noise report, have come through to conditions that have been recommended, that use of these facilities is - doesn't occur between 10pm and 7am Monday to Saturday, and then 10pm to 8am Sundays and public holidays, and then also reducing or limiting the number of persons able to access those spaces.

45 So for the top of the building, which is the larger space, a limit of 20 people at any one time, and then for the Onslow, which is the smaller space, a limit of 15 people at any one time. And I guess from Council's perspective, it is a residential use as opposed to, say, a rooftop bar, so we are looking at it from, you know, generally a residential perspective. Conditions that are relevant, I guess, that we've included are condition 7 regarding the use of that space,

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HARVEY/MAZE-RILEY/SMART/
PRESSICK/ERRINGTON

condition 62 talking to compliance with the acoustic report that was provided, and then there's condition 156 talking to having no speakers or music outside on those communal areas.

5 COMMISSIONER: Anything else to add on that?

WITNESS HARVEY: No, Commissioner.

10 LANCASTER: Commissioner, I'm not sure if - I didn't hear if Ms Errington referred to the exhibit 4, the part of that where the experts addressed previous objections about noise impact. That's found in exhibit 4 at page 28 through to 30.

15 COMMISSIONER: Thank you. There's something here I missed. In regard to streetscape and the design report, there was a photograph or a photo montage as part of one of the objector evidence inclusions. I didn't know the source of it. If I could find that.

20 WITNESS HARVEY: This be a perspective looking--

COMMISSIONER: Which had a perspective from the north looking towards the site and street.

25 WITNESS HARVEY: Looking up Onslow?

COMMISSIONER: Yes, Onslow. I'm just not sure where the design report is in the bundles I have. For example, do you know what the date of that version is?

30 WITNESS SMART: It's on page 46 of the design report.

COMMISSIONER: Is there a date on it?

35 WITNESS SMART: It's dated 19 July 24.

LANCASTER: Exhibit A, tab 26.

40 COMMISSIONER: Okay, that will do me for now. I think that's all the questions I have. Did you have any matters arising?

45 BERGLUND: I only have one matter that I wanted to raise. That was yesterday raised by one or more residents was a question about the correct interpretation of the controls regarding overshadowing of neighbouring apartments and how to interpret what was meant by the 20% reduction I think was the issue. There is a draft interpretation guide. Perhaps if I could hand up a copy of it. I think I'd like Ms Pressick to just address what the City's interpretation of that control is.

50 COMMISSIONER: Is this for Ms Pressick?

BERGLUND: No. I would like to tender that.

COMMISSIONER: This is for me; all right.

5 BERGLUND: But I believe Ms Pressick has a copy of it and I would like her to talk to the issue which we heard yesterday in relation to - it was an interpretation question of the control, not the application question.

10 COMMISSIONER: So exhibit 24, draft minimising overshadowing of neighbouring apartments documentation guide.

EXHIBIT #24 DRAFT MINIMISING OVERSHADOWING OF NEIGHBOURING APARTMENTS DOCUMENTATION GUIDE, ADMITTED WITHOUT OBJECTION

15 BERGLUND: Yes, thank you.

COMMISSIONER: Thanks, Ms Pressick.

20 WITNESS PRESSICK: Yes. Commissioner, this is a guide on the City of Sydney's left site, and it explains how the ADG solar access objectives design criteria and design guidance are applied, and so it outlines the City's interpretation. So objective 3B-2 is - states, "The overshadowing of
25 neighbouring properties is minimised during mid-winter", and so as you know, applicants are required to comply with the objective; and then there are some design guidance underneath that, and this interpretation goes to that design guidance, and I think that the issue that came up yesterday is interpretation of the third design - point of design guidance - "Where an adjoining property does
30 not currently receive the required hours of solar access, the proposed building ensures solar access to neighbouring properties is not reduce by more than 20%".

So if you go to page 4 and 5 of the guide - what's just been handed up - and you open it as a double-page spread - I think the key - the key things are that
35 properties interpreted as being as an apartment, and the measurable criteria is in hours, so the 20% reduction is measured in hours. So by our interpretation, any apartment that receives more than two hours - and this is the top line - can be reduced to two hours' compliance, but not less than that, and any apartment that does not receive the two hours can't be reduced by any less
40 than 20% of the time it currently receives.

COMMISSIONER: So if it's already less than 20%?

45 WITNESS ERRINGTON: No. If it's already less than two hours.

COMMISSIONER: Two hours; sorry.

WITNESS ERRINGTON: You can reduce it by 20%.

50 COMMISSIONER: You can still reduce--

WITNESS ERRINGTON: You can have a minimal impact on that apartment.

COMMISSIONER: Say again?

5 WITNESS ERRINGTON: So if it already receives less than two hours, you can have a minimal impact on that apartment by 20% of time. So if you got one hour, you'd be allowed to overshadow it for--

10 COMMISSIONER: An extra 20% of one hour.

WITNESS ERRINGTON: Yes.

COMMISSIONER: 12 minutes.

15 WITNESS ERRINGTON: So with regard to 23 Billyard, they're the apartments that we looked at the windows at the front who receive many hours of sun currently and will maintain solar access between 9am and 2pm, so they still receive in excess of compliant solar access. And there was one
20 apartment - and this is outlined further in our joint report - but that was receiving 15 minutes, which I think went up to something like 45 minutes. So it wasn't reduced by 20%; it was actually increased, and that was because of the reduction in that bedroom that occurred between the section 34 and now. So in actual fact, no apartments are being reduced by 20% but we thought it was
25 important to explain the interpretation because I think Ms Richter's interpretation is that - and this is just my interpretation of her interpretation and why she thinks the whole building has been put into non-compliance - I understand her interpretation is that no apartment on the property can have a reduction beyond 20% if the building - the building as a whole does not receive
30 70% compliance.

COMMISSIONER: Is there a 70% factor in here? Okay, I see that from--

35 WITNESS ERRINGTON: Well, 70% of apartments need to have compliant sun. That goes to point 4A-1 in the ADG, so there's a link within the objectives in the document, but it is explained in this - in this document that we've just--

COMMISSIONER: You're saying they're isolated points and they shouldn't be read together, are you?

40 WITNESS ERRINGTON: Otherwise almost no development could happen, and also it doesn't help the affected apartments if another apartment maintains, you now, six hours sun a day. The interpretation of the City which is outlined in this document is that this - this control, it's a safeguard for
45 apartments that are currently less - you know, obtaining less than their two hours, but it does allow for some impacts, minor, on those apartments. And that's how - that's how we've assessed the application, and that aside, we're not actually - we're not actually relying on this control because when read by apartment it doesn't apply.

50 COMMISSIONER: Say again?

WITNESS ERRINGTON: There is no reduction to any of the apartments that are impacted by this development by 20% or any other amount. There's no reduction to living room windows and private open spaces, so there doesn't need to be a reliance on that design guidance because the objective is met.

5

COMMISSIONER: Okay.

BERGLUND: That was all I had on that point unless any of the applicant's experts hold a different view.

10

COMMISSIONER: Did you have another - no?

BERGLUND: No. I'll wait until the experts are finished and then I'll address you on the view.

15

LANCASTER: Commissioner, there's a couple of things arising. The first is there was reference to the public view analysis. So if you have our tender list.

COMMISSIONER: Yes. I must say, 11A does have a lot more room on the bench for documents. I've got it.

20

LANCASTER: I'll just explain what we think has occurred here. So in the list, tab 38 is struck through and that's referred to as "addendum visual impact assessment", but that was, as it turns out, incorrectly struck through because it was mis-described, and I think it was assumed that the more recent visual impact had replaced that, but that should be described as public view analysis, and I have a copy of that I can tender it separately or just add it to exhibit A.

25

COMMISSIONER: Perhaps we'll just tender it separately, if that's okay. Exhibit G, and this is the public view analysis by Fortis dated October 2023.

30

LANCASTER: I think we have a G which was photocopy of a - maybe I have an incorrect note of that.

35

BERGLUND: We only up to exhibit F; we're up to G.

COMMISSIONER: You're happy with G?

LANCASTER: Yes, thank you.

40

EXHIBIT #G PUBLIC VIEW ANALYSIS BY FORTIS DATED OCTOBER 2023, ADMITTED WITHOUT OBJECTION

Could I just ask Ms Maze-Riley if she wishes to address that exhibit G at all or whether it's just enough for it to be provided?

45

COMMISSIONER: I really wanted to - look, I might just take 15 minutes to look at it before we do the site inspection, if that's okay.

50

LANCASTER: Sure, yes. Another issue I would like to ask the experts to

address is the question of community consultation which came up with a number of the objectors asserting an absence of consultation. Perhaps Mr Harvey, can I ask you to--

5 WITNESS HARVEY: Yes, sure. Sorry, I don't have it - so a number of the
submissions talked about lack of consultation but proactively prior to us
lodging this application, there was Urbis's community consultation team
10 addressed and approached a number of the owners corporations at a number
of the surrounding sites, so I'll just take you through that just briefly. There
were five sessions that occurred with some of the surrounding buildings, so
that was 21B Billyard Avenue, Elizabeth Bay, and that happened on 4 July
2023. There were three people in attendance from that building; 13 Onslow
15 Avenue, Elizabeth Bay, which occurred on 5 July, and there were three people
in attendance at that session; 12 Onslow Avenue, Elizabeth Bay, that was on
Friday 7 July, and there was one person in person and one online; 8 Onslow,
there was a session held on 11 July 2023 at 6pm, there was one online
attendee and two apologies; 15-19 Onslow Avenue, we had a session with
them on 12 July 2023, and there were four people in attendance in person and
one online; 23 Billyard was contacted but declined to respond for a briefing.

20 Just for context, at those briefing sessions we had representatives from
planning, design, visual experts and the applicant's team. So we have - I think
we have tried proactively to engage prior to lodging the application, and we
just wanted to acknowledge that.

25 LANCASTER: Can I note, Commissioner, in exhibit A tab 22 there's a
document called "engagement snapshot" which summarises the form's
engagement and just the process that was undertaken.

30 COMMISSIONER: Anything else?

LANCASTER: Ms Maze-Riley raised with me before Court an issue in respect
of the previous view studies that were referred to in evidence yesterday, and I
understand she wishes to address you on that briefly.

35 COMMISSIONER: Okay.

WITNESS MAZE-RILEY: Thank you, Commissioner. I just thought it was - it
might be useful to point out that all the submitters who spoke, including
40 Mr Moody and Mr Daintry, rely on photo montages prepared by another
consultant. The photo montage is an isolated photo montage, and the view
impact directly corresponds with that, with one photo montage. That's how it's
presented in those reports; that's how it's listed below the photo montage that
the quantification of a change in one view - the photo montage view - equals
45 an impact. That's actually not how Tenacity planning principle works at all, and
there are--

COMMISSIONER: Have you got an example you can take me to?

50 WITNESS MAZE-RILEY: Yes. In the submitters' submissions they have

photographs provided by that practitioner. I think from Meudon, the ones from the apex window that you might recall.

COMMISSIONER: I don't recall where that would be.

5

LANCASTER: There's exhibit 19 is Ms Ross's large presentation I think.

COMMISSIONER: Did that include Meudon?

10

WITNESS MAZE-RILEY: He's also done some for Darnley Hall, but the Meudon ones are probably the most useful to discuss.

COMMISSIONER: I can recall the image that's taken from the immediate area of the apex.

15

WITNESS MAZE-RILEY: Yes. I have similar ones in the view sharing report as well.

COMMISSIONER: It's included in your documentation as well.

20

WITNESS MAZE-RILEY: My point is that the photo montage, below it is the view impact, and it's simply a quantification of change in that one view. That is not an impact assessment. The view impact has to consider all of the steps in Tenacity prior to the view that you're analysing - that's steps 1 and 2 - before you get to an impact rating in step 3.

25

COMMISSIONER: Look, I know this.

WITNESS MAZE-RILEY: Okay. So what I'm saying is that--

30

COMMISSIONER: I don't need to hear this.

WITNESS MAZE-RILEY: --the impact is overstated.

35

COMMISSIONER: Yes, okay. I know how to interpret Tenacity. That's okay, that's under control.

LANCASTER: I didn't have anything further, thank you, Commissioner.

40

COMMISSIONER: So how are we going with the site inspection?

BERGLUND: We have all four units you wish to inspect available.

45

COMMISSIONER: Right, okay. It's 11.30 now. Look, I really literally mean it will be in and out. Who needs to come and if I said we met on site at 12.30, is that practical? It's only one stop on the train.

LANCASTER: It could be even sooner, but yes.

50

COMMISSIONER: So who would you like to bring? This group if they wanted

to come? I may not ask any questions. I'm not certain of that.

LANCASTER: I think it will just be me and Ms Maze-Riley.

5 BERGLUND: Unless they have a different view between them, I think and Ms Pressick if you're happy to come, or Ms Errington. I'll bring Ms Errington.

LANCASTER: I might bring Mr Smart. I'll speak to him.

10 BERGLUND: One lawyer and one or two experts perhaps.

COMMISSIONER: Righto. And to the lay people that are here, look, thanks very much for letting us come on but I won't be hearing from you when we do the inspection, if that's okay, and what I'm intending to take is the visual
15 analysis that was included in exhibit 4. I'll also take the analysis included in exhibit 7, was it, the second report. The submission from the gentleman who lives in Elizabeth Bay Gardens, so he had A3 document that showed - it's the streetscape presentation. I'd like to take that. If it could be that the design report's also there on site would be good. I know you've just had that recently.
20 There's a lot of documents in this matter.

What happens, it takes some getting on top of but I do get to view all the documents but it takes time, and it's a later part of the exercise. It doesn't happen in two weeks. So just because I'm not finding the document in the
25 bundle, I know where it is and I'll be able to locate it if I need to get to it. So I think that's all I need to take. Is there anything else that I might be missing?

BERGLUND: I don't think so.

30 LANCASTER: We can probably get there by 12.15 I think.

BERGLUND: When you say meet on site, is there a particular - outside the subject site?

35 COMMISSIONER: Maybe outside of Elizabeth Bay Gardens, start there. I'm not sure where the outside is but I can recall - I think it's just in front of the garden, the communal open space.

40 WITNESS SMART: I think the entrance is off Greenknowe Avenue.

COMMISSIONER: We went in through the garage or something, didn't we? Look, maybe we'll meet in front of the site.

45 BERGLUND: On Greenknowe Avenue?

COMMISSIONER: Onslow, yes. Then we can work out how we move from there. So 12.15.

50 <THE WITNESS WITHDREW

ADJOURNED TO VIEW

VIEW NOT RECORDED

5 Housekeeping?

LANCASTER: I don't believe I have any housekeeping.

10 COMMISSIONER: Those photos, they'll come later.

LANCASTER: They will. It was perhaps too optimistic to think that they might be ready now but they're being prepared.

15 COMMISSIONER: So I'd like to get just the photos that were taken by telephone today as well as the more complete documents.

LANCASTER: Yes.

20 BERGLUND: Yes.

LANCASTER: And also I undertook to give you a complete set of the drawings as referred to in proposition condition 1A of the application - of the consent orders.

25 COMMISSIONER: You undertook to do that, did you say? That's coming later, is it?

LANCASTER: Yes, I did undertake to do that and so that will be provided as soon as possible, a complete set.

30 COMMISSIONER: Okay.

35 LANCASTER: Commissioner, this is an application for orders with the consent of the Council as set out in the most recent version of the consent orders, which is that filed on 4 November at 4.15pm. The first of the orders sought by consent refers to upholding the applicant's request under cl 4.6 of the LEP.

40 COMMISSIONER: I'll just grab that. That's exhibit 13 is it? Sorry, which exhibit is that?

LANCASTER: Exhibit 9.

COMMISSIONER: I have exhibit 9 as the list of addendums to exhibit 8 here.

45 LANCASTER: By my record, the list of submitters all were part of exhibit 8, and then you marked the consent orders filed on 4 November as exhibit 9.

COMMISSIONER: Yes, I do have it in my notes. So something is amiss here.

50 LANCASTER: I have a fresh complete copy if you need them.

COMMISSIONER: That might be useful. We can cross-check this later but I have exhibit 9 marked as the revised consent orders. Yes, sorry, thanks Mr Lancaster.

5 LANCASTER: Not at all. So the first of the orders sought by consent is that the applicant's request under cl 4.6 be upheld. Just for cross-referencing purposes, that was the document you admitted as exhibit F.

10 COMMISSIONER: I won't interrupt you much but it would be great to get a PDF version of that, if possible, of cl 4.6.

LANCASTER: Yes, can certainly be done, and I'll go to that in a moment. Proposed orders 2 and 3 in the consent orders, to uphold the appeal and for the development application to be approved subject to the conditions in
15 annexure A. Annexure A in proposed condition 1(a) has the usual recitation of the plans that comprise what was proposed to be approved, the latest iteration of the application in other words, and as I said, the applicant will cause to be provided to you a full set of those as soon as we can. They're all in evidence but I accept they're in two or three different locations at the moment.

20 I've prepared some written submissions which were filed on 4 November, and I trust that you have those. I don't propose to go through every paragraph by any means but just to address on some of the key matters. Can I do that first by reference to the evidence before you from the experts. So to go first to the
25 joint report of the experts, the original one which became exhibit 4.

COMMISSIONER: Yes.

LANCASTER: And as, of course, you have been told numerous times, all the
30 matters are agreed between the five experts. Exhibit 4 is, in my submission, a thorough and careful consideration, first of each of the contentions originally raised by the Council in response to the application, and secondly, to issues raised by the objectors, and I'll come to that specifically in a minute. You no doubt have had the opportunity to read the report, Commissioner, but the
35 contentions that remained pressed until a month or so ago - the timing's not that relevant - but the experts addressed each of these topics, and as I said, all five of them have signed up to an agreed position in respect of each of these. So owner's consent was the first one. The owner's consent issue largely arose with what has now become the famous wall, and that was explained to you this
40 morning in evidence, again in respect of that wall crossing the boundary with 23 Billyard but not being affected by the proposed works to carry out the development. All the works comprising the development will be contained within 21(c).

45 Contention 4 addressed design excellence. The experts agree that the application plans, as amended, have design excellence and been fully assessed according to cl 2.1(c) of the LEP. Now, in that respect, as I think you saw this morning, there is as one of the appendices in the joint report, appendix E, further detail of the assessment of the proposal against cl 6.21(c).
50 Can I go to that briefly.

COMMISSIONER: Yes.

LANCASTER: So you'll see after the title page - it's set out in tabular form where on the left are the particular clauses in 6.21(c) and then an assessment by the experts. Again, this is all a common agreed position in respect of each of them. But it is perhaps worth just noting some of the issues on the way through because obviously enough, many of these issues as topics were raised by some of the objectors that you heard from extensively yesterday, and this in part stands in addition to the experts' oral evidence. This stands responsibly to those concerns that are raised as well as complying with the task of assessing design excellence according to the criteria in 6.21(c).

One of the particular matters you were taken to this morning was in relation to the consideration in (d)(ii), the existing and proposed uses and use mix, and that contains a reference to in particular the dates of the public notification of the recent City of Sydney draft plan in respect of retention of dwellings, and that just confirms those dates that the development application was lodged on 14 August 2023, and it's an agreed position both between the parties as a legal submission and the experts as an expert evidence position, that that ought not be given weight in your consideration.

COMMISSIONER: I'll need a bit more detail on that. I haven't looked at the LEP at all yet, so from one of you I'd just like to be taken to it, et cetera, but otherwise I don't want to interrupt your train.

LANCASTER: On the next page you were also I think taken to this morning in part, the heritage issue that the Council identifies as a neutral item which has the consequences that are set out and agreed. Other than that, I don't propose to go to any particular matter in the design excellence submission but emphasise, firstly, that it's there, and secondly, that its assessment outcomes are agreed between the experts and the parties.

Then going back to the text of exhibit 4, contention 4 was the design excellent contention; contention 5 addressed building mass and bulk; contention 6 addresses view sharing, view loss, and I'll come back to views in a moment; contention 8 was one about residential amenity; contention 9 deep soil; contention 10 tree canopy; contention 13 some issues with the previous plans; and then condition 14 - this is one part of the joint report I did wish to emphasises - so as you've no doubt seen, what the experts undertook to do was to go through the public submissions that were received to identify particular issues raised in the submissions and then deal with them one by one.

In my submission, it shows a procedure adopted not only by the parties but by the experts themselves to consider, with respect, and then deal with in detail the issues that were raised in response to the public exhibition of the application. Again, in agreed terms, the experts addressed these issues - issue A to issue FF - over some 31 pages of the joint report, as you've seen from p 14 through to 45, and many of those were referred to - or a number of those were referred to specifically in the course of the experts'

5 responses to your questions about issues raised by the objectors, but of course this is something of a useful ready reckoner, in my submission, if you're giving further consideration to the text of any objector's concerns, these 26 plus 6, 32 different issues identified and responded to in agreed terms by the experts.

10 So as I submitted, it shows a thorough and careful consideration of each contention raised both by the Council and by the objectors, each of which resolved in agreed terms by the experts and found in each instance that the application satisfactorily addressed the concern that was raised.

15 Appendix D to this joint report was, of course, the view sharing report which has come in for very close attention, and so I don't propose to go through that. You're very familiar with that, with respect, including as recently as a couple of hours ago.

20 One of the issues raised by one or two of the objectors identified what did turn out to be an inaccuracy in some of the survey points that were applied to determine the height plane, and that was addressed, in my submission, in detail and completely satisfactorily in the supplementary joint report of the experts, which was marked as exhibit 7. Can I go to that briefly.

COMMISSIONER: Yes.

25 LANCASTER: I perhaps should have done this when the experts were in the witness box but paras 1 and 2 each have a typographical error in them. Paragraph 1 refers to an earlier date. The date of the supplementary joint report is 4 November not 27 September. Just the signing page shows that.

30 COMMISSIONER: So that's the first paragraph?

35 LANCASTER: First paragraph, first line. Then in the second paragraph there's a cross-reference that seems to be a typographical error, the last sentence, "Further explanation is provided" - it says, "para 1 below", but it must be I think "para 10 below". I think Ms Berglund agrees with those two amendments.

BERGLUND: Yes.

40 COMMISSIONER: I've made those changes in handwriting to exhibit 7.

45 LANCASTER: Thank you. Then if I can just briefly go back to the text of this. I know you also considered this, Commissioner, but para 7 - so the previous inaccuracy on the western side was a very minor one, between 2 centimetres and 4 centimetres, and that doesn't have any impact on the height plane. Then para 8 on the eastern side, two survey points were previously inaccurately identified as 15.08 RL and 13.53 RL, were previously used to extrapolate the three-dimensional height plane, and you had a full explanation from Mr Smart with which the others agreed as to the effect on that
50 extrapolation when it was taken up 22 metres from ground.

5 So we have a height plane that, in my submission, should be accepted
as - whether it's described as an adjusted Bettar height plane or is just a Bettar
height plane, the intent and the effect of what the height plane extrapolation
has done is to identify survey points on each side of the site which are either
parallel or close to parallel to the demarcation line, and that's ended up - and
then to extrapolate that line across the site up 22 metres, and as Mr Smart
explained today, that involved a slope not only down the hill but across the hill
a little as well. So that's why there's a differential effect on the balcony railing
and the top part of the structure just in front of the lift overrun because at that
10 point it is sloping both down the hill and across the hill, and of course, I take it
that Mr Smart's explanation was agreed as between the experts, and in my
submission - and Mr Smart also explained that the numerical difference at the
boundary is not the numerical difference at the point the height plane hits the
structure because of that slope in the height plane.

15 The experts have then had a careful look at that revised height plane effect
and have all come to the conclusion, again, that it is a satisfactory outcome in
the sense that there is a non-compliance with the 22 metre level at various
points so that the cl 4.6 request should be accepted for the reasons it gives,
20 that notwithstanding the compliance all the objectives of the relevant control
have been achieved in respect of the site.

25 This para 10 sets out a series of significant mutual views from the experts in
relation to that. I won't read them all out, of course, but I invite, Commissioner,
you to give that close attention. No doubt you already have. It contains a full
explanation of the experts' view of the acceptability of the outcome. In
particular, can I draw attention to 10(j). In summary, the applicant has
examined and provided detail of potential height calculations for the height
planes between Merman and Bettar do obviously differ, the experts agree that
30 the exceedance from either methodology does not give rise to unreasonable
overshadowing and view loss as a result of the breach.

35 In para 11 the experts confirm that in their opinion the proposal, as described
in the amended drawings, is consistent with the relevant objectives of the
height of building standard in cl 4.3. Their previous evidence in relation to
consistency with the height objectives can be relied upon and expressly picks
up part of the former September 2024 joint report.

40 Paragraphs 14 and 15 and 16 refer to the coloured overlays that were applied
to some of the view diagrams, and para 15 it's an agreed position there's a
negligible effect in the easterly views from number 13 Onslow, and in relation
to 16, no additional effects to those already determined and agreed by the
experts as reasonable and acceptable in respect of those Darnley Hall views
that are there referred to.

45 As I mentioned, the cl 4.6 variation request is exhibit F. May I take you to that.
Again, I don't propose to do this at length given that this has been very much a
focus of the evidence over the last day and a half. So the site context is set
out in s 2, and you have the aerial view of the site on that page number 2; the
50 proposed development, described briefly on p 3; the relevant standard with the

22 metres and 15 metre height restrictions for what I'll call the back and the front buildings, are set out on p 4; and p 5 identifies some of the authorities, including Bettar itself, as an explanation for a description of some of the facts of those cases.

5

In the middle of p 6, those preparing the cl 4.6 said, "The facts and...the subject site", and then there's what's become the famous diagram identifying where those survey points are, and are a little difficult to see at this scale but the amended one's are in blue on that, as you can see.

10

Then p 7 sets out the result of the extrapolation according to the Bettar method, and it has helpfully included the height exceedances, including amended exceedances from the height plane at various points across the top of the built form. The greatest exceedance remains the lift overrun, and you can see that in the middle of the site, and the area immediately adjacent to the lift overrun.

15

Then in respect of the front building, the Billyard building, the same analysis has been undertaken on p 8 although that, of course, has not had any recent amendment made to it. That is as in the original.

20

On p 9 it's set out that the height plan was also modelled using the Merman method, that is that there were measurements adopted on the basis that ground level existing refers to points that can include artificially excavated areas, and the analysis also included that for both of the buildings on 9 and 10.

25

Then the document moves to the assessment framework p 11 and 12, setting out of course very well-known propositions about what 4.6 actually says and the approach to 4.6 that the cases, including Initial Action require, and the 4.6 adopts the approach of saying - the way in which this is put forward as an acceptable 4.6 request is that the first method that's been described by the Chief Judge as "the most usual", which is to demonstrate that the objectives of the standard are achieved, notwithstanding non-compliance with the terms of the standard, and there's an assessment table in table 1 which goes from p 13 to 15 which sets out each objective of the cl 4.3 "height control", and then there's a commentary demonstrating achievement of the objective by the proposal. Again, I don't propose to read through that on the basis that we have been considering this document and this issue in some detail in very recent times.

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Then the important other part of the cl 4.6 request of course is not just to show that the objectives are achieved but to address the second part of the exercise which is to demonstrate sufficient environmental planning grounds to justify the contravention, and that is addressed in s 6.3 in great detail, and in my submission would satisfy you that there are very clear environmental planning grounds supporting the contravention. The summary is at 6.3.5 - well, it's more of a conclusion than a summary, and in my submission, you ought find that cl 4.6 adequately addresses all of the statutory requirements and it is a well-founded request for concluding that the development standard's unreasonable and unnecessary in the circumstances. Commissioner, I am told

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this final cl 4.6 has been emailed to you this afternoon so it's an email of 2.42pm. Hopefully that has come through, thank you.

5 Can I go back to my written submissions. As I said, I won't eat into
everybody's time by going through all of these documents but can I perhaps go
to one matter that you did refer to, Commissioner, which was the affordable
housing regime, that there are two aspects to it. One is arising under the
Housing SEPP - this is in para 56 of my written submissions - and the written
10 submissions only address one of the two aspects of affordable housing. This
is affordable housing, strictly so-called, under the Housing SEPP, and for their
part, the experts have agreed about this as well although I note your comment
that it's really a legal issue.

15 The three bullet points are put forward in support of our eventual submission
that the buildings on this site, the subject of the development application, are
exempt from pt 3 of ch 2 of the Housing SEPP, and as you heard from
Council's expert who put it in general terms, it's a strata scheme and so that's
the explanation. In terms of the specifics of it, I can perhaps add a little to the
third bullet point which refers to the transitional provisions. Can I just identify
20 what that transitional provision is to give that specific reference. So cl 4 of
sch 8 of the Strata Schemes Development Act says that a scheme under the
1973 Act is "taken to be a strata scheme under this Act".

25 COMMISSIONER: I don't think there's any dispute about that. It doesn't
qualify for pt 3 of ch 2 of the Housing SEPP.

LANCASTER: I just wanted to give you that specific reference just to track it
through. The other aspect of what was called "affordable housing" as a
general topic but it's probably more accurately referred to as Council's new
30 policy about retention of dwellings generally. Again, I think I've address that in
the course of taking you to the design excellence assessment report but it's
certainly the agreed position of the parties and the experts that that document
came into being only after submission of the development application, and as
Council's expert also helpfully pointed out, it does contain a savings provision
35 in any event, so that in terms does not apply.

COMMISSIONER: Is it in the bundle, Council's bundle?

40 LANCASTER: I don't think it's currently in evidence.

COMMISSIONER: Because I do need it in.

BERGLUND: I don't believe it's in evidence but I can address you on why.

45 LANCASTER: We can certainly provide a copy but it will be for the purpose of
saying here's the red herring but it will be useful for you to see the document.

COMMISSIONER: I definitely want to have a look at it. I'm interested in the
legalities of it so I'm mindful of 4.15, whatever. It's a draft LEP that's been
50 placed on exhibition. It sounds like it's therefore a matter for consideration. I

know you're saying that. So you can address me on it.

BERGLUND: I'll address you on that.

5 LANCASTER: The savings provision certainly pulls it out of that realm.

COMMISSIONER: Yes. Then I know Pepper J's written on this in some of her work but I just need to be clear on the legalities of that - even if it comes later.

10 LANCASTER: I won't steal Ms Berglund's thunder.

COMMISSIONER: You'll have another go anyway, of course.

LANCASTER: Yes, your Honour.

15

COMMISSIONER: Do you have a copy that perhaps we can--

BERGLUND: I don't with me but I can get one provided.

20 COMMISSIONER: Do you have one you can send to Commissioner Support, for example?

BERGLUND: I can certainly get one sent to Commissioner Support.

25 LANCASTER: Commissioner, they were the only specific additions to my written submissions that I wanted to raise, at least for the moment. With respect to the procedure that you adopted in relation to addressing the objectors' issues was a very effective one in the sense that it gave you material in response to the issues raised by the objectors immediately for your
30 consideration in dealing with this application, and given again the proximity of now to when that occurred, it would seem like unnecessary repetition for me to go over all of those issues, so unless there's any further issue you'd like me to address, those are my submissions in-chief in support of the application.

35 COMMISSIONER: I'm interested in the draft LEP. I think that's the only - what I normally do in the submissions, I write notes to myself to remind me to ask you questions, the only one I wrote down was the draft LEP, so we'll come to that. Ms Berglund.

40 BERGLUND: Are you happy for me to address you before you have a copy of the--

COMMISSIONER: I'd like to just be able to look at it while you do so. Is it online?

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BERGLUND: I think Ms Whitney is trying to find it for me. Unfortunately - I was going to say mislaid my solicitor but I know where he is; he's just not here.

50 COMMISSIONER: Ms Whitney, you've sent it down to Commissioner Support?

WHITNEY: One moment, yes.

5 BERGLUND: There is another matter I can usefully address you on while Ms Whitney's doing that if that's convenient. Exhibit 9 which was the consent orders which also annexes a copy of the conditions of consent that have been agreed by the parties - this is what Mr Lancaster and I have marked exhibit 9 - I think you do now.

10 COMMISSIONER: Yes, I'm with you.

BERGLUND: I note that Mr Lancaster has already undertaken or his team has already undertaken to provide you with a consolidated set of the plans that are set out in condition 1 to annexure A of the consent orders. I just want to draw your attention to one correction in the conditions.

15 COMMISSIONER: Yes.

20 BERGLUND: So in condition 1, which is the list of approved plans, that is a correct list of the approved plans. Have you got the table in condition 1 before you?

COMMISSIONER: Yes.

25 BERGLUND: The entry, the seventh from last on p 2, so that's the seventh from last in the table.

COMMISSIONER: One zero LA 4?

30 BERGLUND: DA 460 revision G.

COMMISSIONER: Sorry?

35 BERGLUND: So the p 2 I'm referring to is down the bottom right-hand corner. It's actually the first page of annexure A.

COMMISSIONER: DA 460 revision G?

40 BERGLUND: Yes, that's right. So the reference in the table is correct. That's correct there, and when you get the set of consolidated plans from the applicant, that is the revision that will be referred to, but somebody - I think it was my planner but in any event it doesn't really matter - if you then go to p 5 of this document, in the very first line you'll see the sentence, "The proposed retaining wall depicted in DA 460 revision F", that should read "revision G". What I don't know and what I will clarify is firstly whether a version of these conditions in Word and PDF has been sent to the Court yet; if it hasn't, then I'll

45 make sure that it is, but also if the version that's been sent to the Court previously didn't have that correction of revision G, I'll make sure that a version that does have the correct revision reference is forwarded to the Court.

50 COMMISSIONER: Okay. So I'll end up making some orders just for those

revised conditions to be filed or the revised consent orders to be filed.

5 BERGLUND: Yes, they should be in any event but I'll just make sure that
that's corrected, and perhaps on that note I can just say the Council's
position - I will address you on the planning proposal when you have a copy of
it before you, but other than that the Council's position, obviously this was a
deemed refusal but at the stage of formulating the statement of facts and
contentions, and then again at the stage of formulating amended statements of
10 facts and contentions after the first significant round of amendments, it's only
through a two-stage process that the Council has come to the view that it could
enter into consent orders in this matter. The first is those two rounds of
significant amendments, and the dates for those were helpfully set out in
Mr Lancaster's submissions, so I don't need to revisit that.

15 So the first set of significant amendments were made by a notice of motion
filed on 26 August and granted on 3 September 2024, and then the second
round was about two weeks ago. I think it was 22 October 2024. So the first
stage in the Council's satisfaction that its contentions have been resolved in
this matter has been those amendments, but the second stage in the Council
20 reaching a state of satisfaction of entering into consent orders is these
extensive conditions that have been agreed with the applicant. I would just like
to emphasise, obviously the Council is no longer the consent authority,
Commissioner; the Court is the consent authority, but if the Court is minded to
grant consent to this application, the Court should please be aware that the
25 Council's indication that the matter is by consent is subject to the agreed
conditions of consent being opposed on the development consent because
they are part of what forms the Council's state of satisfaction that the
development is now satisfactory, without the conditions. There might
otherwise still be some, not matters of design concern or anything like that, but
30 matters of operational concern.

I don't understand that to be in dispute but the applicant has agreed to the
conditions of consent but I just need to clarify that that is part of the process
which led to the Council's position.

35 LANCASTER: And you certainly have not heard me contend that any
condition should not be imposed.

COMMISSIONER: Look, I'd like to look at the instrument.

40 BERGLUND: Yes, that's fine.

LANCASTER: It should have arrived by now, we hope.

45 COMMISSIONER: I'll send an urgent request. One way to do this is I open up
the web page. Is there a name for the revision or the project, at least?

LANCASTER: It's called "planning proposal - dwelling retention".

50 BERGLUND: Yes, I'm sure that's correct.

COMMISSIONER: So I can see on the web page there's a document, "planning proposal - dwelling retention". It's a PDF of 3.05 megs. I'm just looking at that, if it's the instrument. It looks like it's more the planning proposal documentation.

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BERGLUND: It is a planning proposal.

COMMISSIONER: So there is an instrument, though, isn't there? There's no instrument?

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BERGLUND: No, it's still a planning proposal.

COMMISSIONER: I guess if it's been on exhibition, I thought a draft instrument might have been on exhibition. That hasn't occurred? So there's no draft LEP?

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BERGLUND: There's been a gateway determination.

COMMISSIONER: Is it really the planning proposal pre preparation of an instrument that's all that's been exhibited?

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BERGLUND: Yes.

COMMISSIONER: So 4.15(1) isn't triggered?

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BERGLUND: It's not triggered for two reasons. I wanted to wait until you have the document before you because I'm perfectly happy to tender it so that it's in evidence.

COMMISSIONER: All you're tendering is the planning proposal not a draft instrument that was on exhibition?

30

BERGLUND: No, just the planning proposal.

COMMISSIONER: Okay. I've got the planning proposal document here.

35

BERGLUND: Under s 4.15(1)(a)(ii), the Court is correct, a draft instrument, so any proposed instrument that is or has been the subject of public consultation under this Act and has been notified to the consent authority is a matter to be taken into account; however, whether the date at which the relevant instruments, whether they're in force or draft, under s 4.15 applies, whether it's the date of lodgement or the date of determination depends on whether or not there's savings provisions. There is some case law around in which the appropriate date has been the date of determination rather than the date of lodgement, but in all those circumstances that's when you, for example, have a SEPP that hasn't had savings provisions.

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Generally speaking, you do have savings provisions in LEPs but we don't need to go to the general situation because my planner, Ms Errington, has already given evidence that she's seen the planning proposal and it proposes to

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5 contain a savings provision. So that planning proposal first went to the Council in December 2023. The development application was lodged in August 2023. So at the date of lodgement, which given the savings provisions, the Council says is the appropriate date to consider any instrument or any draft instrument, it didn't exist. If this application was lodged today, then we might get into the territory of it being a draft instrument because it has been put on exhibition, so even though it's not in the form of an instrument, it's a planning proposal. It was voted on by the Council.

10 They then got a gateway determination and I think it was April this year. It was then put on exhibition. The exhibition closed in August. They are still going through all the submissions that were received in relation to that. If that was the case, if it was lodged now, we might be getting into the territory where we have to address you on whether it's certain or imminent, and in those particular
15 circumstances we would say having only just come off exhibition, it's not certain or imminent in any event but it would still be a draft instrument which the Court had to take into account, but in circumstances in which the development application was lodged in August 2023 this planning proposal didn't even exist until December or at some point after December 2023, it's not
20 even a draft instrument for the purpose of 4.15(a)(ii) which is a proper matter for consideration under s 4.15.

25 COMMISSIONER: Look, I'd have to look at the citations. What I understand generally is 4.15(1)(a)(ii), if that's the right reference--

BERGLUND: It is.

30 COMMISSIONER: --it relates to a draft environmental planning instrument, not a planning proposal. So a planning proposal isn't - like it's a precursor to an environmental planning instrument, so I don't think - if there's been no environmental planning instrument on exhibition, that's not triggered. That would be my first position on it at least. Now, it doesn't mean the issue goes away completely. Like I think the issue of housing supply could still be a public benefit consideration. I'm not saying on there but unless you tell me
35 something different. This is useful for me to understand the setting of the planning framework. That's one point.

40 BERGLUND: I was going to - sorry, I didn't mean to interrupt you - I was going to whether or not it's a mandatory consideration under s 4.15 which I understood to be a question not whether it would be an improper matter to consider in a broader planning context.

45 COMMISSIONER: Yes. So what I'm saying back to you on that topic is I don't think if there's no instrument that it is a consideration in that regard. It can be a consideration more broadly. Do you have anything to say on that, Mr Lancaster?

LANCASTER: No. I agree with that position existing.

50 COMMISSIONER: I've got this document. It looks like it's the edited version

so I can see a lot of cross-outs and so on - November 2024. So can this become a tender document?

BERGLUND: Yes, it can.

5

COMMISSIONER: You have the same one, don't you, Ms Berglund?

BERGLUND: Yes.

10

COMMISSIONER: Like my one starts--

BERGLUND: I have looked at it. I don't have it in front of me at the moment but I have looked at it online on the Council's website.

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COMMISSIONER: Its first page says, "Attachment B planning proposal - dwelling retention, post exhibition amendments in red", and otherwise it starts off with, "Date planning proposal, November 2024" on the next page. If I mark that exhibit 25. So this is the planning proposal.

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EXHIBIT #25 PLANNING PROPOSAL NOVEMBER 2024, ADMITTED WITHOUT OBJECTION

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BERGLUND: That's right. Ms Whitney's going to send me the same document. I don't anticipate there will be a difficulty but I'll let you know if there is. Otherwise, I think we're up to exhibit 25.

COMMISSIONER: Sorry, I didn't hear what you said before "25".

30

BERGLUND: I just said Ms Whitney is going to send me a copy so that I have the same document that's been sent to you.

COMMISSIONER: Yes, great.

35

BERGLUND: And I'm happy to tender that, and I think we're up to exhibit 25.

COMMISSIONER: I'll just print that out, but it's clear the document. I don't think there's anything else I wanted to ask you.

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BERGLUND: I didn't have anything else I needed to say.

COMMISSIONER: Anything more from you, Mr Lancaster?

LANCASTER: No, thank you, Commissioner.

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COMMISSIONER: So I think the orders I need to make are that - perhaps you can give me a date - I'm thinking maybe it's not problem for me to make it seven days time, but if it's more convenient for you I'll make it briefer, but I need to set a date for the filing of the amended consent orders.

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LANCASTER: We can do that very promptly, Commissioner.

BERGLUND: Yes, they're ready.

LANCASTER: We can do that tomorrow.

5 COMMISSIONER: If it's also just the agreed bundle of plans that are referenced as condition 1, that might occur when?

LANCASTER: We can provide that tomorrow.

10 COMMISSIONER: Tomorrow as well. And the other thing is the additional photographic material from Darnley Hall.

LANCASTER: Likewise will be ready tomorrow.

15 BERGLUND: Would you like the conditions in Word version as well as PDF?

COMMISSIONER: Yes. So you can file them in PDF.

20 BERGLUND: And forward them in Word, that's fine.

COMMISSIONER: I will adjourn just pending the receipt of those documents but expect that I will reserve my decision immediately on their receipt, but otherwise I am making orders now for the parties to file agreed revised consent orders and an agreed bundle of plans that accord with condition 1 in the
25 consent order, and further photographic material in regard to Darnley Hall that was discussed on site this afternoon, all that to occur by 4pm on 7 November.

Thanks all for your participation.

30 DECISION RESERVED