

33 OF 1980

10/81

IN THE PRIVY COUNCIL

No. of 1980

ON APPEAL
FROM THE SUPREME COURT
NEW SOUTH WALES
IN CAUSE No. S 4347 OF 1976

BETWEEN:

ROGER JOHN MASSIE DUNLOP

Appellant

— AND —

THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

Respondent

RECORD OF PROCEEDINGS

Appellant's Solicitors:

STEPHEN, JAQUES & STEPHEN,
50 BRIDGE STREET,
SYDNEY, N.S.W. 2000
BY THEIR AGENTS
REYNOLDS PORTER CHAMBERLAIN AND CO.
CHICHESTER HOUSE
278-282 HIGH HOLBORN
LONDON WC1V 7HA

Respondent's Solicitors:

MCDONNELL, MOFFITT, DOWLING, TAYLER
9 BLIGH STREET,
SYDNEY, N.S.W. 2000
BY THEIR AGENTS
YOUNG JONES HAIR & CO.
2 SUFFOLK LANE
LONDON EC4R OAU

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BETWEEN

ROGER JOHN MASSIE DUNLOP

Plaintiff (Appellant)

AND

THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

Defendant (Respondent)

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	(i) <u>Dunlop</u> Roger John Massie Examined Stood down		
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8.	Exhibits tendered by defendant		
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33.	Documents tendered by plaintiff Exhibit C: Document relating to bank interest headed "Period A"		undated
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34.	Documents tendered by defendant Part Exhibit 1: Plans Exhibit 2: Judgment of His Honour Mr. Justice Wootten	26 September	1975

THE DEFENDANT'S VERIFIED STATEMENT
IN ANSWER TO PLAINTIFF'S INTERROGATORIES

The defendant, The Council of the Municipality of Woollahra, answers the plaintiff's interrogatories specified in notice filed on 19th January 1978, as follows:—

1A On or about June 3, 1974 did the Defendant receive from the Plaintiff a letter a copy of which is attached hereto and marked with the letter "A"?

1B Yes

2A On or about May 15, 1974 did the Defendant receive from Messrs. Hall & Hall, Solicitors, a letter a copy of which is attached hereto and marked with the letter "B"?

2B Yes

3A On or about May 14, 1974 was a meeting held between the Plaintiff, Mr. Howarth, Councillor Bray, and Mr. Regnis, the Deputy Town Clerk, at the Woollahra Municipal Council?

3B Yes

4A On or about May 27, 1974 did a meeting of the Town Planning Committee for the Woollahra Municipal Council take place at which the Plaintiff, Mrs. T. A. Dunlop, Mr. Howarth and Mr. Charles Phillips attended?

4B Yes

5A Are there any records in existence of matters discussed at the meeting referred to in 4 above?

5B Yes. See Minutes of Town Planning Committee dated 27 May 1974 — Discovery Document No. 3.

6A Did the Plaintiff at the meeting referred to in 4 above state the following matters to members of the Town Planning Committee:—

- (a) That the contractual relationship between the Plaintiff and the owners of numbers 10 and 12 Wentworth Street Point Piper was still in existence.
- (b) That the Plaintiff and the owners of numbers 10 and 12 Wentworth Street, Point Piper intended to continue their contractual relationship even if Home Units Pty Limited did not proceed with its plans for developing numbers 8, 10 and 12 Wenworth Street, Point Piper.
- (c) That if Home Units Pty Limited did not proceed with the development of numbers 8, 10 and 12 Wentworth Street, Point Piper the Plaintiff and the owners of numbers 10 and 12 Wentworth Street, Point Piper would submit a Development Application for the three properties in line with the recommendations of the Local Government Appeals Tribunal.

6B The Defendant does not know.

7A When did the council officers receive the Instrument of Decision of the Local Government Appeals Tribunal handed down on May 10, 1974?

7B 6 May 1974.

8A What meetings of the full council of the Defendant and the Town Planning Committee of the Defendant took place between the date of the Instrument of Decision of the Local Government Appeals Tribunal being handed down and June 10, 1974 inclusive?

8B Town Planning Committee — 27 May 1974.

Town Planning Committe — 10 June 1974.

Council Meeting — 10 June 1974.

9A List all person who attended all of the meetings listed in 8 above.

(a) 27 May 1974 — Town Planning Committee

- (i) Alderman R. F. Taylor
- (ii) Alderman R.P.W. Byrne
- (iii) Alderman D.L. Parker

- (iv) Alderman T.J. White
- (v) Alderman G.J.J. O'Neill
- (vi) Alderman G.L. Sanderson

Other Alderman present were :

- (vii) His Worship the Mayor Alderman M.K.F. Bray
- (viii) Alderman B.S. Backhouse
- (ix) Alderman A.L.S. Teece
- (x) Alderman G.A. Warneke
- (xi) Alderman G.C.T. Burfitt-Williams

(b) 10 June 1974 — Town Planning Committee

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- (i) Alderman R.F. Taylor (V.C.)
- (ii) Alderman R.P.W. Byrne
- (iii) Alderman D.L. Parker
- (iv) Alderman G.J.J. O'Neill
- (v) Alderman T.J. White

Other Alderman present were :

- (vi) His Worship the Mayor Alderman M.K.F. Bray
- (vii) Alderman B.S. Backhouse
- (viii) Alderman A.L.S. Teece

(c) Council Meeting — 10 June 1974

20

- (i) His Worship the Mayor Alderman M.K.F. Bray
- (ii) Alderman G.J.J. O'Neill
- (iii) Alderman B.S. Backhouse
- (iv) Alderman J.W. O'Brien
- (v) Alderman D.L. Parker
- (vi) Alderman A.L.S. Teece
- (vii) Alderman T.S. White
- (viii) Alderman G.C.T. Burfitt-Williams
- (ix) Alderman J.B. Carpenter
- (x) Alderman J. O'Grady
- (xi) Alderman T.O.L. Reynolds
- (xii) Alderman G.A. Warneke

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10A For the following persons please state:—

- (a) Whether they were employed as officers of the Defendant.
- (b) In what capacity were they employed.
- (c) The date from which they were employed, and where applicable, when they left the employment of the Defendant.

Miss Margaret Harvey-Sutton, Miss Meredith Walker, Mr. Michael Regnis, and Mr. Douglas Ford.

10B Miss Margaret Harvey Sutton

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From 29 June 1970 to 1 August 1975 (Resigned)

— Principal Planning Officer

Miss Meredith Walker

From 27 April 1971 to 28 September 1973 (Resigned)

— Development Officer

Michael Regnis

From 11 November 1963

— Deputy Town Clerk
Douglas Ford
From 16 June 1959
— Town Clerk

11A At any meeting of the Town Planning Committee of the Defendant which took place on June 10 1974 did discussions take place in relation to the contents of the letter forming annexure "A" to this document?

11B The defendant does not know.

12A At any meeting of the Town Planning Committee of the Defendant which took place on June 10 1974 did discussions take place in relation to the contents of the letter forming annexure "B" to this document? 10

12B The defendant does not know.

13A If answers to the above two questions (that is 11 and 12) are in the affirmative do records of such discussions exist?

13B No records exist.

14A If answer to 13 above is in the affirmative, where may they be inspected?

14B Not applicable.

15A At any meeting of the Town Planning Committee of the Defendant which took place on June 10, 1974 did any councillors choose to have their dissent recorded in relation to any motions affecting the Plaintiff's property which were put to that meeting. If so, who were such councillors and to what motions did their dissent relate respectively? 20

15. No

16A What were the respective reasons given by the Councillors referred to in 15 above for their desire to have their dissent recorded?

16B Not applicable.

17A Was any consideration given by either —

- (a) the Town Planning Committee of the Defendant, or
- (b) the Full Council of the Defendant, or
- (c) by any relevant officer of the Defendant at any time as to whether in respect of any development upon numbers 8 to 12 Wentworth Street, Point Piper or any of such properties it was possible to comply with — 30
 - (i) the building code for the area
 - (ii) the Woollahra Planning Scheme Ordinance
 - (iii) the zoning for the area

and also to comply with the resolutions passed by the Defendant pursuant to Sections 308 and 309 (4) passed on June 10, 1974 and relating to the Plaintiff's property. If so, when and by whom was such consideration given and in the case of any such consideration what conclusions if any were reached?

17B The Defendant does not know.

18A Did either the Town Planning Committee of the Defendant or the Full Council of the Defendant make itself familiar with the Instrument of Decision of the Local Government Appeals Tribunal. If so, which of them did or which members of them did and at what time or times respectively? 40

18B Yes. Town Planning Committee meeting of 27 May 1974 a copy of the decision was circulated to each committee member prior to this meeting. In respect of the full council meeting the decision was referred to in the minutes of the Town Planning Committee of 27 May 1974.

19A If any of the lastmentioned bodies or persons became familiar with the Instrument of

Decision of the Local Government Appeals Tribunal by virtue of the report of an officer of the Defendant, was any further examination or consideration of that report ever made or carried out. If it was how was it made or carried out and when and by whom?

19B Not applicable.

20A Did any members of either the Town Planning Committee of the Defendant or the Full Council of the Defendant ever read the original Instrument of Decision of the Local Government Appeals Tribunal. If so, which of them did so and when did each do so?

20B The defendant does not know.

21A (a) In what way did the Town Planning Committee of the Defendant or the Full Council of the Defendant or the proper officers of the Defendant make assessments of the validity of such resolutions as were passed pursuant to Section 308 and 309 of the Local Government Act.

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21B (a) The validity of the resolutions was not doubted.

21A (b) Was any legal or other independent advice received by either the Town Planning Committee the Full Council or proper officers of the Defendant as to the validity of such resolutions before they were passed. If so, when, from whom and in what form and terms?

21B (b) Yes. Letter from Dowling Tayler dated 9 May 1974.

22A Was any consideration at any time given by either the Town Planning Committee of the Defendant or the Full Council to the possibility of a appeals by the Plaintiff from the resolutions passed by the Defendant pursuant to Sections 308 and 309(4) of the Local Government Act.

22B No.

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23A Did the Council receive a letter dated May, 9, 1974 from Messrs. McDonell Moffitt Dowling Tayler, Solicitors for the Defendant, a copy of which is annexed hereto and marked with the Letter "C"?

23B Yes.

24A If such letter was received, what consideration if any was given to the letter by the Town Planning Committee of the Defendant and the Full Council and when and by whom was such consideration given and what conclusions were reached in each case?

24B Objected to on the ground that the question is vexatious and oppressive on its face.

25A Was the resolution under Section 309(4) of the Local Government Act passed by the council on the basis of the advice contained in the said letter?

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25B Objected to on the ground that the question is vexatious and oppressive on its face.

26A Upon whose advise or upon what ground did the Council pass the resolution under Section 308 of the Local Government Act?

26B As to the "advice" the resolution was passed pursuant to the recommendation of the Town Planning Committee and the Town Planner. As to the "ground" the question is objected as vexatious and oppressive on its face.

27A What were the "strong planning grounds" upon which the Council resolutions under Section 309(4) of the Local Government Act was passed were based?

27B Objected to on the ground that the question is vexatious and oppressive on its face.

28A Did the Defendant forward letters to the Minister for Local Government seeking to have an interim development order made in respect of the properties 8 to 12 Wentworth Street, Point Piper. If so, please supply copies of those letters?

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28B Yes.

29A On July 3, 1973 did the then Mayor, Alderman Reynolds, write to Mr. J. Cohen of 29a Wentworth Street, Point Piper concerning numbers 8 to 12 Wentworth Street, Point Piper. If so, please supply a copy of the said letter. If the abovementioned letter was forwarded by the then Mayor, was the forwarding of such letter authorised by Council? If so, please supply details of

that authorisation.

29B Yes. There was no express authorisation.

30A Was a report made by the Town Clerk to the then Mayor to the effect that Mr. D. T. Simpson had been responsible for bringing about a change in the zoning of the land on the southern side of Wentworth Street?

30B No.

31A If such a report was prepared what was the factual basis in such report for such proposition? If such a report was written, where may a copy of same be inspected.

31B Not applicable

32A At whose instigation was the said report brought before the March 1973 meeting of Council which considered the Development application lodged on behalf of Home Units Pty Limited? 10

32B Not intelligible.

33A Did the plaintiff at a meeting between councillor Bray, Mr. Regnis, the Plaintiff, and Mr. Howarth on or about May 14, 1974 make known his financial difficulties in relation to the continuing non-development of the subject property?

33B The defendant does not know.

34A Did the Plaintiff at the meeting of the Town Planning Committee of the Defendant on or about May 27, 1974 make known his financial difficulties in relation to the continuing holding of the subject land in its undeveloped state? 20

34B The defendant does not know.

35A Was the effect of the passing of resolutions pursuant to Sections 308 and 309(4) of the Local Government Act on June 10, 1974 to delay the Plaintiff in putting his land to its highest and best economic use.

35B No.

36A At or about 1974 and 1975 what was the average length of time for the Defendant to grant —
(a) development approval, and
(b) building approval

for development of properties within its municipality?

36B This question is objected to as it is vexatious and oppressive on its face. 30

37A Was consideration ever given at any time by the Town Planning Committee of the Defendant or the Full council of the Defendant to the use of controls as set out in the Woollahra Planning Scheme Ordinance in relation to restrictions of building heights and boundary set backs for the subject property. If so, when and by whom and what conclusions, if any, were reached by either of the same?

37B This question is objected to as it is vexatious and oppressive[∞] on its face.

38A In the sketch plan forming an annexure to the report of Miss Margaret Harvey-Sutton dated May 27, 1974 were all building alignments of adjoining and subject properties show. If not, what reasons were there for the author of such sketch plan not showing the same?

38B No. It was not considered necessary. 40

39A Was it the intention of the Full Council of the Defendant in passing the resolution of June 10, 1974 under Section 309(4) of the Local Government Act to limit the number of storeys which could be built on the land 8 to 12 Wentworth Street, Point Piper, to three storeys?

39B The resolution speaks for itself.

40A Was it the intention of the Defendant in passing the resolutions of June 10, 1974 under Section 309(4) of the Local Government Act to prevent the Plaintiff or any other person taking advantage of the parameters laid down by the Local Government Appeals Tribunal for the

permissible development of the said property?

40B The resolution speaks for itself.

41A Was it the intention of any members of the Council of the Defendant in passing the resolution under Section 309(4) of the Local Government Act to prevent the Plaintiff or any other person taking advantage of the parameters laid down by the Local Government Appeals Tribunal for the permissible development of the said property. If so, which of such members?

41B The defendant does not know.

42A Was it the intention of the Full Council of the Defendant in passing the resolution of June 10, 1974 under Section 308 of the Local Government Act to fix a building line for the properties numbered 8 to 12 Wentworth Street, Point Piper ranging from sixty feet from the eastern boundary of number 8 to thirty-five feet on the western boundary of number 12.

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42B The resolution speaks for itself.

43A Was it the intention of the Defendant in passing the resolution dated June 10, 1974 pursuant to Section 308 of the Local Government Act to prevent the Plaintiff or any other person taking advantage of the parameters laid down by the Local Government Appeals Tribunal for the permissible development of the said property?

43B The resolution speaks for itself.

44A Was it the intention of any members of the Council of the Defendant in passing the resolution under Section 308 of the Local Government Act to prevent the Plaintiff or any other person taking advantage of the parameters laid down by the Local Government Appeals Tribunal for the permissible development of the said property. If so, which of such members?

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44B The defendant does not know.

45A Did any of the members of the Council of the Defendant who passed the resolution under Sections 308 or 309(4) on June 10, 1974—

- (a) know
- (b) believe
- (c) suspect

that the effect of the same or either of them would probably be to—

- (i) delay
- (ii) prevent

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multi-storey development of the subject land?

45B The defendant does not know.

46A In the report of Margaret Harvey-Sutton dated May 27, 1964 upon what planning grounds did Miss Harvey-Sutton recommend the following:—

- (a) 2A residential development in a 2C zoning.
- (b) 2B residential development in a 2C zoning
- (c) Low scale development in the face of evidence to the contrary given by various Town Planners and by the Town Planner attached to the State Planning Authority before the Local Government Appeals Tribunal.

46B The report speaks for itself.

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47A Were files of the Council relating to the development of properties numbered 8 to 12 Wentworth Street, Point Piper, missing prior to June 10, 1974. If so, which files. When was each first known to be missing. Have any of such files subsequently been discovered or recovered?

47B No

48A For the purposes of the resolutions passed on June 10, 1974 pursuant to Sections 308 and 309(4) of the Local Government Act and relating to the development of properties numbered 8 to 12 Wentworth Street, Point Piper, was any attempt made to provide substitute materials for

consideration of the Town Planning Committee or the Full Council of the Defendant, if the files referred to in 47 above were missing. If so, what other materials were made available?

48B Not applicable.

49A A letter of March 27, 1975 from Messrs. McDonell Moffitt Dowling & Tayler, Solicitors to Messrs. Aitken & Pluck, Solicitors, a copy of which is attached hereto and marked with the letter "D" contained the following statement:—

"We are further instructed that the rezoning was at the request of your client".

Who instructed such solicitors on this matter?

49B The quoted instructions were erroneous. No such instructions were given.

50A Did any member or members referred to in 9 above, assist in the preparation of the resolutions passed pursuant to Section 308 and 309 of the Local Government Act relating to the properties 8 to 12 Wentworth Street, Point Piper and passed on June 10, 1974.

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50B No.

51A Upon what planning grounds did the Council pass the resolution which sought —

(a) the suspension of the Woollahra Planning Scheme Ordinance under Section 342(y), and

(b) an interim development order over the properties 8 to 12 Wentworth Street, Point Piper.

Were there any other grounds other than planning grounds upon which the Council passed the aforesaid resolutions.

51B This question is objected to on the ground that it is vexatious and oppressive on its face.

52A In 1971 did Miss Walker report to the Town Planning Committee that the draft planning Ordinance in relation to 8 to 12 Wentworth Street, Point Piper was inappropriate?

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52B No.

53A If the answer to 52 above is in the affirmative, what was the result of her representation?

53B Not applicable.

54A Were the properties displayed as 2C zoning under the requirements of the Local Government Act in relation to draft Planning Ordinances and were they advertised? If so, in what newspapers did the advertisements appear and upon what date?

54B In the scheme as exhibited the subject properties were not so displayed.

55A Did Miss Walker report in or about September 1973 on future planning for 8 to 12 Wentworth Street, Point Piper. If so, did such report recommend tower buildings to five storeys for that property?

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55B Discovery document No. 42 which speaks for itself.

56A Was the report of Miss Walker prepared in or about September 1973 included in the deliberations of —

(a) the Town Clerk, and

(b) the Town Planning Committee of the Defendant, and

(c) the Council of the Defendant, and

(d) the reports of the Planning Officers and Deputy Town Clerk

in May/June 1974? If not, in any such case why was such report not included?

56B This question is objected to on the ground that it is vexatious and oppressive on its face.

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57A Was the Planning Officer of the Defendant Council directed by members of the Council of the Defendant to recommend height restrictions in relation to properties 8 to 12 Wentworth Street, Point Piper, in or about 1974. If so, when and by whom. In what form and in what terms was the directions?

57B No.

DATED

.....

Defendant's Solicitor

AFFIDAVIT

On 13 March 1978, I DOUGLAS CHARLES FORD of new South Head Road, Double Bay in the State of New South Wales, Town Clerk, say on oath:—

1. I am the Town Clerk of the defendant and am authorised to make this affidavit on its behalf.
2. The answers herein are true to the best of my knowledge, information and belief based on my inquiries of officers of the first defendant.

SWORN at Sydney
before me:—

.....
.....
A Justice of the Peace

“A”

120 Ocean Street,
Edgecliff.
3rd June, 1974

The Town Clerk,
Woollahra Municipal Council,
WOOLLAHRA.

Dear Sir,

The owners of No. 8, 10 and 12 Wentworth Street, Point Piper will lodge at the earliest opportunity a Development Application appropriate to the 2C Zoning of the area.

The Development Application will be in accordance with the Gazetted Town Plan and will follow the guide line laid down by the Appeals Tribunal.

I am bringing it to Council's notice that these Land Owners have suffered harrassment, difficulty and unpleasantness, and in two instances severe financial hardship.

I would ask Council to deal with this Application as expeditiously as possible and with the minimum delay.

I am,

Yours faithfully,

(Sgd) R. J. M. DUNLOP

This is the annexure marked “A” referred to in the attached Interrogatories.

The Town Clerk,
Municipality of Woollahra,
536 New South Head Road,
DOUBLE BAY, N.S.W. 2028.

"B"

15 May, 1974

Dear Sir,

Re: 8-12 Wentworth Street, Development Appeal by Blackburn Development and Rezoning of Subject Land.

We refer to previous correspondence herein and to our recent telephone conversation with the Deputy Town clerk. Our client objectors instructed us to request Council's immediate action in respect of the rezoning of the above land. 10

Our instructions are that certain advices which have been received by the writer and conveyed by telephone to the Deputy Town Clerk should be relayed to Council. The advices referred to are that the owners of the subject land are re-negotiating a new contract and new development plans are at present being prepare by the previous apellants architects for immediate submission to the Council.

As the Council will no doubt be aware lodgement of a new development application will render abortive action taken by the Council and the objectors in defending the appeal unless some immediate action is taken to rezone the land and nullify any further development applications lodged contrary to the Council's proposals for rezoning. It is noted that any action taken to rezone the land after lodgement of a new Development Application will be useless to control development on the land. 20

In view of the above and of our client's objection to the rendering abortive of their time and expense in defending the appeal in respect of the above land by delay of the Council to consolidate its position at the earliest possible time we are instructed to strongly request that Council immediately resolve to limit the number of storeys in any residential flat building to be erected on the land to 2 under its powers under Section 309 (4) of the Local Government Act 1919 and that the Council further resolve to prepare an amending scheme rezoning the land to Residential 2 (a).

The later request is the long term solution to the problem and it also serves to add weight to the Section 309 (4) resolution. 30

Our instructions are that should Council delay unnecessarily in granting the above requests our clients would take the view that their interests were not properly protected by their present representatives on Council and would act accordingly come September next.

Trusting that the Council is disposed to act in accordance with legal advice given to it and the requests of our clients at an early date.

Yours faithfully,

(Sgd) HALL & HALL

This and the preceding page form the annexure marked "B" referred to in the attached Interrogatories.

The Town Clerk,
Woollahra Municipal Council,
Council Chambers,
DOUBLE BAY 2028.

"C"

9th May, 1974

Dear Sir,

RE: THE COUNCIL and BLACKBURN DEVELOPMENTS (25) PTY. LTD. — 8-12 Wentworth Street, Point Piper

We refer to our letter of 6th instant herein enclosing the Minutes of Proceedings and Instrument of Decision of the Local Government Appeals Tribunal in this matter.

The Council was successful on the appeal and development consent was refused to the application. No Order as to costs was made by the Board.

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Council was represented by Mr. T. Cole of Counsel who appeared on the 21st November 1973. Due to Mr. Cole's unavailability on the resumed hearing date, Mr. T.F.M. Naughton of Counsel appeared on the council's behalf on the 12th, 13th and 14th February 1974.

A number of objectors sought and were granted leave to appear as parties to the proceedings. These objectors were jointly represented by Mr. P. Stein of Counsel.

Evidence in support of council's case was given by Miss Harvey Sutton, council's Principal Planning Officer, Mr. Neil Ingham of Planning Workshop, Consultant Town Planner, and Mr. M. George, a Planner employed by the State Planning Authority of New South Wales. Evidence from two local objectors, namely Senator McLelland, and a representative of the Ave Maria Convent also supported Council's case.

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Several of the objectors who were granted leave to appear as parties in the proceedings were called by Mr. Stein and gave evidence of their objections to the proposal.

On behalf of the local residents three objections to the proposal were submitted. It was firstly argued by Mr. Stein that the application lodged with the Council was invalid and that this situation could not be rectified. Thus, it was submitted, the Board on appeal could not properly consider the same. Secondly, it was put that in view of the history of the rezoning of the land and the character of the proposed development obtaining in the surrounding locality the application should be refused. Finally, it was argued that the proposed development, by virtue of its overshadowing effect, visual impact and obstruction of views and the creation of traffic congestion would tend to injure the surrounding amenity of the area and should therefore be refused.

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Counsel retained by the Council contended that development on the site should be restricted to a development appropriate to the 2 (b) Zone under the Council's Planning Scheme Ordinance, and advanced the specific grounds of refusal in support of such contention. In addition it was argued that the proposal did not comply with Clauses 44 and 46 of the Ordinance.

As regards the first objection advanced by Mr. Stein it was submitted that the requirements of Clause 32 (1) (d) of the Ordinance had not been complied with and that the situation was not capable of rectification following lodgment of the application. On the authority of Else Mitchell J. in Hornsby Shire Council v. Devery 12 LGRA 165 a similar argument was not advanced on Council's behalf. In that case His Honour held that where a Council had dealt with an application it was estopped from late arguing that the application was defective in form. The decision of the Board in Touma v. Canterbury Municipal Council 1972/73 LGATR 162 is difficult to reconcile with Devery's case. However, it would appear that Council may only argue that the Board lacks jurisdiction where it has at the outset refused no deal with an application or the

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reason of an irregularity of the application or the appeal is from the neglect and delay of the Council to deal with the application in the time specified.

In any event, the Board did not uphold the arguments advanced by Mr. Stein and held it had jurisdiction to determine the appeal.

As regards the other arguments of the objectors, although the Board was prepared to give considerable weight to the impact the proposed development would have on the immediate environment, due to the fact that Wentworth Street formed a boundary between the 2(c) and 2(a). Zones it did not consider that the objections of the residents that the development would injure the amenity of the area to be substantiated.

The Board would not entertain the appeal on the basis that the land the subject of the appeal should have been some other zoning. The Board emphasised that the zoning of the land is Residential 2(c) which is designed to permit, subject to Council's consent, residential flat development of the highest density permissible in the Municipality. The Council, nor the Board on appeal cannot prohibit such form of development simpliciter. 10

In its Minutes of Proceedings the Board has commented on the grounds of refusal and we do not propose to comment thereon save in relation to the following aspects.

In relation to the calculation of floor space ratio, the main issue for determination was whether balconies should properly be included in the calculations of floor space. The Board drew attention to the provisions of Clause 4 of the Local Government Act which in effect includes everything except certain specified exceptions and also noted that Council's code specifically excludes balconies for the purposes of calculating floor space ratio. 20

Whilst differing from the views of Mr. Ingham that bulk of building is one of the factors intended to be controlled by floor space limitations the Board was of the opinion that without some specific exclusion of balconies within the Scheme Ordinance itself, they must be included in the calculations of floor space: This view accords with the decision of Mr. Justice Hardie in Hooker Home Units Pty. Limited v. North Sydney Municipal Council 21 LGRA 101.

We would suggest therefore that to avoid any future argument in relation to the meaning of floor space the Code should be amended to coincide with the definition of that term as specified in Clause 4 of the Ordinance. We note that we have already recommended to Council that the Double Bay Code be similarly amended. 30

With regard to site coverage the Board considered that it was a matter of fact and degree in the particular case as to whether a particular structure constitutes site coverage. In the instant case the Board was of the view that the lower podium building forming part of Stage 2 of the development should be included in the calculations of site coverage as should those accessible roof areas which formed private gardens or courts.

The Board did not consider that ground of refusal No. 7 was justified. However, it did agree that the particular parking design was unsatisfactory as casual visitors to the complex including service, trade and visitor vehicles, would be obliged to drive through an entire garage and parking area to the rear of the site.

The Board also agreed with the Council that the development was clearly out of character with the development in the immediate locality of Wentworth Street and that the development constituted a gross overdevelopment of the site. The Board felt that the development should be reduced to serve as a buffer between that street and Wolseley Road and considered, that any development should not exceed a population density of 70 to 75 persons to the acre with a corresponding reduction in the bulk of the buildings to be erected on the site. 40

Finally the Board criticised Council in attempting to reject absolutely the logical consequences of the zoning of the land which the council itself had sought and considered that some residential

flat development of a reduced scale should be allowed.

It should be noted that the Board felt that strict compliance with the provisions of the Code need not necessarily be warranted, it being obviously not without fault and that the erection of a three or four storey building of substantial bulk on the site could be more injurious to the locality than the erection of well designed tower buildings to the maximum permissible height.

If Council does desire to restrict development on the site to that appropriate to a 2 (b) Zone it is essential that representations to the Minister be made immediately with a view to having the subject land suspended from the provisions of the Ordinance. Obviously if nothing is done and an amended application is received in the meantime which is generally in accordance with the views of the Tribunal expressed above it would be well nigh impossible to successfully resist an appeal from Council's decision refusing the application. No doubt also, once an appeal is lodged the Minister would not interfere by suspending the land from the Ordinance.

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At the same time Council may consider exercising its powers under Section 309 (4) of the Local Government Act by regulating the number of storeys which may be contained in any residential flat building sought to be erected on the site. We feel that again it it is obviously desirable that any action in this regard should be taken immediately. Any action under the Section must be based on strong planning grounds in order to avoid any possible inference that Council acted mala fide, and must not be taken simply to defeat any possible appeal.

The council should be aware that the Tribunal has adopted the view that it has the power to vary a resolution made under the Section (Hooker Home Units Pty. Limited v. Ryde Municipal Council 73000745), hence Council must have strong planning evidence to ground a resolution under the Section. On appeal, Council must be able to show that the exercise of the power was bona fide and not colourable or designed merely to thwart an appeal. Accordingly we would recommend that if Council desires to exercise its powers under the Section it do so immediately.

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Yours faithfully,
DOWLING TAYLER

Per: (Sgd) Indecipherable

Before me:

D. McGUINN, JP

A Justice of the Peace

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This and the preceding three pages form the annexure marked "C" referred to in the attached Interrogatories.

27th March, 1975

Messrs. Aitken & Pluck,
Solicitors,
C.D.E. 178

"D"

SYDNEY

Dear Sirs,

Re: Woollahra Municipal Council ats Dunlop

We refer to your letter of the 24th March, 1975 herein and to the writer's subsequent telephone conversation with your Mr. McLachlan.

We confirm that we cannot conceive how any of the documents referred to by you in your letter can in any way be relevant to the present proceedings.

We are instructed that the subject land has never been suspended from the provisions of the Woollahra Planning Scheme Ordinance. Prior to the prescription of the Ordinance on the 15th December, 1972 the land was subject to the provisions of the County of Cumberland Planning Scheme Ordinance. Under the Ordinance, we are instructed the subject land was zoned as "Living Area". We are further instructed that under the Scheme as exhibited, your client's land was proposed to be zoned Residential 2(a) and that it was following an objection lodged by your client that the land was zoned on prescription of the Scheme Ordinance as Residential 2(c). The application to the Court foreshadowed by you in your letter will be resisted and we will seek the appropriate order for costs against your client.

Yours faithfully,

DOWLING TAYLER

per:

C.D.E.245

This is the annexure marked "D" referred to in the attached Interrogatories.

FURTHER AMENDED STATEMENT OF CLAIM

1. The plaintiff at all material times was the owner of an interest in the land and buildings comprised in premises Nos. 8 and 10 Wentworth Street, Point Piper (hereafter called "the premises").
2. The defendant, at all material times was the local government body charged with the duty and responsibility for lawfully administering the Local Government Act and Ordinances made thereunder in respect of the local government area in which the premises were located.
3. The premises together with an adjoining property No. 12 Wentworth Street, Point Piper and buildings thereon were situated at all material times within a Residential 2(c) zone under the Woollahra Planning Scheme Ordinance prescribed on 15th December 1972. Under the provisions of Part III of that Ordinance development of the three parcels of land and each of them for high rise residential flat buildings was permissible with the consent of the defendant. 10
4. An application for consent to erect residential flat buildings on the three parcels was made to the defendant by Blackburn Developments (No. 25) Pty. Limited with the consent of the owners of Numbers 8, 10 and 12 Wentworth Street, on or about 23rd February, 1973.
5. The said application was refused by Council on or about 11th September 1973.
6. An appeal was lodged by the applicant with the Local Government Appeals Tribunal on 28th September 1973. The matter was heard by the Tribunal on 21st November 1973 and 12th, 13th and 14th February, 1974. 20
7. On 6th May 1974 the Tribunal issued its instrument of decision and refused the application. The plaintiff will refer to the instrument of decision in full on the hearing of this matter. The Tribunal indicated in its decision certain parameters of design which it considered acceptable.
- 7A. At all material times prior to and after 10th June, 1974 it was the intention of the plaintiff to proceed with the development of the said premises by lodging further development plans in accordance with the parameters laid down by the Local Government Appeals Tribunal.
8. On 10th June 1974 the defendant being aware of the plaintiff's intention referred to in paragraph 7A above considered the future development of premises 8-12 Wentworth Street, Point Piper. 30
9. On 10th June 1974 the defendant unlawfully and intentionally passed certain resolutions in respect of the premises 8-12 Wentworth Street, Point Piper and each of them which purported to have the effect of limiting the number of storeys of buildings on the said land to three and also purported to fix certain boundary set-backs in respect of buildings to be erected on the said land.
10. The said resolutions were passed by the defendant for the mala-fide and ulterior purpose of preventing development on premises 8-12 Wentworth Street in accordance with the parameters laid down by the Local Government Appeals Tribunal from dealing with any further application and appeal in accordance with the prescribed Woollahra Planning Scheme Ordinance and also to prevent development on any of the said premises for purposes permissible under the prescribed Woollahra Planning Scheme Ordinance. 40
11. The resolution as to the number of storeys on the land was contrary to the Council's prescribed planning scheme ordinance.

12. The resolution as to the boundary set-backs was unlawful being in breach of the defendant's duty to act fairly as required by the Local Government Act.
13. The plaintiff suffered loss as the inevitable consequence of the unlawful intentional and positive acts of the defendant referred to in and about the passing of the said resolutions in that inter alia he was delayed in putting his land to its highest and best economic use and also had to pay interest, expenses, and legal costs until such time as the unlawful resolutions referred to above were set aside by the Supreme Court.
- 13A. No appeal was taken by the defendant from the decision of the Supreme Court setting aside the resolutions.
14. Alternatively to 13 above and 15 below, the plaintiff says that the defendant was under a duty to the plaintiff pursuant to the Local Government Act, Parts XI and XIIA to administer the provisions of the Act and Ordinances made thereunder, in accordance with law, and in breach of this duty, in passing the said unlawful resolutions, the defendant failed to perform its said duty, whereby the plaintiff suffered the loss and damage referred to in paragraph 13 above. 10
15. Further, in the alternative to paragraphs 13 and 14 above, the defendant was under a duty to the plaintiff to perform its duties under Parts XI and XIIA of the Local Government Act in dealing with building and development controls with respect to the said land, in a reasonable, careful and responsible manner but the defendant in and about passing the said resolutions acted unreasonably, negligently and irresponsibly whereby the plaintiff suffered the loss and damage referred to in paragraph above. 20
- 15A. Further, in the alternative, the defendant was a public corporate body which occupied a public office and was incorporated by a public statute and which had power to and did exact revenue from ratepayers in its area under the Local Government Act to enable it to perform its public duties and the defendant abused its said office and public duty under the said Statute by purporting to pass each of the said resolutions with the consequence that damage was occasioned to the plaintiff.
16. At all material times the plaintiff was a party to a contract with the owners of adjoining premises for the joint development for home unit purposes of the three premises for the joint development for home unit purposes of the three premises Numbers 8, 10 and 12 Wentworth Street, Point Piper. 30
17. As at 10 June 1974 the defendant knew of the said contract and with intent to prevent its performance wrongfully passed the resolutions referred to in paragraph 9 above and thereby prevented the performance of the said contract, as a result of which the plaintiff suffered loss and damage.

And the plaintiff claims damages and costs.

PARTICULARS OF ACTS COMPLAINED OF UNDER ALL COUNTS

Date

- 10th June 1974 Resolutions passed by Council which 40
- (a) limited the number of storeys in buildings to be erected on the land 8-12 Wentworth Street, Point Piper;
 - (b) prescribed building set-backs in respect of the said land.

PARTICULARS OF PARAGRAPHS 14 and 15

See detailed particulars in letters from plaintiff's solicitors dated 10/12/76 and 15/6/77

PARTICULARS OF PARAGRAPHS 15A

The defendant was a public body corporate incorporated under the Local Government Act 1919. It had the public duty to administer the Local Government Act within its area (sec. 84) and to administer the Woollahra Planning Scheme Ordinance. See Clause 6(2); Clause 44(5) and clause 73. The Council abused its office and public duty by passing each of the invalid resolutions on 10 June 1974. Each of the said resolutions was beyond the defendant's power and/or unlawful.

PARTICULARS OF PARAGRAPHS 16 and 17

Contract made on or about the 11th day of January 1973 Between the plaintiff, Alec R. Howarth and The Perpetual Trustee Company Limited to jointly co-operate for the erection on the said premises Nos. 8, 10 and 12 Wentworth Street, Point Piper of high rise residential flat development.

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PARTICULARS OF DAMAGES

See detailed particulars in letter from plaintiff's solicitors dated 10 December 1976 and 15 June 1977.

.....
Francis John Alfred HOFFEY
Plaintiff's solicitor
Filed: 7 April 1978.

TO THE DEFENDANT, Council Chambers, New South Head Road, Double Bay, N.S.W. 2028

You are liable to suffer judgment or an order against you unless you comply with the rules of Court relating to your defence.

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Nominated place for trial:
Plaintiff:

Sydney
Roger John Massie Dunlop,
10 Wentworth Street,
POINT PIPER, N.S.W. 2027

Solicitor:

Medical Practitioner
George Murray Stephenson of
Messrs. Stephen Jacques & Stephen
Solicitors,
Level 32,
A.M.P. Centre,
50 Bridge Street,
SYDNEY, N.S.W. 2000 239.1111

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Plaintiff's address for service:
Address of Registry:

At the office of his solicitor.
Law Courts Building,
Queens Square,
SYDNEY, N.S.W. 2000
Clerk of the Court.

PM.76695

10th December, 1976.

Messrs. McDonnell Moffitt Dowling Tayler,
Solicitors,
C.D.E. 207.

Your Ref.: 5/AWN/761077

Dear Sirs,

Re: Dunlop ats. Woollahra Municipal Council

We refer to your letter of 27th July. We hereby set out the particulars sought in your letter under reply.

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- 1. (a) The plaintiff owns No. 8 Wentworth Street, Point Piper.
- (b) The property No. 10 Wentworth Street, Point Piper is registered in the name of the Perpetual Trustee Company Limited as trustee for the plaintiff's mother for life with the plaintiff having a one third share of the remainder as tenant in common.
- 2. From the time our client purchased the premises in December 1972 to date.
- 3. (a) The purpose of the resolutions are self evident from their terms. At the trial evidence will be led that the Council and its members passed the resolutions for non-bona fide and ulterior reasons, and/or with malice. A development of the type contemplated by the resolutions is completely inappropriate for the high-rise zoning and the Tribunal had in effect so found in its award.

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- (b) There is no appeal to the Local Government Appeals Tribunal from the resolutions passed by the Council.
- 4. Apart from the defects referred to by Mr. Justice Wootton it is alleged that the resolutions were passed for non-bona fide and ulterior purposes and/or with malice.
- 5. The Council is the responsible authority under the Woollahra Planning Scheme Ordinance clause 6(2). The Council is given powers to administer Part XI of the Act in Sections 308 and 309. It is an implied obligation of Council to administer those provisions in accordance with law and not otherwise. Reliance is also placed on Section 84 of the Act.
- 6. By passing the unlawful resolutions of 10th June 1974 causing the plaintiff to suffer damage and loss.
- 7. The defendant failed to exercise reasonable care in and about passing the unlawful and invalid resolutions of 10th June 1974 which it reasonable knew or ought to have known would cause financial loss to the plaintiff.
- 8. In and about passing the unlawful and invalid resolutions for an ulterior purpose and/or non-bona fide purpose and/or with malice. The Council also did not seek proper detailed legal advice as to the manner of exercise of its powers nor did it seek proper detailed advice as to its proposal to invoke s. 308 and s. 309(4).

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9. **Particulars of Damage**

(a) Interest payable to the Bank of New South Wales on the plaintiff's overdraft which overdraft financed the purchase of 8 Wentworth Street, Point Piper from the 10th June 1974 to the 24th October 1975	\$109,490.91
(b) Overdraft fees payable to the Bank of New South Wales from the 10th June 1974 to 24th October 1975	209.42
(c) Increase in building costs for the period from the 10th June 1974 to the 24th October 1975 calculated on the basis of a 37% increase during such period and calculated by reference to the building envisaged by the development application currently before council	341,057.00

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(d)Architects fees due to Charles Phillips rendered valueless	6,000.00
(e)Legal costs incurred in relation to the Equity Court proceedings before Mr. Justice Wootton not recovered from council	12,076.50
<u>Holding Charges</u>	
Council rates for 1975	\$2,841.15
Water rates for the 1974-75 year	494.00
Land tax for 1975 year	10,627.50

The plaintiff shall also claim exemplary and general damages.
Please file your defence within fourteen days of receipt of this letter.

Yours faithfully,

AITKEN & PLUCK

Per:

DHG:GMS

15th June, 1977.

Messrs. McDonnell Moffitt Dowling & Tayler,
Solicitors,
D.X. 207 SYDNEY.

Dear Sirs,

Re: Dunlop v Woollahra Municipal Council

We hereby set out the particulars sought in your letter under reply:—

1. The answer to the first question contained in this paragraph is no. Additional facts and matters which will be relied upon by the plaintiff are:
 - (a) delay of the Council in considering the Development Application of Blackburn Developments No. 25 Pty. Limited, lodged in February, 1973; 10
 - (b) the recommendations of Miss Harvey-Sutton considered by the Council on 10th September, 1973 relating to this Development Application;
 - (c) the reasons of the Council for refusing consent to the Development Application;
 - (d) the report of Miss Harvey-Sutton considered by the Town Planning Committee of the Council on 18th September, 1973;
 - (e) the recommendations of the Town Planning Committee of 18th September, 1973;
 - (f) the application by Council to the Minister for Local Government of 15th October, 1973;
 - (g) the Council's conduct subsequent to the Minister's decision dated 12th November, 1973 in relation to the application; 20
 - (h) the approach adopted by the Council in conducting its case before the Tribunal in relation to the appeal of Blackburn Developments No. 25 Pty. Limited;
 - (i) the Council's conduct after receipt of the advice of Council's solicitors dated 9th May, 1974;
 - (j) meeting of Messrs. Dunlop, Howarth, Regnis & Bray on 14th May, 1974;
 - (k) the letter from Messrs. Hall & Hall dated 15th May, 1974;
 - (l) the report of Miss Harvey-Sutton considered by the Town Planning Committee on 27th May, 1974;
 - (m) the report of Mr. Regnis considered by the Town Planning Committee on 27th May, 1974;
 - (n) the meeting of the Town Planning Committee on 27th May, 1974 and its resolution; 30
 - (o) the report of Miss Harvey-Sutton to the Council's meeting of 10th June, 1974;
 - (p) the meeting of the Council of 10th June, 1974;
 - (q) failure by the Council and its Committees to give an opportunity to be heard to the owners affected with respect to the resolutions of 10th June, 1974.
- These additional factors, together with the factors referred to in your paragraph, shall be relied upon to infer lack of bona fides, ulterior motives and/or constructive malice.
2. Yes.
 3. The plaintiff owned land and buildings in the municipality. The Council was the responsible authority. It is subject to the Local Government Act and the Woollahra Planning Scheme Ordinance. It has no power to act outside the legislation. It was not empowered to pass resolutions which adversely affected private land unless such resolutions were in accordance with the Local Government Act and the Woollahra Planning Scheme Ordinance. The award of the Local Government Appeals Tribunal and the duty of the Council to be guided by that award. 40

4. The first matter is confirmed. The other matters upon which the plaintiff will rely are as follows:
- (a) the failure of the Council to act fairly in relation to persons affected by the resolution purportedly under Section 308 of the Local Government Act;
 - (b) in failing to act consistently with the terms of Clause 73 of the prescribed planning scheme ordinance;
 - (c) failing to accurately and fairly summarise the relevant terms of the Local Government Appeal Tribunal's award of 6th May, 1974 and to present such accurate and fair summary to the Council Aldermen for such meetings at which such summary came up for consideration;

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5. The correct figure for interest payable to the Bank of New South Wales is \$110,708.86. The amount of the debt on which interest was payable was \$560,143.73. The interest rates were as follows:—

10th June, 1974 — 30th September, 1975	14.5%
1st October, 1975 — 24th October, 1975	13.0%

The sum of \$110,708.86 was calculated as follows:

(1) 10th June, 1974 — 30th September, 1975 interest at 14.5% on debt of \$560,143.73	\$105,920.78
(2) 1st October, 1975 — 24th October, 1975 interest at 13.0% on debt of \$560,143.73	4,788.08

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TOTAL: \$110,708.86

10th June, 1974 was the date of the passing of the subject Council resolutions; 24th October, 1975 was the date of expiration of the right of appeal against the judgment of Mr. Justice Wootten in the action by the present plaintiff against the present defendant in the Equity Division of the Supreme Court.

6. The figure of \$341,057.00 in respect of the increase in building costs was calculated by Byrnes, Smith & Associates Pty. Limited as follows, based on Cordell's Building Cost Book and Estimating Guide:

No. 8 Wentworth Street, Point Piper

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<u>Item</u>	<u>Quantity</u>	<u>Building Estimates</u>		October, 1975	
		<u>\$ rate</u>	<u>\$ cost</u>	<u>\$ rate</u>	<u>\$ cost</u>
Residential					
floor area	2,700m ₂	216m ₂	583,200	300m ₂	810,000
Balconies	130m ₂	61m ₂	7,930	85m ₂	11,050
Carpark	1,715m ₂	150m ₂	257,250	200m ₂	343,000
Site work	say		17,000		23,500
Landscaping	say		1,350		1,800
Pool	say		3,400		4,500
Demolition	say		3,400		4,500
Subtotal			873,530		1,198,350
5% contingency			43,680		59,917
Total			917,210		1,258,267
Price vary (June '74 to Oct. '75)			\$341,057		(37.18%)

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It should be noted that the figure of 29% mentioned in paragraph 9(c) of Aitken & Pluck's letter of 10th December, 1976 should have read 37%.

7. The correct figure for architect's fees paid to Mr. Charles Phillips is \$4,750.00. That sum was paid for the preparation of drawings suitable for submission to the defendant Council in respect of the proposed development of the property at 8-12 Wentworth Street, Point Piper. The details of the architect's account are as follows:

Re: Proposed Flat Units, 8-12 Wentworth Street, Point Piper

To preparing drawings suitable for Development Application to Woollahra Council.

First Scheme July, 1974, Town Houses at 8 Wentworth Street. 10

Second Scheme October, 1974, 7-storey building

2 flats per floor at 10-12 Wentworth Street.

Third Scheme October, 1974, 7-storey building

1 flat per floor at 10-12 Wentworth Street.

Fourth Scheme October, 1974, 8-storey building

3 flats per floor at 8 Wentworth Street.

Fifth Scheme October, 1974, 8-storey building,

2 flats per floor at 8 Wentworth Street.

Sixth Scheme October, 1975, amended drawings of Fifth Scheme.

Attending conferences and discussions, interviewing Council Officers, making application to council, attending Court 20

\$4,750.00

The sum of \$4,750.00 was paid in the following manner:

Paid on account	\$1,500.00
10th September, 1976	500.00
26th November, 1976	500.00
17th April, 1977	500.00
1st June, 1977	<u>1,750.00</u>
	<u>\$4,750.00</u>

8. The correct figure for legal costs incurred in relation to the Equity Court Proceedings before Mr. Justice Wootten and not recovered from Council is \$10,221.90. This figure is computed as follows: 30

Counsel's fees

Mr. A. B. Shand \$ 3,660.00

Mr. B. J. Tamberlin 3,099.00

Solicitor's costs

Aitken & Pluck 5,850.00

Disbursements 511.05

\$13,120.05

Less amount credited by Council in respect of rates owed by plaintiff 2,898.15

\$10,221.90

Various portions of this total amount were paid by the plaintiff at different times during and after the conduct of the matter.

9. No. 8 Wentworth Street, Point Piper.
10. On the basis that the resolutions of the Council were a deliberate intentional act causing delay expense and damage and not merely a negligent omission.
11. Loss of professional time, inconvenience and distress.

Please file your defence within twenty-eight (28) days.

Yours faithfully,
STEPHEN, JAQUES & STEPHEN

FURTHER AMENDED STATEMENT OF DEFENCE

1. In answer to paragraphs 1, 7A and 16 of the amended Statement of Claim the defendant does not know and cannot admit the facts alleged therein or any of them.

2. In answer to paragraphs 8 and 9 of the Amended Statement of Claim the defendant:

(a) admits that on 10th June 1974 it passed certain resolutions which related to the properties 8-12 Wentworth Street, Point Piper;

(b) denies that it was aware of the plaintiff's intention referred to in paragraph 7A of the Amended Statement of Claim;

(c) does not admit that the said resolutions were in the form, or had the legal effect, alleged in paragraph 9 of the Amended Statement of Claim and craves leave to refer to the said resolutions when produced as if the same were fully set forth herein;

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(d) save as aforesaid denies the facts alleged in the said paragraphs.

3. In answer to paragraph 10 of the Amended Statement of Claim the defendant denies the facts alleged in the said paragraph and each of them.

4. In further answer to paragraph 10 of the Amended Statement of Claim the defendant says that the matters therein alleged were issues in the proceedings heard in the Equity Division of this Honourable Court, No. 2688 of 1974 and that in the said proceedings the said issues were determined in favour of the defendant as a consequence whereof the plaintiff is estopped as against the defendant from seeking to have the said issues or any of them determined in the proceedings herein.

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5. In answer to paragraph 11 of the Amended Statement of Claim the defendant does not admit the legal accuracy of the allegations made therein and relies upon the decision of Mr. Justice Wootten in the said proceedings No. 2688 of 1974.

6. In answer to paragraph 12 of the Amended Statement of Claim the defendant admits that in the said proceedings No. 2688 of 1974 the said resolution of the defendant purportedly passed pursuant to the provisions of Section 308 of the Local Government Act, 1919 was held by Mr. Justice Wootten to be invalid but save as aforesaid the defendant denies the facts alleged in paragraph 12 and each of them.

7. In answer to paragraphs 13, 14, 15 and 17 of the Amended Statement of Claim the defendant denies the facts alleged in the said paragraphs and each of them.

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8. In answer to paragraph 15A of the Amended Statement of Claim the defendant:

(a) admits that it was a public corporate body incorporated by a public statute which had power to and did exact revenue from ratepayers in its area under the Local Government Act to enable it to perform its public duties;

(b) save as aforesaid denies the facts alleged in the said paragraph;

(c) says that the said facts as alleged in the said paragraph do not disclose any cause of action entitling the plaintiff to claim damages against the defendant in the circumstances set forth in the said paragraph or in the particulars thereto or at all.

Filed: 10/4/78

(Sgd) Indecipherable

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Solicitor for the defendant

Added pursuant to leave granted by Mr. Justice Yeldham on 7 April 1978.

Added pursuant to leave granted by Mr. Justice Yeldham on 7 April 1978.

C.C. Phillips, examination
Plaintiff Evidence.
R.J.M. Dunlop, examination

CORAM: YELDHAM, J.
MONDAY, 3RD APRIL, 1978

DUNLOP v. THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

MR. HUGHES, Q.C., with MR. TAMBERLIN appeared for the plaintiff.
MR. WILCOX, Q.C., with MR. TOBIAS and MR. KERR appeared for the defendant.

(Mr. Hughes stated an amended statement of claim had been filed, dated 25th November 1977)

(His Honour stated he had read the amended statement of claim, and had also re-read the decision of Wootten, J. in the equity proceedings)

(Mr. Hughes opened to his Honour)

(Copy of the Woollahra Planning Scheme Ordinance handed to his Honour)

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(Mr. Wilcox called for the production of documents in accordance with a subpoena duces tecum addressed to the plaintiff. Mr. Hughes produced documents in answer to the subpoena)

(Mr. C.C. Phillips was called on subpoena duces tecum)

CHARLES CLARENCE PHILLIPS

MR. WILCOX: Q. What is your full name? A. Charles Clarence Phillips

Q. Do you appear in answer to subpoena dated 29th March 1978? A. Yes.

Q. Do you produce the documents sought in the subpoena? A. Yes.

Q. Do you produce the whole of the documents? A. All I have. There are not as many as the subpoena asks for.

Q. Would you look at the subpoena and tell me if there are any documents in your possession in the category of par. 1? A. I had no diary instructions. All instructions from my client were verbal.

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Q. Are you saying there are no such documents as are sought in par. 1? A. Yes.

Q. And par. 2? A. Those are there.

Q. And par. 3? A. Copy of the account is in there too.

Q. Such documents as you have, referred to in that subpoena, are produced, is that right?

A. Yes.

(Witness retired)

PLAINTIFF

Sworn and examined

MR HUGHES: Q. Is your name Roger John Massie Dunlop? A. Yes.

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Q. Are you a legally qualified medical practitioner? A. Yes.

Q. Do you practice your profession at Ocean Street, Edgecliffe? A. Yes.

Q. Do you live at 10 Wentworth Street, Point Piper? A. Yes.

Q. Have you lived there for a considerable number of years, man and boy? A. Yes.

Q. In December 1972, did you make arrangements to purchase from Mr. William Baxter Enever property situated in Wentworth Street at the time known as No. 8? A. Yes.

Q. Is that a photostat copy of the contract? (shown) A. Yes.

Q. You did pay stamp duty on that contract in the sum of \$14,000 did you not? A. Yes.

(Photostat copy of contract tendered and marked Ex. A)

Q. Would you tell his Honour the object, if any, that you had in mind in buying 8 Wentworth Street, Point Piper, when you did in December 1972? A. The primary object was to develop the land to its highest and best use. The secondary object was to realise upon my mother's trust property in No. 10.

Q. Your mother lives at No. 10, and has for many, many years, is that so? A. Yes. 10

Q. And that property adjoins No. 8? A. Yes.

Q. She is the life tenant under a trust on that property, is she not? A. Yes.

Q. The legal owner of the property being the Perpetual Trustee Co? A. Yes.

Q. You and your two sisters are remainderman and women under that trust, is that right? A. Yes.

Q. You have told his Honour one of the objects in buying No. 8 was to assist towards realising something on the trust property No. 10. Do you mean a joint development? A. Yes.

Q. Did a Mr. Howarth also become interested in the proposal for joint development? A. Yes.

Q. He being the owner of 12 Wentworth Street? A. Yes.

Q. Following upon the development of this joint arrangement did you make a contract with a company known as Blackburn Developments No. 25? A. Yes. 20

Q. Or was it Home Units of Australia Pty. Ltd.? A. It was Blackburn Developments.

Q. Was that contract made on 11th January 1973? A. Yes.

Q. Is that a photostat of it? (shown) A. Yes.

Q. There is a deed of variation dated 11th February 1974. Was that executed by you and by Blackburn Developments? A. Yes.

Q. It was to do with an extension of time, is that right? A. Yes.

(Original contract and variation tendered and marked Ex. B)

Q. Did the other owners, Perpetual Trustee Co. and Mr. Howarth, enter into like arrangements with Blackburn Developments as your contractual arrangements? A. Yes. 30

Q. Is it within your personal knowledge that following the making of those contracts to which you have referred in your evidence, Blackburn Developments No. 25 on or about 2nd February 1973, submitted a development application relating to the three properties, 8, 10 and 12 Wentworth Street, Point Piper, to the Woollahra Council? A. That is correct.

MR. WILCOX: There is no dispute it went in.

MR. HUGHES: I will tender it later, if necessary. There will be no difficulty identifying it.

Q. Would this be a convenient summarised description of the nature of the development covered by that development application to which you have just referred, that it was a twin tower type of building that was proposed? A. That is correct.

Q. Going how high in storeys? A. Up to a maximum 235.5 feet above standard datum. 40

Q. That would take it to eight storeys, is that right? A. That is correct.

Q. How many residential flats were comprised within that plan? A. In the two twin towers, plus the podium underneath, there was a total of 38 units.

Q. To finance your purchase when it came to be completed, in relation to the property No. 8, did you make any arrangements with the Bank of New South Wales? A. I did.

Q. Did you at that time bank with the Rose Bay branch of the Bank of New South Wales? A. Yes.

Q. And you still do? A. Yes.

Q. How much of the purchase price of \$500,000 did you borrow? A. I borrowed 100 per cent.

Q. Plus stamp duty? A. Plus stamp duty.

Q. Was that borrowing affected by your drawing what is called a line of bills? A. Yes.

Q. Were there five bills? A. Yes.

Q. Each for \$100,000? A. Yes.

Q. And another bill, the sixth, for \$14,000 stamp duty? A. Yes.

Q. Were they 90 day bills? A. Yes.

Q. Were they rolled over from time to time? A. Yes.

Q. Up to the 90 day period which expired on 22nd October 1974? A. Yes.

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Q. When the bills were first drawn and each time they were rolled, did you incur a liability for a discount fee and an acceptance fee?

A. Yes.

Q. Dealing with the nature of your liability constituted by the borrowing, in October 1974, to be executed on or about the 22nd, did the last of the bills expire? A. Yes.

Q. Was your liability under that last line of bills transferred to an overdraft liability on your bank account with the Bank of New South Wales, Double Bay? A. It was.

Q. And the figure that was taken into the overdraft on 22nd October 1974 as representing the matured liability on the bills is \$514.00, is that right? A. Yes, it was.

Q. In the meantime had discount fees and acceptance fees from time to time been debited to your account with that branch of the bank? 20

A. Yes.

Q. After the 22nd October 1974, has interest at the going rate from time to time been charged by the bank against your overdraft account?

A. Yes.

Q. Has that been to your knowledge on a simple basis or on a compounding basis? A. To the best of my knowledge, a compounding basis.

(Witness stood down)

JOSEPH JOHN SZOTA

Sworn and examined

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MR. HUGHES: Q. Is your name Joseph John Szota? A. Yes.

Q. Are you an officer of the Bank of New South Wales? A. Yes.

Q. Is your present position that of manager's assistant at the Rose Bay Branch of the bank?

A. That is correct.

(Document handed to his Honour dealing with figures to be referred to by the witness)

Q. Where do you live? A. Unit 14, 18/20 Harrow Road, Stanmore.

Q. Have you brought to court with you a substantial file, which is one of the bank files, with regard to Dr. Dunlop's financial dealings with the bank? A. Yes.

Q. In that file, have you got documents you can produce to the court setting out the arrangements that were made initially in April 1972 for the provision of finance to Dr. Dunlop, to enable him to purchase 8 Wentworth Street, Point Piper, the provision of finance having been arranged by a line of bills? A. I have not got the actual original bills.

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Q. What has happened to them? A. The actual original bills were held by the bank.

HIS HONOUR: Q. Have you a copy of them? A. With each roll-over fresh bills are executed. With 90 day bills, each 90 days a fresh bill is executed. These are held, up to approximately the April bills, in the bank's records.

Q. April 1974? A. April 1974.

Q. What happens then? Are they destroyed? A. I am not exactly sure when they are destroyed, but after a certain period of time, yes.

MR. HUGHES: Q. Could you produce your file so that you can refer to it? A. Yes.

Q. Is there a document in that file which establishes that on some date in April 1973 the plaintiff drew in favour of the bank a line of bills consisting of five for \$100,000 each, and one bill for \$14,000? If it is another month, you can let me know. Can you go back to April 1973, when the first line of bills was drawn? A. I will have to look at the papers.

(Short adjournment)

MR. HUGHES: We have been able to reach agreement on a number of matters, but as far as bank interest arising out of overdraft liability and out of bills is concerned, I can tender by consent part of that document which is before your Honour. That is the section headed "Period A". The first four pages. 10

HIS HONOUR: That is tendered as evidence of the facts, is it?

MR. HUGHES: Of the computations. The discounting and acceptance charges and interest computations.

MR. WILCOX: I should formally object to the relevance of the document but I think that is a matter for argument at a later stage. I have no objection to my friend proving the fact in this short-cut way.

HIS HONOUR: I think I should admit it subject to objection, and relevance can be debated later. 20

(Document relating to bank interest, headed "Period A" tendered and marked Ex. C)

HIS HONOUR: It will be noted it is tendered as evidence of the actual calculations, and that Mr. Wilcox objects to it only on the ground of relevance. I will admit it subject to objection and deal with its relevance later.

MR. HUGHES: I do not wish to ask anything further in chief.

MR. WILCOX: I have no questions.

(Witness retired)

PLAINTIFF

On former oath

(Mr. Hughes tendered development application lodged by Blackburn Developments No. 25 Pty. Ltd dated 2nd February 1973, which was marked Ex. D) 30

MR. HUGHES:

Q. That development application was lodged with your consent, is that right? A. Yes.

Q. As well as with the consent of the Perpetual Trustee Co. as the owner of No. 10 and Mr. Howarth as the owner of No. 12? A. Yes.

Q. In September 1973 did you hear that the council had refused on the tenth of that month consent to the development application that had been lodged the previous February? A. Yes.

Q. Thereafter to your knowledge was an appeal lodged and prosecuted by Blackburn Developments against the refusal of that application? A. Yes.

Q. Was that appeal concluded with the making of an award by the Local Government Appeals Tribunal on 6th May 1974? A. Yes. 40

Q. Shortly after 6th May 1974, did you attend a meeting of the council. I withdraw that. Did you attend a meeting with the then mayor of the council, Alderman Michael Bray? A. Yes.

Q. Was a Mr. Regnis also present at that meeting? A. Yes.

Q. Do you remember the substance of anything you said to the mayor and Mr. Regnis during the

course of that meeting? A. I recall there was much conversation about the town planning matters.

Q. Could you tell his Honour first of all whether or not you said anything about your financial position? A. Yes, I did.

Q. Would you tell his Honour without any prompting from me what you said to Alderman Bray in the presence of Mr. Regnis about your financial position? A. I said that I was suffering from severe financial hardship, that I had borrowed a very large sum of money, in excess of half a million dollars, and was subject to holding charges and interest charges, and that I would like to see a speedy resolution of this matter, and there was other discussion, to the best of my knowledge, on the question of rezoning, and this alarmed me considerably. 10

Q. When you say "rezoning", had this land in Wentworth Street consisting of 8, 10 and 12 been zoned 2C when the Woollahra Planning Scheme Ordinance was promulgated? A. Yes, it had.

Q. Prior to it being zoned 2C, on the promulgation of the ordinance, had it been tentatively zoned in the course of the original exhibition of the plans as Residential 2A? A. Yes.

Q. What did either Alderman Bray, the mayor, or Mr. Regnis say about the possibility of rezoning? Was the nature of the rezoning mentioned? A. They discussed the question of an amending scheme to the Woollahra ordinance, and I felt this was going to — (interrupted)

Q. Do not tell us what you felt. What did you say? A. I do not think I said anything.

Q. On 27th May 1974, did you attend a meeting of the Town Planning Committee of the Woollahra Council? A. I did. 20

Q. Did you attend that meeting in response to an invitation to do so? A. Yes.

Q. An invitation emanating from the council? A. I did.

Q. Can you tell us approximately how many members of the council were in attendance at that town planning committee meeting on 27th May? A. Approximately 11.

Q. Did you address that committee meeting? A. I did.

HIS HONOUR: Do you know how many there were on the council itself at that time? A. I think there were 15 on the council at that time.

MR. HUGHES: When you addressed the town planning committee meeting on that date, did you cover a number of topics in your remarks? A. Yes.

Q. Can you recall whether on that occasion you said anything about your financial position? A. I did. 30

Q. Can you tell his Honour in substance what you said? A. I again reported the fact that both Mr. Howarth and myself were under severe hardship, and in relation to my own affairs I had borrowed a large sum of money, and again referred to the amount, which was more than \$500,000, and again I referred to the difficulties with the holding charges and the water rates, and the interest.

Q. Were you also liable at that time for land tax? A. And land tax.

Q. Did you come to hear of the passing of the council resolutions on 10th June, first limiting the extent of any building to be erected? A. Yes.

Q. On the three properties or any of the three properties, eight, ten and twelve Wentworth Street? A. I did. 40

Q. And also the resolution setting very substantial building line set backs? A. I did.

Q. Before that resolution came to your notice, did you write to the council a letter of which this document I now show you is a photostat of a letter dated 3rd June 1974? A. Yes, I wrote that on 3rd June 1974 after I had attended the town planning committee meeting, in order to put basically before them what I would propose to do, and to draw to the attention of council as distinct from the town planning committee exactly what my financial troubles were.

(Letter from the plaintiff to the council dated 3rd June 1974 tendered and marked Ex. E)

Q. Prior to the writing of that letter, had Blackburn Developments No. 25 Pty. Ltd. taken any action in relation to the contractual situation that had existed between that company and yourself? A. They had.

Q. What had they done? A. They had rescinded the contract on 23rd May. I think that was the date. They certainly rescinded mine and No. 10's and No. 12's on that date.

Q. Following the adverse position as a result of the appeal? Following the adverse decision on the appeal? A. Yes.

Q. Following the passing of the two resolution, which I shall call the 309 resolution and the 308 resolution, did you take any steps in relation to investigating the possibility of developing No. 8 Wentworth Street within the framework of the limitations set by those two resolutions? A. I did. 10

Q. What steps did you take? A. I consulted with Mr. Charles Phillips.

Q. Is he an architect practising in the city? A. He is.

Q. And was at the time? A. Yes, and on my instructions he contacted various members of the town planning committee. I am sorry, the town planning department.

Q. Of the council? A. Yes, and we drew up various plans in order to try and satisfy these parameters that the council laid down by the resolution. As I recall, we went into a town house development. We looked at a three storey development, and we subsequently — that comes later. Those are the two things we looked into at this stage.

Q. Did the initiation of that investigation and work occur in about June 1974? A. Yes, it did. 20

Q. Not long after the resolutions of the 10th had been passed? A. Yes.

Q. Did Mr. Phillips in accordance with your instructions draw up sketch plans? A. Yes.

Q. First of all, in relation to town houses, on No. 8? A. Yes.

Q. And also a three storey development on No. 8? A. He did.

Q. Did you receive advice about the appropriateness or otherwise of going ahead with those types of development? A. I did. The thought as I recall, that Mr. Phillips had — (Objected to — rejected).

Q. I will be calling Mr. Phillips. And what advice did you receive?

A. The advice was that they were totally unsuitable and uneconomic.

Q. Did that advice have any influence on your mind in relation to your decision whether or not to go ahead with any such proposal? 30

A. Yes, it did. I decided not to.

Q. You commenced proceedings in the Equity Division in 1974 to have these resolutions declared invalid, did you not? A. Yes.

Q. The resolutions of 10th June 1974, is that right? A. Yes.

Q. Prior to or at about the time you launched those proceedings, did you cause a development application to be lodged with the Woollahra Municipal Council in connection with your property, No. 8 Wentworth Street? A. I did.

Q. What was the nature of that proposed development? A. That proposed development was a development in accordance with the parameters of the tribunal, and it was for an eight storey building, 235.5 feet above sea level, which was the level of the height restriction. 40

Q. You say "The parameters of the tribunal". Do you mean the parameters those advising you and you thought were deducible from the award of the tribunal when the appeal had been dismissed earlier in the year? A. That is correct.

Q. Did those plans in their formulation ignore the two resolutions that had been passed by the council on 10th June 1974? A. Yes.

Q. The resolution of the building line set-back? and the resolution about the number of storeys?

A. They did.

Q. Did the Equity proceedings come on for hearing in August 1975? A. Yes.

Q. Were you in court during those proceedings? A. Yes.

Q. And you gave evidence? A. I did.

Q. Proceedings before Wootton, J. which lasted for five hearing days. A. Yes.

Q. On 26th September 1975 did Wootton, J. deliver a reserve judgment in which he declared invalid the s.308 resolution and the s.309 resolution, but for different reasons in each case?

A. That is correct.

Q. Shortly after the delivery of judgment, in that case, did you take steps to reagitate the question of developing the land, No. 8? A. I did.

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Q. What was the fate of the development application that you had lodged in November 1974?

A. About I think 15th July 1975, about a fortnight before the Equity case commenced, they refused the application.

Q. Was anything done about that refusal? A. No.

Q. Shortly after the judgment was given by Wootton, J. in late September, did you take steps to reagitate the question of getting development approval for 8 Wentworth Street? A. I did.

Q. What was the first step you took? A. With Mr. Phillips I attended a meeting on 9th October 1975 at the council.

Q. Whom did you see? A. I saw Mayor Bray, Alderman Perry, and the Town Clerk, Mr. Ford.

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Q. What was the substance of the discussion that took place on the occasion? A. The substance of the discussion was we went down to ascertain what sort of building the council would entertain, seeing that the resolutions had been set aside, and it became patently obvious to us after half an hour — (Objected to — rejected)

Q. What was said? A. They informed us they did not consider themselves bound by the Equity decision.

HIS HONOUR: Q. Not bound by it? A. Yes.

MR. HUGHES: Q. At this time, the appeal time had not run out, is that right? A. Yes. They also considered a high-rise development was most unsuitable for that site, and that, although it was not in actual words, the feeling was — (Objected to — rejected).

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Q. You can only say what was said. Do you understand? A. Yes. We discussed it generally for some time.

Q. At this meeting? A. Yes. I then told Mr. Phillips to have further conferences.

Q. With the planning staff? A. Yes.

Q. As far as you know did he carry out those instructions? A. He did.

Q. Did he report back to you? A. He did.

Q. What month did he report back as far as you can recall? A. That was 9th October. He reported back to me some time towards the end of October, and the gist of what he said to me was that he was finding it extremely difficult to get any co-operation whatsoever, and they were still saying — (Objected to — struck)

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Q. Early in November 1975 did a negotiation commence with a development company known as Mirvac? A. That is correct.

Q. Did you deal with a Mr. Fortune from that company? A. I did.

Q. Did those negotiations extend over some period of time? A. They did.

Q. What was the nature of the negotiations? A. They submitted a proposition to me which was a joint venture proposition, which meant that I would put the land in at \$500,000, and that I would

wait until sell-off date, and I would receive a profit that on their figures amounted to approximately \$420,000. I talked to them at some length through November and December on this subject, and I negotiated the question as to whether if they were prepared to take the holding charges and the interest, I would certainly be interested in the deal.

Q. That is to say the holding charges and the interest after the point of time at which a contract was made with them, is that right? A. Yes. That must have been. I cannot give you the exact date, but that must have been somewhere about the end of November, about 25th November, and then they came at me when they rejected what I had put to them, with a possibility of buying the land outright for \$500,000. I was worried about this, and made certain arrangements with an architect to have a look at the scheme, because I was worried I had put in a gross over-
development. 10

Q. Why were you worried on that score? A. Because I felt we had to get the matter resolved and passed by the council. I thought their own architects might well be tempted to put in an over-development which could jeopardise my chances of it being passed by the council. Do you want me to proceed?

Q. Did negotiations founder some time in late March 1976? A. Yes, they did.

Q. Did they founder over the question whether a height covenant would be given by the Perpetual Trustee Co., the owner of No. 10, your mother's home? A. Yes, that was the thing they brought up right at the end, and I was anxious not to damage my equity interest.

Q. Ultimately after much work and investigation and many representations, was a development application lodged by you in July 1976? A. Yes. 20

Q. The date being 28th July 1976, and was that development application ultimately approved? A. Yes.

Q. Was that approved on 14th December 1976? in accordance with this instrument? (shown) A. Yes.

(Approval of development application tendered and marked Ex. F)

Q. On 8th August, consequential upon obtaining that development approval, did you make a contract with Berbella Pty. Ltd.? to sell 8 Wentworth Street for \$450,000? A. Yes.

Q. As a matter of history, has the liability for interest and holding charges continued up to the present time? A. No, it ceased in September 1977. 30

(Contract with Berbella Pty. Ltd. tendered and marked Ex. G)

Q. Do you recall I said when I opened the case that you were receiving during the years 1974 and 1975 rent from occupants of the house built on No. 8? A. Yes.

Q. Was that through the whole of 1974 and 1975? A. Yes.

Q. What was the rent receivable by you in each of those years on an annual basis? A. I cannot answer exactly, because I haven't got the records before me, but I would think the nett would have been somewhere about \$6,000.

Q. That is nett after what? A. Nett after various repairs and agents' commission was taken out, and maintenance.

Q. Did you pay such rates as you paid out of the nett rent? A. I did. 40

Q. You were liable to pay land tax, is that right? A. Yes.

Q. And water rates? A. Yes.

Q. Did you incur costs in relation to the Equity proceedings which you launched to have the resolution of 10th June 1974 declared invalid liability to your solicitors, and through your solicitors to your counsel, in connection with work done in that litigation? A. Yes, I was liable for those charges.

CROSS-EXAMINATION

MR. WILCOX: Q. You told us you purchased this land in December 1973. At that time you knew the land was about to be governed by a new planning scheme ordinance, the Woollahra Scheme, did you not? A. I paid the deposit after the plan was gazetted.

Q. Within a few days of the date that the ordinance was prescribed? A. Yes.

Q. You thought you detected the opportunity of making a profit because of the development potential the land had as land zoned 2C under the Woollahra Ordinance, is that right? A. That is correct.

Q. And your purpose was to buy the land, obtain a development consent for the maximum possible development permissible under the ordinance and sell the land to a developer profitably? A. I would object to the words "Maximum permissible". 10

Q. When you referred to the highest and best use, did you have in mind development to the maximum scale permitted under the ordinance. A. Unfortunately development of the land was out of my hands once I signed consent to the development application.

Q. It was a matter of what you had in mind when you talked about highest and best use that concerned me. What did you mean? A. Sufficient development on the land of a high rise nature, to realise the maximum possible economic return.

Q. In other words, to develop to the maximum permissible under the ordinance? A. Yes.

Q. And thereby maximise the profit which you could earn? A. Yes.

Q. You bought the land unconditionally in the sense that the purchase by you was not made dependent upon any developmental approval being given, is that right? A. That is right. 20

Q. You took the risk as to what development you would be able to achieve and how long it would take you? A. Yes.

Q. You were fortunate in being able to sign up Blackburn Development very quickly, within a couple of months, to a contract which, if it had been settled, would have returned you a handsome profit? A. That is correct.

Q. And that was frustrated by the fact that the Local Government Appeals Tribunal regarded the proposal of Blackburn Developments as being excessive? A. Yes. May I qualify that?

Q. Yes. A. The excessive nature of the development was related to the two properties 10 and 12. If you look at it, the development on No. 8 complied in every respect to the requirements that later the Tribunal laid down. 30

Q. I do not want to canvass with you the wisdom or otherwise of the Tribunal's decision, but the fact is that the Tribunal dismissed the appeal brought to it by Blackburn Developments, did it not? A. That is correct.

Q. And refused consent to the development which Blackburn had sought, with your consent, by its application early in 1973? A. That is correct.

Q. Consequent upon that refusal, Blackburn rescinded the contract, did it not? A. That is correct.

Q. You took advice in relation to your legal position concerning Blackburn at that time, did you not? A. No, I did not.

Q. You did not seek any legal advice as to whether Blackburn was entitled to rescind. A. I did at a later date. 40

Q. You did not take any proceedings challenging the decision of Blackburn, did you? A. I did at a subsequent date.

Q. With what result? A. It was struck out.

Q. You failed in the proceedings? A. I failed in the proceedings.

Q. You took proceedings, but they failed? Is that right? A. As far as I can remember, it was regarding the right to rescind.

MR. HUGHES: The right to forfeit the deposit.

WITNESS: Yes, the right to forfeit the deposit.

MR. WILCOX: Q. That left you in May 1974 in this position, didn't it, that Blackburn developments application had been refused, and you no longer had a potential developer to develop this site?

A. I had not at that stage had time to consider whether I had a potential developer or not.

Q. You had no arrangements with any alternative developer, did you? 10

A. I had no arrangements with any alternative developer, no.

Q. You were not in negotiation with any alternative developer, were you? A. I think you will see in my notes I was discussing the question with Parkes Developments. In my diaries.

Q. When? A. In March 1974, after the tribunal.

Q. The tribunal's decision was early May, was it not? A. Yes. If you go through my notes you have subpoenaed, you will see I was there having discussion with Parkes Developments.

Q. Did you mean to say March or was that a slip of the tongue for May? A. I think it was March.

Q. It was between the actual hearing at the tribunal and the date the tribunal gave its decision, was it? A. That is right.

Q. You had some tentative discussions with Parkes Developments, did you? A. Yes. 20

Q. There was no follow-up from them, was there? A. No.

Q. The fact was that mid-1974 was a very unfortunate time in trying to find a developer to try and take over a large project such as this, is that right? A. You would have to ask an economic expert.

Q. You follow the daily newspapers, don't you? A. Yes.

Q. And you were aware in the very period during which the Board was considering its decision, Home Units had announced substantial losses and there was a rescue operation by two of its major shareholders, one of them being I.A.C.? A. I don't recall that.

Q. You do not recall Home Units collapsed, and I.A.C. coming in and taking over the administration? A. My recollection is that Home Units went to the wall in July 1974. 30

Q. Accepting your correction as to the date, the fact was that at that time Home Units according to public announcement, had made massive losses, and there was an operation to try and rescue the company, isn't that right? A. I was not aware at the date you refer to.

Q. I am accepting your date. In July. A. Yes, definitely.

Q. I mean the company called Home Units Australia Pty. Ltd., which was parent of Blackburn Developments No. 25 Pty. Ltd., the company which had contracted to purchase the land from you. A. Yes, they went to the wall in July 1975.

Q. That is the context in which you understood my question, is it not? A. Yes.

Q. About the same time, Mainline went into liquidation, did it not? A. Somewhere a little later, I think. 40

Q. A Receiver-Manager was appointed in August 1974, is that so? A. Yes. A little later.

HIS HONOUR: I understood the last answer was July 1975.

WITNESS: 1974.

Q. MR. WILCOX: Q. And the Cambridge Corporation, in September 1974?

A. Yes.

Q. Would you agree with me that the outlook for anybody such as yourself who was trying to interest a major developer in a big project in the latter part of 1974 was a most inauspicious one? A. Could I qualify my reply?

Q. Yes. A. I would agree with you it was an inauspicious time but it was no use undergoing an exercise to attempt to get anybody to look at the site whilst I had no development application or any chance of a development application.

Q. But you do agree it was a most inauspicious time to find a developer who would take over a project of this magnitude, do you not? The project of developing your land? A. Again I qualify it, if I may. It was an inauspicious time, but it was not worth even looking at whilst I had no possibility of anything other than a three storey or a private development application under the ordinance. 10

Q. Correct me if I am wrong, but is it the fact that you did not talk to any developer about development after mid-1974 until your discussions with Mirvac in 1975? A. No, I would not accept that. I would not accept that for the reason there were discussions going on all the time, but the upshot of the discussion was "Look, you have a beautiful piece of land and have the most dreadful restrictions placed on you by the council, and nobody is interested in a site like that for a three storey development. Clear the matter up before the law, and maybe we will be interested." That was the subject of the discussion the whole time.

Q. With particular developers? A. With particular people. Particular real estate agents. They all said the same. 20

Q. Did you actually have discussions with any developer during the period from mid-1974 to November 1975 when you talked to Mirvac? A. There was a man in particular who was discussing it. Remember there were very few viable developers at that stage. I think you could have counted them on the fingers of your hand, and only one hand, at that.

Q. That was a problem? A. There was an estate agent who discussed it during this period with these people. They all said the same. "We would not consider it while it is subject to that sort of restriction".

Q. Did you have any discussion with any developer as distinct from a real estate agent in the period from July 1974 until November 1975. A. The real estate agents that were acting on my behalf, I did not personally have any discussions, no. 30

Q. Can you nominate any developer who was approached with a proposition during that period?

A. As far as I can recall and I am pretty certain of my recollection at this stage, as far as I can recall he canvassed all the ones which were viable.

Q. Which, as you say, could have been numbered on the fingers of one hand at that time?

A. Exactly.

Q. You say that your first reaction after receiving notification of the two resolutions of 10th June was to ask Mr. Phillips to look at the viability of the three storey development? A. That is correct.

Q. And that was done quite quickly was it not? A. I think it was.

Q. Indeed, the sketches were drawn and examined by you during the month of June, 1974? 40

A. Yes.

Q. And you immediately determined that they were not acceptable to you? A. Correct.

Q. The reason for that was because you could not see their sufficient development to provide you with the return on the land which you sought? A. There were other reasons.

Q. Firstly was that a reason? A. Yes.

Q. What was the other? A. The others were, and these were town planning reasons, Mr. Phillips and Mr. Ingham in the tribunal consulted the town planning, and said straight out in the tribunal that a three storey building would not be possible under the ordinance and under the building code. There was considerable doubt in the mind of Mr. Phillips at the time as to whether the council would be able to pass a three storey building. There was considerable doubt in his mind and certainly with the dicta of the tribunal laid down at the hearing there was considerable resistance in the tribunal to the thought of the three storey building on such a brilliant site. Those were the other reasons and they were very cogent.

Q. What you are saying is you preferred the design of a higher building? A. No, I am giving very cogent reasons why I would not embark upon, economically, development of a three storey building. 10

Q. As far as you were concerned when you bought this land if you had a development consent you would get it through the council? A. You know from the word "go" by expert evidence that was previously given.

Q. You are not going so far as to say it would be impossible to design a three storey building which would comply? A. I am because that was the statement of Mr. Ingham the consultant town planner, during the hearing.

Q. All he said was to express a view on the desirability of three storey development as against something higher? A. I am not an expert but I am not agreeing that he said that categorically.

Q. In any event you determined that you were not interested in the three storey development after seeing Mr. Phillips' sketches? A. Not for the reason you say alone. 20

Q. In any event you decided after seeing the sketches not to proceed? A. I did.

Q. And that was before the end of June, 1974? A. Yes, approximately that date.

Q. And you knew that the tribunal had in a previous case expressed the view that it had the power to set aside an appeal on the height restriction imposed by council under s.309(4) (Objected to; allowed). A. I will answer your question if you will allow me to answer it in this manner, that almost immediately, in late June, I had my first conference with Mr. Shand and Mr. Tamberlin and I continued to have conferences throughout the July, August period. There was considerable doubt in their minds as to the proposition you have just put to me. Considerable doubt which to their minds vitiated against any possibility of undergoing the exercise of putting into the tribunal a high rise development. 30

Q. The answer to my question is that you were aware of the view taken by the tribunal on that matter; is that right? A. I would prefer the view of my barristers.

HIS HONOUR: Q. Did you know that rightly or wrongly the appeal tribunal had expressed the opinion that it could itself take steps to in effect vitiate the power exercised by the council in relation to height? A. It had been canvassed by my barristers. Yes.

MR. WILCOX: Q. You knew the tribunal claimed the power whether correct or otherwise in so claiming? A. I will answer that by saying that my advice was, the advice of my legal advisers that that was not sustainable.

Q. The answer to my question is Yes, is it not? 40

HIS HONOUR: Q. It was answered. You did know rightly or wrongly that is what it claimed to be able to do. A. Yes.

MR. WILCOX: As I understand it you then discussed it with your barristers and they were in some doubt as to what the position was? A. I did not say it that way. I said I received advice as to the doubtfulness of the position and it was such doubt that it would be very unwise at that stage to put in a development.

Q. Notwithstanding that you did of course lodge a development application with the council on 25th November, 1974, did you not? A. I did.

Q. And that was before there had been any resolution of the doubt to which you have referred. Is that right? A. That is correct.

Q. And that development sought to have a building which went to the maximum 235.5 feet standard datum allowable under the ordinance? A. Yes.

Q. And clearly did not comply with the restriction which the council had purported to impose upon you on 10th June, 1974. A. That is correct.

Q. Before that development application was submitted Mr. Phillips had prepared for your consideration and instructions the number of sketches setting out alternative designs, had he not? A. He had. 10

Q. And that work had taken place over two or three months before the date when the development application was submitted? A. That is correct.

Q. So you had made up your mind that you wanted to proceed with a development which gave you the maximum height permissible under the ordinance and you had instructed Mr. Phillips to prepare sketches? A. Yes.

Q. And naturally it took some time for him to prepare sketches, show them to you and the like and then about two to three months after your instruction to him in went the development application in November, is that right? A. Yes.

Q. You are aware and you were aware then that it was necessary for the council to obtain the concurrence of the Planning and Environment Commission if it were to grant a consent to any development on your land? A. Yes. 20

Q. That flows from the terms of the Woollahra Development Scheme itself? A. Yes.

Q. You know that the council in fact referred your application to the planning and environment commission within a few weeks of its receipt by the council? A. That is correct.

Q. In fact the development application was 26th November, 1974? A. Yes.

Q. The development application which the council gave the number 260/74 was dated 26th November, 1974 and received on that day. Is that right? A. Yes.

Q. And that proposed a development on No. 8 Wentworth Street alone for a building the estimated cost of which was \$1.2m. A. That is correct. 30

Q. The development was then referred by the council to the Planning and Environment Commission then called the State Planning Authority, on 2nd January, 1975? A. That is correct.

Q. You are aware are you not that the council between 11th March 1975 and 4th July, 1975, sent a number of follow-up letters to the Commission urging a prompt consideration of the matter.

A. Until you showed me those documents I had no idea.

Q. I show you the correspondence from the council's file. The first letter is 11th March, 1975 referring to your development application and asking for the commission to expedite consideration of the matter so that it could be dealt with by council? A. Yes.

Q. Further letter of 7th April, 1975 pointing out that there had been no reply and again asking for expedition? A. Yes. 40

Q. A further letter of 16th April, 1975 again asking for expedition? A. Yes.

Q. The next letter is from the Commission dated 21st April, 1975 relating to expedition? A. Yes.

Q. A further letter from the council on 14th May, 1975 referring to the Commission's letter of 21st April and again requesting expedition. A. Yes.

Q. A letter from the Commission on 21st May acknowledging and stating "as requested action on the matter is being expedited"? A. Yes.

Q. On 25th June, 1975, another letter from the council pointing out the content of the earlier letter and requesting a reply to the council by 3rd July, so that decision could be taken by council before the date of the hearing, referring to the then pending equity proceedings? A. Yes.

Q. Then on 4th July, 1975 a letter from the Commission setting out its attitude. Do you see that? A. Yes.

Q. You will see what the Commission says in par. 2, is that pursuant to cl.59 the Commission concurs in the development subject to it meeting requirements and in par. 3 the commission draws attention to its prime responsibility in relation to regional aspects and par. 4 sets out some comments, one of which is that there should be a suitable reduction in scale of the building to help reduce any undesirable impact of the building on the immediate environment whilst allowing the landscape to be improved? A. Yes. 10

Q. So in essence they are saying for formal appearance you have concurrence but here are some comments? A. Yes.

Q. And then subsequently the council dealt with the matter and sent out a letter dated 15th July setting out its decision on the application including its reasons for refusal? A. 24 hours to consider a development of that magnitude does not impress me.

Q. The 4th July is the date of the Commission's letter. The meeting was on 14th July and the town clerk had a letter despatched to you the following day in which he set out the council's reasons for refusal? A. Yes.

Q. They included no less than 12 grounds? A. Yes. 20

Q. Only one of which, No. 6, related to see the council's resolution of 10th June, 1974? A. Yes.

Q. You took advice, did you not, on the prospects of appealing against the decision which was set out in that letter? A. No, I did not take any advice about that at all because quite frankly that development application was put in rapidly and put in quickly on the advice of my counsel.

Q. You mean by that that it was not a development with which your were happy? A. It could have been altered in certain respects.

Q. You were not happy to proceed with such development is that what you were saying? A. What I am really saying is that it was a development application which was put in at the time when we lodged the equity case and it was a development application to which because of various contingencies did not have a lot of time spent on it. 30

Q. The relevance of the fact that it was a hurried development application is simply on more mature reflection you realised that it was not a development that you would want to have built? A. I certainly agree it could have been modified.

Q. And for that reason you did not appeal against the council's refusal? A. No, I won't accept that. We were going to equity within ten days.

Q. You never at any stage, either before or after the decision of Wootton, J., appealed against the refusal of the council as notified in the letter of 15th July, 1975. A. I think you will find that the council treated the next development application as amended application. In other words, what I am saying is that that development application that was ultimately passed in December, 1976, was treated by the council as an amended development application. 40

HIS HONOUR: Q. Was there any appeal lodged against the decision conveyed on 15th July? A. No there was not.

MR. WILCOX: Q. You still retained Mr. Phillips as your consultant architect at that time? A. At that time, yes.

Q. After the decision by Wootton, J., you had a meeting on 9th October, 1975 with the Mayor, Alderman Perry and Mr. Regnis, I am sorry, Mr. Ford, the town clerk? A. Yes.

Q. That was a general discussion of the nature of the development which might be put on the site? A. Yes.

Q. When you said in response to my learned friend that the representatives of the council indicated that they did not consider themselves bound by the Equity decision, are you saying that they indicated that they were not yet sure whether the council was going to appeal against the decision? A. I have no idea but I suppose that would have been what they indicated. I got the distinct impression, and I think it was borne out by subsequent events, that they were not to be bound.

Q. Can you tell us who it was who said this? A. The Town Clerk.

Q. What precisely did Mr. Ford say (question withdrawn). (Luncheon adjournment).

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UPON RESUMPTION

MR. WILCOX: I was asking you about the meeting of 9th October 1975. The meeting terminated on the basis that you would have Mr. Phillips discuss with the council's officers thereasons for refusal of application, and then consider what course you would take, is that right? A. Yes, partially right.

Q. It was agreed, was it not, that there would be a subsequent discussion between Mr. Phillips and the relevant officers of the council in respect of the recently refused application? A. Yes.

Q. And the council's reasons for refusal? A. Yes.

Q. And you indicated to the Mayor and other people present, after you had Mr. Phillips' report and advice on those conversations you would determine whether or not you would submit an amended plan or whether you would appeal to the local government appeals tribunal? A. No, whether I would submit an amended plan. I did not discuss any appeal. I did not talk about appeals at all.

20

Q. The question was whether you would submit an amended plan in the light of information you got back from Mr. Phillips? A. That is correct.

Q. In due course Mr. Phillips reported back to you that he had had conversation with the council's officer? A. Yes.

Q. Did you subsequently ask Mr. Phillips to prepare a further plan? A. No. Mr. Phillips indicated that at that stage, and remember that this was October, that the discussions with the council had been unsatisfactory and that he could not really resolve the matter with council and I think it was left there. I cannot completely recall.

30

Q. In any event you did not use Mr. Phillips services further in regard to this matter? A. That is correct.

Q. And instead of that you obtained some advice from a different firm of architects and planners known as Byrnes, Smith and Associates. A. Yes.

Q. And there were some discussions early the following year April 1976, which involved Mr.

Smith from that firm? A. Yes. Mr. Smith and I had considerable discussions and also Mr. Byrnes.

Q. As a result of these discussions a new development application was lodged on 28th July 1976? A. That is correct.

Q. And that development application 107/76? A. That is correct.

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Q. The proposal that was there made was that a seven storey building be limited to No. 8? A. Yes.

Q. In accordance with the normal procedure that was referred to the Planning and Environment Commission? A. Yes.

Q. And on this occasion the commission advised on 27th October, 1976, that it concurred. A. Yes.

Q. In the meantime you had lodged an appeal with the Local Government Appeal Tribunal against the neglect or delay of the council? A. I did.

- Q. The council on 1st November, 1976 resolved to grant a consent? A. Yes.
- Q. But there was a technical legal problem in the sense that the appeal having been lodged the council felt that it was necessary for the appeal to be actually formally withdrawn in order that it could give a valid consent? A. That is as I understand it.
- Q. So in fact it was December 1976 before the formal consent was issued to you? A. That is correct.
- Q. You would agree that the plans that were the subject of that application were a very considerable improvement on the previous plans prepared by Mr. Phillips? As you indicated before lunch, in something of a hurry? A. That would be a reasonable statement.
- Q. The building was one storey shorter than the earlier proposal? A. Yes. 10
- Q. The plans were much more detailed? A. Yes.
- Q. And it showed a building, the facade of which was broken up by use of various projections to allow shadow and remove the monolithic appearance of the wall? A. That would be correct.
- Q. And that would be due to the fact much more time was available and it was a better design than earlier? A. Yes.
- Q. You yourself had reservations about it? A. I did.
- Q. So it is true to say, is it not, that the first application complying with the parameters laid down by the tribunal which in your opinion was an acceptable design was the application made in 1976 on the design of Messrs. Byrnes, and Smith? A. You have said it round the wrong way, I think. 20
- Q. The first application that complied with the tribunals parameters and which in your own mind was acceptable in terms of design was the 1976 application designed by Byrnes and Smith? A. I am sorry, I am confused.
- Q. Following the decision of the tribunal there was an application made in 1974 on the plans prepared by Mr. Phillips? A. Yes.
- Q. The next plans which were prepared were those done by Messrs. Byrnes and Smith? A. Yes.
- Q. In 1976? A. Yes.
- Q. They were the only two submissions of plans to council which in your judgment were within the parameters laid down by the tribunal in its award? A. Yes.
- Q. The first of them was a design which did not find acceptance in your eyes? A. That would be correct. 30
- Q. So that the first application within the parameters which satisfied yourself was the 1976 application? A. That would be correct. The previous one was tainted with the odour of the 308-9 resolution.
- Q. Forget the tainting, in terms of design it did not satisfy you. (Objected to; allowed).
- Q. I think you have already agreed with me that the first application which was acceptable in your eyes in terms of design was the 1976 application? A. Yes.
- Q. And that in fact was approved by the council? A. Yes.
- Q. And approved with commendable speed after the attitude of the Planning and Environment Commission was notified to the council? A. Certainly with speed greater than the previous one. 40
- Q. It was approved by council at the very next meeting after the receipt of the Commission's letter, wasn't it? A. Yes.
- Q. In fact you did not immediately implement that consent granted at the end of 1976, did you? A. No.
- Q. You did not at that stage have a developer to take over the project? A. I auctioned it in February 1977.

Q. Was it sold at the auction? A. No. There was a bid at the auction and immediately Mirvac and Mr. Malouf, who subsequently bought the property, negotiated afterwards.

Q. At the end of 1976 you did not have any particular arrangements with any developer? A. No, because I was going to put it up after Christmas.

Q. You in fact put it up in February and it was passed in and you entered into negotiations with Mirvac on the one hand and Malouf on the other? A. Yes.

Q. The negotiations with Malouf finally resulted in the contract with the company Berbella signed on 8th August, 1977? A. That would be correct.

Q. In the meantime you were aware that a consent granted under the ordinance lapses unless the work is substantially commenced within 12 months? A. Yes.

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Q. In order to avoid that occurring, you applied to the council to extend the consent for a further 12 months from December 1977? A. I think that was Mr. Malouf.

Q. You were aware application was lodged and granted by the council on 12th September, 1977? A. Yes.

Q. And that is still current? A. The building is about to commence.

Q. There has been some further modification in the plans, approved by council? A. I am aware of it.

Q. In effect the project has been taken over by Burbella Pty. Ltd., and the present matters are out of your hands? A. That would be correct.

Q. Would you look at this set of plans and tell me whether you recognise them as being the plans the subject of the development application of November 1974? A. Yes they are.

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Q. You will see on one of the sheets a calculation which shows a plot ratio. There is a typed sheet showing 1.07 to 1. A. That is correct.

Q. That accords with your understanding of the plot ratio Mr. Phillips was designing too? A. That is correct.

(Plans m.f.i. 1).

Q. Are these plans I show you prepared by Byrnes Smith and Associates? A. They are.

Q. And they were the subject of the 1976 application which was in fact approved? A. That is correct.

Q. I am not too sure that the calculation appears here but do you remember that the plot ratio which these plans achieved was 0.86 to 1? A. Yes.

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Q. So it is reduction by about 20% on the Phillips' plans? A. Yes.

(Plans, Byrnes Smith and Associates, m.f.i.2).

(Witness retired).

(Order of Wootten, J., tendered and without objection marked Ex. H.).

MR. WILCOX: We would be content to have your Honour follow Wootten, J's resolution of conflicts insofar as they arise. I did not understand it to be credit but as to accuracy of recollection in those proceedings. His Honour did say there were particular aspects that he considered were not fully and accurately recalled. I do not think he suggested anybody was intending not to tell the truth.

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(Affidavit of Charles Clarence Phillips, 25th November, 1974. and transcript of his oral evidence, pp.62, item 71 in the Equity proceedings tendered and marked Ex. J).

HIS HONOUR: It is noted that it is agreed by counsel that I should deal with his credibility on the same basis as Wootten, J.

(Affidavit of George Wellings-Smith 25th February, 1975 together with transcript of pp.71 to 81 of the Equity proceedings tendered and marked Ex. K).

HIS HONOUR: I note the parties agree I should approach his evidence on the same basis as that of Mr. Phillips and I should reject that portion of a letter which is an annexure to the affidavit dealing with value.

(Report to Town Planning Committee from Council's principal planning officer 18th September, 1973 tendered, objected to, admitted subject to objection and marked Ex. L).

MR. WILCOX: Perhaps it could be noted I object generally on the grounds of relevance to the various documents put before the council prior to the date of the resolution.

MR. HUGHES: I seek to support the tenders as documents in the nature of reports from council officers as indicating the deliberate and positive nature of the act complained of.

(Report 27th May, 1974, from Mr. Regnes, Deputy Town Clerk, tendered, admitted subject to objection and marked Ex. M). 10

(Report 27th May, 1974, from Miss Harvey-Sutton tendered, admitted subject to objection and marked Ex. N).

(Report 10th June, 1974 from Miss Harvey-Sutton, tendered to objection and marked Ex. O).

(Report to Town planning Committee by Mr. Regnes, 10th June, 1974, tendered, admitted subject to objection and marked Ex. P).

(Letter and award of Local Government Appeals Tribunal, 6th May, 1974 tendered, admitted subject to objection and marked Ex. Q).

(Extract from Minutes of Committee of council 13th October, 1975 tendered, objected to, tender withdrawn). 20

(Town Planning Committee Minute 19th December, 1973 indicating application on 15th October, 1973, by council to have planning scheme suspended, together with letter S.P.A. tendered; admitted subject to objection and marked Exh. R).

(Application by Mr. Phillips on behalf of Dr. Dunlop 26th November, 1974, correspondence between counsel and S.P.A. and plans m.f.i. 1 tendered and marked Ex. S).

(Document setting out the amount of land tax liability agreed between the parties to have been incurred by the plaintiff for period 10th June, 1974 to 24th October, 1975, tendered admitted subject to objection and marked Ex. T).

MR. HUGHES: It is agreed that the amount of the defendants liability for water rates on the subject property during the period 10th June, 1974 to 24th October, 1975 was \$400. It is also agreed that costs in respect of Town House plans prepared by Mr. Phillips in June/July, 1974 are \$750 and that is the only item in respect of Mr. Phillips. 30

(Case for the plaintiff closed).

CASE FOR THE DEFENDANT

MR. WILCOX: I do not propose to call any oral evidence. The only evidence I propose to give is in respect of documents being the 1976 application.

(Development application 27th July, 1976 together with plan previously m.f.i. 2, some supporting material from Wellings-Smith and Byrnes, letter from Planning and Environment Commission 20th October, 1976, report prepared for the Building and Health Committee, 25th October, 1976 and council's resolution of 1st November, 1976 tendered and marked Exhibit 1). 40
(Judgment of Wootten, J. in Equity proceedings tendered and marked Exhibit 2).

(Case for the defendant closed).

(No case in reply).

(Further hearing adjourned until 10 a.m. on Thursday, 6th April, 1978.)

THURSDAY, 6TH APRIL, 1978.

CJM:GL:4

DUNLOP v. THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

(PART HEARD)

(Photostat copy of resolutions of the defendant council dated 10th June, 1974 tendered and marked Ex. U)

MR. HUGHES: I indicate the areas in which agreement has been reached between the parties as to amounts, but not as to liability for any of these amounts. I will give your Honour a summary. It appears from a document tendered the other day the amount for the full period, that is from 10th June 1974 to 25th October 1975, is \$112,431. Costs and disbursements of the proceedings instituted by the plaintiff in the Equity Division to have the resolution set aside are agreed at \$10,512. That is solicitor's costs and disbursements, including counsels' fees.

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HIS HONOUR: Wasn't an order for costs made?

MR. HUGHES: Yes. I am going to add something in respect of that. Would your Honour note and undertake that I give on behalf of the plaintiff that if the plaintiff recovers judgment in these proceedings, and that judgment includes the amount mentioned in respect of costs, the plaintiff will not seek to exercise any right to tax the costs against the defendant of those equity proceedings.

HIS HONOUR: They have not yet been taxed?

MR. HUGHES: They have not yet been taxed. In other words, if we recover here we agree or undertake not to tax them. The amount agreed as a matter of computation in respect of council rates is \$671. A larger sum was mentioned earlier, but it was the subject of a credit, and that credit is allowed for, and the final figure is \$671.

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The amount agreed with respect to computation of the plaintiff's land tax liability is \$14,635. for water rates the amount agreed as a computation \$400. A figure of \$750 is agreed as the amount of the plaintiff's liability to Mr. Phillips, the architect, for preparing the sketch plans of the town-house idea. That is the set of plans that explored the development of the land within the parameters or confines of the council's resolutions.

That gives one a total in round figures of \$139,600, from which there will have to be deducted, as appears from the evidence given by the plaintiff the other day, the sum of \$6,000 or a little more.

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HIS HONOUR: The rent?

MR. HUGHES: \$6,000 per year. It is 16 months. About \$7,500. If the plaintiff is entitled to recover, we would claim, as we do, interest on damages from 25th October 1975 at what appears to be the appropriate rate these days, 10%. That is under s.94 of the Act.

HIS HONOUR: That is the whole of the agreement, is it?

MR. HUGHES: Yes.

HIS HONOUR: And there is no other evidence?

MR. HUGHES: No.

MR. WILCOCK: No. I hand up a copy of the typewritten reasons for judgment of Wootten, J.

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HIS HONOUR: They have already been marked Ex. 2.

(Counsel addressed)

FRIDAY, 7TH APRIL, 1978.

OM.AB.4

DUNLOP v. THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

(PART HEARD)

(Proposed amendment to statement of claim handed up. Counsel addressed.)

HIS HONOUR: I will note that Mr. Hughes, for what he terms "more abundant caution" has sought leave to add par. 15A to the Statement of Claim. Mr. Wilcox objects only on the basis it does not disclose a cause of action. I allow the amendment.

I order the plaintiff to pay such costs as are referable to the amendment, and if the plaintiff should succeed only on that claim, I will have to hear counsel on what order for costs I should make.

I take it the statement of defence traverses the relevant allegation, Mr. Wilcox?

MR. WILCOX: Yes, although it may be desirable that I bring in a defence to the amended paragraph.

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HIS HONOUR: Yes. It will be noted that the defendant should bring in a defence to the amended paragraph. That can be handed to my associate within the next few days.

MR. WILCOX: There is an incorrect section reference in par. 6. It refers to s.309(4). The proper section should be 308.

HIS HONOUR: I have changed that.

(Counsel addressed.)

(Decision reserved.)

Contract For Sale of Land

Description of Property.

ALL THAT piece or parcel of land in the Municipality of Woollahra Parish of Alexandria County of Cumberland being the whole of the land in Certificate of Title Volume 3814 Folio 117 TOGETHER WITH the premises erected thereon known as 8 Wentworth Street, Point Piper.

~~AUCTION CONDITIONS Upon a sale by auction.~~

- (a) the highest bidder shall be the Purchaser. In case of any dispute the property shall be put up again at any former bidding and no bidding shall be retracted.
- (b) the sale is subject to a reserve price and the right to bid is reserved on behalf of the Vendor.
- (c) upon the fall of the hammer the Purchaser shall sign the following agreement the ~~conditions of which, with these conditions, are the conditions of the sale by auction.~~

10

Vendor's full name, address and occupation.

AGREEMENT made the 19th day of December, 1972

BETWEEN WILLIAM BAXTER ENEVER of Point Piper, Company Director (herein called the Vendor) of the one part AND ROGER JOHN MASSIE DUNLOP of 120 Ocean Street, Edgecliff, Medical Practitioner (herein called the Purchaser) of the other part

Purchaser's full name, address and occupation.

WHEREBY the Vendor agrees to sell and the Purchaser agrees to purchase, if more than one as

*Delete words not applicable.

~~*JOINT TENANTS/*TENANTS IN COMMON IN THE FOLLOWING SHARES.~~

with joint and several liability under this agreement, the property above described (herein referred to as "the property") for the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000) upon and subject to the following terms and conditions:—

20

1.—The Purchaser shall upon the signing of this agreement pay as a deposit to the Vendor's solicitors herein named as stakeholder the sum of Fifty thousand dollars (\$50,000.00) which shall vest in the Vendor upon and by virtue of completion and which shall be accounted for to the Vendor upon receipt of an order from the Purchaser or his Solicitor authorising such payment. The deposit may be paid by cheque but if the cheque is not honoured on presentation the Purchaser shall immediately and without notice be in default under this agreement.

The balance of the purchase price shall be paid as stipulated in the First Schedule hereto. Any moneys payable to the Vendor hereunder by the Purchaser or the Agent shall be paid to the Vendor's Solicitor or as he may direct in writing.

*Delete words not applicable.

2.—The title to the land is under

30

*THE REAL PROPERTY ACT, 1900 (not being Qualified Title or Strata Title)

~~*STRATA TITLE (Conveyancing Strata Titles) Act, 1961—~~

~~*OLD SYSTEM~~

~~*QUALIFIED TITLE (Part IVA of the Real Property Act and Old System)~~

~~*CROWN LANDS (CONSOLIDATION) ACT, 1913~~

~~*OTHER ACT RELATING TO CROWN LANDS, namely—~~

3.—After the date of this agreement and within a reasonable time after written request by the Purchaser or prior thereto if the Vendor so desires the Vendor shall furnish to the Purchaser a written statement of his title which shall comprise:—

(a) FOR LAND UNDER THE REAL PROPERTY ACT (including Strata Title): particulars of title and the form of any restrictive covenant easement or other interest to be created by the transfer sufficient to enable the Purchaser to prepare the transfer. The Purchaser shall not be entitled to an abstract of any document affecting the title. Any instrument in respect of which a caveat is entered on the register shall, if in the possession of the Vendor or of any mortgagee of the property, be produced to the Purchaser free of charge;

(b) ~~FOR LAND UNDER OLD SYSTEM TITLE: a proper abstract of his title together with the form of any restrictive covenant easement or other interest to be created by the conveyance. For the purpose of this clause a proper abstract of the Vendor's title may as to relevant documents to be abstracted comprise or include photographic copies (being themselves legible) of such documents PROVIDED THAT where the abstract includes any photographic copy of a document the Vendor shall furnish as part of his abstract and in addition to the foregoing requirements a chronological index of all the facts events and documents which comprise his title stating as regards the documents to be so indexed brief particulars of:—~~

~~(i) the date of the document: (ii) its general nature: (iii) the parties to the document and (iv) its registration~~

The Vendor shall not be called upon to abstract the Crown Grant unless it is the only good root of title or to abstract or furnish a covenant to produce any deeds or documents in support of the title or in varification of the abstract which are not in the possession of the Vendor or of any mortgagee of the property. No objection shall be made to the execution of any document under a power of attorney authorising its execution;

(c) FOR LAND UNDER QUALIFIED TITLE: paragraph (a) of this clause shall apply to that part of the title evidenced by instruments registered under the Real Property Act and paragraph (b) shall apply to that part of the title not so evidenced:

(d) FOR LAND UNDER ANY ACT RELATING TO CROWN LANDS: particulars of title sufficient to enable the Purchaser to prepare his transfer and an abstract of title as provided in paragraph (b) of this clause in respect of the relevant facts and the documents of title which are not in a form prescribed by or pursuant to the Act under which the land is held and the form of any restrictive covenant easement or other interest to be created by the transfer or conveyance:

(e) FOR LAND UNDER MORE THAN ONE TITLE: a statement of title shall not be complete ~~until furnished in respect of each title to the property—~~

4.—The Purchaser shall be deemed to have waived any objection or requisition which he has not made and delivered to the Vendor within twenty-one days after the delivery of the Vendor's statement of title. Within twenty-eight days from the delivery of the Vendor's statement of title the Purchaser shall at his own expense tender to the Vendor for execution the appropriate assurance of the property provided however that if the assurance requires the consent of the Minister for Lands or other prescribed authority the time for tender thereof under this clause shall be the twenty-eight day period aforesaid or fourteen days from the notification to the Purchaser of the consent having been granted, whichever is the later.

5.—No error or misdescription of the property shall annul the sale but compensation if demanded in writing before completion but not otherwise shall be made or given as the case may require, the amount to be settled in case of a difference by an arbitrator appointed by the

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parties by mutual agreement or failing agreement nominated by the President for the time being of The Law Society of New South Wales. Clause 15 hereof shall not apply to any such claim for compensation.

^{†insert}
^{***completion**}
^{"this}
^{agreement"}
^{or other}
^{agreed date.} 6.—The Vendor shall be entitled to the rents and profits and shall pay or bear all rates taxes and outgoings up to and including the date of [†] completion from which date the Purchaser shall be entitled to and shall pay or bear the same respectively and any necessary apportionment thereof shall be made and adjusted on completion. Where the Vendor has paid or is liable to pay land tax on the property for the year current at the date of apportionment whether to the Commissioner of Land Tax or to a predecessor in title the amount to be apportioned as land tax under this clause shall be the sum which would have been payable by the Vendor for land tax on the property as used by him if the property had been owned and was the only land owned by him at midnight on 31st October than last past and the Vendor were natural person. 10

7.—No objection or requisition or claim for compensation shall be made by the Purchaser in respect of any of the following matters:

- (a) the ownership or location of any dividing fence as defined by the Dividing Fences Act, 1951;
- (b) any water supply or sewerage or drainage service to the property being a joint service with any other property, the water supply sewerage or drainage pipes or connections for the property passing through other land or the water supply sewerage or drainage pipes or connections for any other land (not being mains or pipes of any water sewerage or drainage authority) passing through the property; 20
- (c) any wall being a party wall in any sense of that term;
- (d) any exception reservation or condition contained in any relative Crown Grant;
- (e) the existence of any other exception or reservation the substance of which is disclosed in the Second Schedule hereto;
- (f) the existence of or departure from the terms of any easement or restrictive covenant affecting the property provided that the substance of any such easement or restrictive covenant is disclosed in the Second Schedule hereto.

8.—If the property sold is or is intended to be a lot on a Strata Plan within the meaning of the Conveyancing (Strata Titles) Act, 1961, (in this clause called "the Act") then the Purchaser shall take title subject to the provisions of the Act and the Regulations thereunder in general and in particular to the following matters:— 30

- (a) the by-laws of the Body Corporate created or to be created by virtue of the registration of the Strata Plan as contained in the First and Second Schedules to the Act subject only to such conditions variations or deletions as are in substance disclosed in this agreement;
- (b) clause 7 of this agreement shall be read as applying equally to the property and to the parcel (as defined by the Act).
- (c) For the purposes of this agreement:
 - (i) "outgoings" shall include contributions to the Body Corporate pursuant to Section 15(2) of the Act; 40
 - (ii) unless and until separate assessments of rates and taxes are issued in respect of the said lot or lots by the relevant authorities all necessary adjustments between the parties (whether on or after completion) shall be made on the basis that the lot shall be liable to that proportion of any such rates taxes and outgoings (other than land tax) levied or assessed against the parcel (as defined by the Act) as a whole

- which the unit entitlement of such lot or lots bears to the total entitlement of all lots comprised in the Strata Plan; and
- (iii) unless and until contributions under Section 15(2) of the Act are fixed outgoings paid by the Vendor which would properly be the subject of such contributions when fixed shall be adjusted between the parties on the same basis as provided in paragraph (ii) of this sub-clause.
- (d) If the Strata Plan has not been registered the Vendor shall take all necessary steps to have it registered and completion of this agreement is subject to the Plan being registered within a reasonable time after the date hereof or such other time as may be specified expressly or by necessary implication in this agreement. 10
- (e) The Purchaser shall not make any objection requisition or claim in respect of:
- (i) any minor variations as regards the subject lot between the Strata Plan produced to the Purchaser and the Strata Plan as registered which may be required by any statutory authority or by the Registrar-General; or
 - (ii) any minor alterations which may be required by any statutory authority or by the Registrar-General in the number size location or unit entitlement of any lot or lots in the Strata Plan (other than the subject lot) or in or to the common property provided that the proportionate unit entitlement of the subject lot shall not thereby be varied;
- (f) notwithstanding any rule of law or equity to the contrary the risk of the property sold shall not pass to the Purchaser until completion; 20
- (g) the property is sold subject to a warranty that the Vendor is not aware of:
- (i) any actual or contingent liabilities of the Body Corporate of the said Strata Plan (other than for normal operating expenses); or
 - (ii) any defects (whether patent or latent) in the common property which may involve the said Body Corporate in the expenditure of money for repair or replacement (other than for ordinary wear and tear);
- (h) without prejudice to any rights arising under the last preceding sub-clause if it should be established prior to completion that there is any actual or contingent liability of the Body Corporate of the said Strata Plan (other than for normal operating expenses) then the Purchaser shall be entitled to rescind this agreement. 30
- 9.—(a) if the property sold is land under Qualified Title, notwithstanding the provisions of the Real Property (Conversion of Title) Amendment Act, 1967, and save as herein otherwise provided expressly or by necessary implication the provisions of the Conveyancing Act, 1919, which do not apply exclusively to land under the provisions of the Real Property Act, 1900, shall be deemed to apply, mutatis mutandis, to that part of the title of the land subject to this agreement which is not evidenced by instruments registered under the provisions of the Real Property Act, 1900.
- (b) if the Purchaser so requires the Vendor shall in addition to any transfer give a conveyance of his title. 40
- 10.—If the property sold is land under any Act relating to Crown Lands:
- (a) if the time for issue of a certificate of conformity has passed the Vendor shall at his own expense produce the certificate or an official letter stating that the certificate was issued:

*Delete words not applicable.

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- (b) land held under a purchase tenure is sold subject to/free from all money payable to the Crown to complete the purchase. When the same is subject to payment by the Purchaser of the money lastmentioned the Vendor shall pay any postponed debt and interest shall be apportioned as an outgoing under Clause 6 hereof; and
- (c) the rent of the land held under a leasehold tenure shall be apportioned as an outgoing under Clause 6 hereof.

11.—The Vendor shall apply for any necessary consent of the Minister for Lands or other prescribed authority to the transfer of the property or any part of it whether still under Crown tenure or not and shall pursue such application and shall pay all costs and fees (other than those of the Purchaser's Solicitor) in respect thereof. The Purchaser shall promptly join in the application as may be necessary. If such consent is refused either party may rescind this agreement. If consent is granted subject to any condition with which either party may be unable or reasonably unwilling to comply that party may give to the other notice in writing that the conditional consent is unacceptable to him and thereupon the consent shall be deemed to have been refused provided that the Vendor on his own election may as an alternative to making application for the consent of the Minister or other authority as aforesaid at his own expense make application to the Minister pursuant to the provisions of the Crown Lands and Other Lands (Amendment) Act, 1970, for a certificate under the hand of the Minister.

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12.—The vendor shall not whether before or after completion be bound to contribute to the erection or cost of erection of any dividing fence or wall between the property and any adjoining land owned by the Vendor. If so required the Purchaser shall include in his conveyance or transfer a restrictive covenant on his part in such form as the Vendor shall reasonably require for the benefit of any adjoining land of the Vendor, binding himself and his successors in title, which will exempt the Vendor and his successors in title other than purchasers on sales from liability to make or pay any such contribution.

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13.—The property is sold

*Delete words not applicable.

~~*with vacant possession of part of premises occupied by Vendor~~

*subject to existing tenancies, particulars whereof are set out in the Third Schedule

+insert
*"completion"
"this
agreement"
or other
agreed date.

hereto,
the benefit of which shall be given to the Purchaser at the date of completion.

14.—The requirements existing at the date of this agreement of any valid notice issued prior to the date of this agreement by any competent authority or by an owner or occupier of land adjoining the property necessitating the doing of work or expenditure of money on or in relation to the property or any footpath or road adjoining the same must be fully complied with by the Vendor prior to completion and any such requirements not existing at the date of this agreement must subject to completion of this agreement be complied with by the Purchaser who shall indemnify the Vendor in respect thereof. Nothing herein contained shall relieve the Vendor from liability in respect of any work done prior to the date of this agreement upon the property or upon any footpath or road adjoining the same and the Vendor agrees to indemnify the Purchaser against all liability in respect thereof notwithstanding the completion of this agreement. If without default of the Purchaser this agreement is rescinded the Vendor shall repay to the Purchaser any amount expended by the Purchaser in complying with any such requirement which was in the nature of capital expenditure or has resulted in a benefit to the Vendor.

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15.—If the Vendor shall be unable or unwilling to comply with or remove any objection or requisition which the Purchaser has made and shall not have waived within 14 days after the Vendor has given him notice of intention to rescind this agreement the Vendor, whether he has or has not attempted to remove or comply with the objection or requisition and notwithstanding any negotiation or litigation in respect thereof and whether the Purchaser has or has not taken possession, shall be entitled by notice in writing to rescind this agreement.

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16.—If the Purchaser defaults in the observance or performance of any obligation imposed on him under or by virtue of this agreement the deposit paid by him hereunder, except so much of it as exceeds 10% of the purchase price, shall be forfeited to the Vendor who shall be entitled to

terminate this agreement and thereafter either to sue the Purchaser for breach of contract or to resell the property as owner and the deficiency (if any) arising on such resale and all expenses of and incidental to such resale or attempted resale and the Purchaser's default shall be recoverable by the Vendor from the Purchaser as liquidated damages provided that proceedings for the recovery thereof be commenced within 12 months of the termination of this agreement. The Vendor may retain any money paid by the Purchaser on account of the purchase other than the deposit money forfeited under this clause as security for any deficiency arising on a resale or for any damages or compensation (including any allowance by way of occupation fee or for rents or profits from a Purchaser who has been in possession of the property or in receipt of the rents or profits thereof) awarded to him for the Purchaser's default provided that proceedings for the recovery of such damages or compensation be commenced within 12 months of the termination of this agreement.

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17.—Should it be established that at the date of this agreement the property was affected by any one or more of the following:

- (a) any provision of any planning scheme, whether prepared or prescribed, or any interim development order made under the provision of the Local Government Act, 1919;
- (b) any Residential District Proclamation under Section 309 of the Local Government Act, 1919;
- (c) any proposal for realignment widening siting or alteration of the level of a road or railway by any competent authority;
- (d) any mains or pipes of any water sewerage or drainage authority passing through the property;
- (e) any provisions of or under the Mines Subsidence Compensation Act, 1961;
- (f)

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†Any other matters.
*desired to be disclosed in the Fourth Schedule.

in any manner other than as disclosed in the Fourth Schedule hereto, then the Purchaser shall be entitled to rescind this agreement but shall not be entitled to make any other objection requisition or claim for compensation in respect of any such matter. Any right of the Purchaser to rescind under this clause shall be exercised by notice in writing given to the Vendor prior to completion. In relation to paragraph (c) hereof, the property shall be deemed to be affected by a proposal if the Purchaser produces a written statement of the authority concerned, the substance of which is other than the property is not affected by any proposal of the authority.

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18.—If before transfer of title the Purchaser is given the benefit of possession of the property then until transfer of title

- (a) he shall not let or part with possession of or make any structural alteration or addition to the property;
- (b) he shall
 - (i) keep the property in good repair having regard to its condition at the date of possession and permit the Vendor or his agent at all reasonable times to enter and view the state or repair;
 - (ii) keep all buildings fully insured against fire or as the Vendor may reasonably require and deliver the policy and renewal receipts to the Vendor;
 - (iii) punctually pay all rates and taxes on the property and any necessary apportionment shall be made at the date provided in clause 6 or the date of possession whichever is the earlier; and
 - (iv) comply with the provisions of all statutes and regulations and of any instrument or covenant or order affecting the property.

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If the Purchaser shall make default in any of these obligations the Vendor may without notice

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make good the default and without prejudice to his other rights may recover from the Purchaser as a debt the cost of so doing with interest thereon at 10% per annum until repayment and such amount and interest shall until repayment be a charge on the property.

19.—Where the balance of the purchase price is payable by instalments before transfer of title:

- (a) if default by the Purchaser in payment of any instalment of the purchase price or interest hereunder shall continue for four weeks (in this respect time being of the essence) the balance of the purchase price then owing with accrued interest shall immediately without notice to the Purchaser become due and payable irrespective of the transfer of title; 10
- (b) the Purchaser shall not be required to tender the assurance as stipulated in clause 4 hereof but shall tender it within 14 days after making the final payment hereunder; and
- (c) the deposit shall be accounted for under clause 1 of this agreement and any necessary authority in that regard shall be given forthwith on the signing of this agreement.

20.—If this agreement is rescinded (as distinct from terminated) pursuant to any express right to rescind (as distinct from a right to terminate) conferred by this agreement the rescission shall be deemed to be a rescission ab initio, and

- (a) the deposit and all other money paid by the Purchaser hereunder shall be refunded to him; 20
- (b) neither party shall be liable to pay the other any sum for damages costs or expenses; and
- (c) if the Purchaser is or has been in occupation or in receipt of the rents or profits of the property he shall account for or pay to the Vendor the net rents and profits received or a fair occupation rent for the property (whichever is the greater) until the date of rescission but the Vendor shall give the Purchaser credit for any interest paid by the Purchaser and any resulting balance payable by the Purchaser may be deducted by the Vendor from the deposit and other moneys before returning the same to the Purchaser.

21.—Where herein used words importing the singular number or plural number shall include the plural number and singular number respectively and words importing the masculine gender shall include the feminine or neuter gender. 30

22.—(a) Service of any notice or document under or relating to this agreement:

- (i) may be effected as provided in Section 170 of the Conveyancing Act, 1919; and
- (ii) shall be sufficient service on a party if effected on his solicitor in any manner provided in that section.

- (b) A notice given or document signed and served on behalf of any party hereto by his solicitor shall be deemed to have been given or served by that party personally.

23.—Schedule III of the Conveyancing Act, 1919, shall not apply to this agreement.

Municipality of Woollahra
CERTIFICATE No. 5062

UNDER SECTION 342AS OF THE LOCAL GOVERNMENT ACT 1919

TO — Messrs Dibbs, Crowther & Osborne,
— Solicitors,
— 16 Barrack Street,
— SYDNEY. N.S.W. 2000.

Date of Application — 19/5/70. (PRE).

DESCRIPTION OF LAND

MUNICIPALITY OF WOOLLAHRA

COUNTY OF CUMBERLAND 10

PARISH OF ALEXANDRIA

Street — WENTWORTH STREET, POINT PIPER
House Number — 8
Lot — 15/16
Section — 3
Deposited Plan —
Volume — 3814
Folio — 117
OR
Book —
Number —
Area —
Frontage — 147'/165'2"
Depth — 185'8''/265'6''

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In accordance with the provisions of Clause 9 of Ordinance No. 107 of the Local Government Act 1919, the following information is given in respect of the abovementioned land:—

In the County of Cumberland Planning Scheme this land is zoned:—

- (a) Living Area.
- (b) Foreshore Scenic Protection Area.

In the Local Planning Scheme, as placed on public exhibition on 31st July, 1968, by the Minister for Local Government, this land is zoned:—

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- (a) Residential 2(a)
- (b) Foreshore Scenic Protection Area.

This land is situated in proclaimed Residential District No. 43 of 9/9/38, wherein all trades, etc., and flats, prohibited.

Enclosed: Receipt for the Prescribed Fee of \$2.00.

Council Chambers,
536 New South Head Road,
Double Bay, N.S.W. 2028
Phone: 32.6711
5th June, 1970. JM.

SPECIAL CONDITIONS

1. Notwithstanding the Certificate under Section 342AS annexed hereto the Purchaser acknowledges that the property is within an area in respect of which the Woollahra Municipal Council has prepared a Scheme pursuant to the Local Government Act as amended. The Purchaser acknowledges that he is aware of the provisions of such Scheme although the same has not as yet been prescribed by the Governor in accordance with the Act and it is hereby agreed that no requisition objection or claim for compensation will be made in respect of the zoning of the subject premises under the proposed Scheme.

2. ~~Included in the said sale are all blinds, light fittings, curtains and fixed floor coverings in the main building, the annexe and the cottage and all furniture belonging to the Vendor in the cottage and the annexe with the exception of the furniture set out in the list annexed hereto.~~

10

(Sgd) W. BAXTER ENEVER

Vendor

Purchaser

Payment of balance of purchase money (Clause 1)

*In cash on completion

THE FIRST SCHEDULE

*If inappropriate delete and substitute agreed terms.

THE SECOND SCHEDULE

Reservations & conditions contained in Crown Grant.

Easements, restrictive covenants, etc. (Clause 7).

THE THIRD SCHEDULE

Tenancies or Occupancies (Clause 13).

Part Occupied	Tenant's Name	Nature of Occupancy	Rental
Annexe	Elizabeth Ward, Jennifer Grimbly & Mary Pigram	Lease dated 27/3/1971 for a period of 6 months from 1/4/1971 holding over on a monthly basis at \$260 per calendar month	
Cottage	Frances Walker	Lease dated 25/8/1972 for a period of six months from 1/9/1972 — \$300 per calendar month	

THE FOURTH SCHEDULE

Zoning, etc. (Clause 17).

*The property is affected as shown in the copy certificate under Section 342AS of the Local Government Act, 1919, annexed hereto.

*Delete if not applicable.

SIGNED by the Vendor in the presence of (Sgd) W. Baxter Vendor Enever

SIGNED by the Purchaser in the presence of Purchaser

Witness (Sgd) G. SYMONDS

Purchase Price \$500,000.00
 Deposit 50,000.00
 Balance \$450,000.00

Vendor's Solicitor Dibbs Crowther & Osborne, 16 Barrack St., Sydney. Tel. No. 29-7312.

Description of Property.

ALL THAT piece or parcel of land in the Municipality of Woollahra, Parish of Alexandria and County of Cumberland being part of Lots 15 and 16 of Section 3 of Point Piper Estate and being wholly comprised in Certificate of Title Volume 3814 Folio 117 together with the improvements erected thereon and known as 8 Wentworth Street, Point Piper.

~~AUCTION CONDITIONS Upon a sale by auction:~~

- (a) the highest bidder shall be the Purchaser. In case of any dispute the property shall be put up again at any former bidding and no bidding shall be retracted.
- (b) the sale is subject to a reserve price and the right to bid is reserved on behalf of the Vendor.

10

- (c) upon the fall of the hammer the Purchaser shall sign the following agreement the ~~conditions of which, with these conditions, are the conditions of the sale by auction.~~

Vendor's full name, address and occupation.

AGREEMENT made the 11th day of January, 1973.

BETWEEN

ROGER JOHN MASSIE DUNLOP of 10 Wentworth Street, Point Piper Medical Practitioner (herein called the Vendor) of the one part

AND

Purchaser's full name, address and occupation.

BLACKBURN DEVELOPMENTS NO. 25 PTY LIMITED a company duly incorporated and having its registered office at 15 Bent Street, Sydney in the State of New South Wales (herein called the Purchaser) of the other part

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*Delete words not applicable.

WHEREBY the Vendor agrees to sell and the Purchaser agrees to purchase, if more than one as *JOINT TENANTS/*TENANTS IN COMMON IN THE FOLLOWING SHARES:

with joint and several liability under this agreement, the property above described (herein referred to as "the property") for the sum of

SIX HUNDRED & SEVENTY THOUSAND DOLLARS (\$670,000-00)

upon and subject to the following terms and conditions:—

1.—The Purchaser shall upon the signing of this agreement pay as a deposit to the Vendor's Agent herein named as stakeholder the sum of

FIFTY SIX THOUSAND FOUR HUNDRED DOLLARS (\$56,400-00)

which shall vest in the Vendor upon and by virtue of completion and which shall be accounted for to the Vendor upon receipt of an order from the Purchaser or his Solicitor authorising such payment. The deposit may be paid by cheque but if the cheque is not honoured on presentation the Purchaser shall immediately and without notice be in default under this agreement.

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The balance of the purchase price shall be paid as stipulated in the First Schedule hereto. Any moneys payable to the Vendor hereunder by the Purchaser or the Agent shall be paid to the Vendor's Solicitor or as he may direct in writing.

2.—The title to the land is under

*Delete words not applicable.

THE REAL PROPERTY ACT, 1900, (not being Qualified Title or Strata Title)

3.—After the date of this agreement and within a reasonable time after written request by the Purchaser or prior thereto if the Vendor so desires the Vendor shall furnish to the Purchaser a written statement of his title which shall comprise:—

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- (a) FOR LAND UNDER THE REAL PROPERTY ACT (including Strata Title): particulars of title and the form of any restrictive covenant easement or other interest to be created by the transfer sufficient to enable the Purchaser to prepare the transfer. The

Purchaser shall not be entitled to an abstract of any document affecting the title. Any instrument in respect of which a caveat is entered on the register shall, if in the possession of the Vendor or of any mortgagee of the property, be produced to the Purchaser free of charge;

~~(b) FOR LAND UNDER OLD SYSTEM TITLE: a proper abstract of his title together with the form of any restrictive covenant easement or other interest to be created by the conveyance. For the purpose of this clause a proper abstract of the Vendor's title may as to relevant documents to be abstracted comprise or include photographic copies (being themselves legible) of such documents PROVIDED THAT where the abstract includes any photographic copy of a document the Vendor shall furnish as part of his abstract and in addition to the foregoing requirements a chronological index of all the facts events and documents which comprise his title stating as regards the documents to be so indexed brief particulars of:—~~

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~~(i) the date of the document: (ii) its general nature: (iii) the parties to the document and (iv) its registration~~

The Vendor shall not be called upon to abstract the Crown Grant unless it is the only good root of title or to abstract or furnish a covenant to produce any deeds or documents in support of the title or in varification of the abstract which are not in the possession of the Vendor or of any mortgagee of the property. No objection shall be made to the execution of any document under a power of attorney authorising its execution,

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~~(c) FOR LAND UNDER QUALIFIED TITLE: paragraph (a) of this clause shall apply to that part of the title evidenced by instruments registered under the Real Property Act and paragraph (b) shall apply to that part of the title not so evidenced:~~

~~(d) FOR LAND UNDER ANY ACT RELATING TO CROWN LANDS: particulars of title sufficient to enable the Purchaser to prepare his transfer and an abstract of title as provided in paragraph (b) of this clause in respect of the relevant facts and the documents of title which are not in a form prescribed by or pursuant to the Act under which the land is held and the form of any restrictive covenant easement or other interest to be created by the transfer or conveyance:~~

~~(e) FOR LAND UNDER MORE THAN ONE TITLE: a statement of title shall not be complete until furnished in respect of each title to the property.~~

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4.—The Purchaser shall be deemed to have waived any objection or requisition which he has not made and delivered to the Vendor within twenty-one days after the delivery of the Vendor's statement of title. Within twenty-eight days from the delivery of the Vendor's statement of title the Purchaser shall at his own expense tender to the Vendor for execution the appropriate assurance of the property provided however that if the assurance requires the consent of the Minister for Lands or other prescribed authority the time for tender thereof under this clause shall be the twenty-eight day period aforesaid or fourteen days from the notification to the Purchaser of the consent having been granted, whichever is the later.

5.—No error or misdescription of the property shall annul the sale but compensation if demanded in writing before completion but not otherwise shall be made or given as the case may require, the amount to be settled in case of a difference by an arbitrator appointed by the parties by mutual agreement or failing agreement nominated by the President for the time being of The Law Society of New South Wales. Clause 15 hereof shall not apply to any such claim for compensation.

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†insert
**"completion"
"this
agreement"
or other
agreed date.

6.—The Vendor shall be entitled to the rents and profits and shall pay or bear all rates taxes and outgoings up to and including the date of completion from which date the Purchaser shall be entitled to and shall pay or bear the same respectively and any necessary apportionment thereof shall be made and adjusted on completion. Where the Vendor has paid or is liable to pay land tax on the property for the year current at the date of apportionment whether to the Commissioner of Land Tax or to a predecessor in title the amount to be apportioned as land tax under this clause shall be the sum which would have been payable by the Vendor for land tax on the property as used by him if the property had been owned and was the only land owned by him at midnight on 31st October than last past and the Vendor were natural person.

7.—No objection or requisition or claim for compensation shall be made by the Purchaser in respect of any of the following matters: 10

- (a) the ownership or location of any dividing fence as defined by the Dividing Fences Act, 1951;
- (b) any water supply or sewerage or drainage service to the property being a joint service with any other property, the water supply sewerage or drainage pipes or connections for the property passing through other land or the water supply sewerage or drainage pipes or connections for any other land (not being mains or pipes of any water sewerage or drainage authority) passing through the property;
- (c) any wall being a party wall in any sense of that term;
- (d) any exception reservation or condition contained in any relative Crown Grant; 20
- (e) the existence of any other exception or reservation the substance of which is disclosed in the Second Schedule hereto;
- (f) the existence of or departure from the terms of any easement or restrictive covenant affecting the property provided that the substance of any such easement or restrictive covenant is disclosed in the Second Schedule hereto.

8.—~~If the property sold is or is intended to be a lot on a Strata Plan within the meaning of the Conveyancing (Strata Titles) Act, 1961, (in this clause called "the Act") then the Purchaser shall take title subject to the provisions of the Act and the Regulations thereunder in general and in particular to the following matters:—~~

- (a) the by-laws of the Body Corporate created or to be created by virtue of the registration of the Strata Plan as contained in the First and Second Schedules to the Act subject only to such conditions variations or deletions as are in substance disclosed in this agreement; 30
- (b) clause 7 of this agreement shall be read as applying equally to the property and to the parcel (as defined by the Act).
- (c) For the purposes of this agreement:
 - (i) "outgoings" shall include contributions to the Body Corporate pursuant to Section 15(2) of the Act;
 - (ii) unless and until separate assessments of rates and taxes are issued in respect of the said lot or lots by the relevant authorities all necessary adjustments between the parties (whether on or after completion) shall be made on the basis that the lot shall be liable to that proportion of any such rates taxes and outgoings (other than land tax) levied or assessed against the parcel (as defined by the Act) as a whole which the unit entitlement of such lot or lots bears to the total entitlement of all lots comprised in the Strata Plan; and 40

- (iii) ~~unless and until contributions under Section 15(2) of the Act are fixed outgoings~~ paid by the Vendor which would properly be the subject of such contributions when fixed shall be adjusted between the parties on the same basis as provided in paragraph (ii) of this sub-clause.
- (d) If the Strata Plan has not been registered the Vendor shall take all necessary steps to have it registered and completion of this agreement is subject to the Plan being registered within a reasonable time after the date hereof or such other time as may be specified expressly or by necessary implication in this agreement.
- (e) The Purchaser shall not make any objection requisition or claim in respect of:
- (i) any minor variations as regards the subject lot between the Strata Plan produced to the Purchaser and the Strata Plan as registered which may be required by any statutory authority or by the Registrar-General; or
- (ii) any minor alterations which may be required by any statutory authority or by the Registrar-General in the number size location or unit entitlement of any lot or lots in the Strata Plan (other than the subject lot) or in or to the common property provided that the proportionate unit entitlement of the subject lot shall not thereby be varied;
- (f) notwithstanding any rule of law or equity to the contrary the risk of the property sold shall not pass to the Purchaser until completion;
- (g) the property is sold subject to a warranty that the Vendor is not aware of:
- (i) any actual or contingent liabilities of the Body Corporate of the said Strata Plan (other than for normal operating expenses); or
- (ii) any defects (whether patent or latent) in the common property which may involve the said Body Corporate in the expenditure of money for repair or replacement (other than for ordinary wear and tear);
- (h) without prejudice to any rights arising under the last preceding sub-clause if it should be established prior to completion that there is any actual or contingent liability of the Body Corporate of the said Strata Plan (other than for normal operating expenses) ~~then the Purchaser shall be entitled to rescind this agreement.~~
9. ~~(a) if the property sold is land under Qualified Title, notwithstanding the provisions of the Real Property (Conversion of Title) Amendment Act, 1967, and save as herein otherwise provided expressly or by necessary implication the provisions of the Conveyancing Act, 1919, which do not apply exclusively to land under the provisions of the Real Property Act, 1900, shall be deemed to apply, mutatis mutandis, to that part of the title of the land subject to this agreement which is not evidenced by instruments registered under the provisions of the Real Property Act, 1900.~~
- (b) if the Purchaser so requires the Vendor shall in addition to any transfer give a ~~conveyance of his title.~~
10. ~~If the property sold is land under any Act relating to Crown Lands:~~
- (a) if the time for issue of a certificate of conformity has passed the Vendor shall at his own expense produce the certificate or an official letter stating that the certificate was issued;
- (b) land held under a purchase tenure is sold subject to/free from all money payable to the Crown to complete the purchase. When the same is subject to payment by the Purchaser of the money lastmentioned the Vendor shall pay any postponed debt and ~~interest shall be apportioned as an outgoing under Clause 6 hereof; and~~

*Delete words not applicable.

(c) the rent of the land held under a leasehold tenure shall be apportioned as an outgoing under Clause 6 hereof.

11.—~~The Vendor shall apply for any necessary consent of the Minister for Lands or other prescribed authority to the transfer of the property or any part of it whether still under Crown tenure or not and shall pursue such application and shall pay all costs and fees (other than those of the Purchaser's Solicitor) in respect thereof. The Purchaser shall promptly join in the application as may be necessary. If such consent is refused either party may rescind this agreement. If consent is granted subject to any condition with which either party may be unable or reasonably unwilling to comply that party may give to the other notice in writing that the conditional consent is unacceptable to him and thereupon the consent shall be deemed to have been refused provided that the Vendor on his own election may as an alternative to making application for the consent of the Minister or other authority as aforesaid at his own expense make application to the Minister pursuant to the provisions of the Crown Lands and Other Lands (Amendment) Act, 1970, for a certificate under the hand of the~~

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12.—The vendor shall not whether before or after completion be bound to contribute to the erection or cost of erection of any dividing fence or wall between the property and any adjoining land owned by the Vendor. If so required the Purchaser shall include in his conveyance or transfer a restrictive covenant on his part in such form as the Vendor shall reasonably require for the benefit of any adjoining land of the Vendor, binding himself and his successors in title, which will exempt the Vendor and his successors in title other than purchasers on sales from liability to make or pay any such contribution.

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13.—The property is sold

*with vacant possession

~~*subject to existing tenancies, particulars whereof are set out in the Third Schedule~~

hereto,

the benefit of which shall be given to the Purchaser at the date of * completion.

14.—The requirements existing at the date of this agreement of any valid notice issued prior to the date of this agreement by any competent authority or by an owner or occupier of land adjoining the property necessitating the doing of work or expenditure of money on or in relation to the property or any footpath or road adjoining the same must be fully complied with by the Vendor prior to completion and any such requirements not existing at the date of this agreement must subject to completion of this agreement be complied with by the Purchaser who shall indemnify the Vendor in respect thereof. Nothing herein contained shall relieve the Vendor from liability in respect of any work done prior to the date of this agreement upon the property or upon any footpath or road adjoining the same and the Vendor agrees to indemnify the Purchaser against all liability in respect thereof notwithstanding the completion of this agreement. If without default of the Purchaser this agreement is rescinded the Vendor shall repay to the Purchaser any amount expended by the Purchaser in complying with any such requirement which was in the nature of capital expenditure or has resulted in a benefit to the Vendor.

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15.—If the Vendor shall be unable or unwilling to comply with or remove any objection or requisition which the Purchaser has made and shall not have waived within 14 days after the Vendor has given him notice of intention to rescind this agreement the Vendor, whether he has or has not attempted to remove or comply with the objection or requisition and notwithstanding any negotiation or litigation in respect thereof and whether the Purchaser has or has not taken possession, shall be entitled by notice in writing to rescind this agreement.

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*Delete words not applicable.

†Insert
**"completion"
"this agreement"
or other agreed date.

16.—If the Purchaser defaults in the observance or performance of any obligation imposed on him under or by virtue of this agreement the deposit paid by him hereunder, except so much of it as exceeds 10% of the purchase price, shall be forfeited to the Vendor who shall be entitled to terminate this agreement and thereafter either to sue the Purchaser for breach of contract or to resell the property as owner and the deficiency (if any) arising on such resale and all expenses of and incidental to such resale or attempted resale and the Purchaser's default shall be recoverable by the Vendor from the Purchaser as liquidated damages provided that proceedings for the recovery thereof be commenced within 12 months of the termination of this agreement. The Vendor may retain any money paid by the Purchaser on account of the purchase other than the deposit money forfeited under this clause as security for any deficiency arising on a resale or for any other than the deposit money forfeited under this clause as security for any deficiency arising on a resale or for any damages or compensation (including any allowance by way of occupation fee or for rents or profits from a Purchaser who has been in possession of the property or in receipt of the rents or profits thereof) awarded to him for the Purchaser's default provided that proceedings for the recovery of such damages or compensation be commenced within 12 months of the termination of this agreement.

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17.—Should it be established that at the date of this agreement the property was affected by any one or more of the following:

†Any other matters.
*desired to be disclosed in the Fourth Schedule.

- (a) any provision of any planning scheme, whether prepared or prescribed, or any interim development order made under the provision of the Local Government Act, 1919;
- (b) any Residential District Proclamation under Section 309 of the Local Government Act, 1919;
- (c) any proposal for realignment widening siting or alteration of the level of a road or railway by any competent authority;
- (d) any mains or pipes of any water sewerage or drainage authority passing through the property;
- (e) any provisions of or under the Mines Subsidence Compensation Act, 1961;
- (f) °

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in any manner other than as disclosed in the Fourth Schedule hereto, then the Purchaser shall be entitled to rescind this agreement but shall not be entitled to make any other objection requisition or claim for compensation in respect of any such matter. Any right of the Purchaser to rescind under this clause shall be exercised by notice in writing given to the Vendor prior to completion. In relation to paragraph (c) hereof, the property shall be deemed to be affected by a proposal if the Purchaser produces a written statement of the authority concerned, the substance of which is other than the property is not affected by any proposal of the authority.

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18.—If before transfer of title the Purchaser is given the benefit of possession of the property then until transfer of title

- (a) he shall not let or part with possession of or make any structural alteration or addition to the property;
- (b) he shall
 - (i) keep the property in good repair having regard to its condition at the date of possession and permit the Vendor or his agent at all reasonable times to enter and view the state or repair;
 - (ii) keep all buildings fully insured against fire or as the Vendor may reasonably require and deliver the policy and renewal receipts to the Vendor;

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- (iii) punctually pay all rates and taxes on the property and any necessary apportionment shall be made at the date provided in clause 6 or the date of possession whichever is the earlier; and
- (iv) comply with the provisions of all statutes and regulations and of any instrument or covenant or order affecting the property.

If the Purchaser shall make default in any of these obligations the Vendor may without notice make good the default and without prejudice to his other rights may recover from the Purchaser as a debt the cost of so doing with interest thereon at 10% per annum until repayment and such amount and interest shall until repayment be a charge on the property.

19.—Where the balance of the purchase price is payable by instalments before transfer of title:

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- (a) if default by the Purchaser in payment of any instalment of the purchase price or interest hereunder shall continue for four weeks (in this respect time being of the essence) the balance of the purchase price then owing with accrued interest shall immediately without notice to the Purchaser become due and payable irrespective of the transfer of title;
- (b) the Purchaser shall not be required to tender the assurance as stipulated in clause 4 hereof but shall tender it within 14 days after making the final payment hereunder; and
- (c) the deposit shall be accounted for under clause 1 of this agreement and any necessary authority in that regard shall be given forthwith on the signing of this agreement.

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20.—If this agreement is rescinded (as distinct from terminated) pursuant to any express right to rescind (as distinct from a right to terminate) conferred by this agreement the rescission shall be deemed to be a rescission ab initio, and

- (a) the deposit and all other money paid by the Purchaser hereunder shall be refunded to him;
- (b) neither party shall be liable to pay the other any sum for damages costs or expenses; and
- (c) if the Purchaser is or has been in occupation or in receipt of the rents or profits of the property he shall account for or pay to the Vendor the net rents and profits received or a fair occupation rent for the property (whichever is the greater) until the date of rescission but the Vendor shall give the Purchaser credit for any interest paid by the Purchaser and any resulting balance payable by the Purchaser may be deducted by the Vendor from the deposit and other moneys before returning the same to the Purchaser.

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21.—Where herein used words importing the singular number or plural number shall include the plural number and singular number respectively and words importing the masculine gender shall include the feminine or neuter gender.

22. (a) Service of any notice or document under or relating to this agreement:

- (i) may be effected as provided in Section 170 of the Conveyancing Act, 1919; and
- (ii) shall be sufficient service on a party if effected on his solicitor in any manner provided in that section.

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- (b) A notice given or document signed and served on behalf of any party hereto by his solicitor shall be deemed to have been given or served by that party personally.

23.—Schedule III of the Conveyancing Act, 1919, shall not apply to this agreement.

SPECIAL CONDITIONS

24. It is a condition of this Contract that the Purchaser agrees to release the deposit to the Vendor on exchange of Contracts PROVIDED THAT if the Purchaser shall be entitled to rescind this Contract pursuant to the terms and conditions hereof then the Vendor shall refund the deposit to the Purchaser upon request.
25. Within twenty-one days from the date of exchange of Contracts the Purchaser shall lodge with the Woollahra Municipal Council an application to develop the property with adjoining properties Nos. 10 and 12 Wentworth Street, Point Piper by the erection thereon of a building or buildings containing home units. Completion of this Contract is subject to a conditional of the Purchaser obtaining on conditions acceptable to it the consent of the Woollahra Municipal Council to its development application or applications. The Vendor will upon being requested by the Purchaser so to do shall execute all such letters requests applications and other documents and do all things that the Purchaser shall reasonably require to assist in obtaining such consent. Should such consent not be given or be refused or should it be given subject to conditions not acceptable to the Purchaser on or before the 4th day of June, 1973 either party, subject to Special Condition 27, shall be entitled to cancel this Contract which shall thereupon be at an end and the Vendor shall forthwith refund or cause to be refunded to the Purchaser all moneys paid by the Purchaser hereunder and thereafter either party shall have no right or claim against the other party. 10
26. Completion of this Contract is conditional upon the Purchaser entering into Contracts for the Purchaser of the adjoining properties known as Nos. 10 and 12 Wentworth Street, Point Piper from the respective owners thereof. Should such Contracts not be entered into as aforesaid either party may by notice in writing to the other elect to determine this Contract whereupon the Contract shall be at an end and all moneys paid by the Purchaser to the Vendor shall be refunded to the Purchaser in full and thereupon neither party shall have any right or claim against the other. 20
27. Notwithstanding anything herein contained the Purchaser may at any time on or before the 28th day of May, 1973 by written notice to the Vendor elect to complete the Contract and the parties shall in that event complete the Contract on the 3rd day of July, 1973. 30

CERTIFICATE UNDER SECTION 342AS OF THE LOCAL GOVERNMENT ACT, 1919

No. 3376

O.T. Simpson,
1 Knox Lane,
Double Bay

ORIGINAL

Date 14/12/1972

LAND DESCRIPTION:

County of Cumberland, Parish of Alexandria, Postal District . . (Indecipherable)
Street Wentworth Street House No. 8 Lot No . . . Deposited, Plan No . . .
Strata Plan No. Strata Lot No Frontage 147' Depth 185-8"
165½' 265-6"

ZONING:

In accordance with the provisions of Clause 9, Ordinance 107 of the Local Government Act, 1919, the following information is given in respect of the abovementioned land:—

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- (i) In the County of Cumberland Planning Scheme, this land is zoned:—
 - (a) Living Area/.....
 - (b) Foreshore Scenic Protection Area ✓
- (ii) In the Local Planning Scheme, prescribed by the Minister for Local Government, on 4th December, 1972, this land is zoned:—
 - (a) Residential 2(C) *Height limit 235.5 ft above standard datum
 - (b) ~~Foreshore Scenic Protection Area/Harbour Foreshore Preservation Area~~
~~In the City of Sydney Planning Scheme prescribed by the Minister for Local Government on 16th July, 1971, this land is zoned:—~~
 - (a)
 - (b) Foreshore Scenic Protection Area
- (iii) This land is situated in proclaimed Residential District
~~No.....wherein.....~~

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TREE PRESERVATION ORDER:

A general Tree Preservation Order has been placed on all trees situated within the Municipality with a height in excess of 12' and a branch spread of more than 10'

DEVELOPMENT CONSENT DETAILS

- NIL
- GRANTED...../...../.....
- REFUSED...../...../.....

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(If Applicable)

Type of Use Granted.....
Conditions.....

Council Chambers,
536 New South Head Road,
DOUBLE BAY, N.S.W. 2028
Phone 328-6711 and

D.C. FORD,
TOWN CLERK.
Per:.....Indecipherable

Payment of balance of purchase money (Clause 1)

*In cash on completion

THE FIRST SCHEDULE

*If inappropriate delete and substitute agreed terms.

Reservations and conditions, if any, contained in the Crown Grant.

THE SECOND SCHEDULE

Easements, restrictive covenants, etc. (Clause 7).

THE THIRD SCHEDULE

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Tenancies or Occupancies (Clause 13).

Part Occupied	Tenant's Name	Nature of Occupancy	Rental
	NIL		

Exhibits: Exhibit B Contract for Sale of Land Dunlop to Blackburn Investment No. 25 Pty Ltd
 11 January 1973 and Deed of Variation 11 February 1974

Zoning, etc.
 (Clause 17).
 *Delete
 if not
 applicable.

THE FOURTH SCHEDULE

*The property is affected as shown in the copy certificate under Section 342AS of the Local Government Act, 1919, annexed hereto.

SIGNED by the	(Sgd) R. J. M. DUNLOP	SIGNED by the	
Vendor in the	.....	Purchaser in	.....
presence of	Vendor	the presence of	Purchaser
Witness.....		Witness.....	
Purchase Price	\$680,000-00		
Deposit	\$56,400-00		
Balance	\$623,600-00		

Vendor's Solicitor D.T. SIMPSON, SOLICITOR, 1 KNOX LANE, DOUBLE BAY. 2028. Tel. No. 36 6442

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Purchaser's Solicitor FREEHILL, HOLLINGDALE & PAGE, 60 MARTIN PLACE, SYDNEY. Tel. No. 2 0359

DEED made the 11th day of February One thousand nine hundred and seventy-four BETWEEN BLACKBURN DEVELOPMENTS NO. 25 PTY. LIMITED a company duly incorporated in New South Wales and having its registered office at 15 Bent Street, Sydney in the said State (hereinafter called "the Purchaser") of the first part AND ROGER JOHN MASSIE DUNLOP of 10 Wentworth Street, Point Piper, New South Wales, Medical Practitioner (hereinafter called "the Vendor") of the second part

WHEREAS

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A. By a contract (hereinafter referred to as "the sale contract") dated 11th January, 1973 between the Purchaser and the Vendor the Vendor agreed to sell and the Purchaser agreed to buy all that piece or parcel of land in the Municipality of Woollahra Parish of Alexandria County of Cumberland being part of Lots 15 and 16 of Section 3 of the Point Piper estate and being wholly comprised in Certificate of Title Volume 3814 Folio 117 together with improvements erected thereon known as 8 Wentworth Street, Point Piper.

B. Special Condition 25 of the sale contract provided amongst other things that if the gonsent of the Woollahra Municipal Council was not obtained on or before the 4th June, 1973 then either party would be entitled to cancel the sale contract.

C. The Vendor and the Purchaser have agreed (as evidenced by their execution of this Deed) that the time for obtaining the consent of the council set out in Special Condition 25 of the sale contract be varied to read the 25th December, 1973.

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D. Special Condition 27 of the sale contract provided that the Purchaser might at any time on or before the 28th May, 1973 by written notice to the Vendor elect to complete the sale contract and that in that event the parties would complete the sale on the 3rd day of July, 1973.

E. The Vendor and the Purchaser have agreed (as evidenced by their execution of this Deed) that the time in which the Purchaser can make its election in Special Condition 27 be varied to read the 18th December, 1973 and that the date of completion if such election is made be varied to read 25th January, 1974.

Exhibits: Exhibit B Contract for Sale of Land Dunlop to Blackburn Investment No. 25 Pty Ltd
11 January 1973 and Deed of Variation 11 February 1974

NOW THIS DEED WITNESSETH that in consideration of the mutual covenants herein contained the parties expressly covenant and agree the one with the other as follows:

1. The sale contract is hereby varied by the substitution of the 25th December, 1973 as the time limit for obtaining council approval in Special Condition 25 of the sale contract.

2. The sale contract is further varied by the substitution of the 18th December, 1973 as the date of election in Special Condition 27 of the sale contract and by the substitution of the 25th January 1974 for the date of completion if such an election is made.

3. The Purchaser will pay to the Vendor interest on the purchase price expressed in the sale contract at the rate of 9½% per annum calculated from the 3rd July, 1973.

1973. These interest payments are to be made monthly and shall continue until the 25th December, 1973 or the date of completion or the date of cancellation of the sale contract as varied by this Agreement, whichever shall first occur. 10

4. If the decision of the Woollahra Municipal Council to the amended Development Application submitted by the Purchaser is unduly delayed or not acceptable to it the Purchaser undertakes to lodge an appeal with the Local Government Appeals Tribunal and in consultation with the Vendor to pursue the said appeal with all due diligence.

5. If the Instrument of Decision issued by the Local Government Appeals Tribunal is issued subject to conditions which are not acceptable to the Purchaser the Purchaser reserves the right to cancel the sales contract as varied within thirty (30) days of the Instrument of Decision being issued. If such a cancellation takes place the Vendor shall forthwith refund or cause to be refunded to the Purchaser all moneys paid by the Purchaser (save the interest payments already made or accrued pursuant to clause 3 of this Deed) under the sale contract as varied and otherwise neither party shall have any right or claim against the other. 20

6. The Purchaser will pay the following expenses:

- (i) All reasonable costs incurred in the preparation of this Deed of Variation;
- (ii) All additional stamp duty which this Deed of Variation may attract;
- (iii) All expenses involved in the Development Applications submitted to the Woollahra Municipal Council;
- (iv) All legal costs which may be incurred in any application to the Local Government Appeals Tribunal pursuant to any such Development Applications. 30

7. Except to the extent that the agreements contained in the sale contract are modified by this Deed the covenants and provisions of the sale contract are hereby ratified and confirmed.

IN WITNESS WHEREOF the parties hereto have set their hands and seal the day and year first hereinbefore written.

THE COMMON SEAL OF BLACKBURN DEVELOPMENTS NO. 25 PTY. LTD.

was hereunto affixed by authority of the Directors in the presence of:

Director

Secretary

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SIGNED SEALED & DELIVERED by the said ROGER JOHN MASSIE

(Sgd) R. J. M. DUNLOP

DUNLOP in the presence of: (Sgd) Indecipherable

WOOLLAHRA MUNICIPAL COUNCIL

**Application to Carry out Development under the Town Planning Provisions of
the Local Government Act, 1919**

INSTRUCTIONS:

1. This application must be completed in triplicate, and accompanied by the necessary plans in triplicate.
2. Sketch plan should be given in the space provided on the form or included in (1) above.
3. Estimated cost of new works must be stated.

4. **Scale of Fees**

Minimum Fee.....\$4.00

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Maximum Fee.....\$200.00

An additional fee of \$10.00 of advertising is required.

¼ of 1% of the cost for the first \$2,000.00

1/10 of 1% of the cost for the next \$98,000.00

1/40 of 1% of the cost for the remainder.

Council may fix an additional fee for buildings estimated to cost more than \$488,000.00

5. All questions must be answered. If not applicable this should be stated.
6. Development Control Schedules at back of form.

FULL NAME OF APPLICANT: Blackburn developments No. 25 Pty. Limited

ADDRESS: 15 Bent Street, Sydney

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FULL NAME OF OWNER OF PROPERTY: See attached authorities

ADDRESS: See attached authorities 317768

SITE OF THE PROPOSED DEVELOPMENT: 8, 10, 12 Wentworth Street, Point Piper

See attached schedule

Lot Section Folio D.P.

Dimensions of Land: Frontage Depth

ARE YOU THE OWNER OF THE LAND CONCERNED? IF NOT
you must attach the Owner's written authority appointing you his representative for the purpose
of making this application.

FULL DESCRIPTION OF THE PROPOSED DEVELOPMENT: You must state in this space exactly
what you propose to do and give sufficient detail to leave no doubt in the Council's mind as to
what development you are applying to commence and/or carry on. If application is for consent to
erect a residential flat building the following additional information is required:—

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Diagrammatic front and side elevations with profile of ground through centre line of building.
Levels showing height of ground floor and roof with relation to footpath level at centre of
frontage.

Proposal for garaging, and capacity.

Number of each type of flat in terms of bedrooms.

Full particulars of area of land, etc., to enable Council to check coverage, total floor area, etc.

See attached plans and letter

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Exhibits: Exhibit D Development Application
 Blackburn Development No. 25 Pty Ltd 2 February, 1973

	LOT	D.P.	VOL.	FOLIO
8 Wentworth Street, POINT PIPER	15 & 16	WHOLE OF LAND	3814	117
10 Wentworth Street, POINT PIPER	2	545877	11654	19
12 Wentworth Street, POINT PIPER	1	545877	11654	18

ESTIMATED COST \$1,250,000

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DO YOU PROPOSE TO USE THE WHOLE OR ONLY PART OF THE BUILDING OR LAND? Whole of the land

IF PART ONLY INDICATE WHAT PART

WHAT WAS THE USE OF LAND OR BUILDING(S) on 27th June, 1951? Residential

WHAT ADDITIONS OR ALTERATIONS ARE INTENDED TO EXISTING BUILDING? Nil

HERE GIVE SKETCH GROUND PLAN OF THE LAND AND BUILDINGS THE SUBJECT OF THIS APPLICATION. PROPOSED BUILDINGS SHOULD BE DISTINGUISHED FROM BUILDINGS NOW IN EXISTENCE.

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See attached plans

.....
 (Signature of Applicant)

BLACKBURN DEVELOPMENTS NO. 25 PTY. LIMITED

Date of application.....

FOR OFFICE USE ONLY:

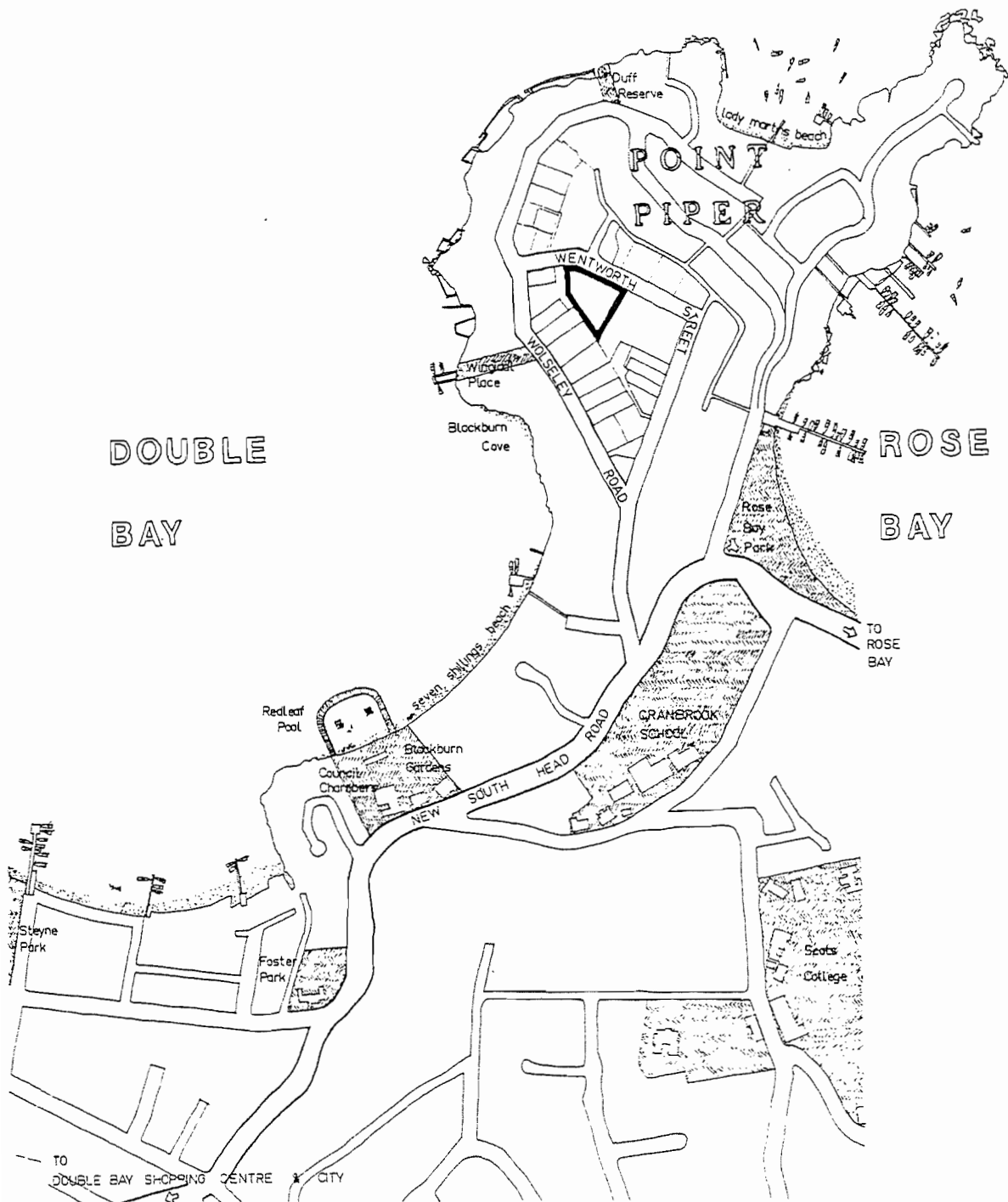
DATE OF RECEIPT 2.2.73 APPLICATION FEE \$1920.60

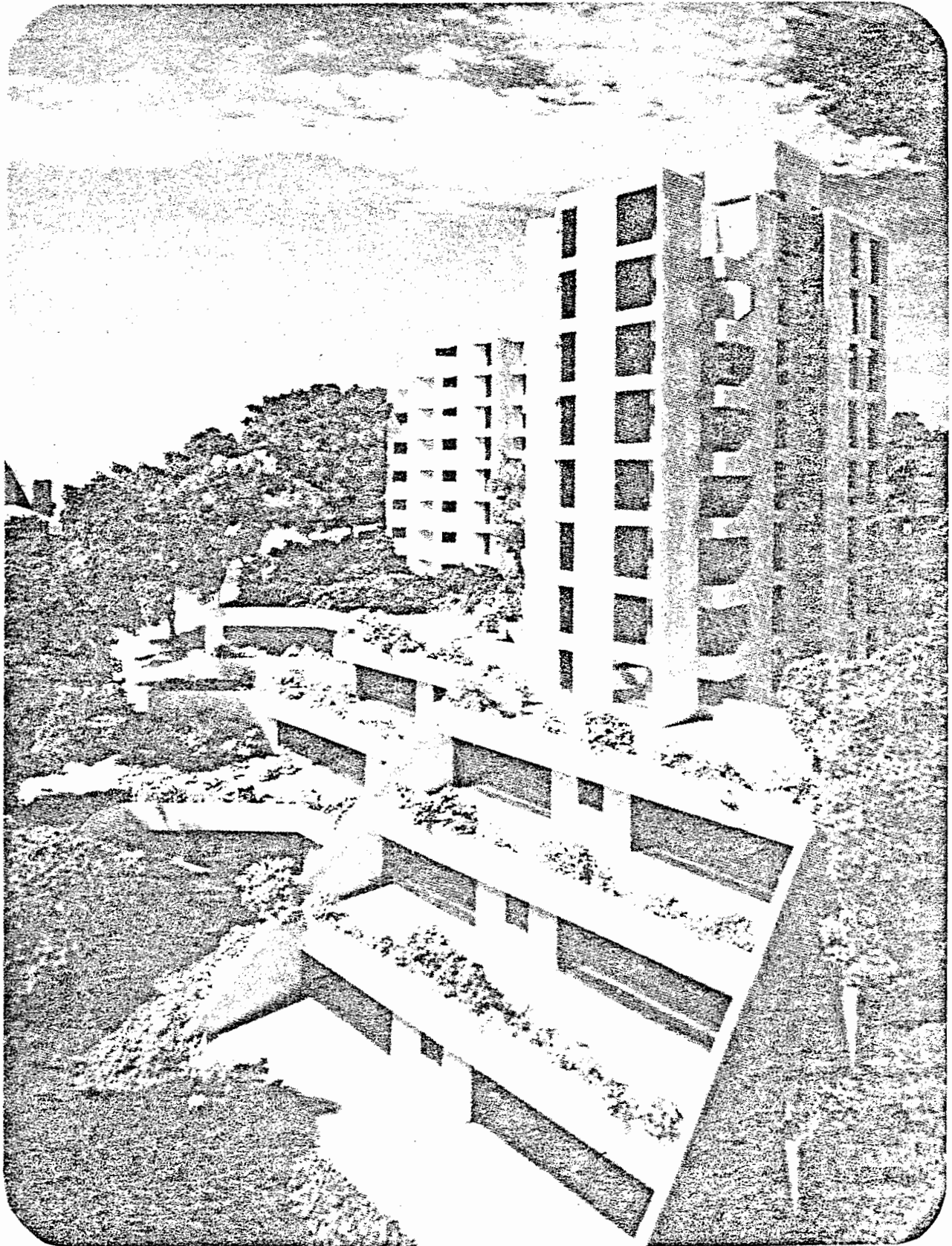
ADVERTISING FEE.....

RECEIPT No. 1544 AMOUNT \$1920.60

30

PORT JACKSON





THE PROJECT

The scheme proposed is in two stages: Stage 1, an eight storey building comprising three luxury 15 square apartments per floor, and Stage 2, a separate eight storey tower of one 15½ square luxury apartment surmounting a three floor terraced base of two 2-bedroom townhouses per floor. All apartments are to be finished and equipped to the highest standards.

In planning the rooms and balconies views without overlooking, the Architects have produced unusual interior spaces and an undulating, heavily indented facade which, because of its softness of form and cliff-like quality, is well suited to the topography of Point Piper. The terraced garden levels of the townhouses in Stage 2 are designed as an extension of the site works and landscaping.

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Parking is provided in the ratio required by the planning scheme. Resident parking is mostly in the form of underground basements with landscaped podiums over. As visitor parking is at the rear of the site where access to the building is easier, the uncovered cars will not be seen from the street.

External finishes are limited to a buff coloured surface coating to all masonry elements and olive green window frames, blinds and exterior metalwork. These colours relate to the sand and foliage cover which are the two dominant natural features of Point Piper.

The Developers are aware that the land is one of the last sites available in Point Piper for redevelopment and that it therefore offers one of the last opportunities to construct a building with standards of design, finish and accommodation appropriate to this exclusive location.

THE SITE

The project is sited on the high ground of Point Piper, on one of the few undeveloped parcels of land zoned for redevelopment. Views of the harbour extend from Double Bay right around to Rose Bay, with particular views north east to The Heads and down the line of Wentworth Street to the Harbour Bridge and the Opera House. However, the prominence of the development viewed from the harbour is, reduced by the uncompromising bulk of Ave Maria and large adjoining red brick houses and flats surrounding the site.

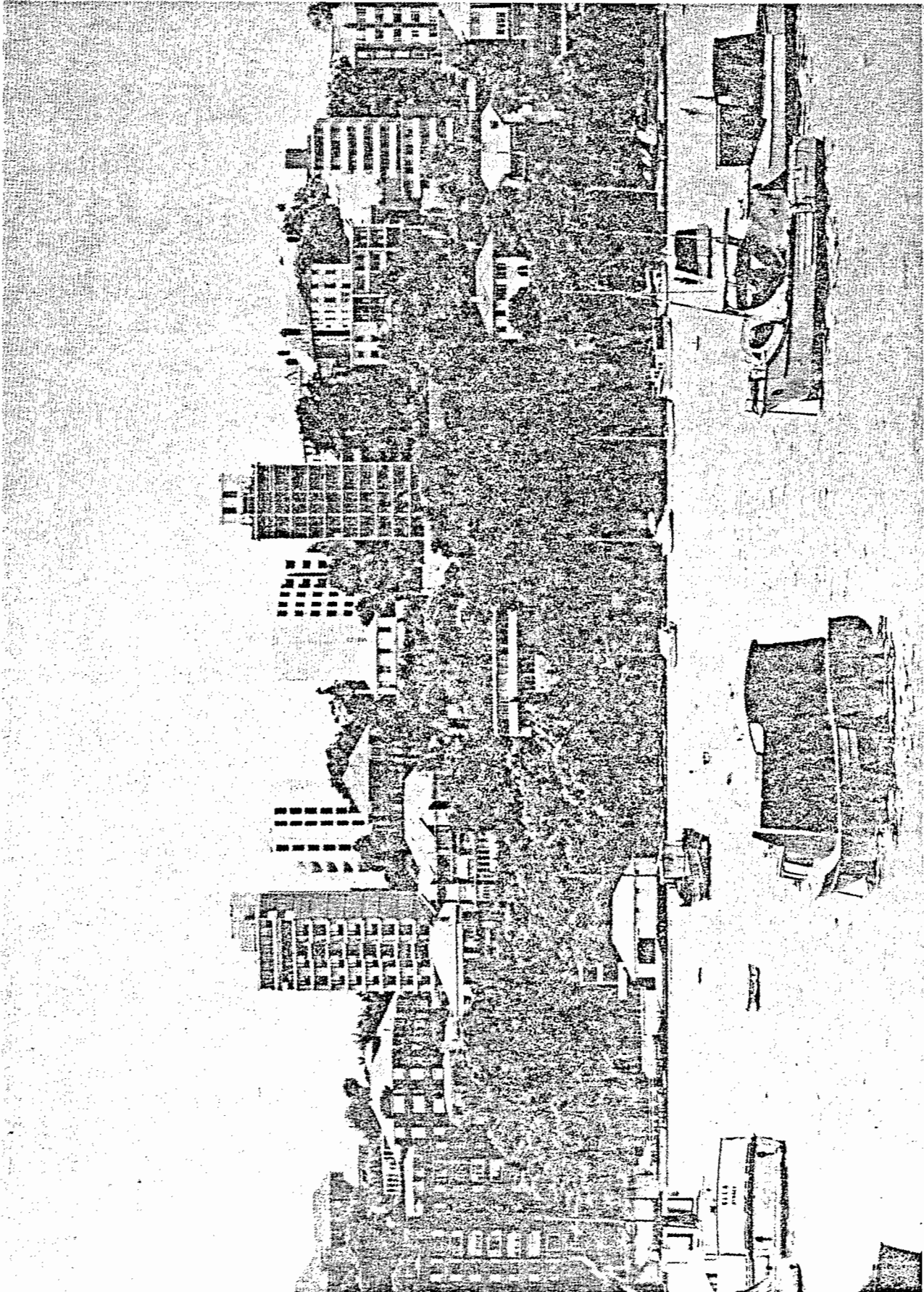
In the course of the preparation of this design the Architects, together with councils' officers, conducted several surveys of the harbour foreshores from the Harbour Bridge to Neilsen Park on the south side and Middle Head on the north side to study the existing buildings and their impact both at close and distant range to establish the correct criteria for scale, proportion and building mass.

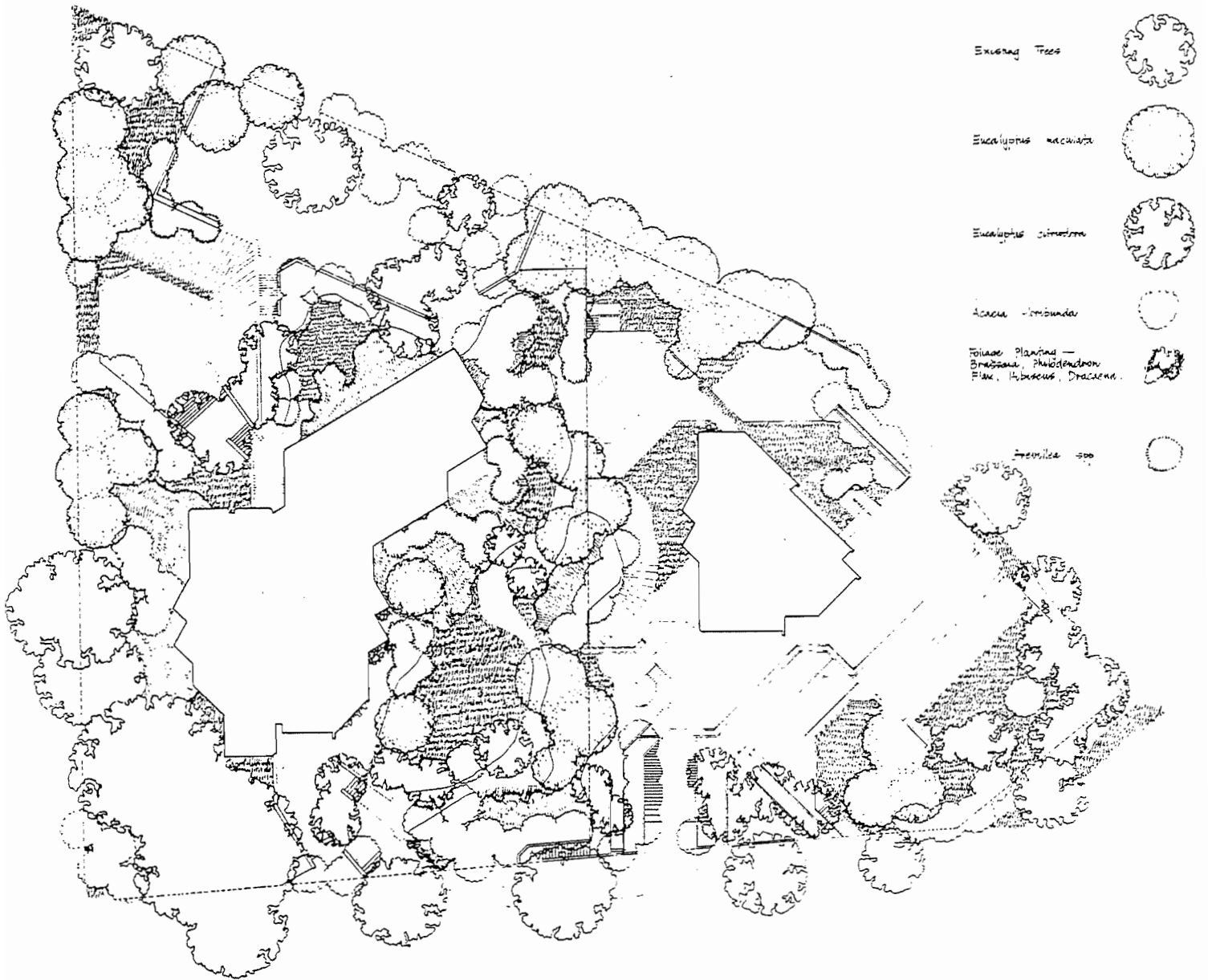
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The site is shielded from the street and adjoining properties at the eastern end by advanced trees which, together with the street trees, will form the basis of the landscaping scheme.

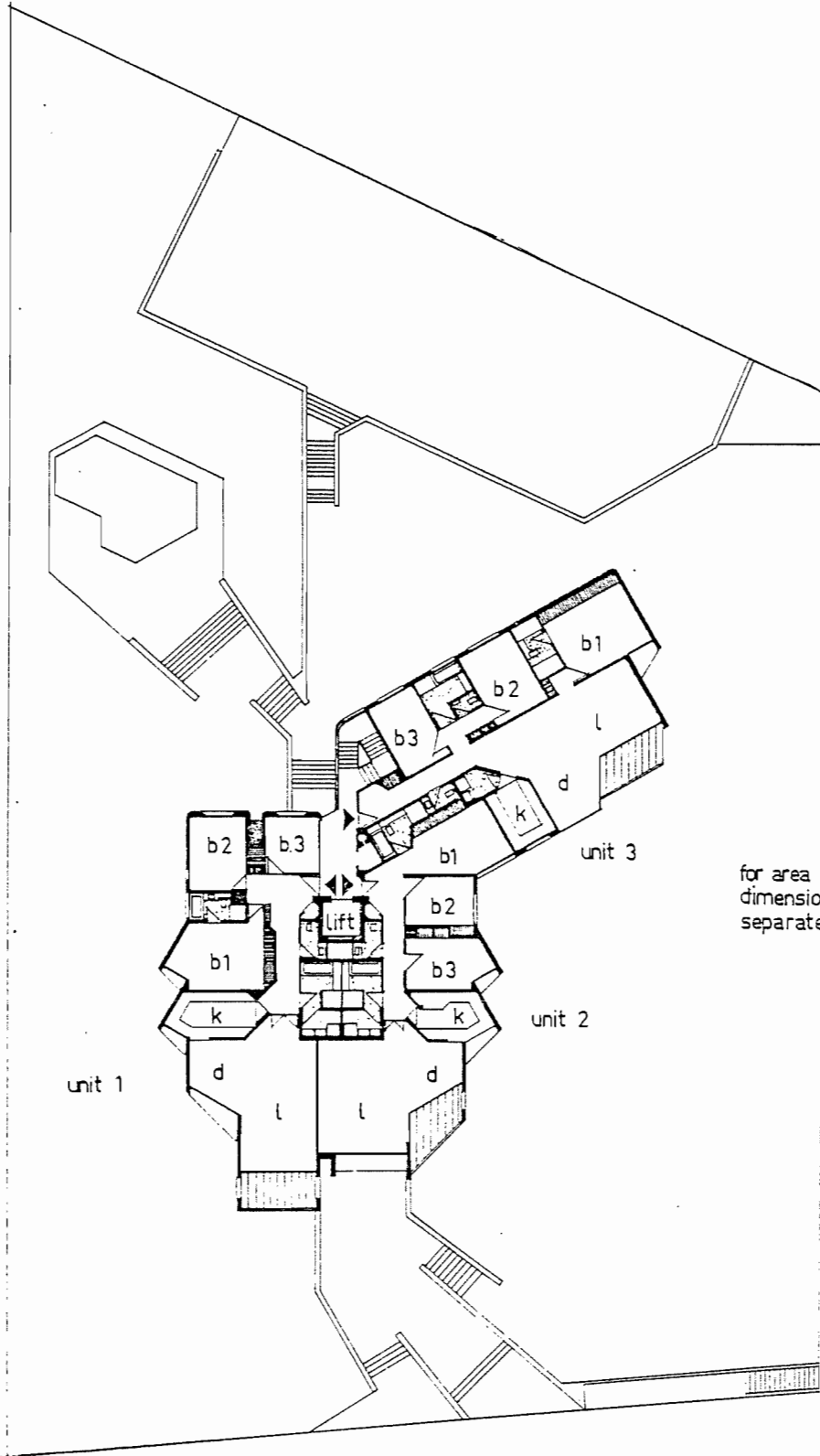
THE REGULATIONS

The planning scheme adopted by Woollahra Council stipulates the maximum floor space, height and site cover of buildings which, together with the required setbacks and the obvious need to obtain the best views, rigidly control the bulk and form of the building envelope within which the Architects have to work.





LANDSCAPE PLAN



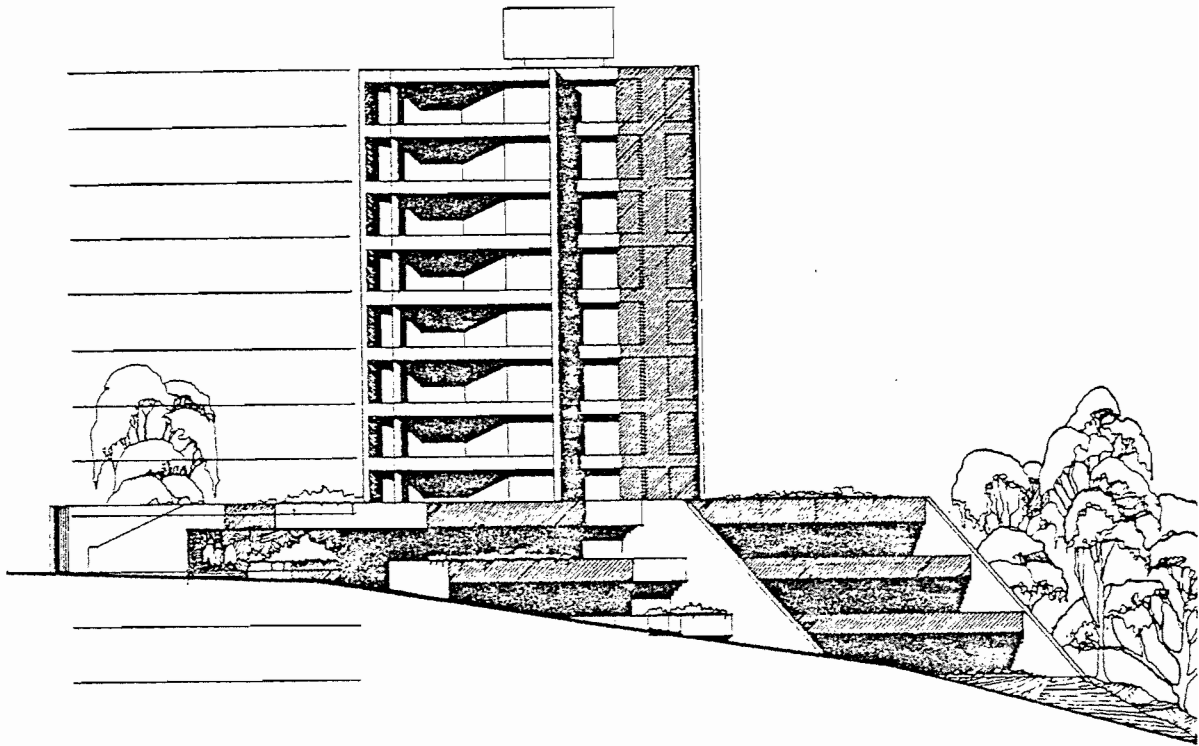
for area calculations and
dimensions refer to
separate drawing

unit 1

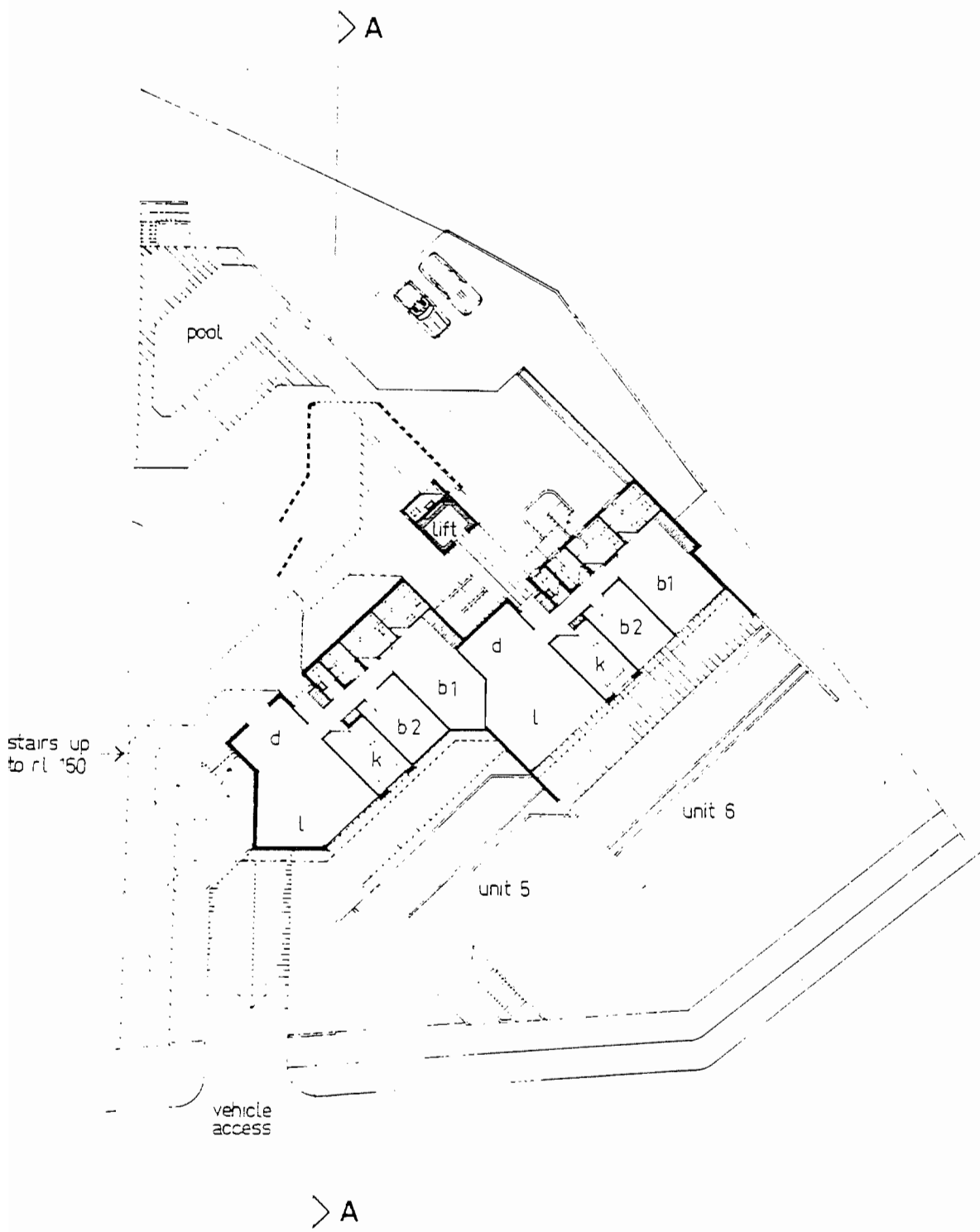
unit 2

unit 3

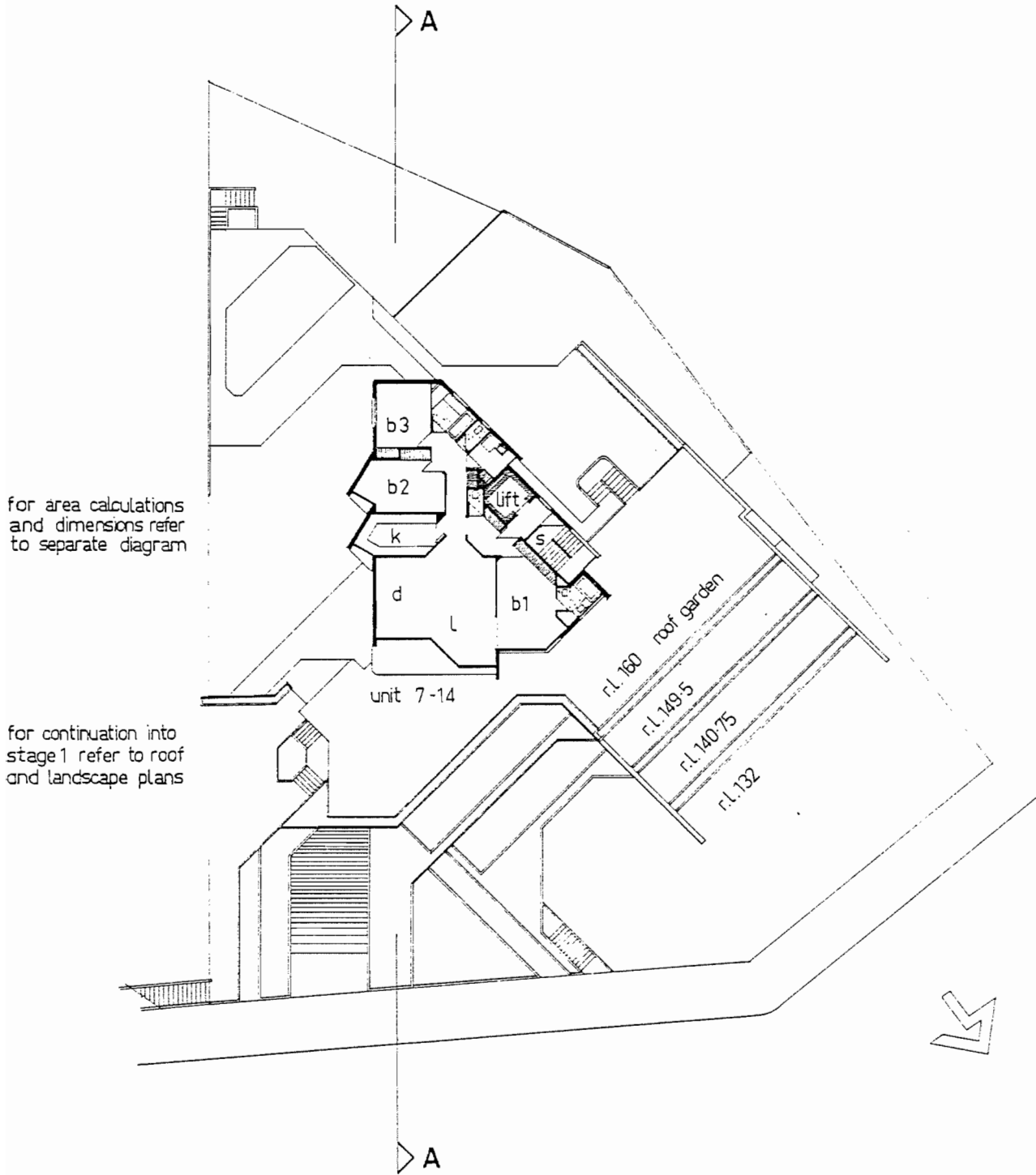
stage I
TYPICAL FLOOR PLAN



stage 2
NORTH ELEVATION

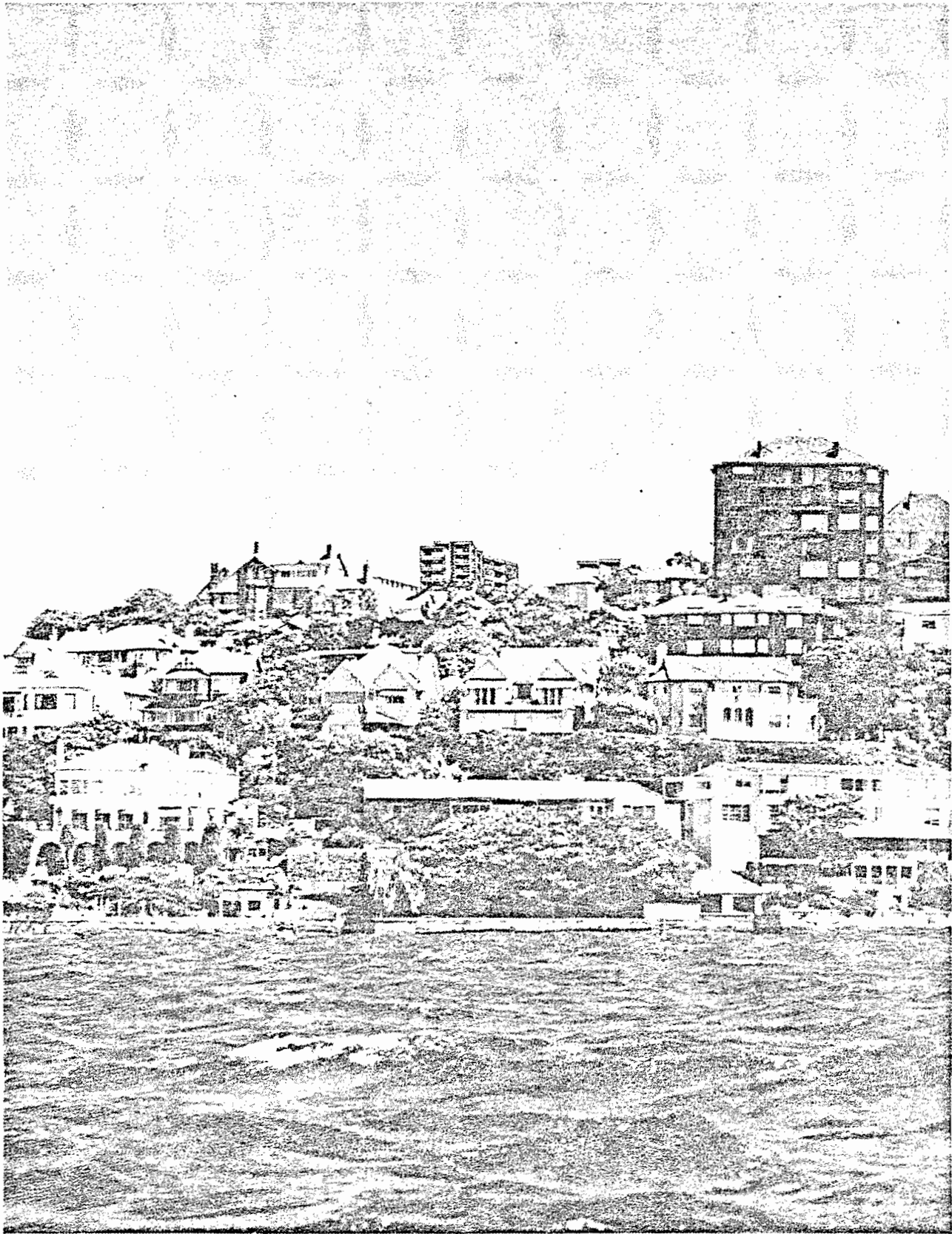


stage 2
LEVEL 3 r.l. 149.5



stage 2
TYPICAL FLOOR PLAN

scale ft 0 2.4 6.8 10 20 30



Exhibits: Exhibit E
Letter Plaintiff to Defendant 3 June 1974

120 Ocean Street,
Edgecliff.
3rd June, 1974

The Town Clerk,
Woollahra Municipal Council,
WOOLLAHRA

Dear Sir,

The owners of No. 8, 10 and 12 Wentworth Street, Point Piper will lodge at the earliest opportunity a Development Application appropriate to the 2C Zoning of the area.

The Development Application will be in accordance with the Gazetted Town Place and will follow the guide line laid down by the Appeals Tribunal.

I am bringing it to Council's notice that these Land Owners have suffered harrasment, difficulty and unpleasantness, and in two instances severe financial hardship.

I would ask Council to deal with this Application as expeditiously as possible and with the minimum delay.

I am,

Yours faithfully,

(Sgd) Roger Dunlop

Aitken & Pluck,
Solicitors,
Anchor House,
234-242 George Street,
SYDNEY. 2000.

Woollahra Council Chambers,
536 New South Head Road,
Double Bay, N.S.W. 2028.

Dear Sirs,

14th December, 1976

Development Application No: 107/76
Property: 8 Wentworth Street, Point Piper.
Proposal: Erection of a Seven Storey Residential
Flat Building

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I refer to Dr. Dunlop's application for development within the above property, his Appeal to the Local Government Appeals Tribunal, Council's advice to you, dated 17th November 1976, and the subsequent withdrawal of the Appeal agreed to by the Local Government Appeals Tribunal by instrument dated 10th December 1976, and I have to inform you that the matter was again considered by the Council at its meeting of 13th December 1976.

The Council, in accordance with its powers as the responsible authority under Part XIA of the Local Government Act, 1919, has granted consent to the application, in terms of the resolution as set out below.

The provisions of the Act are such that the Council is obliged to draw your attention to your right of appeal to the Local Government Appeals Tribunal against any or all of the conditions of consent. Should you be dissatisfied with any condition, it is respectfully suggested that you discuss the matter in the first instance with an officer of the Council's Town Planning Department.

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RESOLUTION OF THE COUNCIL

THAT having regard to the provisions of Clause 25(e) of Ordinance 1 and to the report of the Town Clerk dated 13th December 1976, and notwithstanding the resolution of 1st November 1976, to grant consent to Development Application DA107/76 — 8 Wentworth Street, Point Piper, the Council do now resolve pursuant to Section 530A of the Local Government Act, 1919, as amended, that every other power hereunto enabling to delegate authority to His Worship the Mayor, Alderman M.K.F. Bray, to satisfy himself that the Appeal lodged by Dr R.J.M. Dunlop to the Local Government Appeals Tribunal in respect of the Development Application hereinbefore referred to has been effectively withdrawn and to have such withdrawal verified by the Council's Solicitors and the Tribunal and thereafter to consent to the said Development Application and to cause a letter of consent to be issued over the signature of the Town Clerk, on the basis:—

30

THAT the Council, as the responsible authority, grant consent to DA107/76 for the erection of a seven storey residential flat building at 8 Wentworth Street, Point Piper, subject to the following conditions:—

1. Submission to, and approval by, the Council of a formal Building Application, lodged in accordance with the provisions of Part XI of the Local Government Act, 1919, as amended, and Ordinances thereunder, prior to the commencement of any building works, including demolition or alterations.
2. A future Building Application providing for the redesign of the garbage chute area allowing for a 20" diameter chute opening into the foyer and for adjacent storage for bulky waste items on each level.

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Exhibits: Exhibit F Defendant approval of
Development Application 14 December 1976

3. The building being redesigned to provide vertical shafts for mechanical ventilation services distinct and separate from plumbing and other ducts.
 4. A separate Building Application being lodged for all mechanically ventilated parking levels and all internal rooms.
 5. A separate Building Application being lodged for the proposed compactor chute system such to be of a design and type satisfactory to Council.
 6. The design and materials being used in the building being to the satisfaction of Council's Town Planning Department.
 7. The building complying in all respects with Ordinance 70 to the satisfaction of Council.
 8. A landscape plan incorporating the retention of the existing developed trees being submitted and approved by Council prior to the approval of a Building Application and such landscape plan being at scale 1:100 and including large scale tree planting with the height, spread and common name indicated on the plan. 10
 9. The height of the building to the uppermost point not exceeding R.L. 71.3 metres.
 10. The site coverage not exceeding 13.45%.
 11. The plot ratio not exceeding .86:1.
 12. All sound producing plant equipment, machinery or fittings associated with or forming part of a mechanical ventilating system being capable of complying with the Noise Criteria prescribed in Schedule C of the Council's ventilating code.
 13. All compressors and similar equipment used on the site during demolition and/or construction having noise emission no greater than 75dB(A) when measured in accordance with the ISO 2151 Standard at a radius of seven (7) metres. 20
 14. The noise emission from all plant associated with the installation not exceeding the ambient noise level at any time as measured at the boundary of the premises.
 15. That provision be made in the proposal for the introduction of at least three mature evergreen trees (by transplantation) along the frontage to Wentworth Street. The height of such trees to be 8m with a stem diameter of 200mm, not less than 1m above ground level when planted and the location and species to be to the satisfaction of Council.
 16. The use not commencing until such time as the requirements of and/or the conditions of this development consent have been carried out. 30
- The delegation contained in this resolution shall be exercisable only for the period from the date of this resolution and concluding Friday 17th December 1976 (inclusive).

Yours faithfully,
D.C. FORD,
TOWN CLERK

CONTRACT FOR SALE OF LAND

VENDOR'S AGENT
RICHARD STANTON & SONS PTY. LIMITED
167 Macquarie Street,
sydney. 2000.

Description of Property.

ALL THAT piece or parcel of land situate in the Municipality of Woollahra, Parish of Alexandria and County of Cumberland having a frontage of 44.80 m to Wentworth Street, being Lot 1 in Deposited Plan No. 76952 together with the dwelling erected thereon known as No. 8 Wentworth Street, Point Piper and being whole of the land in Certificate of Title Volume 12620 Folio 244.

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~~AUCTION CONDITIONS Upon a sale by auction:
(a) the highest bidder shall be the Purchaser. In case of any dispute the property shall be put up again at any former bidding and no bidding shall be retracted.
(b) the sale is subject to a reserve price and the right to bid is reserved on behalf of the Vendor.
(c) upon the fall of the hammer the Purchaser shall sign the following agreement the conditions of which, with these conditions, are the conditions of the sale by auction.~~

Vendor's full name, address and occupation.

AGREEMENT made the 8th day of August, 1977.

BETWEEN

ROGER JOHN MASSIE DUNLOP of Edgecliff, Medical Practitioner (herein called the Vendor) of the one part

20

AND

Purchaser's full name, address and occupation.

BERBELLA PTY. LIMITED of 19 Dover Road, Rose Bay (herein called the Purchaser) of the other part

WHEREBY the Vendor agrees to sell and the Purchaser agrees to purchase, if more than one as *JOINT TENANTS/*TENANTS IN COMMON IN THE FOLLOWING SHARES:

with joint and several liability under this agreement, the property above described (herein referred to as "the property") for the sum of

*Delete words not applicable.

FOUR HUNDRED & FIFTY THOUSAND DOLLARS (\$450,000.00)

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upon and subject to the following terms and conditions:—

1.—The Purchaser shall upon the signing of this agreement pay as a deposit to the Vendor's solicitors herein named as stakeholder the sum of FORTY FIVE THOUSAND DOLLARS (\$45,000.00)

which shall vest in the Vendor upon and by virtue of completion and which shall be accounted for to the Vendor upon receipt of an order from the Purchaser or his Solicitor authorising such payment. The deposit may be paid by cheque but if the cheque is not honoured on presentation the Purchaser shall immediately and without notice be in default under this agreement.

The balance of the purchase price shall be paid as stipulated in the First Schedule hereto.

Any moneys payable to the Vendor hereunder by the Purchaser or the Agent shall be paid to the Vendor's Solicitor or as he may direct in writing.

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*Delete words not applicable.

2.—The title to the land is under

THE REAL PROPERTY ACT, 1900, (not being Qualified Title or Strata Title)

3.—After the date of this agreement and within a reasonable time after written request by the Purchaser or prior thereto if the Vendor so desires the Vendor shall furnish to the Purchaser a written statement of his title which shall comprise:—

(a) FOR LAND UNDER THE REAL PROPERTY ACT (including Strata Title): particulars of title and the form of any restrictive covenant easement or other interest to be created by the transfer sufficient to enable the Purchaser to prepare the transfer. The Purchaser shall not be entitled to an abstract of any document affecting the title. Any instrument in respect of which a caveat is entered on the register shall, if in the possession of the Vendor or of any mortgagee of the property, be produced to the Purchaser free of charge; 10

~~(b) FOR LAND UNDER OLD SYSTEM TITLE: a proper abstract of his title together with the form of any restrictive covenant easement or other interest to be created by the conveyance. For the purpose of this clause a proper abstract of the Vendor's title may as to relevant documents to be abstracted comprise or include photographic copies (being themselves legible) of such documents PROVIDED THAT where the abstract includes any photographic copy of a document the Vendor shall furnish as part of his abstract and in addition to the foregoing requirements a chronological index of all the facts events and documents which comprise his title stating as regards the documents to be so indexed brief particulars of:—~~ 20

~~(i) the date of the document; (ii) its general nature; (iii) the parties to the document, and (iv) its registration details.~~

The vendor shall not be called upon to abstract the Crown Grant unless it is the only good root of title or to abstract produce or furnish a covenant to produce any deeds or documents in support of the title or in verification of the abstract which are not in the possession of the Vendor or of any mortgagee of the property. No objection shall be made to the execution of any document under a power of attorney authorising its execution:

(c) FOR LAND UNDER QUALIFIED TITLE: paragraph (a) of this clause shall apply to that part of the title evidenced by instruments registered under the Real Property Act and paragraph (b) shall apply to that part of the title not so evidenced; 30

(d) FOR LAND UNDER ANY ACT RELATING TO CROWN LANDS: particulars of title sufficient to enable the Purchaser to prepare his transfer and an abstract of title as provided in paragraph (b) of this clause in respect of the relevant facts and the documents of title which are not in a form prescribed by or pursuant to the Act under which the land is held and the form of any restrictive covenant easement or other interest to be created by the transfer or conveyance:

~~(e) FOR LAND UNDER MORE THAN ONE TITLE: a statement of title shall not be complete until furnished in respect of each title to the property.—~~

4.—The Purchaser shall be deemed to have waived any objection or requisition which he has not made and delivered to the Vendor within twenty-one days after the delivery of the Vendor's statement of title. Within twenty-eight days from the delivery of the Vendor's statement of title the Purchaser shall at his own expense tender to the Vendor for execution the appropriate assurance of the property provided however that if the assurance requires the consent of the Minister for Lands or other prescribed authority the time for tender thereof under this clause shall be the twenty-eight day period aforesaid or fourteen days from the notification to the Purchaser of the consent having been granted, whichever is the later. 40

5.—No error or misdescription of the property shall annul the sale but compensation if demanded in writing before completion but not otherwise shall be made or given as the case may require, the amount to be settled in case of a difference by an arbitrator appointed by the parties by mutual agreement or failing agreement nominated by the President for the time being of The Law Society of New South Wales. Clause 15 hereof shall not apply to any such claim for compensation.

†insert
"completion"
"this
agreement"
or other
agreed date.

6.—The Vendor shall be entitled to the rents and profits and shall pay or bear all rates taxes and outgoings up to and including the date of ⁶ completion from which date the Purchaser shall be entitled to and shall pay or bear the same respectively and any necessary apportionment thereof shall be made and adjusted on completion. Where the Vendor has paid or is liable to pay land tax on the property for the year current at the date of apportionment whether to the Commissioner of Land Tax or to a predecessor in title the amount to be apportioned as land tax under this clause shall be the sum which would have been payable by the Vendor for land tax on the property as used by him if the property had been owned and was the only land owned by him at midnight on 31st December than last past and the Vendor were natural person.

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7.—No objection or requisition or claim for compensation shall be made by the Purchaser in respect of any of the following matters:

- (a) the ownership or location of any dividing fence as defined by the Dividing Fences Act, 1951;
- (b) any water supply or sewerage or drainage service to the property being a joint service with any other property, the water supply sewerage or drainage pipes or connections for the property passing through other land or the water supply sewerage or drainage pipes or connections for any other land (including mains or pipes of any water sewerage or drainage authority) passing through the property;
- (c) any wall being a party wall in any sense of that term;
- (d) any exception reservation or condition contained in any relative Crown Grant;
- (e) the existence of any other exception or reservation the substance of which is disclosed in the Second Schedule hereto;
- (f) the existence of or departure from the terms of any easement or restrictive covenant affecting the property provided that the substance of any such easement or restrictive covenant is disclosed in the Second Schedule hereto.

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~~8.—If the property sold is or is intended to be a lot on a Strata Plan within the meaning of the Conveyancing (Strata Titles) Act, 1961, (in this clause called "the Act") then the Purchaser shall take title subject to the provisions of the Act and the Regulations thereunder in general and in particular to the following matters:—~~

- ~~(a) the by-laws of the Body Corporate created or to be created by virtue of the registration of the Strata Plan as contained in the First and Second Schedules to the Act subject only to such conditions variations or deletions as are in substance disclosed in this agreement;~~
- ~~(b) clause 7 of this agreement shall be read as applying equally to the property and to the parcel (as defined by the Act).~~
- ~~(c) For the purposes of this agreement:
 - ~~(i) "outgoings" shall include contributions to the Body Corporate pursuant to Section 15(2) of the Act;~~
 - ~~(ii) unless and until separate assessments of rates and taxes are issued in respect of~~~~

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~~the said lot or lots by the relevant authorities all necessary adjustments between the parties (whether on or after completion) shall be made on the basis that the lot shall be liable to that proportion of any such rates taxes and outgoings (other than land tax) levied or assessed against the parcel (as defined by the Act) as a whole which the unit entitlement of such lot or lots bears to the total entitlement of all lots comprised in the Strata Plan; and~~

~~(iii) unless and until contributions under Section 15(2) of the Act are fixed outgoings paid by the Vendor which would properly be the subject of such contributions when fixed shall be adjusted between the parties on the same basis as provided in paragraph (ii) of this sub-clause.~~

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~~(d) If the Strata Plan has not been registered the Vendor shall take all necessary steps to have it registered and completion of this agreement is subject to the Plan being registered within a reasonable time after the date hereof or such other time as may be specified expressly or by necessary implication in this agreement.~~

~~(e) The Purchaser shall not make any objection requisition or claim in respect of:~~

~~(i) any minor variations as regards the subject lot between the Strata Plan produced to the Purchaser and the Strata Plan as registered which may be required by any statutory authority or by the Registrar-General; or~~

~~(ii) any minor alterations which may be required by any statutory authority or by the Registrar-General in the number size location or unit entitlement of any lot or lots in the Strata Plan (other than the subject lot) or in or to the common property provided that the proportionate unit entitlement of the subject lot shall not thereby be varied;~~

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~~(f) notwithstanding any rule of law or equity to the contrary the risk of the property sold shall not pass to the Purchaser until completion;~~

~~(g) the property is sold subject to a warranty that the Vendor is not aware of:~~

~~(i) any actual or contingent liabilities of the Body Corporate of the said Strata Plan (other than for normal operating expenses); or~~

~~(ii) any defects (whether patent or latent) in the common property which may involve the said Body Corporate in the expenditure of money for repair or replacement (other than for ordinary wear and tear);~~

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~~(h) without prejudice to any rights arising under the last preceding sub-clause if it should be established prior to completion that there is any actual or contingent liability of the Body Corporate of the said Strata Plan (other than for normal operating expenses)~~

~~then the Purchaser shall be entitled to rescind this agreement~~

~~9. — (a) if the property sold is land under Qualified Title, notwithstanding the provisions of the Real Property (Conversion of Title) Amendment Act, 1967, and save as herein otherwise provided expressly or by necessary implication the provisions of the Conveyancing Act, 1919, which do not apply exclusively to land under the provisions of the Real Property Act, 1900, shall be deemed to apply, mutatis mutandis, to that part of the title of the land subject to this agreement which is not evidenced by instruments registered under the provisions of the Real Property Act, 1900.~~

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~~(b) if the Purchaser so requires the Vendor shall in addition to any transfer give a conveyance of his title.~~

*Delete
words not
applicable.

10.—~~If the property sold is land under any Act relating to Crown Lands:~~

- (a) if the time for issue of a certificate of conformity has passed the Vendor shall at his own expense produce the certificate or an official letter stating that the certificate was issued;
- (b) land held under a purchase tenure is sold subject to/free from all money payable to the Crown to complete the purchase. When the same is subject to payment by the Purchaser of the money lastmentioned the Vendor shall pay any postponed debt and interest shall be apportioned as an outgoing under Clause 6 hereof; and
- (c) ~~the rent of the land held under a leasehold tenure shall be apportioned as an outgoing under Clause 6 hereof.~~

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11.—The Vendor shall apply for any necessary consent of the Minister for Lands or other prescribed authority to the transfer of the property or any part of it whether still under Crown tenure or not and shall pursue such application and shall pay all costs and fees (other than those of the Purchaser's Solicitor) in respect thereof. The Purchaser shall promptly join in the application as may be necessary. If such consent is refused either party may rescind this agreement. If consent is granted subject to any condition with which either party may be unable or reasonably unwilling to comply that party may give to the other notice in writing that the conditional consent is unacceptable to him and thereupon the consent shall be deemed to have been refused provided that the Vendor on his own election may as an alternative to making application for the consent of the Minister or other authority as aforesaid at his own expense make application to the Minister pursuant to the provisions of the Crown Lands and Other Lands (Amendment) Act, 1970, for a certificate under the hand of the Minister enabling the property to be transferred without such consent.

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12.—The vendor shall not whether before or after completion be bound to contribute to the erection or cost of erection of any dividing fence or wall between the property and any adjoining land owned by the Vendor. If so required the Purchaser shall include in his conveyance or transfer a restrictive covenant on his part in such form as the Vendor shall reasonably require for the benefit of any adjoining land of the Vendor, binding himself and his successors in title, which will exempt the Vendor and his successors in title other than purchasers on sales from liability to make or pay any such contribution.

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13.—The property is sold

*with vacant possession

*~~subject to existing tenancies, particulars whereof are set out in the Third Schedule~~

hereto,

the benefit of which shall be given to the Purchaser at the date of completion.

14.—The requirements existing at the date of this agreement of any valid notice issued prior to the date of this agreement by any competent authority or by an owner or occupier of land adjoining the property necessitating the doing of work or expenditure of money on or in relation to the property or any footpath or road adjoining the same must be fully complied with by the Vendor prior to completion and any such requirements not existing at the date of this agreement must subject to completion of this agreement be complied with by the Purchaser who shall indemnify the Vendor in respect thereof. Nothing herein contained shall relieve the Vendor from liability in respect of any work done prior to the date of this agreement upon the property or upon any footpath or road adjoining the same and the Vendor agrees to indemnify the Purchaser against all liability in respect thereof notwithstanding the completion of this agreement. If

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*Delete
words not
applicable.

*Insert
**"completion"
**this
agreement**
or other
agreed date.

without default of the Purchaser this agreement is rescinded the Vendor shall repay to the Purchaser any amount expended by the Purchaser in complying with any such requirement which was in the nature of capital expenditure or has resulted in a benefit to the Vendor.

15.—If the Vendor shall be unable or unwilling to comply with or remove any objection or requisition which the Purchaser has made and shall not have waived within 14 days after the Vendor has given him notice of intention to rescind this agreement the Vendor, whether he has or has not attempted to remove or comply with the objection or requisition and notwithstanding any negotiation or litigation in respect thereof and whether the Purchaser has or has not taken possession shall be entitled by notice in writing to rescind this agreement.

16.—If the Purchaser defaults in the observance or performance of any obligation imposed on him under or by virtue of this agreement the deposit paid by him hereunder, except so much of it as exceeds 10% of the purchase price, shall be forfeited to the Vendor who shall be entitled to terminate this agreement and thereafter either to sue the Purchaser for breach of contract or to resell the property as owner and the deficiency (if any) arising on such resale and all expenses of and incidental to such resale or attempted resale and the Purchaser's default shall be recoverable by the Vendor from the Purchaser as liquidated damages provided that proceedings for the recovery thereof be commenced within 12 months of the termination of this agreement. The Vendor may retain any money paid by the Purchaser on account of the purchase other than the deposit money forfeited under this clause as security for any deficiency arising on a resale or for any damages or compensation (including any allowance by way of occupation fee or for rents or profits from a Purchaser who has been in possession of the property or in receipt of the rents or profits thereof) awarded to him for the Purchaser's default provided that proceedings for the recovery of such damages or compensation be commenced within 12 months of the termination of this agreement.

17.—Should it be established that at the date of this agreement the property was affected by any one or more of the following:

- (a) ~~any provision of any planning scheme, whether prepared or prescribed, or any interim development order made under the provision of the Local Government Act, 1919;—~~
- (b) ~~any Residential District Proclamation under Section 309 of the Local Government Act, 1919;—~~
- (c) any proposal for realignment widening siting or alteration of the level of a road or railway by any competent authority;
- (d) ~~any mains or pipes of any water sewerage or drainage authority passing through the property;—~~
- (e) any provisions of or under the Mines Subsidence Compensation Act, 1961;
- (f)

†Any other matters, *desired to be disclosed in the Fourth Schedule.

in any manner other than as disclosed in the Fourth Schedule hereto, then the Purchaser shall be entitled to rescind this agreement but shall not be entitled to make any other objection requisition or claim for compensation in respect of any such matter. Any right of the Purchaser to rescind under this clause shall be exercised by notice in writing given to the Vendor prior to completion. In relation to paragraph (c) hereof, the property shall be deemed to be affected by a proposal if the Purchaser produces a written statement of the authority concerned, the substance of which is other than the property is not affected by any proposal of the authority.

18.—If before transfer of title the Purchaser is given the benefit of possession of the property then until transfer of title

- (a) he shall not let or part with possession of or make any structural alteration or addition to the property;
- (b) he shall
 - (i) keep the property in good repair having regard to its condition at the date of possession and permit the Vendor or his agent at all reasonable times to enter and view the state or repair;
 - (ii) keep all buildings fully insured against fire or as the Vendor may reasonably require and deliver the policy and renewal receipts to the Vendor;
 - (iii) punctually pay all rates and taxes on the property and any necessary apportionment shall be made at the date provided in clause 6 or the date of possession whichever is the earlier; and
 - (iv) comply with the provisions of all statutes and regulations and of any instrument or covenant or order affecting the property.

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If the Purchaser shall make default in any of these obligations the Vendor may without notice make good the default and without prejudice to his other rights may recover from the Purchaser as a debt the cost of so doing with interest therein at 10% per annum until repayment and such amount and interest shall until repayment be a charge on the property.

19.—Where the balance of the purchase price is payable by instalments before transfer of title:

- (a) if default by the Purchaser in payment of any instalment of the purchase price or interest hereunder shall continue for four weeks (in this respect time being of the essence) the balance of the purchase price then owing with accrued interest shall immediately without notice to the Purchaser become due and payable irrespective of the transfer of title;
- (b) the Purchaser shall not be required to tender the assurance as stipulated in clause 4 hereof but shall tender it within 14 days after making the final payment hereunder; and
- (c) the deposit shall be accounted for under clause 1 of this agreement and any necessary authority in that regard shall be given forthwith on the signing of this agreement.

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20.—If this agreement is rescinded (as distinct from terminated) pursuant to any express right to rescind (as distinct from a right to terminate) conferred by this agreement the rescission shall be deemed to be a rescission ab initio, and

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- (a) the deposit and all other money paid by the Purchaser hereunder shall be refunded to him;
- (b) neither party shall be liable to pay the other any sum for damages costs or expenses; and
- (c) if the Purchaser is or has been in occupation or in receipt of the rents or profits of the property he shall account for or pay to the Vendor the net rents and profits received or a fair occupation rent for the property (whichever is the greater) until the date of rescission but the Vendor shall give the Purchaser credit for any interest paid by the Purchaser and any resulting balance payable by the Purchaser may be deducted by the Vendor from the deposit and other moneys before returning the same to the Purchaser.

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21.—Where herein used words importing the singular number or plural number shall include the plural number and singular number respectively and words importing the masculine gender shall include the feminine or neuter gender.

22. (a) Service of any notice or document under or relating to this agreement:
(i) may be effected as provided in Section 170 of the Conveyancing Act, 1919; and
(ii) shall be sufficient service on a party if effected on his solicitor in any manner provided in that section.
- (b) A notice given or document signed and served on behalf of any party hereto by his solicitor shall be deemed to have been given or served by that party personally.
- 23.—Schedule III of the Conveyancing Act, 1919, shall not apply to this agreement.

SPECIAL CONDITIONS

**ANNEXURE TO CONTRACT FOR SALE MADE BETWEEN RODER JOHN MASSIE DUNLOP
(VENDOR) OF THE ONE PART AND BERBELLA PTY. LIMITED (PURCHASER) OF THE OTHER
PART DATED this 8th day of August 1977**

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24. No objection or requisitions or claim for compensation shall be made by the Purchaser if it should be found that:—

- (a) there is any breach of Local Government Act Ordinances by the walls eaves or gutters of any building on the property;
- (b) there is any encroachment by or upon the property;
- (c) any roof or surface water drainage is connected to the sewers;
- (d) the property was affected by any provision of any planning scheme, whether prepared or prescribed, or any interim development order made under the provisions of the Local Government Act, 1919.

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25. The Purchaser acknowledges that he does not rely in this contract upon any warranty or representation made by the Vendor or any person on behalf of the Vendor except such as are expressly provided herein but has relied entirely upon his own enquiries relating to and inspection of the property AND the Purchaser further acknowledges that he accepts the property and any chattels and things included in this contract in their present condition subject to fair wear and tear.

26. Without prejudice to the generality of Clause 24 hereof, the Purchaser shall not be entitled to object, requisition or make any claim for compensation in respect of any matter disclosed in:—

- (a) The Survey Report of the property by G.W. Oborn dated 17th June, 1970, a copy of which is annexed hereto and marked with the letter "A".
- (b) The Sewerage Service Diagram for the property, a copy of which is annexed hereto and marked with the letter "B".

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27. The Purchaser is aware that the Vendor has obtained consent from the Woollahra Municipal Council to Development Application No. 107/76, a copy of which consent, dated 14th December, 1976, is annexed hereto and marked with the letter "C". The Purchaser acknowledges that he will not object, requisition or make any claim for compensation in respect of any matter disclosed therein.

28. The Purchaser shall not be entitled to delay completion of this contract on the ground that the property is subject to a charge for any unassessed land tax at the date of completion but the Purchaser shall accept the Vendor's undertaking to comply promptly with the proper requirements of the Commissioner for Land Tax in relation to returns and subject to any necessary adjustment thereof to pay any land tax assessed to the Vendor within the time limited by the Assessment Notice or Notices when issued. In the event of the Commissioner for Land Tax alleging the existence of unassessed or unpaid

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land tax charged upon the property and his specifying the amount required to be paid to release his charge in respect thereof the Purchaser's solicitor will retain out of the purchase money the sum equal to such amount to be held in the Purchaser's solicitor's trust account pending the final determination of any assessment issued by the Commissioner. Such amount may be placed on deposit at the discretion of the Vendor's solicitor and interest thereon paid to the Vendor.

29. Should a receiver, official manager, liquidator or provisional liquidator be appointed to the Purchaser before completion of this contract then the Vendor may by notice in writing to the Purchaser or his solicitors rescind this contract and the provisions of Clause 20 hereof shall govern such rescission. 10
30. (a) The Purchaser will lodge a building application within thirteen (13) weeks of the date hereof with Woollahra Municipal Council for approval by the said Council of the erection of a building in accordance with the conditions of the attached development consent, provided that subject to compliance by the Purchaser with such conditions in preparing the said building application the Vendor shall raise no objection nor shall he be entitled to make any claim or take any other action pursuant to this agreement in respect of any departures in the said building application from any plans submitted with the application for such development consent. Should the Purchaser fail to lodge such application within the period of thirteen (13) weeks and if the parties hereto shall not meanwhile have mutually agreed in writing to an extension of the time during which the said application may be lodged then the Vendor shall be at liberty by notice in writing to the Purchaser or to its solicitors (such notice to be given within fourteen (14) days of the Vendor becoming aware of the failure to lodge) to rescind this Contract in which case the provisions of Clause 20 hereof shall apply to such rescission. 20
- (b) The purchaser shall be entitled to apply for an extension or renewal of the attached development consent number 107/76. In this regard both parties shall execute any application or other document reasonably required by the said Council to enable an application to be lodged for extension or renewal of such consent as soon as practicable after the date hereof. 30
- (c) In the event of the said building application being refused or of its not being determined within forty (40) days after lodgment with the said Council or of its being approved subject to any conditions which the purchaser does not accept, the Purchaser shall within fourteen (14) days after the happening of any of the three aforesaid events appeal to the Local Government Appeals Tribunal or institute proceedings in a Court if considered on legal advice more appropriate in respect of any such events. If an appeal is lodged or proceedings are commenced pursuant to this paragraph the Purchaser undertakes to pursue the same with all due expedition and at its own expense and for the purpose of this agreement the final decision of the said Tribunal or Court or of the Council pursuant to any such proceedings shall be deemed to be the date of approval of the Purchaser's building application for the purpose of this agreement. In the event of the said building application not being approved by 30th June, 1978 and if the parties hereto shall not meanwhile have mutually agreed in writing to an extension of the time during which the said approval may be obtained then either party hereto shall be at liberty by notice in writing to the other party or to its solicitors (such notice to be 40

given within fourteen (14) days of 30th June, 1978) to rescind this contract in which case the provisions of clause 20 hereof shall apply to such rescission provided however that if at 30th June, 1978 there is litigation in any court which relates to the implementation or the approval of the said building application then the date by which approval of the said building application must be obtained shall be extended to 31st October, 1978. If at 31st October, 1978 such approval has not been given and if the parties hereto shall not meanwhile have mutually agreed in writing to an extension of the time during which the said approval may be obtained then the purchaser shall be at liberty by notice in writing to the Vendor or to his solicitors (such notice to be given within fourteen (14) days of 31st October, 1978) to rescind this Contract in which case the provisions of Clause 20 hereof shall apply to such rescission. 10

(d) The Purchaser undertakes to prosecute the application for building approval, any application which it may make to extend the existing development consent and any appeal or proceedings as aforesaid with reasonable diligence and despatch and the Vendor undertakes to execute any form of consent or other document which may lawfully or reasonably be required by the said Council or Tribunal or court in connection with the same and to give the Purchaser all assistance which it might reasonably request in relation to the prosecution of such applications, appeal or proceedings. 20

31. Pending completion the deposit herein shall be placed on deposit in Australian Guarantee Corporation Limited in the name of Adrian Consett Stephen representing the Vendor's solicitors and Barry Lindsay Doyle representing the Purchaser's solicitors as trustees for the parties hereto to be applied pursuant to the terms of this agreement upon completion or determination thereof and upon condition that all interest payable by such company shall be paid to the Purchaser upon such completion or determination provided that in the event of the Vendor becoming entitled to forfeit the deposit pursuant to Condition 16 hereof such interest shall upon the said forfeiture be paid to the Vendor.

32. The Vendor warrants that the proposed residential flat building shown in the plan lodged with his application to the said Council for the said development consent complied in respect of its height, site coverage and plot ratio with the limits specified in condition 9, 10 and 11 of such consent. Without prejudice to the Purchaser's other rights hereunder its obligations under Condition 30(a) (i) hereof are expressly subject to this warranty. 30

SURVEYOR'S CERTIFICATE

17th June, 1970

Messrs. Dibbs, Crowther & Osborne,
Solicitors,
16 Barrack Street,
SYDNEY. 2000. N.S.W.

ATTENTION: Mr. P. Everett

TITLE:

Land at Point Piper in the Municipality of Woollahra, Parish of Alexandria County of Cumberland, having a frontage of 147'0" to Wentworth Street, being the land described in File Plan No. 76952 and being the whole of the land comprised in Certificate of Title Volume 3814, Folio 117.

10

CERTIFICATE:

I hereby certify that the survey of the land shown edged red on the sketch adjoining was made in accordance with the Survey Practice Regulations.

IMPROVEMENTS:

Upon the land, in the position shown on the sketch, stands a brick cottage on stone foundations, and with a slate roof, known as number 8 Wentworth Street, "Liskeard".

LOCAL GOVERNMENT ACT ORDINANCES:

The subject cottage complies with the requirements of Clauses 48(a) and 48(c) of Ordinance 71 of the Local Government Act, 1919, as regards the distances from the walls to the boundaries and the clearance of the overhang. However, it would appear that the subject cottages was in fact, erected before the commencement of the abovementioned Act. The weatherboard dwelling at the rear of the cottage which is presently being used for residential purposes, does not comply with the abovementioned Ordinances of the Local Government Act. This dwelling also appears to have been erected prior to 1919.

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GENERAL:

The positions of all fences are as shown on the sketch, and subject to irregularities in these, there are no encroachments by or upon the subject property.

(Sgd) G. W. OBORN

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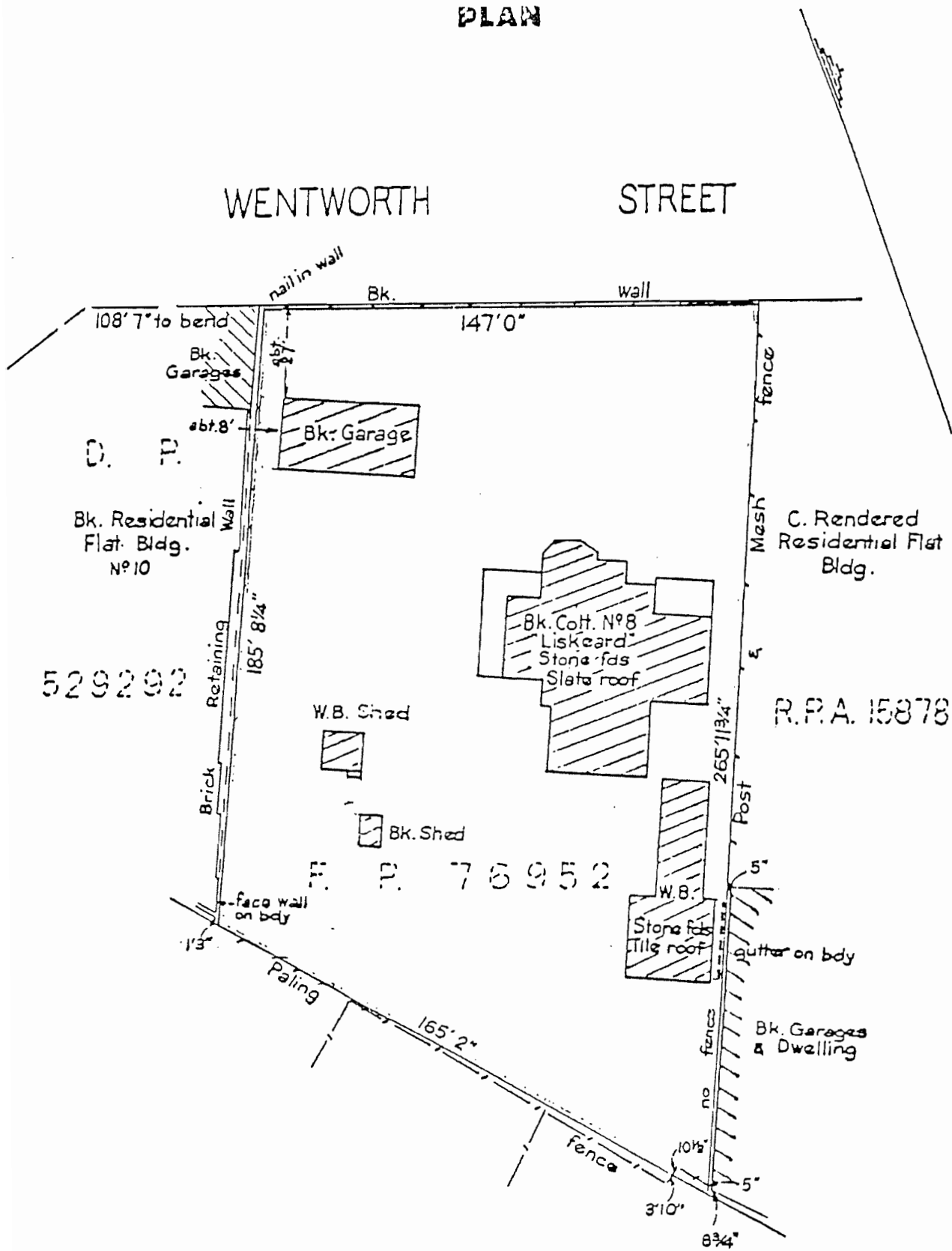
.....

G.W. OBORN

(Registered Surveyor).

—Take in 2 Illustration Pages—

PLAN



[Handwritten Signature]
.....
(Registered Surveyor)

MUNICIPALITY OF WOLLAHIRA
DIAGRAM OF SANITARY DRAINAGE

Municipality of WOLLAHIRA

SEWER AVAILABLE

Diagram No. 104213

SYMBOLS AND ABBREVIATIONS							
□	Boundary Trap	RV	Reflux Valve	I.P.	Induct Pipe	Bsn	Basin
■	Pit	CE	Cleaning Eye	M.F.	Mica Flap	Shr	Shower
■	Grease Interceptor	Vert	Vertical Pipe	T	Tubs	W.I.P.	Wrought Iron Pipe
■	Gully	V.P.	Vert. Pipe	K.S.	Kitchen Sink	C.I.P.	Cast Iron Pipe
■	R. Trap	S.V.P.	Soil Vent Pipe	W.C.	Water Closet	FW	Floor Waste
■	Reflux Sink	D.C.C.	Down Cast Cowl	B.W.	Bath Waste		

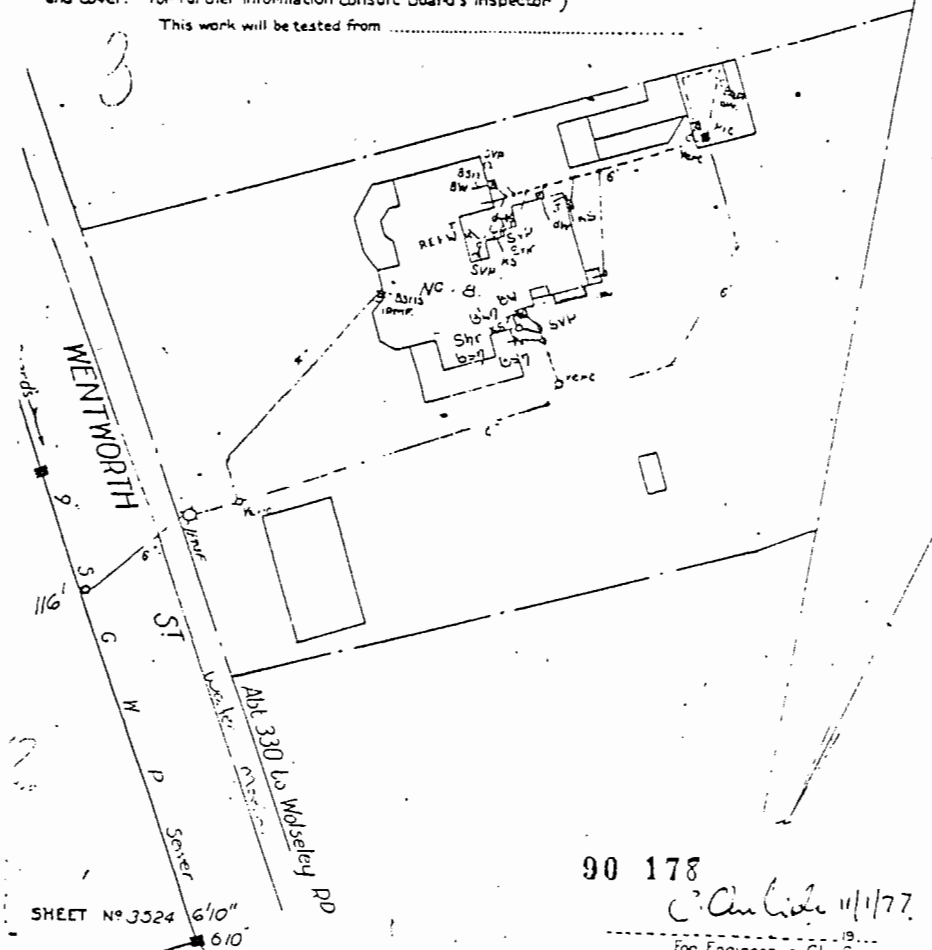
Existing drainage shown by black lines. Scale: 40 Feet to an Inch New drainage shown by full blue lines.

This diagram is the property of the Proprietor and is to be returned to him on completion of the work. Certificates for drainage and sanitary plumbing may be obtained on application at the office of the Board by the Drainer or Plumber concerned.

The Board accepts no responsibility for the suitability of the diagram in relation to the eventual position of the Board's sewer. When the sewer becomes available it will be necessary to apply for a revised diagram.

This work must be carried out in accordance with the Board's By-laws and Regulations. (4" dia. pipes may be used in lieu of 6" dia pipes as shown on this diagram if the property owner so desires, provided that the relative levels of the sewer and house fixtures will permit of the pipes being laid with regulation grades and cover. For further information consult Board's Inspector.)

This work will be tested from



90 178

C. Clarke 11/1/77

For Engineer-in-Chief

SHEET No 3524 6'10" x 6'10"

OFFICE USE ONLY						
W.C.	Designed by	Date	Inspector	First Visit	Passes	Date
B.W.	Inspector	1/1				
Shr	Examined by	1/1	This memo must be returned as soon as possible or NOT LATER THAN B.T.K.	Checked with Design and Diagram		
Bsn	Chief Inspector			Chief Inspector		
K.S.						
T.						
Plg						
Dge Int						

Aitken & Pluck,
Solicitors,
Anchor House,
234-242 George Street,
SYDNEY 2000.

Woollahra Council Chambers,
536 New South Head Road,
Double Bay, N.S.W. 2028.

14th December 1976

Dear Sirs,

Development Application No: 107/76

Property: 8 Wentworth Street, Point Piper.

Proposal: Erection of a Seven Storey Residential Flat Building

I refer to Dr Dunlop's application for development within the above property, his Appeal to the Local Government Appeals Tribunal, Council's advice to you, dated 17th November 1976, and the subsequent withdrawal of the Appeal agreed to by the Local Government Appeals Tribunal by instrument dated 10th December 1976, and I have to inform you that the matter was again considered by the Council at its meeting of 13th December 1976. 10

The Council, in accordance with its powers as the responsible authority under Part XIIA of the Local Government Act, 1919, has granted consent to the application, in terms of the resolution as set out below.

The provisions of the Act are such that the Council is obliged to draw you attention to your right of appeal to the Local Government Appeals Tribunal against any or all of the conditions of consent. Should you be dissatisfied with any condition, it is respectfully suggested that you discuss the matter in the first instance with an officer of the Council's Town Planning Department. 20

RESOLUTION OF THE COUNCIL

THAT having regard to the provisions of Clause 25(e) of Ordinance 1 and to the report of the Town clerk dated 13th December 1976, and notwithstanding the resolution of 1st November 1976, to grant consent to Development Application DA107/76 — 8 Wentworth Street, Point Piper, the council do now resolve pursuant to Section 530A of the Local Government Act, 1919, as amended, that every other power hereunto enabling to delegate authority to His Worship the Mayor, Alderman M.K.F. Bray, to satisfy himself that the Appeal lodged by Dr R.J.M. Dunlop to the Local Government Appeals Tribunal in respect of the Development Application hereinbefore referred to has been effectively withdrawn and to have such withdrawal verified by the Council's Solicitors and the Tribunal and thereafter to consent to the said Development Application and to cause a letter of consent to be issued over the signature of the Town clerk, on the basis:— 30

THAT the Council, as the responsible authority, grant consent to DA107/76 for the erection of a seven storey residential flat building at 8 Wentworth Street, Point Piper, subject to the following conditions:—

1. Submission to, and approval by, the Council of a formal Building Application, lodged in accordance with the provisions of Part XI of the Local Government Act, 1919, as amended, and Ordinances thereunder, prior to the commencement of any building works, including demolition or alterations. 40
2. A future Building Application providing for the redesign of the garbage chute area allowing for a 20" diameter chute opening into the foyer and for adjacent storage for bulky waste items on each level.
3. The building being redesigned to provide vertical shafts for mechanical ventilation services distinct and separate from plumbing and other ducts.

4. A separate Building Application being lodged for all mechanically ventilated parking levels and all internal rooms.
5. A separate Building Application being lodged for the proposed compactor chute system such to be of a design and type satisfactory to Council.
6. The design and materials being used in the building being to the satisfaction of Council's Town Planning Department.
7. The building complying in all respects with Ordinance 70 to the satisfaction of Council.
8. A landscape plan incorporating the retention of the existing developed trees being submitted and approved by Council prior to the approval of a Building Application and such landscape plan being at scale 1:100 and including large scale tree planting with the height, spread and common name indicated on the plan. 10
9. The height of the building to the upper most point not exceeding R.L. 71.3 metres.
10. The site coverage not exceeding 13.45%.
11. The plot ratio not exceeding .86:1.
12. All sound producing plant equipment, machinery or fittings associated with or forming part of a mechanical ventilating system being capable of complying with the Noise Criteria prescribed in Schedule C of the Council's ventilating code.
13. All compressors and similar equipment used on the site during demolition and/or construction having noise emission no greater than 75dB(A) when measured in accordance with the ISO 2151 Standard at a radius of seven (7) metres. 20
14. The noise emission from all plant associated with the installation not exceeding the ambient noise level at any time as measured at the boundary of the premises.
15. That provision be made in the proposal for the introduction of at least three mature evergreen trees (by transplantation) along the frontage to Wentworth Street. The height of such trees to be 8m with a stem diameter of 200mm, not less than 1m above ground level when planted and the location and species to be to the satisfaction of Council.
16. The use not commencing until such time as the requirements of and/or the conditions of this development consent have been carried out.

The delegation contained in this resolution shall be exercisable only for the period from the date of this resolution and concluding Friday 17th December 1976 (inclusive). 30

Yours faithfully,
(Sgd) D. C. FORD
D.C. FORD
TOWN CLERK

THE FIRST SCHEDULE

Payment of
balance of
purchase
money
(Clause 1)

*if
inappropriate
delete and
substitute
agreed terms.

*In cash on completion which shall take place within thirty days of the date of approval of the Purchaser's Building Application pursuant to clause 30 hereof PROVIDED THAT if the purchaser shall have been entitled to rescind this Contract pursuant to its rights in that behalf contained in clause 30 hereof but shall not have so rescinded, completion of this Contract shall take place within thirty days after the last day upon which the purchaser would have been entitled to rescind.

THE SECOND SCHEDULE

Easements,
restrictive
covenants, etc.
(Clause 7).

NIL.

THE THIRD SCHEDULE

Tenancies
or
Occupancies
(Clause 13).

Part Occupied	Tenant's Name	Nature of Occupancy	Rental
	NIL		10

THE FOURTH SCHEDULE

Zoning, etc.
(Clause 17).

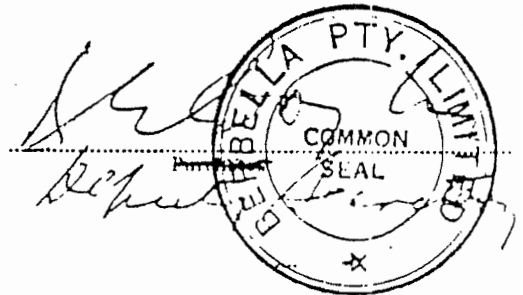
*Delete
if not
applicable.

~~*The property is affected as shown in the copy certificate under Section 342AS of the Local Government Act, 1919, annexed hereto:~~

NIL

THE COMMON SEAL of
BERBELLA PTY. LIMITED

was affixed hereto
by Order of the Board
in the Presence of:
(Sgd) Indecipherable.....



Director			
SIGNED by the		SIGNED by the	
Vendor in the	.....	Purchaser in	.....
presence of	Vendor	the presence of	Purchaser
Witness.....	.....	Witness.....	.....

Purchase Price	\$450,000.00
Deposit	\$45,000.00
Balance	\$405,600.00

Vendor's Solicitor STEPHEN JAQUES & STEPHEN A.M.P. CENTRE 50 BRIDGE ST., SYDNEY.
Tel. No. 36 6442
Purchaser's Solicitor H. WILSIRE WEBB, SON & DOYLE, 91A YORK ST., SYDNEY.
Tel. No. 2 0359

ORDER

THE COURT DECLARES that—

1. The purported resolutions of the defendant referred to in paragraph C1 and 2 of the defendant's letter dated 12 June 1975 and set forth in the Schedule hereto be declared null and void.

THE COURT ORDERS that—

2. The defendant pay the plaintiff's costs.

SCHEDULE

"C. 1. THAT THE Council, under the provisions of Section 309 (4) of the Local Government Act, 1919, regulate the number of storeys in any residential flat buildings erected on properties Nos. 8, 10 and 12 Wentworth Street, Point Piper, or any one or combination of storeys at no more than three. 10

2. THAT the council, under the provisions of Section 308 of the Local Government Act, 1919, fix a building line relating to properties Nos. 8, 10 and 12 Wentworth Street, Point Piper, in accordance with the plan accompanying the Town Planning committee report of 10th June, 1974, and providing for set-backs from Wentworth Street ranging from 60' along the eastern boundary of property No. 8, to 45' between properties 8 and 10, to 35' between properties 10 and 12, and 35' to the Western boundary of No. 12, being part annexure "B" to Affidavit of J. M. Dunlop sworn 25 November 1974 and filed herein.

ORDERED 26 September 1975 AND ENTERED 11 May 1976
BY THE COURT

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A. G. NEVILL
Registrar in Equity

AFFIDAVIT

On the 25th day of November One thousand nine hundred and seventy-four CHARLES CLARENCE PHILLIPS of Sydney in the State of New South Wales, Architect, being duly sworn makes oath and says:

1. I am an architect and am familiar with the premises No. 8 Wentworth Street, Point Piper.

2. Details of my qualifications and experience are as follows:

Bachelor of Architecture University of Sydney

Fellow of The Royal Australian Institute of Architects

Forty years experience as practising Architect, especially in design of flats and houses.

3. I have been asked by the Plaintiff in these proceedings to consider the type of development which could be constructed on the premises No. 8 Wentworth Street, Point Piper prior to the Council's resolutions on the 10th June, 1974 and thereafter.

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4. I have had regard to the decision of the Local Government Tribunal issued on the 6th May 1974, a copy of which is annexed to the Affidavit of the Plaintiff herein and in my opinion consistently with that decision and prior to 10th June 1974 the Plaintiff could have applied for permission and would have had a substantial prospect of obtaining from the Tribunal approval to erect a development of 1 Tower Block of 8 storeys containing 16 units of 3 bedrooms each consistently with the Woollahra Planning Scheme Ordinance and the Council Code which applies to residential flat development.

5. After 10th June, 1974 if the resolutions of Council the subject of these proceedings are valid the type of development which could be erected on the premises No. 8 Wentworth Street, Point Piper was very substantially reduced in size so that in my view there could only have been a building of 3 storeys containing not more than 10, 3 bedroom units. Such a building would not be an economical proposition in the sense that it would not recoup the cost of the land and the cost of the building to be erected.

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6. From my experience as an architect and my association with development applications over the years I consider that the value of the Plaintiff's land was greatly reduced by reason of the resolutions passed on 10th June, 1974 if they are valid.

7. I have been instructed by the Plaintiff to prepare and lodge with the Defendant a set of plans and an application for development consent in respect of a residential flat development which will not comply with Council's resolution of 10th June, 1974. Such application will be lodged in the near future. The proposed development does comply with the zoning of the land and with council's residential flat code so far as I am aware.

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SWORN by the Deponent on the day

and year first hereinbefore

mentioned Before me:

.....
A Justice of the Peace

CHARLES CLARENCE PHILLIPS

Sworn and examined:

MR. SHAND: Q. Is your full name Charles Clarence Phillips? A. Yes.

Q. You live at what address in Sydney? A. 118 Wolseley Road, Point Piper.

Q. You are an architect? A. Yes.

Q. And you swore an affidavit on 25th November, 1974. Is that affidavit correct? A. Yes.

CROSS-EXAMINATION:

MR. WILCOX: Q. You read the decision of the tribunal before you swore your affidavit, I take it, when you set out in your affidavit that the type of development which you thought was possible before and after 10th June, you had in mind what the tribunal had said, did you? A. Yes.

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Q. Could it be correct to say as a general proposition that there is a relationship between the amount of floor space in a building and the population density created by that building? A. Yes.

Q. One can have large units in which one would expect a large number of people or small units in which one could expect a small number of people? A. Well, not altogether; although they are large units they do not necessarily have a large number of people in them.

Q. One appreciates that there will always be exceptions; you get a large flat with even a single person in it, or you can have a family in a two-bedroom flat. But as a general rule you relate floor space to population density as a statistical prediction? A. You do.

Q. And the formula that is usually adopted is to take a certain number of persons for a two-

bedroom flat, and if one bedroom flats are in issue a certain number of people for them. Is that right? A. Yes. Approximately.

Q. Now the way in which the tribunal specified its idea of the scale of the development was to take, in terms of persons per acre, rather than floor space? A. That is so.

Q. And indeed the parameter, as the Board called it in relation to acceptable scale of development, was set out on p.13 of the decision, I am just reading, "without laying down precise parameters for an acceptable scale of development the Board agrees with the views of the council's planner that in this location given the existing zoning any development should not exceed population density of 70 to 75 persons to the acre"? A. Yes. I remember that.

Q. "The Board envisages a corresponding reduction in the plot of any buildings to be erected on the site". Is that right? A. Yes. 10

Q. What the Board is saying is, well, we have population of the order of 70 to 75 and we would expect floor space to relate to that. You agree with that? A. Yes. They said that.

Q. You will have noticed from the Board's decision that a calculation was made in respect of the projected population of the proposal before the Board at 94 persons per acre. Is that right?

A. Well, I have just forgotten that figure, but I do remember the 75 which they recommended.

Q. Well, do you recall it was about 94 persons per acre calculated at — A. Something like that, yes.

Q. And that was for a development which, in terms of plot ratio, went up to the maximum specified in the council's ordinance, namely 1.15 to one. Is that right? A. Yes. 20

Q. Now I wonder would you just follow through some figures with me. What I want to do is just make a conversion of the parameters of the Board in terms of population relating it to plot ratio, you see? If one takes 94 persons per acre and reduces it to 75 persons per acre, which is the top of the range expressed by the Board, that means a reduction of 19 persons per acre from 94 or 20.2 per cent, and then if one takes the plot ration in the proposal before the Board of 1.15 and takes off 20 per cent, would you agree that that involves a reduction of .232 in plot ratio?

MR. SHAND: Could I have that last part again?

MR. WILCOX: If one takes 1.15 plot ratio less 20 per cent gives 0.232 bringing one back to a plot ratio figure of 0.918? A. Something like that, yes.

Q. That looks pretty right, does it? Now, that is the top of the range that the Board specified. Do the similar exercise from the bottom of the range, that is reduce the population from 94 to 70, so you take off 24 over 94, which is a reduction of the 25 per cent. Is that right? A. Yes. 30

Q. And if you take 25 per cent off the top ratio of 1.15, you deduct 0.2875 and end up with a figure of 0.8625? A. Yes. I do think those figures would be right.

Q. So we find with the range of plot ratio which one has, if one applies the Board's population parameters, goes from 0.86 to 0.91 and the figure that the council laid down in its decision was a plot ratio of 0.9, right, do you agree with that? A. No. I do not quite follow that reasoning. What was it you said again?

Q. The range of plot ratio that one takes when one applies the population parameters the Board specified, is 0.86 to 0.918? A. Yes. 40

Q. And the council's resolution specified a plot ratio a maximum of 0.9. Is that right? A. Yes.

Q. You were aware of that, were you not, Mr. Phillips? A. Well, I was not thinking particularly of the — I look at the number of people which would probably be in the flats that I design, from a different point of view to this.

Q. Were you aware that the council had specified a plot ratio of 0.9? A. Yes. I suppose I was.

Q. Well, is not that something that would be important in assessing the development potential of the site? A. Yes. Up to a point it was.

Q. It is really of basic importance, is it not, in the sense if the plot ratio for instance had been a maximum of .5 then the potential for development is only 5/9ths of what it is if it is .9? A. Yes. Well, I did not take that as a main consideration in designing my flats.

Q. Just look at it on these figures, would you not agree that what the council has done is to specify, in terms of plot ration, a scale of development which is right within the range of scale expressed by the tribunal in population terms? A. Yes, well, the plot ratio is the relationship of the total floor area of the building to the area of the site.

10

Q. Yes. But we will come to that in a moment. Will you agree with me what the council has done is to specify in plot ration terms a scale of development which is almost precisely in the middle of the range which the tribunal specified talking in population terms? A. Yes.

Q. And you have already agreed that there is a relationship in terms of the amount of development that is permissible between the ratio and population? A. Yes. I do not know how rigidly the council applies the population in connection with these particular developments. They are more interested in — to my knowledge they are more interested in the actual building, size of the building, rather than the number of people who are in it.

Q. But they are very much interested in the amount of floor space within the *

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30

Q. But they are very much interested in the amount of floor space within the building? A. Of course.

Q. And the population can only be expressed in relation to a building if one converts proposed units into people; one says X persons for a three bedroom flat, Y persons for two bedroom flat? A. Not necessarily.

Q. How else does one determine whether a given building is going to yield 70 persons per acre or 150 persons per acre? A. As I said, the size of the flat, unit, or the residential flat or whatever it is likely to be termed, does not necessarily indicate the number of people who are going to be in it. Some people like to have a very large flat, there may only be three in the family, but instead of just having one double bedroom and one single bedroom they like to have a large flat.

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Q. Mr. Phillips, one appreciates that different people have different tests as to the amount of

room they want. You understood the tribunal, in talking about parameters, to be talking about how you judge a future development application, did you not? A. Yes.

Q. At the time a development application is prepared by an architect, and at the time that it is received by a council, it is almost always the position that nobody knows which individuals will occupy the particular units? A. Of course not.

Q. One does not know whether you are going to have a widow living there on her own, or a family with five children? A. That is so.

Q. So that one has to take statistical figures and assess, well, on the average in our municipality we get X persons to a three bedroom unit, and Y persons to a two bedroom unit. Is that right?

A. Yes.

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Q. And if parameters have been laid down in terms of the population, the only way that that can be translated into, that that can be used to evaluate a development application is to apply those statistical figures. Right? A. Yes. Theoretically.

Q. That is the only way in which they can be used, is it not? A. No. In my experience the actual number of people who are reckoned to come to live in the people (sic) are not the over-riding consideration.

Q. I did not ask you that. I asked you — you see, one has a population parameter specified, and then one is seeking, you use that guidance in relation to a particular development. What I am suggesting to you is that the only way that that guidance is of any utility is to convert it into units by taking a statistical figure? A. The council code does not lay any particular stress on population.

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Q. Mr. Phillips, it will be quicker if you deal with my questions.

HIS HONOUR: You are not being asked anything about the council code. You are just being asked about a particular calculation. Listen to the question.

WITNESS: I beg your pardon. Will you rephrase?

MR. WILCOX: Q. I will put the question to you again. If one is given some guidance by a tribunal that the population density for a particular site ought to be within a particular range, the only way in which that can be used in relation to a future development application is to translate the number of people in the parameters of the tribunal into units by reference to some standard figure of persons per unit? A. Yes.

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Q. As a general proposition the more bedrooms in the unit the larger the floor space it will occupy? A. Yes.

Q. So that one finds in practice a correlation between population densities as laid down in a general formula such as the tribunal did, and floor space? A. Yes.

Q. You have made the point that in your experience the Woollahra Council does not normally talk in terms of population density but rather in terms of floor space and other requirements of its code? A. That is so.

Q. So in this particular case it is clear, is it not, that what the council did when it specified a plot ratio of 19 was to specify in its own normal yardstick, normal plot ratio, a figure which was squarely within the range expressed by the tribunal talking in population terms? A. Yes.

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Q. The controlling factor in terms of the scale of the development is the plot ratio which one can get on a site? A. Yes.

~~Q. The controlling factor in terms of the scale of the development is the plot ratio which one can get on a site? A. Yes.~~

RE-EXAMINATION:

MR. SHAND: Q. Are you presently aware of what has been suggested to you as the council's decision as to plot ratio in respect of a development on this site by virtue of its resolutions of 10th June? A. I beg your pardon? I do not quite understand that question.

Q. Are you presently aware of what is suggested to be the council's delimitation or definition of plot ratio by virtue of its resolutions of 10th June, 1974, relating to this site? A. Yes.

Q. Are you aware of its terms specifically or not? A. Not specifically.

Q. What I think my friend has been referring to is this; after reference to the regulation of the number of storeys and after reference to the fixing of a building line, in relation to the frontages of the sites, and that the council passed this resolution, "that the owners of the said properties be advised of the council's resolution in one and two above (the two I have mentioned) and further that they are advised that the council would consider permitting greater site coverage than that allowed in its adopted relevant code and roof terraces being accepted as open space for site coverage calculations, both to be at the discretion of the council, and with a plot ratio of up to 0.9 to 1, 24 being the maximum number of dwelling units, all being subject to a high standard of design, including a satisfactory subject to a high standard of design, including a satisfactory landscaped area facing Wentworth Street and provision of an average set back of 30 ft. to the rear boundary to permit retention of existing trees and privacy of adjoining residents." First of all with regard to the part that applies to plot ration and the words that "the owners be advised the council would consider permitting a plot ratio of up to 0.9"; do you regard that as being a laying down of positive plot ratio for these sites? A. Yes.

Q. Do you regard it as such? A. Yes. Actually the plot ratio that I work to exceeded that because I work to the original code.

Q. I did not hear the first part of that answer. A. The plot ratio that I work to exceeded that .9 because I work to the code which applies to high rise residential flat buildings. I think the plot ratio was 1.15.

Q. I want to ask you this about plot ratios; you were asked whether in fact, as I understand it, you used this concept of plot ratios or you got to it by looking at the number of residential units which are proposed for development and calculate? A. Yes. The maximum, the floor space of the whole building.

Q. I realise that, but it was put to you as I understand it that the use of plot ratio for this purpose is intended to enable one to get a population density for a site. Is that so? A. Yes.

MR. WILCOX: If it is suggested I put that, your Honour, I would not, because that is obviously wrong.

HIS HONOUR: I do not think you put that.

MR. SHAND: Q. In fact, can you have a particular site, merely applying the same formula of number of persons per particular size residential unit, regardless of whether the site is in Point Piper, Redfern, or Westmead? A. No. It would vary depending on the district.

Q. And with regard to Point Piper; can you tell us what you believe to be the proper approach to a calculation of the number of persons which should be allowed for in relation to residential units of particular sizes? A. Well, I think that in Point Piper there would be less people living in one of these units than would if the unit were, say, at Bankstown, or somewhere remote.

HIS HONOUR: Q. Perhaps in Paddington? A. Or Paddington, your Honour, yes.

MR. SHAND: Q. Dealing with what the council appeared to be indicating in these resolutions, would the building line. and would the regulations of the number of storeys to a maximum of

three and taking into account plot ratio of 0.9 to 1, and 24 as the maximum number of dwelling units, what is the shape of the building that you think results from that, putting it in general terms? A. Well, if the building were designed as a three storey building it would necessarily have to be a very long building and, in any case, a three storey building is an unsatisfactory type of building because, for that particular area anyhow because people just do not like walking up three flight of stairs, and a three storey building is a most unusual height for a building except in the more remote areas; it would be a most unusual height for a building to build in Point Piper because you would not be able to, in my view, sell the thing or rent it to type of people who would be wanting to live there. They just would not walk up so many flights of stairs.

Q. You do not conceive putting lifts into a three storey building? A. Well, a three storey building is difficult to plan for lifts whereas a compact high building, it is a simple matter to arrange the lift core in the centre of the building. 10

Q. Incidentally, if it were built to the maximum of three storeys and to these other specifications in these resolutions, would there be any effective use made, or could there be any really effective use made of the views which would be available from the site? A. No. Well, that is another important factor. In a vertical site like that, the low three storey building, relatively low building would not take advantage of the views, whereas a high rise building would take advantage of them and be very much more valuable building on that account, and a very much pleasanter one to live in.

Q. (By leave) Tell us, if you would, what you think is the real effect upon any construction that came within these council requirements and their resolutions as to the setback which was prescribed; 60-feet at the eastern boundary of NO. 8 and reducing through 45-feet to 35-feet on the western boundary of No. 12? A. Yes, well, in my view that is an extreme building line to stipulate and it would of course have a big effect on the type of building that would be put on the site. 20

Q. Coupled with the reference to an average setback of 30-feet to the rear boundary what effect does it have, those two lines, on the building? A. Well, they are all in the excess of the requirements of the code and they would have a severe effect on the size of the building which would be designed for the site.

Q. What do you think it would really do to the shape of a building? A. Well, yes, and the overall dimensions of it, it would affect the planning of the building and the building would not be as satisfactorily planned within those limits as it could, as a building would just adhering to the normal code dimensions. 30

Q. What shape building do you really finish up with if you comply with those two line, front and rear, and with the other requirements of these regulations? A. Well, you would finish up with a much more massive building, a squarish building, rather than a spread out one.

HIS HONOUR: Q. Why is that? A. Well, your Honour, the working within those rigid limits in order to get the size flats, the floor space in the flats which were suitable for that particular site, you would have to have a squarish building, whereas with an elongated building you would —

Q. Why would you have to have a squarish building; that is what I do not follow? A. Well, because, instead of being only 20-feet from the street front they require you to keep back at one point 60-feet and at another point 35-feet, I think it is. 40

Q. Would that not be consistent with an elongated building parallel to the — A. No. The site is deeper, much deeper than it is wide and the proper way to plan it is from back to front, from north to south.

Q. Are you talking about just No. 8, or are you talking about — A. I am speaking about No. 8.

HIS HONOUR: I think some of the answers to the questions puzzled me, Mr. Shand, and I think you may have been asking about the whole and the witness replying about 8.

MR. SHAND: I was really directing my mind to the three.

HIS HONOUR: I do not think he appreciated that at some stage.

MR. SHAND: Q. Could I just ask you this: you have given us your opinion about the effect of these resolutions on No. 8 taken by itself? A. Yes.

Q. What opinion do you express with regard to the resulting effect upon the shape of development which was desinged of all three blocks and within these requirements? A. Well, I really only worked on the — I quickly looked into the whole three sites, but the scheme I prepared was for No. 8, and that is the site that I looked closely into.

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Q. You have not looked, considered the three in combination? A. Not sufficiently.

Q. Could you just tell us, whether you can answer it or not, if you would look at this drawing which I hand to you an being a sketch plan which was provided by the principal planning officer of Woollahra Council, Miss Harvey-Sutton, with one of her reports of the three sites with the building line to the frontage of Wentworth Street drawn in with the description you have and with the building line at the rear portion of 8 and part of 10 drawn in, with it perhaps incomplete. (Sketch shown) A. Yes. What was your question?

Q. If you are able to answer it, it is this: what sort of a building, in other words, what shape would you feel would have to be designed to come within the requirements of this council's resolutions and within those building lines which are referred to an which have been mentioned, in the sketch, involving maximum of 24 units and a maximum of three storeys, that is on those three sites? A. Well, just, my impression would be that probably the best type of design would be a U-shaped building. This being a three storey building, Mr. Shand?

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HIS HONOUR: Q. Maximum of three, not necessarily three all the time. A. Well, as a maximum of three storeys I would think that a building would turn out to be a U-shaped building with the open courtyard towards Wentworth Street and the sides of the U running possibly — it may only turn out to be — I beg your pardon, put up an L-shaped building with one leg of the L running parallel to the eastern boundary and the other leg running parallel to the rear boundary.

MR. SHAND: Q. If you had that sort of structure would you be able to take any real advantage of the views available from the site? A. Some of the units would have a view of some sort, but I do not think any of them would have a very good view.

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MR. WILCOX: Q. (By leave) Just considering from Dunlops' property, that is No. 8; are you aware of the available building depth that one would have if one designed the building for that site which complied strictly with the building line and also the rear boundary at back shown on the sketch you have in front of you; applying that, not necessarily going right to it. Do you know what depth there is available for you? A. Depth of site?

Q. Yes? A. Offhand I do not. I have just forgotten the dimension of that boundary. I know the site was 33,500-square feet, about, but I have forgotten the depth of that alignment there.

Q. Would you agree with me that on the eastern boundary where one has the 60-foot building line, 30-foot rear setback, the boundary itself is 265-feet which leaves 175-feet of depth? A. That would be right.

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Q. And on the western boundary 45-foot building line, 30-foot rear setback the boundary 185-feet which leaves 109-feet of depth. Now, that is ample depth in which to design a residential flat building, is it not?

A. Yes, well, you would not have the full depth because you have to keep in from the side boundary about 30-feet it would work out, I think, which would reduce the depth available for the building because you cannot build a building right on the side alignment.

WITNESS: You do not have the 75 feet of depth available.

MR. WILCOX: Q. The western side of the building will have available more than 109 feet, it is also in from the boundary? A. You would require to keep in from the western side correspondingly.

Q. There is no problem, is there, about putting a residential flat building on that site? A. No, you could put a residential building on that site.

Q. If it were to achieve a plot ratio of .9, that could be obtained by having three storeys with a building occupying thirty per cent of the site? A. With a three storey building you would not get enough flat units to make it an economic proposition.

Q. Put aside the economics for the moment, you could get a .9 ratio by having a three storey building occupying thirty per cent of the site? A. Yes. 10

Q. There is no problem about finding thirty per cent of the site which is free of that building line and rear set back restriction? A. Yes, you could.

Q. The real question is what you understand to be the economics of it is that right? A. Yes.

Q. The critical question there is the price which Dr. Dunlop paid for that block of land?

A. Whatever the value of the land is that affects the economics of the building of course.

Q. At no time have you been given any instructions by Dr. Dunlop to attempt to design a three storey building for this site have you? A. Dr. Dunlop asked me to look into the question of a three storey building.

HIS HONOUR: You say "for this site". 20

MR. WILCOX: Q. For No. 8? A. Yes, for No. 8.

Q. Have you ever done any design sketches for that? A. Yes, I did and I found, in my opinion and also the opinion of —

Q. Just confine yourself to your own opinion. A. Yes, I did look into it.

Q. You did some design sketches, did you? A. Yes.

Q. What plot ratio did you show in your design sketches? A. The plot ratio laid down by the council code.

Q. That was unsatisfactory to Dr. Dunlop, was it? A. It was unsatisfactory to me, in particular, I thought it was not a suitable for that very splendid site.

Q. Dr. Dunlop even in his latest application has sought to obtain a plot ratio up to the maximum specified in the ordinance of 1.51 to 1? A. That is right. 30

Q. He is very firmly of the desire as he has expressed it to you that there should be an 8 storey building achieving that plot ratio? A. Yes.

Q. And the reason is because he regards that as being the building which is going to return to him the greatest financial benefit from development? A. The reason he told me, and one that I think I agree with too, is that he wanted the building to conform with the code laid down by the council when he bought the site.

Q. You can have anything less than the maximum figure specified for plot ratio and still conform with the code, can you not? A. But it has to be a satisfactory building.

Q. From the owner's point of view it is also a desire to obtain a maximum return on the development? A. Yes, of course. 40

Q. And that really is the position, that Mr. Dunlop is firmly of the view that he ought to have a 1.51 ratio so as to get the maximum benefit from the site? A. Yes, and that is what I feel too.

RE-EXAMINATION

MR. SHAND: Q. What were the defects of the building you designed that you have been talking about? A. The known defects were that I designed a three storey building and although I was able to get quite nicely planned units, with a three storey building it was quite obvious that they would be unsatisfactory to most people because they simply would not walk up three flights of stairs on a site like that.

HIS HONOUR: Q. You only walk up two flights in a three storey building do you not? A. From the garage, people drive into the garage and then they would have to walk up.

Q. Is the garage under the other three storeys? A. Yes. They would park their cars and then have to walk up all these stairs. That was the main reason for the three storey building and another reason, I thought the building would not be satisfactory was that it did not take advantage of the views and another consideration was that the building was too spread out and I was firmly of the opinion that a high rise building was the proper building to put on that particular site.

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MR. SHAND: Q. You swore a second affidavit on 28th July last. That was correct too, was it?
A. Yes, I did.

(Witness retired and excused)

AFFIDAVIT

On the twenty fifth day of February One thousand nine hundred and seventy-five, GEORGE WELLINGS SMITH of 72 Wallalong Crescent, West Pymble, in the State of New South Wales, Town Planner, says on oath:

1. I am a qualified town planner. I was retained by Blackburn Developments Pty. Limited in respect to an appeal to the Local Government Appeals Tribunal relating to a proposed development at 8-12 Wentworth Street, Point Piper. I am conversant with the subject premises and the relevant events and matters which relate to the development of those premises.

2. My qualifications as a town planner are:

- (a) Bachelor of Surveying (University of Queensland), graduating 1958 10
- (b) Master in City Planning (Massachusetts Institute of Technology), graduating 1967
- (c) I have held a Certificate as Town and Country Planner under Ordinance 4 of the Local Government Act, N.S.W., since 1962.
- (d) I have been a Member of the Institution of Surveyors of Australia since 1965, of the Royal Australian Planning Institute since 1965, and of the Royal Town Planning Institute since 1964.

3. My experience in town planning and directly related fields is as follows:

- 1958 Planning Assistanty, Brisbane City Council
- 1958-1963 Planning Officer — Research, Brisbane City Council
- 1963-1966 Director of Research, Urban Planning and Research Centre, Pty. Limited, Sydney.
- 1964-1968 Partner, Clarke Gazzard & Partners, Architects & Planning Consultants, Sydney. 20
- 1968-1971 Principal, George Wellings Smith & Byrnes Pty. Limited, Planning Consultants, Sydney.

4. My sixteen years experience in town planning has ranged over all facets of the profession except those closely allied with aesthetics and three dimensional design. It has included economic feasibility studies and development control and, as a result, I have gained a good insight into the impact of various forms of control (zoning, codes etc.) on the development potential of land and hence on its value. This experience is sufficient to enable me to make general comments as set out in Annexure A to this affidavit, on the impacts of the resolutions made by the Woollahra Municipal Council on 10th June in respect of the subject premises.

5. Annexed hereto and marked A is a true copy of a letter dated 14th August 1974 sent by me to the plaintiff. So far as the matters of fact set out in Annexure A are concerned, it has come to my notice subsequent to my writing of this letter that the Defendant resolved on the 24th September 1973 to apply to the Minister for suspension of the zoning pursuant to Section 342Y of the Local Government Act and this application was made on the 15th October 1973. The other matters of fact set out in Annexure A are true to the best of my knowledge and belief. So far as the opinions expressed therein: I say that they are opinions genuinely held by me as an expert town planner and that these views are based on my experience and investigations. 30

SWORN by the Deponent on the day
and year first hereinbefore
mentioned before me:

August 14, 1974.

Dr. R. Dunlop,
120 Ocean Street,
Edgecliff2027.

Dear Sir:

Re : 8-12 Wentworth Street, Point Piper.

As requested by you in our telephone conversation on July 30, we have set down our comments on the effects of Council's resolutions of June 10, 1974, on this lands.

1. We believe it necessary to include a brief planning history of the properties to place the issues involved in context.
— When the draft local scheme was exhibited, the properties were included in the Residential 2(a) zone. 10
— As the result of objections, that zoning was altered to Residential 2(c) in the prescribed scheme. In addition to the usual provisions applicable in such a zone including a maximum floor space ratio of 1.15:1, this particular land fell within the Harbour Foreshore Protection Area (requiring the concurrence of the Authority to any application) and was subject to a specific maximum height limitation (235.5 feet above sea level).
— On February 2, 1973, a development application seeking to erect two tower buildings, each of eight storeys to contain 38 flats, was submitted to the Woollahra Municipal Council.
— Council refused the application on September 12, 1973. 20
— On December 15, 1973, Council resolved to apply to the Minister for suspension of the zoning and its replacement with a Residential 2(b) zone. The main effect of such a change would have been to reduce the density fo development on the site to that achievable with "town house" type flats and the consequent restriction in the height of any building on the land to two (or at most three) storeys.
— This application for suspension was refused by the Minister.
— The development application was taken to appeal and the appeal dismissed by the Local Government Appeals Tribunal in a decision issued on May 6, 1974.
— On June 10, 1974, Council passed a series of resolutions affecting the site, the net effect of those resolutions being to severely restrict the development potential of the land — in reality to less than that which might be achieved in a Residential 2(b) zone. 30
2. The Council's resolutions of June 10, 1974, seek to establish several matters:—
 - (a) by a resolution in terms of Section 309(4) of the Act, to limit the height of any building on the land to three storeys;
 - (b) by Section 308, to establish a building line varying in depth across the frontage of the site from 35 to 60 feet; and
 - (c) to limit, by resolution, the maximum permissible floor space ratio to 0.9:1 and the maximum number of flats to 24 and to impose a building line on the rear boundary of the site of 30 feet, while offering some relaxation of the provisions of the Council's code applying to residential flat buildings in relation to site coverage. 40
3. At the hearing before the Appeals Tribunal, the Council indication its preference for the development of the site to be kept low, ideally to comply with Council's code.

The Tribunal expressed the view in its decision (at page 13) that:—

“it is clear from the evidence that strict compliance with the provisions of the code could produce a most unsatisfactory development . . .

The Board agrees with the submission of the appellants that the erection of a three or four storey building of substantial bulk on the site could be more injurious to the locality than the erection of well designed tower buildings to the maximum permissible height.”

Despite this comment, the Council has pursued this line of approach contending that the form of development should be a low rise “stepped” building while admitting that such a building cannot be produced under the Code to control Residential Flat Buildings.

In doing so, it continues to give weight to a series of propositions which were tested by the Tribunal and found to be of little weight, including such issues as overshadowing, overlooking and obstruction of views and, possibly, traffic generation.

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4. The Tribunal rejected the previously proposed development on the grounds that it was out of character with the balance of the development in Wentworth Street and that it “constituted gross overdevelopment of the site”. While recognising the merits of the architectural solution proposed, the Tribunal also expressed concern over the preservation of existing trees and the arrangements for carparking and there were technical defects in the building’s design which in the opinion of the Tribunal placed it in breach of the provisions of the Scheme.

5. The previous proposal drew many objections from local residents. They were concerned about their potential loss of privacy through overlooking and loss of views. It is ironic that many of the objectors live in blocks of flats or other buildings which have destroyed the privacy and views once enjoyed by this site. For that reason alone, the weight given to those objectors must be discounted to a degree.

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6. Clearly, the Tribunal and the State Planning Authority believe that the site can best be developed by a sensitively designed high rise building or buildings although the decision of the former indicates that it could reject any proposal seeking to maximise the potential conferred on the site by the Scheme. As I recall at the hearing, the only town planner to seriously argue the case for low rise development was Council’s Town Planner.

7. Unless the buildings on the site were designed as close as possible to the ground and introverted in a way to deny them most of the views to the harbour, most of the problems of a tower building would remain — overlooking, overlooking, possibly overshadowing and certainly blocking of views. However, it is an accepted policy (around the harbour foreshores and in Woollahra Municipality) to permit tower blocks on high land and the provisions of the Scheme specifically countenance that form of development on this site. The value of the site and the amenity of any flat erected on it, will reflect the extent of the view obtainable and those views will extend with increase in height.

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This is a unique site. Council is seeking to destroy its uniqueness (and its value) by insisting on a low rise building.

8. The Council is also seeking to limit the number of flats erected on the site. This is an unwarranted imposition. The Tribunal suggested that a density of 70 to 75 persons would be appropriateness of that limitation could be debated but the translation of that limitation to the number of units to be permitted depends on two factors — the sizes of the flats proposed and the number of persons expected to be in each flat. The latter is a sociological phenonemon which can only be estimated from a study of conditions in similar developments

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and not by the imposition of a rule of thumb. The former should be determined by the developer through his estimation of the market situation.

9. What Council has done, in effect, is to place on this site controls which are not applicable to any other site in the Municipality. They are ad hoc controls and constitute a de facto rezoning. They are excessive controls aimed at restricting the development of the site to a form which is, at least, potentially undesirable and which detracts from the natural advantages the site enjoys. These controls constitute spot zoning, a practice which has been soundly criticised for many years as inequitable and not conducive to proper development.
10. In implementing this spot de facto zoning, the Council has resorted to the outdated provisions of Section 309 of the Act to achieve what it could not obtain ministerial consent to do. It has established a building line under Section 308 which is far in excess of those applicable in the rest of Wentworth Street and which is most inequitable. By way of recompense, it offers some relaxation of its Code by reiterating provisions the Code already contains and which, consequently, are available to every development. There is no quid pro quo. 10
11. I can appreciate Council's problems in attempting to ensure that any development on the site is not unduly disruptive of local amenity. It is open to the Council to refuse any proposal it considers inappropriate and allow the matter to go to appeal. As exhibited in the Tribunal hearing earlier this year, the Board hearing the matter will thoroughly examine the issues in dispute and deliver a well considered decision.
As it is, the Tribunal has already established a further parameter for the development of the site — a population density and expressed concern for the preservation of existing trees, etc. These are fresh guide lines for any new proposal. 20
This site is a particular difficult one to plan and develop properly. It calls for great sensitivity in design. Placing more and more controls on it in the way Council has done will only make the task more difficult and may very well prevent design options that could produce very satisfactory solutions.
12. In my opinion, the Council's action in adopting the resolutions of June 10, 1974, have seriously affected the value of the site and have made the achievement of the best design solution — architecturally and town planning wise — exceedingly difficult. Any solution achieved under the controls imposed by Council is likely to be less desirable than one which might have been prepared prior to those resolutions. 30
13. Council's action in reverting to powers vested in it under Section 309 seem a retrograde step quite out of line with the general trends in the evolution of planning controls in this State. It is a blatant attempt to circumvent the provisions of a recently prescribed scheme as they affect a site which was given particular attention when that scheme was approved. If this attempt is allowed to succeed, it will create an undesirable precedent whereby Councils can, by resolution, significantly change the intent of their planning schemes without the owners of land having any definite right of appeal.
14. Council's declaration on the building line applicable to the site can only be described as inequitable. Council has the powers conferred by its tree preservation order to protect the existing trees — the building line will do nothing to protect them or any other landscape feature. It is purely a device to force any development away from the Wentworth Street frontage, a greater distance than is normally accepted and a greater distance than is common in that Street. 40

GEORGE WELLING SMITH

Sworn and examined:

MR. SHAND: Q. What is your full name? A. George Wellings Smith.

Q. You live at 72 Wallawong Crescent, West Pymble? A. Yes.

Q. You are a town planner by occupation? A. Yes.

Q. You have sworn and affidavit in these proceedings dated 25th February? A. Yes.

Q. You confirm the correctness of the contents of that affidavit which incorporates a report you previously made which is annexed to it? A. Yes.

CROSS-EXAMINATION


MR. WILCOX: Q. In the report of 14th August which is annexed to your affidavit you have set out certain opinions you have regarding the effects of council's resolutions? A. Yes.

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C. C. Phillips ret'd.

G. W. Smith x,xx

Yours faithfully,

(Sgd) G.W. SMITH 

G. W. Smith,
GWS : JJ.

This and the preceding five pages is the annexure marked "A" referred to in the attached Affidavit of GEORGE WELLINGS SMITH sworn this 25th day of February, 1975 Before me:

.....

Q. And also a desirable planning approach for this land, is that right? A. I do not know whether it goes on to the latter part.

Q. It sets out what you think as to the merits and demerits of alternative approaches in terms of heights of buildings and so on? A. Yes.

Q. Would it be your experience that even amongst expert town planners there is very often a sharp difference of opinion as to what is the right thing to be done in respect of a particular area or a particular site? A. Yes.

Q. It is not infrequent in your experience for an appeal to be heard by the appeals tribunal and to find qualified and well regarded planners each of them supporting the alternative point of view? A. That is the normal case.

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Q. You find that you are frequently in the position of having to dissent from the view of one of your colleagues? A. Yes.

Q. In this particular case you gave evidence in support of the appeal by Blackburn Developments, did you? A. Yes.

Q. I take it that you expressed views before the tribunal favourable to the allowance of that appeal and to the granting of the consent sought by Blackburn Developments? A. Yes. I was primarily interested with the appropriateness of that particular type of building on that site.

Q. But you were also of the view that the application that was before the tribunal was an acceptable one which ought to have approved by the council and which the tribunal ought to have been approved of that appeal? A. Yes, although I was not aware at that time and I doubt that anyone connected with Blackburn Developments was aware that in the final analysis there were some features of the building which put it in breach of the ordinance.

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Q. You are talking about the question of the balconies? A. Yes, and some of the site coverage.

Q. You have referred to that as the technical matter of how you calculate balconies, whether they are in or out in terms of floor space, whether the podium should be considered as site coverage or not? A. Yes.

Q. And you were in favour of it? A. Of a high rise building on that particular block.

Q. You were expressly in favour of those two buildings going on that particular site? A. Yes. In my opinion they presented a reasonable solution to that particular problem site.

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Q. You were called to give evidence by the appellant to that end? A. Yes.

Q. In the event as you discovered the tribunal did not share your view that was an appropriate development to go on that site? A. That is correct.

Q. In fact they were unkind enough to describe the proposal as a gross over-development of the site? A. They were.

Q. Which would indicate that the members of the tribunal, having considered the whole of the matter and applying their own expertise, found themselves in disagreement from you? A. Yes.

Q. You have said in your letter that the council's town planner was, so far as you recall, the only town planner to seriously argue the case for low rise development. You are referring to Miss Harvey Sutton, are you? A. Yes.

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Q. Do you recall that Mr. Neil Ingham also gave evidence in the hearing of the appeal? A. Yes, and to the best of my recollection he did not argue specifically in favour of low rise development.

Q. Do you recall reading the written report which he prepared and which was tendered to the tribunal as his evidence in chief? A. I probably did at the hearing.

Q. Do you remember the passage contained in it, "In my opinion buildings on this site should not exceed three storeys in height . . . Wentworth Street"? A. No, I cannot recall that. If I had

recalled it I would have put it in the affidavit.

Q. Is your memory refreshed by my reading it to you? A. If it is in the document presumably at some stage I did read it. That affidavit was written six months after the hearing I suppose.

Q. Do you recall Mr. Ingham expressing the view in favour of a low rise building, that is about three storeys, in contrast to the eight storey proposal that was before the tribunal? A. No, I do not recall that.

Q. Your background as the planner is by way of surveying I take it? A. My basic qualifications are in surveying, I have never practised as a surveyor.

Q. You do not have any qualifications as an architect? A. No, other than I have been a director of an architectural firm for a number of years. 10

Q. And are you referring to your present firm or to Park — A. Both.

Q. When you were with Park you were doing planning rather than architectural work? A. Yes, I was primarily engaged on the planning side of it.

Q. You say at p.2 of your letter that the net effect of the council's resolutions was to severely restrict the development potential of the land in reality to less than that that might be achieved in a 2B zone. Would you agree the relevant potential is currently judged in terms of available plot ratio? A. No, not any more. That was the situation it is not anymore.

Q. How do you judge it? A. In the yield per unit which is related basically to density.

Q. Population density? A. Yes.

Q. That brings you back to a calculation, to numbers of units, taking account of the number of bedrooms contained in them? A. No. 20

Q. How else do you relate population density to the size of the building? A. The size of the building is best expressed in terms straight out of units, regardless of their size or population frankly because we have found from experience that the actual occupancy of units does not depend on the number of bedrooms, you will find four bedroom units with less people in them than two bedroom units and really it is just being too precise to try and correlate the two.

Q. Do you say your merely specify the maximum number of units? A. That is correct. The other way round it to specify the amount of space per — amount of site per unit, the number of units per acre.

Q. To specify the amount of land and space per unit normally takes account of the size of the unit in the sense that you have a greater amount of land space for a three bedroom or a one bedroom or a two bedroom unit? A. No. 30

Q. To specify the number of units really means a developer who is anxious to minimise his development would put in large units rather than small units if he thinks the market will stand it? A. If he thinks the market will carry it, yes.

Q. If one is dealing with a yard stick expressed in terms of population the only way in which that can be related to any particular development is to calculate the number of units having regard to the projected population on statistical data for units of particular number of bedrooms?

A. No, the number of bedrooms to a unit does not affect the actual population. Repeated surveys have shown the number of people living in Woollahra in home units in a survey we had about ten years ago was 1.96 and it did not vary depending on the number of bedrooms. 40

Q. It did not vary according to whether it was a three bedroom or a one bedroom unit? A. No, it was a very insignificant difference. If you said on the average unit in Woollahra there would be those persons you would be pretty right, as a figure which would be difficult to depart from even if you split it up into one, two, three, four bedroom units.

Q. How do you get to the result that you would achieve less on the council's resolutions than you could get in 2B zone? A. I would have to have all the various material but as I recall it that relates to — frankly I have not examined that for 12 months so I am not absolutely certain, I would have to have a copy of the ordinance and so forth.

Q. Were you aware the maximum plot ratio permissible in a 2B zone in Woollahra at that time was .6? A. Yes, I would have been.

Q. And 2B zone is a zone in which one expects to find as a standard development duplexes or town houses? A. Yes.

Q. Both of which are customarily two storey developments? A. Two or three.

Q. But more often two than three? A. Depending on land values.

Q. So the standard type of development in 2B zone would be two storeys occupying about thirty per cent of the site? A. Two storeys probably.

Q. A population of about .6? A. Yes.

Q. And the council's resolution envisaged three storeys with the population of .9? A. Yes, but it also limited it to 24 units which I think is perhaps the critical fact.

Q. Did you do some calculations to establish that fact? A. No. I frankly do not know what led me to that statement at this stage. As I say it is 12 months ago.

Q. At the present time would you agree that the only building in Wentworth Street which is not a dwelling house is the convent next to Dr. Dunlop's land? A. There is one directly opposite, it is a block of flats. When you say a dwelling you are excluding or including flats?

Q. I am excluding flats. A. There is a block of flats immediately opposite No. 8.

Q. No. 8 what? A. Wentworth Street, opposite the convent.

Q. Are you sure about that. A. Yes, there was — unless they have changed in the last few months they were there, they were five flats.

Q. This is a house converted into flats? A. Yes.

Q. But it was built as a dwelling house? A. Yes.

Q. There has been no building built as flats in Wentworth Street? A. Not that I am aware of, no.

HIS HONOUR: Q. You said No. 8, that is Dr. Dunlop's place? A. Opposite No. 8, I think it is No. 23, I am not sure.

MR. WILCOX: Q. It is a house converted to flats? A. Yes, one flat being over the garage and the other four in the building.

Q. It is a two storey building? A. I think it could be three, I am not sure.

Q. And the convent is the only other building which is not a single dwelling house? A. Apart from the buildings on the site which have also been converted to flats.

Q. Again built as dwelling houses? A. Yes.

Q. The convent is a three storey building is it? A. The first part adjacent to the site is, yes.

Q. So whether one likes the change or not it is quite clear that an eight storey building constructed as flats would be quite different from the existing development in Wentworth Street? A. Yes.

Q. Your view is that although it is different it is acceptable, is that right? A. Yes, because recently, it is three years ago now, the Minister, Planning Authority, took specific care to set limits to permit an eight storey building on this land.

Q. Whatever the reason is, you say it is different but you find it acceptable, other people could put the view that it is different and they regard it as objectionable? A. The way I look at it is that the Minister and his advisers have said that this land can be developed in this way, people

have acted in accordance with that assumption and there has to be some good reason for saying that you cannot make use of it, otherwise planning schemes become worthless documents.

Q. We appreciate you have that point of view and the reasons for it but before the tribunal there were two views expressed which were in opposition? A. Yes, but the tribunal in their judgment in fact came out in favour of a tall building.

Q. In par. 8 of your letter you refer to population density, you say the appropriateness of that limitation could be debated but the translation of the limitation to the number of units to be permitted depends on two factors, the sizes of the flats proposed and the number of persons expected to be in each flat? A. That is correct.

Q. That is really what I was putting to you earlier? A. Yes, My advice to a client there would be he would work on the basis of say two or 2.2 persons per flat. 10

Q. That is providing a relevant council is prepared to accept that as being an appropriate translation? A. Most councils do, Woollahra might not.

Q. Most councils draw a distinction, rightly or wrongly, between a three bedroom flat, a two bedroom flat and a one bedroom flat in terms of population likely to be expected? A. Some councils do, yes.

Q. The vast majority do, do they not? A. I do not think so. The State Planning Authority has recommended it but they cannot produce any figures to verify it.

Q. The fact is, rightly or wrongly, the majority of the councils do adopt different figures according to the number of bedrooms in the flat? A. I could not agree with that. 20

Q. Have you ever investigated that matter? A. The impression I get is that it is at least an even split but I could not be certain.

Q. In par. 8 you go on to say, "The latter is a sociological phenomenon. . . rule of thumb". Do you mean by that what is the appropriate figure depends upon some consensus to show how many people there are on average a flat? A. Yes.

Q. You say the former should be determined by the developer, that is the sizes in the flats proposed, through his estimate of the market situation? A. That is correct.

Q. Do you mean council should just say, "You can have X flats" and let the developer decide how big they are to be? A. Within broad limits of setback and site coverage perhaps, yes.

Q. That is a view which I suggest to you is not adopted by any council in the Sydney metropolitan area? A. No, to the best of my knowledge North Sydney and Mosman do, Gosford certainly does. 30

Q. Those being three councils your firm had advised? A. Yes.

Q. Leaving aside your three client councils, can you tell us one other council that adopts that point of view? A. I am not sufficiently up to date to be certain of it but some of the other suburban ones certainly do.

Q. Like where? A. I think it is Liverpool and Fairfield I have encountered but it is quite some time ago.

Q. Are you sure about that? A. It is some time ago, I do not know what the current position is.

Q. When you said in par. 9 these words. "What council had done in effect . . . municipality", what did you mean? A. They are in fact a set of controls specifically defined to decide, prepared for this site, the excessively large fronted building line, the thirty foot average setback at the rear of the building and in the 2C zones the proper ratio absolute limit on number of units. 40

Q. We understand the particular resolution referred to this site in that sense is unique to the site but are you saying there is no other site in the municipality which has a height limitation

imposed on it under s.309, are you saying that? A. As far as I am aware that is the situation, there have not been any proposed since the scheme came in.

Q. Did you make any enquiries before you made that statement in your letter? A. Yes.

Q. Of whom did you enquire? A. I think that issue —

Q. As to whether there were any other 309 resolutions in Woollahra council? A. I think I enquired of the council but again it is 12 months ago.

Q. When were you asked to swear this affidavit? A. Some time late last year I suppose, I do not know, it is quite some time ago.

Q. You swore the affidavit on 25th February? A. Yes. It was well before that that I was asked.

Q. By 25th February I suppose you re-read your report for the purpose of satisfying yourself that it was indeed your report and that it accurately set out your opinions? A. Yes. 10

MR. WILCOX: And then more recently you were made aware that the matter had been fixed for hearing this week and that you may be required to attend and give evidence? A. Yes.

Q. Did you read your affidavit or your report? A. Yes.

Q. And at any stage, in February this year or recently, did you check up as to the accuracy of the statement you had made? A. No.

Q. When you made that statement did you have in mind fixing a building line? A. To an extent that that is an exceptionally large building line set-up. The set-up of a building line is common practice, but not a 60 foot building line.

Q. Building lines are found in almost all municipalities and in great number of allotments? A. Yes. 20

Q. In fact probably the majority of allotments in the Sydney metropolitan area have a building line fixed for them? A. Yes, but not a 60 foot building line.

Q. Do you know what the set-back is of the convent building which is next door to Dr. Dunlop's land. the actual set-back from the street? A. I did at one stage, there was a survey plan of it I think I had prior to the appeal hearing. It is something of the order of 40 or 50 feet.

Q. There is located just forward of the 60 foot line at the eastern extremity of Dr. Dunlop's land a stone wall and some trees are there not? A. Well there are certainly trees and a stone wall close to the street, yes.

Q. Did you at any stage, after the June 1974 resolution became known to you, go back to inspect the site to evaluate it in relation to the Council's requirements? A. I went out there, yes. 30

Q. Did you, for instance, pace out or measure out to determine whereabouts the building line would be on the site? A. Not on the site. I think as I recall it I still had a copy of the survey plan at that stage, with contours and a fair amount of detail on it.

Q. Did it show the trees? A. Yes.

Q. Are you sure about that? A. Yes, as I recall it.

Q. Did it show the stone wall? A. Yes, it showed the wall.

Q. You did not go back and — A. I did not pace it out on the site, no.

Q. That would be the usual thing for a planner to do before expressing an opinion about what is the right sort of restriction for a site? A. No, I don't think so. 40

Q. Not to go and have a look at it? A. I would go and have a look at it, yes, but the effect of these restrictions the Council made are so unusual in my opinion that with all due respect to the preservation of the stone wall, they are excessive. As far as the preservation of trees are concerned, the Council has a tree preservation order and can use it. The mere declaration of building line does not preserve trees.

Q. You know very well the tree preservation order is completely useless if there is a proposal which is permitted, to erect a building on the position where the tree presently is? A. Well I have certainly seen buildings re-designed to avoid trees.

Q. To take the municipality where you live, Ku-ring-gai, there is a tree preservation order throughout the whole municipality, isn't there? A. Yes.

Q. And it is commonplace for trees to be destroyed in order to make way for buildings? A. Yes.

Q. Because if you applied a tree preservation order literally in an area where there is dense timber you would not have any development at all? A. Yes, that is correct.

Q. So that the real question is not whether you have a tree preservation order, but what you are going to do about your building control so as to avoid disturbance of trees? A. Yes, and Council's use the tree preservation orders to achieve this in some instances. 10

Q. The very point of the building line here was to ensure the buildings would be setback to such position as to avoid disturbance to the trees? A. Well I think that is a questionable use of a building line. It is an inflexible line which an architect may want to infringe on.

Q. Your attitude to this matter is coloured by the fact that the zoning is 2C and you say "Well that being so, that ought to be the predominant matter for consideration"? A. It is not only a matter that the zoning is 2C, it is a matter the site was obviously subject to inquiry during the preparation of the scheme, or the prescription of the scheme, because it has what is in effect a height limit on it, and I know from discussions with officers of the State Planning Authority, one of whom is since deceased, and I think it was the architects involved in preparing the Blackburn Development Project, there is a great deal of reference to skyline, impact of buildings on skyline, urban growth, and so on, that went into that issue. 20

Q. Were you aware that when the scheme was placed on exhibition these three allotments, numbers, 8, 10 and 12 were shown as 2A? A. That is correct.

Q. For single dwellings? A. That is correct.

Q. So far as all the local people are concerned who inspected the exhibited scheme, it was 2A? A. That is correct.

Q. They got into the scheme as 2C because of an objection to the 2A zone? A. Yes.

Q. And without any re-exhibition? A. That is not an unusual situation. Perhaps it is not an unusual situation, but it is the fact, isn't it? A. That is correct. 30

Q. So so far as the local people were concerned who lived in the area, if they took any interest in the exhibited scheme it was 2A, and they woke up to find the scheme prescribed with it shown as 2C? A. I am not certain that was the way. As I recall it the Woollahra scheme was around for quite some months, if not longer than that, in a sort half state of Minister's determination for prescription, while they sweated out the Double Bay 3D zone or something.

Q. After the Minister's decision had been made it was then 2C? A. Minister's determination of objection, yes.

Q. So the reality is anybody who favoured this being 2A was in the situation he thought it would be 2A and found, without his having any opportunity to object to the fact, the decision had been made to make it 2C? A. That is a situation arises every time there is a change of zoning as a result of objection. 40

Q. What you say may be right, but it is the fact in this case? A. Yes.

Q. And it is in an area where there are a considerable number of high standard and very valuable and pleasant homes? A. Yes.

MR. SHAND: I have no re-examination.

(Witness retired and excused.)

ALEXANDER RITCHIE HOWARTH

Sworn and examined:

MR. SHAND: Q. Is your full name Alexander Ritchie Howarth? A. Yes.

Q. You live at 12 Wentworth Street, Point Piper? A. Yes.

Q. You are a company director? A. Yes.

Q. Your swore an affidavit on 26th March 1975 in these proceedings? A. Yes.

Q. And you verify the correctness of the contents of the affidavit? A. Yes.

CROSS-EXAMINATION:

MR. WILCOX: Q. You mentioned in the affidavit you went to a meeting of the town planning committee of the Council on 27th May? A. That is correct. 10

Q. You addressed the meeting, did you? A. That is right.

Q. And you knew when you were going along that the purpose of the meeting was to consider the most suitable form of future development for the land owned by yourself and Dr. Dunlop and Dr. Dunlop's mother? A. I don't know that I knew that specifically.

Q. What did you understand to be the purpose of the meeting? A. I think the purpose of the meeting was as far as I was concerned to enable me to put my point of view regarding the development, which was my only concern at any time, has been the delay, the uncertainty which has existed for some years.

Q. There had been an application by Blackburn Developments, had there not? A. That is correct.

Q. That had been dealt with by the Council, there had been an appeal, and the appeal had been disposed of by the tribunal? A. That is right. 20

Q. You knew all that was finished as of 27th May? A. That is right, I was aware of the tribunal's recommendation.

Q. You knew they had made a decision in which they had dismissed the appeal? A. The decision, to my recollection, of the tribunal, was that there should be a modification of the plan that had been put in. They did I think subsequently recommend a two-tower development.

Q. I won't debate with you what it came down to, but you knew the tribunal's decision had been made and published prior to you going along to the meeting? A. That is right.

Q. You were anxious to have some finality in the question of what sort of development was going to go on? A. That is right. 30

Q. On Dr. Dunlop's land, and perhaps on your land also? A. Yes.

Q. And in particular you wanted to know whether to finish completing the building of your house or whether to start pulling it down? A. The building was completed. The furnishing of the house never has been completed, because my wife at one point said "What is going to happen?". This is what we have been waiting to find out.

Q. You were anxious, no doubt spurred on by your wife, to get an answer to that question?

A. That is right.

Q. You knew the purpose of the council meeting was to enable the Council to make up its mind as to whether there should be residential flat development on this land, and if so, what form it should take? A. At the time I thought the tribunal had disposed of that question. 40

Q. Well why did you think the Council was inviting you along to talk to it? A. I don't know, because at that stage I felt — I think I had learned at that point they were having other thoughts as to how it might be developed.

Q. In other words they were concerned with the most suitable future development for the site, weren't they? A. Yes. (Objected to.)

Exhibits: Exhibit K Oral Evidence
in proceedings before Wootten J.

Q. Incidentally, who is it who had conveyed to you the time at which the committee would hear you, and asked you to come along? A. I am not sure, I couldn't remember. I know I checked recently in my diaries, and I had it firmly written down, "5.45 Woollahra Council," in both diaries, but whether I was advised by somebody from the Council —

Q. You do not remember? A. I don't remember exactly.

Q. You had, I think, been along with Dr. Dunlop to see the Mayor? A. That is right.

Q. A week or so before you went to the committee meeting? A. Yes.

Q. Is that right? A. I don't know exactly when. I remember going with Dr. Dunlop to see Mr. Bray.

Q. It was between the time when the tribunal's decision was made known and the date that the committee sat? A. Yes, I think it was. 10

Q. Do you remember Mr. Regnis being present on that occasion? A. I don't recall the name. I know we were met downstairs by a person from the Council, who took myself and Dr. Dunlop up to Mr. Bray's.

Q. Do you see Mr. Regnis in court, the gentleman sitting in the second bench? A. I wouldn't have recognised him, I am afraid.

Q. Do you remember there was another person there besides Dr. Dunlop and Mr. Bray and yourself? A. No, I don't remember.

Q. You don't recall that at all? A. No, I don't.

Q. Do you remember some discussion going on about the sort of alternatives that were available to regulate the development which could occur on the land? A. I think there might have been something in a general sort of way. I know there was nothing specific, because I don't seem to have any memory about it. 20

Q. Do you remember one thing that was said, the Council might wish to change the zoning to 2B? A. I don't remember those words.

HIS HONOUR: Q. Who did the talking on the Council side? A. I am not sure. I wouldn't remember.

MR. WILCOX: Q. Do you have any real recollection of this meeting at all? A. I am very hazy on it. I remember well and truly going there, it was a nice fine day, we were met and taken upstairs, and I had my say, and Dr. Dunlop had something to say, but I felt as far as my situation was concerned, you know what that was, it was a non-event. I did not feel we had made any progress in any way. 30

Q. Because no decision had been made? A. I think it was said there — by the Mayor, I think — I wouldn't say I am perfectly correct, but I think he did suggest at the time that he would arranged for us to meet the building committee. I think that arose out of it.

Q. Do you remember there were some possibilities thrown around in the discussions as to the sort of alternatives that were available to the Council? A. No — very vaguely.

Q. Do you mean by that that you remember there were some alternatives discussed, but you can't remember what they were? Would that be a fair way to put it? A. I wouldn't even know that. I think there was some vague suggestion that the Council could have other ideas, but there was nothing specific. If there had been. I think I would have remembered it. 40

Q. And that the Council could take various steps in regard to it, depending on what their idea finally was? A. No, I don't remember that.

Q. You say you do not remember this other person being present in the discussion at all? A. No. I really don't.

Q. Your attitude to whether or not there would be development on your land, was this almost a question of being neutral about it, but the most important thing was to get — A. A decision, that is right.

Q. Whereas Dr. Dunlop quite definitely wanted to see some redevelopment occur? A. Yes, that is right.

MR. SHAND: No re-examination.

[Witness retired and excused.]

MR. SHAND: That is the last of the deponents with respect to affidavits filed on behalf of the plaintiff. My friend indicated he did not wish to cross-examine Mr. Sanderson. That would leave only Miss Harvey Sutton as the last deponent to be examined.

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MARGARET HARVEY SUTTON

Sworn and examined:

MR. WILCOX: Q. Your full name is Margaret Harvey Sutton? A. It is.

Q. Where do you live? A. 27 Kent Road, Rose Bay.

Q. I think you are an architect and town planner by occupation? A. I am.

Q. You are the principal planning officer of the Woollahra Council? A. I am.

Q. You swore an affidavit in this matter on 23rd January 1975? A. Yes.

Q. Are the contents thereof correct? A. Yes.

Q. You say in your affidavit that you attended the hearing before the Local Government Appeal Tribunal. Was there a Mr. Ingham, a consultant town planner, who gave evidence in support of the Council's case on that occasion? A. Yes.

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TOWN PLANNING COMMITTEE — 18/9/73
DA 17/73 — 8/12 WENTWORTH STREET, POINT PIPER — RESIDENTIAL
FLAT BUILDING. BLACKBURN DEVELOPMENTS NO. 25 P/L.

PRINCIPAL PLANNING OFFICER'S REPORT.

At the Council Meeting of the 10/9/73 Council resolved

“(A) THAT consent be refused for the following reasons;

1. the proposal does not comply with the requirements of Council's code for residential flat buildings adopted at its meeting of 26th March, 1973;
2. the proposal is considered an overdevelopment of the site having regard to the scale and bulk of the buildings and the development on the adjoining and nearby sites;
3. it is considered that the proposal will detrimentally affect the amenity for residents in nearby buildings, particularly in regard to views.
4. the proposal will alter the character of Wentworth Street;
5. objections have been received from residents in the area in regard to the zoning of the land and the resultant change in character of the site and the locality generally;
6. having regard to the scale and location of the development, the car parking, though in accordance with Council's code, is considered to be insufficient;
7. the location of the visitor car parking is unsatisfactory having regard to the distance from the street and the entrance to the units;
8. the circumstances of the case and the public interest.

(B) THAT the application be referred to a joint meeting of the Building and Health & Town Planning Committees and the Principal Planning Officer report further thereto.”

I have carried out a brief study of the subject properties in relation to the desirable form of any future redevelopment bearing in mind the existing Residential 2(c) zoning of the area.

Wentworth Street despite a few residential flat buildings towards each end of the street is generally developed with private homes and gardens often of large sizes. The Convent adjoining the subject property has a building of up to 4 floors in height but has large grounds.

TOWN PLANNING COMMITTEE — 18/9/73

The subject property backs onto an existing area containing some multi storeyed residential flat buildings.

I consider that some of the ways in which the present fairly low density open character of Wentworth Street could be maintained is by requiring;

(a) fixing building lines providing extensive set backs from the street alignment perhaps varying with the number of storeys in a building to permit the growth of large trees and make new buildings less obvious, for example, set backs of the order of

30ft — buildings of 1 or 2 floors.

45ft — buildings of 3 floors.

60-80ft — buildings of 4 or 5 floors.

The shape of the properties would be a consideration here as to what would be reasonably required in detail in that they are irregularly wedged shaped with a greater proportion of the site fronting the street than in a rectangular site.

(b) greater set backs from side boundaries than proposed in development application particularly on the east adjacent to the Convent for the same reasons as in (a).

(c) the possible imposition of a height limit/s under Section 309(4) of the Local Government Act: "The Council may regulate the number of storeys which may be contained in a residential flat building: Provided that no more than three storeys shall be contained in a residential flat building of either Class A or Class B".

The height could be say 5 storeys (habitable floors). However a notation should then be made to the effect that buildings of 2-3 floors are sought over all or the greater part of the development.

(d) the general reduction of bulk of buildings by various means for example reduction in height, site coverage, all resident parking being fully underground, minimum building up of site works such as ramps, retaining walls, bridges, etc.

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The possibility of reducing the proposed building by approximately 25% is also being investigated by the loss of say 8-12 dwellings, a substantial reduction of height accompanied by perhaps an increase in the number of dwellings in the low stepped erections of the building. The provision of guide lines of this sort by a resolution of council in relation to a particular site has the danger that the development which flows from the guide lines may not be as envisaged or desired by Council but may be difficult to refuse if complying with detailed guide lines. Unless the guide lines were very restrictive it would be difficult to formulate satisfactory specific requirements without in effect redesigning the proposal.

PROPERTY — 8-12 WENTWORTH STREET, POINT PIPER (490.8-12)

THAT in addition to the recommendation to be placed before the Council later in the evening and as set out in the Business Agenda, the following recommendation also be made:— 20

- C. 1. THAT the Council, under the provisions of Section 309 (4) of the Local Government Act, 1919, regulate the number of storeys in any residential flat buildings erected on properties Nos. 8, 10 and 12 Wentworth Street, Point Piper, or any one or combination of storeys at no more than three.
2. THAT the council, under the provisions of Section 308 of the Local Government Act, 1919, fix a building line relating to properties Nos. 8, 10 and 12 Wentworth Street, Point Piper, in accordance with the plan accompanying the Town Planning Committee report of 10th June, 1974, and providing for set-backs from Wentworth Street, ranging from 60' along the eastern boundary of property No. 8, to 45' between properties 8 and 10, to 35' between properties 10 and 12, and 35' to the western boundary of No. 12. 30
3. THAT the owners of the subject properties be advised of the Council's decision in 1 and 2 above and they be informed the Council would consider permitting a greater site coverage than that allowed in its adopted relevant code and roof and terraces being accepted as open space for site coverage calculations (both to be at the discretion of the Council); and that a plot ratio of up to 0.9:1, 24 being the maximum number of dwelling units, all being subject to a high standard of design, including a satisfactory landscaped area facing Wentworth Street and provision of an average set-back of 30' to the rear boundary to permit retention of existing trees and privacy of adjoining residents.

TOWN PLANNING COMMITTEE — 27/5/1974
PROPERTY 8-12 WENTWORTH STREET, POINT PIPER — (FILE NO. 490.8-12):

{Deputy Town Clerk's Memo:— The Aldermen have had circulated to them as a separate document the decision of the Local Government Appeals Tribunal in regard to the appeal lodged by Blackburn Developments No. 25 Pty. Ltd., in respect of the Council's refusal of development consent to a two (2) stage residential flat proposal on land known as No. 8-12 Wentworth Street, Point Piper.

The Tribunal upheld the Council's decision to refuse development consent to the application. The Council's Solicitors have commented on the decision and their advising of 9th May, 1974, is attached hereto as Appendix No. 1. 10

At the request of His Worship the Mayor, Alderman M.K.F. Bray, arrangements have been made for Dr. Dunlop and Mr. Howarth, owners of properties within the subject site, to address the Town Planning Committee meeting at 5.45 p.m. on the evening of 27th May.

A letter from Messrs. Hall & Hall, Solicitors, is attached as Appendix 2. Messrs. Hall & Hall acted on behalf of persons who are resident in and around Wentworth Street, Point Piper and who had their objections argued before the Local Government Appeals Tribunal. With regard to the advising from the Council's Solicitors, it will be noted that three specific suggestions are made. They are: 1 — Page 3, paragraph 2:

“We would suggest . . . that to avoid any future argument in relation to the meaning of floor space, the Code should be amended to co-incide with the definition of that term as specified in Clause 4 of the Ordinance.” 20

2— Page 3, paragraph 8:

“If Council does desire to restrict development on the site to that appropriate to a 2(b) Zone, it is essential that representations to the Minister be made immediately with a view to having the subject land suspended from the provisions of the Ordinance.”

3 — Page 4, paragraph 2:

“At the same time Council may consider exercising its powers under Section 309 (4) of the Local Government Act by regulating the number of storeys which may be contained in any residential flat building sought to be erected on the site.”

In regard to the three matters, it should be noted:— 30

1. Alteration to Residential Flat Code — Floor Space Ratio.

Clause 4 — Interpretation — of the Woollahra Planning Scheme Ordinance has the following definition:—

“Floor Space includes all wall thicknesses, ducts, vents, staircases and lift wells, but does not include —

- (a) Any car parking space in the building provided to meet the standards required by the responsible authority (but not such space provided in excess of such standards) or any internal access thereto;
- (b) Space used for the loading or unloading of goods, and
- (c) Lift towers, cooling towers, machinery and plant rooms, and any storage space related thereto.” 40

It is desirable for the Council's Code to have regard to the advice from the Solicitors. Accordingly, it is suggested that the Code contain a statement to the effect that floor space shall have the meaning ascribed to it in the Woollahra Planning Scheme Ordinance.

2. Proposal for a change of zoning from Residential 2(c) to Residential 2(b):

At this meeting on 24th September 1973, the Council resolved in the following terms:—

“In respect of property 8-12 Wentworth Street, Point Piper, the Council make application to the Minister for Local Government, through the State Planning Authority of New South Wales, for suspension of the provisions of the Woollahra Planning Scheme under Section 342Y of the Local Government Act, 1919, as amended, and to seek an Interim Development Order restricting development within the subject land, viz:

8-12 Wentworth Street, Point Piper,
to those purposes as stated within the Ordinance, and in particular in clause 23 (Land Use Tables) for Residential 2(b) Zones.”

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By letter of 8th November 1973, the State Planning Authority of N.S.W. advised in terms:—

“I refer to Council’s letter of 15th October 1973, requesting that the Minister for Local Government take action to suspend the provisions of the Woollahra Planning Scheme in respect of the abovementioned lands, and that he make an Interim Development Order restricting future development on such lands to those purposes permissible in the Residential 2(b) Zone.

As the Council will be aware, an Appeal has been lodged with the Local Government Appeals Tribunal against the Council’s refusal to grant consent to the carrying out of residential flat development on these lands. The Appeal is listed for Hearing on 20th November 1973.

In the light of the report submitted to him by the Authority, and having regard to the Appeal that has now been lodged, the Minister for Local Government has now decided that he would not be justified in taking suspension action and making an Interim Development Order as requested by the Council.”

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The Town Planning Committee and the Council now have to examine the matter of any further request for a change to a 2(b) Zoning, in the light of the recent Appeal Hearing and having regard to the further representations from ratepayers and residents in the Point Piper Area.

3. Section 309 (4) Local Government Act, 1919 — Regulation of Number of Storeys in any Residential Flat Building

Sub-section 4 of Section 309 of the Act provides:—

“The Council may regulate the number of storeys which may be contained in a residential flat building;

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Provided that not more than three storeys shall be contained in a residential flat building of either Class A or Class B.”

With regard to 2. and 3. above the Principal Planning Officer, Miss M. Harvey-Sutton has reported in detail (see attached Appendix 3). However, it may assist the Town Planning Committee, at this stage, to note certain statements which are contained in the “Instrument of Decision and Minutes of Proceedings” of the Local Government Appeals Tribunal Board in the case; Blackburn Developments No. 25 Pty. Limited v Woollahra Municipal Council.

On page 9 of the Minutes it is stated:—

“3. Planning Scheme Provisions —Weight to be Given.

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While consideration of this issue may, prima facia, appear irrelevant, in this case the Board considers it desirable to examine it because of the case presented for the repondent Council and Objectors. Both advanced a number of arguments which the Appellant claimed (and legitimately in the Board’s opinion) were founded basically on an objection to the zoning. Indeed, some of the alternative forms of development canvassed before the Board as the limits

of what should be approved amounted to what would in effect have followed if there were to be a rezoning of the subject land to Residential 2(b). For that reason the Board considers it opportune and necessary to state quite categorically that its determination of this appeal cannot be founded on a view that the zoning should be other than what it is. It is not the function of the Board to address itself to the correctness or otherwise of decisions regarding the contents of the prescribed Scheme, which had been taken by other proper authorities."

On page 10, in regard to the weight to be given to the views of the Objectors the comment is:—
"There were, however, two other aspects of the Objectors' case. There was firstly, the impact of the proposed development on the immediate environment and a consideration of the character of the proposed development in relation to the character of the existing development in the locality. This aspect the Board considered to be highly relevant because in this case Wentworth Street formed a boundary between the Residential 2(c) and 2(a) zonings. The Board was prepared in the particular circumstances of this case to afford considerable weight to this aspect of the objections. The second aspect of the Objector's case went to alleged injury which would be created by the proposed development . . ."

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On page 12 —

"However, the two heads of consideration which the Board considered dominant in its assessment of the Appellant's application, were those at the beginning of clause 33, namely:—

(v) The character of the proposed development in relation to the character of the development on the adjoining land and in the locality. The Board noted from the evidence and more particularly from its own inspections of the area that the submissions made concerning the character of Wentworth Street as a reasonably quiet residential street of high amenity were quite correct. While the general bulk of the Wentworth Street buildings is greater than that of buildings in the vast majority of Residential 2(a) areas, this bulk was in the Board's view consistent with the character of the area. The proposed development, designed to achieve at least the very highest intensity of land use possible under the provisions of the Scheme Ordinance was clearly out of character with the development obtaining in the immediate locality of Wentworth Street, and the Board endorsed completely the submissions put to it that this character was totally different from that of development in Wolseley Road.

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(vi) The size and shape of the parcel of land to which the application relates. The siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the adjoining land and the development thereon. In this regard the Board reached the conclusion that, quite apart from the technical considerations set out previously regarding floor space ration and site coverage, the present proposal constituted gross overdevelopment of the site and that it would not, therefore, be in the public interest to grant consent to the application before the Board . . ."

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Clearly, then, the Town Planning Committee needs to—

- (a) Amend the Residential Flat Code in relation to the definition of "floor space"; and
- (b) determine whether the Council should again make representations for the subject properties to be rezoned as Residential 2(b); and
- (c) determine whether action should be commenced to regulated the number of storeys in any residential flat building erected on the subject properties.

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TP Chee 27/5/74

(NOTE: Mrs Dunlop, Dr Dunlop, Mr Howarth and Mr C. C. Phillips were present. Mr Howarth and Dr Dunlop addressed the Committee in regard to properties 8-12 Wentworth Street, and they answered questions directed to them by the Aldermen.)

(A) THAT the Council's code for residential flat buildings throughout the Municipality be amended to provide that "floor space" has the same meaning as ascribed to it under Clause 4 of the prescribed Woollahra Planning Scheme, viz:—

"Floor Space" includes all wall thicknesses, ducts, vents, staircases and lift wells, but does not include —

(a) any car parking space in the building provided to meet the standards required by the responsible authority (but not such space provided in excess of such standards) or any internal access thereto; 10

(b) Space used for the loading or unloading of goods, and

(c) Lift towers, cooling towers, machinery and plant rooms, and any storage space related thereto.

(B) THAT the resolution of the Council of 24th September, 1973, which was in the following terms:—

"In respect of property 8-12 Wentworth Street, Point Piper, the Council make application to the Minister for Local Government, through the State Planning Authority of New South Wales, for suspension of the provisions of the Woollahra Planning Scheme under Section 342Y of the Local Government Act, 1919, as amended, and to seek an Interim Development Order restricting development within the subject land, viz: 20

8-12 Wentworth Street, Point Piper

to those purposes as stated within the Ordinance, and in particular to Clause 23 (Land Use Tables) for Residential 2(b) Zones."

be and is hereby rescinded.

(C) THAT a report be submitted to the next meeting of the Town Planning Committee in regard to the aspect of regulating the number of storeys in any residential flat building on the land, under the provisions of Section 309 (4) of the Local Government Act, 1919.

DOWLING TAYLOR
SOLICITORS

9 May, 1974

Our Ref: Mr. A. W. Nicol 73637
Your Ref: DA 17/73 R:V

The Town Clerk,
Woollahra Municipal Council,
Council Chambers,
DOUBLE BAY 2028.

Dear Sir,

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RE: THE COUNCIL and BLACKBURN DEVELOPMENTS
(25) PTY. LTD. — 8-12 Wentworth Street, Point Piper

We refer to our letter of 6th instant herein enclosing the Minutes of Proceedings and Instrument of Decision of the Local Government Appeals Tribunal in this matter.

The Council was successful on the appeal and development consent was refused to the application. No Order as to costs was made by the Board.

Council was successful on the appeal and development consent was refused to the application. No Order as to costs was made by the Board.

Council was represented by Mr. T. Cole of Counsel who appeared on the 21st November 1973. Due to Mr. Cole's unavailability on the resumed hearing date, Mr. T. F. M. Naughton of Counsel appeared on the Council's behalf on the 12th, 13th and 14th February 1974.

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A number of objectors sought and were granted leave to appear as parties to the proceedings. These objectors were jointly represented by Mr. P. Stein of counsel.

Evidence in support of Council's case was given by Miss Harvey-Sutton, Council's Principal Planning Officer, Mr. Neil Ingham of Planning Workshop, Consultant Town Planner, and Mr. M. George, a Planner employed by the State Planning Authority of New South Wales. Evidence from two local objectors, namely Senator McLelland, and a representative of the Ave Maria Convent also supported Council's case.

Several of the objectors who were granted leave to appear as parties in the proceedings were called by Mr. Stein and gave evidence of their objections to the proposal.

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On behalf of the local residents three objections to the proposal were submitted. It was firstly argued by Mr. Stein that the application lodged with the Council was invalid and that this situation could not be rectified. Thus, it was submitted, the Board on appeal could not properly consider the same. Secondly, it was put that in view of the history of the rezoning of the land and the character of the proposed development obtaining in the surrounding locality the application should be refused. Finally, it was argued that the proposed development, by virtue of its overshadowing effect, visual impact and obstruction of views and the creation of traffic congestion would tend to injure the surrounding amenity of the area and should therefore be refused.

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Counsel retained by the Council contended that development on the site should be restricted to a development appropriate to the 2 (b) Zone under the Council's Planning Scheme Ordinance, and advanced the specific grounds of refusal in support of such contention. In addition it was argued that the proposal did not comply with Clauses 44 and 46 of the Ordinance.

As regards the first objection advanced by Mr. Stein it was submitted that the requirements of Clause 32 (1) (d) of the Ordinance had not been complied with and that the situation was not capable of rectification following lodgment of the application. On the authority of Else Mitchell J. in Hornsby Shire Council v. Devery 12 LGRA 165 a similar argument was not advanced on Council's behalf. In that case His Honour held that where a Council had dealt with an application it was estopped from late arguing that the application was defective in form. The decision of the Board in Touma v. Canterbury Municipal Council 1972/73 LGATR 162 is difficult to reconcile with Devery's case. However, it would appear that Council may only argue that the Board lacks jurisdiction where it has at the outset refused to deal with an application for the reason of an irregularity of the application or the appeal is from the neglect and delay of the Council to deal with the application in the time specified.

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In any event, the Board did not uphold the arguments advanced by Mr. Stein and held it had jurisdiction to determine the appeal.

As regards the other arguments of the objectors, although the Board was prepared to give considerable weight to the impact the proposed development would have on the immediate environment, due to the fact that Wentworth Street formed a boundary between the 2(c) and 2(a) Zones it did not consider that the objections of the residents that the development would injure the amenity of the area to be substantiated.

The Board would not entertain the appeal on the basis that the land the subject of the appeal should have been some other zoning. The Board emphasised that the zoning of the land is Residential 2(c) which is designed to permit, subject to Council's consent, residential flat development of the highest density permissible in the Municipality. The Council, nor the Board on appeal cannot prohibit such form of development simpliciter.

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In its Minutes of Proceedings the Board has commented on the grounds of refusal and we do not propose to comment thereon save in relation to the following aspects.

In relation to the calculation of floor space ratio, the main issue for determination was whether balconies should properly be included in the calculations of floor space. The Board drew attention to the provisions of Clause 4 of the Local Government Act which in effect includes everything except certain specified exceptions and also noted that Council's code specifically excludes balconies for the purpose of calculating floor space ratio.

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Whilst differing from the views of Mr. Ingham that bulk building is one of the factors intended to be controlled by floor space limitations the Board was of the opinion that without some specific exclusion of balconies within the Scheme Ordinance itself, they must be included in the calculations of floor space: This view accords with the decision of Mr. Justice Hardie in Hooker Home Units Pty. Limited v. North Sydney Municipal Council 21 LGRA 101.

We would suggest therefore that to avoid any future argument in relation to the meaning of floor space the Code should be amended to coincide with the definition of that term as specified in Clause 4 of the Ordinance. We note that we have already recommended to Council that the Double Bay code be similarly amended.

With regard to site coverage the Board considered that it was a matter of fact and degree in the particular case as to whether a particular structure constitutes site coverage. In the instant case the Board was of the view that the lower podium building forming part of Stage 2 of the development should be included in the calculations of site coverage as should those accessible roof areas which formed private gardens or courts.

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The Board did not consider that ground of refusal No. 7 was justified. However, it did agree that the particular parking design was unsatisfactory as casual visitors to the complex, including service, trade and visitor vehicles, would be obliged to drive through an entire garage and parking area to the rear of the site.

The Board also agreed with the Council that the development was clearly out of character with the development in the immediate locality of Wentworth Street and that the development constituted a gross overdevelopment of the site. The Board felt that the development should be reduced to serve as a buffer between that street and Wolseley Road and considered that any development should not exceed a population density of 70 to 75 persons to the acre with a corresponding reduction in the bulk of the buildings to be erected on the site.

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Finally the Board criticised Council in attempting to reject absolutely the logical consequences of the zoning of the land which the Council itself had sought and considered that some residential flat development of a reduced scale should be allowed.

It should be noted that the Board felt that strict compliance with the provisions of the Code need not necessarily be warranted, it being obviously not without fault and that the erection of a three or four storey building of substantial bulk on the site could be more injurious to the locality than the erection of well designed tower buildings to the maximum permissible height.

If Council does desire to restrict development on the site to that appropriate to a 2 (b) Zone it is essential that representations to the Minister be made immediately with a view to having the subject land suspended from the provisions of the Ordinance. Obviously if nothing is done and an amended application is received in the meantime which is generally in accordance with the views of the Tribunal expressed above it would be well nigh impossible to successfully resist an appeal from Council's decision refusing the application. No doubt also, once an appeal is lodged the Minister would not interfere by suspending the land from the Ordinance.

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At the same time Council may consider exercising its powers under Section 309 (4) of the Local Government Act by regulating the number of storeys which may be contained in any residential flat building sought to be erected on the site. We feel that again it is obviously desirable that any action in this regard should be taken immediately. Any action under the Section must be based on strong planning grounds in order to avoid any possible inference that Council acted mala fide, and must not be taken simply to defeat any possible appeal.

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The Council should be aware that the Tribunal has adopted the view that it has the power to vary a resolution made under the Section (Hooker Home Units Pty. Limited v. Ryde Municipal Council 73000745), hence Council must have strong planning evidence to ground a resolution under the Section. On appeal, Council must be able to show that the exercise of the power was bona fide and not colourable or designed merely to thwart an appeal. Accordingly we would recommend that if Council desires to exercise its powers under the Section it do so immediately.

Yours faithfully, DOWLING TAYLER

Per:

APPENDIX III

TOWN PLANNING COMMITTEE 27/5/74

PROPERTY: 8-12 WENTWORTH STREET, POINT PIPER

Report of Principal Planning Officer

Details of the Local Government Tribunal's decision and comments on that decision by Council's Solicitors have been given earlier in the Report.

Desirable Development on the Site

The Tribunal has supported Council's view that the character of Wentworth Street is different to that of Wolseley Road.

In my opinion, the following three types of development would be considered desirable on the site:— **10**

- (a) A re-subdivision of the land to allow development for private dwellings and/or duplexes, with a minimum lot size of say, 10,000 to 12,000 sq.ft (exact size should be determined by a detailed study).

Dwelling house sites are extremely rare in Point Piper and command a high price.

Zoning — should be 2 (b) with a restriction on maximum development to duplex residential flat building — Residential Flat Building Class A.

- (b) Group dwelling development in a Residential 2 (b) zoning — Residential Flat Building Class B. The standard should be Council's normal standards of maximum plot ratio .6, maximum site coverage 30% and proportion of one group dwelling to every 3,250 sq.ft of land. **20**

It is important that a wide belt of landscaping and tree planting should be provided facing the street and in this case, a building line should be imposed of say, 50'. Again, the exact width would follow a detailed study.

- (c) Residential flat building of low scale. Zoning would then be Residential 2 (c) with a maximum development of Residential Flat Building Class C.

In order to ensure a low scale, a restriction on height of two or three floors should be imposed, and compliance with Council's Residential Flat Building Code enforced.

A similar building line as in Paragraph (b) above should be enforced.

Future Development in the light of the Tribunal's Decision

Council will recall that the development before the Tribunal was for a two tower development with a low scale development at the back. Evidence was given to the Tribunal that population density would be as follows:— **30**

Subject Proposal

Stage 1

Twenty-four three/bedroom units in an eight storey tower

Density of 72 persons

Site area = 33,451 sq.ft = 94 persons per site acre

Stage 2

Eight three/bedroom and six/two bedroom units in a stepped development with eight storey tower

Density of 39 persons **40**

Site area = 18,919 sq.ft = 90 persons per site acre

Total number of units = 38

Floor space index = 1.14:1

The Tribunal has indicated that it considers a development with a population density of 70-75 persons per site acre, producing a lower scale of building than was proposed, would be acceptable in the circumstances.

The population density in the evidence given by the Tribunal was based on a figure of three persons for each three bedroom flat and 1.25 persons per two bedroom flat.

If the future development were to be in proportion to the density proposed by the Tribunal, I would expect the floor space index to be a maximum of .8:1 and the number of dwelling units to be a maximum of twenty-four.

This sort of development would need to be a scaled down version of that originally proposed (which has a moderate proportion of stepped development entailing a larger site coverage than usually accepted) in order to obtain the desired landscaping around the site and particularly fronting Wentworth Street.

Otherwise, a development of .8:1 would inclined to be a bulky one which would certainly detract from the present attractive character of Wentworth Street. 10

However, I would not recommend a plot ratio of .8:1 on this site. As I have said earlier in this report, I think a maximum development of .6:1 is desirable here.

If, in the light of the Tribunal's comments, Council felt that a slightly denser development should be permitted, I would recommend that the development did not exceed .7:1 for either stepped development or a combination small tower and stepped development.

Council, when considering an unusual development in the Banksia Street area did approve a stepped development varying in height from one to five storeys, which had a plot ratio of .7:1 and site coverage of 34.5%.

This scale of development is the most that I think is acceptable for a site in this location. Special regulations should be devised in such a case, including a lower site coverage to permit wide street landscaping. I concur in the remarks put forward earlier in this Report. 20

(Sgd) M. HARVEY SUTTON

M. Harvey Sutton
PRINCIPAL PLANNING OFFICER

TOWN PLANNING COMMITTEE 10/6/74
PROPERTY 8-12 WENTWORTH ST., POINT PIPER (490.8-12 D.A. 17/73)

Report of Principal Planning Officer
FUTURE DEVELOPMENT
REGULATION UNDER SECTION 309(4) OF THE LOCAL GOVERNMENT ACT 1919

TERMS OF SECTION 309(4) OF THE LOCAL GOVERNMENT ACT 1919

The terms are:

309(4) "The Council may regulate the number of storeys which may be contained in a residential flat building: Provided that not more than three storeys shall be contained in a residential flat building of either Class A or Class B." 10

The terms "Class A or Class B" above relate to Schedule VII of the Local Government Act. This is made clear by the provisions of Section 309 (3) namely:—

"There shall be three classes of residential flat buildings which may be referred to as Class A, Class B and Class C, and the standard prescribed by this Act for each such class shall be the standard set out in Schedule VII in respect of that class."

Schedule VII deals with minimum setbacks to side boundaries and maximum site coverages. (See ANNEXURE A). The standards in Schedule VII are generally regarded as being in some respects, outmoded but form of course, the legal limits to any residential flat building development.

The terms in Schedule VII must not be confused with the definitions of different types of residential flat buildings in the Woollahra Planning Scheme. 20

DEFINITIONS OF RESIDENTIAL FLAT BUILDINGS IN THE WOOLLAHRA PLANNING SCHEME

Council is familiar with these definitions, Class A means in brief, a "duplex" residential flat building and Class B, group dwellings i.e. "town houses".

DEFINITION OF TERM "STOREY"

Section 304 of the Local Government Act defines a "storey" as:

"any floor containing any habitable room or rooms or containing any room or rooms occupied or used or so constructed, designed or adapted as to be capable of being occupied or used as a shop, office or factory."

Hence, storey means a habitable floor only.

A building may also have non-habitable floors such as a plantroom floor or a parking floor which may add to its height. 30

Regulation of height of residential flat building under Section 309 (4) however, can only be by numbers of storeys and not directly by dimension or levels.

POINT PIPER RESIDENTIAL 2 (c) ZONE

The Residential 2 (c) zone includes all the properties in Wolseley Road between the two intersections of Wentworth Street and Wolseley Road. It also includes properties No. 2 (at the southern end of Wentworth Street) and Nos. 8, 10 and 12 Wentworth Street (the subject properties). The erection of residential flat buildings of all types is permissible in the zone with Council's consent.

In addition to the provisions affecting all Residential 2 (c) zones in the Woollahra Planning Scheme, the Point Piper Residential 2 (c) zone is affected by Clause 44 (5) of the Woollahra Planning Scheme namely:— 40

"A building shall not be erected in that part of Zone No. 2 (c) which is within broken black

lines on sheet 3 of the scheme map to a height greater than 235.5 feet above standard datum.”

The maximum height specified above is a general limit applying to the whole zone. It represents the height of the tallest existing building above standard datum.

It has to be read in the context of all the provisions of the Woollahra Planning Scheme Ordinance.

Cl.33 which is a mandatory clause requires, for example, that Council, when considering applications, consider the character of the development on the adjoining land and in the locality. 10
The provisions of Clause 33 are:—

“In respect of any application under this Ordinance for consent to erect or use a building or to carry out or use a work or to use land for a purpose referred to in Column IV of the Table to clause 23 the responsible authority shall take into consideration —

- (a) the character of the proposed development in relation to the character of the development on the adjoining land and in the locality;
- (b) the size and shape of the parcel of land to which the application relates, the siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the adjoining land and the development thereon;
- (c) Whether the proposed means of entrance to and egress from the site are adequate and whether provision has been made for the loading, unloading and parking vehicles on the site; 20
- (d) any representations made by any statutory authority in relation to the application or to the development of the area, and the rights and powers of any such authority;
- (e) any detailed plan or design adopted by resolution of the responsible authority for the development of the locality in which the land to which the application relates is situated;
- (f) whether adequate provision has been made for the landscaping of the site;
- (g) the existing and future amenity of the neighbourhood;
- (h) the circumstances of the case and the public interest; and
- (i) the provisions of the scheme.” 30

The Local Government Tribunal, in an Appeal by Blackburn Developments No. 25 Pty Ltd v Woollahra Municipal Council, had before it, a residential flat building application which proposed development to, or about, both the maximum height specified in Clause 44 and the maximum floor space permitted by Clause 46 (i.e. 1.15:1).

The Tribunal disallowed the Appeal supporting the Council's view that the proposal constituted a gross overdevelopment of the site and that it was clearly out of character with the development obtaining in the immediate locality of Wentworth Street.

In reading the Tribunal's Minutes, it is clear that the Tribunal view is that any residential flat building erected on the site should be of a lesser bulk than that proposed by Blackburn Developments No. 25 Pty Ltd. See for example, the quotation below from Page 13 of the Minutes. 40

“Without laying down precise parameters for an acceptable scale of development, the Board agrees with the views of the Council's consultant town planner, Mr Ingham, that, in this location and given the existing zoning, any development should not exceed a population density of 70-75 persons to the acre. The Board envisages a corresponding reduction in the bulk of any buildings to be erected on the site.”

I am of the opinion particularly in the light of the provisions of Clause 33, quoted above, that Council may regulate the bulk of any future development on the subject properties and in the

zone generally, to below the maximum limits of floor space and height specified in the Woollahra Planning Scheme Ordinance.

DESIRABLE NUMBER OF STOREYS

IN RELATION TO NOS. 8, 10, 12 WENTWORTH STREET

Height re: No. 6 Wentworth Street and Wentworth Street generally

The Tribunal on pages 12/13 of its Minutes commented:—

"The particular site, although zoned Residential 2 (c) is an integral part of Wentworth Street and it is the Board's view that the development should be reduced to serve as a buffer between that street and Wolseley road."

The typical height of buildings in the central sections of Wentworth Street is two storeys. 10

However, the new wing of the 'Ave Maria' building has three habitable floors over a garage and store. The building is four floors in height towards the street, its walls measuring approximately 44 feet at the north-west corner, adjacent to the driveway. The walls are at their greatest height at this point.

It is considered that the height of any building on the subject buildings should, in any case, be less than the height of the new wing, and should be not more than 40 feet at the maximum above street level at any point.

Allowing for existing levels on the subject properties, it is expected that a future development could then contain up to three residential floors with basement parking accommodation.

Height re: Building Line 20

I consider that a wide strip of landscaping onto the street alignment is essential in order to protect the present character of Wentworth Street. A fixed building line is recommended to ensure a suitable width.

A plan has been prepared showing the recommended position of this building line together with a sketch illustrating some of the existing features on the subject properties and on No. 6 Wentworth Street. A careful consideration of these features and others not shown has led to the recommendation.

Height re: Population Density

The Tribunal has indicated that it considers a development with a population density of 70-75 persons would be acceptable in the circumstances. (For details see copy of Report dated 27/5/74 Appendix B). 30

A residential flat building containing approximately twenty-four dwelling units would have a population density of that order.

A two storey residential flat building, provided Council permitted a 35% site coverage in lieu of the usual maximum of 30%, could have a plot ratio of 0.7:1.

It could contain up to twenty four dwelling units each being in the order of 1300-1400 sq.ft in area, allowance being made for circulation between the units.

However, a site coverage of 35% could be too great to permit development within the building line and also within desirable setbacks from the remaining site boundaries. It would for example, be desirable for any building to be set back 30 feet from the rear boundary to preserve existing trees, and assist in protecting the privacy of adjoining residents. 40

A stepped development of varying heights containing from one to three storeys with a site coverage of say, 32% might well be preferable.

In that case, Council might consider regulating the number of storeys on the subject properties to a maximum of three.

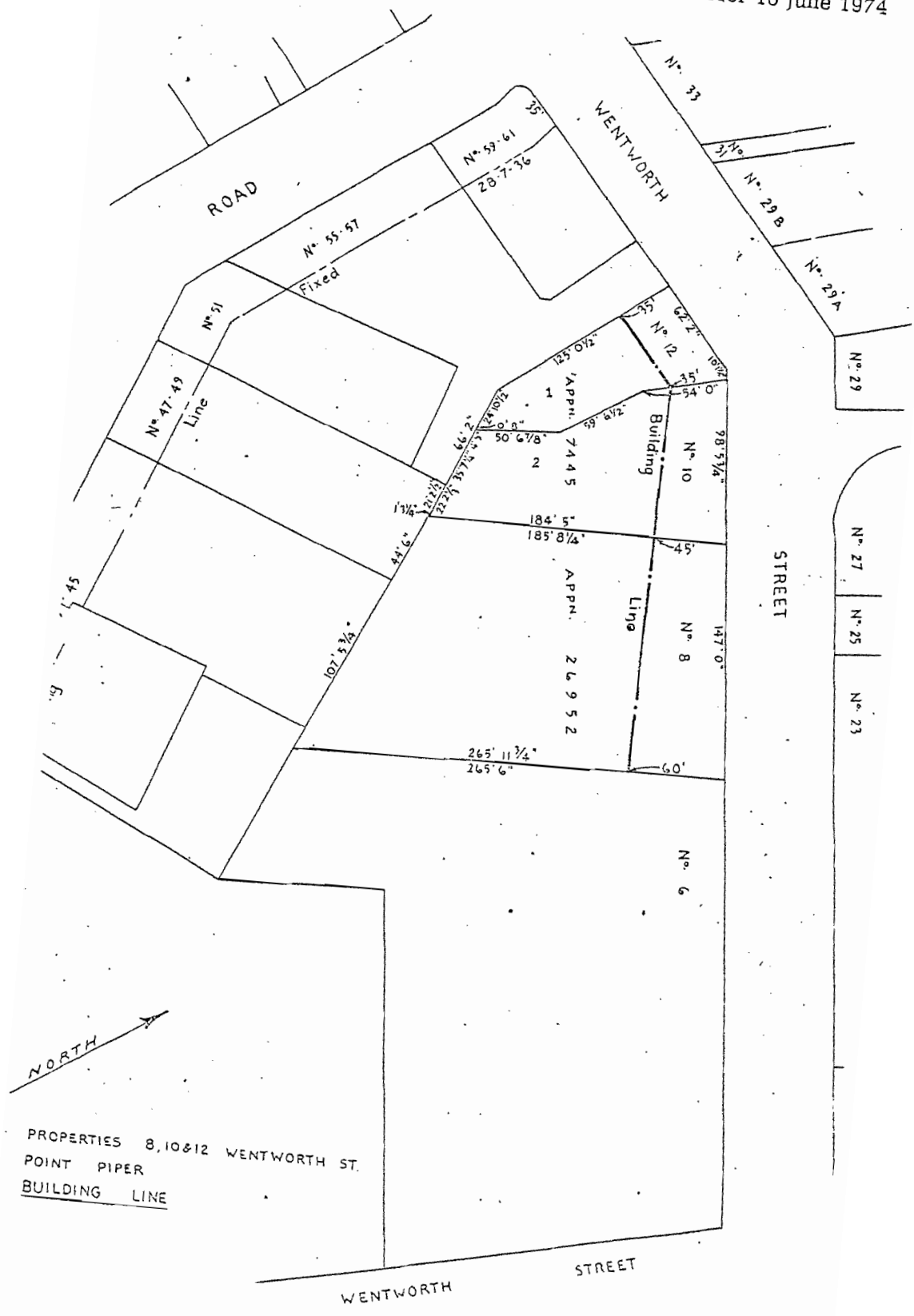
It is therefore RECOMMENDED:

- A. THAT Council under the provisions of Section 309 (4) of the Local Government Act, 1919, regulate that any residential flat building erected on properties Nos. 8, 10 and 12 Wentworth Street, Point Piper or any one or combination of them contain no more than three storeys.
- B. THAT Council, under the provisions of Section 308 of the Local Government Act, 1919, fix a building line relating to properties No. 8, 10 and 12 Wentworth Street, Point Piper as marked on the accompanying plan.
- C. THAT the owners of the subject properties be advised of Council's resolutions in A and B above.

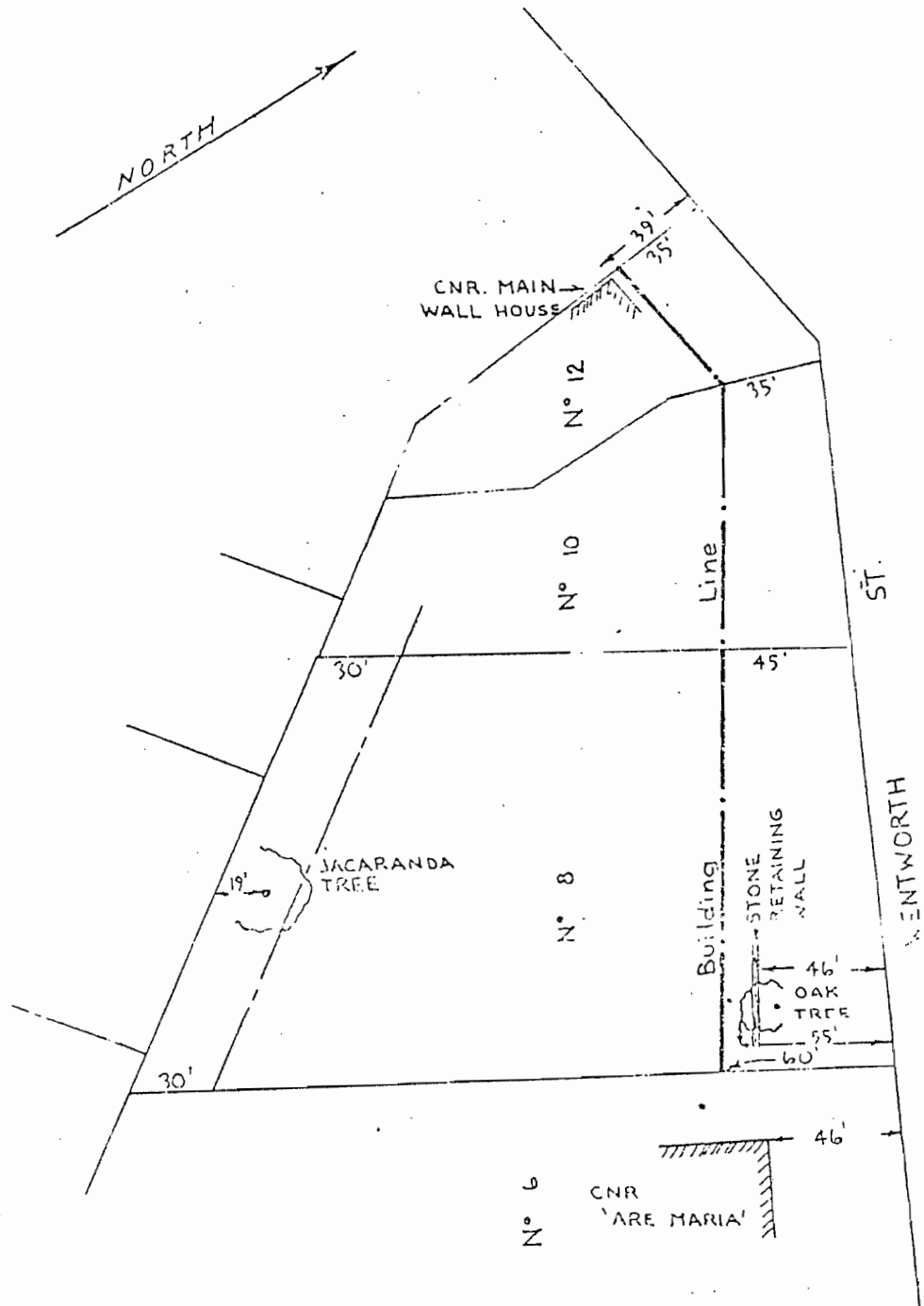
AND FURTHER THAN they be advised that Council would consider permitting a greater site coverage than that allowed in its adopted relevant code, together with a plot ratio of up to 0.7:1, twenty four being the maximum number of dwelling units all being subject to a high standard of design, including a satisfactory landscaped area facing Wentworth Street and provision of an average set back of 30 feet to the rear boundary to permit retention of existing trees and privacy of adjoining residents. 10

(Sgd) M. HARVEY SUTTON
M. Harvey Sutton
PRINCIPAL PLANNING OFFICER

Exhibits: Exhibit O Report from Defendants
 Principal Planning Officer 10 June 1974



PROPERTIES 8, 10 & 12 WENTWORTH ST.
 POINT PIPER
 BUILDING LINE



PROPERTIES 8, 10, 12 WENTWORTH ST.
Building Line in relation to position
of existing features.

SKETCH PLAN

TOWN PLANNING COMMITTEE — 10/6/1974
PROPERTY 8-12 WENTWORTH STREET, POINT PIPER (490.8-12 DA17/73)

(DEPUTY TOWN CLERK'S MEMO:) At its meeting on 27th May 1974, the Town Planning Committee heard representations from owners of land 8-12 Wentworth Street, Point Piper. At the same time, the Committee members had before them the written submissions by Messrs. Hall and Hall, Solicitors, on behalf of persons who had lodged objections to the original development proposal for residential flat development.

The Town Planning Committee made the following decisions:

"A. THAT the Council's Code for residential flat buildings throughout the Municipality be amended to provide that "floor space" has the same meaning as ascribed to it under Clause 4 of the prescribed Woollahra Planning Scheme, viz: 10

"Floor Space" includes all wall thicknesses, ducts, vents, staircases and lift wells, but does not include —

(a) any car parking space in the building provided to meet the standards required by the responsible authority (but not such space provided in excess of such standards) or any internal access thereto;

(b) space used for the loading or unloading of goods; and

(c) lift towers, cooling towers, machinery and plant rooms, and any storage space related thereto.

(B) THAT the resolution of the Council of 24th September, 1973, which was in the following terms:— 20

"In respect of property 8-12 Wentworth Street, Point Piper, the Council make application to the Minister for Local Government, through the State Planning Authority of New South Wales, for suspension of the provisions of the Woollahra Planning Scheme under Section 342Y of the Local Government Act, 1919, as amended, and to seek an Interim Development Order restricting development within the subject land, viz:

8-12 Wentworth Street, Point Piper

to those purposes as stated within the Ordinance, and in particular to Clause 23 (Land Use Tables) for Residential 2(b) Zones."

be and is hereby rescinded. 30

(C) THAT a report be submitted to the next meeting of the Town Planning Committee in regard to the aspect of regulating the number of storeys in any residential flat building on the land, under the provisions of Section 309 (4) of the Local Government Act, 1919.

The decision of the Committee will form part of the report of the Town Planning Committee to the Council Meeting of 10th June. However, the Principal Planning Officer has reported further in regard to part (C) of the recommendation. Should the Town Planning Committee wish to report to the Council Meeting later in the night, it is possible for an oral report to be made. The Principal Planning Officer's report is attached.

It should be noted that the following submissions have been received since the date the Committee last considered this matter:— 40

Rosemont Pty. Ltd. — 2 Guilfoyle Avenue, Double Bay

"I write to express firstly my dismay at the apparently underhand way in which the re-zoning of the Wentworth Street land occurred.

Resisting the threat of the building (quite unsuitable) has caused others affected and myself considerable expense and inconvenience.

This expense would not have been necessary had reasonable notice of the re-zoning been given.

You and we have now defended the appeal and I request you take all possible steps to prevent a further development appeal on the same land.

I request you also to give a copy of this letter to the Alderman for our area asking that he use his best endeavours to have the land returned to the zoning as originally shown on the plan. 10

I do particularly request an acknowledgement from the Alderman on this point, as I cannot give support in future to a representative who would go along with the procedures used in this case.

Finally I request a resolution under what I believe to be Section 309(4) of the Local Government Act for immediate protection and a resolution of Council proposing a variation scheme giving a long term solution to this land.

Philip L. Gibson,
Managing Director"

Mrs. L. J. Rainbow, 2/23 Wentworth Street, Point Piper

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"With the memory of the last few months in mind regarding the proposed Blackburn Developments, 8-12 Wentworth Street, Point Piper.

I feel by now Council is well aware of the shortness of Wentworth Street, the realization of what would happen should such high density buildings, chaotic traffic, housing of so many people, would mean to the home owners of this small area.

I have previously stated to Council many reasons why such developments should never be permitted by Council. Present home owners would lose everything, peace, what space this small street now provides for existing homes. My home, as would many others, drop drastically valuation-wise.

May I respectfully suggest Council in its wisdom consider the serious situation owners are now place in, always in fear of facing a similar situation arising, such as prevailed when Blackburn Developments proposed their project. 30

I ask Council for their support and consideration and re-zone the side of Wentworth Street which is the cause of such anxiety to present home owners, back to 2B — or prevent any such high-density or over crowded developments to come into being in this small street, already halved by an extremely steep hill at the western end, this forcing cars back into what is left of Wentworth Street.

I have never found Council unhelpful in the past, I can only hope I receive consideration in this vital matter now."

Mr. Roger Dunlop, 120 Ocean Street, Edgecliff

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"The owners of No. 8, 10 and 12 Wentworth Street, Point Piper will lodge at the earliest opportunity a Development Application appropriate to the 2C Zoning of the area.

Exhibits: Exhibit P Report from Defendant Deputy Town Clerk 10 June 1974
Exhibit Q Letter from Local Government Tribunal to Defendant 6 May 1974

The Development Application will be in accordance with the Gazetted Town Plan and will follow the guid line laid down by the Appeals Tribunal.

I am bringing it to council's notice that these Land Owners have suffered harrassment, difficulty and unpleasantness, and in two instances severe financial hardship.

I would ask Council to deal with this application as expeditiously as possible and with the minimum delay."

LOCAL GOVERNMENT APPEALS TRIBUNAL

SL 18-7/73

323 CASTLEREAGH STREET, SYDNEY, NEW SOUTH WALES

Messrs. Dowling Tayler,
Solicitors,
90 Pitt Street,
SYDNEY. N.S.W. 2000

73-001490 10
PL:MK.

6 MAY 1974

Dear Sirs,

Appeal by Blackburn Developments No. 25 Pty. Ltd v Woollahra Municipal Council

Enclosed for your information is a copy of the Tribunal's Instrument of Decision and Minutes in respect of the above matter.

The combined effect of section 342BC and section 342BI(3) of the Local Government Act, 1919, is that the decision of the Tribunal in respect of the above matter is deemed to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect to accordingly. 20

On receipt of a written request therefor from the parties, consideration will be given to the return of exhibits tendered at the hearing. If, at the end of a period of two months, no request has been received for the return of exhibits such exhibits will be destroyed at the discretion of the Tribunal.

Encl.

Yours faithfully,
(Sgd) J. R. SHORT
REGISTRAR

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LOCAL GOVERNMENT APPEALS TRIBUNAL
INSTRUMENT OF DECISION AND MINUTES OF PROCEEDINGS.

BLACKBURN DEVELOPMENTS NO. 25 PTY. LIMITED v WOOLLAHRA MUNICIPAL COUNCIL.

BOARD: Mr. F. J. Hanson (Chairman)
Mr. B. M. O'Neile
Mr. P. R. Jackson
Alderman W. Iles.

SECRETARY: Mr. J. B. Christopher.

APPEARANCES:

Appellant — Mr. T. Morling Q.C. assisted by Mr. B. Tamberlin, Barrister, instructed by
Messrs. Freehill, Hollingdale and Page, Solicitors. 10

Council — Mr. T. Cole on 21st November, 1973, and afterwards, Mr. T. Naughton,
Barrister, instructed by Messrs. Dowling Tayler, Solicitors.

Objectors — Mr. P. Stein, Barrister, instructed by Hall & Hall, Solicitors.

HEARD: 21st November, 1973, and 12th, 13th and 14th February, 1974.

This was an appeal under section 342N of the Local Government Act, 1919, against the
Woollahra Municipal Council's refusal of the Appellant's application seeking consent to carry
out a two-stage residential flat development on land known as Nos. 8-12 Wentworth Street, Point
Piper. Stage I comprises an eight storey building containing 24 three-bedroom units (three per
floor) to be erected upon No. 12 Wentworth Street. Stage II also involved an eight storey
structure, containing one three-bedroom unit per floor and erected upon a terraced podium area 20
beneath which was to be erected three levels each containing two units. This Stage was to be
erected upon Nos. 8 and 10 Wentworth Street.

The Appellant's application was lodged with the Council on 2nd February, 1973. By letter
dated 11th September, 1973, the Council advised that the application had been refused for eight
reasons, namely:—

- "1. The proposal does not comply with the requirements of Council's code for residential flat
buildings adopted at its meeting on 26th March, 1973.
2. The proposal is considered an overdevelopment of the site having regard to the scale and
bulk of the buildings and the development on the adjoining and nearby sites.
3. It is considered that the proposal will detrimentally affect the amenity for residents in 30
nearby buildings, particularly in regard to views.
4. The proposal will alter the character of Wentworth Street.
5. Objections have been received from residents in the area in regard to the zoning of the
land and the likely resultant change in character of the site and the locality generally.
6. Having regard to the scale and location of the development the car parking, though in
accordance with the Council's code, is considered to be insufficient.
7. The location of the visitor car parking is unsatisfactory having regard to the distance from
the street and the entrance to the units.
8. The circumstances of the case and the public interest."

The subject land is situated on the southern side of Wentworth Street immediately adjoining 40
and just west of the Ave Maria Convent which is located on the corner formed by a right angled
bend in Wentworth Street. The convent and subject properties form generally the highest part of
the locality and both enjoy outstanding harbour views. However, the more westerly portion of
the subject land marks the beginning of a reasonably shapr falling away to the lower situated

Wolesley Road. The area contains many attractive large residences, including those opposite the subject land and otherwise nearby, and buildings of significance particularly the convent. Residential flat use in Wentworth Street has generally been restricted to the conversion of certain large residences. However, in near vicinity to the subject land in Wolesley Road there is quite a number of modern high and medium rise residential flat buildings. The Board members in inspections of the locality made subsequent to the appeal fully familiarised themselves with the pattern of development in the locality.

The zoning of the subject land is Residential 2(c) under the Woollahra Planning Scheme Ordinance (prescribed 15th December, 1972) wherein development of the nature proposed is permissible with consent. Clause 44 of the Ordinance limits the height of the proposed development to not more than 235.5 feet above standard datum while clause 46 limits the floor space ratio to no more than 1.15:1. The land is, also, within the Harbour Foreshore Preservation Area under the local Scheme and the concurrence of the State Planning Authority of New South Wales is required pursuant to clause 59 of the Ordinance in respect of the proposed development. In the immediate locality the Residential 2(c) zoning comprises the subject land and extends westerly thereof along the southern side of Wentworth Street to Wolesley Road and the easterly side of that Road to its southern-most intersection with Wentworth Street. The land on the western side of Wolesley Road is substantially within a Residential 2(b) zone which, however, ends just north of the northernmost Wolesley/Wentworth intersection. The remainder of the immediate locality, including the properties opposite the subject site are zoned Residential 2(a). Generally speaking, within the Residential 2(b) zone permissible residential flat buildings are restricted to Classes A & B as described under the Scheme Ordinance. Residential flat buildings are prohibited within the Residential 2(a) zone.

The State Planning Authority withheld its concurrence in respect of the proposed development and by letter of 30th May, 1973, informed the Council that "it would appear from the plans that Stage II of the development does not comply with the Ordinance in respect of the height (the overall height including the lift tower seems to be more than 71.78 above standard stratum)".

The Authority indicated that it would however be prepared to grant concurrence if the plans were amended to meet the minimum requirements of clauses 44 and 46 of the Ordinance. The Authority did not "consider that the buildings as proposed would contravene the principle of the Harbour Foreshore Preservation Area or interfere with the views to and from the water". Evidence in support of this view and on the matter in general was given by a town planning officer of the Authority who was called by the Council.

The prescribed action under Section 342ZA of the Act had been taken in respect of the proposed development and 39 objections thereto had been received by the Council. At the hearing a number of Objectors sought and were granted leave to become parties to the proceedings. They were represented legally for the purpose and called as witnesses by their Counsel.

At the outset, the Council, supported by the objectors, put to the Board that the present Residential 2(c) zoning of the land under the Woollahra Planning Scheme was inappropriate, had resulted from a determination by the Minister of an objection by the Council to the proposed Residential 2(a) zoning under the Council's exhibited Scheme and that the situation had not been the subject of any public notification prior to prescription of the Scheme. The objectors stressed that they had effectively been prevented from voicing any opposition to the change of zoning from Residential 2(a) to 2(c) and, in fact, had not been aware of that change until after the Scheme had been prescribed.

On 15th December, 1973, in the light of objections to the Residential 2(c) zoning then expressed by local residents, the Council had sought suspension action pursuant to Section 342Y of the Act in respect of the subject site. The Council therefore put to the Board that any determination of the instant appeal should be adjourned pending some final determination of the zoning question.

The Board did not, however, accede to that request. Firstly, because the State Planning Authority had advised that after consideration of its report the Minister had decided not to take suspension action. That decision, it was advised, was reached having regard to the fact that the Appellant Company had exercised its right of appeal against the Council's refusal of the development application and that this would enable the Council and, through the Council, local residents an opportunity to submit their views. Also, the taking of suspension action at that stage would have negated the applicant's right of appeal and such action could not be justified on town planning grounds. Secondly, because it was the Board's firm view that it was bound to determine the appeal in the light of the provisions of the prescribed Scheme. The Board ruled as inadmissible any evidence which was aimed at investigating the history of events leading to the prescribed zoning of the subject land rather than attempting to examine the merits of the Appellant's proposal in the light of the Scheme's provisions.

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The Appellant's case broadly rested on two assertions. The first was that it was impossible to disregard the provisions of a Scheme prescribed so recently as the Woollahra Scheme. It had designated the particular site not only as one capable of redevelopment for residential flat purposes but also as one providing for the highest density of redevelopment within the Municipality. Further, the proposal met all of the Scheme requirements, satisfied the State Planning Authority with regard to foreshore scenic protection aspects and was, therefore, prima facie, fit for approval. Secondly, the particular design was such that the claims of injury to amenity of the neighbourhood could not be substantiated.

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The council's case, despite the Board's aforementioned ruling on admissibility of evidence, was to a great extent directed towards establishing the inappropriateness of the current Residential 2(c) zoning. Its principal objections to the specific development proposed were, however, those set out in its letter of refusal of the Appellant's proposal. In addition, the Council strongly disputed that the proposed development complied with the height and floor space maxima permissible under clauses 44 and 46 respectively of the Scheme Ordinance.

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In the case for the Objectors, three basic considerations were put to the Board. The first went to jurisdiction. It was submitted that the Appellant's application as lodged with the Council had been invalid. It was further argued that following lodgement the situation was not capable of being rectified and consequently the appeal had not and could not properly come before the Board. It was accordingly submitted that the appeal should be dismissed for want of jurisdiction. The second consideration went to the history of the rezoning of the subject land but involved also the question of the character of the proposed development in relation to that of existing development obtaining in the surrounding locality. The third consideration was directed particularly to injury to nearby development by overshadowing, visual impact and obstruction of views as well as the creation of traffic congestion.

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In the light of all that was put to it by the parties and its own inspections of the site (one in the company of all parties) and the area generally, the Board considered that there were a number of basic issues to be resolved. The first was the basic question of jurisdiction to entertain the appeal. The second related to the technical aspects of measurement of site

coverage and floor space ratio. The third concerned the weight to be given to the provisions of the prescribed Scheme. The fourth was the weight to be given to the views of the Objectors in the particular circumstances of this case. The fifth was the merits of the particular development in the light of those heads of consideration set out in Clause 33 of the Scheme Ordinance. The sixth was whether in the light of the determination of all of these issues the reasons of refusal adduced by the Council should be confirmed or otherwise. These issues will now be dealt with in turn:—

1. Jurisdiction

While the Board had reserved its judgment on the matter put to it by Mr. Stein, and had continued to hear evidence as to the merits of the development, obviously this issue has to be determined prior to any assessment of merit since lack of jurisdiction would divest the Board of power to proceed further. Mr. Stein's argument here was that the application as originally submitted to the Council had failed to satisfy the provisions of Clause 32(1)(d) of the Scheme Ordinance, essentially for want of accompaniment by the correct written authorities of the owners of the lands comprising the subject site. It was claimed that, this provision being mandatory, the application had been invalidly before the Council, could not have legally been considered by it and consequently that the Tribunal had no jurisdiction to hear the appeal which had subsequently arisen. Clause 32 provides that "Any application for the consent of the responsible authority under the provisions of this Ordinance shall be made in writing to the responsible authority and shall be accompanied by the following" which comprise sub-clauses (a) to (d). Subclause (d), which is of interest in this case, provides that "if the application is by a person other than the owner, the consent in writing of the owner".

Owner is defined in Section 4 of the Local Government Act and was referred to in detail.

Mr. Stein indicated that among the factors of the Appellant's application upon which he relied for his submission of the Tribunal's non-jurisdiction were the absence of a date upon the Application; that a solicitor had signed an owner's consent as agent for that owner; that a purported owner had not been the registered owner at the time a consent was signed; that no agency had existed between two bodies one of which had authorised the other to make the application; and that another owner's consent was not an effective means of giving that owner's consent.

Mr. Stein submitted that, on the basis of the definition of "owner", an application for development consent was not valid unless every person who qualified in terms of the definition consented in writing to the submission of the application, and that such consent accompanied the application at the time of its lodgment. It was further submitted that any attempt to rectify a lack in this regard by subsequent and supplementary submission was invalid. Reference was also made to the decision of the Tribunal in *Touma v Canterbury Municipal Council* which it was claimed supported the submission further.

Mr. Stein also claimed that the authority of *Hornsby Shire Council v Devery* (12 LGRA 1965 34) and certain other cases upon which Mr. Morling had relied to rebut the submission were not applicable here because the basis of those judgments was that the councils concerned which had considered and dealt with the relevant applications were therefore prevented by estoppel, waiver or other considerations from contesting an applicant's right of appeal from such decision on the grounds that the application was lacking validity ab initio. Mr. Stein raised the further point that nothing had arisen from those cases extending to the position of objectors pursuant to section 342ZA who had no opportunity of contesting the validity of a development application until such time as an appeal arose.

The Board gave very careful consideration to the matters raised but found itself unable to accept Mr. Stein's submission that the appeal should be dismissed for want of jurisdiction. The cases referred to including that of Devery did not particularly help the Board's deliberations. In the Devery case, for example, the matter involved an application for interim development consent under an Interim Development Order, the terms of which were substantially different from those of the prescribed Scheme Ordinance in this particular case. However, it is instructive that in delivering judgement in that case Else Mitchell J. observed "whether a particular requirement is madatory or not it does not follow that the body making a determination will always be acting in excess of power if it decides to refuse or to grant an application which is defective and the determination it makes upon such an application may nevertheless be valid and effective for the purpose of founding rights in the Appellant, either to carry out the development or otherwise to use the land and buildings thereon in conformity with the permission granted, or to seek to set aside by some appellate process a refusal to allow the development sought or any other adverse decision."

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However, in the Board's view there were even more substantial grounds on which it should presume jurisdiction to determine the appeal.

The first went to the right of the Objectors to raise this issue when the Council itself had not done so. Section 342ZA of the Act very clearly characterises objectors as persons who own land, the enjoyment of which in the opinion of the responsible Authority or the Council as the case may be, may be detrimentally affected if the development, the subject of the application, is carried out. Such persons may within the prescribed time lodge objection to the granting of the appliaton, again on the basis that they contend that enjoyment of their land would be detrimentally affected if the development the subject of the application were carried out. Very clearly the basis of any objection and of any submissions in a later appeal are on the grounds of the detrimental affect of the proposed development.

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In the Board's opinion, if the right of an objector is to be taken further to enable him to raise a jurisdictional point which was not taken by the respondent Council, then the burden of proof very clearly rests upon such objector to establish that he enjoys this right under the enabling legislation. In the Board's view Mr. Stein did not discharge this burden.

Secondly, the Board did not accept the argument put on behalf of the Objectors that any deficiency in the original submission could not be rectified after the event. Clause 32(1)(d) of the Ordinance requires the application to be accompanied by the consent in writing of the owner. However, to interpret the word accompany in the sense that all necessary documentation must be submitted simultaneously is in the Board's opinion far too restrictive. As a matter of practical administration it is quite common for those elements which normally constitute an application, i.e. plans, specifications, diagrams, models, various forms and any required fee to be submitted to a Council separately. While it seems a perfectly legitimate application of the requirements of clause 32(1)(d) to say that the application is not finally before the Council until all necessary elements have been submitted, the Board does not accept that a failure to lodge the elements simultaneously renders the application a nullity.

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Thirdly, however, and most importantly in the Board's view, is the nature of the defect complained of by the Objectors in this case. There seems little doubt on the evidence available at the hearing that the form of the original application was deficient. However, even though that be held by the Board it does not follow that the intention of Clause 32(1)(d) has in this case been violated. In the Boards estimation this provision in the Ordinance is designed to prevent any developer dealing in property without the knowledge of the owner evidenced in writing before the Council.

In the instant case those persons whose consent would now be necessary for the submission of an application in respect of this property are clearly parties to the subject application and the present appeal. Indeed, Mr. Stein admitted in answer to the Board's questions that his argument, if accepted, would do no more than delay the proceedings since it would be possible for the parties to submit a fresh application to the Council, receive precisely the same decision and then appeal again to the Tribunal. The subject case, therefore, is quite distinguishable from that of Touma v Canterbury Municipal Council (Tribunal Reference 72-000310 and 319); the Board in this case follows the course taken in the case of Gemmell Holdings Pty. Limited v Woollahra Municipal Council (Tribunal Reference 72-000025) and in accordance with its charter to determine appeals as speedily and as cheaply as possible, presumes jurisdiction to determine the merits of the instant case. The Board records that on this issue both parties gave the appropriate notice under Section 342BK of the Act. 10

2. Site Coverage and Floor Space Ratio

The technicalities of these measurements assumed importance in the assessment of the application because of the limitations on floor space ratio laid down in Clause 46 of the Scheme Ordinance. It was common ground between the parties that within a Residential 2(c) zone the maximum permissible floor space ratio was 1.15:1. However, apart from dispute between the Appellant and the Council regarding some calculations there was a fundamental difference of opinion in that the Appellant had proceeded on the basis that the balconies in the proposal were not floor space within the meaning of "Floor space" as defined in Clause 4 of the Ordinance, whereas the Council submitted that they were. If the Council's view was correct then the development proposed did not comply with the provisions of the Ordinance in this regard. The definition reads — 20

"Floor space" includes all wall thicknesses, ducts, vents, staircases and lift wells but does not include —

- (a) Any car parking space in the building provided to meet the standards required by the responsible Authority (but not such space provided in excess of such standards) or any internal access thereto.
- (b) Space used for the loading or unloading of goods.
- (c) Lift-towers, cooling-towers, machinery and plant rooms and any storage space related thereto. 30

It was the Appellant's case that since the balconies were located outside the external walls they were not to be counted as floor space. The Council on the other hand submitted to the Board that, since floor space was virtually defined as including everything except certain specified exceptions, the balconies which were not included among those exceptions were to be counted in the assessment of floor space. The Appellant had also drawn the Board's attention to the fact that, in its new code governing the erection of residential buildings, the Council itself had specifically exempted balconies from inclusion in floor space. Mr. Ingham, Consultant Town Planner, who gave evidence on behalf of the Council insisted that it was logical to include balconies in the calculation of floor space. In his view balconies contributed to the bulk of the proposed buildings which was one of the factors intended to be controlled by floor space limitations. 40

The Board, however, sees objection to Mr. Ingham's view in that bulk of building is more properly controlled by limitations on height and site coverage and requirements regarding setbacks. Floor space ratio controls are more intended as an indirect method of controlling

population density in any given area and on that ground there is sound reason for excluding balconies from the calculation of floor space, it being held that a balcony does no more than provide an amenity for person who are already resident within the building. The present trend among building regulation authorities is to specifically exclude balconies from floor space calculations, although the Board is also aware of a school of thought opposed to this view on the grounds that there is quite often a desire and an attempt to enclose open balconies at some later stage of a building's life.

In the present case there were no immediate and specific authorities to guide the Board. However, the case of Hooker Home Units Pty. Limited v North Sydney Municipal Council (LGRA 21, page 101) has some relevance. In that case His Honour Mr. Justice Hardie was faced with the question of determining whether for the purpose of interpreting Schedule Seven to the Local Government Act, balconies should be included within floor plan area. His Honour said "I am of the opinion that the balconies are 'within the extreme external boundaries' of the storeys of which they are part, and accordingly that the total area of the balconies must be taken into account in determining the maximum floor plan area." While the language of the Scheme Ordinance and Schedule Seven are not identical there appears some correlation in the principle involved. Accordingly the Board is of the view that without some specific exclusion of balconies within the Scheme Ordinance itself, they must be included in the calculations of floor space. On that ground the present application fails to satisfy Clause 46 of the Ordinance. However, just as in the above case of Hooker Home Units, that ground in itself would not be sufficient to dismiss the appeal since it could quite easily be the subject of suitable and not extensive amendment.

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The Appellant and Council gave notice pursuant to section 342BK in the event of an adverse finding of the Board.

Again, with regard to site coverage, there was dispute between the parties as to whether the lower podium building being part of Stage 2 was in fact site coverage. It was the Appellant's submission that because the podium area which constituted the roof area of the units below was generally available for public use and circulation, it did not constitute site coverage. The Council disputed this claim because in its view the podium covered building constituted building bulk on the site and therefore could not be ignored. Although both parties again gave the appropriate notice under Section 342BK regarding this question, it is in the Board's estimation more a matter of fact and degree in the particular case as to whether any structure constitutes site coverage. There appears authority in building regulations generally for discounting as site coverage a basement or a structure which is erected at such a low level that its roof is generally available as part of ground area. Some authorities discount any floor where the roof is erected entirely below natural ground level. Others, again, discount such a floor provided the roof is not more than five feet above natural ground level at any point, the figure of five feet being related to the distinguishing characteristic of a basement.

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However, without entering into obvious niceties of interpretation the Board formed the view that in the present case it could not accept the Appellant's submission. The uppermost roof of the podium structure was well above site level and there is a complete lack of continuity between the accessible roof areas. Further, in the Board's view, there was no warrant whatever for excluding from site coverage calculations those accessible roof areas which formed private gardens or courts. As it transpires, the Board's final decision does not turn upon the question of strict technical compliance or non-compliance regarding the above two factors. However, in view of the argument put and the notice given under section 342BK, the Board records its views for the benefit of the parties.

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3. Planning Scheme Provisions — Weight to be given.

While consideration of this issue may, prima facie, appear irrelevant, in this case the Board considers it desirable to examine it because of the case presented for the respondent Council and Objectors. Both advanced a number of arguments which the Appellant claimed (and legitimately in the Board's opinion) were founded basically on an objection to the zoning. Indeed, some of the alternative forms of development canvassed before the Board as the limits of what should be approved amounted to what would in effect have followed if there were to be a rezoning of the subject land to Residential 2(b). For that reason the Board considers it opportune and necessary to state quite categorically that its determination of this appeal cannot be founded on a view that the zoning should be other than what it is. It is not the function of the Board to address itself to the correctness or otherwise of decisions regarding the contents of the prescribed Scheme, which had been taken by other proper authorities.

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4. Views of Objectors — Weight to be given.

In regard to this consideration, as observed previously by the Board the Objectors through their Counsel, placed particular stress upon what they regarded had been a denial of their right to have their views considered at the time of the rezoning of the subject land from Residential 2(a) to 2(c). This consideration the Board dismissed as irrelevant and inadmissible.

There were, however, two other aspects of the Objectors' case. There was firstly, the impact of the proposed development on the immediate environment and a consideration of the character of the proposed development in the locality. This aspect the Board considered to be highly relevant because in this case Wentworth Street formed a boundary between the Residential 2(c) and 2(a) zonings. The Board was prepared in the particular circumstances of this case to afford considerable weight to this aspect of the objections. The second aspect of the Objector's case went to alleged injury which would be created by the proposed development. The alleged injury due to the creation of traffic congestion was not substantiated and as Mr. Morling rightly observed the only worthwhile evidence on traffic aspects placed before the Board was that given for the Appellant, which was clearly in its favour. Apart from the observations which it makes below the Board attached very little weight to this consideration.

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Another source of alleged injury was due to over-shadowing, overlooking and the obstruction of views. Once again, the Board found on the evidence presented to it and from its own inspections that this submission was not substantiated. Overlooking was a consequence of the development which could occur consistent with the zoning and which was, in any case, minimal. The evidence placed before the Board regarding the creation of shadows was to say the least unsatisfactory and in one respect was quite clearly wrong. The Board did not accept that there would be any more substantial shadows cast upon the grounds of the adjoining Ave Maria Retreat House by the proposed development than were caused by the substantial buildings of the Convent itself. Nor did the Board accept that there was as great an injury due to loss of views as had been alleged by the evidence submitted. The situation plainly is that the Ave Maria Retreat House is itself a building which by reason of its bulk is hardly consistent with the type of development obtaining in the surrounding Residential 2(a) zone. Its dormitory wing, erected in recent times with Council's approval, could not be regarded as satisfying the highest tenets of town planning, while the Board considers that injury to the occupants of this wing would be much less than claimed. The Board is convinced, however, that the activities carried out at the Ave Maria Retreat House, which are confined within spacious and well kept grounds, as well as being somewhat physically protected are in no way injurious to the amenity of the

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neighbourhood. However, it does not accept that protection of Ave Maria's presently enjoyed unique advantages should be the dominating consideration in the Board's assessment of the appeal. Given the fact that the adjoining land is now zoned Residential 2(c), it would be unreasonable and unrealistic to expect that the Retreat House and Convent could continue to enjoy without some compromise the unique advantages which they presently do.

5. Merits of Proposed Development.

The foregoing brought the Board then to a consideration of the precise merits of the application in the light of those heads of consideration set out in Clause 33 of the Scheme Ordinance. Those heads which are considered immediately relevant but not necessarily in any order are as follows:—

- (i) The provisions of the Scheme. The Board treats this first because it is necessary to emphasise once again that the zoning of the land is Residential 2(c) which is designed to permit subject to consent, residential flat development of the highest density permissible in the Municipality. It cannot be conceded that such a form of development is to be prohibited simpliciter.
- (ii) Whether adequate provision has been made for landscaping of the site. From the evidence it would appear that there was room for some improvement to preserve existing trees but in general the efforts of the Architect in this regard were commendable.
- (iii) Any representations made by any statutory authority in relation to the application or to the development of the area, and the rights and powers of any such authority. The views of the State Planning Authority conveyed by correspondence and amplified by the Officer of the Authority called by the Council clearly indicated that the Authority had no substantial objection to the proposed development.
- (iv) Whether the proposed means of entrance to and egress from THE site are adequate and whether provision has been made FOR the loading, unloading and parking of vehicles on the site. The Board did not accept the Council's submission that, despite compliance with the requirements of its Parking Code, the Appellant in this case should provide facilities over and above the Code's. The Code itself sets a high standard and one consistent with the environment of this Municipality. Its standards being satisfied, the Board considered that no greater number of parking facilities could be reasonably imposed. However, mere literal compliance with the provisions of a code regarding number or amount of facilities to be provided does not make for an objective assessment of the worth of these facilities which is necessary in the light of sound town planning principles. In this regard the Board considers that the Council's objections concerning location of visitor parking spaces are well founded. The particular parking design before the Board was unsatisfactory in that casual visitors to the complex, including service, trade and visitor vehicles, would be obliged to drive through an entire garage and parking area to the rear of the site. This feature, the Board considered, would unfavourably lend itself to the problem of traffic congestion envisaged by the Council and the Objectors.

However, the two heads of consideration which the Board considered dominant in its assessment of the Appellant's application, were those at the beginning of clause 33, namely:—

- (v) The character of the proposed development in relation to the character of the development on the adjoining land and in the locality. The Board noted from the evidence and more particularly from its own inspections of the area that the submissions made concerning the character of Wentworth Street as a reasonably quiet residential street of

high amenity were quite correct. While the general bulk of the Wentworth Street buildings is greater than that of buildings in the vast majority of Residential 2(a) areas, this bulk was in the Board's view consistent with the character of the area. The proposed development, designed to achieve at least the very highest intensity of land use possible under the provisions of the Scheme Ordinance was clearly out of character with the development obtaining in the immediate locality of Wentworth Street, and the Board endorsed completely the submissions put to it that this character was totally different from that of development in Wolseley Road.

- (vi) The size and shape of the parcel of land to which the application relates. The siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the adjoining land and the development thereon. In this regard the Board reached the conclusion that, quite apart from the technical considerations set out previously regarding floor space ratio and site coverage, the present proposal constituted gross overdevelopment of the site and that it would not, therefore, be in the public interest to grant consent to the application before the Board. In saying this, the Board places on record its appreciation of the evidence of the Appellant's Architects, represented by Mr. Dash, and of their efforts to produce a sensitive design of the highest calibre. The fault in this case has not been with their professional capacity in discharging their brief but rather with the terms of that brief which was, as frankly admitted in evidence, to obtain the maximum development possible under the existing controls. The result has been a development which because of its bulk and size and density would not be appropriate in this location. The particular site, although zoned Residential 2(c) is an integral part of Wentworth Street and it is the Board's view that the development should be reduced to serve as a buffer between that street and Wolseley Road. 10 20

Without laying down precise parameters for an acceptable scale of development, the Board agrees with the views of the Council's consultant town planner, Mr. Ingham, that, in this location and given the existing zoning, any development should not exceed a population density of 70 to 75 persons to the acre. The Board envisages a corresponding reduction in the bulk of any buildings to be erected on the site.

- (vii) Existing and future amenity of the neighbourhood. In respect of this what has been said above should suffice to indicate the Board's thinking in this regard. It is the Board's view that if the other matters discussed were suitably taken into account in a redesign or different proposal then there would not be sufficient injury to the amenity of the neighbourhood to justify refusal of development of the site in accordance with the Residential 2(c) zoning. 30

6. Council's Grounds of Refusal — Evaluation in the Light of Board's Views.

Ground No. 1 — The Board notes the utter disagreement between the parties as to whether the Appellant had been made aware of Council's attitude to the Council's Code for residential flat buildings (adopted 26th March, 1973) prior to submission of the application. In general, the Board considers that application of the Code would not be warranted. Apart from the equitable question as to whether the Appellant had proceeded on the basis that such code did not apply, which could not be determined on the evidence given to the Board, it was clear from the evidence that strict compliance with the provisions of the code could produce a most unsatisfactory development. The code is quite obviously not without faults and the Board agrees with the submission for the Appellant that the erection of a three or four storey building of 40

substantial bulk on the site could be more injurious to the locality than the erection of well designed tower buildings to the maximum permissible height. This case appears very similar to that of Hooker Home Units Pty. Limited v North Sydney Municipal Council mentioned previously, in this regard.

Ground No. 2 — That the proposal is, in the circumstances, an over development of the site has been treated previously by the Board which endorses this ground.

Ground No. 3 — This also has been previously dealt with. It is generally regarded as ill founded.

Ground No. 4 — This might have been better expressed as “The proposal would be out of character with the existing character of Wentworth Street”. However, the ground is endorsed by the Board, on the foregoing understanding.

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Ground No. 5 — Is partly only informative but otherwise largely irrelevant but related to ground No. 4.

Ground No. 6 — Is not supported by the Board for reasons previously detailed.

Ground No. 7 — The Board considers this to be well founded.

Ground No. 8 — Is not sufficiently supported by the evidence and submissions.

The Board considered that, in all circumstances of this particular case and in the light of all that has been said previously, the Council was essentially wrong in attempting to so absolutely reject the logical consequences of the zoning of the subject land which the Council itself had sought. As outlined previously, the Board considered that some residential flat development of a reduced scale should be allowed. The Board further considered however, that in the circumstances of this case it was neither appropriate nor desirable that the Board itself grant such an approval. The Board's decision therefore is:—

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1. That the appeal be dismissed and consent to the application be refused.
2. No order be made as to costs.

(Sgd) J. B. CHRISTOPHER
.....

Secretary

6 May 1974
.....

Date

(Sgd) F. T. HANSON
.....

Chairman

(Sgd) B. N. O'NEILL
.....

Member

In accordance with Section 342 BI (5) of the Local Government Act, 1919, I, being a person appointed by the Senior Chairman for the purpose, certify that this document is a true copy of the original document as described in the title thereof.

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(Sgd) J. B. CHRISTOPHER
.....

TOWN PLANNING COMMITTEE — 10/12/1973
PROPERTY — 8-12 WENTWORTH STREET POINT PIPER — PROPOSAL FOR ERECTION OF
RESIDENTIAL FLAT BUILDINGS (DA 17/73)

At the Town Planning Committee meeting of 12th November, 1973, reference was made to the Appeal lodged with the Local Government Appeals Tribunal against the Council's refusal of development consent to a proposed residential flat complex.

At the same time, the Committee noted a letter from the Secretary, The State Planning Authority of N.S.W., in terms:—

"I refer to Council's letter of 15th October, 1973, requesting that the Minister for Local Government take action to suspend the provisions of the Woollahra Planning Scheme in respect of the abovementioned lands and that he make an interim development order restricting future development on such lands to those purposes permissible in the Residential 2(b) zone. 10

"2. As the Council will be aware, an appeal has been lodged with the Local Government Appeals Tribunal against the Council's refusal to grant consent to the carrying out of residential flat development on these lands. The appeal is listed for hearing on the 20th November, 1973.

"3. In the light of a report submitted to him by the Authority and having regard to the appeal that has been lodge the Minister for Local Government has now decided that he would not be justified in taking suspension action and making an interim development order as requested by the Council." 20

It was decided by the Committee that consideration be deferred.

The Appeal was partially heard by the Tribunal on 22nd November last. Mr. T. R. Cole of Counsel appeared on behalf of the Council and Mr. T. R. Morling, Q.C., appeared on behalf of the Appellant.

Mr. Coshott, Solicitor, sought leave to appear on behalf of a number of objectors.

At the outset, the Council sought an adjournment of the matter to a later date, but this was rejected. Evidence was then given by Mr. Dash, Architect, in support of the Apellant's case and the matter was then stood over for further hearing on 12, 13th and 14th February, 1974.

With regard to the matter of the suspension application by the Council and its rejection by the Minister, advice from Mr. Cole of Counsel is to the effect that no action may be taken either by means of a relator suit, or otherwise, which can compel the Minister for Local Government to suspend land or to alter a decision previously made by him. The decision whether the Minister for Local Government will suspend land, pursuant to Section 342Y of the Local Government Act, 1919, is entirely one within his own discretion. If he fails to do so, there is no means of compelling him. 30

The situation is that the Appeal hearing will recommence in February, 1974, and that the Tribunal may make a decision which is binding upon the parties.

The report is submitted for the information of the Aldermen.

TPC Hee 10/12/73: That the Town Clerk's report be received and noted. 40

CM 19/12/73: ADOPTED

WOOLLAHRA MUNICIPAL COUNCIL

Application to Carry out Development under the Town Planning Provisions of the Local
Government Act, 1919

INSTRUCTIONS:

1. This application must be completed in triplicate, and accompanied by the necessary plans in triplicate.
2. Sketch plan should be given in the space provided on the form or included in (1.) above.
3. Estimated cost of new works **must** be stated.
4. **Scale of Fees.**

Change of Use	\$30	10
\$1-\$12,000	\$30	
\$12,001-\$100,000	\$30 plus \$2.50 for every \$1,000 of estimated value over \$12,000 (maximum fee \$250)	
\$100,001-\$2,000,000	\$250 plus \$14.44 for every \$10,000 of estimated value over \$100,000 (maximum fee \$2,993.60)	
\$2,000,001 upwards	\$3,000 plus \$3.33 for every \$10,000 estimated value over \$2,000,000 (no maximum fee)	

The scale of fees shall be subject to the following:

1. Additional \$10 if advertising is required;
2. An additional \$40 if advertising is required for residential flat buildings other than duplex residential flat buildings; 20
3. In the case of substantial amendments to an application an additional fee be charge of 50% of the original fee.
5. All questions **must** be answered. If not applicable this be stated.

FULL NAME OF APPLICANT: C. C. Phillips B.Arch. F.R.A.I.A.

ADDRESS: 118 Wolseley Road, Point Piper

FULL NAME OF OWNER OF PROPERTY: Roger John Massie Dunlop

ADDRESS: 10 Wentworth Street, Point Piper

SITE OF PROPOSED DEVELOPMENT:

8 Wentworth Street, Point Piper

Lot 15 and 16 Section 3 Vol. 3814 Folio 117

Point Piper Estate

Dimensions of Land: Frontage 44.810 m (147'0") Depth 81.071 m x 56.210 m (265'11¾") x (184'5")

ARE YOU THE OWNER OF THE LAND CONCERNED? Yes IF NOT you must attach the Owner's written authority appointing you his representative for the pupose of making this application.

FULL DESCRIPTION OF THE PROPOSED DEVELOPMENT: You must state in this space exactly what you propose to do and give sufficient detail to leave no doubt in the Council's mind as to what development you are applying to commence and/or carry on. If application is for consent to erect a residential flat building the following additional information is required:—

Diagrammatic front and side elevations with profile of ground through centre line for building. 40

Levels showing height of ground floor and roof with relation to footpath level at centre of frontage.

Proposal for garaging, and capacity.

Number of each type of flat in terms of bedrooms.

Full particulars of area of land etc., to enable Council to check coverage, total floor area, etc.

Exhibits: Exhibit S Development Application by C.C. Phillips on behalf of Plaintiff 26 November 1964. Letter from Plaintiff to Defendant 26 November 1964

It is proposed to erect an 8 storey residential flat building containing 2 flats on each floor, 16 flats in all each with 3 bedrooms and underground lower floor for parking 32 cars belonging to residents of the building.

Area of the land is 3107.59 sq. metres (33,451 sq.ft.)

ESTIMATED COST \$1,200,000

DO YOU PROPOSE TO USE THE WHOLE OR ONLY PART OF THE BUILDING OR LAND? All the land

IF PART ONLY INDICATE WHAT PART.....

WHAT WAS THE USE OF LAND OR BUILDING(S) on 27th June, 1951? Private dwelling.

WHAT ADDITIONS OR ALTERATIONS ARE INTENDED TO EXISTING BUILDINGS? Nil

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HERE GIVE SKETCH GROUND PLAN OF THE LAND AND BUILDINGS THE SUBJECT OF THIS APPLICATION. PROPOSED BUILDINGS SHOULD BE DISTINGUISHED FROM BUILDINGS NOW IN EXISTENCE.

Full details of the proposed building are shown on accompanying drawings.

I CONSENT TO THIS APPLICATION BEING MADE TO COUNCIL

DATE 26/11/1974

SIGNED (Sgd) R.J.M. DUNLOP

(Signature of Owner/s)

SIGNED (Sgd) C.C. PHILLIPS

(Signature of Applicant)

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Date of application 26/11/1974

FOR OFFICE USE ONLY:

DATE OF RECEIPT 26/11/74 APPLICATION FEE.....

ADVERTISING FEE \$50.00

RECEIPT No. 9878 AMOUNT \$2600.00

120 Ocean Street
Edgecliff 2027

The Town Clerk,
Woollahra Council

26/11/74 30

Dear Sir,

I hereby authorise Mr. Charles Phillip to lodge a Development Application on my behalf.

Yours faithfully

Exhibits: Exhibit S Form Letter Defendant
to State Planning Authority of N.S.W. 2 January 1975

STATE PLANNING AUTHORITY OF NEW SOUTH WALES FORM FOR REFERENCE BY COUNCILS OF DEVELOPMENT APPLICATIONS		
State Planning Authority of N.S.W. Box 3927 G.P.O.		Date 2.1.75 Council's Ref. No. DA260/74
The Woollahra Municipal Council hereby refers for the Authority's attention the undermentioned development application. This reference is made pursuant to the provisions of—		
*Clause 44(5) of the Woollahra Planning Scheme Ordinance. *Clause of Interim Development Order No.....		
DETAILS REQUIRED	DETAILS FURNISHED BY COUNCIL	(Should there be insufficient space to indicate adequately any of the details required, such details should be given on a separate sheet.)
1. Land description (Lot No., Section, D.P., Street No. and name, locality, etc.) dimensions and area.	DESCRIPTION: 8 Wentworth Street, POINT PIPER	DIMENSIONS: AREA: .....ac.....rd.....per.
2. Name and address of applicant.	C.C. Phillips, 118 Wolseley Road, Point Piper	
3. Name and address of owner.	R.J.M. Dunlop, 10 Wentworth Road, POINT PIPER	Has owner consented to making of application? Yes.
4. Complete and precise description of proposed development.	8 Storey residential flat building containing 16 (3) bedroom flats with underground parking for 32 residents cars and street level parking for 7 visitors cars	
5. Landscaping.	Does proposed development involve landscaping?.....	If answer is "Yes", it will assist if a plan showing existing trees, areas to be landscaped and details of landscaping is attached.
6. Height of Building.	Does proposed development involve a building over 80 feet in height (thus bringing proposal under provisions of Height of Buildings Act, 1912-1967)? no	If answer is "Yes", attach particulars referred to on rear of this form.
7. Use of land and nature of improvements (if any) at date relevant Ordinance or Order became law.	Private Dwelling	Were the use and improvements authorised by Council?.....
8. Use of land and nature of improvements (if any) at present.	As above	Have the use and improvements been authorised by Council?.....
9. Zoning, etc., under prescribed Planning Scheme or Interim Development Order.	Residential 2(c) Height limit 235.5 ft. above standard datum	
10. Proposed zoning under Local or Varying Scheme (if any) and stage reached in Scheme preparation.	PROPOSED ZONING:	STAGE OF SCHEME:
11. Effect of road proposals, if any.		
12. Effect of Authority's ribbon development control plan (if applicable).		
13. Residential district proclamation, if any.	(a) Residential District No. — Government Gazette of —	(b) Is proposed development contrary to terms of proclamation?
		(c) If answer to (b) is "Yes", is development permissible under Sec. 309(2) of L.G. Act, 1919?
14. If development to be carried out on land affected by Country road or railway proposals state —	Estimated cost of development \$..... U.C.V. of land \$..... I.C.V. of land \$..... Date of Valuations.....	
15. Names of other authorities (e.g., Dept. of Main Roads, Police Department) whose views have been sought by Council.		Attached is/are copy/copies of letter(s) received from—
16. Council's views on proposed development.	Not as yet considered by Council	It will assist if copies of Council's servants' reports on subject application are attached.
17. Any other relevant information.	Copy of plans forwarded and Tribunal previous decision will be sent when we obtain it from Council's solicitors should you wish further information Contact Mr. Shiels.	
A locality plan showing the subject land edged in red and a site plan showing the layout of the proposed development are attached. Also attached is a statement setting out the history of previous applications relating to the subject land. There have been no previous development applications relating to the subject land.		
*Delete item not applicable		..... Town & Shire Clerk

Exhibits:

Exhibit S Letter Defendant to N.S.W. Planning and Environment Commission 11 March 1975

Letter Defendant to N.S.W. Planning and Environment Commission 7 April 1975

GAS:MB

11th March, 1975

Development Officer
The Secretary,
N.S.W. Planning & Environment
Commission,
11th Floor,
139 Macquarie Street,
SYDNEY. 2000

Dear Sir,

RE: DEVELOPMENT APPLICATION 260/74 — 8 WENTWORTH STREET, POINT PIPER.

I am writing in regard to the above development application which was referred to you on 8/1/75.

As this matter is due for hearing in the Equity Court in May 75, it would be appreciated if you could expedite your consideration so the matter can be dealt with by Council.

Yours faithfully,

D. C. Ford
TOWN CLERK
Per:

DA260/74 GAS:SK

7th April, 1975

Development Officer
The Secretary,
N.S.W. Planning & Environment
Commission,
302 Castlereagh St.,
SYDNEY 2000

Dear Sir,

RE: DEVELOPMENT APPLICATION DA260/74 — 8 WENTWORTH STREET, PT. PIPER.

I refer to my previous letters of the 2/1/75 and 11/3/75 requesting comment from the Commission in regard to the abovementioned Development Application. As there has still been no reply from the Commission in this regard, and the matter is due for hearing in the Equity Court in May 1975, I would appreciate if you could expedite your consideration, so the matter can be dealt with by Council.

Yours faithfully,

D. C. Ford
TOWN CLERK
Per:

Exhibits:

Exhibit S Letter Defendant to N.S.W. Planning and Environment Commission 25 June 1975

GAS:MB

25th June, 1975

Development Officer
The Secretary,
New South Wales Planning
& Environment Commission,
Box 3927 G.P.O.,
SYDNEY. 2001

Dear Sir,

RE: DEVELOPMENT APPLICATION 260/74 — 8 WENTWORTH STREET, POINT PIPER.

I am in receipt of your letter dated the 27th May, 1975 in which you stated that the abovementioned Development Application is being expedited by you department. However, to date a reply has not yet been received and I would point out that Council has a Court Case pending on the 28th July, 1975.

Could you please forward a reply to Council by the 3rd July, 1975 so that a decision can be taken by Council before the date of the hearing.

Yours faithfully,

D. C. Ford
TOWN CLERK

Per:

Exhibits:

Exhibit S Letter from N.S.W. Planning and Environment Commission 4 June 1975

New South Wales Planning and Environment Commission

302 Castlereagh Street, Sydney

211 0966 Ext. 250

all mail to be addressed to

Box 3927 GPO Sydney 2001

The Town Clerk,
Woollahra Municipal Council,
536 New South Head Road,
DOUBLE BAY, N.S.W. 2028

4 July 1975

Our Reference 3/19 D 455 Your Reference D.A. 260/74
MTF:MH:EW GAS:MB.

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Dear Sir,

Property: No. 8 Wentworth St., Point Piper.

I refer to the Council's letter of 25th June, 1975, and previous correspondence concerning an application for permission to erect an eight-storey residential flat building at the above site.

2. Pursuant to the provisions of Clause 59 of the Woollahra Planning Scheme Ordinance, the Commission concurs in the proposed development in accordance with the plan prepared by C.C. Phillips, Architect, dated November, 1974, subject to the development meeting the requirements of the provisions of Clauses 44 and 46 of the Scheme Ordinance with respect to height and floor space ratio control.

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3. The Commission's prime responsibility under Clause 59 of the Scheme Ordinance is to ensure that development does not have an adverse impact on the foreshores from a regional viewpoint and as the proposed development would not be greatly intrusive in this particular section of the harbour foreshore, concurrence is given in this instance.

4. The Commission, however, considers that:—

- (i) there is a lack of detail available to assess the quality of landscaping, site treatment, suitability of open space to be provided for, play areas, etc. The amount of landscaped area would appear from the plans to be insufficient for this situation;
- (ii) the form of design and fenestration of the building could and should be suitably improved to reduce a somewhat undesirable impact on the immediate environment;
- (iii) a suitable reduction in scale of the building would be necessary to help reduce any undesirable impact of the building on the immediate environment whilst enabling the landscaping position to be improved; and
- (iv) the landscaping plans should provide, inter alia, for further large-scale trees in addition to the retention of any significant existing trees so as to achieve an attractive environment around the building at ground level to the satisfaction of the Council.

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Yours faithfully,
(Sgd) G. F. L. FELTHAM
(G.F.L. Feltham)
SECRETARY

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BUILDING & HEALTH COMMITTEE 7/7/75

DA 260/74 8 WENTWORTH STREET POINT PIPER — C. C. PHILLIPS (APPLICANT) ERECTION
OF AN 8 STOREY RESIDENTIAL FLAT BUILDING

ZONING

Woollahra Planning Scheme Ordinance — Residential 2(c) H.F.P.A. Height Limitation of 235.5 ft.

THE SITE

The site is located on the southern side of Wentworth Street and is known as No. 8 Wentworth Street Point Piper.

It has a frontage facing Wentworth Street of 44.81 metres and an eastern boundary length of 56.21 metres, a western boundary length of 81.07 metres and a rear boundary length of 56.52 metres providing for a total area of 3,110.9 sq. metres.

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It is presently occupied by a rather large, two storey residence with car parking provided on site.

THE HISTORY

In February 1973 a Development Application was received for No. 8 to No. 12 Wentworth Street Point Piper for the erection of a two stage residential flat development. Stage 1 was to comprise of an 8 storey building containing 24 three bedroom units (3 per floor), which was to be erected upon No. 12 Wentworth Street. Stage 2 also involved an eight storey structure containing one three bedroom unit per floor and was to be erected on a terrace podium area beneath which was to be erected three levels each containing three units. This stage was to be erected on Nos. 8-10 Wentworth Street. On the 11/9/73, the Council advised the applicant that the abovementioned Development Application had been refused for eight reasons namely:—

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1. the proposal does not comply with the requirements of Council's Code for Residential Flat Buildings adopted at its meeting of the 26th March 1973;
2. the proposal is considered to be an overdevelopment of the site having regard to the scale and bulk of the building and the development on the adjoining and nearby sites;
3. it is considered that the proposal will detrimentally affect the amenity for residents in nearby buildings, particularly in regard to views;
4. the proposal will alter the character of Wentworth Street;
5. Objections have been received from residents in the area in regard to the zoning of the land and the likely resultant change in character of the site and the locality generally;
6. having regard to the scale and location of the development the car parking, though in accordance with Council's code, is considered to be inefficient;
7. The location of the visitors car parking is unnecessary having regard to the distance from the street and the entrance to the units;
8. the circumstances of the case and the public interest.

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On the 24th September 1973 Council resolved the following:—

“THAT in respect to the properties 8-12 Wentworth Street Point Piper, the Council make application to the Minister for Local Government, through the State Planning Authority of N.S.W. for suspension of the provisions of the Woollahra Planning Scheme under Section 342Y of the Local Government Act, 1919, as amended, and to seek an interim Development Order restricting development within the subject land, viz:

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8-12 Wentworth Street, Point Piper, to those purposes as stated in the Ordinance, and in particular in Clause 23 (Land Use Tables) for Residential 2(b) zone”.

As a result of Council's decision in regard to Development Application DA 3/73, the applicant lodged an appeal to the Local Government Appeals Tribunal.

A letter was then received from the State Planning Authority in regard to the application for suspension which read as follows:—

"I refer to Council's letter of the 15th October requesting the Minister for Local Government take action to suspend the provisions of the Woollahra Planning Scheme in respect of the abovementioned land and that he make an interim Development Order, restricting future development on such land to those purposes permissible in Residential 2(b) zone.

As the Council will be aware, an appeal has been lodged to the Local Government Appeals Tribunal against Council's refusal to grant consent to the carrying out of a Residential Flat Building on these lands. The appeal is listed for hearing on the 20/11/73. 10

In the light of a report submitted to him by the Authority and having regard to the appeal that has been lodged, the Minister for Local Government has now decided he would not be justified in taking suspension action and making an interim Development Order as requested by the Council."

On the 9/5/74, Council's solicitors, Dowling Tayler advised the Local Government Appeals Tribunal had dismissed the appeal lodged by the applicant.

On the 27/5/74 a comprehensive report was submitted to the Town Planning Committee, relating to the Tribunal's decision and to a request for Section 342Y's suspension. The Committee took a number of decisions including one to rescind the Resolution of the 24/9/73 relating to the Section 342Y suspension. 20

On the 10/6/74 Council resolved the following:—

1. "That the Council, under the provision of section 309(4) of the Local Government Act, 1919, regulate the number of stories in any residential flat building erected on properties Numbers 8, 10, 12 Wentworth Street Point Piper for any one of a combination of stories at no more than three.
2. That Council, under the provisions of Section 308 of the Local Government Act, 1919, fix a building line relating to properties, Nos. 8, 10 and 12 Wentworth Street, Point Piper at 60 feet from the Wentworth Street alignment on the eastern side of property number 8 fenced to 45 feet at the common boundary of No. 10 and 12 35 feet on the western boundary of No. 12, as delineated in the plan accompanying the report to the Town Planning Committee. 30
3. That the owners of the subject property be advised of Council's Resolution in 1 and 2 above and further that they be advised that Council would consider permitting a greater site coverage than that allowed in its adopted relevant code and roof terraces being accepted as open space for site coverage calculations, both to be at the discretion of Council; and with a plot ratio of up to .9:1; 24 being the maximum number of dwelling units, all being subject to a high standard of design including a satisfactory landscaped area facing Wentworth Street and provision of an average set back of 30 feet to the rear boundary to permit retention of the existing trees and privacy of adjoining residents."

Following Council's decision of the 10/6/74, the owner of the property, Dr. Dunlop commenced equity proceedings against council. He maintains Council does not have the right, pursuant to Section 309(4) and 308 of the Local Government Act, 1919 to restrict the number of stories of Residential Flat Buildings and impose what he considers to be unreasonable boundary setbacks. This case is due for hearing on the 28/7/75. 40

Exhibits: Exhibit S Report and recommendations of Defendants
Building and Health Committee 7 July 1975

On the 26/11/74, an amended Development Application DA206/74 was received for an 8 storey residential flat building on 8 Wentworth Street Point Piper. The Application was referred to the Planning and Environment Commission and was advertised under section 342ZA of the Local Government Act.

On the advice of Counsel (Mr. Murray Wilcox) the current application, namely DA 260/74 should be discharged before the equity case is heard on the 28/7/75. This is the application that will now be considered.

THE PROPOSAL

It is proposed to demolish the existing two storey dwelling and erect an 8 storey Residential Flat Building containing 16 three bedroom units. Car parking is provided at basement level for 32 vehicles.

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Exhibits: Exhibit S Report and recommendations of Defendants
Building and Health Committee 7 July 1975

Details of Proposal

Site Area (Applicants figure)	3110.9m ²	
	<u>Proposed</u>	<u>Required</u>
Site Coverage	13.69%	15%
		complies
Total Floor Plan Area (Excluding balcony)	3132.96m ²	
Plot Ratio (excluding balcony)	1.03:1	.95:1
		non compliance
Total Floor Plan Area (including balcony)	3391.48m ²	
Plot Ratio (including balcony)	1.09:1	0.95:1
		non compliance
Undisturbed Landscape Area	1852m ² 59.5%	40%
		complies
Total Paved Driveway Area	241m ² 7.7%	10%
		complies
Landscape Open Space	2444m ² 78.6%	60%
		complies
<u>Boundary Set Backs</u>		
(calculated on maximum heights of wall)		
	<u>Proposed</u>	<u>Required</u>
North Boundary	14.3m	11.03m
		complies
South Boundary	15.2m	11.03m
		complies
East Boundary	13.7m	11.03m
		complies
West Boundary	12.19	11.03m
		complies
Car Parking		
Residents — undercover	32	32
		complies
Visitors — open area	7	7
		complies

Exhibits: Exhibit S Report and recommendations of Defendants
Building and Health Committee 7 July 1975

342ZA

Pursuant to section 342ZA of the Local Government Act, the application was advertised in the Local paper, a notice was placed on the site, and letters were sent to surrounding occupants inviting comment on the proposal in the ensuing 21 days. Fourteen objections were received these are summarised as follows:—

Mr B. M. Paton,
10/55 Wolseley Road,
POINT PIPER 2027

Development would detrimentally affect his enjoyment of the unit. The building will destroy the whole atmosphere of the area which is renowned in Australia as an outstanding residential area. This development could set a precedence for the ultimate destruction of the area. Would almost completely block out all morning sun for many residents. Additional traffic hazard.

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The Franciscan Missionaries
of Mary
"Ave Maria" Retreat House,
6 Wentworth Street,
POINT PIPER 2027

Development contravenes Council's resolution of a height limit of no more than three storeys. The Retreat values the quietness of the surroundings for the work it carries out each year offering a retreat to more than 4,000 people. Such an eight storey building would physically dominate surrounding private dwellings, almost overpowering them. Peace and quiet of surroundings would greatly lessen if this development were approved.

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M/s H. C. Hinchliffe,
/55 Wolseley Road,
POINT PIPER 2027

Contravenes Council's resolution of June, 1974 that development be restricted to three storeys on the subject site. Building will stand on the highest land in this vicinity and will obliterate quite a large section of the sky. Increased traffic will be detrimental to her enjoyment of living in Point Piper.

Mr & Mrs J. Weisz,
5/45 Wolseley Road,
POINT PIPER 2027

Their privacy will be considerably impaired. Casting of shadows on their unit which will deprive them of all the morning sun. Views to Rose Bay will be completely obliterated and block off southern and eastern breeze which relieves the intense heat in the afternoon. Decrease in value of unit.

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Mr. Philip L. Gibson,
Rosemont Pty Ltd,
45 Wolseley Road,
POINT PIPER 2027

Development will shade our area from early morning sun, reduction in privacy. Increased vehicular congestion in area already congested.

SUMMARY OF OBJECTIONS TO 8 WENTWORTH STREET, POINT PIPER

P. M. Barton, Strata Plan 3529, Unit 4 Wolseley Place 45 Wolseley Road <u>POINT PIPER 2027</u>	The development will affect the environment generally. Block out views, light and sunshine and cause extreme noise and congestion to already congested area. Can see no merit in proposed development.	
Mr L. P. Plasto 55 Wolseley Road, <u>POINT PIPER 2027</u>	Proposed development will be an obstruction to their pleasure, views and privilege. Beauty spots of Sydney must be protected.	
Mr N. M. Rutherford, 5/55 Wolseley Road, <u>POINT PIPER 2027</u>	Development will bring more traffic to Point Piper and there have already been occasions when the one outlet for this area to New South Head Road has become a bottle-neck and therefore hazard in times of emergency, i.e. fire brigade and ambulance.	10
Mr R. W. Furber, 25 Wentworth Street, <u>POINT PIPER 2027</u>	Do not want any more high rise in Point Piper, and this development seems to contravene Council's resolution of the 10th June, 1974 stating that the number of storeys erected at Nos. 8, 10, 12 Wentworth Street be no more than three.	
Mrs. Patricia Grierson, 6/45 Wolseley Road, <u>POINT PIPER 2027</u>	Development will block out some of the views, light and sun and cause extreme noise and more congestion to an area which is congested enough now. No aesthetic value will be added to the area by erection of this building.	20
Mr R. J. Coshott, "Alphington", 47 Wolseley Road, <u>POINT PIPER 2027</u>	Development is entirely out of character with the surrounding development. Increased volume of traffic, further strain on limited street parking, overshadowing of surrounding homes, invasion of privacy by overlooking. Increased density of the local area.	
Peter A. Thane, Secretary, 55 Wolseley Road, 240 New South Head Road, <u>EDGECLIFF</u>	Objects strongly to the proposed development as it will affect the environment generally, being a tall building containing many units. It will block out views, light and cause extreme noise and congestion.	
Mrs. L. J. Rainbow 2/23 Wentworth Street, <u>POINT PIPER 2027</u>	Increase in density of the area by an ugly building. Noise at night by car movements and taxis. Congestion in very small street. Contravenes Council's resolution that no building over three storeys be erected on that land. Suggests an artistically designed town house development would be more suitable to the area.	30
The Director, Chatsworth House Pty Ltd, 6 Chatsworth, 59 Wolseley Road, <u>POINT PIPER 2027</u>	An eight storey residential flat building would dominate the neighbourhood and would seriously diminish the attractive and aesthetic appearance of Point Piper. Traffic would be much increased and noise level outside Chatsworth House with cars accelerating up the hill would be obnoxious. Disruption caused by lengthy construction of building. Quiet enjoyment of the area would be impaired.	40

The Planning & Environment Commission

The Application was referred to the N.S.W. Planning & Environment Commission and on 4/7/75 the Commission replied with the following:—

2. Pursuant to the provisions of Clause 59 of the Woollahra Planning Scheme Ordinance, the Commission concurs in the proposed development in accordance with the plan prepared by C.C. Phillips, Architect, dated November, 1974, subject to the development meeting the requirements of the provisions of Clauses 44 and 46 of the Scheme Ordinance with respect to height and floor space ratio control.

3. The Commission's prime responsibility under Clause 59 of the Scheme Ordinance is to ensure that development does not have an adverse impact on the foreshores from a regional viewpoint and as the proposed development would not be greatly intrusive in this particular section of the harbour foreshore, concurrence is given in this instance. 10

4. The Commission, however, considers that:—

- (i) there is a lack of detail available to assess the quality of landscaping, site treatment, suitability of open space to be provided for, play areas, etc. The amount of landscaped area would appear from the plans to be insufficient for this situation;
- (ii) the form of design and fenestration of the building could and should be suitably improved to reduce a somewhat undesirable impact on the immediate environment;
- (iii) a suitable reduction in scale of the building would be necessary to help reduce any undesirable impact of the building on the immediate environment whilst enabling the landscaping position to be improved; and 20
- (iv) the landscaping plans should provide, inter alia, for further large-scale trees in addition to the retention of any significant existing trees so as to achieve an attractive environment around the building at ground level to the satisfaction of the Council.

CONSIDERATION

It is first pointed out, that it has been difficult to give a detailed consideration to this proposal having regard to the standard of plans submitted. Requests were made to the applicant to provide additional information, however this information has not been forthcoming.

It is considered that the applicant has paid little heed to Council's code or to the topography of the area and the surrounding development when he designed the proposed structure. In addition, the proposal does not comply with the guidelines set down by the Local Government Appeals Tribunal or Council's resolution of the 10/6/74. These matters will now be considered in more detail. 30

Plot Ratio

Pursuant to Council's Residential Flat Building Code as adopted on the 26/3/73 the maximum plot ratio permitted for a residential flat building shall be dependent on a sliding scale which varies between .8 for sites between 10,000 and 17,500 sq feet increasing to a maximum of 1.15 for sites in excess of 55,000 sq feet. The subject site has an area of 33,451 sq. feet or 3110.9 sq metres and accordingly, the maximum plot ratio permissible under said code is .95:1. In addition to this, Council resolved on the 10/6/74 that the maximum plot ratio permissible on this site would be .9:1.

Height of Structure

The proposed structure is to be 8 stories in height and according to the submitted plans dated November 1974, with no drawing number, the maximum R.L. is to be 235.5 ft or 71.78 metres. This is the absolute maximum permissible in this area under the Woollahra Planning Scheme Ordinance. The subject site is the highest point in Point Piper and a building of this size and 40

design would not only dominate the skyline, but it would have a detrimental affect on adjoining and surrounding properties, particularly those on the south-east, which are zoned Residential 2(a) and are predominantly dwelling houses. In addition there is the adverse affect that would be suffered by the property to the west, namely Ave Maria. This property would be likely to suffer considerable overshadowing and an extreme loss of privacy. Having regard to the surrounding development, Council on the 10/6/74, resolved:—

“THAT Council, under the provisions of Section 309(4) of the Local Government Act, 1919, regulate the number of stories in any residential flat building erected on the properties No. 8, 10 and 12 Wentworth Street Point Piper, or any one or combination of stories at no more than three.”

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While Council is not stating that this particular site should be considered strictly as a 2(b) zoning, it has been expressed on a number of occasions that the type of development should be in a step formation so as to be more in keeping with the topography of the area and the surrounding development.

Overdevelopment

The subject proposal forms the boundary between the Residential 2(c) and Residential 2(a) zone. Accordingly there should be some type of scaling down, so as not to have 8 storey building contiguous to 2 storey residences. Having regard to the excessive plot ratio and the proposed height of the building, it is felt that the proposal as such, constitutes an overdevelopment of the site. It was held by the Local Government Appeals Tribunal when considering Development

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Application DA 17/73, which was of similar height, that:—
“The proposal constituted a gross over-development of the site and that it would not, therefore, be in the public interest to grant consent to the application before the board. The particular site, although zoned Residential 2(c) is an integral part of Wentworth Street, and it is the Board's view that the Development should be reduced to serve as a buffer between that street and Wolseley Road.”

It would therefore seem that that this proposal is outside the guidelines provided by the Local Government Appeals Tribunal.

Having regard to the abovementioned facts it is considered that the proposal constitutes and overdevelopment of the site and is out of character with development in the locality.

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Objections

As can be seen from the summary of objections, the proposal is certainly not favoured by adjoining and surrounding residents. This point was also given considerable weight by the local Government Appeals Tribunal when considering the previous application and part of the ratio decidendi included:—

“The impact of the proposed development on the immediate environment and the consideration of the character of the proposed development in relation to character of the existing development in the locality. This aspect, the Board considers to be highly relevant because in this case, Wentworth Street forms the boundary between the Residential 2(c) and Residential 2(a) zonings. The board was prepared in the particular circumstances of the case, to afford considerable weight to this aspect of the objections.”

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Similar objections have been received for this particular proposal and it is again felt, that if the matter goes before the Local Government Appeals Tribunal, that it would again give weight to these objections.

Landscaping

From the plans submitted it would appear that little or no thought had been given to the provision of landscaping on the subject site. This is a matter of grave importance, especially with a residential flat building of this magnitude.

CONCLUSION

Having regard to the abovementioned facts, it is concluded that the proposal constitutes an overdevelopment of the site, and it is felt that it would not be in keeping with the topography of the area or the surrounding development. It has also been shown that the proposal does not comply with the Council's Residential Flat Building Code and apparently does not comply with the guidelines as set down by the Local Government Appeals Tribunal when considering the previous application. In addition the proposal does not comply with Council's resolution of the 10/6/74 in regard to height of building, boundary setbacks and the character of the development.

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RECOMMENDATION

I recommend that the Council, as the responsible authority, refuse Development Application DA 260/74 for the erection of an eight storey residential flat building at 8 Wentworth Street, Point Piper, subject to the following condition:

1. The proposal does not comply with the requirements of Council's Residential Flat Building Code as adopted on the 26/3/73.
2. The proposal is considered unsatisfactory in relation to the size and shape of the parcel of land to which the application relates, the siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the adjoining land and the development thereon.
3. The proposal is considered to constitute an over-development of the site, having regard to the scale and bulk of the building and the development on the adjoining and surrounding sites.
4. The character of the proposed development is considered to be unsatisfactory in relation to the character of the developments on the adjoining land and in the locality.
5. It is considered that the proposal will detrimentally affect the amenity of residents in nearby buildings particularly in regard to views.
6. The proposal does not comply with Council's policy for redevelopment of the subject site which was adopted on the 10/6/74.
7. It is considered that the proposal will detrimentally affect the existing character of Wentworth Street.
8. A number of objections have been received from residents in the area in regard to the proposed development.
9. It is considered that the proposal does not sympathise or harmonise with the contiguous residential 2(a) zoning.
10. It is considered that the proposal will have a detrimental affect on the harbour foreshore area, the immediate locality and future proposals in the vicinity.
11. It is considered that the proposal is likely to detrimentally affect the present and future amenity of the locality.

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Exhibits: Exhibit S Report and recommendations of Defendants
Building and Health Committee 7 July 1975

12. The circumstances of the case and the public interest.

(Signed) (Sgd) GARY A. SHIELDS

GARY A. SHIELDS

DEVELOPMENT OFFICER

BH 7/7/75

That the application be referred to the Inspection Committee

Inspection Committee 8/7/75

Adopted as above.

C.M. 14/7/75, Adopted

DA260/74 BC:LG

15th July 1975

Town Planning Department

Mr. C. C. Phillips,

B. Arch., F.R.S.I.A.,

118 Wolseley Road,

POINT PIPER, 2027.

Dear Mr. Phillips,

Development Application No. DA260/74

Property: 8 Wentworth Street, Point Piper

Proposal: Erection of 8 storey Residential Flat Building

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I refer to your application for development within the above property, and I have to inform you that the application was considered by the Council at its last meeting.

The Council, in accordance with its powers as the responsible authority under Part XIII A of the Local Government Act, 1919, has refused consent to the application in terms of the resolution as set out below.

The provisions of the Act are such that the Council is obliged to draw your attention to your right of appeal to the Local Government Appeals Tribunal in respect of the refusal. However, it is suggested that if you are dissatisfied with the decision, you discuss the matter in the first instance with an officer of the Council's Town Planning Department.

RESOLUTION OF THE COUNCIL

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THAT the Council, as the responsible authority, refuse Development Application DA260/74 for the erection of an eight storey residential flat building at 8 Wentworth Street, Point Piper, for the following reasons:—

1. The proposal does not comply with the requirements of Council's Residential Flat Building Code as adopted on 26/3/73.
2. The proposal is considered unsatisfactory in relation to the size and shape of the parcel of land to which the application relates, the siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the adjoining land and the development thereon.
3. The proposal is considered to constitute an over-development of the site, having regard to the scale and bulk of the building and the development on the adjoining and surrounding sites.
4. The character of the proposed development is considered to be unsatisfactory in relation to the character of the developments on the adjoining land and in the locality.
5. It is considered that the proposal will detrimentally affect the amenity of residents in nearby buildings particularly in regard to views.
6. The proposal does not comply with Council's policy for redevelopment of the subject site which was adopted on 10/6/74.
7. It is considered that the proposal will detrimentally affect the existing character of Wentworth Street.
8. A number of objections have been received from residents in the area in regard to the proposed development.
9. It is considered that the proposal does not sympathise or harmonise with the contiguous residential 2(a) zoning.

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Exhibits: Exhibit S

Letter from Defendant to C.C. Phillips 15 July 1975

10. It is considered that the proposal will have a detrimental affect on the harbour föreshore area, the immediate locality and future proposals in the vicinity.
11. It is considered that the proposal is likely to detrimentally affect the present and future amenity of the locality.
12. The circumstances of the case and the public interest.

Yours faithfully,

TOWN CLERK

Per:

PROPERTY 8-12 WENTWORTH STREET, POINT PIPER (490.8-12)

MOTION MOVED by ALDERMAN TAYLOR

SECONDED by ALDERMAN BACKHOUSE:

11/17 (A) THAT the Council's Code for residential flat buildings throughout the Municipality be amended to provide that "floor space" has the same meaning as ascribed to it under Clause 4 of the prescribed Woollahra Planning Scheme, viz:—

"Floor Space" includes all wall thicknesses, ducts, vents, staircases and lift wells, but does not include—

- (a) any car parking space in the building provided to meet the standards required by the responsible authority (but not such space provided in excess of such standards) or any internal access thereto; 10
- (b) space used for the loading or unloading of goods, and
- (c) Lift towers, cooling towers, machinery and plant rooms, and any storage space related thereto.

(B) THAT the resolution of the Council of 24th September 1973 which was in the following terms:—

"In respect of property 8-12 Wentworth Street, Point Piper, the Council make application to the Minister for Local Government, through the State Planning Authority of New South Wales, for suspension of the provisions of the Woollahra Planning Scheme under Section 342Y of the Local Government Act, 1919, as amended, and to seek an Interim Development Order restricting development within the subject land, viz: 8-12 20
Wentworth Street, Point Piper, to those purposes as stated within the Ordinance, and in particular to Clause 23 (Land Use Tables) for Residential 2(b) Zones."

be and is hereby rescinded.

- (C) 1. That the council, under the provisions of Section 309(4) of the Local Government Act 1919 regulate the number of storeys in any residential flat buildings erected on properties Nos. 8, 10 and 12 Wentworth Street, Point Piper, or any one or combination of storeys at no more than three. 30

This is Page No. 5 of the Minutes of the Ordinary Meeting of the Woollahra Municipal Council held on 10th June, 1974.

(Sgd) D. C. FORD

(Sgd) BRAY

Mayor

I HEREBY CERTIFY THIS IS A TRUE AND CORRECT COPY OF PAGE 5 OF THE MINUTES OF THE ORDINARY MEETING HELD ON 10TH JUNE, 1974.
29/3/1974. D. C. FORD, TOWN CLERK

2. That the Council, under the provisions of Section 308 of the Local Government Act, 1919, fix a building line relating to properties Nos. 8, 10 and 12 Wentworth Street, Point Piper, in accordance with the plan 40

accompanying the Town Planning Committee report of 10th June 1974 and providing for set-backs from Wentworth Street ranging from 60' along the eastern boundary of property No. 8, to 45' between properties 8 and 10, to 35' between properties 10 and 12, and 35' to the western boundary of No. 12.

3. That the owners of the subject properties be advised of the Council's decision in 1 and 2 above and they be informed the Council would consider permitting a greater site coverage than that allowed in its adopted relevant code and roof terraces being accepted as open space for site coverage calculations (both to be at the discretion of the Council); and with a plot ratio of up to 0.9:1; 24 being the maximum number of dwelling units, all being subject to a high standard of design, including a satisfactory landscape area facing Wentworth Street and provision of an average set-back of 30' to the rear boundary to permit retention of existing trees and privacy of adjoining residents. 10

CARRIED.

(NOTE: Aldermen Warnecke and White asked that they be recorded as voting against the motion.)

- 11/18 RESOLVED that the report and recommendations of the Town Planning Committee be adopted, subject to amendments as shown against the items the subject of amendment. 20

INSPECTION COMMITTEE — 5/6/1974

- 11/19 RESOLVED that the report and recommendations of the Inspection Committee be received and dealt with.

ITEM 4 BA313/74 — MR & MRS B. J. NOLAN — 1 NURRAN ROAD, VAUCLUSE — ALTERATIONS & ADDITIONS — \$70,000 (Referred from Building and Health Committee 3/6/1974 — Item 23)

MOTION MOVED by ALDERMAN O'BRIEN

SECONDED by ALDERMAN BURFITT-WILLIAMS:

- 11/20 THAT consideration be deferred until the completion of all other business. 30
CARRIED.

(NOTE: See Minute No. 11/36)

- 11/21 RESOLVED that the report and recommendations of the Inspection Committee be adopted, subject to amendments as shown against the items the subject of amendment.

I HEREBY CERTIFY THIS IS A TRUE AND CORRECT COPY OF PAGE 6 OF THE MINUTES OF THE ORDINARY MEETING HELD ON

10TH JUNE, 1974.

D. C. FORD, TOWN CLERK.

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DA107/76

WOOLLAHRA MUNICIPAL COUNCIL

Application to Carry out Development under Cl. 32 of Municipality of Woollahra Planning Scheme Ordinance, and the Town Planning Provisions of the Local Government Act, 1919

INSTRUCTIONS:

1. This application must be completed in **triplicate**, and accompanied by the necessary plans in **triplicate**.
2. Sketch plans should be given in the space provided or included in (1) above.
3. Estimated cost of new works must be stated. 10
4. Providing false information is an offence which may lead to prosecution under Cl. 77 of the Ordinance.
5. All questions **must** be answered. If not applicable this to be stated.

FULL NAME OF APPLICANT: Byrnes Smith & Associates Pty. Ltd. as Architects for the OWNER

ADDRESS: 225 Clarence Street, Sydney, Ph: 29 2432

FULL NAME OF PROPERTY OWNER(S): R. J. M. Dunlop

ADDRESS: 10 Wentworth Street, Point Piper

PHONE No:.....

If the applicant is not the registered property owner, the Owner's written authority to lodge this application must be attached. 20

SITE OF PROPOSED DEVELOPMENT:

SUBURB: Point Piper STREET NAME: Wentworth

STREET No. 8 SUITE OR SHOP No.....

Lot No: 15 & 16 Section No. 3 Of the Point Piper Estate. Vol: 3814 Folio: 7

Situated on South side of street near the corner of Wentworth Place and Wentworth Street.

DIMENSIONS OF LAND

Frontage 44.81 & 50, 34 m Depth 81.07 & 56.60 m Area 3107.6 m²

Do you propose to use the whole or only part of the building or land? Whole.

If part only indicate what part N/a.

What was the use of land or building(s) on 27th June, 1951? 30

Not Known

What was the use of land or building(s) on 15th December, 1972?

Residential Flat Building.

What is the present use of land or building(s)

Residential Flat Building.

FULL DESCRIPTION OF THE PROPOSED DEVELOPMENT

You must state in this space exactly what you propose to do and give sufficient detail to leave no doubt in the Council's mind as to what development you are applying to commence and/or carry on. See Information Sheet for details of the information that council requires. Sketches should be provided in space overleaf.) 40

This amended application is for a seven storey residential flat building containing twenty flats as shown in plans nos: 74104/SKL-74104/SK11 submitted herewith.

ESTIMATED COST \$1,300,000 (See list of fees.)

Exhibits: Exhibit 1 Development Application by Byrnes Smith & Ass.
on behalf of plaintiff 27 July 1976

WHAT ADDITIONS OR ALTERATIONS ARE INTENDED TO EXISTING BUILDING(S)? Nil
I/We consent to this application being made to Council.

SIGNED . . . R.J.M. DUNLOP

Owner's Signature

Date: 27/7/76

SIGNED . . . G.W. SMITH

Applicant's Signature

Date:

LOCATION SKETCH AND FLOOR PLAN

Exhibits: Exhibit 1 Letter from Wellings Smith and Byrnes
to Defendant 27 July 1976

Wellings Smith and Byrnes Pty Ltd Planning Consultants
283 Clarence Street Sydney New South Wales 2000 Telephones 29 2431, 29 5738
GWS:jlk
27th July 1976

The Town Clerk,
Woollahra Municipal Council,
New South Head Road,
Double Bay, 2028.

Dear Sir,

Attention Mr. Peter Jensen

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NO. 8 WENTWORTH STREET, POINT PIPER

Herewith please find an amended development application on behalf of Dr. R. Dunlop in respect of the above property. As indicated in our letter of 22nd July 1976, we have not yet received advice from Council as to whether or not it will waive the development application fee as requested in an earlier letter of 13th April 1976. Consequently no fee is enclosed with this amended application.

The documents lodged with this application comprise the following:

1. Development Application Form (3 copies);
2. Environmental Impact Statement requested by Council (3 copies);
3. Architect's drawings, numbers 74104/SK1-74104/SK11 inclusive, prepared by Byrnes, Smith and Associated Pty. Ltd.

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In addition, it is proposed to lodge a set of photo-montages showing a simulation of the building on its site within the next week. A model of the site environs, showing the environmental impact of the proposal, will be lodged within the next month. When the model is complete, it will be placed on the helioscope at the Department of Architectural Science at Sydney University and the the shadow effects studied. This latter information will form a supplement to the Environmental Impact Study.

No surveyor's plan is included with this application as, we believe, Council has copies of a site survey from earlier application.

Should there be any enquiry about the documents submitted herewith, please contact the writer at the address as per the enclosed notice.

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We commend this amended application to Council and request its speedy consideration.

Yours faithfully,
(Sgd) G.W. SMITH
G. W. SMITH

Wellings Smith and Byrnes Pty Ltd
ENVIRONMENTAL IMPACT STATEMENT

PROPOSED RESIDENTIAL FLAT BUILDING
NO. 8 WENTWORTH STREET
POINT PIPER

PREPARED BY
WELLINGS SMITH AND BYRNES PTY. LTD.
PLANNING CONSULTANTS
225 CLARENCE STREET
SYDNEY, 2000

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JULY 1976

THIS REPORT IS INTENDED TO BE READ
IN CONJUNCTION WITH PLANS NOS. 74104/SK1-SK11

PREPARED BY
BYRNES, SMITH AND ASSOCIATES PTY. LTD.

JULY 1976

1.00 STATEMENT OF OBJECTIVES

The site has been the subject of previous applications and considerable litigation. The core of the problem lies in a conflict between the development permissible under the prescribed planning scheme and the development which local residents and the Council consider appropriate. In the final analysis, this relates to the height of any building to be erected on the site.

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The objectives of this application for development consent are to achieve a building which, while producing a realistic return for the owner, ameliorates the concerns of the Council and local residents, and does not detract from the local environment.

The controls which affect the land and the criteria that have emerged from earlier deliberations relating to it, are:—

A. Under the prescribed Woollahra Planning Scheme:—

- (i) The land is zoned Residential 2(c) in which the following uses are permissible with the consent of the Council:—

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“Boarding houses; clubs other than those registered under Part X of the Liquor Act, 1912; dwelling houses within the Harbour Foreshore Preservation Area; educational establishments; home occupations; hospitals; motels; open space; parking; places of public worship; professional consulting rooms; public buildings; residential flat buildings; roads; self service laundries; utility installations other than gas holders or generating works”.

- (ii) The land lies in the Harbour Foreshore Preservation Area. Pursuant to Clause 59 of the Scheme, the Planning and Environment Commission must give its concurrence to any development in this area.

- (iii) The land is also subject to the provisions of Clause 44(5) which stipulates that the height of any building on the site must not exceed 235.5 feet above standard datum; and
- (iv) Under Clause 46, the ratio of total floor space area to the area of the land must not exceed 1.15:1;

B. Council's Codes:—

The Council has "A Code for Residential Flat Buildings, Boarding Houses and Hospitals in the Municipality of Woollahra" (adopted 26.3.73). This code establishes the controls over site coverage, plot ratio, set backs, unbuilt-on areas and landscaping around buildings.

Council also has a Parking Code (adopted 24.9.73); and

C. Flowing from previous decisions:—

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In 1974, the subject land and other adjoining properties were the location for a residential flat building project refused by Council and by the Local Government Appeals Tribunal. The latter in its judgement expressed the view that "any development should not exceed a population density of 70 to 75 persons to the acre".

The proposal submitted herewith has been designed to comply with these various controls and criteria.

In assessing the impact of the proposal on the environment, there appear to be effects at the local and regional levels. The local effects are typically those created by a higher building among lower buildings. The regional effects arise from the impact (if any) on the view from the Harbour.

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2.00 PHYSICAL DESCRIPTION OF THE PROPOSAL

The property is described as No. 8 Wentworth Street, Point Piper. It has an area of 3107.6 square metres and is improved with a two storied building (originally a Victorian residence) with a steeply pitched roof and various out-buildings. The premises are presently used as flats. The existing buildings have a combined site coverage of 15.95% compared with 13.45% for the proposal.

The proposal provides for a residential flat building of seven storeys standing on a podium of two levels of car parking spaces. The car parking is sunk into the site so that, at its greatest height, it is 1.2 metres above the natural ground level. The building will contain 20 dwellings, 7 being of three bedrooms, 12 being of two bedrooms and one being a one bedroom caretaker's flat.

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The table in Appendix 1 to this Report give technical details of the development and comparable data from the controls and criteria listed in Section 1.

The land occupies the crest and upper north and western slopes of the central ridge in Point Piper. Maximum ground elevation on the site is 53.75 m above sea level. The land has a relatively flat central section but slopes away steeply to the east, north and west.

There are a number of large trees on the site. It is intended that all but one of these be preserved. The tree removed is a 4 metre tall exotic species.

Construction of the proposed building will require the excavation of material and its removal from the site prior to erecting the building. No investigations have yet been made of foundation conditions but in view of the depth of excavation, it seems likely that rock will be encountered. Heavy earthmoving machinery will be needed for the excavation.

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Disposal of the soil from the excavation will be the responsibility of the contractor engaged for the work. It will necessitate trucks moving along Wentworth Street to gain New South Head Road, the nearest main road.

Construction of the building is envisaged as being undertaken by conventional methods using hoist and platform rather than a large crane. Materials used will be primarily brick and reinforced concrete with glass infill panels. It is estimated that the building will take about nine months to complete.

When completed, the building will provide three flats on each of the six upper floors. Each flat will be orientated so as to maximise the views available from it. The three bedroom flats all look north-west directly towards the Harbour Bridge. The two bedroom flats at the southern end also look across towards Double Bay while those at the northern end look towards Manly and the Heads. In order to minimise overlooking of the adjacent Ave Maria Convent and Retreat, the only rooms with windows looking east towards it are those in the kitchens of the two bedroom units.

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The plan form of the building, rectangular with the corners truncated, minimises the bulk of the building from virtually all angles of view. It also minimises the obstruction of view from the Retreat House to the west.

The broken plan form and staggered balconies on the elevation produce an overall effect of reduced bulk and height and give the building a human scale. This is furthered by the preservation of the large trees intended landscaping which will ultimately produce more large trees.

The heavily modelled facade will reduce any wind turbulence effects which could present problems on such an exposed site if large plane elevations were utilised.

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3.00 DESCRIPTION OF THE ENVIRONMENT

Point Piper is one of Sydney's more exclusive residential areas. Being a peninsula, it is free from the ill effects of through traffic. Being steep-sided and surrounded on three sides by the Harbour, it offers varied and very attractive views from almost any location. However, while much of Point Piper consists of quiet tree-lined streets backed by large and costly residences, there are major departures from that character in parts.

The western side of the peninsula, in particular, has a number of large, tall and relatively new residential flat buildings along Wolseley Road interspersed between similarly bulky (but not so high or prominent) older style flat buildings. In addition, on Wentworth Street there is a large convent and retreat with open air carpark which, while not overtly institutional in appearance, is not in harmony with the balance of the street. (See attached Land Uses plan.)

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The proposed building will be the first major tall building on Wentworth Street although the retreat adjoining is also a large, relatively recent structure of similar bulk but lower height. The quiet enjoyment of the site as a private residence has been seriously prejudiced by the buildings erected around it. The three storied retreat house overlooks the whole site. It is only used periodically and by transient guests so that its impact on the amenity of the site is of the worst kind — not only does it overlook, but such overlooking is done by a large number of people who are strangers to the residents. Moreover, the transient occupants using it, including school children, have no interest in maintaining the peace and quiet of the area and do, at times, create disturbances.

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Similarly, the tall flat buildings to the west and south-west overlook the site — admittedly from a distance — but their impact on the site is equal to that of the proposal on them.

The greatest problem lies to the north where, across Wentworth Street, there are single family residences and some low, domestic scale flat buildings. The transition from two storied houses and flats to a seven storied building is abrupt because within the existing controls on development of the site it has proved impossible to create a transition in terms of building form.

As far as is known, there are no unique features of the site which might be important to local ecology, but because of its position on top of a prominent harbourside ridge, it does have some possible regional connotations. These were investigated, in depth, when the local Draft Planning Scheme was being considered by the State Planning Authority prior to its prescription. At that time, the Authority was exhibiting great concern for developments around, and visible from, the Harbour. It seems that the Authority's inclusion of a height limit, in the Scheme affecting this site, is its tacit acceptance that a building of that height or less will not adversely affect the view from the Harbour. This is endorsed by the concurrence which the Authority and its successor, the Planning and Environment Commission, granted to previous applications proposing buildings to the height specified in the Scheme. In this context it should be noted that at best two of the existing flat buildings in Point Piper are slightly higher than that proposed on this site, and that the convent's roof line is almost as high as the proposed building. 10

4.00 ENVIRONMENTAL SAFEGUARDS

The proposed building has been designed to minimise adverse environmental effects and in accordance with the detailed controls established by the various authorities for development on this site. In general, it is the appearance of the building which will be of greatest environmental significance due to its prominent site, and careful consideration has been given to detailed design aspects.

Insofar as the appearance of the building from the Harbour is concerned, for the most part it will be the bulk of the building rather than the details of the facade which will be visible due to the distance of the site from the Harbour. Given that the design of the building produces a broken facade, there should be no large expanses of like material which might detract from the aspect of the building when viewed from the Harbour. The view from the north, the Harbour proper, is of the narrowest elevation of the proposed building. 20

One potential danger is that the western facade, which contains a large area of glass, will tend to reflect the afternoon sun. This wall will be of dark tinted glass and highly reflective finishes will be avoided. Horizontal, louvred sunscreens above window areas and projecting balconies will cast shadows over the glass, further reducing reflectivity.

The one facade of the building which presents large, plain facades (of generally solid walls) is that on the eastern side, so designed as to reduce overlooking of the convent. From a distance, this elevation is largely screened by the existing convent buildings some 15 metres away. Only the top 6.5 metres of the building will protrude above the convent's ridge line. Given the broken plan form of the building, which will induce heavy shadow effects, and the distance between any observer and the building, it seems unlikely that the effect on the skyline when viewed from the south-east will be adverse. 30

From closer-up, the broken plan form and interesting, varied elevational treatment would give the building a human scale and reduce its apparent height and bulk.

The tapered plan form and broken facades of the proposed building should also ensure that air turbulence will be minimised. (See Section 5, part (3) for further discussion of this point.)

The siting of the proposed building and its tapered plan form, oriented north-south, reduce overshadowing of surrounding areas to the greatest extent possible for a building of this size. (See Section 5, part (4) for a detailed description of shadow effects.) 40

The limitation on floor space and density within which the building is designed and the types of flat and standard of finish will ensure that the social environment of the area will not be disrupted. Traffic generation and noise, as a function of both building design and types of inhabitants, will be minimal in the proposed development. (See Section 5, parts (1) and (2).)

Most of the existing mature vegetation and features of the site such as old stone walls are retained. Substantial supplementary landscaping is proposed so that the existing environment will be enhanced and the new building will be largely screened from the immediate vicinity.

5.00 INTERACTIONS WITH THE ENVIRONMENT

The potential environmental factors which are relevant to this proposal are:—

- (1) Noise
- (2) Traffic
- (3) Turbulence
- (4) Shadows
- (5) Overlooking
- (6) Visual amenity

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These are dealt with in order below.

(1) Noise

The possible sources of noise are:

- (i) noise from occupants within their flats (parties etc.);
- (ii) noise from occupants in the grounds;
- (iii) noise from garbage removal operations; and
- (iv) noise from traffic induced by the project.

The fourth item is dealt with under traffic.

(i) When considering the probable level of noise from this building, it is essential to consider the likely inhabitants of the flats. The building will be designed and finished to sell in the luxury apartment market — units will sell for prices in excess of \$100,000. People purchasing such units are not likely to have small children and while some may be wealthy younger people, experience with similar projects suggests that the majority will be older people — either married couples without children, individuals living alone (for example, widows) or with adult companions (for example, widow with grown-up daughter).

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While every precaution will be taken to minimise noise transmission within the building, it is inevitable that excessive noise in any one apartment will be transmitted to others nearby in the same building. Consequently, if any occupants of one flat create a nuisance, they are likely to be policed by their near neighbours. The presence of a caretaker on the premises will add to the efficiency of such policing within the body corporate.

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Should the noise from any apartment be sufficient to cause disturbance to the amenity of the wider area, it will undoubtedly disturb other people in the building and is likely to attract the self-policing mechanism of the body corporate. Any person disturbed outside the body corporate will be able to complain to the caretaker, who will have the responsibility for curbing excessive noise.

The probability of excessive noise from parties, etc. in the apartments seems remote. The building most likely to be affected is the retreat house and on that side of the building only the kitchen windows of the two bedroomed flats face in that direction, so that noise transmission will be minimal.

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There will be no plant other than the lift motor room, below the car parking basement of the building, to generate noise. Provision will be made for the installation of room air-conditioners in each flat if required by individual owners, but these should not cause any disturbance beyond the boundary of the site.

(ii) Noise outside the building will stem primarily from the use of the grounds. A swimming pool has been included in the plans but it may not be built as there appears to be little demand for

such facilities in luxury apartment houses. Given the expected age structure of the resident population, little boisterous use of the gardens seems likely.

If the pool is proceeded with, it will be enclosed by screen walls and landscaping to give privacy and this will attenuate some noise. The pool will be on a lower level of the site and any noise (other than extremely loud sounds) should not affect any more than the adjoining block of flats to the west. It should be noted that the block of flats to the west already has a swimming pool and that the existing residence on the subject site has a large, above-ground pool.

(iii) The system of garbage removal proposed complies with Council's code. Each floor of the building is provided with a chute for garbage. The chute leads to a central compactor storage room in the basement. Bottle and other specified waste can be placed in a cupboard adjacent to the chutes on each floor and will be removed by the caretaker to the same central store. 10

The caretaker will bin all waste and deliver bins by rubber tyred trolley to a predetermined collection point for removal by Council's garbage service. Garbage trucks will not enter the site. Consequently, the removal of waste should not generate more noise than already created by the service to existing premises.

(2) Traffic

Apart from noise created during the construction period, there is no reason to anticipate any excessive noise from traffic generated from this site. All parking is underground including the visitor parking spaces. Apart from the rare occasions, when there are activities which generate parking demands in excess of that provided on site, there should be no noise from car doors being closed, motors revving or noise from the conversations of people entering cars. Since the approach ramps to both levels of the car park are of quite gentle slope (1 in 10 maximum), there should be no need for excessive noise as vehicles leave these basements. 20

Wentworth Street is a quiet street carrying little traffic. On a previous occasion when a much larger project was contemplated on this site and adjoining land, experts considered the traffic implications and found that no significant traffic changes would occur and that traffic would not disturb the amenity of the area.

(3) Turbulence

Any tall building, whatever its location, can create problems of turbulence. These problems fall into two categories:

- (i) turbulence affecting the surrounding area; and 30
- (ii) turbulence affecting the building itself.

If no design precautions are taken against unwanted turbulence, a single tall building or a group of buildings can generate air turbulence of a high magnitude. The most serious effects are created by tall, regular-sided, rectangular buildings whose edges produces vortices which can affect the building and its surrounding environment.

In this instance, the bulk of the proposed building is broken up and small projections such as sun-control shades and balconies would eliminate the possibility of turbulence generation. The most regular side of the building is in the lee of the Retreat building and the general environment is protected by the location of numerous trees and the broken-up bulk of adjacent buildings.

As no adjacent flat building has regular, unbroken, rectangular form, the overall grouping of buildings on this ridge is unlikely to produce any general nuisance turbulence. 40

(4) Shadows

As will occur with any tall building on a hill top, there will be substantial shadow effects — to the west in the early morning and to the east (onto the convent) in the afternoon. However, no property will be deprived of sunlight during the critical midday hours in summer or winter. Since

the building will have a relatively narrow silhouette on the east-west section, the shadow cast during the midday hours will be relatively narrow and the tapered plan form will aid in reducing the shadow cast in the mid-morning and mid-afternoon periods.

In the early morning, the shadow cast falls across the rear of the houses at 10 and 12 Wentworth Street due to the deep setback of the building. In the late evening the shadow affects the retreat house — as the shadow of the present building does, since the retreat house already casts a shadow across most of the convent's grounds in the late evening, there will be little or no additional effects from the proposed building on the convent's grounds. It might be noted that the retreat house casts a shadow over the site in the early morning and that that shadow affects other properties to the north also.

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(5) Overlooking

It is inevitable that the residents of a tall building on this site will be able to look across the homes and yards of surrounding properties. In this instance, due to the separation of the buildings and the existing and proposed landscaping on the site, the problem of viewing into windows is not of much import. Moreover, it is a problem which would occur with practically any building on the site and occurs now.

The design of the building limits overlooking, in an easterly direction, to that from kitchen windows. This view is over the retreat house and does not materially affect the convent. The viewer's normal sightline only begins to reach ground level about the convent's carpark even from the top floor.

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To the south, the view is over part of the convent and then into a series of existing tall, flat buildings fronting Wolseley road. This overlooking is not likely to cause any significant reduction in privacy or amenity.

To the west, the view will be over the rear yards of No. 5, 10 and 12 Wentworth Street and towards residential flat buildings in Wolseley Road and over the yard of one house (No. 47) Wolseley Road. All of the area over which the residents of the proposed building might look is already in the view of the residents of existing residential flat buildings. Consequently, the marginal effect on amenity cannot be great.

To the north, there is no existing overlooking problem. There are 5 or 6 residences or small low flat buildings which may be affected along Wentworth Street. Existing trees on the site and in Wentworth Street act as screens for other properties and the fall in hill towards Wyuna Street. Beyond, Wentworth Place limits the effects in that direction.

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The problem is primarily that of overlooking of grounds rather than of looking into windows. The curtilages of the most affected buildings do not appear to contain any swimming pools or private areas which might be exposed to view. The one pool in the street is screened by two rows of trees. The impact on these properties would not be greatly different if a low rise flat building were erected on the site.

It is questionable whether or not having a tall, flat building at some distance really affects the amenity of open yards. If it does, the effect must be marginal.

(6) Visual Amenity

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There is no doubt that a tall building on this site will affect the visual amenity of some of the existing residents — primarily those looking across to the site from the north and north-east. The proposed building, through its plan form, tends to minimise its apparent bulk, however. The broken form of each facade will further reduce the apparent bulk. Existing trees will screen the building and the proposed landscaping, utilising tall tree species, will naturally improve the position once they have time to grow.

From the convent, that is from the windows of the retreat house, the proposed building will obstruct the view to the west. The present buildings on the site already do this but the extent of the obstruction will be increased. This effect would arise from any larger building on the site. The small site coverage of this proposal linked with the tapered plan form minimises the obstruction of views by allowing distant views at an angle from anywhere along the retreat house. Only in the centre of that building are these angles excessively acute.

From a distance the proposed building will be within the scale of surrounding development which consists of a number of blocks of flats up to 12 storeys in height. In fact the proposed building would be only 7 storeys above the ground at its roof level is slightly lower than those of some of the surrounding buildings, so that in terms of the overall built form of Point Piper, it will not be a significant addition. 10

6.00 ASSESSMENT OF ENVIRONMENTAL IMPACT

(1) Noise

There should be no significant long-term adverse effects in terms of noise. There will, however, be noise generated in the short-term during the demolition, excavation and construction period.

(2) Traffic

Traffic generation effects of the development should, again, not be significant in the long-term but there will be some short-term nuisance from heavy trucks.

(3) Turbulence

The design of the building is such that air turbulence should be minimal, both on the site and in the surrounding area. 20

(4) Overshadowing

Overshadowing will be substantial, but mainly during early morning and late afternoon. The shape and siting of the building has been determined to reduce shadowing effects as much as possible.

(5) Overlooking

Overlooking is minimised by orientating most of the windows to the north, west and south, in which directions the landscaped grounds of the building and the surrounding streets act as buffers. The east facade, facing the convent retreat house, is mainly blank apart from kitchen windows. 30

(6) Visual Amenity

Because of its prominent site, the visual impact of the proposed building assumes great importance. However, in relation to surrounding development, the building will not be obtrusive in distant views. From closer view, the building has been carefully designed and sited to produce an interesting character and human scale. Existing mature trees and distinctive site features have been retained and will be supplemented by additional substantial landscaping, such that the finished development will not detract from its surroundings.

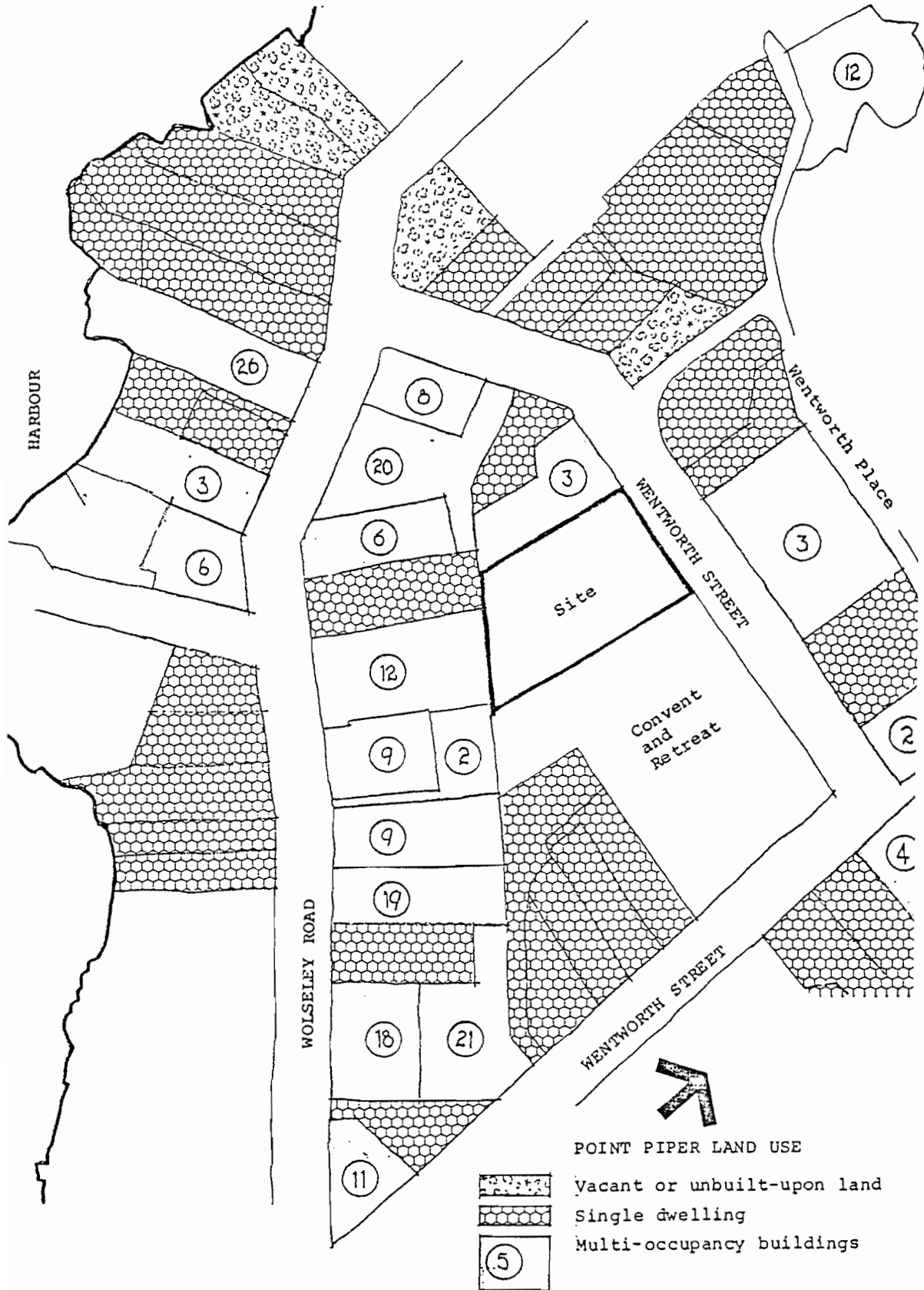
Wellings Smith and Byrnes Pty Ltd
 No. 8 Wentworth Street, POINT PIPER.
 Job No: 74104 Date: 26.7.76.

APPENDIX 1.

ITEM	COUNCIL REQUIREMENT* PROPOSAL		
Site Area	3107.6 m ²		
Plot Ratio**	0.95:1	0.86:1	
Floor Area**	2952.2 m ²	2675 m ²	
Site coverage	Min. of 15% or 418 m ²	13.45% 418 m ²	
Street setback	Min. 6.1 m	20.4 m	10
Boundary setbacks	Min. 9.4 m	18.4, 15.4, 9.5 m average	
Landscaping (total)	Min. 60%	77.4%	
Undisturbed landscaping	Min. 40%	41.9%	
Vehicular surface	Max. 10%	9.2%	
Car parking	39 + 8 visitor spaces	40 + 8 visitor spaces	
Typical Floor Area (including 23.5 m ² of Balconies).		418 m ²	
Balcony Areas as percentage of Typical Floor Area.		5.62%	
Number of 3 bedroom dwellings		7	20
Number of 2 bedroom dwellings		12	
Number of 1 bedroom dwellings		1	
Total Number of Dwellings		20	
Total Population (based on SPA Technical Bulletin No: 3)		53.7 persons	
Density		173 persons/hectare. (70 persons/acre)	

* As per "Code for Residential Flat buildings, Boarding Houses and Hospitals in The Municipality of Woollahra (adopted 26 March 1976")

** Not including Balconies under 8% of Floor Area. 40



BUILDING & HEALTH COMMITTEE 25/10/76

DA: 107/76
ADDRESS: 8 WENTWORTH STREET, POINT PIPER
APPLICANT: BYRNES SMITH AND ASSOCIATES PTY LTD.,
PROPOSAL: ERECTION OF A 7 STOREY RESIDENTIAL FLAT BUILDING-
ZONING

Woollahra Planning Scheme Ordinance — Residential 2(c) H.F.P.A. Height Limitation of
235.5 ft.

THE SITE

The site is located on the southern side of Wentworth Street and is known as No. 8
Wentworth Street Point Piper. 10

It has a frontage facing Wentworth Street of 44.81 metres and an eastern boundary length
of 56.21 metres, a western boundary length of 81.07 metres and a rear boundary length of
56.52 metres providing for a total area of 3,110.9 sq. metres.

It is presently occupied by a rather large, two storey residence with car parking provided
on site.

THE HISTORY

In February, 1973, a Development Application D/A 17/73 was received for No. 8-12
Wentworth St., Point Piper for the erection of a two stage Residential Flat Building.
Stage 1 was to comprise of an 8 storey building containing 24 three bedroom units (3 per
floor), which was to be erected upon No. 12 Wentworth Street. Stage 2 also involved an
eight storey structure containing one three bedroom unit per floor and was to be erected
on a terrace podium area beneath which was to be erected three levels each containing
three units. This stage was to be erected on Nos. 8-10 Wentworth Street. 20

The proposal was subsequently advertised under 342 ZA of the Local Government Act and
referred to the State Planning Authority. The reply from the Authority was received by the
Council on 1st June, 1973, and indicated that the Authority did not concur in the Council
approving of the plans as submitted. In so advising the Council the Secretary of the
Authority, indicated that the overall height of the proposed development, including the lift
tower seemed to be more than the limitation provided under Clause 44 of the Scheme
Ordinance. The letter went on to say that if the plans were modified to meet the minimum
requirements of height and floor space the Authority would be prepared to grant its
concurrence. 30

On the 11/9/73, the Council advised the applicant that the abovementioned Development
Application had been refused for eight reasons namely:—

1. The proposal does not comply with the requirements of Council's Code for Residential Flat
Buildings adopted at its meeting of the 26th March 1973;
2. The proposal is considered to be an overdevelopment of the site having regard to the scale
and bulk of the building and the development on the adjoining and nearby sites;
3. It is considered that the proposal will detrimentally affect the amenity of residents in nearby
buildings, particularly in regard to views; 40
4. The proposal will alter the character of Wentworth Street;
5. Objections have been received from residents in the area in regard to the zoning of the land
and the likely resultant change in character of the site and the locality generally;
6. Having regard to the scale and location of the development the car parking, though in
accordance with Council's code, is considered to be inefficient;

7. The location of the visitors car parking is unsatisfactory having regard to the distance from the street and the entrance to the units;
8. The circumstances of the case and the public interest.

On the 24th September 1973 Council resolved the following:—

“THAT in respect to the properties 8-12 Wentworth Street Point Piper, the Council make application to the Minister for Local Government, through the State Planning Authority of N.S.W. for suspension of the provisions of the Woollahra Planning Scheme under Section 342Y of the Local Government Act, 1919, as amended, and to seek an interim Development Order restricting development within the subject land, viz:

8-12 Wentworth Street, Point Piper, to those purposes as stated in the Ordinance, and in particular in Clause 23 (Land Use Tables) for Residential 2(b) zone”.

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As a result of Council's decision in regard to Development Application DA 3/73, the applicant lodged an appeal to the Local Government Appeals Tribunal.

A letter was then received from the State Planning Authority in regard to the application for suspension which read as follows:—

“I refer to Council's letter of the 15th October requesting the Minister for Local Government take action to suspend the provisions of the Woollahra Planning Scheme in respect of the abovementioned land and that he make an interim Development Order, restricting future development on such land to those purposes permissible in Residential 2(b) zone.

As the Council will be aware, an appeal has been lodged to the Local Government Appeals Tribunal against Council's refusal to grant consent to the carrying out of a Residential Flat Building on these lands. The appeal is listed for hearing on the 20/11/73.

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In the light of a report submitted to him by the Authority and having regard to the appeal that has been lodged, the Minister for Local Government has now decided he would not be justified in taking suspension action and making an interim Development Order as requested by the Council.”

On 6th May, 1974 the Tribunal handed down its decision to dismiss the Appeal against the refusal of consent by the Council. In doing so the Tribunal indicated it considered that some residential flat development of a reduced scale should be allowed. It agreed with the view put forward by Mr. Ingham, Consultant Town Planner for the Council, that in the location and given the existing zoning any development should not exceed a population density of 70:75 persons to the acre. The Tribunal envisaged a corresponding reduction in the bulk of any buildings to be erected on the site.

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On the 10/6/74 Council resolved the following:—

1. “That the Council, under the provision of section 309(4) of the Local Government Act, 1919, regulate the number of stories in any residential flat building erected on properties nos. 8, 10, 12 Wentworth Street Point Piper for any one of a combination of stories at no more than three.
2. That Council, under the provisions of Section 308 of the Local Government Act, 1919, fix a building line relating to properties Nos. 8, 10 and 12 Wentworth Street, Point Piper at 60 feet from the Wentworth Street alignment on the eastern side of property No. 8 fenced to 45 feet at the common boundary of No. 10 and 12 as delineated in the plan accompanying the report to the Town Planning Committee.
3. That the owners of the subject property be advised of Council's Resolution in 1 and 2 above and further that they be advised that Council would consider permitting a greater site

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coverage than that allowed in its adopted relevant code and roof terraces being accepted as open space for site coverage calculations, both to be at the discretion of Council; and with a plot ratio of up to .9:1; 24 being the maximum number of dwelling units, all being subject to a high standard of design including a satisfactory landscaped area facing Wentworth Street and provision of an average set back of 30 feet to the rear boundary to permit retention of the existing trees and privacy of adjoining residents."

On the 27th November, 1974, a further development application was lodged D.A. 206/74. Following advertising pursuant to Section 342, referral to the Planning and Environment, and detailed consideration, Council, at its meeting of the 14.7.75 resolved:—

"THAT the Council, as the responsible authority, refuse Development Application D.A. 260/74 for the erection of an eight storey residential flat building at 8 Wentworth Street Point Piper, subject to the following conditions. 10

1. The proposal does not comply with the requirements of Council's Residential Flat Building Code as adopted on the 26/3/73.
2. The proposal is considered unsatisfactory in relation to the size and shape of the parcel of land to which the application relates, the siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the adjoining land and the development thereon.
3. The proposal is considered to constitute an over-development of the site, having regard to the scale and bulk of the building and the development on the adjoining and surrounding sites. 20
4. The character of the proposed development is considered to be unsatisfactory in relation to the character of the developments on the adjoining land and in the locality.
5. It is considered that the proposal will detrimentally affect the amenity of residents in nearby buildings particularly in regard to views.
6. The proposal does not comply with Council's policy for redevelopment of the subject site which was adopted on the 10/6/74.
7. It is considered that the proposal will detrimentally affect the existing character of Wentworth Street.
8. A number of objections have been received from residents in the area in regard to the proposed development. 30
9. It is considered that the proposal does not sympathise or harmonise with the contiguous residential 2(a) zoning.
10. It is considered that the proposal will have a detrimental affect on the harbour foreshore area, the immediate locality and future proposals in the vicinity.
11. It is considered that the proposal is likely to detrimentally affect the present and future amenity of the locality.
12. The circumstances of the case and the public interest.

At about the same time this application was lodged the owner of No. 8 Wentworth Street made application to the Equity Court for a declaration that the resolutions passed pursuant to Section 308(4) of the Act were invalid. 40

Exhibits: Exhibit 1 Report and recommendations of Defendant
Building and Health Committee 25 October 1976

The application was successful with the Judge handing down his decision on 26th September, 1975. The conclusion to his judgement was:—

“In summary, I reject the plaintiff’s contention that the Council resolutions were not bona fide exercises of its powers, but I hold that the resolutions are invalid for other reasons. The resolution under Section 308(1) is invalid because the Plaintiff was not given notice of the Defendant’s intention to consider it, which, in all circumstances, fairness required. The resolution under Section 309(4) is invalid because its operation would be inconsistent with Clause 44(5) of the Woollahra Planning Scheme Ordinance, which inconsistency is not permissible by reason of Clause 73(1) of the Ordinance.”

On the 14/4/76, Mr. D. Byrnes, lodged an enquiry proposal for an eight storey Residential Flat Building. The enquiry was not accompanied by the standard forms for Development Applications, did not include a fee, and the plans submitted were only partially completed. Consequently, the proposal could not be considered to constitute a Development Application. 10

Previously, Council, on the 13th December, 1971 had resolved in the following terms:—

“That where an enquiry application is submitted in respect of any matter, which, if it were subject to a Development Application, would require action pursuant to Section 342ZA of the Local Government Act, Council, as a matter of policy, refuse to consider that enquiry application unless and until the action required under Section 342Z has been complied with.”

On the 27/4/76, a meeting was held between individual Aldermen of Council Dr. Dunlop and Mr. G. Smith (applicant). The applicant and Dr. Dunlop were advised of the above Council policy, and Mr. Smith was asked how long did he estimate it would take to submit a formal application. In reply Mr. Smith said that the time taken to prepare a formal application, subject to discussions with council officers would be three weeks, say at the end of May. On the 28/7/76, a formal Development Application was lodged D.A. 107/76 and the proposal was immediately advertised pursuant to Section 342ZA of the Local Government Act, and referred to the Planning and Environment Commission, pursuant to Clause 59 of the Woollahra Planning Scheme Ordinance. Clause 59 states:— 20

“The responsible authority shall not approve any application for consent to carry out development on land within the Harbour Foreshore Preservation Area unless it has obtained the concurrence of the authority.” 30

Despite several letters to the Planning and Environment Commission, and numerous ‘phone calls, a reply was not forthcoming from the Commission before the Statutory period of 40 days had expired.

On the 27/9/76, Council received notification that the Applicant had lodged an Appeal to the Local Government Appeal Tribunal for the neglect or delay of the council of the Municipality of Woollahra, to give a decision to the application lodged within the 40 day period.

The Commission’s letter was received on the 21/10/76, and this report has been prepared for the consideration of this Committee.

THE PROPOSAL

It is proposed to demolish the existing two storey residence and construct a seven storey Residential Flat Building with two levels of underground car parking. 40

The Ground Floor

The ground floor is to contain a foyer, change area, male and female sauna baths, a caretaker’s flat, a lift, a room for garden tools, and a three bedroom unit.

Exhibits: Exhibit 1 Report and recommendations of Defendant
Building and Health Committee 25 October 1976

Typical Floor Layout

Each of the remaining floors above ground level are to contain two, two bedroom units and one three bedroom unit. The total number of units in the building will be seven, three bedroom units, twelve two bedroom units and one bedroom caretaker's unit. In addition a swimming pool is proposed at ground level on the western side of the proposed building.

Details of the Proposal

<u>ITEM</u>	<u>COUNCIL REQUIREMENT* PROPOSAL</u>		
Site Area 3107.6 m ²			
Plot Ratio**	0.95:1	0.86:1	
Floor Area**	2952.2 m ²	2675 m ²	10
Site coverage	Max. of 15% or 418 m ²	13.45% 418 m ²	
Street setback	Min. 6.1 m	20.4 m	
Boundary setbacks	Min. 9.4 m	18.4, 15.4, 9.5 m average	
Landscaping (total)	Min. 60%	77.4%	
Undisturbed landscaping	Min. 40%	41.9%	
Vehicular surface	Max. 10%	9.2%	
Car parking	39 + 8 visitor spaces	40 + 8 visitor spaces	
Typical Floor Area (including 23.5 m ² of Balconies).		418 m ²	
Balcony Areas as percentage of Typical Floor Area.		5.62%	20
Number of 3 bedroom dwellings		7	
Number of 2 bedroom dwellings		12	
Number of 1 bedroom dwellings		1	
Total Number of Dwellings		20	
Total Population (based on SPA Technical Bulletin No: 3)		53.7 persons	
Density		173 persons/hectare. [70 persons/acre]	

Section 342ZA

Pursuant to Section 342ZA of the Local Government Act, notification of the proposal was placed in the local paper, a sign was displayed on the site, and surrounding residents were notified. A large number of objections have been received and they are summarized as follows:—

The Franciscan Missionaries Of Mary,

P.O. Box 135,

DOUBLE BAY

Will incur a loss of income during construction of the proposed building. The noise incurred during construction will destroy the peace and silence necessary for the successful running of the Retreat House and result in a reduction of the numbers attending and a consequent reduction in income. The building process will create great amounts of airborne dust and dirt and increase maintenance and cleaning costs. There will also be a severe loss of winter sunlight from midday onwards. There will be a high noise level around the swimming pool. 10

Mr. R. M. Creighton,

Unit 7, 45 Wolseley Rd.,

POINT PIPER

I will be detrimentally affected by this proposed development and wish to join with all of the other residents in lodging a strong protest against such a development.

Mr. J. F. Cohen,

29A Wentworth St.,

POINT PIPER

Considers it the duty of all Aldermen:—

- (a) to preserve the present character of Point Piper.
- (b) to preserve the existing and future amenity of the neighbourhood.
- (c) in the public interest, refuse all applications for high-rise development in Point Piper.
- (d) to preserve the quiet, tranquil, charming tree-lined atmosphere, which presently prevails in
Wentworth Street,
- (e) the enjoyment of the land will be detrimentally affected if the proposed re-development is carried out.

B. Shillan,

20/85 Wolseley Rd.,

POINT PIPER

Is very much against sky high buildings with destruction of environment and privacy, lack of parking and the interference of views to established residents. 30

P. A. Schneider,

4/2A Wentworth St.,

POINT PIPER

- (a) High rise construction has already passed the point which can reasonably be regarded as maximum for the area.

- (b) Additional motor traffic by the residents of the proposed new building and their visitors would significantly worsen the bottleneck already evident at the junction of New South Head and Wolseley Roads.

Gerald S. Wronker & Associates,
75-85 Elizabeth St.,
SYDNEY

(Solicitors for 13 residents in the area)

A seven storey building in that position would shut out the enjoyment of the eastern, north-eastern and a major part of the northern sun to the residents occupying lands south of No. 8 Wentworth Street. 10

Two levels of car parking space comprising accommodation for 47 cars would create a considerable nuisance in the area of Wolseley Road and streets deriving their access from Wolseley Road as a result of traffic congestion, noise and pollution.

It would seriously detract from the residential character of Point Piper.

The overall character of the area is one devoted to low density living and therefore the proposed building would disrupt the present character of the neighbourhood.

Mrs. H. M. St. Clair,
3/55 Wolseley Rd.,
POINT PIPER

The erection of a building such as is proposed will make street parking even more difficult I am sure, at time impossible. 20

There is no doubt such a development will detract from the present residents enjoyment of the area and reduce the value of their investments.

T. J. Smith,
4C Wentworth St.,
POINT PIPER

The proposal is totally out of character and most undesirable to property owners paying high rates for the privilege of living in a quiet residential area. In a very short time this lovely peninsular could be turned into a concrete jungle similar to Darling Point.

It will greatly increase traffic, noise and parking problems in the area, jeopardise my privacy by overlooking my house and garden, besides lowering the value of individual homes, and add to pollution. 30

Miss E. Binnie,
9 Wentworth Place,
POINT PIPER

(a) I consider that such a development would be detrimental to the area.

(b) The surrounding homes are substantially private dwellings and I consider that a high rise building such as proposed will be out of character.

(c) The street is already over congested by motor traffic, particularly during the evening and at night and such a development would only add further congestion. 40

Hudson and West Pty Ltd.,
2-6 Mentmore Ave.,
ROSEBERY

State that Clonmell Investments Pty Ltd for which company the writer is Governing Director,
have no objection to the development proposed in regard to 8 Wentworth Street.

Chatsworth House Pty Ltd.,
6 Chatsworth,
59 Wolseley Rd.,
POINT PIPER

1. The 8 storey residential flat building, standing as it would on possibly the highest ground, would dominate the neighbourhood and would seriously diminish the attractive and aesthetic appearance of Point Piper. 10
2. The whole development would considerably impair the quiet enjoyment of the area by local residents.
3. Traffic in Wentworth Street would be much increased and the noise level outside Chatsworth House, which faces the steep hill forming the Northern end of the street, could become obnoxious because of the acceleration required, particularly with heavy vehicles, when climbing the hill.
4. The general disruption caused by the additional traffic and noise during a lengthy period of construction would also interfere with the residents' quiet enjoyment of their properties. 20

Ms J. Taubman,
27 Wentworth St.,
POINT PIPER

It would appear that the building would have little visual merit. Its height would overshadow my simple one storey residence and reduce the light. The lack of service parking will mean a considerable increase of vehicles in Wentworth Street. One of the most unique and important qualities of my house is its privacy and with a seven storey building more than 200 ft. high overlooking the main rooms and garden, most of that privacy will be lost.

J. Abrahams,
P.O. Box 111,
DOUBLE BAY

This proposed building would detrimentally affect the enjoyment of the surroundings with little or no privacy in our apartment or gardens. The building of same, which would take approximately two years, would be detrimental to the health of myself and my wife. 30

Alfred Moss,
4A Wentworth St.,
POINT PIPER

I am sure the proposed development of high-rise flats would not be in the public interest but only in the interest of the developers.

Object strongly mainly to possible noises, smoke and all fumes from garbage disposal, shade and parking. 40

Dr. P. Rundle,
Runson Pty Ltd.,
Hengrove Hall,
193 Macquarie St.,
SYDNEY

We object to the introduction of such High Rise Development in this residential area and the environmental and destruction of the aesthetic appearance. Such development is not an urgent housing necessity for unhoused persons of this Municipality. Already the roadways here are taxed to capacity when the Ave Maria Retreat House is following religious occasions and other necessary activities of the calling.

10

If this approval is given one can foresee that the present position of residence in this area will be progressively eroded away and the loss to the City will be total and irretrievable.

Mr. R. J. Coshott,
47 Wolseley Rd.,
POINT PIPER

The proposed design of the building is out of character with the surrounding development and the local area. Further the site of the proposed development is entirely unsuited, both geographically and sociologically, for a development of the size, bulk and nature of that proposed.

The present proposal is at least, if not more, undesirable as the previous proposals placed before Council and thus should be refused on the same grounds.

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Mr. L. Plasto,
19/55 Wolseley Rd.,
POINT PIPER

Our view will be destroyed and high rise buildings will cause depreciation of my property. There will be additional traffic causing additional driving hazards. The swimming pool faces our bedroom and den and will disturb our peaceful occupancy due to noise from swimmers. It will also set a precedent for further high rise.

Planning and Environment Commission

A day or two after the lodging of the application on the 28/7/76, the proposal was submitted to the Planning and Environment Commission for their consideration. By letter dated 21/9/76 the Commission replied with the following:—

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“I refer to Council’s letter of 27th September, 1976 and previous correspondence concerning a development application for permission to construct a seven storey residential flat building on the subject site.

Pursuant to the provisions of Clause 59 of the Woollahra Planning Scheme Ordinance, the Commission concurs in the proposal.

By way of comment, because of the location of the site in respect of the transition between Residential 2(c) and Residential 2(a) zones, the Commission considers that:—

- (a) site landscaping will be of considerable importance in reducing the impact of the proposed development upon the immediate vicinity and in this respect Council should obtain more details of proposed landscaping in order to satisfy itself as to the extent of existing vegetation retained and whether the type and scale of supplementary landscaping will be appropriate to the proposed development.

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- (b) both car parking levels could be served by one external driveway only and consequently the proposed driveway area in the north west corner of the site might better serve as a landscaped recreation area."

Town Planning Comment

Statutory Constraints

As stated, the subject site is zoned Residential 2(c) and comes within the Harbour Foreshore Preservation Area under the Woollahra Planning Scheme Ordinance. Pursuant to Clause 44(5) of the above Ordinance, any development in this area must not exceed 235.5 feet above standard datum and pursuant to Clause 46, the plot ratio of the building must not exceed 1.15:1. The proposal complies in all respects with the above statutory constraints.

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Council's Residential Flat Building Code

The proposal complies in nearly all respects with Council's adopted code. The plot ratio, site coverage and hard standing area are all less than council's maximum requirement. Similarly the side boundary setback, minimum undisturbed landscaped area and total landscaped area, are all in excess of Council's minimum requirement. The car parking proposed, complies with Council's requirement for 39 spaces for residents and 8 spaces for visitors. However, all visitors spaces have been provided beneath the building, and consequently all resident garages would need to be provided with doors and the basement level No. 1 would need to be open at all times.

In addition the ramping system that is proposed is difficult to access as it is not shown on the northern elevation and details of its relative level in respect to Wentworth Street are not provided. With the exception of the latter, the proposal would appear to comply in all respects with Council's Residential Flat Building Code.

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Local Government Appeal Tribunal

When the Tribunal upheld Council's decision to refuse the previous Development Application D.A. 17/75, it laid down certain parameters for a future proposal. These included the following:— The board agreed with the Council's Consultant Town Planner Mr. Ingham that in this location and given the existing zoning, any development should not exceed a population density of 70-75 persons per acre. The Board envisaged a corresponding reduction in the bulk of any buildings to be erected on the site.

The Board agreed with Council that in the circumstances, the proposal constituted an overdevelopment of the site.

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The Board agreed that the proposal was out of character with the existing character of Wentworth Street.

Finally the Board considered that in the circumstances of the particular case and in the light of all that had been said previously, the Council was wrong in attempting to absolutely reject the logical consequences of zoning of the subject land which the Council itself had sought. As outlined previously, the Board considered that some Residential Flat Development of a reduced scale should be allowed. The Board further considered however, that in the circumstances of this case it was neither appropriate or desirable that the Board itself grant such an approval. It would appear that the proposal generally complies with most of the guideline previously laid down by the Tribunal.

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ENVIRONMENTAL IMPACT

The applicant has submitted an Environmental Impact Statement which give consideration to a number of factors which would be likely to affect the environment. Sections of this statement

will be included in the following paragraphs with suitable comments from Council's Town Planning Department.

Description of the Environment

"Point Piper is one of Sydney's more exclusive areas. Being a peninsular, it is free from the ill effects of through traffic. Being steep sided and surrounded on three sides by the harbour, it offers varied and very attractive views from almost any location.

The greatest problem lies in the north where, across Wentworth Street, there are single family residents and some low, some domestic scale flat buildings. The transition from the two storey houses and flats to a seven storey building is abrupt because within the existing controls on development of the site, it has proved impossible to create a transition in terms of building form."

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This situation is of some concern to the Town Planning Department. The buildings north of Wentworth Street are of a low scale and when viewed together, they provide an interesting streetscape of uniform character which helps to facilitate a pleasant environment in the area. The building as proposed would be a dramatic transition and it is felt that a reduction in the height of this building would certainly be desirable. To maintain the same plot ratio and reduce the height of building, the maximum permissible site coverage would need to be increased to possibly 30 to 35%. When the previous Development Application was considered by the Tribunal. Council argued that a desirable development would not exceed three or four storeys in height. However, the Tribunal, in its decision stated:—

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"Indeed some of the alternative forms of development canvassed before the Board as the limits of what should be approved, amounts to what would, in effect have followed if there were to be a rezoning of the subject land to Residential 2(b). For that reason the Board considers it opportune and necessary to state quite categorically that its determination on the appeal cannot be founded on a view that the zoning should be other than what it is. It is not the function of the Board to address itself to the correctness or otherwise of decisions regarding the contents of the scheme, which have been taken by other proper authorities."

It is the opinion of the Department that whilst it would be far more desirable to insist on a much lower building, there would be little chance, having regard to the above decision, of supporting this view before the Tribunal.

30

The Retreat House adjoining the proposed development, would, in the opinion of the Town Planning Department, be adversely affected by noise, loss of sun in the afternoon, and loss of privacy. This matter was previously considered by the Tribunal in relation to the previous Appeal. The findings of the Tribunal were as follows:—

"The Board does not accept that the protection of Ave Maria's presently enjoyed unique advantages should be a dominating consideration in the Board's agreement of the appeal. Given the fact that the land is now zoned Residential 2(c) it would be unreasonable and unrealistic to expect that the Retreat House and the convent could continue to enjoy without some compromise of the unique advantages they presently enjoy.

Environmental Safeguards

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"The proposed building has been designed to minimise adverse environmental effects and in accordance with the detailed controls established by the various authorities for development on this site. In general, it is the appearance of the building which will be of greatest environmental significance due to its prominent site, and careful consideration has been given to detailed design aspects.

Insofar as the appearance of the building from the harbour is concerned, for the most part it will be the bulk of the building rather than the details of the facade which will be visible due to the distance of the site from the harbour. Given that the design of the building produces a broken facade, there should be no large expanses of like material which might detract from the aspect of the building when viewed from the harbour. The view from the north, the harbour proper, is of the narrowest elevation of the proposed building.

One potential danger is that the western facade, which contains a large area of glass, will tend to reflect the afternoon sun. This wall will be of dark tinted glass and highly reflective finishes will be avoided. Horizontal louvred sun screens above window areas and protecting balconies will cast shadows over the glass further reducing reflectivity. 10

The one facade of the building which presents large, plain facades (of generally solid walls) is that on the eastern side, so designed as to reduce overlooking of the convent. From a distance, this elevation is largely screened only the top 6.5 metres of the building will protrude above the convent's ridge line. Given the broken plan form of the building, which will induce heavy shadow effects, and the distance between any observer and the building, it seems unlikely that the effect of the skyline when viewed from the south-east will be adverse."

It is the opinion of the Town Planning Department, that the facades of the building have been so designed to provide an apparent reduction in bulk and an interesting easterly elevation which is not normally an integral part of a building of this size. The Department's main concern is the overall length of the building and when viewed from the west it will have a dramatic effect on the existing skyline of Point Piper. Similarly, because of the large amount of small scale buildings north of Wentworth Street, the proposal when viewed from the north, even though it is a relatively narrow elevation, it will be very prominent on the Point Piper skyline. 20

Interaction With The Environment

The applicant has suggested that the potential Environmental factors which are relevant to this proposal are:—

- 1 Noise
 - 2 Traffic
 - 3 Turbulence (Wind)
 - 4 Overshadows
 - 5 Overlooking
 - 6 Visual Amenity
- 30

BUILDING & HEALTH COMMITTEE 25/10/76

1. Noise

“There should be no significant long term adverse effects in terms of noise. There will, however, be noise generated in the short term during the demolition, excavation and construction period.” The Department suggests that some noise is likely to be generated by the swimming pool which is in a very prominent position, and vehicles arriving and leaving the basement carpark.

2. Traffic

“Traffic generation effects of the development should, again, not be significant in the long run. There will be some short term uses for heavy trucks.”

Obviously there will be severe disturbances to the neighbours during the period of construction. Similarly in the long term with an increase in density to approximately 70 persons per acre, and provision for 48 vehicles on site, there would be a substantial increase in the traffic generated.

3. Turbulence

“The design of the building is such that air turbulence should be minimal both on the site and in the surrounding area.”

With the setbacks that have been provided from side boundaries there is little chance that air turbulence will occur.

4. Overshadowing

“Overshadowing will be substantial but mainly during early morning and late afternoon. The shape and siting of the building has been determined to reduce shadowing effects as much as possible.”

Obviously with a building of this size, there will be substantial effects to buildings to the south and west through the morning with buildings to the south-east and east affected in the afternoon. As stated above, early morning and late afternoon will create the greatest overshadowing particularly in winter when the shadow cast will be several hundred feet long.

5. Overviewing

“Overviewing is minimized by orientating most of the windows to the north, west and south in which directions landscaped grounds of the building and the surrounding streets act as buffers. The east facade facing the Convent Retreat House is mainly blank apart from kitchen windows.” This statement is generally true and the eastern elevation has been designed to reduce the loss of privacy to the retreat.

6. Visual Amenity

“Because of its prominent site, the visual impact of the proposed building assumes great importance. However, in relation to the surrounding development, the building will not be obtrusive in distant views. For closer views, the building has been carefully designed and sited to produce an interesting character and human scale. Existing mature trees and distinctive site features have been retained and will be supplemented by additional substantial landscaping such that the finished development will not detract from its surroundings.”

The Town Planning Department disagrees that the proposal will not be obtrusive from a distance. In fact it is felt that when the building is viewed from the north, west and south west it would be quite an obtrusive feature on the Point Piper skyline. The design could be said to be reasonable, however, it is totally incongruous to suggest that a seven storey residential flat building could possess human scale other than perhaps in its detailing.

SUMMARY

To summarize the various consideration relating to this application we have the following:—

CONSIDERATION

COMMENTARY

Statutory Constraints

Proposal Complies

Council's Residential Building Code

Proposal Complies in almost all respects.

Council's Parking Code

Proposal Complies

Local Government Appeals

Tribunal Guidelines

Proposal Conforms

Environmental Impact

— Noise

Generally small except for swimming pool

10

— Traffic

Substantially increased over present situation

— Air Turbulence

Little problem envisaged

— Overshadowing

Substantial particularly in winter

— Overviewing

Reasonably well controlled

— Visual Amenity

At the macro scale — no problem

At the micro scale a considerable impact

Resident Objections

A substantial number.

It would seem that while the proposed development complies in most respects with statutory constraints, Codes and the Tribunal's guidelines, certain problems can be perceived in relation to environmental impact.

20

In addition substantial resident objection has been received and at a purely local scale of planning much of this seems to be validly based.

The contention that this proposal would through its height have a dramatic visual impact upon the local environment cannot be denied. While the quantitative specification of physically detrimental impacts on the environment is extremely difficult, concern for this seems equally reasonable.

Certainly the proposal could not be considered as being in character with the existing development but then the zoning is not considered as permitting such a situation to be achieved in any case.

An architectural model, a shadow study including photographs and Environmental Impact Statement are available as separate items for perusal by Council.

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RECOMMENDATION

If Council decides to approve the application, it is recommended that the following recommendation should be adopted:

THAT the Council, as the responsible authority consent to D.A. 107/76 for the erection of a seven storey residential flat building at 8 Wentworth Street, Point Piper, subject to the following conditions:—

1. Submission to, and approval by, the Council of a formal Building Application, lodged in accordance with the provisions of Part XI of the Local Government Act, 1919, as amended, and Ordinances thereunder, prior to the commencement of any building works, including demolition or alterations.
2. A future Building Application providing for the redesign of the garbage shoot area allowing for a 20" diameter shoot opening into the foyer and for adjacent storage for bulky waste items on each level.

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Exhibits: Exhibit 1 Report and recommendations of Defendant
Building and Health Committee 25 October 1976

3. The building redesigned to provide vertical shafts for mechanical ventilation services distinct and separate from plumbing and other ducts.
4. A separate Building Application being lodged for all mechanically ventilated parking levels and all internal rooms.
5. A separate Building Application being lodged for the proposed compactor shoot system such to be of a design and type satisfactory to council.
6. The design and materials being used in the building being to the satisfaction of Council's Town Planning Department.
7. The building complying in all respects with Ordinance 70 to the satisfaction of Council.
8. A landscape plan being submitted and approved by Council prior to the approval of a Building Application and such landscape plan being at scale 1:100 and including large scale tree planting with the height, spread and common name indicated on the plan. 10
9. The height of the building to the upper most point not exceeding R.L. 71.3 metres.
10. The site coverage not exceeding 13.45%.
11. The plot ratio not exceeding .86:1.
12. All sound producing plant equipment, machinery or fittings associated with or forming part of a mechanical ventilating system being capable of complying with the Noise Criteria prescribed in Schedule C of the Council's ventilating code.
13. All compressors and similar equipment used on the site during demolition and/or construction having noise emission no greater than 75dB(A) when measured in accordance with the ISO 2151 Standard at a radius of seven (7) metres. 20
14. The noise emission from all plant associated with the installation not exceeding the ambient noise level at any time as measured at the boundary of the premises.
15. The use not commencing until such time as the requirements of and/or the conditions of this development consent have been carried out.

(Signed)

GARRY A. SHIELS
DEPUTY TOWN PLANNER

PETER ROLF JENSEN

M.Arch.(Lvpil),B.Arch.Hons(Adel)
Dip. T. & C.P. (Syd),ARAIA,MIRAPI
TOWN PLANNER

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CM: 1st Nov 1976

THAT the Council, as the responsible authority, grant consent to DA 107/76 for the erection of a seven storey residential flat building at 8 Wentworth Street, Point Piper, subject to the following conditions:—

1. Submission to, and approval by, the Council of a formal Building Application, lodged in accordance with the provisions of Part XI of the Local Government Act, 1919, as amended, and Ordinances thereunder, prior to the commencement of any building works, including demolition or alterations.
2. A future Building Application providing for the redesign of the garbage shoot area allowing for a 20" diameter shoot opening into the foyer and for adjacent storage for bulky waste items on each level. 10
3. The building being redesigned to provided vertical shafts for mechanical ventilation services distinct and separate from plumbing and other ducts.
4. A separate Building Application being lodged for all mechanically ventilated parking levels and all internal rooms.
5. A separate Building Application being lodged for the proposed compactor shoot system such to be of a design and type satisfactory to Council.
6. The design and materials being used in the building being to the satisfaction of Council's Town Planning Department.
7. The building complying in all respects with Ordinance 70 to the satisfaction of Council. 20
8. A landscape plan incorporating the retention of the existing developed trees being submitted and approved by Council prior to the approval of a Building Application and such landscape plan being at scale 1:100 and including large scale tree planting with the height, spread and common name indicated on the plan.
9. The height of the building to the upper most point not exceeding R.L. 71.3 metres.
10. The site coverage not exceeding 13.45%.
11. The plot ratio not exceeding .86:1.
12. All sound producing plant equipment, machinery or fittings associated with or forming part of a mechanical ventilating system being capable of complying with the Noise Criteria prescribed in Schedule C of the Council's ventilating code. 30
13. All compressors and similar equipment used on the site during demolition and/or construction having noise emission no greater than 75dB(A) when measured in accordance with the ISO 2151 Standard at a radius of seven (7) metres.
14. The noise emission from all plant associated with the installation not exceeding the ambient noise level at any time as measured at the boundary of the premises.
15. That provision be made in the proposal for the introduction of at least three mature evergreen trees (by transplantation) along the frontage to Wentworth Street. The height of such trees to be 8 m with a stem diameter of 200 mm, not less than 1 m above ground level when planted and the location and species to be to the satisfaction of Council.
16. The use not commencing until such time as the requirements of and/or the conditions of this development consent have been carried out. 40

CORAM: YELDHAM J.

28th July, 1978

DUNLOP v. THE COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

JUDGEMENT

HIS HONOUR: This is an action brought by Dr. Roger Dunlop, the owner of No. 8 Wentworth Street, Point Piper, against the Council of the Municipality of Woollahra arising out of certain resolutions of the defendant concerning the plaintiff's property passed on 10th June, 1974. It will later be necessary to examine in some detail the various causes of action upon which the plaintiff relies. The resolutions were the subject of a decision by Wootten J. in the Equity division of this court on 26th September, 1975, (the case being reported — (1975) 2 N.S.W. L.R.446) and I have derived much assistance from his Honour's judgment. It would appear that the evidence in the equity proceedings and that before me was substantially identical, although the issues are not the same. Wootten J. has set out in considerable detail the relevant facts, but it is necessary that I should briefly recite them in so far as they relate to the issues in the present matter. 10

The plaintiff has for many years resided at 10 Wentworth Street, Point Piper, in which property he has, with his sisters, an interest in remainder, his mother being the life tenant. In 1972 he purchased the adjoining property, No. 8, for the sum of \$500,000 the full amount of the purchase price being borrowed by him from the Bank of New South Wales at interest. This property he purchased so that he, with the owner of No.12 Wentworth Street, Mr. Howarth, and the trustee of No.10, might take steps to have the three parcels of land developed to maximum advantage. On 11th January, 1973, the plaintiff entered into a contract with Blackburn Developments No.25 Pty. Limited for the sale of No.8 Wentworth Street for \$670,000. One condition of that contract was that within twenty-one days the purchaser should lodge with the defendant council an application to develop it, together with Nos. 10 and 12, which it had also contracted to purchase (apparently upon similar terms) from the owners thereof, by erecting a building or buildings containing home units. Completion of the contract was said to be subject to the purchaser obtaining, on conditions acceptable to it, the defendant's consent to its development application. The parties agreed that if such an acceptable consent was not given or before 4th June, 1973, (a date which by a later deed was extended to 25th December, 1973.) either party might cancel the contract. 20 30

Therafter on 2nd February, Blackburn Developments No.25 Pty. Limited submitted a development application for the three properties to the defendant. Such application sought consent to the erection of a twin-tower type of building rising to a maximum height of 235.5 feet above standard datum, being eight storeys high and containing a total of thirty-eight units.

It should here be said that when the draft Town Planning Scheme for the Municipality of Woollahra was exhibited in 1968 the properties the subject of the development application were zoned Residential 2(a), the effect of which was to prohibit the erection in such zone of residential flat buildings, other than units of single-storey construction for aged persons.

However, the final scheme as promulgated and gazetted in December 1972 zoned the three subject properties as Residential 2(c). The effect of this was that residential flat buildings of any type could be erected with the consent of the responsible authority, which was the defendant. Clause 6 of the Ordinance provided, inter alia: 40

“(2) The Council shall, subject to this ordinance, be the responsible authority and shall be charged with the functions of carrying into effect and enforcing the provisions of this ordinance relating to any power, authority, duty or function . . . ”.

Clause 44(5) of the same Ordinance provided:

“(5) A building shall not be erected in that part of Zone No.2(c) which is within broken black lines on sheet 3 of the Scheme map to a height greater than 235.5 feet above standard datum”.

It was common ground that this provision applied to the land in question.

The development application was refused by the defendant on 10th September, 1973. In the same month it resolved to make application to the Minister for Local Government, through the State Planning Authority of New South Wales, for suspension of the provisions of the Planning Scheme under s.342Y of the Local Government Act, 1919 and to seek an Interim Development Order restricting development of the land to those purposes permissible in a Residential 2(b) Zone. In such a zone only flats containing not more than two units, and town houses were permissible. Thereafter such an application was made and it was refused by the Minister in November 1973. In the same month an appeal by Blackburn against the defendant's refusal to consent to the development application was begun and on 6th May, 1974, the Local Government Appeals Tribunal gave its judgment, dismissing the appeal. To the terms of such judgment it is necessary to make some reference. In the course of its reasons the Tribunal stated “quite categorically” that its determination of the appeal could not be founded on a view that the zoning should be other than what it in fact was. Both the present defendant and certain objectors who appeared had argued that the land should in reality be treated as though it were Residential 2(b), having regard to the zoning of surrounding areas. In fact, as the Board pointed out, Wentworth Street formed a boundary between Residential 2(c) and 2(a) zonings. Two matters in particular led the Tribunal to the conclusion that the appeal should be dismissed. The first was the character of the proposed development in relation to the character of the development on the adjoining land and in the locality. It said:

“The proposed development, designed to achieve at least the very highest intensity of land use possible under the provisions of the Scheme Ordinance, was clearly out of character with the development obtaining in the immediate locality of Wentworth Street, and the Board endorsed completely the submissions put to it that this character was totally different from that of development in Wolseley Road”.

The second matter was the size and shape on the parcel of land to which the application related. In this connection the Board said:

“ . . . the present proposal constituted gross overdevelopment of the site and . . . it would not, therefore, be in the public interest to grant consent to the application before the board . . . the particular site, although zoned Residential 2(c), is an integral part of Wentworth Street and it is the Board's view that the development should be reduced to serve as a buffer between that street and Wolseley Road”.

The Tribunal added that, without laying down precise parameters for an acceptable scale of development, it agreed that in the location in question and having regard to the existing zoning “any development should not exceed a population density of 70 to 75 persons to the acre. The Board envisages a corresponding reduction in the bulk of any buildings to be erected on the site”.

A submission that the development application should be refused also on the ground of the existing and future amenity of the neighbourhood was rejected.

Two further quotations from the reasons of the Tribunal should be made. The first is:

“... it was clear from the evidence that strict compliance with the provisions of the Code could produce a most unsatisfactory development. The Code is quite obviously not without faults and the Board agrees with the submission for the appellant that the erection of a three or four storey building of substantial bulk on the site could be more injurious to the locality than the erection of well designed tower buildings to the maximum permissible height”.

And finally:

“The Board considered that in all the circumstances of this particular case and in the light of all that has been said previously, the Council was essentially wrong in attempting to so absolutely reject the logical consequences of the zoning of the subject land which the council itself has sought. As outlined previously, the Board considered that some residential flat development of a reduce scale should be allowed. The Board further considered however that in the circumstances of this case it was neither appropriate nor desirable that the Board itself grant such an approval”.

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The plaintiff, whose evidence I accept, said that shortly after the appeal was dismissed he attended a meeting with the then Mayor of Woollahra and on 27th May he attended a meeting of the Town Planning Committee at which about eleven members of the entire Council of fifteen were present. On both of these occasions he emphasised that he was suffering from financial hardship by reason of interest charges which he had incurred and other payments which he was required to make in relation to the land he was seeking to develop. This he reiterated in a letter dated 3rd June, 1974, addressed to the Town Clerk, which was in these terms:

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“The owners of Nos. 8, 10 and 12 Wentworth Street, Point Piper will lodge at the earliest opportunity a Development Application appropriate to the 2(c) zoning of the area. The Development Application will be in accordance with the gazetted Town Plan and will follow a guideline laid down by the Appeals Tribunal. I am bringing it to Council's notice that these landowners have suffered harassment, difficulty and unpleasantness and in two instances severe financial hardship. I would ask Council to deal with this application as expeditiously as possible and with a minimum of delay”.

In the meantime, on 23rd May, 1974, Blackburn Developments No. 25 Pty. Limited rescinded the contract with the plaintiff and also those with the owners of the adjoining properties, pursuant to the right conferred upon it by such contracts. In about July of the same year the parent company of Blackburn Developments, according to evidence given by the plaintiff, “went to the wall”.

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Several reports by council's officers to the Town Planning Committee and also a letter from the defendant's solicitors to it were tendered. These I admitted subject to the objection of counsel for the defendant, but I have come to the conclusion that they are admissible as being relevant to some of the issues which I must ultimately determine. From them it appears that the defendant's solicitors, by letter dated 9th May, 1974, after reporting upon the result of the appeal, made several suggestions as to steps which the defendant might take if it desired to restrict development on the site. Such letter said, inter alia:

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“If Council does desire to restrict development on the site to that appropriate to a 2(b) Zone it is essential that representations to the Minister be made immediately with a view to having the subject land suspended from the provisions of the ordinance. Obviously if nothing is done and an amended application is received in the meantime which is generally in accordance with the views of the Tribunal expressed above it would be well nigh impossible to successfully resist an appeal from Council's decision refusing the application. No doubt also,

once an appeal is lodged the Minister would not interfere by suspending the land from the Ordinance. At the same time Council may consider exercising its powers under s.309(4) of the Local Government Act by regulating the number of storeys which may be contained in any residential flat building sought to be erected on the site. We feel that again it is obviously desirable that any action in this regard should be taken immediately. Any action under the section must be based on strong planning grounds in order to avoid any possible inference that Council acted male fide and must not be taken simply to defeat any possible appeal. The Council should be aware that the Tribunal has adopted the view that it has the power to vary a resolution made under the section . . . hence Council must have strong planning evidence to ground a resolution under the section. On appeal, council must be able to show that the exercise of the power was bona fide and not colourable or designed merely to thwart an appeal. Accordingly we would recommend that if Council desires to exercise its powers under the section it do so immediately".

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This letter was attached to a report to the Town Planning Committee of 27th May, 1974, by the Deputy Town Clerk. At a meeting of that committee on the same date the plaintiff and Mr. Howarth were heard and the committee had before it a report from Miss Harvey Sutton, its principal planning officer, in which she expressed the view that a maximum plot ratio of .6:1 was desirable or, if the defendant felt that a slightly denser development should be permitted, then a plot ratio of .7:1 for either stepped development or a combination small tower and stepped development. At its meeting the committee resolved to recommend that Council rescind its resolution of 24th September, 1973, asking the Minister to suspend the provisions of the scheme and it resolved also that a report should be submitted to its next meeting upon the possibility of regulating the number of storeys of any residential flat building under s.309(4) of the Local Government Act. That section is in these terms:

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“(4) The Council may regulate the number of storeys which may be contained in a residential flat building: provided that not more than three storeys shall be contained in a residential flat building of either class A or class B”.

These classes of residential flat buildings, for which provision is made by s.309(3), are defined in Schedule 7 to the Act.

Miss Harvey Sutton reported again to the Town Planning Committee on 10th June, 1974. She referred to the provisions of s.309(4) and to Council's own planning scheme and said:

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“I am of the opinion particularly in the light of the provisions of clause 33 . . . the Council may regulate the bulk of any future development on the subject properties and in the zone generally to below the maximum limits of floor space and height specified in the Woollahra Planning Scheme Ordinance”.

After discussion of the views of the Appeal Tribunal she recommended:

- “A. That Council under the provisions of s.309(4) of the Local Government Act 1919 regulate that any residential flat building erected on properties Nos. 8, 10 and 12 Wentworth Street, Point Piper or any one or combination of them contain no more than three storeys.
- B. That Council, under the provisions of s.308 of the Local Government Act, 1919 fix a building line relating to properties Nos. 8, 10 and 12 Wentworth Street, Point Piper as marked on the accompanying plan.
- C. That the owners of the subject properties be advised of Council's resolutions in A and B above.

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AND FURTHER THAT they be advised that Council would consider permitting a greater site coverage than that allowed in its adopted relevant code, together with a plot ratio of up to 0.7:1, twenty-four being the maximum number of dwelling units, all being subject to

a high standard of design, including a satisfactory landscaped area facing Wentworth Street and provision of an average set-back of 30' to the rear boundary to permit retention of existing trees and privacy of adjoining residents".

At that meeting also the Town Planning Committee had before it not only the letter of the plaintiff of 3rd June to which I have referred but also letters from adjacent residents opposing the type of development which the plaintiff was seeking.

Upon the recommendation of the Town Planning Committee the defendant, at its meeting held also on 10th June, 1974, passed the following resolutions, the validity of two of which was the subject of the proceedings before Wootten J., and the passing of which was the reason for the present proceedings. Those resolutions were as follows:

“(B) THAT the resolution of the Council of 24th September 1973 which was in the following terms:—

‘In respect of property 8-12 Wentworth Street, Point Piper, the Council make application to the Minister for Local Government, through the State Planning Authority of New South Wales, for suspension of the provisions of the Woollahra Planning Scheme under Section 342Y of the Local Government Act, 1919, as amended, and to seek an Interim Development Order restricting development within the subject land, viz: 8-12 Wentworth Street, Point Piper, to those purposes as stated within the Ordinance, and in particular to Clause 23 (Land Use Tables) for Residential 2(b) Zones.’

be and is hereby rescinded.

(C) 1. That the Council, under the provisions of Section 309(4) of the local Government Act 1919 regulate the number of storeys in any residential flat buildings erected on properties Nos. 8, 10 and 12 Wentworth Street, Point Piper, or any one or combination of storeys at no more than three.

2. That the Council, under the provisions of Section 308 of the Local Government Act, 1919, fix a building line relating to properties No. 8, 10 and 12 Wentworth Street, Point Piper, in accordance with the plan accompanying the Town Planning Committee report of 10th June 1974 and providing for set-backs from Wentworth Street ranging from 60' along the eastern boundary of property No. 8, to 45' between properties 8 and 10, to 35' between properties 10 and 12, and 35' to the western boundary of No. 12.

3. That the owners of the subject properties be advised of the Council's decision in 1 and 2 above and they be informed the Council would consider permitting a greater site coverage than that allowed in its adopted relevant code and roof terraces being accepted as open space for site coverage calculations (both to be at the discretion of the Council); and with a plot ratio of up to 0.9:1; 24 being the maximum number of dwelling units, all being subject to a high standard of design, including a satisfactory landscaped area facing Wentworth Street and provision of an average set-back of 30' to the rear boundary to permit retention of existing trees and privacy of adjoining residents.”

Section 308 of the Local Government Act empowers a Council, subject to any Ordinances, to fix building lines.

In May or June the plaintiff had engaged Mr. Phillips, an architect, to confer with officers of the defendant and to prepare plans in an endeavour to satisfy the Council's requirements. Sketch plans were drawn for town houses on No. 8 Wentworth Street and also for a three-storey development, but the plaintiff was advised that any building in accordance with such sketch plans would be totally unsuitable and uneconomic and hence he did not proceed with them.

On 25th November, 1974, Mr. Phillips made application to the defendant on behalf of the plaintiff for development approval in respect of plans which he had drawn for a building of eight

storeys, containing two residential flats on each floor, such building to be of a height of 235.5 feet above standard datum, which was the maximum permissible under clause 44(5) of the Planning Scheme Ordinance. These plans and the application clearly did not comply with the restrictions which the defendant had purported to impose in respect of the land by its resolutions of 10th June. On 2nd January, 1975, the defendant, in accordance with its obligations, referred the application to the State Planning Authority. Despite a number of letters seeking prompt consideration of the matter, which the Council wrote to the Authority, it was not until 4th July, 1975, that the latter (then re-named the Planning and Environment Commission) wrote to the defendant indicating, pursuant to clause 59 of the Ordinance, its occurrence in the proposed development, subject to certain comments which it made, one of which was that there should be a suitable reduction in scale of the building to help reduce any undesirable impact of it upon the immediate environment, whilst allowing the landscape to be improved. 10

On 7th July, 1975, the Building and Health Committee of the Council concluded:

“. . . that the proposal constitutes an overdevelopment of the site, and it is felt that it would not be in keeping with the topography of the area or the surrounding development. It has also been shown that the proposal does not comply with the Council's Residential Flat Building Code and apparently does not comply with the guide lines as set down by the Local Government Appeals Tribunal when considering the previous application. In addition the proposal does not comply with Council's resolution of the 10.6.74 in regard to height of building, boundary set backs and the character of the development". 20

By letter dated 15th July, 1975, Mr. Phillips was informed that Council had refused the Development Application for reasons which were set out in twelve numbered paragraphs. Number six read:

"The proposal does not comply with Council's policy for redevelopment of the subject site which was adopted on 10.6.74".

That Development Application was described by the plaintiff as one which "was put in rapidly and put in quickly on the advice of my Counsel . . . and it was a development application . . . which because of various contingencies did not have a lot of time spent on it". The plaintiff clearly indicated in evidence that it was not a satisfactory plan and he did not appeal against refusal of it. Nor did he further employ it Mr. Phillips in relation to the development which he desired but thereafter engaged a firm of architects and town planners, Byrnes Smith and Associates, to act on his behalf. 30

Following upon the defendant's resolutions of 10th June, 1974, the plaintiff instituted the proceedings which later came before Wootten J. in the Equity Division, the actual hearing of which began on 28th July, 1975, judgment being given on 26th September. In those proceedings he sought declarations that the resolutions relating to the height of buildings and the building line were invalid. Wootten J., for reasons which appear in the report of his decision, held that the defendant had not given to the plaintiff any notice with respect to its proposed action under s.308(1) (the fixing of a building line) and that hence such resolution was invalid because its exercise was vitiated by lack of fairness towards the plaintiff. So far as the resolution restricting the number of storeys pursuant to s.309(4) was concerned, his Honour held that it was invalid because it was in conflict with the maximum height permitted by clause 44(5) of the Ordinance. This result followed from clause 73(1) of the latter, which was in these terms: 40

"(1) The operation of s.309 of the Act and of the Proclamations made thereunder declaring residential districts are hereby suspended to the extent to which such section and such proclamations are inconsistent with any of the provisions of this Ordinance or with any consent given thereunder".

Shortly after the decision of Wootten J. had been given the plaintiff, with Mr. Phillips, saw the mayor, another alderman and the Town Clerk for the purpose of ascertaining what type of building would be permitted. Thereafter Mr. Phillips had further conversations with employees of the defendant but these apparently did not enable him to prepare any acceptable plans. In November 1975 negotiations began between the plaintiff and a company called Mirvac Pty. Limited but those were terminated late in March 1976.

On 27th July, 1976, Byrnes Smith and Associates Pty. Limited lodged yet another development application on behalf of the plaintiff in relation to 8 Wentworth Street, such application being for a seven-storey residential flat building containing twenty flats with a plot ratio of .86:1. In relation to the plans the subject of that application the plaintiff gave evidence as follows:

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“Q. You would agree that the plans that were the subject of that application were a very considerable improvement on the previous plans prepared by Mr. Phillips? As you indicated before lunch, in something of a hurry? A. That would be a reasonable statement.

Q. The building was one storey shorter than the earlier proposal? A. Yes.

Q. The plans were much more detailed? A. Yes.

Q. And it showed a building, the facade of which was broken up by use of various projections to allow shadow and remove the monolithic appearance of the wall? A. That would be correct.

Q. And that would be due to the fact much more time was available and it was a better design than earlier? A. Yes.

In due course, after obtaining the concurrence of the Planning and Environment Commission, the defendant approved the development application on conditions which are set out in the defendant's letter to the plaintiff's then solicitors of 14th December, 1976, to the terms of which it is not necessary to refer.

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Thereafter, the plaintiff submitted the property to auction in February 1977 but no purchaser was found. Later he entered into negotiations for the sale of the land with various persons and ultimately on 18th August, 1977, a contract to sell it was signed with Berbella Pty. Limited, the price being \$450,000.

In the present proceedings the plaintiff claims damages for losses which he alleges he suffered in consequence of the resolutions of the defendant passed on 10th June, 1974, which resolutions were held by Wootten J. to be invalid. He alleges that such damage was suffered by him between the date of the resolutions and 25th October, 1975, the latter being the last day upon which the defendant might have appealed against the decision of Wootten J. given on 26th September, 1975. His claim comprises the sum of \$112,431 being the amount which he incurred for interest and for charges in relation to the discounting and acceptance of a line of bills of exchange, by means of which the plaintiff obtained overdraft accommodation from his bank; costs and disbursements of the proceedings before Wootten J. totalling \$10,512 (in relation to which senior counsel for the plaintiff gave an undertaking that if the plaintiff succeeded in the present proceedings and if the amount of such costs was included in his judgment, he would not seek to exercise any right to tax costs against the defendant pursuant to the order made by Wootten J.); land tax in respect of the relevant period amounting to \$14,635; municipal rates of \$671 and water rates of \$400; architect's fees for Mr. Phillips amounting to \$750; and interest upon each of the foregoing pursuant to s.94 of the Supreme Court Act, 1970. It was conceded on behalf of the plaintiff that a sum of about \$7,500 should be deducted from any damages which he recovered, this representing rental received by him from the property during the relevant period.

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The plaintiff's case was put in three different ways. The first cause of action relied upon was that set out in the amended statement of claim in this way:

“7A. At all material times prior to and after 10th June, 1974 it was the intention of the plaintiff to proceed with the development of the said premises by lodging further development plans in accordance with the parameters laid down by the Local Government Appeals Tribunal.

8. On 10th June 1974 the defendant being aware of the plaintiff's intention referred to in paragraph 7A above considered the future development of premises 8-12 Wentworth Street, Point Piper.

9. On 10th June 1974 the defendant unlawfully and intentionally passed certain resolutions in respect of the premises 8-12 Wentworth Street Point Piper and each of them which purported to have the effect of limiting the number of storeys of buildings on the said land to three and also purported to fix certain boundary set-backs in respect of buildings to be erected on the said land. 10

10. The said resolutions were passed by the defendant for the mala-fide and ulterior purpose of preventing development on premises 8-12 Wentworth Street in accordance with the parameters laid down by the Local Government Appeals Tribunal from dealing with any further application and appeal in accordance with the prescribed Woollahra Planning Scheme Ordinance and also to prevent development on any of the said premises for purposes permissible under the prescribed Woollahra Planning Scheme Ordinance.

11. The resolution as to the number of storeys on the land was contrary to the Council's prescribed planning scheme ordinance. 20

12. The resolution as to the boundary set-backs was unlawful being in breach of the defendant's duty to act fairly as required by the Local Government Act.

13. The plaintiff suffered loss as the inevitable consequence of the unlawful intentional and positive acts of the defendant referred to in and about the passing of the said resolutions in that inter alia he was delayed in putting his land to its highest and best economic use and also had to pay interest, expenses, and legal costs until such time as the unlawful resolutions referred to above were set aside by the Supreme Court.”

These paragraphs were based upon a cause of action to which reference was made by the High Court of Australia in Beaudesert Shire Council v. Smith & Ors., 120 C.L.R. 145 at 155-6 in these terms: 30

“There is, therefore, a solid body of authority which protects one person's lawful activities from the deliberate, unlawful and positive acts of another. It is not, however, possible to adopt a principle wide enough to afford protection in all circumstances of loss to one person flowing from a breach of the law by another, for regard must be had to the limitations which the law has placed upon the right of a person injured by reason of another's breach of a statutory duty to recover damages for his injury. Bearing this in mind, it appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other. It may be that a wider proposition could be justified, but the proposition we have stated covers this case and leads us to the conclusion that the appellant is liable to the respondents for loss occasioned by its unlawful trespass in removing gravel from the river-bed”. 40

In relation to the foregoing Mason J. observed in Kitano v. The Commonwealth of Australia 129 C.L.R. 151 at 174:

“neither the decision nor the principle as it was expressed turns on the existence of an

intention on the part of the defendant to cause harm to the plaintiff. It is enough to found liability, provided that the other elements are present, that the act is intentional and its inevitable consequence is to cause loss to the plaintiff".

The decision of Mason J. was expressly approved on appeal by McTiernan, Menzies, Gibbs and Stephen JJ.

Mr. Hughes, senior counsel for the plaintiff, submitted that both resolutions passed by the defendant on 10th June, 1974, constituted a restriction upon the rights of the plaintiff as owner of the land which, as Wootten J. had observed (ante) at pp.475-6, amounted to a significant diminution in the benefits the plaintiff derived from being a landholder, which no amount of conceptual analysis could alter. But for such restrictions, so it was argued, the plaintiff would have been entitled, during the whole of the time that the resolutions were regarded as valid and enforceable and were acted upon by the defendant, to make a development application proposing the erection of a residential flat building complying with the less stringent height restrictions contained in the Planning Scheme Ordinance. Mr. Hughes argued that the plaintiff, as owner of the relevant property, had a legal right to insist that any proposal to develop his land should not be vitiated or frustrated by any invalid resolution passed without statutory or any other justification. Such a right, so he submitted, was violated by the Council by each resolution. 10

From the passage cited above from Beaudesert Shire Council v. Smith & Ors. it appears that the High Court concluded that the authorities justify the view that a person who suffers harm or loss as the inevitable consequence of the unlawful intentional and positive acts of another is entitled to recover damages. The principle is said to be restricted by the regard which must be had to the limitations which the law has placed upon the right of a person injured by reason of another's breach of statutory duty to recover damages for his injury. The decision itself is criticised by two academics, Messrs. Dworkin and Harari in articles published in 40 A.L.J. 296 and 347 and in Fleming. The Law of Torts (5th ed.) at p.689. Mr. Wilcox, senior counsel for the defendant, formally submitted before me that the decision was erroneous. However, as he himself recognised, it is binding upon me and the first question for my determination is whether the plaintiff has shown that all the ingredients said by the High Court to be required to entitle the plaintiff to damages have been established. 20

The first question for consideration is whether the acts of the Council in passing the two resolutions on 10th June, 1974, which acts were plainly intentional and positive, were also unlawful. If they were, and if the plaintiff's harm or loss was the inevitable consequence of them, then it would appear from the statement of principle by the High Court that the plaintiff would be entitled to recover. In Hull v. Canterbury Municipal Council, (1974) 1 N.S.W.L.R. 300 at 311 Nagle J., in obiter dictum referring to the Beaudesert decision, said that the evidence before him did not establish that the defendant deliberately intended to harm the plaintiffs. So also Mason J. in Kitano v. The Commonwealth (ante), notwithstanding his Honour's statement that the principle as expressed did not turn on the existence of an intention by the defendant to cause harm to the plaintiff, did conclude that the plaintiff there had not succeeded in showing that the act was tortious (and not merely a contravention of the statute), that its inevitable consequence was to cause damage to the plaintiff, or that there was an intention to cause harm to the plaintiff. 30 40

In support of a submission that the passing of the resolutions, or either of them, constituted an unlawful act on the part of the defendant, Mr. Hughes argued that the effect of clause 73 of the Ordinance, the terms of which have earlier been set out, was to repeal s.309(4) as a source of

power for the Council to regulate the height of residential flat buildings and that its reliance upon that subsection was, in the light of such repeal, unlawful in the sense that the resolution lacked any statutory justification. He argued that clause 73 was tantamount to a statutory command to the Council not to invoke the provisions of the subsection. "Unlawful", in the context in which it appears in the principle referred to by the High Court meant, so he argued, either "contrary to law" or "lacking a lawful justification". He argued that as the Council is a statutory corporation and may lawfully do only that which it is permitted by the charter, if it does something not so permitted, or which is prohibited, then it acts without lawful authority and consequently in an unlawful manner. So also in relation to the building line, which he submitted was unlawful because it lacked legal validity. In support of these submissions Mr. Hughes referred to Mogul Steamship Company Limited v. McGregor, Gow & Co. (1892) A.C. 25 at 39; Riche v. The Ashbury Railway Carriage and Iron Co. Ltd., (1874) L.R. 9 Ex. 224 at 262 (where Blackburn J. said that if this intention of the Legislature is that a corporation shall not enter into a particular contract, every court is bound to treat such a contract entered into contrary to that enactment as illegal and therefore wholly void) and Corbett v. South Eastern and Chatham Railway Companies' Managing Committee, (1906) 2 Ch. 12 at 19-20 (where Riche's case is referred to and applied).

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Mr. Wilcox argued that there was a distinction between the concept of illegality or unlawfulness on the one hand and invalidity on the other. He submitted that the resolutions in question were, as Wootten J. decided, invalid or, in the words of the declaration made in the case, "null and void". He argued that they were not, nor was either of them, forbidden by law because they were not in contravention of any statutory or common law prohibition and that it is only acts which are so forbidden by law to which the principle referred to in Beaudesert Shire Council v. Smith relates.

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That the High Court was, in using the expression "unlawful" referring to something "forbidden by law", in my opinion emerges from a passage at p.152 of the report where it is said that "liability must depend upon the broad principle that the Council intentionally did some positive act forbidden by law, which inevitably caused damage to Smith . . ." and also from the citation on p.155 from Keeble v. Hickeringill and the reference to Mogul Steamship Company v. McGregor, Gow & Co. (ante). In the latter case Bowen L.J. in the Court of Appeal (whose decision was upheld by the House of Lords — (1892) A.C. 25) said (23 Q.B.D. 598 at 619):

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"Lastly, we are asked to hold the defendant's Conference or Association illegal, as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contract; it merely declines, after they have been made, to recognize their validity".

See also per Bowen L.J. at p.614 and per Fry L.J. at p.626. In the House of Lords, in the same case, Lord Halsbury L.C., at p.39, spoke of the more accurate use of the word "unlawful" as being "contrary to law".

In Haigh v. The Town Council of Sheffield, (1874) 10 L.R.O.B. 102 at 109 Lush J., in discussing betting and wagering, referred to a statute "by which ordinary betting was treated as a thing of neutral character, not to be encouraged, but on the other hand, not to be absolutely forbidden; and it left an ordinary bet a mere debt of honour, depriving it of all legal obligation, but not making it illegal". This passage was applied by A.L. Smith L.J. in Strachan v. The Universal Stock Exchange Ltd. (No. 2) 2 Q.B. 697 at 704-5 where his Lordship said that a section there under consideration "does not make the agreement illegal, but renders it void".

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In my opinion the proper conclusion is, as Mr. Wilcox submitted, that something which is not authorised by statute is invalid, but it is not unlawful unless made so expressly or by necessary implication — see Salemi v. Minister for Immigration and Ethnic Affairs, 51 A.L.J.R. 538 at 540; and Brooks v. Burns Phillip Trustee Co. Ltd. 121 C.L.R. 432 at 458-9. In Osborne's Concise Law Dictionary "illegal" is defined, inter alia, as "an act which the law directly forbids . . . but an act is not illegal in the strict sense simply because it is not recognised by the law as capable of giving rise to rights. Thus a contract made ultra vires is void, but not illegal . . .". In the same work "void" is defined as "of no legal effect; a nullity". See also the same words as defined in the Dictionary of English Law, by Earl Jowitt.

I have come to the conclusion in the present case that the resolutions were merely devoid of legal effect. That which was passed under s.308 (fixing the building line) was ineffectual because, as Wootten J. found, the defendant had failed to act in accordance with the principles of fairness. So far as the resolution under s.309(4) (regulation of height) was concerned, the power which the defendant would otherwise have had under that subsection was suspended because of inconsistency with the Ordinance during its operation. There was no statutory or other prohibition upon the defendant forbidding it from passing either resolution, but each was ultra vires in the circumstances. In coming to this conclusion I obtain some support from the view of McNerney J. in Grand Central Car Park Pty. Ltd. v. Tivoli Freeholders, V.R. 62 at 74. In Kitano's case (ante) the issue of the certificate of clearance by the Customs authorities was unlawful because it contravened s.122 of the Customs Act.

Hence I conclude that the plaintiff has failed to show that either resolution was unlawful in the sense required by Beaudesert Shire Council v. Smith or by the cases to which the High Court there referred. In these circumstances it is not necessary to consider the difficult question of whether any damage which the plaintiff suffered was the inevitable consequence of them. I reject the plaintiff's claim in so far as it depends upon the action on the case referred to in Beaudesert Shire Council v. Smith.

I turn now to the second way in which his case is put. This was embodied in par. 15A of the statement of claim, which I permitted to be inserted by amendment during the course of the hearing, and it was in these terms:

"15A. Further, in the alternative, the defendant was a public corporate body which occupied a public office and was incorporated by a public statute and which had power to and did exact revenue from rate-payers in its area under the Local Government Act to enable it to perform its public duties and the defendant abused its said office and public duty under the said Statute by purporting to pass each of the said resolutions with the consequence that damage was occasioned to the plaintiff.

PARTICULARS

The defendant was a public body incorporated under the Local Government Act 1919. It had the public duty to administer the Local Government Act within its area (sec. 84) and to administer the Woollahra Planning Scheme Ordinance. See Clause 6(2); Clause 44(5) and Clause 73. The council abused its office and public duty by passing each of the invalid resolutions on 10 June 1974. Each of the said resolutions was beyond the defendant's power and/or unlawful."

Mr. Hughes submitted that an action on the case would lie against a public official or body for misfeasance in office, which action, he argued, does not depend upon proof of malice. Here, he claimed, the misfeasance consisted in the passing and continued reliance upon the invalid

resolutions, in each case under colour of office. He referred to Halsbury, Laws of England, 3rd ed., vol. 30 at par. 1346 where it is said:

“Where a public officer commits a breach of his official duty, and thereby causes injury to any person, he is liable to an action for damages, if the breach complained of amounts to misfeasance . . .”.

He relied also upon a decision of the English Court of Appeal in Wood v. Blair & Anor (unreported 4.7.57) in which the existence of such a cause of action, there being no malice, was assumed, the Court of Appeal being concerned only with questions of damages. There the plaintiff suffered financial loss as a result of compliance with an order made by a local authority in purported compliance with a statutory regulation, which in law was a nullity because conditions essential to its validity had not been fulfilled. Bell Bros. Pty. Limited v. Shire of Serpentine—Jarrahdale 121 C.L.R. 137 upon which Mr. Hughes relied, (especially at p.147) does not, in my view, advance his argument because the question there was whether or not the plaintiff could recover fees charged by a council and exacted by it under colour of its office pursuant to a by-law which was invalid. I do not find in the judgments any assistance in relation to an action upon the case in circumstances such as the present. 10

In support of his submission that a claim for damages for misfeasance in a public office does not depend upon proof of malice Mr. Hughes relied upon Brasyer v. MacLean L.R., 6 P.C. 398, a decision of the Judicial Committees of the Privy Council. That was an action against the sheriff and it was held that he was liable, without proof of malice or want of probable cause, in an action for damage suffered by the plaintiff for a false return of rescue made by him upon a writ of *capias ad respondendum*. Such return rendered the plaintiff liable to attachment for a contempt of court without being allowed to show that the facts returned were untrue, and it constituted a misfeasance by a public ministerial officer in the discharge of his duties. However, it appears from the facts, especially those set out in the report of the hearing before the Supreme Court (12 S.C.R. 206), that the two bailiffs, for whose actions the sheriff was held to be vicariously liable, were at all times aware that the plaintiff had not endeavoured to rescue the man against whom the writ of care had been issued and that the statement to the contrary by the sheriff was in consequence a false statement, even though not false to his personal knowledge. In the judgment of their Lordships. at pp.405-6, it is said: 20

“This is a case of a misfeasance by a public ministerial officer in the discharge of his duties. The sheriff was intrusted with the power of making a return to the Court which would be considered conclusive by the Court as to the truth of the facts stated in the return. He was enabled, therefore, by virtue of his office. to make a return to the Court in this particular instance, which was conclusive . . . that the plaintiff did rescue Wylie from his custody . . . It appears, therefore, to their Lordships that the sheriff in the case was guilty of a misfeasance in the exercise of the powers which were entrusted to him by law and in the discharge of his duty as a public ministerial officer and that in respect of that misfeasance he is liable to an action, for the damage which resulted in that act, notwithstanding it was not proved against him that he was actuated by a malicious motive. The mere fact of the misfeasance and the damage resulting from it by reason of the attachment issuing upon the return as conclusive evidence against the plaintiff was sufficient damage to enable the plaintiff to maintain an action against the sheriff for that misfeasance and to recover the damage which he has sustained in consequence of it”. 30 40

In Farrington v. Thomson & Anor., [1959] V.R.286 Smith J. had occasion to consider the nature of the tort of misfeasance in a public office. His Honour, at p.293, dealt with the matter in this way:

“That an action on the case lay for such a misfeasance was established at a relatively early period. In Comyns' Digest, titled 'Action on the Case for Misfeasance (A1)', there is the statement: 'an action on the case lies for misfeasance; as, if an officer misdemean himself by any falsity . . . or otherwise misbehave himself in this office'. In the same work, tit. 'Action on the Case for a Deceit (A6)', it is stated that such an action will be 'if an officer, being entrusted by the law, act deceptive in his office'. In Bacon's Abridgment, 'Office and Officers (N)', it is said that all officers, whether such by the common law or made pursuant to statute, are punishable for oppressive proceedings by an action at the suit of the party injured. Then is Whitelegg v. Richards (1823), 2B. & C. 45 at p.52, it is stated that an action on the case may be maintained against any officer of a court 'for a falsity or misconduct in his office, whereby a party sustains a special damage'. In Henly v. Mayor & Burgesses of Lyme (1828), 5 Bing. 91, at pp. 107-8, it is laid down by Best, C.J., as perfectly clear law that 'if a public officer abuses his office, any individual is entitled to redress in a civil action' against the public officer. It was pointed out in Fitzgerald v. Boyle (1861) 1 Q.S.C.R. 19, that this language should not be treated as applying to acts done in the exercise of judicial functions, but subject to this limitation the law as stated by Best, C.J., was there approved. See also Halsbury, 2nd ed., vol.26, section 579; Chaster, Public Officers, at p.631.

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Some of the authorities seem to assume that in order to establish a cause of action for misfeasance in a public office it is, or may be, necessary to show that the officer acted maliciously, in the sense of having an intention to injure: compare Acland v. Buller (1848), 1 Exch. 837; 1 Rolle's Abr. p.93; Drewe v. Coulton (1787), 1 East 563 (n). It appears to me, however, that this is not so and that it is sufficient to show that he acted with knowledge that what he did was an abuse of his office: see the other authorities previously cited, and see too, Smith v. East Elloe R.D.C., (1956) A.C. 736, at p.752; 1 All E.R. 855. Indeed, in some cases at least, even this is unnecessary, and it is sufficient that the act was a breach of his official duty, even though it is not shown either that he realised this or that he acted maliciously: compare Bresyer v. Maclean (1875), L.R. 6 P.C. 398, at p.406. Proof of damage is, of course, necessary in addition.”

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In that case, although it was conceded that the defendant police officers had acted in good faith in asserting that the plaintiff's licence had been forfeited, nonetheless the jury held that they had not acted honestly in intended execution of the provisions of the Licensing Acts in so far as they conceded that they knew there was no power to use force or to give binding orders to the plaintiff, and hence in that respect the latter relied upon an allegation of mala fides.

His honour found some support for the contention of the plaintiff from the decision of Wood v. Blair & Anon. (ante); see also, as to that case, per Beattie J. in Takaro Properties Limited & Anon. v. Rowling, (1976) 2 N.Z.L.R. 657 at 670. In the latter case Beattie J. held that a Minister of the Crown was under no liability for giving an administrative decision in good faith, which decision is later pronounced to be void as a matter of administrative law, unless a tort which is independent of that invalidity is committed. His Honour cited with approval from a decision of the Court of Appeal in Campbell v. Ramsay, 78 S.R. 327, where Wallace P. and Holmes J.A. were inclined (obiter) to the view that a malicious refusal or neglect to grant a licence permitting a specific activity may found a cause of action.

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In Tampion v. Anderson, (1973) V.R. 715 the Full Court of Victoria, in a judgment delivered by Smith J. said, at p.720:

“Little attention has in modern times been directed to the tort of malfeasance in a public office, but interest in it has recently been received by reason of concern regarding the inadequacy of the remedies usually resorted to by the citizen injuriously effected by administrative action . . . The precise limits of the tort have yet to be defined but certain things are clear. Employment with the Crown is not necessarily a public officer for this purpose.

The office must be one the holder of which owes duties to members of the public as to how the office shall be exercised. The action has been held to lie in respect of an act done in purported exercise of statutory or common law powers incident to such an office where those powers are knowingly exceeded; cf. Farrington v. Thomson and Bridgland . . . and authorities there cited. But to be able to sustain an action upon this basis a plaintiff plainly must not only show damage from the abuse; he must also show that he was the member of the public, or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of”.

Mr. Hughes relied also upon Henly v. The Mayor of Lyme, (1828) 5 Bing. 91 (130 E.R. 995) where, at p.107, Best C.J. in his judgement (described by Lord Denning M.R. in Ministry of Housing and Local Government v. Sharpe & Anon. (1970) 2 Q.B. 223 at 226 as “celebrated”) said:

“It is next insisted, the Crown probably might have a right to complain, but that an individual cannot maintain an action for any injury he has sustained from the Corporation of Lyme not having fulfilled the trusts which the Crown reposed in them at the time of granting this borough; or, rather, not having executed the duty which was the consideration of the grant. Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of emission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them. Then, what constitutes a public officer? In my opinion, everyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer”.

And after considering a number of specific examples his Lordship continued:

“It seems to me that all those cases established the principle, that if a man takes a reward . . . for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action”.

In Chaser, The Powers Duties and Liabilities of Executive Officers, (5th ed.), at pp.169-170 the rule is said to be:

“Whenever the law confers upon an officer a power to do a certain act by an obligatory as distinguished from an enabling enactment, there is then a corresponding duty in the officer to perform the act required, in which if he failed, he will be liable to an action at the suit of the person who has sustained damage by reason of his default. On the other hand, if the duty is optional or discretionary, no such liability (in the absence of malice) exists”.

See generally also Kiralfy: The action on the case (1951) pp. 9-16.

I am prepared to assume that, because the defendant was a body corporate which received rate revenue from ratepayers, and because it had public duties to perform, it was a public

officer within the principle which I have been discussing. Apart from questions of causation and damage the principal matter for consideration is whether, in passing the invalid resolutions or either of the them it committed a misfeasance so as to entitle the plaintiff to sue in an action on the case of the nature referred to. Best C.J. in Henly's case (ante) refers to "any act of abuse in his office" and Smith J. in Harrington v. Thomason & Anon. (ante) cited from Comyns' Digest the requirement that it be shown that an officer "misdemean himself by any falsity . . . or otherwise misbehave himself in his office". In Brayser v. Maclean (ante) the issue of a false return by the sheriff (who was responsible for the acts of the bailiffs) was a breach of his official duty.

The cases are far from clear as to whether and in what circumstances malice, or actual knowledge that the acts or omissions amount to an abuse of office, is required. If it is necessary in a case such as the present, then I am satisfied that it has not been shown. The use of s.309(4) was suggested by the defendant's solicitors in their letter of 9th May, 1974, and both resolutions were recommended by the Chief Planning Officer of the Council. There is no suggestion that the defendant was aware, at the time when it passed either resolution, that what it was doing was invalid either because, in relation to the fixing of a building line, its action was vitiated by lack of fairness towards the plaintiff or, in relation to s.309(4), because it was in conflict with the maximum height permitted by clause 44(5) of the Ordinance. 10

But in my opinion the reason why the plaintiff should be held not to have succeeded in establishing liability on the part of the defendant for misfeasance in office by a public body is that the passing of neither invalid resolution constituted a "misfeasance" as that word is employed in the various authorities concerning such an action. Although in this context "misfeasance" does not necessarily involve moral turpitude it does require at least some misconduct by the public officer or body in the discharge of a duty which it owes to persons including the person allegedly aggrieved. I am of the opinion that merely to pass resolutions which are void and of no effect, for whatever reason, and without knowledge of their invalidity, does not constitute an act of abuse by a local authority in its office as such. The resolution which it purported to pass under s.309 was simply ultra vires and therefore ineffective whilst that passed in reliance upon s.308 was invalid because of failure to comply with the requirements of natural justice (see Twist v. Randwick Municipal Council. 51 A.L.J.R. 193 at 194 and 198). Perhaps if a local authority declined to give consideration to a development application at all then (leaving aside questions of mandamus and rights of appeal) it could be said, by its failure to discharge its duty to consider and give a decision upon it, to have committed a misfeasance, to have abused its office. So also if it deliberately passed a resolution which it knew to be invalid. But that is not this case and I consider that the plaintiff has failed to prove that in passing either resolution the defendant abused its office. I therefore reject the claim based upon that allegation. 20

The third and final way in which the plaintiff's case is put is that, in purporting to pass both the resolution under s.309(4) and that under s.308, the defendant was negligent and that as a consequence of such negligence he suffered damage. The basis of this claim in so far as it concerned the restriction upon height, was that the defendant should, by the exercise of reasonable care, have known the meaning and effect of clause 73 of its own ordinance and the relationship between clause 44(5) and s.309(4). Mr. Hughes submitted that it was important in the present context that the defendant had prepared the planning scheme, including the ordinance, and he submitted that if reasonable care had been exercised the invalid resolution would not have been passed. 30 40

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The plaintiff's claim in negligence was contained in pars. 14 and 15 of the amended statement of claim and was in these terms:

"14. Alternatively to 13 and 15 below, the plaintiff says that the defendant was under a duty to the plaintiff pursuant to the Local Government Act, Parts XI and XIIA to administer the provisions of the Act and Ordinances made thereunder, in accordance with law, and in breach of this duty, in passing the said unlawful resolutions, the defendant failed to perform its said duty, whereby the plaintiff suffered the loss and damage referred to in paragraph 13 above.

15. Further, in the alternative to paragraphs 13 and 14 above, the defendant was under a duty to the plaintiff to perform its duties under parts XI and XIIA of the Local Government Act in dealing with the building and development controls with respect to the said land, in a reasonable, careful and reponsible manner but the defendant in and about passing the said resolutions acted unreasonably, negligently and irresponsibly whereby the plaintiff suffered the loss and damage referred to in paragraph 13 above".

Although it was argued, somewhat faintly, that the claim in negligence extended to the failure to afford the plaintiff natural justice in relation to the resolution passed under s.308, I entertain no doubt that, whatever other consequences might flow from such failure, it does not render the defendant liable in damages to the plaintiff. I do not regard the absence of a hearing as constituting any breach of a duty of care owed by the defendant to the plaintiff. Nor am I satisfied that there was any causal relation between the denial of natural justice and the damage which the plaintiff suffered. Not only was the existence of a building line but one of many grounds advanced for rejecting the plaintiff's development application, but the defendant would have been quite entitled, after hearing the plaintiff, to have fixed the very building line which he did. However, I need not develop this aspect further because I am satisfied that the Council was not negligent in failing to hear the plaintiff before it exercised its powers under s.308.

There remains for consideration, therefore, the plaintiff's claim that, in purporting to fix a maximum height for the building — i.e. in assuming to exercise the powers which it did not have and which resulted in its order being a nullity - the defendant should be held liable in damage for negligence.

The first question is whether the defendant owed to the plaintiff a duty of care when purporting to regulate the number of storeys which could be contained in this proposed building, such a duty involving at least the asertainment by it of the extent of its power to do so, or whether such a power existed at all. In answering this question it is necessary to keep in mind the distinction, on the other hand, between the exercise of a power which a body such as the defendant undoubtedly has (and the circumstances in which such exercise might be constituted a breach of a relevant duty of care) and on the other, the case where a Council purports to exercise a power which it does not have, under the erroneous belief that it may do so.

A number of cases were cited to me dealing with the circumstances in which a Council might be held liable in damages for the negligent exercise of statutory powers or duties. The majority of these were instances where the Council was alleged to have performed wrongly or negligently the very act which it was obliged or empowered by statute to perform. Most of them also were concerned with breach of duty, not in the area of policy or discretion, but in what has been referred to as "the operational area" of the activities of the Council. This expression was employed by Lord Wilberforce in *Anns v. Merton London Borough Council*, (1977) 2 W.L.R. 1024 at 1034 where his lordship said that "It can safely be said that the more 'operational' a power or

duty may be, the easier it is to superimpose upon it a common law duty of care". The principal cases to which I was referred were Ministry of Housing and Local Government v. Sharpe, (1970) 2 K.B. 223; Dutton v. Bognor Regis Urban District Council, (1972) 1 Q.B. 373; Hull v. Canterbury Municipal Council, (1974) 1 N.S.W.L.R. 300; G.J. Knight Holdings Pty. Limited v. Warringah Shire Council, (1975) 2 N.S.W.L.R. 796; Anns v. Merton London Borough Council (ante) and L. Shaddock & Associates Pty. Ltd. and Anor v. The Council of the City of Parramatta (Waddell J., unreported, 20th March, 1978).

In view of the conclusion at which I have arrived, I do not find it necessary to discuss the authorities except to observe that in Dutton and Anns the relevant alleged negligence was the failure of the local authority to properly inspect foundations of the buildings, which foundations were necessarily later concealed; in Sharpe the Council was vicariously liable for the negligence of a clerk who carelessly searched the register and caused an erroneous certificate to be issued; in Hull the negligence was in furnishing a consent to build, which consent was acted upon by the plaintiff but was invalid for reasons which would be known only to the defendant; and in Knight (which was argued by Mr. Wilcox to have been wrongly decided) a consent to the development of land was given which in fact was a nullity but which was acted upon by the plaintiff to its detriment. 10

Mr. Wilcox referred me to several cases decided in the Supreme Court of Canada, from which I have derived much assistance. Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg, (1972) 22 D.L.R. (3d) 470, a decision of five Judges delivered by Laskin J., was a case where a Council had enacted a by-law in relation to zoning, upon which the plaintiff relied in commencing to build. Subsequently the by-law was declared to be invalid not because of any want of substantive authority residing in the defendant but because of failure to observe self-imposed antecedent procedures for the giving of notice to affected parties. The proceedings in which it was declared invalid are reported — Wiswell & Ors. v. Metropolitan Corporation of Greater Winnipeg, (1965) 51 D.L.R. (2d) 754. It was held that the municipality, in making the by-law, was engaged in a quasi-judicial exercise. In the course of giving the Court's judgement Laskin J., said at p.467 ff.: 20

"Accepting the Hedley Byrne has expanded the concept of duty of care, whether in amplification or extension of M'Alister (or Donoghue) v. Stevenson (1932) A.C. 562 it does not, nor, in my view would any underlying principle which animates it, reach the case of a legislative body or other statutory tribunal with quasi-judicial functions, which in the good faith exercise of its powers promulgates an enactment or makes a decision which turns out to be invalid because of anterior procedural defects The defendant is a municipal corporation with a variety of functions, some legislative, some with also quasi-judicial components . . . and some administrative or ministerial, or perhaps better categorised as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity preforms a quasi- 30
judicial duty . . . A municipality in what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate 40

view of a court, albeit it acted on the advice of Council. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability and damages for its breach. 'Invalidity is not the test of fault and it should not be the test of liability': see Davis, 3 Administrative Law Treaties (1958) at page 487 . . .''.

See also Berryland Canning Co. Ltd. v. The Queen, (1974) 44 D.L.R. (3d) 568 and Central Canada Potash Co. Ltd. v. Attorney General for Saskatchewan, (1976) 57 D.L.R. (3d) 7 at 134-5.

The question whether the defendant in the present case owed to the plaintiff a duty to take reasonable care to see that a resolution which it passed and which affected the latter's land was one which was lawfully entitled to pass raises questions of considerable complexity. The very task of classification of the type of power which the defendant purported to exercise itself raises matters of difficulty which were discussed in relation to s.289 (e) of the Local Government Act, and in relation to the decision of Wootten J. in the present matter, by the Court of Appeal in White v. Ryde Municipal Council & Ors. (unreported, 16th December, 1977). But even a categorization of the power as quasi-judicial would not necessarily answer the question in accordance with the views expressed in the Canadian case to which I have referred. There is no question here of procedural defects in the exercise of a power which the Council possessed. What it did was to erroneously assume that it had power which did not exist, and the consequence was that its act was a nullity. Nor is the case like many of those to which I was referred where planning approval in fact was given and acted upon, such approval being later found to be invalid for various reasons. The present is a case of the purported fixing of a maximum height which was later relied upon by the defendant as one of a number of reasons for declining to grant development approval at all. Not only does this fact raise questions of considerable complexity relation to causation but it is relevant to the question of the existence of a duty of care and, indeed, breach. It is apparent also that the case is not concerned with the alleged negligent exercise of a power which a local authority undoubtedly has. Amongst factors to be considered is that the ascertainment of whether or not the defendant had the power which it purported to exercise under s.309(4) is something which would equally be known to or capable or ascertainment by the plaintiff or those advising him, as it would be to the defendant. That question, as appears from the judgement of Wootten J. at pp.490-2, raises questions of construction of some complexity. Here the defendant's error was one of law, and the consequence of its erroneous assumption that it had power to do that which it purported to do was that its resolution was a nullity and could have been ignored or (as was done) declared to be invalid.

Whether, in the circumstances, it owed a duty of care to the plaintiff is a matter upon which I entertained considerable doubt and one which I need not finally resolve. I say this because I have come to the conclusion that, on the assumption that the defendant did have a duty to the plaintiff to exercise reasonable care in fixing or purporting to fix the maximum height of his building, it did not fail to exercise that care, notwithstanding that it had no power to pass the relevant resolution.

This conclusion I have reached for a number of reasons. The question of law involved, which depended upon there being inconsistency between the Planning Scheme Ordinance and the provisions of s.309(4) was, as I have indicated, one of some complexity; the only negligence alleged is the failure by the defendant to know the meaning and effect of clause 73 of its own

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Ordinance and the relation between clause 44(5) and s.309(4); the letter from the defendant's own solicitors dated 9th May, 1974, was a clear indication to it that, in the opinion of those solicitors, it might validly act under s.309(4) to regulate the number of storeys which may be contained in any residential flat building sought to be erected on the site; and this was the advice also given to the Council by Miss Harvey Sutton, its principal planning officer who recommended, in a report dated 10th June, 1974, that it pass the resolution.

In these circumstances, even if it should be held that the defendant did in the circumstances owe a duty of care to the owners of the land affected by the resolution, a finding that it was in breach of that duty would be, in my opinion, in effect to place it in the position of an insurer. I consider that in the circumstances it was entitled to rely upon advice from its solicitors and its chief town planner, and this it did. It was not suggested that the defendant was vicariously liable for any negligence of Miss Harvey Sutton, nor do I think, in the light of the advice of the solicitors, that she herself could be said to have been negligent.

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Hence the plaintiff's claim based upon negligence must fail and it is not necessary to deal with the complex questions of causation and remoteness of damage.

There must therefore be a verdict and judgement for the defendant and the plaintiff must pay the defendant's costs.

I Certify that this and the thirty
preceding pages are a true copy of
the reasons for judgment herein of
The Honourable Mr. Justice Yeldham.

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Date 28/7/78

Associate

JUDGMENT

ORDER

1. That the defendant have a verdict against the plaintiff and the plaintiff to pay the defendant's costs.
2. This judgment takes effect on 28 July 1978.

BY THE COURT

(Signed) G.J. BERECRY

Deputy Registrar

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

No. 2688 of 1974

CORAM: WOOTTEN J.
Monday, 28th July, 1975.

DUNLOP v. COUNCIL OF THE MUNICIPALITY OF WOOLLAHRA

MR. SHAND, Q.C., with MR. TAMBERLIN appeared for the plaintiff MR. WILCOX appeared for the defendant

MR. SHAND: There are several subpoenas I would like called. The first is the Town Clerk of the defendant Council.

MR. WILCOX: I answer that subpoena on behalf of the Town Clerk. The documents are in Court. 10
They are fairly numerous and bulky. I put them on the Bar table.

MR. SHAND: There was some discussion about a claim of privilege at one stage. I assume that claim is not now pressed.

HIS HONOUR: Are you asking to inspect them?

MR. SHAND: Yes, I ask your Honour's leave to have access to them.

MR. WILCOX: I do not have any objection to my friend,s looking through the files. There may be some individuals documents which would be properly privileged.

HIS HONOUR: Do you mean you are indicating the possibility of objecting to them if they are tendered in evidence, but you do not mind him inspecting them?

MR. WILCOX: Yes.

HIS HONOUR: The only matter that arises at the moment is your inspection, Mr. Shand, and that is not objected to, so you may have access to the documents.

(Secretary, New South Wales Planning And Environment Commission, called on subpoena
dudes tecum. The documents are in Court. Counsel granted access to them)

(Court Reporting Branch called on subpoena dudes tecum; no appearance. Inquiries to be
made)

(Mr. Shand opened to his Honour.)

(Documents on subpoena Dudes tecum from Court Reporting branch produced)

(Affidavit of Roger John Massey Dunlop, sworn 25th November, 1974.

(Affidavit of Charles Clarence Phillips, sworn 25th November, 1974. 30

paragraph 5, last sentence objected to; rejected.

paragraph 6 objected to; rejected)

(Affidavit of Roger John Massey Dunlop, sworn 2nd December, 1974.)

(Affidavit of George Wellings Smith, sworn 25th February, 1975, objected to)

HIS HONOUR: The objection to Mr. Smith's affidavit does not go to the form in which his opinions are presented, but to their relevance to the case, and in some respect to his qualification to state them. I am not concerned at this stage to decide whether or to what extent what Mr. Smith says would establish or satisfy me about the issues of bona fides that are raised by the plaintiff. I am only concerned at this stage to rule whether they have some possible relevance to the decision of those issues, perhaps in combination with some other evidence. I am unable to say they are not relevant to 40 those issues, and I will allow the affidavit. So far as the particular point is concerned about par. 12 it

seems to me that while Mr. Smith has not put forward qualifications as a valuer he is not seeking to give any precise value of the property and it would seem to be within the area of his expertise to express a general view as is expressed there. I allow the affidavit.

(Affidavit of George Wellings Smith, sworn 25th February, 1975.)

(Affidavit of Alexander Ritchie Howarth sworn 26th March, 1975.
paragraphs 3 and 4 objected to)

HIS HONOUR: The affidavit is tendered as corroboration of the evidence of the plaintiff, and in that respect it is not objected to, and I allow it on that basis.

MR. TAMBERLIN: They are all the affidavits in-chief.

(Affidavit of Margaret Harvey Sutton sworn 23rd January, 1975).

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(Short adjournment)

ON RESUMPTION:

MR. SHAND: I have handed my friend five copy affidavits, the original in no case having yet been filed, and I will be applying to file them in Court. Three of them would relate to our case in-chief, and I would be seeking to read them as part of that case.

(Affidavit of Margaret Harvey Sutton continued)

(Woollahra Planning Scheme Map handed to his Honour)

(Affidavit of Michael Ronald Regnis sworn 21st July 1975 read)

(Objection to summary of conversations at various points in par.8 of above affidavit, and also pars.9 and first portion of par.10. Objection noted and his Honour indicated that any part that is not in direct speech he will treat only as introductory or background and not as giving any evidence of what was actually said. He stated that if Mr. Wilcox wanted to rely on any part other than that which now appears in direct speech he should add it by oral evidence.)

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(Mr. Wilcox foreshadowed an affidavit by the Mayor of Woollahra Council)

(Mr Shand sought leave to file in court affidavits of the plaintiff sworn 26th July 1975, Charles Clarence Phillips sworn 28th July 1975, David Lewis Parker sworn 25th July 1975, Gregory Lachlan Sanderson sworn 25th July 1975 and Ian Douglas Strathdee sworn 25th July 1975: leave granted).

(Affidavit of plaintiff sworn 3rd June 1975 read)

(Affidavit of plaintiff sworn 26th July 1975 read)

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(Documents produced from hire car company handed to Mr. Shand).

(Affidavit of Charles Clarence Phillips sworn 28th July 1975 read).

(Affidavit of Ian Douglas Strathdee sworn 25th July 1975 read.)

(Transcript dated 21st May 1974 in the matter of Regina v. Bazevski at Central Criminal Court tendered: Wilcox said the evidence of Mr. Strathdee was not challenged. Tender of transcript not necessary.)

(Affidavit of David Lewis Parker sworn 25th July 1975 read)

(Affidavit of Gregory Lachlan Sanderson sworn 25th July 1975 read).

PLAINTIFF,

Sworn and examined:

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MR. SHAND: Q. Your full name is Roger John Massey Dunlop? A. Yes.

Q. You live at 10 Wentworth Street, Point Piper A. Yes.

Q. You are the plaintiff in this action? A. Yes.

Q. You have sworn a number of affidavits and you have heard them read today? A. Yes.

Q. And they are correct in terms as to your belief when you swore them? A. Yes.

Q. There is one additional matter on one aspect, upon your attendance at the meeting of 27th May 1974, that is the meeting of the Town Planning Committee of the Council, was there any reference at

all to the fixing of a building line for these three particular properties? A. None whatsoever.

Q. Was there any reference to the exercise of powers under s.308 of the Local Government Act?

A. None whatsoever.

Q. In the course of your attendance at the meeting of the defendant Council on 10th June 1974 did you address yourself in any way to the subject of a building line for these properties? A. I did not attend the Council meeting on the 10th June.

Q. Did you address yourself on the 27th May to any such proposition? A. No.

Q. As at the 10th June 1974, were you aware in any way of a proposal either under consideration or intended to be implemented with regard to the fixing of a building line for any of these three properties? A. No, not at all. 10

Q. Since seeing Mr. Regnis' affidavit have you turned your mind to the possibility that Mr. Regnis could be wrong as to the date of the alleged meeting which he placed as having occurred on 21st May 1974? A. Yes, he was wrong.

Q. Have you been through such records as you have in order to attempt to unearth indications as to any meeting that you may have had with the Mayor prior to 27th May 1974 could have occurred?

A. Yes. I examined my daily journal that I keep in my surgery and I found that I had a meeting on the 14th May with the Mayor and on my recollection — and I have noted it in the diary - with the Town Clerk, not the Deputy Town Clerk. I made notes of what was said at that meeting and I can produce those.

Q. Do you have a recollection of who attended that meeting, apart from the Mayor and the Town Clerk? A. Alderman — the Mayor Alderman Bray. My recollection of it is that it was the Town Clerk and it was not the Deputy Town Clerk but I could possibly be wrong, but looking at Mr. Regnis now I don't think I was. 20

Q. You Don't think you were wrong? A. No.

HIS HONOUR: Q. Do you remember the name of the Town Clerk? A. Mr. — oh dear — not Mr. Ford, that is the Engineer. Mr. Hunt — no, Mr. Ford I think it is — I'm afraid sir, I don't.

MR. SHAND: Q. Was there anyone else there apart from the two Council gentlemen you mention?

A. And Mr. Howarth was there as well.

Q. What is your recollection of the conversation that took place during that meeting? A. May I have my notes that I made at that time after the meeting. 30

HIS HONOUR: Any objection to consulting them?

MR. WILCOX: I take it the witness is saying he has no independent recollection — on that basis —

MR. SHAND: I will take care of that.

Q. Doctor, the rules of evidence prescribe in regard to a matter where you have made notes of some conversation that you should try to exercise your recollection first, to the extent to which you have a recollection of it, and then perhaps use the notes later to fill in what you have not been able to remember? A. Certainly. My recollection was that I was told at this meeting that there was a proposal to re-zone the area and that this was the only proposals the Council were at that time considering.

Q. Is that about as much as you can remember without assistance as to what you were told? A. There was general discussion about the whole thing. Mr. Howarth put his point of view about the delay, the fact that the land had been frozen since 1968, the fact that the land owners had suffered grievous hardship by the actions of the Council from 1968 to 1974, the fact that the tribunal had made certain recommendations, and the general tenor of it was that I - my discussion in addition to what I had been told be the Council people, my recollection of it was that we were trying to get some speedy resolution of this matter that had gone on for a very long time. 40

Q. That is your recollection so far as it goes, is it? A. Yes.

Q. Was there any mention at that meeting of any proposal to limit the number of storeys which could be built upon these properties by the use of s. 309 subsection (iv) of the act? A. None whatsoever.

Q. Or anything remotely resembling such a reference? A. None.

Q. Was there any reference by anyone during that meeting to the fixing of a building line? A. No, there was no recollection (sic) at all. Your Honour, may I just speak to - it is the big blue book.

Q. When did you make the notes, doctor, what you are now about to refer to? (Handed journal) How long after the conversation? A. I went straight back from the meeting with the Council and I went and wrote them in my journal which is a habit I have of every conference which I have, 10 whether it be medical or business or anything else.

Q. I want you to tell us with the assistance of the notes that you made what additional was said during the meeting you have indicated, suggesting to you that you should use them to give us your recollection rather than just reading them off the notes? A. Could I read it exactly as I have written it down. I have written it down as what was said and a series of questions that I proposed to ask my solicitor afterwards.

Q. If you would just tell us at the moment what it was that you said, not what you proposed to ask your solicitor, from the notes that you have? A. All I have put down here is, "It is obvious from what the Mayor and the Town Clerk said this morning, this a.m., that the Council would ask for suspension of zoning. The whole thing may take up to two years for resolution if the Minister 20 grants same." Then I have a series of questions after that that I wanted to ask my solicitor.

Q. No other notes that you have got in respect to that date bring back any further conversation that occurred at that meeting? A. No.

CROSS EXAMINATION:

MR. WILCOX: Q. Doctor, do you have any objection to me seeing your note? A. None at all. (notes shown to Mr Wilcox)

Q. The material on the previous page I take it deals with some other matter, does it? A. That is a matter which relates to home units; I don't think it would be fair to -

HIS HONOUR: It does not relate to this meeting? A. No, it does not relate to this meeting.

MR. WILCOX: Q. You are able to fix the day of the conversation because it is written on the sheet that bears the inscription 14th May? A. That is correct. 30

Q. It is fair to say, is it not, that you have not written down any summary of the conversation you had with the Mayor or Town Clerk, or whoever it was? A. I have written down the bare bones of what was essential.

Q. What you have written down is the passage that you read out, namely your own comment as to what was obvious, and then three questions? A. That is correct.

Q. You have not made any record of the contents of the discussion? A. That, with great respect, is quite frankly the only relevant part to come out of this meeting.

Q. Doctor, you do understand what I am asking, do you not? A. I do.

Q. What I am putting to you is it is correct that you did not purport to record the conversation. You have merely written down a comment which you regard as relevant, and three questions intended for your solicitor when you saw him? A. I again answer it was the only thing that was relevant that came out of this meeting. 40

Q. How did it come about that the meeting occurred? A. My recollection of it was that I was rung - I wouldn't swear to this - but my recollection is that I was rung by Alderman Bray.

- Q. And invited to come to see him? A. Invited to come and see him.
- Q. With Mr. Howarth? A. With Mr. Howarth.
- Q. That you knew was for the purpose of considering what might happen to your land in Wentworth Street? A. That is correct.
- Q. You have resided within the Municipality of Woollahra for many years? A. Practically since I was born.
- Q. You have carried on medical practice in the municipality for many years? A. Since 1949.
- Q. Sorry - 1959? A. 1949.
- Q. You are personally acquainted with many of the alderman of the Council who were in office in May 1974? A. I think some three or four who are personal acquaintances. 10
- Q. Indeed one of those, Alderman Sanderson, you would regard as a friend of yours? A. Yes; he is an acquaintance rather than a friend.
- Q. But somebody who you knew fairly well? A. Reasonably well.
- Q. You knew that Alderman Sanderson was a member of the Town Planning Committee of the Council, did you not? A. I did.
- Q. From time to time you spoke to Alderman Sanderson about the problem you had in regard to your land? A. Well, it is very difficult to recollect; from time to time I have seen him in the street; I suppose you could say from time to time I did.
- Q. From time to time you spoke to him about your problem? A. Not in specifics.
- Q. This was something that was very important to you, was it not? A. My discussions with Alderman Sanderson were in generalities. 20
- Q. Doctor, would you answer my question please. This was something that was very important to you? A. Yes it certainly was.
- Q. During the period after the tribunal's decision was made known, you spoke to Alderman Sanderson about the matter. A. Yes.
- Q. I suppose you told him you were anxious to have some resolution of the problem, is that right? A. That would be correct.
- Q. You told the direction in which you would like the decision to go. A. I don't think that that - I would answer no, I didn't; I would answer definitely no I didn't.
- Q. In the course of the discussion with Alderman Sanderson, did he inform you that reports were being prepared for the Town Planning Committee's consideration in regard to this land? 30
- A. No. My recollection of this was purely and simply I referred to the tribunal's decision which I regarded - and as I said at the Town Planning Committee's meeting - I regarded as essentially a fair one. I don't think we had any discussion about Town Planning Committees.
- Q. In the May-June 1974 you did have a number of conversations with Alderman Sanderson about this matter, Did you not? A. I would say at the most two.
- Q. During which you made clear to him that you wished to have a development within the parameters as you understood them to set out in the tribunal's decision? A. That's correct.
- Q. Alderman Sanderson told you that the matter was being considered by the Town Planning Committee, did he not? A. I don't think he mentioned it. 40
- Q. Did he tell you the reports were being prepared by the Council's officers? A. I don't think we got down - as I said to you before, I don't think we got down to those specifics.
- Q. Do you tell me that he gave you no information at all as to what was happening within the Council? A. I think that a Council - and alderman's duty, if I remember it correctly -
- Q. Would you be good enough to answer my question? A. The answer is no.

- Q. So that you say you spoke to Alderman Bray on the 14th May in the presence of the Town Clerk, that is you understood him to be, is that right? A. Yes.
- Q. You then attended a committee meeting on the 27th May, is that right? A. That is right.
- Q. Then you received a letter dated 12th June shortly after it was sent. A. That would be true.
- Q. That summarises your total involvement in this project over that month, does it? A. Almost my total involvement; I had discussed with Alderman Parker as well.
- Q. In so far as Alderman Sanderson was concerned, you spoke to him at least twice during that period, knowing him to be a member of the Town Planning Committee, is that right? A. Yes.
- Q. You also spoke to Alderman Parker, did you? A. Yes, I did.
- Q. Whom you also knew to be a member of the Town Planning Committee? A. Yes, I did. 10
- Q. On how many occasions? A. I would say probably two or possibly three times.
- Q. During which you referred to the problem that was bearing upon you? A. Yes.
- Q. Did you? A. I did.
- Q. You made known to him your views as to the sort of development which should occur?
- A. Within the strict parameters of what had been laid down by the tribunal. Let me add that, and quite frankly, I have no - My feeling is that they were Council officers and it was not up to me to ask them anything about what had been done.
- Q. You mean the two aldermen? A. The two aldermen.
- Q. Do you tell the court that you did not ask either of the two aldermen what was happening in regard to the matter within the Council? A. I did - I didn't ask them; I didn't question them as to what was happening. I can say that categorically. 20
- Q. You didn't even ask them when the Council was likely to reach a decision in the matter? A. No, I didn't.
- Q. You did not even ask them what had transpired as a result of the Committee meeting of the 27th May that you attended? A. I didn't question anyone as to what transpired at the committee meeting.
- Q. Why was it that you had a number of conversations with Alderman Parker during that period? A. Well, he - I rang him, he rang me and he discussed certain matters, but it was a general discussion and I had no discussion with him as to what was going on within the committee, and I can say this quite categorically, that he did not discuss with me what the Town Planning Committee were doing about it or what anyone was doing. 30
- Q. The first time you spoke to Alderman Parker I suppose you gave him your views on the situation, did you not? A. I gave him my views within the parameters of the tribunal.
- Q. So really what you said to both of these aldermen on separate occasions when you spoke to them was "I think there should be a development within the parameters of the tribunal's decision", is that right? A. That is more or less the conversation.
- Q. Just taking Alderman Parker? A. There were certain discussions about Council politics, but there was no specific discussion as to what was going on in the Town Planning Committee.
- Q. Just to take the first conversation you had with Alderman Parker, did you approach him or did he approach you? A. I suspect he rang me up. 40
- Q. When you say "you suspect he rang you up" you mean you are not certain in your recollection? A. I am not certain in my recollection.
- Q. You think he rang you up to speak about problems of development of your land, do you? A. I think he rang me up to discuss the matter with me.
- Q. The matter that you referred to is the development of your land, isn't it? A. Yes.

Q. At what stage was that, do you recall? Was it before your meeting with the Mayor or afterwards? A. It must have been some time during - from the period between the 14th and the 28th.

Q. During that time you informed Alderman Parker of your views that there ought to be development in accordance with the tribunal's parameters, is that right? A. Yes.

Q. That was the end of that discussion? A. I could be very specific about this because nearly all telephone conversations that I had were taped and if I had access to those tapes again, I could probably be quite specific about it, but I can be categorically definite that I did not discuss what was going on within the council as far as my propositions were concerned.

Q. Doctor, be good enough to bear with me and let us follow it through. The first conversation, Alderman Parker rang you up and you told him what you thought about it. I take it that was the end of the conversation so far as it related to development of your property, is that right? 10

A. Yes.

Q. Then there was a second conversation? A. Yes.

Q. What stage was that? Was that before or after the committee meeting which you attended?

A. I think it was - I think there was a discussion after the - before the committee meeting.

Q. A second discussion before the committee meeting? A. Yes. This is all statements that I am making on pure recollection.

Q. We appreciate that.

HIS HONOUR: You said a moment ago doctor that the conversations were between the 14th and 28th June - do you mean that? A. Of May, yes, May. 20

MR. WILCOX: Q. We have a second conversation between the 14th and I think it was the 27th May that you attended committee meeting, is that right? A. Yes.

Q. Who telephoned who on this occasion? A. I honestly don't recollect: I had had a considerable amount of personal trouble at this stage - my wife -

Q. Doctor please? A. No, I'm sorry, I don't.

Q. You do not recollect, thank you? A. I do not recollect.

Q. What was the substance of the conversation that took place on that occasion? A. I think it was mostly on internal politics within the council.

Q. Internal politics within the Council — as they affected your application I take it? A. No, not as they affected my application. 30

Q. Either you rang Alderman Parker or he rang you in order to discuss internal politics of the council unrelated to your application? A. far as I recollect, yes.

Q. Do you normally ring up aldermen and converse about the internal politics of the council?

A. Well, there was probably good reason to discuss the internal politics of the council at that time.

Q. From your point of view, only as they bear upon your application? A. No, as they bear upon certain other events too.

Q. You were not a prospective candidate in the elections, were you? A. No, but they — there had been certain incidents which had occurred over the previous six months which perhaps merited some discussion. 40

Q. Relating to your application? A. No, no relationship to it.

Q. Related to your land? A. Well, I suppose that indirectly my land was the indirect — was the direct result.

Q. It was the only reason you were speaking to Alderman Parker during that period, isn't it? A. I beg your pardon?

Q. The only reason you were speaking to Alderman Parker during that time was because you owned this land in Wentworth Street and desired to see it developed? A. There were other matters that we discussed.

Q. That was internal politics, and, the history of the last few months about which you made reference all related to development proposals to the land? A. I think that the events that occurred over the previous two years were — certainly warranted discussion.

Q. The only matter that you discussed with Alderman Parker related to the development of your land and the internal — A. No, I wouldn't agree with you, I will not agree with you.

Q. So you say you had this conversation. You did not ask him anything about the forthcoming committee meeting? A. I did not.

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Q. You did not make any comment to him about the fact that you had been invited to attend it?

A. I could have mentioned that I had been invited to attend, But I didn't make any — it is not important — he after all is an alderman; I think he stressed to me that as an alderman he couldn't make any comment to me about what the council was doing.

Q. There was a third conversation also, was there? A. I think that was the conversation that I had with him at my mother's house on the 3rd June.

Q. 3rd June? A. Yes.

Q. Alderman Parker came round to see you and your mother at her house? A. Yes.

Q. That was for the purpose of discussing the — A. This discussion was a broad ranging one covering the activities of the council, various activities of the council over the past six or seven years and related to certain — I can be quite specific about this — that conversation related to certain irregularities in building applications in Double Bay, certain actions in relation to building applications by members of the Action Committee.

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Q. It related to a lot of very unpleasant material about Woollahra Council because I don't propose —

Q. Did you tape that conversation? A. I'm not —

Q. Did you tape that conversation? A. I am not going to reveal what happened at that conversation.

Q. It was your normal practice — A. I'm not going to discuss that nor am I going to comment on it.

Q. You are not going to answer that question? A. No, I'm not. That conversation related to about ten years' history of Woollahra Council. It does not reflect a very — the majority of that was a discussion about irregularities in relation to a building application in Double Bay, plus many other irregularities that had occurred in this council over the last six years.

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Q. Doctor, would you — A. Anyhow, that discussion, I can get the transcript of that discussion for you.

Q. So you did keep a tape of it, did you? A. Yes.

Q. Alderman Parker came round to have a conversation with you and your mother and you kept a tape of the conversation that took place, is that right? A. Well, look, let's be quite frank about it, at that stage for some months the police had been investigating Woollahra Council and conversations that I had with any aldermen was taped at the instructions of the C.I.B. If you — you brought this up; I didn't.

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Q. Had they been investigating Woollahra Council at your instigation? A. No, they had been investigating as far as I know for some considerable time.

Q. Doctor — A. And this discussion that I had with Alderman Parker was in the presence of the C.I.B. and it was taped and the transcript is available. You have asked me all these questions; I didn't want to bring all this up.

Q. At your mother's home — A. At my mother's home.

Q. Alderman Parker came around and had a conversation with the C.I.B. took a tape of or you took a tape of? A. Which the C.I.B. took a tape of. They were upstairs in my flat and we were downstairs in my mother's flat. If you want the specifics of this, it is quite easy —

HIS HONOR: Just answer the question doctor.

WITNESS: Sorry your Honour.

MR. WILCOX: Q. When Alderman Parker was at your mother's home on the 3rd June, did you inquire from him as to what had come out of the committee meeting which you attended the previous week? A. I don't think we discussed that.

Q. You knew that the committee meeting had considered the matter of your land generally the previous week. Is that right? A. I subsequently — yes, I knew that, yes 10

Q. You had been there and you had addressed the committee, and so had Mr. Howarth and Mr. Phillips, is that right? A. Yes.

Q. You knew on that occasion that after you finished addressing and questions had been put and answered, the committee asked you to retire? A. That is correct.

Q. Did you say to Alderman Parker, "Well, has the committee reached a decision. Are they going to make a recommendation, or anything like that? A. I didn't, to the best of my recollection, and I can easily check it. I don't think — I don't think we discussed that committee meeting because I think Alderman Parker made it perfectly clear he would not discuss it.

Q. He did not even tell you whether the committee had reached a decision, as distinct from the substance of it? A. I am certain he did not. 20

Q. He did not give you any idea whether the matter had gone into limbo or whether some particular date on which you could expect to know something? A. I am certain he didn't.

Q. Nothing at all, and you did not ask him? A. I did not ask him.

Q. Even though you had half a million dollars tied up and paying interest on No. 8 Wentworth Street? A. Alderman Parker made it very clear that what he discussed — and I have said this half a dozen times — Alderman Parker made it very clear that he would not discuss at any time what occurred in council.

Q. But you see, you did not even say to him "Has a decision been reached? A. No, well —

Q. What about Alderman Sanderson. You had a couple of conversations with him at that time, did you not? A. Yes. Again I did not discuss — I reiterated and I keep on reiterating — 30

Q. Doctor, it would be shorter if you just answered my questions! You had a couple of conversations with Alderman Sanderson during the same period, is that right? A. Yes.

Q. You did not ask him whether a decision had been reached by the Town Planning Committee on the 27th? A. No, I didn't.

Q. You were content for the system just to cough out a decision in due course? A. Well, the system had been coughing out the decision for nearly seven years so I mean, there was no point in hurrying it, was there?

Q. You had not even owned No. 8 Wentworth Street for seven years? 40
A. I had owned it at that stage for nearly three years — two years.

Q. You bought it in December 1972? A. That is correct.

Q. You were paying a high amount of money for interest on it and the sooner you could get some finality the better — right? A. Yes, definitely, but I think the answer to this is that —

Q. Just answer my questions please doctor. It will be quicker? A. Yes.

Q. You completely deny, do you, that you were ever informed by either of these alderman that

the council was considering a number of alternative proposals about your land? A. I was definitely — deny, and I will deny it no matter how many times you ask me; I definitely deny that I discussed that with them.

Q. Did you talk to any of the other aldermen on the council during this period? A. No, I didn't.

Q. You did not go back to Alderman Bray at all? A. As far as I recollect, I may have spoken to Alderman Bray but on the — he rang me I think somewhere round about the 27th May before this meeting of the Town Planning Committee, or I spoke to him; I don't know whether I rang him or he rang me.

Q. He rang you to invite you to the meeting, did he? A. He did.

Q. Are you sure it was not Mr. Regnis? A. I am certain it was not.

Q. You said in your affidavit you met Mr. Regnis in 1973? A. Yes. 10

Q. You know that he is now the Deputy Town Clerk? A. Yes.

Q. You see him in court? A. I see him in court.

Q. You still say that he was not present at the meeting you had with Alderman Bray on the 14th May? A. I said to the best of my recollection.

Q. Do you remember how many aldermen were present when you addressed the committee on the 27th May? A. I think there were — I don't recollect — I recollect that after having read the minutes of the meeting but I can't recollect how many were there.

Q. Would it be correct that there were about eleven aldermen there?

A. Something round about — I think there were somewhere round about eight or nine.

Q. Your recollection is eight or nine? A. I can remember specifically certain people there. 20

Q. On that occasion as you have said in your affidavit, you were asked to comment on the merit of a three or four storey building? A. Yes.

Q. You dealt with that question, did you? A. All I said was that if a three or four storey dwelling was proposed, well then, why wasn't the area zoned accordingly.

Q. Is that all you said? A. And that it was — I mentioned — again I mentioned the findings of the tribunal and I mentioned that the tribunal had expressly stated that a three or four storey building would be detrimental to the amenity of the area.

Q. You had read the minutes of the tribunal's decision before you went to the committee meeting? A. I had read the transcript and the Instrument decision.

Q. The transcript of the evidence? A. Yes. 30

Q. The whole lot, the discussion that took place. During the discussion you referred to the tribunal's views as set out in its minutes, did you? A. Briefly, yes.

Q. You understood that the point of the question as to the merit of the three or four storey development was so that the council could form a view as to whether that was a suitable type of development for the site? A. The question asked of me was what did I think about a three or four storey building.

Q. What was it you thought the committee was sitting to consider? A. Well, quite frankly I didn't know.

Q. You didn't know. You and Mr. Howarth had been invited along to address the committee, and do you seriously tell the court that you did not know what they were meeting to talk about? 40

A. Well, we were given no agenda, we were given no previous knowledge of —

Q. That is not what I asked you, doctor. Do you seriously tell the court that you did not know what they had met to talk about?

A. They had invited me along to speak to them, yes.

Q. Yes, but to speak to them on what subject? A. The development of No. 8,10 and 12 Wentworth Street.

Q. So there was no specific proposal about which they had to reach a decision, is that right?

A. That is correct.

Q. So there was no specific proposal about which they had to reach a decision, is that right?

A. Yes.

Q. It was clear that the committee were concerned to consider desirable future development for this land, is that right? A. Yes.

Q. And they were considering not only No. 8 but also No. 10 and No. 12? A. That is correct. 10

Q. The whole point of you being there was to put your views as to the suitable type of development for this land in the future, is that right? A. Yes. I couldn't frankly see the point of it. They had had the opinion of the tribunal which is supposed to be the major town planning body in the State, and I couldn't really see the point of what we were there for.

Q. Did you query this with Alderman Bray when you were invited to the meeting and say "What am I going there for?" A. No, I didn't.

Q. I suppose you regard yourself as a busy man? A. Pretty busy.

Q. You were giving up your time to go along and talk to the committee of the council, you thought, to no point? A. Well, minds more expert than mine in town planning have reached a decision after four days' hearing and I felt that after having read the Instrument of decision the guidelines were clearly laid down there, and that is what I spoke about. 20

Q. What did you think the council were going to do with the matter that you put in front of them? A. I had virtually no idea.

Q. So you went along to a meeting not knowing the point of the meeting and without any specific idea what the council committee was going to consider. Is that right? A. I certainly did.

Q. Addressing the meeting about future development of your site and answering the questions, is that right? A. That is correct.

Q. Without the foggiest idea what the discussion was all about?

A. Really, I can't agree with that. I couldn't see the point of it at all. They had the decision of the tribunal; it was clearly laid down and there it was. 30

Q. But you did not even know why 8, 9, whatever it was, Aldermen had asked you to waste your time and theirs to have a discussion about your land? A. I knew they were the town planning committee.

Q. But did you think they were engaged in some academic exercise or what? A. It didn't occur to me to think about what they were engaged in. They asked me there to address them. I told them what the tribunal had decided and that was to the best of my knowledge the only sensible thing to do with the land.

Q. Is it your practice to go to meetings without any idea of the point of the meeting? A. I was not given anything. I wasn't told anything. That's what I've been trying to say to you all along. I wasn't told anything. Normally when I go to a meeting I get an agenda so that at least I know what I am going to talk about. 40

Q. Is your usual practice to go to a meeting without any idea of the purpose of the meeting?

A. No, that is what I thought was so strange.

Q. You did not even bother to ask anybody. Is that what you say? A. If I did say "What's it all about?" I got no answer.

Q. Did you say it or didn't you? A. I may well have said, "What's it all about?"

MR. WILCOX: Q. You felt no inhibition about speaking to the Mayor to enquire what was going on, did you? A. None at all.

Q. Before you went on to the council meeting, if you didn't understand it, was there any problem about putting through a call to the Mayor to say, "Look, what precisely is the point of this meeting?" A. As far as I can recall, the only thing that was said to me was, "You can put your views."

Q. You did not say, "views on what?" A. Well naturally I concluded the views were on what I thought should be placed on the land, and I thought there was a much higher body than me. I wasn't going to argue the findings of the tribunal.

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Q. The position is then that you relied upon the views expressed by the tribunal to indicate the type of development which was appropriate? A. I did, I had sat through four days of the case, and I knew pretty well, having read the transcript, what should be placed —

Q. When you were asked to indicate your view as to the appropriate form of development you could summarise your point of view fairly shortly by pointing to what the tribunal had said, is that right? A. That would be correct.

Q. And you did just that? A. I did just that.

Q. You put everything that you wanted to put in regard to the appropriate type of development for the land? A. Within the space of about 5 minutes, yes.

Q. Five minutes — seriously? A. Seriously.

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Q. You say you had five minutes? A. I say that was all I had.

Q. Did anybody chop you off? A. Well I could have said a lot more, but I seemed to get the impression that the meeting was in a hurry.

Q. That the meeting was in a hurry? A. Yes.

Q. The fact is you put everything you wanted to say about the development of your land? A. I think it had all been said before.

Q. Accepting that, you put everything you wanted to say with regard to the development of the land? A. Yes.

Q. The height of the building? A. Yes, I did.

Q. There was discussion about the position on the land of buildings, was there? A. I don't think there was.

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Q. Not at all? A. Not at all.

Q. No reference made to the desirability of preserving some trees? A. Well I mentioned the fact that the landscaping and tree preservation order would be fully carried out, but that was thoroughly dealt with in the tribunal.

Q. But was there not some discussion about the desirability of the building being set back to retain the trees? A. The tree preservation order will do that. There was absolutely no discussion about building setbacks, none whatsoever.

Q. None whatsoever? A. None whatever.

Q. No discussion about setbacks from the rear boundary? A. None whatsoever.

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Q. Are you quite sure about that? A. Absolutely.

Q. But in any event you said what you wanted to say about the proposed development in general terms? A. In the terms of the tribunal, yes.

Q. What you virtually said to the council was, "Look, the tribunal has done the job for you, they have said what ought to go there, that is what I think ought to go there"? A. Basically, yes.

Q. Basically that? A. Basically that.

Q. Then you were asked some questions by members of the committee? A. Yes.

Q. Mr. Phillips went with you? A. He did.

Q. I suppose you arranged for him to go, did you? A. I think I did.

Q. And you did that without knowing the purpose of the meeting? (objected to)

Q. You did that, understanding the meeting was just to discuss in general terms — A. I knew it was a Town Planning meeting, of course I did.

Q. Mr. Phillips spoke and answered questions? A. I think he did, yes.

Q. Mr. Howarth spoke and answered questions? A. Yes, he did.

Q. You were given a pleasant hearing? A. Oh, very pleasant.

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Q. It was an informal sort of discussion, was it not? A. It was hardly a discussion, it was, as I say, just my statement of what I believed to be correct, for the air, and two questions as far as I was concerned.

Q. Everything that needed to be said you thought had been said, so you and Mr. Phillips and Mr. Howarth and your mother departed? A. yes.

Q. Do you know Mr. Ford? A. Yes, I do.

Q. Who is he? A. He is the Town Clerk.

Q. Are you sure about that? A. I am certain of it.

Q. You know what he looks like, do you? A. Yes. Look, this is only recollection. It may well have been Mr. Regnis, I can't swear to that.

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RE-EXAMINATION

MR. SHAND: Q. For how long had the police been in contact with you about the matters relating to the Woollahra Council to which you have been referring? A. Since the beginning of September 1973.

Q. I do not want to go into great detail about this, but you referred to the fact there had been certain incidents which occurred over the six months prior to 27th May, 1974? A. Yes.

Q. Just tell us in short terms what they were? (Objected to)

HIS HONOUR: I would like, if we can leave it until tomorrow morning, so I can look at the transcript and see what was said in the cross-examination. I haven't a clear recollection of how it emerged. If we could reserve that until tomorrow morning I will look at the transcript.

MR. SHAND: Q. You were asked particularly about a conversation which you said occurred on 3rd June, 1974, at your mother's house, do you remember? A. Yes.

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Q. Can you tell us who arranged that meeting, or at whose suggestion it was held? A. I think that — I really can't recollect who arranged that meeting, but I think Alderman Parker — that I had rung Ald. Parker and he had rung me and we had arranged this meeting. Your Honour —

Q. See if you can answer my question, would you? A. I have an idea that it arose out of certain things that had been said at a previous meeting and that in fact it had nothing to do with the Town Planning meeting of 27th May — in fact I am certain it had nothing to do with it. In fact it arose out of those — your Honour, I would rather not discuss that.

MR. SHAND: I will postpone asking you any further questions on what the meeting arose out of, for the moment.

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Q. You were asked whether in fact at the meeting, the Town Planning committee meeting of 27th May, you said everything that you wished to say. Do you remember the question? A. Yes.

Q. Had you known of any proposal to limit the number of storeys to for instance three, would you have regarded yourself as having said all that you wished to say, in the light of that? A. No, I would not have regarded myself, I would have wished for legal representation at that meeting

had I known what was afoot.

Q. Had you known such restriction might be proposed to be carried out under a section of the Local Government Act, which precluded your right of appeal against it, would you have wished to say anything about that? A. I would certainly have wished to seek advice, and certainly wished to take legal representation with me to that meeting.

Q. You said you saw Mr. Regnis in court. Can you point him out to us? A. That is Mr. Regnis over there.

Q. The gentleman with the dark rimmed spectacles and the dark hair in the second row? A. Yes.

Q. Does seeing him bring back to your mind whether he was present at the meeting of 14th May or not? A. I honestly can't recollect.

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MR. SHAND: There is nothing else I wish to ask, apart from the matters that have arisen in cross-examination.

HIS HONOUR: We will come back to that in the morning. (witness stood down)

MR. SHAND: It was not anticipated this witness would be finished, and the speed of the matter has left us without any witnesses here whom my friend wishes to question. I do not mind if the order of matters is disturbed; if it is convenient for any of my friends witnesses to be questioned now I have no objection.

MR. WILCOX: If my friend is without witnesses I can call mine. Perhaps I could call Mr. Regnis first, because I want to ask him some questions in chief.

MICHAEL RONALD REGNIS

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Sworn and examined:

MR. WILCOX: Q. Your name is Michael Ronald Regnis? A. Yes.

Q. Where do you live? A. 42 Vernon Street, Turramurra.

Q. You are the deputy Town Clerk of the Woollahra Municipal Council? A. That is correct.

Q. Did you hold that position in May 1974? A. I did.

Q. In May 1974 what was the position administratively about supervision of the activities of the Town Planning Department?

A. I was in administrative control of the Department by virtue of a decision taken by the Town Planning Committee. In April it decided because of the pressure of work on the principal planning officer, and the difficulties in recruiting staff, it approved that the administrative control be vested in me.

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Q. The principal planning officer remained on the staff to do planning duties? A. Yes.

Q. But you were looking after it administratively? A. That is correct.

Q. In your affidavit you give evidence about a conversation involving the Mayor and Dr. Dunlop on 21st May? A. That is correct.

Q. You have heard the affidavits read which would indicate that date was incorrect. Do you accept you have made a mistake in the date? A. I do accept that.

Q. You have heard Dr. Dunlop give evidence about a discussion he had with the Mayor on 14th May? A. That certainly seems to be correct, because it was a Tuesday, and it is my recollection it was a Tuesday.

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Q. You have the wrong Tuesday in your affidavit? A. I believe so.

Q. Were you present? A. I was.

Q. Was the Town Clerk, Mr. Ford, present? A. No.

Q. How did you come to be present? A. By virtue of the fact that I was in charge of the Department, and also because alderman Bray always did make it a practice for me to attend his interviews.

Q. If they related to town planning? A. Yes, basically.

Q. Did somebody tell you beforehand, or were you summoned to the mayoral room, or what? A. I was summoned, it was just after my morning tea, and I got a telephone call from Ald. Bray, who said he had Dr. Dunlop and Mr. Howarth in his office, and would I join them.

Q. You came up? A. I came up.

Q. You found them with the Mayor in his office? A. Yes.

Q. Was there then some discussion? A. Yes, the Mayor said, "Dr. Dunlop and Mr. Howarth were there to discuss the development of their properties, 8-12 Wentworth Avenue, with regard to the decision we had just received from the tribunal, and also having regard to the history relating to the zoning problems of that area.

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Q. You were personally familiar with the properties and the previous appeal to the tribunal? A. I was, yes.

Q. Then did some discussion occur, after the Mayor's introductory remarks? A. I was asked to give my views, and I indicated — I said to the Mayor that we had received an advising from Dowling Tayler, our solicitors, and that as a result of that advising there appeared to be three choices open to the council.

I said, "I have started a draft report" — I had the notes with me at that time, because —

Q. Just give us the conversation? A. I said I had commenced a report, and the report would canvass three things, based upon the advising. Those three things were, in order, to seek a re-zoning of the three properties from residential 2C to residential 2B, to allow the three properties to remain as residential 2C, and the third choice was to allow the properties to remain residential 2C but to regulate them in another way. I then said that the bases of the three choices were if it was to become 2B that having regard to the Minister's decision of I think December the previous year, not to allow the council's application for the 342Y suspension to continue, but council would have to go through the exercise of seeking a varying scheme. That would involve, from advice which I had received some weeks before in relation to Paddington, an application to the Minister, an exhibition, a consideration of objections received, and the recommendation of the State Planning Authority, as it then was, to the Minister as to whether or not the application should proceed. All in all this could mean a delay of an order of a year or two years. That was the first choice.

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The second choice I put to them was if the council, having regard to the decision of the tribunal, and understanding its parameters, were to take the view that application for development on the site was reasonable, it could allow the 2C zoning to remain, and consider any application on its merits within those parameters.

The third choice was having regard to the history and the fact that a decision was taken by the Minister some time before to re-zone those three properties from residential 2A to 2C, that the council may allow that to remain, but it could regulate the number of storeys in any building by use of s.309(4), because before to re-zone those three properties from residential 2A to 2C, that the council may allow that to remain, but it could regulate the number of storeys in any building by use of s.309(4), because it seemed to me the review tribunal decision, and knowing the evidence put forward by council —

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Q. Are you still giving us the conversation? A. That is correct — the council's Town Planner, Mr. Ingham, consultant Town Planner, the key area as far as the council was concerned was the height of any development that took place, and I then referred to a property in Ocean Avenue which is just below the cliff face of Greenoaks Avenue, where some years before the council had

in fact regulated the number of storeys in a building. The application then was, I said, for 13 storeys, the council had taken the decision to regulate the number of storeys to nine, as a result of representations made by Professor Lungren.

Q. And you said all that? A. Yes.

Q. Did Dr. Dunlop make any comment or ask any questions? A. Actually the Mayor asked a couple of questions. He asked could I explain further in relation to the question of 2C zoning, and at that stage I referred briefly to the history that had taken place that in 1970 the then chairman of the authority had addressed the council, and during his address he had referred to a number of problem areas throughout the municipality in terms of the exhibited scheme. One of those problems arose from this residential 2C zoning, and he suggested because of the type of development that had taken place there should be a height limitation imposed equivalent to the highest building within the zone, and I indicated that as a result of he touching upon that, the council had inspected the area and had made certain recommendations to the Minister as to the zoning. And it was at the time when the Minister made his determinations of the objections to the scheme that he showed on an overlay that the three properties should be residential 2C. The Mayor also asked me to explain s.309 more fully, and I said it is a provision in the Act which enables the council to regulate the number of storeys, and I read from the advising given by Dowling Tayler. 10

Q. Which you had with you? A. Which I had with me, yes.

Q. There was specific reference made to s.309, was there? A. Section 309(4), yes. 20

Q. Were these questions asked by the Mayor and the answers still in the presence of the plaintiff and Mr. Howarth? A. That is correct

Q. Any comment by them or questions asked by them? A. No. Mr. Howarth spoke and said his main concern of the whole area was the lack of decision, he and his wife had bought the property, No. 12, and built a new home in the belief it was a residential 2A zone, then when the scheme had been prescribed he saw it was 2C, he saw a means of capitalising on the land, but the fact that there had been delays, the council had taken s.342Y action to have that particular zoning changed, action which caused him and his wife great distress, and all he wanted to see was a quick answer from the council. Dr. Dunlop referred to the tribunal decision and specifically referred to the population densities which were adverted to in the decision itself, and said the original application was for some 90 persons per acre, and it was suggested in the parameters put forward by the tribunal this perhaps could be reduced to 75, and he saw this was still permitting a high rise development. 30

Q. Was that the whole of this discussion, from your recollection? A. No. At the conclusion of the discussion the Mayor said he would give Dr. Dunlop and Mr. Howarth an opportunity of speaking to the town planning committee; as I said earlier I had indicated I was preparing a draft for the meeting of the 27th, and he asked me to arrange with the doctor and with Mr. Howarth a suitable time for them to come.

Q. On the 27th did you attend the meeting of the town planning committee? A. I did.

Q. Firstly can you tell me how many members there were of the council itself? A. Eleven of the fifteen aldermen. 40

Q. Eleven of the fifteen were present? A. Yes.

Q. Were they all actually members of the town planning committee, as distinct from non-committee aldermen who happened to be there? A. No, I think the Mayor, who normally did not attend the town planning committees, was present, Ald. Backhouse, and one other alderman.

Q. How many members of the committee? A. Eight.

Q. Eight committee members, plus three other aldermen who were there? A. Yes.

Q. So the net result was 11 out of the 15 aldermen were present? A. That is correct.

Q. How long did that section of the town planning committee meeting which related to the Wentworth Street land occupy? A. Approximately 20 minutes.

Q. We know Dr. Dunlop and Mrs. Dunlop, his mother, Mr. Howarth, and Mr. Phillips were present? A. That is correct.

Q. They spoke, did they? A. Dr. Dunlop spoke. He basically spoke certainly on behalf of his mother, because his mother was asked whether she had any comment, by the chairman, Ald. Tayler. Mr. Howarth briefly reiterated what he had said at the meeting with the Mayor and myself, that he was anxious for a decision. Mrs. Dunlop declined, and Mr. Phillips said he had not been involved long enough to make any comment. 10

Q. Do you recall any discussion about the desirable height of the building — I do not want the substance of it? A. No, the form the meeting took was that each of them were asked to speak, and Dr. Dunlop addressed himself basically to the tribunal decision, and to the parameters, which referred to an eight storey height limitation, and went on to say that having regard to his investment, and his family's investment, on 8 and 10 Wentworth Street, that at equitable return would be in the order of eight storeys.

Q. Was there any discussion about a smaller or lower building? A. I can't recall.

Q. There was then a decision made by that committee after the plaintiff and the others retired?

A. That is correct 20

Q. There was a further town planning meeting on 10th June, which reached the decisions set out in your affidavit? A. Yes.

Q. And a full council meeting? A. Later that evening.

Q. Was there a verbal report from the town planning committee to the meeting? A. That is right, by the chairman of the committee, Ald. Taylor.

Q. So far as the council was concerned I think you have taken out details of the aldermen who were present at the council meeting, from the minutes? A. Yes.

Q. And were there in attendance at the council meeting 13 of the aldermen? A. Yes.

Q. I think Ald. Sanderson was on leave of absence, and there was one other alderman not present? A. That is right. 30

Q. And the resolution which was carried, which was set out in your affidavit, was carried by the council with two aldermen asking that they be recorded as voting against the motion? A. That is correct.

Q. That is Aldermen Warnecke and Wright? A. Yes.

Q. And Ald. Parker was present at that meeting? A. He was.

CROSS-EXAMINATION

MR. SHAND: Q. I suppose we are to understand, are we, that you have given this recollection of the conversation which you now say took place on 14th May, entirely without the aid of any records at all, with the possible exception of the report which you ultimately prepared? A. That is correct, but part of my job is to recall what I call key facts, and as deputy Town Clerk I do regard the minutes of the council, and I had a background, I was secretary of the steering committee that the then Minister for Local Government set up in relation to the Church of England lands at Edgecliff, and I was required to take notes of the various meetings that took place then. 40

Document 11 Transcript of Evidence before
Mr. Justice Wootten 28 July 1978, 29 July 1978, 30 July 1978

- Q. And you took notes of the meeting that took place on 14th May, did you? A. No, because —
Q. Just answer the question? A. No.
Q. Whatever you have done in other capacities and in other employment, you did not follow that practice on 14th May? A. No.
Q. You have then nothing more than your own unaided recollection as to what was said at the meeting which you now accept as 14th May? A. That is correct.
Q. But you were quite positive that this meeting took place on 21st May, weren't you? A. I was quite positive it took place on a Tuesday.
Q. Please answer my question. A. I believed it was the 21st, yes.
Q. You were quite positive when you swore your affidavit it took place on 21st May, weren't you? A. I was positive it was a Tuesday. 10
Q. Please answer. Were you positive it took place on 21st May? A. To the best of my recollection, yes.
Q. Were you positive, that is the question? A. I signed the affidavit, yes.
Q. Do you understand what it means to swear an affidavit? A. Yes, I do.
Q. Do you understand it means you swear to the correctness of all the details in it? A. Yes.
Q. Unless you qualify your degree of recollection about it? A. That is right.
Q. You did not qualify your recollection about the fact that the meeting took place on 21st May, did you? A. No.
Q. So we may take it when you swore it you were positive it took place on that day, may we? 20
A. Yes.
Q. You now say your recollection was clearly in error? A. Yes.
Q. What did you rely upon for the fixing of that date? A. I fixed upon the meeting of the 27th and the fact that the advising from the council's solicitors was received by the council's office on the 13th. I believed it to be the Tuesday, and I believed it to be the 21st.
Q. When was it you attempted to cast your mind back to recall this date? A. When I prepared the affidavit.
Q. You may take it the affidavit bears date 21st July, 1975. So was it just before that that you started to recollect? A. Yes.
Q. Was it? A. Yes. 30
Q. You were casting your mind back considerably more than a year? A. That is right.
Q. Without one word or note recorded to help you recollect what was said? A. That is correct.
Q. And your recollection is, is it, or was when you cast your mind back, that this advising was received from your solicitors when? A. On the 13th.
Q. Do you remember the date of the advising? A. It was dated the 7th, I believe.
Q. You have not got a very good memory for this detail, have you? A. I was certainly clear what choices were open to the council.
Q. You have not got a very good memory for this detail, have you? A. I have a good memory for what I call key facts.
Q. What was your recollection when you cast your mind back to this meeting of May 1974? A. Of 40
it being the week before the 21st.
Q. Weren't you informed that the plaintiff had sworn an affidavit as early as 3rd June, 1975, about his ignorance of these proposals concerning height regulations? Weren't you informed of

that earlier? A. Yes, but my understanding of that affidavit was that he indicated he was not informed officially by the council.

Q. Is that really what you thought? A. Yes.

Q. Weren't you given to understand that he was claiming by the time this resolution was made by the council regulating the height, he had never been told the council proposed to do that?

A. That is correct.

Q. So there is no question of whether he had been formally informed, was there? That was not something you had to consider? A. That was my understanding of his affidavit.

Q. Did you read his affidavit? A. Yes.

Q. And did you read that it said, in par.4: "I say I was not informed of the proposal by the council or of any officer or servant of the council . . . or any one or combination of them"?

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A. That is correct, that refers to a decision to resolve it in a particular way. All that had occurred was that the three choices open to the council were put to Dr. Dunlop, not the fact that the council would resolve to regulate or the council would resolve to seek a re-zoning.

Q. You did not think you had to answer anything that may have been told him informally as to the proposals of the council? A. That is correct.

Q. In fact what you did swear was to material which he was informally told about, wasn't it?

A. Yes.

Q. You answered by way of material you considered did not have to be provided at all? A. His affidavit —

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Q. Isn't that so? A. Yes, that is correct.

Q. So it was not to the point when you told us a moment ago that you believed that he was saying he had not been formally informed of the council's proposals, was it? A. That was my belief certainly before — certainly my belief after reading his affidavit.

Q. How long did you think about it before you drew your affidavit? A. I don't think it was a material consideration really. My affidavit purely and simply stated a set of facts at an interview.

Q. Would you mind answering my question — whether you think it is material or not. How long did you think about it before you drew up the terms of your affidavit? A. I don't think it was a consideration; I don't believe I thought of it.

Q. You do not believe you thought at all? A. No, I don't think that at the time I signed my affidavit I gave that particular proposition any thought.

Q. Just in case misunderstand me, who was responsible for the wording of your affidavit? Were you? A. Yes.

Q. How long did you think about the matters that you set out in it before you drew it up in the form in which it finally appeared? A. Perhaps a quarter of an hour, twenty minutes.

Q. It was all done on one day, was it? A. Yes.

Q. And you did not look at any document for that purpose? A. I referred back to my report of 27th May, 1974.

Q. Which you had not completed at the time of the interview? A. No.

Q. When did you start doing your report? A. I did it the same day the advising from Dowling Tayler came in from the council. We have a courier service which delivers documents mid-day, and the Town Clerk and I make a practice of going through the documents at that stage, and in view of what I considered to be the importance of this area I started drafting my report on the basis of the advising, having read the advising that same afternoon.

Q. Your belief was you had not completed that report, even after you had been at it for some 8 days? A. That is correct.

Q. Still incomplete then? Do you claim to be yourself to any extent expert in matters of town planning? A. No. Again I was appointed as an administrative head rather to co-ordinate the efforts of the town planners than to offer any expert advice on town planning matters.

Q. You did not think it was any part of your function to be urging upon the town planning committee any views on what should be done? A. No.

Q. But you did take one side of the cause in this case, didn't you? A. No, I believe not. I only put to them the various choices open to them.

Q. From the town planning point of view? A. Having regard to the advising from our solicitors, the three choices put forward in the solicitors' advising were three things I canvassed, and I attempted to relate them to what had been put forward in the decision of the tribunal. 10

Q. Do you tell us in the course of your consideration of these alternatives, and the way you set them forth for the purposes of a committee, you dwelt for one moment on such rights as the property owners might have themselves in the matter? A. The rights of the property owners or the rights of the electors I do not think are critical. It is the council's decision to take, having in mind its legal advising.

Q. You think that is a proper approach? A. The council is elected to represent the people.

Q. And not fairly to consider among other things the rights of the property owners? A. The rights of the property owners and the rights of the electors both, yes. 20

Q. The rights of the property owners did not come — A. Certainly not within the ambit of my report.

Q. You did not look at it from the rights of the property owners at all? A. I don't believe —

Q. Please answer the question? A. No.

Q. The fact is you were not even attempting to give the town planning committee the benefit of those parts of the tribunal's decision which might be considered favourable to the property owners, were you?

A. The decision of the tribunal was circulated —

Q. Isn't that right? A. The only parts of the tribunal's decision I canvassed were those that related to the advising of council's solicitors. 30

Q. You did not at any point of your advice to the committee make any reference to the parts of the decision of the tribunal which might have been considered favourable to the interests of the property owners, did you? A. The decision was to refuse the application.

Q. You know what I mean when I ask you that question, don't you? You know what I mean, don't you? A. You are referring to the parameter.

Q. You knew perfectly well that is what I was referring to, didn't you? A. Yes.

Q. Now will you answer the question I was asking you? A. No, I did not.

Q. And that was deliberate, wasn't it? A. I can only repeat —

Q. That was deliberate, wasn't it? A. It was not integral to the report.

Q. It was in fact deliberate that you omitted reference to it, wasn't it? A. I must answer that no. 40

Q. You said it was not part of your function to consider it for the purposes of the report? A. That is right.

Q. So it was deliberate? A. It is not the same thing as —

Q. It was deliberate, wasn't it? (Objected to)

Q. You did consider it appropriate, having regard to the alternatives that might be put to the town planning committee, to present them in the light of the favourable aspects of the tribunal's decision, did you? A. The aspect of allowing it to remain 2C must canvass that. If the council were to take the decision that the area was to remain 2C and that any application be considered on its merits, it must be they had regard to the parameters laid out by the tribunal.

Q. You say, do you, that that is what you recommended in your report? A. I made no recommendations. I simply put to them the three choices I mentioned earlier, and they were to seek the re-zoning to 2B, to allow it to remain 2C, and to consider any application on its merits, or third, to allow it to remain 2C and regulate the number of storeys in any residential flat building to a principle which the council would have to determine. 10

Q. Weren't these your words — referring to annexure B to your affidavit, the fourth page of your report, the very bottom, where you have set out various passages from the decision of the tribunal:

“Clearly then the town planning committee needs to —

- (a) amend the residential C code in relation to the definition of floor space and
 - (b) determine whether the council should again make representations for the subject properties to be re-zoned as residential 2B, and
 - (c) determine whether action should be commenced to regulate the number of storeys in any residential flat building erected on the subject properties”?
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A. Yes.

Q. Those were the three matters that you considered the committee needs to do? A. Needs to consider.

Q. Do or consider? That is right, isn't it? A. Yes.

Q. And none of those include any reference to hearing or considering an application for development on its merits to the existing 20, did they? A. No.

[Further hearing adjourned until 10 am on Tuesday, 29th July, 1975.]

SECOND DAY: TUESDAY, 29TH JULY, 1975.

HIS HONOUR: Yesterday I was handed this map of the Woollahra Planning Scheme, but it was not marked as an exhibit. I think it may be convenient to mark it.

(Map of Woollahra Planning Scheme tendered and marked Ex.A.)

There was the reserved question from yesterday, Mr. Shand, about a matter you wanted to ask the plaintiff in re-examination.

(Counsel addressed on admissibility of evidence.)

(For judgment see separate transcript.)

MICHAEL RONALD REGNIS

Cross-examination continued:

(On former oath.)

(Witness' order made.)

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MR. SHAND: Q. You referred in your evidence to the letter from Dowling Tayler, the Council's solicitors, do you recall? A. That is correct.

Q. A letter dated 9th May 1974, which I think you said was received on 13th May? A. That is correct.

Q. Did you have a hand in seeking advice from the solicitors which resulted in that letter? A. No, it is normal practice for the solicitors to advise us on any tribunal decision.

Q. Are you able to tell the court positively that neither was there any documentary request for that advice, nor on the other hand was there any verbal request for it? A. I can't say definitely. Certainly not from me. Perhaps the Town Clerk may have done so.

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Q. There is certainly nothing therefore in the Council records which would indicate any approach to those solicitors for that advice? A. Not that I can recall, no.

Q. You say, do you not, with regard to conversation you say took place with Dr. Dunlop and Mr. Howarth, now said to be on 14th May, that you are able to tell the court what you said as to the alternative courses the Council might adopt, by reference to your report? A. My draft report at that stage.

Q. And you have told us also, I think, haven't you, that it was by reference to your report, that is the finished report which was previously in draft form on 14th May, that you were able to include in your affidavit the topics that you mentioned to Dr. Dunlop and Mr. Howarth on 14th May? A. That is correct.

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Q. You agree, do you not, that in respect of one of those topics that you claim to have explained

to these two gentlemen there is nothing in your report about it at all? A. I take it you mean the previous decision of the Council to regulate under s.309?

Q. No, I do not mean that. Isn't it your claim that you put to these two gentlemen that the Council had available to it three alternative courses of action? A. That is correct.

Q. And those, you say, you are able to tell us, as being those that were put to these two gentlemen, by reason of the fact that they appear in your report? A. That is correct, the three courses.

Q. You claim to have a very good recollection for key topics, you told us? A. Yes.

Q. That means that you would be in no doubt at all as to those three alternative courses of action, would you? A. I tried to define them, yes.

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Q. You would be in no doubt about them at all? A. No.

Q. They would be key topics, wouldn't they? A. Yes.

Q. I want to suggest to you that one of those alternative available courses of action that you say you mentioned to these two gentlemen is not in your report at all. Would you deny that? A. Well I don't know what you are leading to.

Q. You cannot visualise that that is true, can you A. No.

Q. Having the recollection you do have of key topics, I suppose you could remember what you put in your report as to those three alternatives or those three recommended possible courses of action? A. Yes.

Q. What were they? A. The Council could, having regard to the s.342Y action that occurred before, could seek a re-zoning from residential 2C to 2B, it could permit the land to remain as residential 2C and determine an application on its merits, or it could permit the land to remain residential 2C and seek to regulate it another way, s.309, by limiting the number of storeys in a residential flat building.

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Q. In regard to those three I suggest to you the second one is not in your report at all? A. I am sorry, I believe it is.

Q. In the document I am about to show you, your report is a five page document commencing with a handwritten letter B and the heading "Property 8-12 Wentworth Street, Point Piper"?

(Shown) Will you find for us, if you can, the second of those three alternative courses of action which you say it contains? A. I must say that it is not there, but I must —

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Q. That is all I am asking you, thank you. So your recollection in that regard is quite erroneous, isn't it? A. No, I believe that the choices —

Q. Your recollection of what is in the report in that regard — (objected to.)

HIS HONOUR: I think it might assist if you direct the witness' attention specifically to the answer you are talking about.

MR. SHAND: Q. Your recollection in that regard, namely that that alternative course of action was in your report, is quite erroneous, isn't it? A. I believe that the choices set out (b) and (c) at the end, provide Council determine whether it may do or whether it may do something else. If the Council did not take those two choices then the status quo must remain, any application must be dealt with on its merits.

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Q. You think that justifies you in saying that alternative was posed in your report? A. I said it was not specifically stated in the report.

Q. It was not even implied, was it? A. I believe it was.

Q. Do you say it was open to the Town Planning Committee on a reading of this report to interpret it as indicating that you recommended, as one alternative course of action, that the

zoning could be left as it was and any application viewed on its merits within the parameters laid down by the tribunal. A. My report —

Q. Please answer? A. I am trying to answer. My report is part of a series of documents put before the committee.

Q. Please, I am not asking you about any other document but your report, and you heard that question, didn't you? A. Yes.

Q. Are you prepared to answer it? A. Again I can only say that I believe the Council would have been aware of the choice open to it to maintain the status quo from my report.

HIS HONOUR: Q. What I think is being put to you is that until you read that document a moment ago you believed there was an express reference to this? A. I did. 10

Q. And you were wrong about that? A. I was wrong.

MR. SHAND: Q. The fact of the matter was you were at some pains in writing this report to indicate to the committee what you felt it needed to consider as the alternatives open to it, weren't you? A. That is correct.

Q. And that is precisely the wording you used in it, isn't it? A. That is correct, the choices.

Q. Do you say you had in mind it should consider the second of the three alternatives you claim were in it but you left it to be implied by them? A. Yes, that is correct.

Q. You know perfectly well that is not true, don't you? A. I can only answer that by again saying that my document must be read in relation to the other documents that were before the committee. 20

Q. I am talking about your report, about which you have given sworn evidence yesterday and today. That is clear in your mind, isn't it? A. Yes.

Q. Do you say you left it to be implied by them that they could adopt the second of three alternatives you claim were in it? A. That would have to be accepted, yes.

Q. Let us take it one step further. Do you say that you were able, by reference to your report, to recall matters you specifically put to Dr. Dunlop and Mr. Howarth as the available alternative courses of action? A. That is right.

Q. And that in fact you referred to your draft report, you say, don't you, in order to put these alternative courses of action to these two men? A. Yes, and the solicitors advising.

Q. I beg your pardon? Do you say you referred to the solicitors advising for the purposes of these alternatives? A. I referred to the solicitors advising — 30

Q. Please answer the question? A. I referred to the solicitors advising because it did canvas what I saw as the choices.

Q. I am not asking your reason. I am asking a straight question, whether you say you referred to the solicitors advising, as you call it, for the purpose of putting these alternatives to these two men? A. Yes.

Q. Your report would not have helped at all in relation to the second alternative, would it, when you were making your alleged explanations to them? A. I believed —

Q. Please answer the question? A. I believe my report implied there was a third choice.

Q. Would your report have helped you at all in advising these two men about your alleged second alternative? A. My belief is yes. 40

Q. In what way would it have helped you to put to them as to the second alternative? A. Because the three recommendations, (b) and (c) particularly, the words are "whether". If the Council

does not decide to take one or other of those two actions then the status quo must remain.

Q. You said this in your report: "Clearly then the Town Planning Committee needs to" — and then followed three paragraphs headed (a) (b) and (c)? A. Correct.

Q. No fourth one, no reference to the status quo, no other alternatives to those three, is that so?

A. That is correct, if the Council refuses —

Q. Just a minute. You are very anxious to press answers on me, aren't you? A. I want to answer the question fully.

Q. The situation was, was it not, that there was nothing preventing you indicating to the committee if you wished that there was a fourth alternative, namely to leave the status quo as it was? A. I can only repeat —

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Q. Please answer my questions? You did hear my question, did you? A. I must ask you to repeat it.

Q. Are you unwilling to answer my question? A. No, I must ask it be repeated.

HIS HONOUR: Please remember, Mr. Regnis, you are not in the box to argue. Just listen to the questions and answer them.

MR. SHAND: Q. (Question marked * read.) A. Yes, I should have stated that fourth choice.

Q. There was nothing to prevent you doing so, was there? A. Except my belief that my report did canvas the subject.

Q. Would you kindly tell us which part of your report canvassed that subject? A. I have already said it does not expressly state it.

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Q. Which part would you like to refer to? A. I can only again refer to (b) and (c) of the recommendations, or the matters to be considered.

Q. (b) and (c) were in fact quite inconsistent with the preservation of the status quo, weren't they? A. If the Council had adopted one or the other, yes.

Q. So they do not cover this preservation of the status quo, do they? A. No.

Q. What other part of your report does? A. Expressly it does not.

Q. What you were saying, were you not, when you drafted (a), (b) and (c) was this, that you believed that there should be an amendment of the definition of floor space? A. Yes.

Q. And you believed that (b) and (c) should be considered as two alternatives, that is alternatives one to the other? A. Yes.

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Q. I suggest to you that in the light of the evidence you have given about having your notes with you at the time you had this meeting with these two men, that you did not say one word to these two men on the subject of the possibility of the preservation of the status quo and the consideration of the development application on its merits within the tribunal parameters? A. I did.

Q. But the fact of the matter was that you, when you made up your affidavit, that is when you worded it, say you referred back to your report of 27th May 1974? A. That is correct.

Q. And you referred back to it, did you, for the purpose of being able to reproduce the precise wording of the conversation with these two men? A. No.

Q. Didn't you? You didn't do that? A. No.

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Q. Is that clear, you did not do that? A. Not precise wording, no.

Q. Substantial wording? A. Substantial wording, yes.

Q. Perhaps you will tell us then, when you did refer back to your report, from what part of it did you get, or to what part of it did you go in order to provide that part of the conversation which dealt with that second alternative? A. Remaining 2C?

Q. I am referring now to par. 8 of your affidavit, where you include within inverted commas the precise terms of conversation on that day, beginning: "The Town Planning Committee of Council will consider" — you see that? A. Yes.

Q. You come down towards the bottom of the page, where it says: "Council may alternatively resolve to take no action to have the existing . . . on its merits"? A. Yes.

Q. Those you have placed within inverted commas, haven't you? A. That is correct.

Q. As being either the identical words or very close to the identical words used? A. That is correct.

Q. Where did you get those from your report? A. I can only again refer you to the considerations (b) and (c).

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Q. Which are quite inconsistent with that one? A. I firmly believe —

Q. Which are quite inconsistent with that proposition which you have included? A. If one or other would be adopted, that would be correct.

Q. That is the only way you can look at it, isn't it, on the assumption that if they were adopted they would be inconsistent? A. Yes.

Q. So they would not give you any help in recalling these precise words, would they? A. I believe they do.

Q. Over a year later you were compiling this affidavit, weren't you? A. That is right.

Q. And you were putting forward these as your accurate words? A. Yes.

HIS HONOUR: Q. If they were not expressly mentioned in the report how would that help you to remember they were expressly used in the conversation? A. Again, your Honour, I firmly believe the considerations (b) and (c) give the Council the choice of changing the zoning —

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Q. I think I understand what you are saying there, not changing the zoning is the other side of the penny to changing it? A. That is right.

Q. You agree you did not expressly mention it? A. In the report.

Q. But you say you did expressly mention it in the conversation? A. Yes.

Q. How does a report in which it is not expressly mentioned help you to remember it was expressly mentioned in the conversation? A. I can only answer that by saying my belief was that certainly impliedly a failure of the Council to adopt either course (b) or course (c) must mean that the zoning stays as 2C and an application would be dealt with on its merits.

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Q. That is not the question you are being asked. The question is how does that implied reference help you to remember an express reference in a conversation? (No answer.)

Q. Might not you just have implied it in the conversation too? A. No, your Honour, I believe I stated it expressly.

MR. SHAND: Q. Will you concede the possibility that you did not intend to include in your report any implied reference to it? A. Will I concede that I did not intend to include any implied reference to it?

Q. Yes. A. I believe the report does imply it.

Q. Will you concede the possibility that you did not intend to include in your report any implied reference to this status quo alternative? A. No.

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Q. That could not possibly have been the position, you say? A. No.

Q. Will you agree with this — you are a fair-minded man, of course, aren't you? A. I would hope so.

Q. You would not take an arbitrary side of an issue where there were more than one opposing interest involved? A. I think I would be failing in my duty as a servant of the Council if I did.

Q. You would approach this matter involving this development with an open mind? A. Yes.

Q. You would agree, wouldn't you, that if in fact you did not have in your mind this implied reference at the time you compiled your report, from the other alternatives that you proposed in your report it would appear you had clearly taken one side? A. That is not my impression of the report; it may be someone else's.

Q. Just address yourself to the question. If you did not have in your mind any intention to include this implied reference, you would agree the report would then give the impression you had taken one side? (objected to.)

Q. I am asking you now specifically about these alternatives or these provisions (a), (b), (c) appearing at the bottom of p.4 and the top of p.5 of your report — you understand? A. Yes. 10

Q. Now would you agree for the moment that if you had not had in your mind the intention to include, by reference to (b) and (c), an implied reference to this status quo alternative, then this portion of your report would have the appearance of being one-sided with regard to the view you were taking about this development? A. Yes I will concede that interpretation could be put on it.

Q. Would you concede that whilst it may not be your reading of the report it is certainly well and truly open to that reading by others? A. Any report is open to different interpretations.

Q. This report? A. Yes, I will concede it.

Q. The report was intended for the assistance of the Town Planning Committee, wasn't it? A. Yes.

Q. It was one that you had compiled, as you said, with the assistance of the advisings of the Council's solicitors? A. Yes. 20

Q. And I take it you accepted their advisings, did you? A. No, I attempted to re-state them for the benefit of the Aldermen.

Q. Was there any part of their advisings you disagreed with? A. No, I don't think there was.

Q. So that you accepted them A. Yes.

Q. If it was the situation that you intended to assist the committee by putting as a further alternative the preservation of the status quo and the viewing of the application on its merits within the tribunal parameters then I suppose you would have been at some pains to assist the committee by making observations upon what difficulties might accompany such approach, wouldn't you? A. I find that a difficult question to answer. 30

Q. What is so difficult about it? A. Well again it gets down to what is subjective and what is not.

Q. I am asking you really, and you understand that, don't you, what you were really trying to do in this report with regard to assisting or influencing the Town Planning Committee. In the light of that you can answer that, can't you? A. I believe my report was objective, and attempted to be.

Q. If you proposed or intended to put before the Town Planning Committee this extra alternative involving the status quo, consideration of the application on its merits within the tribunal parameters you would be at some pains, wouldn't you, to assist the committee by pointing out any problems that might attach to that particular approach? A. That criticism of the report can be made, yes.

Q. You concede that, do you? A. I concede that. 40

Q. You omitted, did you, you concede, to assist the committee in any way upon that topic? A. I concede I did not mention it. I still maintain my report implicitly gave that alternative, that choice.

Q. If that is so your report completely omitted any helpful comment upon the problems that might arise from that alternative, didn't it. A. Yes.

Q. But if you had had that alternative in mind surely in your desire to help the committee you would have included such a comment, wouldn't you? A. Well obviously I didn't.

Q. I know you didn't, but wouldn't you have, if you had that in mind? A. I did have it in mind; I didn't include it in the report.

Q. If you had had it in mind surely you would have included some such helpful comment, wouldn't you? A. I am sorry, that is a supposition. My report, I believe, impliedly —

Q. It is not a supposition. You said you did have it in mind, and I am asking would you not therefore have sought to include helpful comment upon it? A. Well I didn't.

Q. Is that the best answer you can give, just that you didn't? A. It is the only answer I can give. I am afraid. 10

Q. Well why didn't you? A. I keep coming back to the point that I believe impliedly the Council knew what the choice was, if it did not take these decisions the status quo must remain.

Q. I am talking about helpful comment, which you conceded it is your duty to give. Why didn't you include it on that alternative? A. I believe that the parameters that parameters that were set out in the tribunal decision, which were available to the Aldermen together with this report and Miss Margaret Harvey Sutton's report, indicated what the other choice was.

Q. You have said that several times, but I am asking you why you did not include some comment about it, if you did have it in mind. Are you prepared to answer that or not? A. I can't answer it other than what I have attempted to do.

Q. Did you have in mind the problems with which the Council might be faced if that was the alternative which it adopted, when you wrote your report? A. The problems —? 20

Q. With which the Council might be faced? A. The only problems that I would see —

Q. Did you have it in mind, what problems the Council might have to face if it adopted that alternative, the implied one? A. Yes.

Q. What were those problems? A. The problems would relate to the parameters laid down by the tribunal.

Q. What were the problems? A. The problems would relate to — depending on the application lodged, and no-one knew that — it would relate to matters of side coverage, and floor space ratio, car parking, height.

Q. Ordinary town planning problems? A. Yes. 30

Q. Are those the problems you think they would have had to face? A. Yes.

Q. Didn't you, if you had this alternative in mind when you made your report, pay attention to what the Council's solicitors had said would be the problems? A. The Council's solicitors —

Q. Didn't you? A. In that aspect, no.

Q. But that was the very letter you said you had in your possession? A. That is right.

Q. And wouldn't it have been appropriate for you to help the committee by making some useful comment upon the problems that the Council's solicitors had said would exist if this implied alternative were adopted? A. The advising was distributed to all the Aldermen.

Q. Please answer my question, if you don't mind. Would you like it read again? A. No, I understand the question. 40

Q. Well please answer it? A. It would have been open to me to make comment on their advising, yes.

Q. Because that is what you thought your function was, wasn't it? A. That is right.

Q. Why didn't you make some comment on that, if you had the alternative in mind? A. I can only say, as I have said before, my report has to be read in conjunction with all the other material before the Aldermen on 27th May.

Q. The other material did not stop you commenting on these other aspects, did it? A. No, I believe the three choices were important.

Q. And so was the fourth, you tell us, don't you — or do you? A. I am sorry, the three choices I was referring to were the three I attempted to define, a change from residential 2C to 2B, retention of 2C, or retention of 2C with a regulation under s.309(4).

Q. You set out three courses you thought they needed to consider against paragraphs (a) (b) and (c)? A. (a) is specific, it says clearly the Town Planning Committee needs to amend the C code, (b) says determine whether and (c) says determine whether.

Q. Did you think the Council might have faced some very difficult problems with regard to the future of the application which was anticipated if in fact it adopted your implied alternative? 10

A. I don't see difficulties. We didn't know then what the proposal may be.

Q. Did you read the solicitor's letter with some care? A. Yes, I believe so.

Q. You have told us you agreed with everything that was in it have you not? A. Yes.

Q. So we can take it you did agree with the comment the solicitors made with regard to the difficulties that might result from retaining the status quo position? A. Yes.

Q. And you recognised the difficulties they explained as being serious ones, didn't you? A. Yes, correct.

Q. You recognised that if in fact the status quo remained and an application were lodged for development within the parameters laid down by the tribunal there might be almost nothing that could be done about successfully opposing an appeal, didn't you? A. That is a choice open to the 20 Council.

Q. You recognised that, didn't you? A. Yes.

Q. You did not say one word about it in your report, did you? A. No.

Q. Were you trying to be helpful upon that alternative so as to assist the Council with what might well be considered to be the merits of such an alternative? A. My report did not canvas it, I have said that.

Q. You would recognise, I suppose, wouldn't you, that the implied alternative would quite clearly be likely to be closest to the aims of the property owners, wouldn't you? A. Yes.

Q. Would you recognise that that might well have some merit too? A. Yes.

Q. Well why not help the Council, if you had an open mind on the subject, by discussing the 30 merits of that alternative — why not help the Committee? A. Because that choice was virtually canvassed by the parameters set out by the tribunal in its decision. That decision was circulated to the Aldermen. They were well aware of the thinking of the tribunal. And obviously if they were to retain a 2C zoning without any restriction then they could expect an application which would come somewhere within the ambit of the parameters.

Q. It does not stop you giving them help on the subject, as the administrative head of the Town Planning section, does it? A. I stress I am the administrative head, not the town planner.

Q. You gave them town planning advice in this report, didn't you? A. I don't believe so, I believe it is basically legal advice.

Q. Had you yourself formed a view whether it was advisable for the status quo alternative to be 40 adopted? A. That is not my role.

Q. Did you form a view? A. No.

Q. Are you sure of that? A. Yes.

Q. Did you form a view about the other three matters set out in pars. (a) (b) and (c)? A. I believe we obviously had to adopt what the solicitors said — the solicitors advised in relation to the

residential C code and the way floor space is measured, but that still meant that the Council had choices to take in terms of what it wanted the zoning of the land to be and what regulation if any it wished to impose on any future development.

Q. If I can trouble you for a moment, my question was had you formed a view upon those (a) (b) and (c) matters set out in your report — you have dealt with (a) so far. What about (b) and (c)?

A. No, I did not take any view in relation to the choices.

Q. You had not formed a view? A. No.

Q. Were you aware that the council had been attempting for quite some considerable time before May 1974 to obtain re-zoning of these particular sites? A. Yes.

Q. They had made repeated applications to the Minister, hadn't they? A. They had made one. 10

Q. One? A. Well they had followed it up. The application was for 342Y suspension.

Q. Council and its solicitors wrote letter after letter to the Minister to try to achieve that objective, didn't they? A. Yes.

Q. So you knew this was a very vexed question in the Council, didn't you? A. Yes.

Q. That there was a very strong desire in the Council to prevent the sort of development contained, or which might be contained, in the forthcoming application in respect of these lands by re-zoning. You knew that, didn't you? A. Yes, based on the previous Council decisions.

Q. And you were aware that the first attempt had been made before the Local Government Appeals Tribunal had heard the appeal? A. That is right.

Q. And had been made virtually immediately after the Council had refused its approval to the original application? A. Yes. 20

Q. And that despite the first response to that application to the Minister, which involved a reference by the Minister on its behalf, to the fact an appeal was pending? A. Yes.

Q. Despite that response, and the terms of it, letter after letter was further written attempting to get a reversal of that response? A. That is correct.

Q. You were a party to that, I suppose? A. In my administrative role, yes.

Q. Under direction from — ? A. The Town Clerk.

Q. The Town Clerk himself is under direction from the Council, isn't he? A. Well if a Council makes application for a particular thing it is normal we follow the matter through regularly by letters to the appropriate body. 30

Q. If there is a reversal by the Minister in first instance it needs further direction, doesn't it, for the matter to be pressed further? A. The decision of the Minister was conveyed to the Council.

Q. And thereafter a number of further attempts were made by letter to achieve the same objective?. I understand so, Yes.

Q. And that must have happened by direction from the Council, musn't it? A. I am not sure on that point.

Q. How otherwise would it happen — on your own initiative, or that of the Town Clerk? A. Well it could be on the initiative of the Town Clerk, but I am not sure on that point.

Q. Didn't you play any part in it yourself? A. I would have written letters. Whether I wrote these — I cannot say whether I wrote these, but again I stress if the Council embarks on a particular course of action, unless there is an estoppel by the Council it is normal administrative procedure to follow it through. 40

Q. I am asking your recollection. You remember key topics pretty well, you tell us. How did you come to write the letters that you wrote, to the Minister? A. I write many letters on behalf of the Town Clerk.

Q. I am not the least bit concerned with what you do otherwise. How did you come to write these letters that you have referred to? A. I may be wrong, but I believe the application for 342Y suspension was written by the then administrative assistant.

HIS HONOUR: Q. That is the original application you are talking about? A. Yes, he would have been secretary to the committee at that stage.

MR. SHAND: Q. Who is that, what is his name? A. Mr. Collins.

Q. But you said you wrote letters. Did you say that? A. I have a normal follow-up system where 10

—
Q. I am not a bit concerned with that. You said you wrote some of these letters. didn't you? A. I said I may have written some of these letters.

Q. I put to you if you remember that some letters were written by the solicitors for the Council and some by the Council itself, do you remember that? A. Yes, I believe that is correct.

Q. You will agree, will you not, and I am looking at the letter now, that the first formal application was made to the secretary of the State Planning Authority by letter signed by the Town Clerk, although the reference being the administrative assistant? A. Yes, Mr. Collins.

Q. Dated 15th October 1973? A. Yes.

Q. And then are you aware that on 30th October Dowling Tayler, on behalf of the Council, wrote again referring to the appeal which had been lodged and was set down for hearing on 20th 20
November 1973, stating: "We would appreciate it if the Authority could indicate as a matter of urgency and prior to the hearing its attitude to the resolution and in particular as to whether it would concur in the suspension of the provision of the ordinance as sought by the Council"?

A. Yes.

Q. You remember that? I suppose that the solicitors wrote by virtue of some request or direction from the Council? A. It would have been a direction, or a request rather, from the Town Clerk

Q. So, not content with the original letter of 15th October, the solicitors were called in? A. Yes.

Q. I have to ask you this, because the documents have not arrived yet from the Department of Planning and Environment. You recall that Dowling Tayler wrote again on 13th November 1973 and made a similar type request — remember that? A. Yes. I must say that I was not directly 30
involved with this application at that stage.

Q. Why not? A. Because the set-up of the Council at that stage was the administrative assistant, Mr. Collins, was secretary to the Building and Health and Town Planning Committee. He resigned in December of that year, and it was only subsequent to that that I again came back into the town planning field.

Q. Were Hall and Hall the Council's solicitors in 1973 or 1974? A. No.

Q. Did they act on behalf of the Council? A. No, I believe they acted on behalf of a number of property owners down there in the area.

Q. But you were aware, weren't you, that despite the lodgment of the appeal the Council persisted with attempts to have this land re-zoned? A. I understand that, yes. 40

Q. I take it that that particular course of conduct was consistent with the view that you knew was held in the Council that this application which was then current — A. It was consistent with the Council's view, seeking the re-zoning.

Q. Consistent with the Council view that the application could best be defeated by a re-zoning?

A. Yes, I think that would be correct.

Q. You yourself took the view, did you not, that the 2A zoning which had previously, prior to 1972, covered these properties, should never have been changed? A. No, I did not take any view at all.

Q. Remember seeing the plaintiff about two weeks ago at the Woollahra Council Chambers?

A. Yes.

Q. You had a talk with him there? A. Yes, I gave him some documents.

Q. Somewhere about 11.00 a.m. or midday? A. Yes.

Q. You told the plaintiff then, did you not, that in your view the 2A zoning should never have been changed? A. I did not.

Q. Did you have any discussion on that sort of subject? A. No, we dealt with purely and simply the minutes he had requested, and he paid the fee. 10

Q. However, you had been present at a number of Council meetings throughout 1973 and 1974, hadn't you? A. Council meetings, yes.

Q. Many of them? A. Yes.

Q. And town planning committee meetings? A. Not in 1973.

Q. Town Planning Committee meetings only in 1974, is that the position? A. Yes, that is correct.

Q. Whatever the case may have been you heard it said again and again in those meetings, Committee and Council, that the zoning should never have been changed? A. No this application, this zoning did not come before the town planning committee in 1974 until 27th May.

Q. You had heard it said in Council many times to that effect? A. Very seldom, yes, that is correct. 20

Q. And you knew perfectly well that there was a very considerable effort being made in Council to find one alternative or another which would prevent effect being given to the 2C zoning?

(Objected to; rejected.)

Q. On 14th May 1974 were you aware, or did you hold the belief, that proclamation or a resolution of the Council under s. 309(4) could not be the subject of appeal? A. If the Council's decision was not the subject of an appeal?

Q. I will ask the question again. Did you know, on 14th May 1974, that a resolution of the Council under s.309(4) could not be the subject of an appeal? A. No, I was not aware of that.

Q. Did you think it could? A. I presumed it could. Most decisions of Council are the subject of appeal, or can be the subject of appeal. 30

Q. To the tribunal? A. No, not necessarily.

Q. I am asking you really about an appeal to the tribunal. Did you believe there could be no appeal to the tribunal against a resolution under s.309(4) — at that time? A. Yes, I think that would be right.

Q. You did not say a word to Dr. Dunlop or Mr. Howarth on that subject, did you? A. No.

Q. Wouldn't that have been a relevant matter to explain to them if in fact you were giving them explanations about the operation of s.309(4)? A. No, I only endeavoured to offer to them the choices open to Council, not to canvas what may or may not come out of the choice the Council did take. 40

Q. There was nothing said at the meeting of 27th May about there being no right of appeal against such a resolution, was there? A. No.

Q. There was nothing said at the meeting of 27th May about building lines being fixed, was there? A. Not when Dr. Dunlop and the other people were present at the meeting, no.

Q. Discussion followed on the subject after they retired, did it? A. There was general discussion

Q. Will you please answer my question? A. Was there discussion?

Q. Was there discussion on that matter after they had retired? A. Yes, I believe so.

HIS HONOUR: Q. On the matter of building lines? A. Yes. Not in specific terms, your Honour.

Q. What do you mean by that? A. Not a specific set-back from Wentworth Road, just a generality of whether there should be a fixed building line, and this was part of the discussion after the meeting, and as a result of this Miss Harvey Sutton was asked to report further.

MR. SHAND: Q. And of course you know perfectly well Dr. Dunlop and Mr. Howarth were never informed about that proposal, were they? A. Not until after the Council meeting of 10th June.

MR SHAND: Q. And of course you know perfectly well Dr. Dunlop and Mr. Howarth were never informed about that proposal, were they? A. Not until after the Council meeting of 10th June. 10

Q. Not until after it was a fait accompli? A. Until after the decision was taken.

HIS HONOUR: Q. Who first raised that matter? A. I believe it was Miss Harvey Sutton.

Q. She was at the meeting, was she? A. Yes.

MR. SHAND: Q. I want to return to this question of what you put in your report, that is the report of 27th May 1974. You were at some pains, were you not, to refer to the precise text of various passages from the tribunal's decisions? A. Yes.

Q. Which you considered relevant to the recommendations that you were making A. That is correct.

Q. You told us that you had well in mind as an alternative the status quo alternative? A. Yes.

Q. If you did have that in mind I suppose in order to assist the committee you would have desired to put before them the relevant passages of the tribunal's decision which affected or might well affect the status quo alternative, wouldn't you? A. I can only answer you as I answered you before. I believed that those three choices I set out in (b) and (c) certainly implied that there was the right of the Council to choose 2C without any restriction. 20

HIS HONOUR: Q. That is not the question you were asked. You were asked if you had that in mind you would have referred to other matters, would you not? A. I had it in mind; I did not refer to it.

Q. Well how do you explain it? A. Only again as I tried to before, that I believed (b) and (c) had impliedly given the Council the choice.

MR SHAND: Q. But you did not include in your extracts from the tribunal's decision any passages which would be significant if the status quo alternative were selected, did you? A. No, I did not. 30

Q. Was that by design or accident? A. I did not think they were relevant.

Q. It was by design then, was it? A. Yes.

Q. Even though you will agree, will you not, that those particular passages indicated a very strong probability that if the status quo remained there was a particular type of development which the tribunal would probably approve — or would approve? A. That is correct.

Q. And that was what the tribunal would approve, or probably approve in those circumstances, was in your mind a very relevant matter, wasn't it? A. No, I don't believe I gave it a great deal of consideration. 40

Q. But you gave a lot of consideration to the respects in which the tribunal had condemned the previous application? A. No, I gave consideration to those aspects of the tribunal finding which related to the choices open to the Council to change the status quo.

Q. But none to the choice open to the Council to preserve the status quo, that is so, isn't it? A. No reference to that, no.

Q. No reference, and no supporting material from the tribunal's decision? A. Not in my report,
No.

(Short Adjournment.)

MR. SHAND: Q. By the time you made this report of the 27th May, you really recognised in your own mind, didn't you, that the chances of a rezoning for the Minister were slim, at best? A. By virtue of a c.342Y suspension, yes.

Q. So you put that up as an alternative but not with any confidence that it would achieve anything? A. No, I'm sorry, what I say is to be re-zoned rather than a suspension; it is a different process.

Q. Does that different process involve the Minister's consent? A. Ultimately, yes, but it does provide for an exhibition wherein property owners and others can make representations. 10

Q. It would in your own opinion, take a very considerable time? A. That has been our experience, yes.

Q. In your report — you have that in front of you, haven't you? A. Yes.

Q. You referred at pp.3 and 4 of it to these various passages from the tribunal's decision? A. Yes.

Q. You did that, did you not, and it appears on p.3 in relation expressly to this alternative about the s.309(4)? A. Yes, that is correct.

Q. Were you trying to make out a case for the adoption of that alternative? A. No.

Q. The place I suppose that would have been logical for you to continue with your assistance to the committee would have been by adding at par. 4 — near the bottom of p.4 of your report, wouldn't it? A. If I were to canvass the actual choices that you mentioned. 20

Q. If you were to canvass the actual choice on which you — A. If I was to expressly canvass it, yes.

Q. It would be logical for you to state the alternative and to include within your advice under the alternative some relevant passages from the Tribunal's decision? A. Not necessarily refer to the decision.

Q. Not necessarily, but it might well have been appropriate for you to indicate under such a fourth paragraph at that point if that alternative were to be considered, then the Tribunal's parameters could be gleaned from the following passages, and then set out? A. Yes. 30

Q. Those paragraphs? A. That would be an approach yes.

Q. That never entered your mind? A. I'm sorry?

Q. Didn't that ever enter your mind when you were making up your report? A. No.

Q. If you had been viewing both sides of the matter that would have been a very reasonable approach for you to take, wouldn't it, to include that alternative at that point. A. It would have been a different approach, yes.

Q. A reasonable approach? A. Yes, it would have been a reasonable approach.

Q. Did you not take the view that the use of s.309(4) was an abnormal procedure for the Council to adopt? A. I don't understand what you mean by 'Abnormal'; it had been done before.

Q. Yes, but did you nonetheless consider that to use that power would be an abnormal procedure for the Council to adopt? A. An additional power. 40

Q. An abnormal one? A. No, I don't believe it is abnormal.

Q. One which would not ordinarily be adopted unless all other alternatives had been canvassed? A. Yes, I think that is fair, a fair statement.

Q. Because you recognise, don't you, that it had certain elements of unfairness about it, or could have? A. No, I didn't recognise that at all.

Q. Do you recognise it now? A. No

Q. Firstly, the fact that it is not subject to appeal, that would have a possible element of unfairness about it, wouldn't it? A. As I said earlier, I was not aware that it was not appealable. I believe that most of Council's decisions are appealable to one forum or another.

Q. You still believe it is subject to appeal to the Tribunal? A. Not to the tribunal.

Q. No — A. Not necessarily.

Q. What right of appeal do you think existed? A. Well, I must say I didn't canvass that particularly in my thoughts but I believe, as I said before, most Council decisions are appealable. 10

Q. What right of appeal do you think or even did you think there might be from a resolution under that sub-section. It has got to be an appeal to someone, hasn't it? A. Yes.

Q. Well, to whom? A. I can't say that I have ever considered that aspect.

Q. Of course, if there were no right of appeal that might well carry with it an element of unfairness in the use of the sub-section as an alternative, mightn't it? A. If there were no right of appeal?

Q. Mmm? A. It may, but the council again is surely the master of its own destiny in terms of what it wishes to see in the town planning environment, subject of course to the other forums that are present.

Q. The other what? A. Forums. 20

Q. What forum? A. Well, the tribunal and the courts.

Q. Master of its own destiny, subject to any rights of appeal? A. I believe so.

Q. You did recognise as at about 14th May, 1974 that there were procedures or alternatives which would give rights for the property owners to pursue by way of appeal in order to protect the value of their land or the use of it? A. The zoning use you mean?

Q. Yes, procedures which would give them the right to be heard? A. In terms of 309?

Q. In terms of the other alternatives A. If I can — sorry?

Q. If rezoning by variation, if that is the expression you used, were available, that would give them a right to be heard? A. Yes, certainly.

Q. If rezoning by suspension were used, that would give them a right to be heard too, wouldn't it? A. Not to the same extent as the rezoning would because of the statutory exhibition required by the Minister under a rezoning proposal. 30

Q. You said this in par. 9 of your affidavit — I am asking you if this truly reflected your own view — I am reading the second part of the paragraph — I am not ignoring the first part.

“ . . . I particularly drew attention to the powers of the Council under s.309(4) because I felt this section gave the Council powers in addition to the powers normally vested in a Council . . . ”

A. That's right.

Q. “ . . . under the zoning provisions of the Local Planning Scheme Ordinance.” A. That's correct. 40

Q. I take it that that is in accordance with the view you expressed a few minutes ago, the attitude you took was the Council would not ordinarily exercise power under s.309(4) until all the other alternatives had been explored? A. That's correct.

Q. I want to ask you this, and would you give it careful thought. Was this not the position that at the town planning committee meeting on 10th June, 1974, you informed that committee that a

resolution under s.309(4) could not be appealed against? A. I don't recall saying that.

Q. Would you be able to deny categorically that you said it? A. No, I couldn't deny that categorically.

Q. It may well be that you knew of that position at that time? A. My belief was and is that it was — there was a right of appeal to some jurisdiction.

Q. May it have been that you believed that there was no right of appeal from a resolution under that sub-section at that time? A. I'm sorry, could you just say that again please?

A. In the light of the fact that you cannot deny that you gave that advise to the town planning committee, it may have been your belief at that time that there was no right of appeal? A. My belief was that there was a right of appeal but I can't confirm or deny whether I specifically canvassed it in my report in June. 10

Q. But you may have told the committee that there was no right of appeal? A. Told the committee of 10th June? Do you mean orally told them?

Q. That is what the word ordinarily means? A. I took very little part in the meeting of the 10th June.

Q. Mr. Regnis, I don't mind one bit how much part you took. Is that the position, you may have told the committee on 10th June that you believed there was no right of appeal from a resolution under the sub-section? A. I have no recollection of telling them that.

Q. But you may have told them, nonetheless? A. I have no recollection.

Q. Is it possible you told them? A. It is possible I may have told them, but I have no recollection. 20

Q. What did Dr. Dunlop say when you told him, as you claim you did, about the power available under s.309(4)? A. My remarks were related to the power of the council under that —

Q. Will you please answer my question? A. I'm trying to relate what I said and what he said in reply.

Q. I am asking you what he said. You told us what you said. A. Dr. Dunlop confined his remarks to talking about the number of storeys that were viable on the property and —

Q. What did his answer constitute. Can you remember any words that he uttered? A. No, because I continued from that as to the other choices that were available.

Q. So you went straight on before he could answer or prevent him answering? A. It was a general discussion where I put the choices and where there was discussion afterwards. 30

Q. At whatever point it happened, did he say anything which related to the statement you claim to have made about the use of s.309(4)? A. No, I have no recollection of him saying anything.

Q. He didn't even say, "Well, to what extent might the number of storeys be limited"? A. No, because what I said at the time — that the council could regulate and it could regulate any number of storeys from eight down; it could be four, three, two. It had that power.

Q. You said from eight downwards, did you? A. Well, eight is the figure that was mentioned in the tribunal parameters.

Q. The council could regulate from any number downwards, couldn't it? A. Well, I assumed that if the tribunal had set parameters then it would only consider applications which fell within them. 40

Q. You remember saying that to him? A. No, I assumed. I didn't actually say.

Q. You do not remember saying that to Dr. Dunlop? A. No.

Q. How long had you been with the council — about four years? No, I joined the council in 1963. 1963.

Q. We can take it you only know of one other exercise under this power of s.309(4)? A. Yes.

Q. As far as you were concerned, Mr. Regnis, you believed, did you not, that the delay and doubt which might attach to an alteration of the zoning by a variation or by suspension, one or the other, might well be avoided with the same effect being achieved by the use of s.309(4)? A. The delay and the — I'm sorry, did you say something else — delay and? (Question marked read out) That would be correct, yes.

Q. You had in mind I suppose, didn't you, that as at the 14th May that another application could be expected for development approval? A. Well, Dr. Dunlop did indicate that had occurred, yes.

HIS HONOUR: Q. At that meeting? A. At that meeting.

MR. SHAND: Q. You had in mind that that would be refused by the council? A. No, not necessarily.

10

Q. Probably? A. Oh, I had no idea what his application would constitute.

Q. Didn't you? A. Although again I must say that he talked about a development which would be viable for the land and he was talking about an eight storey development, but councils have changed their minds in the past and no doubt will in the future. I couldn't presume to know what was in the minds of the older men.

Q. But all the indications you had received from the council indicated the high probability of them — A. To that stage, yes.

Q. — rejecting such a development? A. To that stage.

Q. Did you feel that the action which the council should take should be taken immediately?

A. Yes, I think everyone felt that whatever the decision was, that the history of zoning and the application was such, I think everyone felt it was fair it should be dealt with expeditiously.

20

Q. I suppose you conveyed that to the Town Planning Committee on 27th May? A. No, it was not my task to convey it to the committee. I think the committee members were well aware of that.

Q. How do you know that? A. Well, they were members of the council since 1971. They knew the history relating to both zoning and application.

Q. Of this land? A. Of this land.

Q. You say that you were aware that they knew that in the event of an appeal being lodged against a subsequent refusal of the next application, it was most desirable this action be taken immediately in order not to prejudice the council's position in such an appeal? A. Any action, whatever the choice was.

30

Q. You knew from the solicitor's advising that the action then under discussion as being necessary to be taken immediately was, in the alternative, suspension for the purpose of rezoning or the use of s.309(4)? A. Yes.

Q. It was perfectly plain those were the considerations that were being discussed at the meeting of 27th May after the plaintiff and Mr. Howarth left, wasn't it? A. Two of the considerations.

Q. Plain also when these two considerations were being discussed after those two gentlemen retired, it also was being discussed the necessity to act immediately upon one or other alternative? A. Yes, that's right.

Q. Because of the risk of prejudicing council's position in a future appeal? A. I would have to qualify that by saying that also to be fair to all concerned.

40

Q. Including the avoidance of the risk of prejudicing the council's position in a future appeal? A. Of course.

Q. Because it was discussed, was it not, there had to be the appearance of bona fides about such action? A. Not only the appearance of.

Q. Both the appearance and the existence of bona fides? A. Yes.

Q. It was discussed, was it not, that it was necessary to make such action look as if it was not just an alternative method of getting a spot re-zoned? A. I don't believe that was canvassed at all.

Q. In any case at that meeting of 27th May it was recommended that there be rescission of the previous resolution to seek suspension? A. That's correct.

Q. So quite obviously the discussion centred around the fact that that was not a course which was going to fail and therefore there should be rescission of the resolution? A. No, the discussion was divided in that some aldermen believed that because of the council's decisions in the past regarding the zoning that there was an obligation, a moral obligation to retain a 2C zoning with whatever restriction may be imposed by way of s.309, and there was an advocacy for the council to pursue the question of rezoning to residential 2B and there was also a discussion as to whether the zoning should remain and we await an application. 10

Q. The last one did not prevail? A. No, the council resolved to rescind its decision and called for a further report.

Q. It was generally discussed that that resolution to achieve suspension was not likely to succeed in view of the Minister's previously expressed attitude? A. That would be right, yes.

Q. So that the third alternative was then approved, meaning forget about suspension and seek to use s.309(4)? A. Yes.

Q. By the way, Dr. Dunlop and Mr. Howarth did not attend a meeting of the council on 10th June, did they? A. No. 20

Q. Nor the meeting of the Town Planning Committee on that date? A. No.

Q. There was nothing put to the council as to what their views were? A. Only the views they had expressed at the meeting of the 27th May and made known to the aldermen that were present.

Q. But they were not recorded on 27th May, were they? A. No.

Q. I suppose that at the meeting of the 10th June with the council was merely told these gentlemen had addressed the meeting of 27th May? A. That's correct, by way of the record of the meeting.

Q. That is all the information that was given to the council meeting on 10th June as to what had happened? A. That's right.

Q. You were aware I think when you made your report of 27th May of the recommendation which the tribunal had made with regard to the shape and height of any desirable building for the site? A. I was aware of the parameters set out in the tribunal's decision, yes. 30

Q. Were you aware of the dangers expressed by the tribunal as to a building which was of only a few storeys? A. The reservation expressed, yes.

Q. But in fact the erection of a three or four storey building of substantial bulk on the site could be more injurious to the locality than the erection of well designed tower buildings to the maximum permissible height? A. I was aware of that, yes.

Q. But that did not find its way into your report either? A. Well, that is a town planning consideration, surely.

Q. That is the reason you give for not having referred to that in your report, is it? A. That's right. 40

Q. But a matter you agree highly relevant to any issue of regulating height of a building under s.309(4)? A. As a town planning consideration, yes.

RE EXAMINATION:

MR. WILCOX: Q. Mr. Regnis, you were asked about anything you might have said on the 10th June as to the existence of the right of appeal. What was your belief on 10th June, 1974 as to whether there was a right of appeal against a decision to fix a number of storeys under s. 309(4)? A. I believed there was a right of appeal to the appropriate forum.

Q. When was it that for the first time you entertained any doubts as to the correctness of that belief? A. At the time when Dr. Dunlop instituted this action.

Q. You were asked about the fact that you did not include what was said to be helpful comments on the difficulties of the council maintaining the status quo. In the report that you have prepared, did you insert any helpful comments as to difficulties which the council might face if it sought to alter the zoning? A. I believe I did canvass the relevant points, yes. 10

Q. Did you talk about difficulties? A. I can't recall.

Q. Did you talk about any difficulties that might be faced if the council sought to impose a s.309(4) resolution? A. I'm sorry, your Honour —

Q. Did you talk about any difficulties that might be encountered if a 309(4) resolution was imposed? A. No.

[Witness retired].

(Leave sought to file in court affidavit of Mr. Bray, the previous Mayor of the council; no objection, Mr. Bray not needed for cross examination.)

(Affidavit of Michael Keith Fosbery Bray, sworn 29th July, 1975, read.) 20

DAVID LEWIS PARKER

Sworn and examined:

MR. SHAND: Q. Is your full name David Lewis Parker? A. It is.

Q. Do you live at 16 Ginahgulla Road, Bellevue Hill? A. I do.

Q. You are a company director? A. That's correct.

Q. Have you sworn an affidavit on 25th July last in these proceedings? A. I did.

Q. The affidavit is correct? A. Yes.

Q. May I ask you about one other matter. You attended, did you not, a meeting of the Town Planning Committee of the council of which you were a member on 10th June 1974? A. Yes, I did.

Q. Do you remember that that was attended by Mr. Regnis, the deputy town clerk? A. Yes, I do. 30

Q. Do you recollect the subject of a possible resolution under s.309(4) of the Local Government Act, relating to the premises 8/12 Wentworth Street, Point Piper, being raised? A. Yes, that was the subject of the meeting.

Q. Do you recall anything being said by Mr. Regnis in relation to such a resolution about whether or not there was an appeal from it? A. No, he didn't say that. It wasn't a question of whether there was an appeal; it was a question of whether it could be appealable.

Q. Did he say anything on that subject? A. Yes, he did.

Q. What did he say? A. He said that he had been in touch with the council's solicitors and that if the council followed the recommendation of the council's solicitors and himself by adopting a suggested resolution that the conditions attaching to the land would not be alterable; in other words, that they would not be appealable. To be more precise, that they could not be upset. 40

Q. To what was that resolution directed, what sort of a resolution was under discussion when that was said? A. That the committee was faced with a matter on the agenda to do with this property in Wentworth Street and the matter centred around action that might be taken by the committee and presumably, but not necessarily, therefore the council as a council as to what it might do to limit the development of that site.

Q. In that context was this section of the Local Government Act referred to? A. It was.

CROSS EXAMINATION:

MR. WILCOX: Q. Mr. Parker, you were present at the council meeting on 10th June 1974 which adopted the resolution the subject of these proceedings? A. Yes, I was.

Q. You spoke in favour of the resolution which the meeting carried? A. I don't know that I did.

Q. I would ask you to turn your mind back to the debate. You recall this topic very well, do you not? A. Well, I recall — when you say "This topic", I assume we are talking about the whole question of the conditions attaching to that land?

Q. Yes, you recall that matter very well, do you not? A. Yes, I do.

Q. You were present when the council adopted the resolution? A. Yes, I was. 10

Q. Was there any discussion? A. I think there was.

Q. In which you participated? A. I think so.

Q. You spoke in favour of that resolution? A. No Mr. Wilcox, I spoke in favour of part of the resolution.

Q. What part was that? A. The first part had to do with the rescission of an earlier motion which the council had taken and I was in favour of the rescission of that part of it on —

Q. You voted — A. Can I just finish. On the question of the second part my attitude with regard to it was well understood to the committee and as far as I recall I made it clear at the council meeting.

Q. You say you did make it clear at the council meeting? A. As far as I can recall Mr. Wilcox, yes. 20

Q. What was your attitude that you made clear to the council meeting? A. My attitude was, Mr. Wilcox, that the council should not have behaved in such a way as to limit or seek to limit in the way that it did the use that that land could be put to.

Q. So that you say that you were against the latter part of the resolution? A. Yes, that's correct.

Q. Did you move any amendment to delete the latter part of the resolution? A. No, I didn't.

Q. Did you vote on the resolution as a whole? A. Not as I recall by way of a division, but probably said yes or no. Really Mr. Wilcox it was at a point in the council when I think it was all immaterial as to how I might have conducted myself.

Q. Mr. Parker, you did vote on the resolution, did you not? A. I will say I voted on it, Mr. Wilcox, because I can't deny that I did. 30

Q. You are telling the court you can't remember whether you voted or not? A. Mr. Wilcox, I can't be more certain than I am certain than you are standing there, but that is the degree of certainty that I have.

Q. I'm sorry, but I don't understand that answer. Are you telling the court that you can't remember one way or the other whether you voted on this resolution? A. I am saying that as far as I can remember, and I can recall, yes, I did vote on it.

Q. Do you recall in which direction you voted? A. I would have voted I think in favour of it.

Q. In fact, there were two alderman who asked for their names to be recorded as dissenting from the resolution, were there not? A. I believe that is the case. 40

Q. Apart from those two gentlemen, the remainder of the aldermen voted in favour of the resolution? A. I can't be certain of it, Mr. Wilcox.

Q. Anyway, so far as you are concerned you voted in favour of the resolution as a whole? A. I think I did Mr. Wilcox.

Q. Mr. Parker, at that time you had the benefit of having been a member of the council for many years? A. Is that a question?

Q. You had been a member of the council for many years? A. No, I had been a member of the council for about five and a half years.

Q. You had been a mayor for a term of one year? A. That is correct.

Q. You had sat as a member of the Local Government Appeals Tribunal from time to time?

A. That's correct.

Q. And you were then fairly familiar with the planning process and the way in which council went about its functions? A. Yes, I was.

Q. Do you say that despite your experience as an alderman you voted in favour of a resolution which included the second part of the resolution, without seeking to move any amendment there to? 10

A. Your Honour, may I make an explanation?

Q. Do you say that or not?

HIS HONOUR: Q. Just answer the question? A. I'm sorry, sir, I would have to ask you to say it again.

MR. WILCOX: Q. You were an experienced alderman, were you not? A. Yes.

Q. You knew something about the procedures? A. Yes.

Q. Which operated in council? A. Yes.

Q. You knew it was open to you to move an amendment if you liked part of a motion and not all of it? A. Yes.

Q. Despite that fact you did not move any amendment, did you? A. No, I didn't, Mr. Wilcox. 20

Q. You did vote in favour of the resolution as a whole? A. Yes.

Q. Believing thereby that you were assenting to the council imposing a height restriction which was not subject to any appeal? A. Yes. Mr. —

Q. Is that right? A. Mr. Wilcox —

Q. Is that right?

HIS HONOUR: Q. Answer it whether it is right or not, and then give your explanation? A. I have to say yes, your Honour, but may I make an explanation?

Q. Yes. A. There is some doubt in my mind as to whether I would have had a seconder to the question of an amendment.

MR. WILCOX: Q. You didn't even try and find out, did you? A. Oh, I don't think that's the case at all, Mr. Wilcox. 30

Q. You see, you did not put the amendment and wait to see whether there was a seconder, did you? A. No, I didn't.

Q. Mr. Parker, the fact is that you lost your seat at the council elections in September last?

A. Yes, that is correct.

Q. Without going into details of it, that was after a fairly bitter campaign, was it not? A. No, I wouldn't agree with that at all.

Q. I suggest to you that as a result of the campaign you entertained no feelings of warmth towards the council at the present time? A. Oh, Mr. Wilcox, I think that is a gross over simplification. I have some very good friends and I am on very good terms with them within the council. 40

Q. With members of the council? A. Yes.

Q. At which of the two meetings of the 10th June do you say that Mr. Regnis was asked about the matter of an appeal and made the statement that you stated here on evidence? A. At the committee meeting which was held in the aldermen's room.

Q. Who was it asked him about it? A. I don't recall.

Q. Was it yourself? A. No. I made a suggestion to the committee and the suggestion that I made was if the committee and the council went on this way that they would get a writ for injurious affection, and as I recall Mr. Regnis chimed in on the basis that well. this suggested action on the part of the council was not appealable and that there was no question of the council putting itself in a perilous position.

Q. You used the term "Injurious affection"? A. Yes. I did.

Q. It was in reply to that term that he indicated that there was no risk to the council? A. That is as I remember it, yes.

HIS HONOUR: Q. What do you mean by a writ for injurious affection. Do you mean a claim for damages or what do you mean? A. Yes, your Honour, I know it probably sounds as though I am using extravagant language but again if I may explain, when I was first on the council I recall that the council had in mind to take action with regard to a property in Paddington and at that stage the then Town Clerk —

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Q. All I wanted to know was what you meant by the phrase. You did mean an action for damages? A. Yes, I did.

HIS HONOUR: I just wanted an explanation of the term.

MR. WILCOX: Q. What Mr. Regnis said was that there was no risk of that? A. He implied that, yes.

Q. That is all he said about any legal proceedings, isn't it? A. Yes.

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Q. You know that there is a difference between an action for damages and an appeal to the tribunal or some court as to the wisdom or otherwise of the council's decision: A. They are two separate things, yes.

Q. And the topic which you raised and about which he responded was the first topic, namely damages? A. Yes, that's correct

Q. That was all that was said in regard to that, wasn't it? A. Yes, I would say so.

Q. Mr. Parker, you attended the Town Planning Committee meeting when Dr. Dunlop, his mother, Mr. Howarth and Mr. Phillips were present? A. Yes, that's correct.

Q. Did you understand the purpose of the meeting to be to hear what those various persons wished to put before the council as to the type of development which in future ought to be permitted on their land? A. Yes, I understood that was the purpose of the meeting.

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Q. Did Dr. Dunlop and Mr. Howarth each address the committee? A. Oh yes, I recall Dr. Dunlop speaking to the committee.

Q. Dr. Dunlop spoke quite freely, did he not? A. Yes.

Q. He was given a full chance to put everything that he wished to put before council? A. So far as I know.

Q. On that subject? A. So far as I know.

Q. One of the matters which was discussed by him in his address to the committee was what height building was appropriate for the land? A. No, no, Mr. Wilcox, I don't recall questions being put to —

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Q. I am not asking you about questions. I said one of the matters he spoke about was the height of the building that ought to be erected on the land? A. Yes.

Q. He put his point of view as to why there ought to be about an eight storey building? A. I don't recall that.

Q. Do you recall what point of view in relation to the height he was advocating? A. Yes, I recall that he advocated what he called a slim twin-tower development.

- Q. The use of the word "tower" suggested to you a relatively high building? A. Yes, yes.
- Q. He quite fully and quite freely put his reasons for preferring that type of building? A. I don't think he elaborated on it to any great extent.
- Q. Did anybody chop him off and tell him he couldn't say any more? A. Not in full flight, no.
- Q. Well, at all? A. Not that I'm aware of.
- Q. You have frequently attended committee meetings at which persons interested in the topic before the committee have spoken, have you not? A. Oh yes.
- Q. It is the usual course for the council to hear people in committee? A. No, it is the usual course for the committee to hear a person in committee.
- Q. Thank you. A. I'm not trying to be pedantic. 10
- Q. No, I accept your correction, and on this occasion the committee was hearing Dr. Dunlop as it had heard many other people in your experience previously? A. I don't know how you would value "many", but it was not unusual.
- Q. On this occasion it was a relatively informal discussion, was it not? A. Informal in the sense that, yes, he was asked to say or invited to say what he wished to say.
- Q. He did that? A. Yes.
- Q. Do you recall any questions at all being put to him by members of the committee? A. No, I can't.
- Q. You at that day had already received a copy, first of all, of the decision of the tribunal? 20
A. Yes.
- Q. You had received a copy of the solicitor's advice, a letter of 9th May? A. I can't recall on that particular question.
- Q. You had received a copy of Mr. Regnis's report? A. I can't be certain of that either.
- Q. Have you received a copy of Miss Harvey Sutton's report? A. Yes.
- Q. You say you cannot be certain you received Mr. Regnis' report? A. I can't be certain of that Mr. Wilcox, simply — I don't mean that it didn't happen; I simply mean that I can't recall it distinctly.
- Q. There were a number of documents which you had received prior to this committee meeting, relating to the matter, were there not? A. That is a very general question, your Honour. The matter goes back a matter of years before that. 30
- Q. Immediately prior, received immediately prior? A. No, beyond the documents that you have mentioned, I think the answer to that is no.
- HIS HONOUR: Q. Is it normal practice in the committee for each member of the committee to get his own copy of reports on a matter before a committee? A. It was customary, your Honour, for them to be delivered to your house in a sealed envelope before hand. In cases where there was a degree of urgency papers would sometimes be made available at the meeting.
- MR WILCOX: Q. You have seen Mr. Reginis' report, have you not? A. I'm sorry, Mr. Wilcox, I can't answer that question; I simply don't recall.
- Q. (Shown Mr. Regnis' affidavit) I have opened it, Mr. Parker, at annexure B. A. Is it your wish that I should look at this? 40
- Q. I don't want you to read the whole of it but can you just see it relates firstly to 8/12 Wentworth Street, Point Piper, does it not? A. Apparently, yes.
- Q. And it has Deputy Town Clerk's Memo. Do you see that?
- HIS HONOUR: It refers to where it is on the body of the document? A. Yes.
- MR. WILCOX: Q. Do you see — I think it may be chopped off on the first page, but if you turn to the second page, it bears a heading, "Town Planning Committee, 27/5/74"? A. Yes.

Q. Does that refresh your recollection as to whether you had that report before you at that meeting? A. I'm sorry, Mr. Wilcox, it does not.

Q. Have you seen this report previously to this moment? A. I don't recall it in detail.

Q. No, Mr. Parker, have you seen it before this moment? A. Well, I'm sorry, I don't recall having seen it.

HIS HONOUR: Q. You mean you are not sure whether you have seen it or not? A. That is what I am trying to say, your Honour.

MR. WILCOX: Q. Would you like to look at it and see whether you can remember one way or the other? I have looked at it Mr. Wilcox and I really can't say that it alters the position.

Q. Are you telling the Court that you have no idea whether you have seen that memorandum prior to today? A. I say, I simply can't recall it. 10

Q. You can't recall it? A. No, I can't.

Q. You took a deep personal interest in this land and Dr. Dunlop's position, didn't you? A. I don't know what you mean by that question but I was chiefly concerned about the question of the behaviour of the council, that's all.

Q. You took a deep interest in this matter before council — A. I think I have answered the question, your Honour, as best I can.

Q. Did you take a deep interest in it or not, Mr. Parker? A. I took a very deep interest in the question of the behaviour of the council with respect to its dealings on the application, but as far as the land itself is concerned, I have no interest or concern about the matter — 20

Q. I am not suggesting — A. — at all.

HIS HONOUR: Q. Did you take a deep interest in the proceedings about the matter before the council in its committees. Would that be correct? A. I had to involve myself as deeply as I could in the council, yes, your Honour.

MR. WILCOX: Q. You were concerned that matters should be done regularly and fairly? A. Yes.

Q. When the Town Planning Committee met on 10th June, what documents have you then seen which related to this matter and which had come into existence since the tribunal's decision?

A. I had seen the tribunal's findings, but I would say that I had read in detail its finding more than the reasons for it, and I had certainly seen Margaret Harvey Sutton's report.

Q. Which one? A. I beg your pardon? 30

Q. Which one? A. I would have thought there was only one.

Q. Had you seen anything else? A. I may have but I can't recall them in graphic detail.

Q. Had you read anywhere a suggestion that the Council might make a resolution under s.309(4)? A. The matter was in Dowling Tayler's advice as I recall.

Q. When did you see that? A. I saw that at the meeting of the committee which preceded the council meeting of the 10th June.

Q. You say you saw that for the first time on that day? A. No, I am saying that the matter came home to me at that point, let me put it —

Q. Was that the first time you had seen that letter? A. I can't be sure.

Q. It would have come as something of a shock to you, would it not, to receive that suggestion for the first time on the 10th June when the town planning committee was making its final recommendation to council? A. There are a number of questions that you raised there. There was not a question — there was not an air of ordered calm about the whole business to start with. It is very unusual in my experience for committee meetings to be held in an area proceeding a council meeting to the extent that — If I may just run on for a minute — to the extent that the 40

report of that committee given to the council for it to consider is done in verbal terms. In other words, it is usual for a committee to meet some days prior to that so that the committee papers and its recommendation should all be made available to the entire council over the week-end preceding a council meeting.

Q. Mr. Parker, let me understand you, are you saying that the first suggestion you had heard of a s.309(4) resolution was at the committee meeting of 10th June? A. Well, I can only repeat that as far as I am concerned it came home to me at that point.

Q. When you say it came home to you at that point, does that mean it had been mentioned before but that you had not fully appreciated what it meant? A. No, I am really saying to you I think Mr. Wilcox is that I doubt very much that the matter was raised on 27th May but I am certain that it was raised on 10th June. 10

Q. So that on the 10th June you were fully aware that there was a live suggestion of a s.309(4) resolution? A. Oh yes.

Q. Indeed, that was the decision of the committee meeting to recommend to the council? A. Yes, it was.

Q. You say this was the first time you had appreciated that this is something that might happen? A. Yes.

Q. Did this not occur to you as being something that required some reconsideration before it was implemented? A. Mr. Wilcox, I would have thought that it ought to require all sorts of considerations before it was implemented over a very wide spectrum. 20

Q. The position is, you say, that at that time you were concerned with the council's procedures and its fairness. At the committee meeting of 10th June you learned for the first time of the suggestion of the s.309(4) resolution, at a committee meeting, you being a member of the committee. Is that right? A. Yes.

Q. The recommendation's made by that committee to the council, is that right? A. Yes.

Q. A resolution is proposed within the council, to which you raised no objection, none by way of amendment and in favour of which you voted? A. Yes, I think we covered that, Mr. Wilcox, but I certainly argued about it at great length in the committee.

Q. But that is what you are saying to the court happened?

A. That is what I am saying in answer to your question. 30

Q. Are you saying that it would be completely wrong to suggest that Mr. Regnis' report in which a s.309(4) resolution was referred to was before the Town Planning Committee of the 27th May?

A. I didn't say that; I say I don't recall having seen it

Q. You don't recall having seen the solicitor's advice prior to or at that meeting? A. I recall the solicitor's advice at that meeting.

Q. Did you read the solicitor's advice? A. To the extent that one is capable of doing so, yes.

Q. What do you mean the extent? A. I am trying to explain — I'm not trying to be evasive — what I am trying to get across is this: most aldermen and certainly for myself in particular, it is a very, very busy time and one just can't read in the utmost detail every single document that is put before you. I would say to you that it is impossible. And I say to you that I think that a conscientious alderman does his best to absorb the information that is put before him, but if information is put before him in a — actually at a meeting, there is obviously no opportunity for him to do his homework. 40

Q. At that meeting you had the solicitor's letter in front of you. You do recall that, do you? A. I seem to recall, Mr. Wilcox, that the letter was there and that it hadn't been distributed for very long.

Q. Did you read it during the course of the meeting? A. No, I wouldn't have read every single word of it. One would skim through it and pick out what appeared to be the sense of the document.

Q. One matter which was looming quite large in that letter was a s.309(4) resolution, wasn't it?

A. Well, you say so. I'm not denying it.

Q. Do you say you did not see that or appreciate it? A. I certainly appreciated the importance of it at the following meeting held on 10th June. As I recall the primary function of the meeting that was held on 27th May was for Dr. Dunlop and his architect and his neighbour and his mother to make themselves present at the meeting to put their views to the committee.

Q. After that meeting — A. If I could just run on —

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Q. Please don't Mr. Parker.

HIS HONOUR: Q. What do you want to say? A. It is only this, that on the 27th May I think there were other matters on the Town Planning Committee agenda, and in fact, as I recall the meeting convened first in the aldermen's room, and this was one of a number of matters, but I think with regard to the meeting held on 10th June there was no other matter to be discussed except the question of Dr. Dunlop's property.

Q. In between that date and 10th June, you had in your possession the documents which had been handed to you at the meeting of 27th May? A. I would have done.

Q. Did you read them? A. I can't recall.

Q. Would it be normal for you to read documents that had been given to you and which related to a matter which was likely to come up before a meeting of the council in the near future?

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A. Yes, Mr. Wilcox, it would, but I can't swear to it because I can't say I actually read every page of the document that I had in my possession. I can't swear to that.

Q. But Mr. Parker, that was something in which you wished to participate to make a right decision? A. I wished to see the council make the right decision.

Q. You knew it had been a matter of contention within the council over some period of time? A. I knew it had become a matter of contention.

Q. You knew the council had just resisted an appeal at some expense to them, both in terms of money and effort? A. Yes, that's correct.

Q. It was a matter which had called for strong feelings on both sides? A. Oh, I don't know that one can just talk about strong feelings on both sides.

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Q. There had been — A. The implication, what I gather from that is that there were two sides and that there was just a set piece battle.

Q. As to the merit of a high building on this site, two views had been expressed, had they not, to the council? A. I don't know.

Q. Do you seriously say you don't know that? A. Yes I do seriously say it, Mr. Wilcox, because I don't think the matter came before the council; I think it came before the committee.

Q. When the application was received by the council and advertised there were a number of people who objected to it, were there not? A. Apparently so.

Q. They were expressing a view hostile to the development? A. Mr Wilcox, I don't know whether you know it, but I was not on that committee, on the building and health committee at that time.

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Q. You were on the council in 1973? A. Yes.

Q. And 1974? A. By all means, I was.

Q. You knew that objections were received opposed to the application? A. Mr. Wilcox, I would not necessarily know that.

- Q. You would not know that? A. No, I would not necessarily know that.
- Q. Would it not be reported to the council that there were objections? A. Yes, there would, but Mr. Wilcox, I was not in the council when it was considered.
- Q. You mean you were not present at that meeting? A. I was not present.
- Q. Did you read the minutes of that meeting? A. Mr. Wilcox, I was overseas.
- Q. When was that A. In September, 1973.
- Q. How long were you away? A. I was away about three and a half weeks.
- Q. When did you return, do you remember? A. I would have to refer to be absolutely precise but it would be about 25th, 26th, sometime round there, in September, 1973.
- Q. When you got back you would have been furnished with a copy of the minutes of the council whilst you were away, wouldn't you? A. Yes, there would indeed have been. 10
- Q. I presume that you would have read them? A. I would think that very unlikely.
- Q. Do you say that you did not know that the council had received objections to the development? A. Mr. Wilcox, the reason I gave you that answer is that when I came back I distinctly recall there was a pile of paper from the council on my table at home at least that high (indicated) —
- Q. What I asked you was, do you say you did not know that the council had received objections to the development? A. I knew that there were objections to it.
- Q. You knew that that came from people who lived in the area and who did not wish to see that particular proposal? A. Yes, I most certainly knew that.
- Q. You also knew that the applicant company and also the owners of the land wished to see it proceed? A. That is assumed from anybody who puts in an application. 20
- Q. So that there were two views being put before the council and subsequently before the appeals tribunal? A. Yes, that is correct.
- Q. This was a matter that had occupied some time before the appeals tribunal? A. I understand it did.
- Q. It was obvious from your perusal of the tribunal's decision that a considerable number of matters had been canvassed? A. Yes.
- Q. That was the background of the matter of which you were aware when you went to the council meeting on 27th May? A. Yes.
- Q. You heard Dr. Dunlop address the meeting at which he expressed in quite forceful terms his desire to see a development within what he called the parameters laid down by the tribunal? A. I would not have described Dr. Dunlop's behaviour at that meeting as forceful and I am not seeking to avoid or evade your question. 30
- Q. I substitute the word "clear" terms? A. I think he was simply trying to find out what the council had in mind as to what it would agree to on that site.
- Q. But he made it fairly clear what sort of development he wished to see go up on the site? A. As I recall he seemed to think it was suitable for a nice twin-tower development.
- Q. At that meeting you were given a bundle of documents which you knew pertained to that matter? A. Yes.
- Q. You knew that that was — the committee had taken the decision that the planning officer make a further report to the next committee meeting? A. Yes, but I don't recall that the committee came to any other substantial decision. 40
- Q. Is it against that background that you say you cannot recall one way or the other whether between that day and the next meeting — A. Which day, Mr. Wilcox?

Q. 27th May? A. Yes.

Q. — and the next meeting you perused documents that you had been given? A. I say Mr. Wilcox that I can't swear to it but I say — because I just simply can't remember sitting down and looking through those documents. But I can only say to you that I think I would have armed myself as well as I could.

Q. For the meeting of the 10th June? A. For the meeting of the 10th.

Q. By reading those documents before the 10th? A. Yes. but I can't swear to it Mr. Wilcox, because, well, I just can't.

(Luncheon adjournment.)

ON RESUMPTION 10

RE EXAMINATION:

MR. SHAND: Q. Mr. Parker, in your cross examination you were asked question upon the subject of the statements made by Mr. Regnis in the course of the Town Planning Committee meeting on 10th June 1974? A. That's correct.

Q. You had said in your evidence in chief that he made statements advising the committee that some procedures restricting the development of the land would be unappealable. Do you remember? A. Yes, I do.

Q. I just want to be clear about what you mean in cross examination. You were asked then about some reference you made to a risk of the council being confronted by an action for injurious affection? A. That's correct. 20

Q. Could you tell us what, if any, relationship or any of the consequences of whether these various statements were made (1) in relation to this question of unappealability or (2) the risk of an action for injurious affection? (Objected to).

Q. Mr. Parker, just to clear up the matter, will you tell us what was said upon the subject which was contained within my previous question? A. You are going to think I am being trivial Mr. Shand — I'm sorry, I can't recall your previous question.

Q. I will ask you this question — A. I'm sorry, I'm not fooling around, I just can't remember.

Q. In respect of any statement concerning unappealability, injurious affection and such, can you tell us what was said? A. Well, I can recall it, not very after the meeting got under way that I had my say — I withdraw that if I may — I had a say with respect to the question of what the 30

council should do and it was mooted that the the council should limit the development that should take place on that block of land in line with what was put to the committee as being the intentions and the wishes of the appeals tribunal. In other words, it had been put to the committee that the appeals tribunal had found in favour of the council and further that the appeals tribunal felt that the zoning there was not appropriate. That is putting it in two small a term, I'm afraid —

there's a lot more to it than that. But that, in other words, it would behove the council to take some action to delimit the development that should be permitted on that site. And it is on that particular ground that I had a bit to say to the committee and it was along the lines that if the council sought to take action of that nature this would be doing something that was wrong in my opinion and in order, if you like, to bolster the force of my argument, I put it to the committee 40

that I thought that if they did it they would get a writ for injurious affection. And it may be an extravagant use of the term that is the term I used. And following that it was put by Mr. Regnis and on the advice and with the encouragement, if you like, of the council's solicitors, Dowling, Pratt & Nichol, that the council could and should pass a resolution in terms which had been

drafted by the solicitors, and that the council was not putting itself in any peril by doing so because the suggested resolution was unappealable, in the sense that it was removeable only by the council of its own motion.

HIS HONOUR: Q. When you said with the advice and encouragement of the council's solicitors, what were you referring to there? Was anybody present from the solicitors, or are you referring —? A. No.

Q. — to their previous advice? A. No, it was said by Mr. Regnis that he had discussed the matter with the council's solicitors.

MR. SHAND: Q. You were asked a number of questions about the action you took at the meeting of the council on the 10th June, 1974, in voting in respect of the resolution affecting these lots in Wentworth Street, and you said ultimately that you thought you voted in favour of it and that you did not move an amendment. You did say that you had doubt whether you would have had a seconder. How did that doubt influence you in your action? A. There is always pressure in a council meeting, or there always was pressure in a council meeting to get through the business with as least delay as possible, and if there is — if there was no point in getting to one's feet to make a motion, except for the purpose of grandstanding, then I wasn't going to do it, and by that I mean, I am human and I suppose I grandstand upon occasions, but if a cause is hopelessly lost and has been argued exhaustably beforehand, there is no point in rehearsing the whole argument for the benefit of the public again, and it is a waste of council's time. 10

Q. That was the position as you assessed it? A. That was the position as I assessed it. 20

Q. You said it was at a point on the council where it was immaterial whether you voted or not. Was that what you were referring to? A. Yes, it all turns about the same consideration.

Q. You gave another answer that there was not an air of ordered calm about this business. What did you mean by that? A. That goes to another answer which I think I gave with respect to this matter of how the aldermen are informed in writing of the council's business. That is that I regard it as ordered calm to use my own phrase when the committee papers are prepared and distributed in good time for the committee to consider them before the committee meeting and then for the results of that committee meeting to be distributed between the other aldermen so that they may in turn do the same thing, bearing in mind that there is only one alderman who is ever a member of every committee, and that is the mayor, and he usually goes to none of them; and for obvious reasons, not intended as an insult. 30

MR. SHAND: Q. You were asked some questions as to whether you were deeply interested in the matter of the application respecting this land and you gave an answer that you took a very deep interest in the behaviour of the council with regard to the application affecting this land? A. Yes, I did.

Q. What was it consisting of the behaviour of council in which you took a very deep interest?

A. I was very concerned that the council should behave strightforwardly and justly with applications coming before it whether that was compatible to the council or not. I do not want to bore the Court but I could go on for a long time with that very question.

Q. Is there anything about the behaviour of the council with respect to this application which caused you concern? (Objected to: question allowed, with leave given to question further if desired.) 40

Q. Do you recall the question? A. No.

Q. (Above question read.) A. That is a very difficult question to answer because there were certain matters that the council, or certain actions that the council undertook which I think were

very right, and very proper with respect to that application and I think it was quite right that the council, for instance, rejected the application when it ultimately came before the council, as I think I have explained, in my absence in Sydney —

HIS HONOUR: Q. You are just being asked about my concern. You need not reiterate what has given the concern? A. Yes. I do not want to bore the Court, but it is a very wide question.

Q. Confine yourself to what you were asked? A. The question that did concern me with regard to the behaviour of the council on that particular question was whether the council was going behind the backs of the public or the applicants or anybody else and seeking to virtually re-zone the land behind closed doors. I think that is the only matter that was of concern to me as far as council's policy was concerned.

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(Witness retired and excused)
CHARLES CLARENCE PHILLIPS
Sworn and examined:

MR. SHAND: Q. Is your full name Charles Clarence Phillips? A. Yes.

Q. You live at what address in Sydney? A. 118 Wolseley Road, Point Piper.

Q. You are an architect? A. Yes.

Q. And you swore an affidavit on 25th November, 1974. Is that affidavit correct? A. Yes.

CROSS EXAMINATION:

MR. WILCOX: Q. You read the decision of the tribunal before you swore your affidavit, I take it, when you set out in your affidavit that the type of development which you thought was possible before and after 10th June, you had in mind what the tribunal had said, did you? A. Yes.

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Q. Could it be correct to say as a general proposition that there is a relationship between the amount of floor space in a building and the population density created by that building? A. Yes.

Q. One can have large units in which one would expect a large number of people or small units in which one could expect a small number of people? A. Well, not altogether; although they are large units they do not necessarily have a large number of people in them.

Q. One appreciates that there will always be exceptions; you get a large flat with even a single person in it, or you can have a family in a two-bedroom flat. But as a general rule you relate floor space to population density as a statistical prediction? A. You do.

Q. And the formula that is usually adopted is to take a certain number of persons for a three-bedroom flat, and a certain number of people for a two-bedroom flat, and if one bedroom flats are in issue a certain number of people for them. Is that right? A. Yes. Approximately.

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Q. Now the way in which the tribunal specified its idea of the scale of the development was to take, in terms of persons per acre, rather than floor space? A. That is so.

Q. And indeed the parameter, as the Board called it in relation to acceptable scale of development, was set out on p.13 of the decision, I am just reading, "Without laying down precise parameters for an acceptable scale of development the Board agrees with the views of the council's planner that in this location given the existing zoning any development should not exceed population density of 70 to 75 persons to the acre"? A. Yes. I remember that.

Q. "The Board envisages a corresponding reduction in the plot of any buildings to be erected on the site". Is that right? A. Yes.

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Q. What the Board is saying is, well, we have population of the order of 70 to 75 and we would expect floor space to relate to that. You agree with that? A. Yes. They said that.

Q. You will have noticed from the Board's decision that a calculation was made in respect of the projected population of the proposal before the Board at 94 persons per acre. Is that right?

A. Well, I have just forgotten that figure, but I do remember the 75 which they recommended.

Q. Well, do you recall it was about 94 persons per acre calculated at — A. Something like that, yes.

Q. And that was for a development which, in terms of plot ratio, went up to the maximum specified in the council's ordinance, namely 1.15 to one. Is that right? A. Yes.

Q. Now I wonder would you just follow through some figures with me. What I want to do is just make a conversion of the parameters of the Board in terms of population relating it to plot ratio, you see? If one takes 94 persons per acre and reduces it to 75 persons per acre, which is the top of the range expressed by the Board, that means a reduction of 19 persons per acre from 94 or 20.2 per cent, and then if one takes the plot ratio in the proposal before the Board of 1.15 and takes off 20-per cent, would you agree that that involves a deduction of .232 in plot ratio? 10

MR. SHAND: Could I have that last part again?

MR. WILCOX: Q. If one takes 1.15 plot ratio less 20-per cent the 20-per cent gives 0.232 bringing one back to a plot ratio figure of 0.918? A. Something like that, yes.

Q. That looks pretty right, does it? Now, that is the top of the range that the Board specified. Do the similar exercise from the bottom of the range, that is reduce the population from 94 to 70, so you take off 24 over 94, which is a reduction of the 25-per cent. Is that right? A. Yes.

Q. And if you take 25-per cent off the top ratio of 1.15, you deduct 0.2875 and end up with a figure of 0.8625? A. Yes. I do think those figures would be right.

Q. So we find with the range of plot ratio which one has, if one applies the Board's population parameters, goes from 0.86 to 0.91 and the figure that the council laid down in its decision was a plot ratio of 0.9, right, do you agree with that? A. No. I do not quite follow that reasoning. What was it you said again? 20

Q. The range of plot ratio that one takes when one applies the population parameters the Board specified, is 0.86 to 0.918? A. Yes.

Q. And the council's resolution specified a plot ratio a maximum of 0.9. Is that right? A. Yes.

Q. You were aware of that, were you not, Mr. Phillips? A. Well, I was not thinking particularly of the — I look at the number of people which would probably be in the flats that I design, from a different point of view to this.

Q. Were you aware tht the council had specified a plot ratio of 0.9? A. Yes. I suppose I was. 30

Q. Well, is not that something that would be important in assessing the development potential of the site? A. Yes. Up to a point it was.

Q. It is really of basic importance, is it not, in the sense if the plot ratio for instance had been a maximum of .5 then the potential for development is only 5/9ths of what it is if it is .9? A. Yes. Well, I did not take that as a main consideration in designing my flats.

Q. Just look at it on these figures, would you not agree that what the council has done is to specify, in terms of plot ratio, a scale of development which is right within the range of scale expressed by the tribunal in population terms? A. Yes, well, the plot ratio is the relationship of the total floor area of the building to the are of the site.

Q. Yes.. But we will come to that in a moment. Will you agree with me what the council has done is to specify in plot ratio terms a scale of development which is almost precisely in the middle of the range which the tribunal specified talking in population terms? A. Yes. 40

Q. And you have already agreed that there is a relationship in terms of the amount of development that is permissible between plot ratio and population? A. Yes. I do not know how rigidly the council applies the population in connection with these particular developments. They are more interested in — to my knowledge they are more interested in the actual building, size

of the building, rather than the number of people who are in it.

Q. But they are very much interested in the amount of floor space within the building? A. Of course.

Q. And the population can only be expressed in relation to a building if one converts proposed units into people; one says X persons for a three bedroom flat, Y persons for a two bedroom flat? A. Not necessarily.

Q. How else does one determine whether a given building is going to yield 70 persons per acre or 150 persons per acre? A. As I said, the size of the flat, unit, or the residential flat or whatever it is likely to be termed, does not necessarily indicate the number of people who are going to be in it. Some people like to have a very large flat, there may only be three in the family, but instead of just having one double bedroom and one single bedroom they like to have a large flat. 10

Q. Mr. Phillips, one appreciates that different people have different tests as to the amount of room they want. You understood the tribunal, in talking about parameters, to be talking about how you judge a future development application, did you not? A. Yes.

Q. At the time a development application is prepared by an architect, and at the time that it is received by a council, it is almost always the position that nobody knows which individuals will occupy the particular units? A. Of course not.

Q. One does not know whether you are going to have a widow living there on her own, or a family with five children? A. That is so.

Q. So that one has to take statistical figures and assess, well, on the average in our municipality we get X persons to a three bedroom unit, and Y persons to a two bedroom unit. Is that right? 20

A. Yes.

Q. And if parameters have been laid down in terms of the population, the only way that that can be translated into, that that can be used to evaluate a development application is to apply those statistical figures. Right? A. Yes. Theoretically.

Q. That is the only way which they can be used, is it not? A. No. In my experience the actual number of people who are reckoned to come to live in the people (sic) are not the over-riding consideration.

Q. I did not ask you that, I asked you — you see, one has a population parameter specified, and then one is seeking, you use that guidance in relation to a particular development. What I am suggesting to you is that the only way that that guidance is of any utility is to convert it into units by taking a statistical figure? A. The council code does not lay any particular stress on population. 30

Q. Mr. Phillips, it will be quicker if you deal with my questions.

HIS HONOUR: You are not being asked anything about the council code. You are just being asked about a particular calculation. Listen to the question.

WITNESS: I beg your pardon. Will you rephrase?

MR. WILCOX: Q. I will put the question to you again. If one is given some guidance by a tribunal that the population density for a particular site ought to be within a particular range, the only way in which that can be used in relation to a future development application is to translate the number of people in the parameters of the tribunal into units by reference to some standard figure of persons per unit? A. Yes. 40

Q. As a general proposition the more bedrooms in the unit the larger the floor space it will occupy? A. Yes.

Q. So that one finds in practice a correlation between population densities as laid down in a general formulae such as the tribunal did, and floor space? A. Yes.

Q. You have made the point that in your experience the Woollahra Council does not normally talk in terms of population density but rather in terms of floor space and other requirements of its code? A. That is so.

Q. So in this particular case it is clear, is it not, that what the council did when it specified a plot ratio of 19 was to specify in its own normal yardstick, normal plot ratio, a figure which was squarely within the range expressed by the tribunal talking in population terms? A. Yes.

Q. The controlling factor in terms of the scale of the development is the plot ratio which one can get on a site? A. Yes.

RE EXAMINATION

MR. SHAND: Q. Are you presently aware of what has been suggested to you as the council's decision as to plot ratio in respect of a development on this site by virtue of its resolutions of 10th June? A. I beg your pardon? I do not quite understand that question. 10

Q. Are you presently aware of what is suggested to be the council's delimitation or definition of plot ratio by virtue of its resolutions of 10th June, 1974, relating to this site? A. Yes.

Q. Are you aware of its terms specifically or not? A. Not specifically.

Q. What I think my friend has been referring to is this; after reference to the regulation of the number of storeys and after reference to the fixing of a building line, in relation to the frontages of the sites, and that the council passed this resolution, "that the owners of the said properties be advised of the council's resolution in one and two above (the two I have mentioned) and further that they are advised that the council would consider permitting greater site coverage than that allowed in its adopted relevant code and roof terraces being accepted as open space for site coverage calculations, both to be at the discretion of the council, and with a plot ratio of up to 0.9 to 1, 24 being the maximum number of dwelling units, all being subject to a high standard of design, including a satisfactory landscaped area facing Wentworth Street and provision of an average set back of 30 ft. to the rear boundary to permit retention of existing trees and privacy of adjoining residents." First of all with regard to the part that applies to plot ratio and the words that "the owners be advised the council would consider permitting a plot ratio of up to 0.9"; do you regard that as being a laying down of positive plot ratio for these sites? A. Yes. 20

Q. Do you regard it as such? A. Yes. Actually the plot ratio that I work to exceeded that because I work to the original code. 30

Q. I did not hear the first part of that answer. A. The plot ratio that I work to exceeded that .9 because I work to the code which applies to high rise residential flat buildings. I think the plot ratio was 1.15.

Q. I want to ask you this about plot ratios; you were asked whether in fact, as I understand it, you used this concept of plot ratios or you got to it by looking at the number of residential units which are proposed for development and calculate? A. Yes. The maximum, the floor space of the whole building.

Q. I realise that, but it was put to you as I understand it that the use of plot ratio for this purpose is intended to enable one to get a population density for a site. Is that so? A. Yes. 40

MR. WILCOX: If it is suggested I put that, your Honour, I would not, because that is obviously wrong.

HIS HONOUR: I do not think you put that.

MR. SHAND: Q. In fact, can you have a particular site, merely applying the same formula of number of persons per particular size residential unit, regardless of whether the site is in Point Piper, Redfern or Westmead? A. No. It would vary depending on the district.

Q. And with regard to Point Piper; can you tell us what you believe to be the proper approach to a calculation of the number of persons which should be allowed for in relation to residential units of particular sizes? A. Well, I think that in Point Piper there would be less people living in one of these units than there would if the unit were, say, at Bankstown, or somewhere remote.

HIS HONOUR: Q. Perhaps in Paddington? A. Or Paddington, your Honour, yes.

MR. SHAND: Q. Dealing with what the council appeared to be indicating in these resolutions, would the building line, and would the regulations of the number of storeys to a maximum of three and taking into account plot ratio of 0.9 to 1, and 24 as the maximum number of dwelling units, what is the shape of the building that you think results from that, putting it in general terms? A. Well, if the building were designed as a three storey building it would necessarily have to be a very long building and, in any case, a three storey building is an unsatisfactory type of building because, for that particular area anyhow because people just do not like walking up three flights of stairs, and a three storey building is a most unusual height for a building except in the more remote areas; it would be a most unusual height for a building to build in Point Piper because you would not be able to, in my view, sell the thing or rent it to the type of people who would be wanting to live there. They just would not walk up so many flights of stairs.

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Q. You do not conceive putting lifts into a three storey building? A. Well, a three storey building is difficult to plan for lifts whereas a compact high building, it is a simple matter to arrange the lift core in the centre of the building.

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Q. Incidentally, if it were built to the maximum of three storeys and to these other specifications in these resolutions, would there be any effective use made, or could there be any really effective use made of the views which would be available from the site? A. No. Well, that is another important factor. In a vertical site like that, the low three storey building, relatively low building would not take advantage of the views, whereas a high rise building would take advantage of them and be very much more valuable building on that account, and a very much pleasanter one to live in.

Q. (By leave) Tell us, if you would, what you think is the real effect upon any construction that came within these council requirements and their resolutions as to the setback which was prescribed: 60-feet at the eastern boundary of No. 8 and reducing through 45-feet to 35-feet on the western boundary of No. 12? A. Yes, well, in my view that is an extreme building line to stipulate and it would of course have a big effect on the type of building that would be put on the site.

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Q. Coupled with the reference to an average setback of 30-feet to the rear boundary what effect does it have, those two lines, on the building? A. Well, they are all in the excess of the requirements of the code and they would have a severe effect on the size of the building which would be designed for the site.

Q. What do you think it would really do to the shape of a building? A. Well, yes, and the overall dimensions of it, it would affect the planning of the building and the building would not be as satisfactorily planned within those limits as it could, as a building would just adhering to the normal code dimensions.

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Q. What shape building do you really finish up with if you comply with those two lines, front and rear, and with the other requirements of these regulations? A. Well, you would finish up with a

much more massive building, a squarish building, rather than a spread out one.

HIS HONOUR: Q. Why is that? A. Well, your Honour, the working within those rigid limits in order to get the size flats, the floor space in the flats which were suitable for that particular site, you would have to have a squarish building, whereas with an elongated building you would —

Q. Why would you have to have a squarish building; that is what I do not follow? A. Well, because, instead of being only 20-feet from the street front they require you to keep back at one point 60-feet and at another point 35-feet, I think it is.

Q. Would that not be consistent with an elongated building parallel to the — A. No. The site is deeper, much deeper than it is wide and the proper way to plan it is from back to front, from north to south. 10

Q. Are you talking about just No. 8, or are you talking about — A. I am speaking about No. 8.

HIS HONOUR: I think some of the answers to the questions puzzled me, Mr. Shand, and I think you may have been asking about the whole and the witness replying about 8.

MR. SHAND: I was really directing my mind to the three.

HIS HONOUR: I do not think he appreciated that at some stage.

MR. SHAND: Q. Could I just ask you this: you have given us your opinion about the effect of these resolutions on No. 8 taken by itself? A. Yes.

Q. What opinion do you express with regard to the resulting effect upon the shape of development which was designed of all three blocks and within these requirements? A. Well, I really only worked on the — I quickly looked into the whole three sites, but the scheme I prepared was for No. 8, and that is the site that I looked closely into. 20

Q. You have not looked, considered the three in combination? A. Not sufficiently.

Q. Could you just tell us, whether you can answer it or not, if you would look at this drawing which I hand to you as being a sketch plan which was provided by the principal planning officer of Woollahra Council, Miss Harvey-Sutton, with one of her reports of the three sites with the building line to the frontage of Wentworth Street drawn in with the description you have and with the building line at the rear portion of 8 and part of 10 drawn in, with it perhaps incomplete. (Sketch shown) A. Yes. What was your question?

Q. If you are able to answer it, it is this: what sort of a building, in other words, what shape would you feel would have to be designed to come within the requirements of this council's resolutions and within those building lines which are referred to and which have been mentioned, in the sketch, involving maximum of 24 units and a maximum of three storeys, that is on those three sites? A. Well, just, my impression would be that probably the best type of design would be a U-shaped building. This being a three storey building, Mr. Shand? 30

HIS HONOUR: Q. Maximum of three, not necessarily three all the time. A. Well, as a maximum of three storeys I would think that a building would turn out to be a U-shaped building with the open courtyard towards Wentworth Street and the sides of the U running possibly — it may only turn out to be — I beg your pardon, put up an L-shaped building with one leg of the L running parallel to the eastern boundary and the other leg running parallel to the rear boundary. 40

MR. SHAND: Q. If you had that sort of structure would you be able to take any real advantage of the views available from the site? A. One of the units would have a view of some sort, but I do not think any of them would have a very good view.

MR. WILCOX: Q. (By leave) Just considering from Dunlops' property, that is No. 8: are you aware of the available building depth that one would have if one designed the building for that site which complied strictly with the building line and also the rear boundary set back shown on the

sketch you have in front of you; applying that, not necessarily going right to it. Do you know what depth there is available for you? A. Depth of site?

Q. Yes? A. Offhand I do not. I have just forgotten the demension of that boundary. I know the site was 33,500-square feet, about, but I have forgotten the depth of that alignment there.

Q. Would you agree with me that on the eastern boundary where one has the 60-foot building line, 30-foot rear setback, the boundary itself is 265-feet which leaves 175-feet of depth? A. That would be right.

Q. And on the western boundary 45-foot building line, 30-foot rear setback the boundary 185-feet which leaves 109-feet of depth. Now, that is ample depth in which to design a residential flat building, is it not? A. Yes, well, you would not have the full depth because you have to keep in from the side boundary about 30-feet it would work out, I think, which would reduce the depth available for the building because you cannot build a building right on the side alignment.

WITNESS: You do not have the 75 feet of depth available.

MR. WILCOX: Q. The western side of the building will have available more than 109 feet, it is also in from the boundary? A. You would require to keep in from the western side correspondingly.

Q. There is no problem, is there, about putting a residential flat building on that site? A. No, you could put a residential building on that site.

Q. If it were to achieve a plot ratio of .9, that could be obtained by having three storeys with a building occupying thirty per cent of the site? A. With a three storey building you would not get enough flat units to make it an economic proposition.

Q. Put aside the economics for the moment, you could get a .9 ratio by having a three storey building occupying thirty per cent of the site? A. Yes.

Q. There is no problem about finding thirty per cent of the site which is free of that building line and rear set back restriction? A. Yes, you could.

Q. The real question is what you understand to be the economics of it is that right? A. Yes.

Q. The critical question there is the price which Dr. Dunlop paid for that block of land?

A. Whatever the value of the land is that affects the economics of the building of course.

Q. At no time have you been given any instructions by Dr. Dunlop to attempt to design a three storey building for this site have you A. Dr. Dunlop asked me to look into the question of a three storey building.

HIS HONOUR: You say "for this site".

MR. WILCOX: Q. For No.8? A. Yes, for No.8.

Q. Have you ever done any design sketches for that? A. Yes, I did and I found, in my opinion and also the opinion of —

Q. Just confine yourself to your own opinion? A. Yes, I did look into it.

Q. You did some design sketches, did you? A. Yes.

Q. What plot ratio did you show in your design sketches? A. The plot ratio laid down by the council code.

Q. That was unsatisfactory to Dr. Dunlop, was it? A. It was unsatisfactory to me, in particular, I thought it was not a suitable building for that very splendid site.

Q. Dr. Dunlop even in his latest application has sought to obtain a plot ratio up to the maximum specified in the ordinance of 1.51 to 1? A. That is right.

Q. He is very firmly of the desire as he has expressed it to you that there should be an 8 storey building achieving that plot ratio? A. Yes.

Q. And the reason is because he regards that as being the building which is going to return to him the greatest financial benefit from development? A. The reason he told me, and one that I think I agree with too, is that he wanted the building to conform with the code laid down by the council when he bought the site.

Q. You can have anything less than the maximum figure specified for plot ratio and still conform with the code. can you not? A. But it has to be a satisfactory building.

Q. From the owner's point of view it is also a desire to obtain a maximum return on the development? A. Yes, of course.

Q. And that really is the position, that Dr. Dunlop is firmly of the view that he ought to have a 1.51 ratio so as to get the maximum benefit from the site? A. Yes. and that is what I feel too.

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RE EXAMINATION

MR. SHAND: Q. What were the defects of the building you designed that you have been talking about? A. The known defects were that I designed a three storey building and although I was able to get quite nicely planned units, with a three storey building it was quite obvious that they would be unsatisfactory to most people because they simply would not walk up three flights of stairs on a site like that.

HIS HONOUR: Q. You only walk up two flights in a three storey building do you not? A. From the garage, people drive into the garage and then they would have to walk up.

Q. Is the garage under the other three storeys? A. Yes. They would park their cars and then have to walk up all these stairs. That was the main reason for the three storey building and another reason. I thought the building would not be satisfactory was that it did not take advantage of the views and another consideration was that the building was too spread out and I was firmly of the opinion that a high rise building was the proper building to put on that particular site.

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MR. SHAND: Q. You swore a second affidavit on 28th July last. That was correct too, was it?
A. Yes, I did.

(witness retired and excused)

(Stephen Lawrence Mason, an officer of the Planning Environment Commission, appeared on subpoena duces tecum and produced the documents referred to in the subpoena, together with the subpoena. His Honour granted both counsel access to the documents)

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GEORGE WELLINGS SMITH

Sworn and examined:

MR. SHAND: Q. What is your full name? A. George Wellings Smith.

Q. You live at 72 Wallalong Crescent, West Pymble? A. Yes.

Q. You are a town planner by occupation? A. Yes.

Q. You have sworn an affidavit in these proceedings dated 25th February? A. Yes.

Q. You confirm the correctness of the contents of that affidavit which incorporates a report you previously made which is annexed to it? A. Yes.

CROSS EXAMINATION

MR. WILCOX: Q. In the report of 14th August which is annexed to your affidavit you have set out certain opinions you have regarding the effects of council's resolutions? A. Yes.

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Q. And also a desirable planning approach for this land, is that right? A. I do not know whether it goes on to the latter part.

Q. It sets out what you think as to the merits and demerits of alternative approaches in terms of heights of buildings and so on? A. Yes.

Q. Would it be your experience that even amongst expert town planners there is very often a sharp difference of opinion as to what is the right thing to be done in respect of a particular area or a particular site? A. Yes.

Q. It is not infrequent in your experience for an appeal to be heard by the appeals tribunal and to find qualified and well regarded planners each of them supporting the alternative point of view? A. That is the normal case.

Q. You find that you are frequently in the position of having to dissent from the view of one of your colleagues? A. Yes.

Q. In this particular case you gave evidence in support of the appeal by Blackburn Developments, did you? A. Yes.

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Q. I take it that you expressed views before the tribunal favourable to the allowance of that appeal and to the granting of the consent sought by Blacktown Developments? A. Yes. I was primarily interested with the appropriateness of that particular type of building on that site.

Q. But you were also of the view that the application that was before the tribunal was an acceptable one which ought to have been approved by the council and which the tribunal ought to have approved of that appeal? A. Yes, although I was not aware at that time and I doubt that anyone connected with Blackburn Developments was aware that in the final analysis there were some features of the building which put it in breach of the ordinance.

Q. You are talking about the question of the balconies? A. Yes, and some of the site coverage.

Q. You have referred to that as the technical matter of how you calculate balconies, whether they are in or out in terms of floor space, whether the podium should be considered as site coverage or not? A. Yes.

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Q. And you were in favour of it — A. Of a high rise building on that particular block.

Q. You were expressly in favour of those two buildings going on that particular site? A. Yes. In my opinion they presented a reasonable solution to that particular problem site.

Q. You were called to give evidence by the appellant to that end? A. Yes.

Q. In the event as you discovered the tribunal did not share your view that that was an appropriate development to go on that site? A. That is correct.

Q. In fact they were unkind enough to describe the proposal as a gross over-development of the site? A. They were.

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Q. Which would indicate that the members of the tribunal, having considered the whole of the matter and applying their own expertise, found themselves in disagreement from you?
A. Yes.

Q. You have said in your letter that the council's town planner was, so far as you recall, the only town planner to seriously argue the case for low rise development. You are referring to Miss Harvey Sutton, are you? A. Yes.

Q. Do you recall that Mr. Neil Ingham also gave evidence in the hearing of the appeal? A. Yes, and to the best of my recollection he did not argue specifically in favour of low rise development.

Q. Do you recall reading the written report which he prepared and which was tendered to the tribunal as his evidence in chief? A. I probably did at the hearing.

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Q. Do you remember the passage contained in it, "In my opinion buildings on this site should not exceed three storeys in height . . . Wentworth Street"? A. No, I cannot recall that. If I had recalled it I would have put it in the affidavit.

Q. Is your memory refreshed by my reading it to you? A. If it is in the document presumably at some stage I did read it. That affidavit was written six months after the hearing I suppose.

Document 11 Transcript of Evidence before
Mr. Justice Wootten 28 July 1978, 29 July 1978, 30 July 1978

Q. Do you recall Mr. Ingham expressing the view in favour of a low rise building, that is about three storeys, in contrast to the eight storey proposal that was before the tribunal? A. No, I do not recall that.

Q. Your background as the planner is by way of surveying I take it? A. My basic qualifications are in surveying, I have never practised as a surveyor.

Q. You do not have any qualifications as an architect? A. No, other than I have been a director of an architectural firm for a number of years.

Q. And are you referring to your present firm or to Park — A. Both.

Q. When you were with Park you were doing planning rather than architectural work? A. Yes, I was primarily engaged on the planning side of it. 10

Q. You say at p.2 of your letter that the net effect of the council's resolutions was to severely restrict the development potential of the land in reality to less than that that might be achieved in a 2B zone. Would you agree the relevant potential is currently judged in terms of available plot ratio? A. No, not any more. That was the situation, it is not any more.

Q. How do you judge it? A. In the yield per unit which is related basically to density.

Q. Population density? A. Yes.

Q. That brings you back to a calculation, to numbers of units, taking account of the number of bedrooms contained in them? A. No.

Q. How else do you relate population density to the size of the building? A. The size of the building is best expressed in terms straight out of units, regardless of their size or population frankly because we have found from experience that the actual occupancy of units does not depend on the number of bedrooms, you will find four bedroom units with less people in them than two bedroom units and really it is just being too precise to try and correlate the two. 20

Q. Do you say you merely specify the maximum number of units? A. That is correct. The other way round is to specify the amount of space per — amount of site per unit, the number of units per acre.

Q. To specify the amount of land and space per unit normally takes account of the size of the unit in the sense that you have greater amount of land space for a three bedroom or a one bedroom or a two bedroom unit A. No.

Q. To specify the number of units really means a developer who is anxious to minimise his development would put in large units rather than small units if he thinks the market will stand it? A. If he thinks the market will carry it, yes. 30

Q. If one is dealing with a yard stick expressed in terms of population the only way in which that can be related to any particular development is to calculate the number of units having regard to the projected population on statistical data for units of particular number of bedrooms? A. No, the number of bedrooms to a unit does not affect the actual population. Repeated surveys have shown the number of people living in Woollahra in home units in a survey we had about ten years ago was 1.96 and it did not vary depending on the number of bedrooms.

Q. It did not vary according to whether it was a three bedroom or a one bedroom unit? A. No, it was a very very insignificant difference. If you said on the average unit in Woollahra there would be those persons you would be pretty right. As a figure which would be difficult to depart from even if you split it up into one, two, three, four bedroom units. 40

Q. How do you get to the result that you would achieve less on the council's resolutions than you could get in 2B zone? A. I would have to have all the various material but as I recall it that relates to — frankly I have not examined that for 12 months so I am not absolutely certain, I would have to have a copy of the ordinance and so forth.

Document 11 Transcript of Evidence before
Mr. Justice Wootten 28 July 1978, 29 July 1978, 30 July 1978

Q. Were you aware the maximum plot ratio permissible in a 2B zone in Woollahra at that time was 6. A. Yes, I would have been.

Q. And 2B zone is a zone in which one expects to find as a standard development duplexes or town houses? A. Yes.

Q. Both of which are customarily two storey developments? A. Two or three.

Q. But more often two than three? A. Depending on land values.

Q. So the standard type of development in 2B zone would be two storeys occupying about thirty per cent of the site? A. Two storeys probably.

Q. A population ratio of about 1.6? A. Yes.

Q. And the council's resolution envisaged three storeys with the population of .9? A. Yes, but it also limited it to 24 units which I think is perhaps the critical fact. 10

Q. Did you do some calculations to establish that fact? A. No. I frankly do not know what led me to that statement at this stage. As I say it is 12 months ago.

Q. At the present time would you agree that the only building in Wentworth Street which is not a swelling house is the convent next to Dr. Dunlop's land? A. There is one directly opposite, it is a block of flats, When you say a dwelling you are excluding or including flats?

Q. I am excluding flats. A. There is a block of flats immediately opposite No.8.

Q. No.8 what? A. Wentworth Street, opposite the convent.

Q. Are you sure about that? A. Yes, there was — unless they have changed in the last few months they were there, they were five flats. 20

Q. This is a house converted into flats? A. Yes.

Q. But it was built as a dwelling house? A. Yes.

Q. There has been no building built as flats in Wentworth Street? A. Not that I am aware of, no.

HIS HONOUR: Q. You said No.8, that is Dr. Dunlop's place? A. Opposite No.8, I think it is No.23, I am not sure.

MR. WILCOX: Q. It is a house converted to flats? A. Yes, one flat being over the garage and the other four in the building.

Q. It is a two storey building? A. I think it could be three, I am not sure.

Q. And the convent is the only other building which is not a single dwelling house? A. Apart from the buildings on the site which have also been converted to flats. 30

Q. Again built as dwelling houses? A. Yes.

Q. The convent is a three storey building is it? A. The part adjacent to the site is, yes.

Q. So whether one likes the change or not it is quite clear that an eight storey building constructed as flats would be quite different from the existing development in Wentworth Street? A. Yes.

Q. Your view is that although it is different it is acceptable, is that right? A. Yes, because recently, it is three years ago now, the Minister, Planning Authority, took specific care to set limits to permit an eight storey building on this land.

Q. Whatever the reason is, you say it is different but you find it acceptable, other people could put the view that it is different and they regard it as objectionable? A. The way I look at it is that the Minister and his advisers have said that this land can be developed in this way, people have acted in accordance with that assumption and there has to be some good reason for saying that you cannot make use of it, otherwise planning schemes become worthless documents. 40

Q. We appreciate you have that point of view and the reasons for it but before the tribunal there were two views expressed which were in opposition? A. Yes, but the tribunal in their judgment in fact came out in favour of a tall building.

Q. In par.8 of your letter you refer to population density, you say the appropriateness of that limitation could be debated but the translation of the limitation to the number of units to be permitted depends on two factors, the sizes of the flats proposed and the number of persons expected to be in each flat? A. That is correct.

Q. That is really what I was putting to you earlier? A. Yes. My advice to a client there would be he would work on the basis of say two or 2.2 persons per flat.

Q. That is providing a relevant council is prepared to accept that as being an appropriate translation? A. Most councils do, Woollahra might not.

Q. Most councils draw a distinction, rightly or wrongly between a three bedroom flat, a two bedroom flat and a one bedroom flat in terms of population likely to be expected? A. Some councils do, yes. 10

Q. The vast majority do, do they not? A. I do not think so. The State Planning Authority has recommended it but they cannot produce any figures to verify it.

Q. The fact is, rightly or wrongly, the majority of the councils do adopt different figures according to the number of bedrooms in the flat? A. I could not agree with that.

Q. Have you ever investigated that matter? A. The impression I get is that it is at least an even split but I could not be certain.

Q. In par.8 you go on to say, "The latter is a sociological phenomenon . . . rule of thumb". Do you mean by that that is the appropriate figure depends upon some consensus to show how many people there are on average a flat? A. Yes. 20

Q. You say the former should be determined by the developer, that is the sizes in the flats proposed, through his estimate of the market situation? A. That is correct.

Q. Do you mean council should just say, "You can have X flats" and let the developer decide how big they are to be? A. Within broad limits of setback and site coverage perhaps, yes.

Q. That is a view which I suggest to you is not adopted by any council in the Sydney metropolitan area? A. No, to the best of my knowledge North Sydney and Mosman do, Gosford certainly does.

Q. Those being three councils your firm has advised? A. Yes.

Q. Leaving aside your three client councils, can you tell us one other council that adopts that point of view? A. I am not sufficiently up to date to be certain of it but some of the outer suburban ones certainly do. 30

Q. Like where? A. I think it is Liverpool and Fairfield I have encountered but it is quite some time ago.

Q. Are you sure about that? A. It is some time ago, I do not know what the current position is.

Q. When you said in par.9 these words, "What council has done in effect . . . municipality", what did you mean? A. They are in fact a set of controls specifically defined to decide, prepared for this site, the excessively large fronted building line, the thirty foot average setback at the rear of the building and in the 2C zones the proper ratio absolute limit on number of units.

Q. We understand the particular resolution referred to this site in that sense is unique to the site but are you saying there is no other site in the municipality which has a height limitation imposed on it under s.309, are you saying that? A. As far as I am aware that is the situation, there have not been any proposed since the scheme came in. 40

Q. Did you make any enquiries before you made that statement in your letter? A. Yes.

Q. Of whom did you enquire? A. I think that issue —

- Q. As to whether there were any other 309 resolutions in Woollahra council? A. I think I enquired of the council but again it is 12 months ago.
- Q. When were you asked to swear this affidavit? A. Some time late last year I suppose, I do not know, it is quite some time ago.
- Q. You swore the affidavit on 25th February? A. Yes. It was well before that I was asked.
- Q. By 25th February I suppose you re-read your report for the purpose of satisfying yourself that it was indeed your report and that it accurately set out your opinions? A. Yes.
- MR. WILCOX: Q. And then more recently you were made aware that the matter had been fixed for hearing this week and that you may be required to attend and give evidence? A. Yes.
- Q. Did you read your affidavit or your report? A. Yes. 10
- Q. And at any stage, in February this year or recently, did you check up as to the accuracy of the statement you had made? A. No.
- Q. When you made that statement did you have in mind fixing a building line? A. To an extent that that is an exceptionally large building line set-up. The set-up of a building line is common practice, but not a 60 foot building line.
- Q. Building lines are found in almost all municipalities and in a great number of allotments?
A. Yes.
- Q. In fact probably the majority of allotments in the Sydney metropolitan area have a building line fixed for them? A. Yes, but not a 60 foot building line.
- Q. Do you know what the set-back is of the convent building which is next door to Dr. Dunlop's land, the actual set-back from the street? A. I did at one stage, there was a survey plan of it I think I had prior to the appeal hearing. It is something of the order of 40 or 50 feet. 20
- Q. There is located just forward of the 60 foot line at the eastern extremity of Dr. Dunlop's land a stone wall and some trees are there not? A. Well there are certainly trees and a stone wall close to the street, yes.
- Q. Did you at any stage, after the June 1974 resolution became known to you, go back to inspect the site to evaluate it in relation to the Council's requirements? A. I went out there, yes.
- Q. Did you, for instance, pace out or measure out determine whereabouts the building line would be on the site? A. Not on the site. I think as I recall it I still had a copy of the survey plan at that stage, with contours and a fair amount of detail on it. 30
- Q. Did it show the trees? A. Yes.
- Q. Are you sure about that? A. Yes, as I recall it.
- Q. Did it show the stone wall? A. Yes, it showed the wall.
- Q. You did not go back and — A. I did not pace it out on the site, no.
- Q. That would be the usual thing for a planner to do before expressing an opinion about what is the right sort of restriction for a site? A. No, I don't think so.
- Q. Not to go and have a look at it? A. I would go and have a look at it, yes, but the effect of these restrictions the Council made are so unusual in my opinion that with all due respect to the preservation of the stone wall, they are excessive. As far as the preservation of trees are concerned, the Council has a tree preservation order and can use it. The mere declaration of building line does not preserve trees. 40
- Q. You know very well the trees preservation order is completely useless if there is a proposal which is permitted, to erect a building on the position where the tree presently is? A. Well I have certainly seen buildings re-designed to avoid trees.
- Q. To take the municipality where you live, Ku-ring-gai, there is a tree preservation order throughout the whole municipality, isn't there? A. Yes.

Q. And it is commonplace for trees to be destroyed in order to make way for buildings? A. Yes.

Q. Because if you applied a tree preservation order literally in an area where there is dense timber you would not have any development at all? A. Yes, that is correct.

Q. So that the real question is not whether you have a tree preservation order, but what you are going to do about your building control so as to avoid disturbance of trees? A. Yes. and Council's use of the tree preservation orders to achieve this in some instances.

Q. The very point of the building line here was to ensure the buildings would be setback to such a position as to avoid disturbance to the trees? A. Well I think that is a questionable use of a building line. It is an inflexible line which an architect may want to infringe on.

Q. Your attitude to this matter is coloured by the fact that the zoning is 2C and you say "Well, that being so, that ought to be the predominant matter for consideration"? A. It is not only a matter that the zoning is 2C, it is a matter the site was obviously subject to inquiry during the preparation of the scheme, or the prescription of the scheme, because it has what is in effect a height limit on it, and I know from discussions with officers of the State Planning Authority, one of whom is since deceased, and I think it was the architects involved in preparing the Blackburn Development Project, there is a great deal of reference to skyline, impact of buildings on skyline, urban growth, and so on, that went into that issue. 10

Q. Were you aware that when the scheme was placed on exhibition these three allotments, numbers, 8, 10 and 12 were shown as 2A? A. That is correct.

Q. For single dwellings? A. That is correct. 20

Q. So far as all the local people are concerned who inspected the exhibited scheme, it was 2A? A. That is correct.

Q. They got into the scheme as 2C because of an objection to the 2A zone? A. Yes.

Q. And without any re-exhibition? A. That is not an unusual situation. Perhaps it is not an unusual situation, but it is the fact, isn't it? A. That is correct.

Q. So far as the local people were concerned who lived in the area, if they took any interest in the exhibited scheme it was 2A, and they woke up to find the scheme prescribed with it shown at 2C? A. I am not certain that was the way. As I recall it the Woollahra scheme was around for quite some months, if not longer than that, in a sort half state of Minister's determination for prescription, while they sweated out the Double Bay 3D zone or something. 30

Q. After the Minister's decision had been made it was then 2C? A. Minister's determination of objection, yes.

Q. So the reality is anybody who favoured this being 2A was in the situation he thought it would be 2A and found, without his having any opportunity to object to the fact, the decision had been made to make it 2C? A. That is a situation arises every time there is a change of zoning as a result of objection.

Q. What you say may be right, but it is the fact in this case? A. Yes.

Q. And it is in an area where there are a considerable number of high standard and very valuable and pleasant homes? A. Yes.

MR. SHAND: I have no re-examination. 40

(Witness retired and excused.)

ALEXANDER RITCHIE HOWARTH
Sworn and examined:

MR. SHAND: Q. Is your full name Alexander Ritchie Howarth? A. Yes.

Q. You live at 12 Wentworth Street, Point Piper? A. Yes.

Q. You are a company director? A. Yes.

Q. You swore an affidavit on 26th March 1975 in these proceedings? A. Yes.

Q. And you verify the correctness of the contents of the affidavit? A. Yes.

CROSS EXAMINATION

MR. WILCOX: Q. You mentioned in the affidavit you went to a meeting of the town planning committee of the Council on 27th May? A. That is correct.

Q. You addressed the meeting, did you? A. That is right.

Q. And you knew when you were going along that the purpose of the meeting was to consider the most suitable form of future development for the land owned by yourself and Dr. Dunlop and Dr. Dunlop's mother? A. I don't know that I knew that specifically. 10

Q. What did you understand to be the purpose of the meeting? A. I think the purpose of the meeting was as far as I was concerned to enable me to put my point of view regarding the development, which was my only concern at any time, has been the delay, the uncertainty which existed for some years.

Q. There had been an application by Blackburn Developments, had there not? A. That is correct.

Q. That had been dealt with by the Council, there had been an appeal, and the appeal had been disposed of by the tribunal? A. That is right.

Q. You knew all that was finished as of 27th May? A. That is right, I was aware of the tribunal's recommendation. 20

Q. You knew they had made a decision in which they had dismissed the appeal? A. The decision, to my recollection, of the tribunal, was that there should be a modification of the plan that had been put in. They did I think subsequently recommend a two-tower development.

Q. I won't debate with you what it came down to, but you knew the tribunal's decision had been made and published prior to you going along to the meeting? A. That is right.

Q. You were anxious to have some finality in the question of what sort of development was going to go on? A. That is right.

Q. On Dr. Dunlop's land, and perhaps on your land also? A. Yes.

Q. And in particular you wanted to know whether to finish completing the building of your house or whether to start pulling it down? A. The building was completed. The furnishing of the house never has been completed, because my wife at one point said "What is going to happen?". This is what we have been waiting to find out. 30

Q. You were anxious, no doubt spurred on by your wife, to get an answer to that question? A. That is right.

Q. You knew the purpose of the Council meeting was to enable the Council to make up its mind as to whether there should be residential flat development on this land, and if so, what form it should take? A. At the time I thought the tribunal had disposed of that question.

Q. Well why did you think the Council was inviting you along to talk to it? A. I don't know, because at that stage I felt — I think I had learned at that point they were having other thoughts as to how it might be developed. 40

Q. In other words they were concerned with the most suitable future development for the site, weren't they? A. Yes. (Objected to.)

Q. Incidentally, who is it who had conveyed to you the time at which the committee would hear you, and asked you to come along? A. I am not sure, I couldn't remember. I know I checked recently in my diaries, and I had it firmly written down, "5.45 Woollahra Council," in both diaries, but whether I was advised by somebody from the Council —

Q. You do not remember? A. I don't remember exactly.

Q. You had, I think, been along with Dr. Dunlop to see the Mayor? A. That is right.

Q. A week or so before you went to the committee meeting? A. Yes.

Q. Is that right? A. I don't know exactly when. I remember going with Dr. Dunlop to see Mr. Bray.

Q. It was between the time when the tribunal's decision was made known and the date that the committee sat? A. Yes, I think it was. 10

Q. Do you remember Mr. Regnis being present on that occasion? A. I don't recall the name. I know we were met downstairs by a person from the Council, who took myself and Dr. Dunlop up to Mr. Bray's.

Q. Do you see Mr. Regnis in court, the gentleman sitting in the second bench? A. I wouldn't have recognised him, I am afraid.

Q. Do you remember there was another person there besides Dr. Dunlop and Mr. Bray and yourself? A. No, I don't remember.

Q. You don't recall that at all? A. No, I don't.

Q. Do you remember some discussion going on about the sort of alternatives that were available to regulate the development which could occur on the land? A. I think there might have been something in a general sort of way. I know there was nothing specific, because I don't seem to have any memory about it. 20

Q. Do you remember one thing that was said, the Council might wish to change the zoning to 2B? A. I don't remember those words.

HIS HONOUR: Q. Who did the talking on the Council side? A. I am not sure. I wouldn't remember.

MR. WILCOX: Q. Do you have any real recollection of this meeting at all? A. I am very hazy on it. I remember well and truly going there, it was a nice fine day, we were met and taken upstairs, and I had my say, and Dr. Dunlop had something to say, but I felt as far as my situation was concerned, you know what that was, it was a non-event. I did not feel we had made any progress in any way. 30

Q. Because no decision had been made? A. I think it was said there — by the Mayor, I think — I wouldn't say I am perfectly correct, but I think he did suggest at the time that he would arrange for us to meet the building committee. I think that arose out of it.

Q. Do you remember there were some possibilities thrown around in the discussions as to the sort of alternatives that were available to the Council? A. No — very vaguely.

Q. Do you mean by that that you remember there were some alternatives discussed, but you can't remember what they were? Would that be a fair way to put it? A. I wouldn't even know that. I think there was some vague suggestion that the Council could have other ideas, but there was nothing specific. If there had been, I think I would have remembered it. 40

Q. And that the Council could take various steps in regard to it, depending on what their idea finally was? A. No, I don't remember that.

Q. You say you do not remember this other person being present in the discussion at all? A. No, I really don't.

Document 11 Transcript of Evidence before
Mr. Justice Wootten 28 July 1978, 29 July 1978, 30 July 1978

Q. Your attitude to whether or not there would be development on your land, was this almost a question of being neutral about it, but the most important thing was to get — A. A decision, that is right.

Q. Whereas Dr. Dunlop quite definitely wanted to see some re-development occur? A. Yes, that is right.

MR. SHAND: No re-examination.

(Witness retired and excused.)

MR. SHAND: That is the last of the deponents with respect to affidavits filed on behalf of the plaintiff. My friend indicated he did not wish to cross-examine Mr. Sanderson. That would leave only Miss Harvey Sutton as the last deponent to be examined.

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MARGARET HARVEY SUTTON

Sworn and examined:

MR. WILCOX: Q. Your full name is Margaret Harvey Sutton? A. It is.

Q. Where do you live? A. 27 Kent Road, Rose Bay.

Q. I think you are an architect and town planner by occupation? A. I am.

Q. You are the principal planning officer of the Woollahra Council? A. I am.

Q. You swore an affidavit in this matter on 23rd January 1975? A. Yes.

Q. Are the contents thereof correct? A. Yes.

Q. You say in your affidavit that you attended the hearing before the Local Government Appeals Tribunal. Was there a Mr. Ingham, a consultant town planner, who gave evidence in support of the Council's case on that occasion? A. Yes.

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Q. In respect of the height of the building, did he express a view as to how high the building should be? A. Yes.

Q. What was that view? A. What I recall is that he expressed the view that it should be three to four storeys at the most.

Q. I think you recommended the line of the building line which should be fixed relative to Nos. 8-12 Wentworth Street, did you not? A. Yes.

Q. Before you formed an opinion as to the desirable building line did you make any inspection of the site? A. I made three inspections.

Q. Was that to determine where the building line ought to be? A. Yes.

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Q. The plot ratio of .9 which was fixed by the Council in its resolution, would that permit the erection of a building of three storeys with 30% site coverage? A. Yes.

Q. Would such a building be able to conform with the building line requirement and the rear setback? A. As far as I could estimate, yes.

CROSS EXAMINATION

MR. SHAND: Q. Would it be correct to say that you were employed by the defendant Council since well before the planning scheme was exhibited? A. I have been employed by the Woollahra Council since June 1970.

Q. The scheme was prescribed in 1972, wasn't it? A. Yes.

Q. When was it put on exhibition, do you remember? A. Well I was just a member of the general public at that stage, but it was exhibited in 1968.

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Q. By the time you became employed by the Council had the subject land, that is 8-12 Wentworth Street, become residential 2C under the planning scheme or not? A. No.

Q. When did it become residential 2C to your knowledge? A. 15th December 1972.

Q. But it was proposed before then that it should, was it? A. It was zoned living area at that stage.

Q. But there were proposals before that date, which was in fact the date of publication of the planning scheme ordinance, proposed before then that it should become residential 2C, wasn't it? A. Yes, but it was zoned living area.

Q. It was first proposed to become 2C after you became employed by the Council wasn't it?

A. Yes.

Q. When was that? When was it proposed? A. I can't give you the exact date, but soon after I joined the Council in June 1970 the Council received notification of a group of objections that had been received by the Minister.

Q. I am not really concerned to have a lot of history about it. Can you give us an idea when it happened? A. I think — I am sorry — I think it was about August of that year.

10

Q. 1970? A. Yes.

Q. Were you vigorously opposed to it then? A. No.

Q. Have you been vigorously opposed to it since? A. Could you define what vigorously opposed means?

Q. Have you held, at any time since it was first proposed, strong views against that re-zoning from residential 2A to residential 2C for that site, 8-12 Wentworth Street? A. No.

Q. Were you in favour of it at the time it was proposed? A. No.

Q. You had a neutral attitude to it, did you? A. Yes.

Q. When the decision of the tribunal was published you studied it, of course? A. Yes, I read it.

Q. Did you attempt to utilise what you thought was the import of the tribunal's decision in your subsequent reports to the Council? A. Yes.

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Q. Did you attempt to contradict any of what you felt were the significant aspects of that decision, in your reports? A. No.

Q. You are clear about that, are you? A. Well I am not quite sure what you mean.

Q. The tribunal, of course, agreed with some criticisms that had been made of the development site as it then stood? Quite clearly they did that, didn't they? A. Yes.

Q. And laid down what the tribunal apparently regarded as and expressed as parameters for a desirable development on those sites? A. The tribunal's minutes, as I recall them, did lay down what they called I think imprecise parameters.

Q. Whether precise or imprecise, you remember the parameters they laid down? A. I do now.

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Q. Did you disagree with any of them? A. I would have to ask you to be more specific.

Q. I can't. You remember the parameters, and I take it you studied them and came to some view as to whether you agreed with them from your town planning point of view, or disagreed with them? A. Well I really took the attitude of just reading their views and accepting that as their views.

Q. Did you attempt to apply their views in your reports? A. Well, I wrote my report or reports in the light of their views, yes.

Q. Does that mean that in regard to the parameters which they indicated, be they somewhat imprecise, as you suggested, you attempted to implement those in the recommendations contained in your reports, subsequently? A. Well I attempted to work out which were the salient points. If you read the minutes you will see that some of their comments are not quite clear. For example, near the end of the minutes there is a paragraph dealing with a comparison of one type of development with another type of development, which is phrased in a way that is not clear, and there is not a comparison of like and like.

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Q. You are talking about the comparison between the squatter-type buildings with the taller-type buildings? A. Yes, this is not a comparison of like and like.

Q. But is that the passage you are talking about? A. Yes.

Q. With regard to that one did you decide therefore to ignore that? A. I gave it less weight. I endeavoured to write my reports in the light of the whole of the minute.

Q. So we have anyway the fact, do we, that when you wrote your report or reports subsequently you decided in respect of that passage you would give it less weight? A. I thought it had less meaning, the actual English of the paragraph.

Q. You decided to give it less weight, was your answer a few moments ago, wasn't it? A. Yes, I suppose it should be, yes. 10

Q. What you did do then was, was it not, to tend towards a recommendation which tended to favour the erection of a three or four storey building. A. There was no recommendation.

Q. Realising, when you did recommend that, that the tribunal really had warned against that sort of construction in general terms as probably involving substantial bulk on the site? A. No, I would not agree with that.

Q. That is what the tribunal really had said, isn't it? A. No, what I did was to compare a building of three or four storeys, bulky in nature, with a well-designed type of building. They did not compare a well-designed three or four storey building of some bulk with a well-designed tower building of some bulk.

(Further hearing adjourned until 10.00 a.m. on Wednesday, 30th July, 1975.) 20

THIRD DAY: WEDNESDAY, 30TH JULY, 1975

MARGARET HARVEY SUTTON
on former oath:
CROSS EXAMINATION Con'td:

MR SHAND: Q. Miss Harvey Sutton, I want to ask you some further questions about the Tribunal decision. A. Oh yes.

Q. Did you take the view that the Tribunal was not in fact expressing any indication that a taller, slim development would be preferable as compared with one of short, squat character? A. Yes.

Q. You did read that from the decision? A. Yes.

Q. I am looking at p.13 of the decision — the mere fact that they spoke of the possibility of a three or four-storey building of substantial bulk on the site being more injurious to the locality than the erection of well designed tower buildings with maximum permissible height — do you say that you would read that indication from? A. Yes. 10

Q. You yourself were not in favour of tower buildings, were you? A. No I thought it would not fit into the character of Wentworth Street.

Q. So that is it correct that having read the Tribunal decision you set about making such recommendations to the council as would be inconsistent to that indication? A. I understand you to mean that that indication means, that particular paragraph, not the whole of the minutes.

Q. The indication that you just said appears from that paragraph? A. Yes.

Q. So you did set about making recommendations that could be inconsistent with that indication? 20

A. With that limited meaning, yes.

Q. With that fair meaning, whether limited or not? A. Well, my opinion is different to yours, Mr. Shand; I don't think it has very much meaning at all; whatever meaning it had, yes.

Q. You indicated yesterday you criticism of it, but nonetheless you agree today that you read that decision as indicating the preference of the Tribunal for a tower building of proper design as compared with squat-type buildings? A. Yes, provided that is read in the whole context.

Q. You also took the view, did you not, that the maximum limit of 235.5 feet was wholly inappropriate to this particular site? A. Yes.

Q. So that you put that out of your considerations, too, in making recommendations? A. Yes, I thought the building should be below that height.

Q. And well below it? A. Substantially below, yes.

Q. Could you tell us what that maximum height would be compared with nearby development from your recollection. How would that compare, for instance, with the top of Ave Maria Convent building? 30

A. No, I am sorry, I can't give you an exact answer.

Q. Not even an approximate one? A. No, I am sorry. I have been recently in hospital and I am still

convalescing. I have spent almost no time in the office and have not been able to prepare fully for this case.

Q. I want to suggest this to you that you have been influenced from the very outset of the application which was considered by the Tribunal by the zoning of the sites, the existing zoning? When I say "influenced" I mean to suggest that you have always considered that zoning quite unsuitable to this site? A. No.

Q. I suggest to you that you have been persuaded throughout all that time very considerably by the views expressed by people that this site should not have been re-zoned to 2C? A. No, not at all.

Q. Would you have regarded the fact that local residents considered it should not have been re-zoned to 2C as a basis, or at least one basis for recommending refusal of the application? A. In connection 10 with s.342ZA.

Q. Perhaps you can enlighten me on that — what is that section again? A. 342ZA.

Q. That just requires notice — advertising or notice, does it?

A. Both.

Q. That could not possibly constitute a ground for recommending refusal, could it? A. The law requires the council to consider any objections that are received as a result of those notifications or advertising.

Q. Yes. but considering objections is not the equivalent of regarding the objections as a ground for refusal, is it? (objected to.)

Q. You are not suggesting that the fact that there was a need to comply by notice or advertising with 20 s.342ZA in your opinion constituted a ground for you recommending refusal of the application? A. If I understand you rightly, you mean the actual notification?

Q. Yes. A. Or the result of the notification?

Q. What do you mean by the result of the notification? A. Any objections to the erection of the building being received.

Q. You would not regard the fact that objections had been received as a ground for refusal of the application, would you? A. No.

Q. Would you regard the fact that objections had been received in terms to the effect that the land should not have been rezoned from 2A to 2C as a ground for your recommending refusal of the application? A. Of the development application? 30

Q. Yes? A. No, consider the merits of the application, but many of the letters that were received as a result of the advertising contained all sorts of points to do with the actual building.

Q. You would not have been influenced by the fact that objectors had protested about this change of zoning, would you, in recommending refusal of the development application? A. No.

Q. It would be quite wrong for you to take that attitude, wouldn't it, the fact that there was indignation among residents about rezoning? (No answer.)

Q. What do you say? A. Perhaps you could repeat the question?

Q. It would be quite wrong for you to regard or to assess objections which protested about the change of zoning as a ground for you recommending refusal of the application, wouldn't it? A. You say consider them? 40

Q. It would be quite wrong for you in your then situation to regard objections by persons to the effect that there should not have been a rezoning as a ground for recommending refusal of the application, wouldn't it? A. Yes.

Q. Your task was to view the matter in the light of the existing zoning, wasn't it? A. Yes.

Q. You did do that, didn't you? A. Yes.

Q. Not seeking yourself, by your recommendations, to effect a de facto rezoning? A. No.

Q. Who was the development officer in 1973? A. Miss Walker.

Q. What was your position then? A. Principal planning officer.

Q. Did that make you superior to her or she to you, or what? A. I was the senior.

Q. You were senior A. Yes.

Q. You saw the development officer's recommendation and report on the development application, didn't you, at that time? A. Not at the time it was written.

Q. At the time it was considered? A. Yes.

Q. Were you aware that it included a number of grounds of recommendation for the refusal of consent? A. Yes, there would be.

Q. One of which was in these terms — I am speaking of No.5 — "That objections have been received from residents in the area in regard to the zoning of the land . . ."? A. Yes.

Q. " . . . and the likely resultant change in character of the site and locality generally". Do you remember that was the fifth ground, or one of the grounds? A. Well, I will accept that that is the ground, yes. 10

Q. If you would just look at this document I show you now. "Building and Health Committee, 20/8/73." Would you look at the last page of it, signed by Miss Walker, is it? A. Yes.

Q. You see six reasons assigned there for the recommendation requires that consent be refused — of the fifth one I read to you? A. Yes.

Q. You would regard the first part of the fifth one as irrelevant, wouldn't you? A. Yes, but not the rest, of course.

(Report of development officer of defendant council to building and health committee, dated 20th August, 1973, tendered: objected to as irrelevant: admitted provided it is linked up to make it relevant and marked EX.B.) 20

Q. You put in a report, didn't you, to the town planning committee of 18th September, 1973, about that development application? A. Yes.

Q. I show you a photocopy of a three-page document. That is the report you put in? A. Yes.

(The report of Miss Harvey Sutton to the town planning committee dated 18th September, 1973, tendered on the same basis as EX.B objected to as irrelevant , admitted on the same basis as EX.B. and marked EX.C.)

Q. I show you a document which appears to be — perhaps you can tell us — I think it is a record of proceedings of the town planning committee of 18th September, 1973. Is that so? A. Yes, I see it.

Q. Is that what it is? A. Could you say — I am sorry — I am thinking slowly. 30

HIS HONOUR: Q. You are just being asked to identify the document. A. Yes, but did Mr. Shand ask me was this a document that went there?

MR SHAND: Q. Do you recognise that as being a record of the proceedings of the town planning committee of 18th September, 1973? A. I can't actually say it was but it looks familiar, that is all I can say.

Q. Does it bring back to your mind that you made certain recommendations for that committee meeting? A. I recall — I recall making recommendations about the car parking accommodation.

Q. Also in regard to the second matter mentioned? A. I am not sure about that point.

Q. Who else would it have been who made the second recommendation? A. I would have to refresh my memory with the file, I am sorry. 40

Q. I wonder would you do that. (shown file). A. It's a little bit out of order, I'm afraid. That report that begins under my name doesn't seem to be complete.

Q. Doesn't seem to be — A. The second page.

Q. The second page. A. Doesn't appear to be there.

Q. Do you see in the file the first page of the document that I have referred to? A. It is not identical, the wording, the way it is put forward; it looks more like a summary from the town clerk's department in the — you will see there is a memo of mine at the top of the page in brackets, and then recommendations have been set out.

Q. They would be your recommendations, would they? A. No, they could be a recommendation from the committee.

Q. From the committee? A. It could be; I would normally, you see, would sign at the bottom of the page. Do you think we could adjourn, your Honour, for five minutes, and I could —

HIS HONOUR: Q. Do you mean for the purpose of looking at the file? A. Yes, because I can't go far —

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HIS HONOUR: Just go ahead for the moment. We often sit in here while matters are being investigated from time to time.

WITNESS: Your Honour, may I have my brief case, please? (permission granted.) I may have a full copy of that particular report. (Handed briefcase) I have a copy of a report that was written on 18th September which starts off as — dealing with the future development of the land.

MR SHAND: Does that help you to identify who it was who made the recommendation No.2 in the document that I have been showing to you? A. Not yet.

HIS HONOUR: What is the subject matter of the recommendation, Mr Shand?

MR SHAND: The rezoning of this land.

WITNESS: The rezoning. If it is dealing with a planning matter, Mr Shand, it may be in a different file. It could possibly be in the planning file.

20

MR. SHAND: I show you the full file to just perchance ask you to look at — A. Yes.

Q. Memo to the mayor of 2nd August, 1974. It contains on p.2, "Terms of a recommendation said to have been put forward from the meeting to the council of 24th September, 1973."? A. Yes.

Well, that doesn't help us much.

Q. It does not help us much? A. No.

Q. Perhaps you could go to the other documents and see whether they help you, the documents in the file, as to whether or not this was your recommendation? A. Yes, if I could find the copy of the report in which I recommended the car parking accommodation I would know but —

Q. I don't know how it would assist except to hand you more files in case they contain it. A. I notice this file goes from 1970 — 1974 so that there must be more material in another file.

30

Q. You notice the file does which? A. The file sets out — there is a report here, 1970, early in the 1970s and then we have a report of August 1974, so there should be another file with more material in it.

Q. There is a gap in the middle of it? A. Yes.

MR SHAND: The documents I have shown the witness were ones copied on discovery in these proceedings. The originals must be in a file somewhere.

(Mr Wilcox informed his Honour that the other files that he had which were included in the subpoens would not assist.)

WITNESS: Which volumes may I ask have you got of the general policy files there?

40

MR SHAND: Q. It is quite possible, is it not, that you did recommend action for the rezoning of this land back in September 1973? A. I really can't answer that.

Q. But you do remember in fact that the council did resolve on 24th September, 1973, within the terms of that second recommendation I have been referring you to? A. Yes.

Q. If I can just read to you what I suggest was the resolution:

"That in respect of the property 8-12 Wentworth Street, Point Piper, the council make application to the Minister for Local Government through the State Planning Authority of New South Wales for suspension of the provisions of the Woollahra Planning Scheme under s.342Y of the Local Government Act, 1919 as amended, and to seek an interim development order restricting development within the subject land, viz. 8-12 Wentworth Street, Point Piper, to those purposes as stated in the Ordinance, and in particular in cl.23 (land use on tables) for residential 2B zoning."

That was the resolution, wasn't it? A. I can't tell you whether that was the exact resolution, but that was the effect of it, the council did seek the suspension of that land. 10

Q. The council on 10th September, 1973, had resolved that the development application be refused, is that so? A. The council certainly refused the application; I don't know whether that is the right date or not; I will accept that it is.

Q. Would you have been the person who would have been asked to report or make recommendations on other action that may be taken such as action to have the land rezoned?

A. Well, not necessarily; it would depend on what I was doing at the time, whether I was in fact a le to, whether I was in the middle of Court cases or away or whatever, but not necessarily.

Q. No one would have been logically asked to do that, apart from you? A. Or it could have arisen you see in the committee itself.

Q. The committee itself might have? A. Yes. From time to time a committee does make a recommendation. 20

Q. In any case this action to seek rezoning was taken in between the refusal of the application and the subsequent lodgment of the appeal? A. Well, that would just be a matter of fact.

Q. I think you may take it it is? A. Yes.

Q. Do you say that you did not have any views on the desirability of a rezoning application after the refusal of the council to approve the application? A. I don't recall making any recommendation at all, really.

Q. You say you did not have any views on that subject, though? A. Well, I didn't have firm views that I can recall.

Q. Only views. Did you think it was a good idea or not a good idea? A. I think I was fairly neutral about it. 30

Q. In that case you would not have made a recommendation, would you, that this action should be taken? A. No, I really don't think I am in a position to answer your questions, really.

Q. Can't you. Would you have made a recommendation if you had not thought it was a good idea? A. Sometimes one has a choice of two actions.

Q. I am really trying to get down to your views on the subject of rezoning, you understand that, don't you? A. I thought that — no, I was not seeking a rezoning of the land.

Q. I don't want to ask you the question again and again because it becomes tiresome. Did you have any views pro or against the rezoning as the proper method of dealing with this land? A. I am just trying to recall my thoughts so long ago. I think I probably would have thought it was one method, but as to exactly if it were to be rezoned exactly what zoning should be chosen is another matter. I would have thought about it deeply but I don't really recall my thoughts clearly at that stage. 40

HIS HONOUR: Q. When you say you would have thought it was one method, you mean one method of achieving the results you thought were desirable? A. Yes, a desirable building on the land.

MR SHAND: Q. Perhaps you mean by that answer one method of preventing the sort of development that might otherwise get through upon this land under the existing zoning? A. I think I would have thought that the maximum height development was undersirable on this land, but whether it would be necessary to rezone or not, I really don't think I can assist you much.

Q. This application was a very vexed one on the council, wasn't it? A. Well, it was one of many.

Q. Look, I am not concerned with that. It was a very vexed one, wasn't it? A. Well, it wasn't from my point of view.

Q. You knew from your attendance at council meetings it was a very vexed matter, likewise on the town planning committees, too, didn't you? A. I can only speak from my own point of view.

Q. Miss Harvey Sutton, you attended the meetings, didn't you? A. Yes, I suppose it was a controversial piece of land. 10

Q. You heard people talking about it at these meetings, didn't you? A. Yes.

Q. It was a very controversial matter, wasn't it? A. Yes.

Q. The subject of vociferous objections from people living in the area? A. Yes.

Q. Of petition? A. Yes.

Q. And the gravamen of their complaints, many of their complaints, was that it should never have been rezoned from 2A to 2C, wasn't it? A. Of some of the objectors, yes.

Q. That in fact was the topic which was hotly discussed on the town planning committee and on the council in relation to this application, wasn't it? A. Yes.

Q. In fact, it was a most unusual thing to happen, wasn't it, that within, say, ten days or so of the development application being refused, that a resolution was passed to take account in relation to the Minister for an interim development order changing the zoning? A. I don't know. 20

Q. Had you known of it happening before? A. I don't know; it may well have done.

Q. But you don't know of any such instance, do you, before that? A. No, but I don't actually — I can't help you there.

Q. You don't know of any instance, parallel instance, do you? A. Well I don't recall any at this moment, but that does not mean there aren't any.

Q. Thank you. I only want your memory? A. Yes.

Q. It was of course quite obvious to you there would be an appeal from the council's refusal, didn't you? A. I thought it was likely. 30

Q. I suppose the subject of attempting to have a rezoning carried out in the light of the probability of an appeal was also discussed on the committee and in council, wasn't it? A. Yes.

Q. Apparently any doubts that were entertained on that basis were swept aside by the resolution of the council to seek rezoning (objected to: not pressed.)

MR. SHAND: Q. Was there mention after the refusal of the application at a meeting or meetings of the town planning committee or the council of the problem involved in applying for re-zoning of the land in the light of the probability of an appeal against the refusal? A. I don't recall that specifically.

Q. In any case you would agree it was a most unusual course to take, to resolve to seek re-zoning at that point of time? A. Well I don't think I can agree it was most unusual. 40

Q. You would agree with the word "unusual", would you, without the word "most"? A. I don't think I could go as far as that.

Q. You do not know of any other instance, you have told us? A. I said I can't recall any other instance.

Q. You then carried out a study, did you not, after the approval had been refused, of these particular properties in relation to their development under the existing zoning? A. Yes.

Q. At whose instigation or direction was that? A. I wrote a preliminary report. One of the

committees, I think the local planning committee, asked me to advise them as to the future development of the land.

Q. Was that after there had been a resolution to apply for the change of zoning? A. I can't answer that. It was after the refusal of the application.

HIS HONOUR: Isn't this what Ex. C is about, Mr. Shand? It sets out a resolution requesting that they do something.

WITNESS: Yes, that is correct, your Honour. 10th September.

HIS HONOUR: Q. It sets out a resolution of 10th September? A. Yes, with a recommendation to me, asking for this report.

HIS HONOUR: Paragraph (b) of the council resolution. Doesn't that answer your question, Mr. Shand? 10

MR. SHAND: Yes, it does.

Q. You were in effect commissioned, were you not, to find ways and means of limiting the development on this site on the assumption that rezoning could not be obtained? A. I don't think that is exactly what the position was. I started the report, saying "I have carried out a brief study of the subject property in relation to the desirable form of any future re-development, bearing in mind the existing Residential 2C Zoning of the area."

Q. You are aware, are you not, that the council pressed for rezoning through the Minister in a fairly continuous manner from September 1973 onwards? A. I think they only pressed for it briefly. 20

HIS HONOUR: Wasn't it October, Mr. Shand?

MR. SHAND: I think the letter was written in October.

WITNESS: I don't think they pressed for it continuously at all.

HIS HONOUR: The note I have was the application to the Minister was 15th October, 1973.

MR. SHAND: That was the letter, yes.

MR. WILCOX: The actual resolution was 24th September, 1973, according to the minute.

(Letter 28th September, 1973, defendant to plaintiff, tendered and marked Ex.D)

HIS HONOUR: Q. This document which is Ex.C, your report to the town planning committee of 18th September, 1973, sets out a resolution of the council on 10th September in which it refuses an application for certain reasons and then asks you to report further on it? A. Yes. 30

Q. Was that a form of procedure you were used to happening, an application being refused and you being asked to report further? A. Yes, that sort of recommendation might be made.

Q. In those circumstances what did you understand you were being asked to do when you were simply asked to report further? A. I understood the committee wanted to know what I thought was the desirable form of development for the land.

Q. Was this with a view to suggesting to the person whose application had been refused something else to do, or what was the purpose? A. Yes. I canvassed different methods.

Q. But was that what you understood the council wanted you to do, to be able to suggest to the person whose application had been refused some alternative course? A. Yes, to negotiate.

MR. SHAND: Q. Did you negotiate? A. No. 40

Q. Why not?

HIS HONOUR: I don't think the witness said she negotiated, it was with a view to having a basis for negotiations.

WITNESS: Yes.

MR. SHAND: Q. You were not called upon yourself to negotiate? A. Not directly.

Q. In any way? A. Just in the ordinary course of business in the office after applications are refused applicants often come to the department and ask what would be acceptable.

Q. You did say, near the bottom of p.1 of Ex.C, "I have carried out a brief study of the subject property in relation to the desirable form of any future re-development, bearing in mind the existing residential 2C zoning of the area"? A. Yes.

Q. That course was the only basis upon which you could approach the matter, wasn't it? You could only approach it on its existing zoning, couldn't you? A. No, it would depend on the circumstances.

Q. You mean you may have approached it on some different zoning? A. If I was asked to give technical advice in different circumstances I would give it.

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Q. I am sorry, I cannot hear you? A. My position is only to give technical advice; if I am asked to give technical advice about any subject I naturally give it.

Q. You do not think there was some special thought in your mind when you added the remark about zoning, some thought the possibility of zoning might not remain? A. I am sorry, I can't comment.

Q. I want to take you for the moment to 1974, and in particular to your report for the town planning committee of 27th May. A. Yes.

Q. In that report you made recommendations, and among them would you agree you recommended a maximum development for plot ratio of .6.1? A. Yes, I said my opinion was as to the desirable development of the land.

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Q. That would be the equivalent plot ratio in reality for a 2B zoning? A. No, it goes up to a four-storey building under the building standards.

Q. .6 does? A. Yes.

Q. You mean under the residential flat building code? A. Yes.

Q. 0.6 goes up to a three-storey building, doesn't it? A. Four storey, four storey at fifteen per cent is .6.

Q. .6? A. Yes.

Q. Do you have that in front of you, that code? A. Yes.

Q. Maybe it is a misprint in mine. Mine says 0.1. Can I see it for a moment please? A. Yes. (Produced).

30

Q. I think I have been looking at a misprint. 0.1, of course, would not make any sense, would it? A. No.

Q. I want to deal with your report of 10th June, 1974, or for the committee meeting of that date. I go back to 27th May, 1974. When you made your recommendations by report as to desirable development on the site — A. Yes.

Q. Would you agree the first two alternatives for all practical purposes, and perhaps even expressly, negated the existing zone? A. No.

Q. Let us look at the first one. It recommended a re-subdivision of the land to allow development for private dwellings and/or duplexes, correct? A. Yes.

Q. It recommended a zoning of 2B, didn't it? A. I see what you mean, yes, that is right.

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Q. You were there expressing your opinion it should not be zoned 2C, it should be zoned 2B? A. No, I was only canvassing possibilities.

Q. You were canvassing the possibility of a change of zone? A. I was canvassing — I say "The following three types of development would be considered desirable on the site."

Q. Considered desirable in your opinion? A. Yes, naturally.

Q. The first one involved a change of zoning? A. Yes.

Q. The second one also did, didn't it? A. Yes, but not necessarily. One can still re-subdivide the land for houses and duplexes with the present zoning.

Q. Well why did you put in the suggestion about zoning? A. Well generally developers like to know as clearly as possible what the situation was, if the council were to decide to follow that course it would be better to be clearer. But that does not mean it cannot be done under the other zoning.

Q. It would be one way of making sure a tower development could not take place, wouldn't it? A. Yes.

Q. And that was your purpose in suggesting that alternative, wasn't it? A. No, it was not.

Q. Why bother suggesting a change of zone at all if what you were suggesting in that alternative could be done anyway? A. I haven't Recommended one particular method of doing it. 10

Q. You have recommended three alternatives as being desirable? A. Yes.

Q. Why bother to suggest a change of zone if in fact the sort of development you are recommending in the first alternative did not require it? A. I was endeavouring to show the whole range of what could be done.

Q. You suggested that was desirable to let the property owners know exactly where they stood? A. Really what I was endeavouring to say to the council was there was a range of actions. I may not have expressed myself well, but that was what I was endeavouring to do.

Q. It would be a mistake to interpret that as indicating your preference for a change in zoning, would it? A. Yes. 20

Q. And the same for the second alternative, (b), group dwelling development in a residential 2B zoning? A. Yes.

Q. And in that regard, in the second one you introduce a recommendation of a 50' building line? a. It was not a recommendation. I was trying to explain to the council the types of — the different ways that the character of Wentworth Street could be protected. I am sorry, I am talking at cross-purposes with you.

Q. There is a paragraph ending "Alternative (b)"? A. Yes.

Q. And you recommend in that paragraph a building line of say fifty feet, don't you? A. Yes, I say the exact width would follow detailed study.

Q. That was much bigger than the building line provided for in the council's code for residential flat buildings? A. No. 30

Q. Wasn't it? A. No.

Q. Do you remember what the set back from any street alignment was which was provided for in that code? A. It is sixty feet at any one point, and then it decreases.

Q. Have you got the code there?

HIS HONOUR: Q. Are you talking about the council code? A. No, I am not.

Q. That is what you are being asked about; you are being asked if fifty feet is not much greater than the council code? A. The council code has a minimum set back.

MR. SHAND: Q. The minimum set back was, was it not, twenty feet from any street alignment, or one-quarter of the height of the building, whichever was the greater? A. Yes. 40

Q. So you were providing basically, were you not, in respect of the development you were suggesting this group dwelling development for a set back of at least twice what the code provided for? A. The code is just a general building standard that applies right through the municipality. I was giving the council advice about —

Q. Please — in fact you were suggesting a set back which was at least twice that which was provided for under the code as minimum? A. As minimum, yes.

Q. What would the height of this building have been, would you say, that you were then recommending?

HIS HONOUR: That is the one in (b).

MR. SHAND: Q. Approximately what height would it have been? A. Well it would vary from two to three floors. I would imagine.

Q. Give us an idea. A. Take a standard ten feet, floor to floor; perhaps thirty feet.

Q. So that taking the minimum from the code, that would require a set back of twenty feet?

A. Yes, that is a minimum. That is the minimum in any circumstances.

Q. You were not seeking, were you, to make this development by your recommendations totally uneconomic from the point of view of the landowners? A. No, I was not.

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Q. That is not a fact you take into consideration, is it? A. No.

Q. Would you agree these three forms of development you were recommending would really take no substantial advantage of the views available from this site, which would be available from a higher tower like construction? A. Well naturally a lower building has a lesser view than a higher building. It depends on the skill of the designer as to what advantage is taken of the views that are available.

Q. This site is one what has the potential for magnificent views of the harbour from many directions? A. I suppose most of the sites in the municipality have.

Q. This one in particular, an elevated site with a view of a considerable section of the harbour?

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A. Yes.

Q. And the development you were advocating really involved two storeys in respect of — A. Not in (c).

Q. In respect of (a) and (b) and 3 in respect of (c)? A. I thought you were asking me (b) when you asked me about development. In (c) the building would be higher.

Q. None of those alternatives would give substantial scope for views of the harbour, would they?

A. I wouldn't go so far as that, no.

Q. And they would all require, in order to get the number of dwelling units you had in mind, long, comparatively low construction? A. It depends on the design.

HIS HONOUR: Q. It has been suggested that to comply with the various suggestions you made it would have to be a long building? A. No, not necessarily. I don't know what Mr. Shand calls a long building.

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MR. SHAND: Twenty-four dwelling units do you have in mind for it? How many? A. That subject is not gone into at this stage.

Q. Isn't that a matter of some relevance from your point of view? A. It is in a general way.

Q. You would have to come to some sort of appreciation of the number of dwelling units, wouldn't you? A. The number of dwelling units varies with the size of the flat.

Q. You say, you indicated on p.2, that if the development was to be in proportion with the density proposed by the tribunal you would expect floor space index to be 8:1 and the number of dwelling units to be twenty-four? A. Yes.

Q. If you had twenty-four units you would have to have a pretty long sort of construction, wouldn't you? A. No, not necessarily.

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Q. What would you suggest? A. It might be a compact design with courtyards arranged in some attractive manner.

Q. Which would involve the length of the site not being used? A. The site is a good one, and there is room for all sorts of designs on it.

Q. You are not an architect, are you? A. Yes, I am.

Q. Would you agree that provision of lifts for a three-storey building, such as you would have to build on the site, in accordance with your recommendations, particularly under (c) provision of lifts would be a very difficult problem in the sense they would be spread quite a long distance in many cases from the units themselves? A. (A) You would not have to put a lift in; under the building regulations you only need a lift for four floors. Secondly, there are a number of lifts in the municipality with low rise buildings. I do not think there is any particular problem.

Q. The long building, you are likely to have the entrance to your units a long way from the lifts?

A. I haven't agreed there would necessarily be a long building.

(Short Adjournment) 10

ON RESUMPTION:

MR. SHAND: Q. You have been looking for the documents that we were talking about before the adjournment? A. Yes.

Q. Have you found them? A. I have only found the original of the copy you handed me, and the only assistance is that there is an initial which I think is the initial of Mr. Wayne Collins, who was the administrative assistant at that time.

Q. Administrative assistant in the town planning department? A. No, in the Town Clerk's department.

Q. Something to do with town planning? A. No. The way it looks to me, as if the administration has put together recommendations for the information of the council. 20

HIS HONOUR: Q. It does not help you to say where the particular recommendation originated?

A. No, all it helps is to show me I did not sign the whole report, somebody else has initialled it.

MR. SHAND: Q. May I see the document you have there? A. Yes. (Produced).

Q. It leaves the situation, does it, that you may or may not have made these two

recommendations? A. I made the recommendation about the car park on a separate report.

Q. You may have made the second, but you are not certain? A. rather think I did not, but I do not know.

HIS HONOUR: Q. If you did not make it, the most probable thing is that it originated in a committee, is it? A. Yes, but it could have arisen — yes, the idea could have arisen in a committee and somebody asked to formulate the technical resolution. 30

MR. SHAND: Q. Who would have worded it if it originated in a committee? A. It could either have been prepared by one of the clerks or it could have been prepared by one of the technical officers; it could be either.

Q. There apparently was a report prepared as a result of a joint meeting of the building and health and the town planning committees? A. Yes, that is this report.

Q. Which is that? A. My report of 18th September, or rather I prepared a report to that meeting dated 18th September.

Q. That is that three-page document? A. Yes.

HIS HONOUR: A. You say your report to the meeting of 18th September? A. Yes.

HIS HONOUR: That is Ex.C. Are there minutes of that meeting that cast any light on subsequent developments? 40

MR. WILCOX: That is the document the witness has just referred to, but it has been put together and the decisions of the committee meeting on the 18th have been compiled on the one sheet, and the witness has said the original of that bears the initials of Mr. Collins. Because it is a committee meeting the recommendations are to a subsequent meeting.

(Document tendered)

MR. WILCOX: I think this is fairly apparent, the front of the page sets out the decisions reached by the town planning committee on 18th September. Your Honour will see on the back of the page there is in the form of a note the memorandum of the council's decision of 24th September, which carried one of the committee's recommendations into effect.

(Recommendations of town planning committee of 18th September, 1973, and council's decision thereon of 24th September, 1973, tendered and marked Ex.E)

MR. SHAND: Q. When the tribunal had published its decision you prepared a report? A. Yes.

Q. For the 27th May meeting? A. Yes.

Q. Was that on your own motion? How did you come to do that? A. I normally write reports to committees when the decisions of tribunals are received.

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Q. You think it was of your own motion then, under some custom you follow? A. Excuse me —

Q. What are you looking at? A. I just want to look at the opening of that report. All I can say is normally if I am asked to give advice from a committee there will be a resolution, which I normally quote.

Q. So you do not think you were asked to give the advice? A. I don't recall being asked. I was not formally asked.

HIS HONOUR: Q. Apparently your report was part of the larger report that included the decision, comments by the council's solicitor, and also a document tht Mr. Regnis prepared.
A. That is right.

Q. Is that normal procedure too? A. Yes, thank you, that refreshes my memory. Yes, he would have asked me for my town planning comment.

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Q. Mr. Regnis would have, you say? A. Yes.

MR. SHAND: Q. Would it be fair comment to say in the three alternatives you then expressed in your report for that meeting you sought by one means or the other to bring about a situation under which no tower development could remain possible? A. I don't think that is quite correct.

Q. That would be very close to being correct wouldn't it? A. No, because in section (c) I merely say "In order to ensure low scale". There could be a low scale tower envisaged in that group, in (c).

Q. Low scale — A. No, I beg your pardon, I am sorry, I am not thinking clearly. No, what you say is correct.

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Q. The three alternatives also created a situation, if any of them were adopted, under which the applicant, or the owners of those sites, could not by recourse to the appeals tribunal achieve a tower development? A. Yes.

Q. And that course was not accidental on your part, was it? A. Not in this canvassing, this particular canvassing — preliminary canvassing.

Q. It was the advice you were giving the town planning committee, whether preliminary or otherwise? A. Yes.

Q. And you were aware of the fact when you gave it that there was not any appeal available from a procedure which you recommended in (c)? A. Procedure?

40

HIS HONOUR: Restriction on height.

WITNESS Well the application was considered —

MR. SHAND: Q. Please answer? A. Perhaps you could re-phrase your question.

Q. You were aware, when you framed (c), that there would be no appeal from that procedure, if it were adopted?

HIS HONOUR: Q. No appeal from the imposition of a height limit, a storey limitation? A. But if an application were put in at a greater height the applicant could appeal to the tribunal.

MR. SHAND: Q. Were you aware that if in fact the council decided on the third alternative and imposed a restriction of height to two or three floors no appeal could be brought to any other tribunal or body from that decision? A. I don't know the legal position.

HIS HONOUR: The witness said if an application were put in for a higher number of storeys, if it were refused the applicant could appeal to the tribunal.

MR. SHAND: Q. Were you aware of that at the time you made that recommendation? A. Well I would have been aware of that yes.

Q. Why did you use the words "in order to ensure a low scale" if that was your view as to the rights available? A. Well I would have meant as far as possible, naturally. 10

Q. You did not say so, did you? A. No. Perhaps it is not clearly worded, but that would be the intention.

Q. What I am putting to you is you had in mind the suggestion of three alternatives, any one of which, and all of which, would leave the property owners without recourse in respect of any tower development sought thereafter on these properties? That is really what you had in mind, wasn't it? A. No.

Q. The first two of them involved in your mind a re-zoning which, of course, would prevent tower developments, didn't they? A. Yes, but if it is re-zoned the owner — that would only be a proposal for re-zoning. 20

Q. Maybe so, but if it resulted in re-zoning that would put a tower development out of the range of the property owners? A. In those circumstances, yes.

Q. At the time you made this report you anticipated a further application for development approval, didn't you? A. I think I said before that I thought it was likely.

Q. Of course an alternative was open, was it not, for the zoning to stay as it was and for any further application, which included a tower development, to be considered on its merits?

A. Yes.

Q. You did not give any advice in this report on that aspect, did you? A. No, I was discussing desirable development on the site.

Q. In your view that did not include a tower building? A. Not to maximum. 30

Q. No tower unit at all? A. In this preliminary discussion, yes.

Q. Don't worry about the preliminary part. This recommendation of yours did not include any tower development, did it? A. No.

Q. In your view the development which you wished to see ensured, or assured, was low scale?

A. Yes.

Q. And you thought it appropriate to recommend procedures which would deprive in your view the property owners of any chance of a higher scale development? A. Well I wouldn't say any chance, no, because it is open to the applicant to come back to the council.

Q. What, and try and change the decision? A. Yes, ask for a reconsideration.

Q. Was it your view that the opportunity should not be made available to these property owners for the tribunal again to consider a tower development? A. No. 40

HIS HONOUR: Q. That was not your view, you say? A. No.

MR. SHAND: Q. You thought the council should try and strengthen its position, didn't you, for the purpose of meeting any future application involving a tower development? A. I thought the position as to what the council would feel was acceptable should be clarified for everybody's sake.

Q. You thought, did you not, having read the tribunal's decision, that the council should attempt to strengthen its position in view of the possibility of another application involving a tower development? A. I don't really think that was the main purpose of this report.

Q. You realised that is the effect that could be read as being intended? You would admit that, wouldn't you? A. I can't answer that question.

Q. You have worded it that way, haven't you, two re-zonings in (a) and (b) and the further provision in (c), the restriction on the height to ensure a low scale? A. I can't say what other people think.

Q. Maybe you can't, but you can look at your own wording and agree, can you not, that it could well be reasonably read as having that objective? A. Yes, it could be read that way. 10

Q. But you say it was not your intention to convey that meaning? A. No, it was not the main purpose. I was trying to describe what I thought was desirable from a technical point of view.

Q. Were you of the view at some stage that a five-storey development on this site would be reasonable? A. I think I thought that would be — depending on the standard of design — that that was the outer limit of what could be put on the land.

Q. When did you think that? A. I think I put that point in my next report.

Q. In your report for the meeting of 10th June? A. I think so.

Q. Would you have a look at that? It could not be in that next report, could it, in view of your recommendation (a) on p.5? A. Just excuse me a moment. It is on the last page of the report on 27th May. 20

Q. You recommend no more than three storey? A. Yes.

Q. So it was not there, was it? A. If you turn over, if you read the last paragraph on the second page of that report, and then read the top paragraph on the last page.

Q. The last paragraph on the second page?

HIS HONOUR: You have to read the two paragraphs together, p.3, on the top, just above her signature.

MR. SHAND: Q. Would you read the words you are referring to? A. "If in the light of the tribunal's comments council thought that a slightly denser development should be permitted —"

HIS HONOUR: Q. That is at the bottom of p.2 you are reading from? A. Yes.

MR. SHAND: Q. Is this your report of 10th June? 30

HIS HONOUR: No, 27th May. The witness is reading the last paragraph of p.2, and it goes on to the end.

MR. SHAND: Q. Are you referring to that as being an expression of your possible approval of five storeys, or floors? A. I am saying if the council thought a slightly denser development should be permitted in the light of the tribunal's comments, then I would recommend —

Q. Recommend the development did not exceed .7:1? A. Yes, and I say "for either step development . . . "and I go on to say — it is an indication — "council when considering an unusual development . . . from one to five storeys with ratio .5:1 . . ." it was an indication it might be possible with good design if the council wanted to make a higher density, for that to be put on the land, as a possibility. 40

Q. You were referring to a possible approval by you of five storeys, were you? A. I was reminding the council of this particular development in Banksia Street, which was not a 2C zone, where this type of development had been designed, and indicating that maybe that would be all right if they felt it should be there, because of what the tribunal had said.

Q. By the time you made your report on 10th June you had quite clearly abandoned any approval of five storeys, hadn't you? A. Yes, I said —

Q. Hadn't you? A. Yes.

Q. And you regarded three storeys as being a maximum then, didn't you? A. Yes, that was because of the type of regulation involved.

Q. Regulation? Why?

HIS HONOUR: Q. What are you referring to? A. The Local Government Act says the council may regulate.

MR. SHAND: Q. Why did that limit you to three storeys in your approval? A. The position is that if the limit had been five storeys, from experience I would expect that applicants would be likely to apply for the maximum throughout the development, and I did not think a building of five storeys in height throughout, over the whole of its ground floor plan, would be desirable on the land, and the regulation only permits one to state — I thought from a technical point of view it would be hard to get the right results. 10

HIS HONOUR: Q. You mean you could not make a prescription that it should vary from one to five as you canvassed on 27th May? A. Yes, and I thought the consequences of making it five storeys might be poor on that particular site.

MR. SHAND: I am finding it hard to hear you.

HIS HONOUR: She said she thought the consequences of making a prescription of five storeys might be undesirable on that particular site.

MR. SHAND: Q. Your view was, was it not, for 10th June, it might be preferable to have a step development of varying heights containing one to three storeys? A. I thought that might be a development, with it stepped, could be three storeys — I thought that was a development that we might actually achieve. 20

Q. If you had a regulation of the height of this building to five storeys the council itself could take into account a step development and either approve or disapprove of the application in the light of that, couldn't it? A. The difficulty is if the council had regulated the number of storeys to five and an application came in in which it had a total height of five over the whole of the ground plan, council would then have found it difficult to support a refusal of that application, even though the merits of the building might be unsatisfactory. If the height sought was three storeys I thought even if a mediocre application came in the consequences could be accepted, provided there was sufficient landscaping between that building and the street, and provided the residents nearby were protected, because I have observed that there is in reality a great deal of difference in scale between three floors, whatever the design of the building, and anything over that. I thought a badly designed building of five storeys would be obtrusive but badly designed building of three storeys might not be, with care. 30

Q. The council would have every right and authority under cl.33, would it not, of the Ordinance, to disapprove a building of five storeys on the question of bulk, in a neighbourhood — A. Yes.

Q. You were seeking to protect the council from having to take any such decision, were you?

A. No, I was afraid it would be hard to support a refusal, if council specially regulated that height and a building came in that was not of the type envisaged.

Q. All the necessary rights were contained in cl.33? A. Yes, but an appeal would have to be considered before the tribunal. 40

Q. Although you yourself thought a step development up to five storeys would be acceptable —

HIS HONOUR: I don't think she said that. She said if council wanted a denser development this would be the maximum that would be desirable.

MR SHAND: Q. You felt the tribunal had indicated the permissibility of a slightly denser development, did you not? A. Yes.

Q. Denser than you yourself would have preferred? A. Yes.

Q. And the effect of your final recommendation would have been, wouldn't it, in your mind to preclude any application utilising that on denser development which the tribunal had indicated, because of the regulation of height which you recommended? A. No.

HIS HONOUR: Q. Would you be able to give me any idea of approximate height above datum point of this particular land, how much of that maximum height under the Ordinance would be available? A. Yes, we may be able to conclude what it is, if you were to subtract eighty feet. Eighty feet would be the height of an eight-storey building.

Q. An eight-storey building did go to the maximum height under the Ordinance? A. Yes, the application went before the tribunal, so if you were to subtract eighty feet from that you would get it approximately. 10

Q. It would be sufficient for my purpose to say an eight-storey building was the maximum available under the Ordinance for practical purposes? A. I think so, yes.

MR. SHAND: Q. Did you, before you made your report of 27th May, read the Dowling Tayler advice in their letter of 9th May? I suppose you did. A. I would have read it if it went to a committee meeting before that date.

Q. You refer to it in your report, don't you? A. Oh well —

Q. Did you note the portion of the advice which referred to the need to make representations to the Minister immediately for the suspension of the land? A. I don't think so. 20

Q. You do or you do not? A. No.

Q. At the bottom of p.3 of that letter? A. My report?

Q. No. Dowling Tayler's letter, the bottom of p.3. A. I don't think I referred to that in my report, did I?

Q. You say at the outset of your report of 27th May, "Details of the Local Government Tribunal's decision and comments on that decision by the Council's solicitor have been given earlier in the report." Isn't that what you were referring to? A. Yes, I expect that refers to the whole report, the deputy Town Clerk's report, with the advising.

Q. Wasn't that their letter you were referring to when you said the "Comments on that decision by the Council's solicitor"? A. If that is referred to in the report, that is the letter I was referring to. 30

Q. Hadn't you read the letter? A. Yes, I think I would have.

Q. Therefore you read the part at the bottom of p.3, recommending action for immediate suspension? (Objected to).

Q. Did you read the remarks of the solicitors in the following terms, "That if the council does desire to restrict development . . . representations be made to the Minister immediately"? For suspension, in effect? Did you read that? A. I would have read that.

Q. And the following remark obviously, "If nothing was done and an amended application was received in the meantime . . . would be well nigh impossible to successfully resist an appeal from the council's decision refusing the application"? A. Yes.

Q. And did you read the following paragraph, which dealt with need, if s.309(4) was used, to take action of that kind immediately also? A. I would have, yes. 40

Q. It was perfectly clear to you, when you made your report of 27th May that what you were called upon to do was to put as many difficulties in the way of the property owners as you could with regard to the sort of development, that is tower development, which had already been refused? A. No.

Q. You knew that there was a large section of the council that wanted to avoid being pushed into a position where such a development could be approved by the tribunal on appeal? A. I may have, but that would not have affected my technical advice.

Q. You were not meaning to be misleading in your affidavit, were you, in regard to the zoning of nearby land, that is close to these properties? A. No.

Q. You said in par. 2 of your affidavit: "The site 8-12 Wentworth Street immediately adjoins a substantial area zoned under the Woollahra Planning Scheme as Residential 2A"? A. Yes.

Q. What was that adjoining area? A. That is Residential 2C.

Q. Where was the area you referred to there, the Residential 2A area you were there referring to? A. It refers to the residue of Point Piper. 10

Q. "Immediately adjoins a substantial area"? You meant the rest of Point Piper, did you? A. Yes, all those parts of Point Piper that are zoned Residential 2A, nearby, and beside.

Q. You were not referring to the convent property, were you? A. That would be included, yes.

Q. Is that 2A? A. Yes.

Q. Or was that not special purposes? A. It is 2A.

Q. Apart from that, the properties across the road, beside, were 2A, weren't they? A. Yes.

RE-EXAMINATION

MR. WILCOX: Q. You were asked about the areas of the decision of the council in September 1973 at the time it refused the Blackburn Developments' application? A. Yes.

Q. Leaving aside this case altogether, and this land, can you recall instances where consideration of a development application by Council has raised a question as to the appropriateness of the zoning, or whether there should be some change in the controls relating to land? A. Yes. 20

Q. Have there been cases where you have been asked to report on those matters because of some concern by the Council as to whether there should be some change in the present situation? A. Yes.

Q. You were asked by my learned friend about cases where the consideration having been completed there is an application for suspension. I think you were not able to think of any offhand? A. No.

Q. There is a commercial area in Double Bay? A. Yes. 30

Q. Described as such under the Council's scheme? A. That is so.

Q. Having reminded you of Double Bay, can you think of situations there where Council has considered or requested suspension after considering applications for development? A. Yes. There was a series of applications for commercial buildings in Double Bay which were excessive in bulk, and the Council did seek a suspension of the area.

Q. What about the land at Edgecliff owned by the Church of England? Was there any suspension application there? A. No, there was not. There was, however, a proclamation under s.309 restricting the height there to five storeys.

Q. Was that consequential upon consideration of an application? A. Yes.

HIS HONOUR: Q. That was in a 2C Zone? A. No, it was in a re-development 2E under the City Scheme. 40

MR. WILCOX: Q. So far as the Woollahra Scheme is concerned the only controls that one has in a statutory form are the zonings as shown on the scheme map and the ordinance it self, and what is contained in the ordinance? A. I would have thought it would be the Local Government Act.

Q. As well as the Act? A. Yes.

Q. What I wanted to get from you was that one does not have detailed consideration on a site by site or precinct by precinct basis within the scheme itself? A. No.

Q. I suppose within any one zone in Woollahra one does tend to find significant differences in topography and nature of the area and so on? A. Certainly.

Q. Again taking you to September 1973, as at that time if you were asked to report to Council or a Council committee on a particular matter and during the course of preparation of your report it occurred to you that some particular step was desirable, was it your practice to include a specific recommendation in your report? A. Yes.

Q. The report that you prepared for presentation to Council's Town Planning Committee on 18th September set out the views that you had formed prior to completing that report and presenting it to the meeting? A. Yes.

[Witness retired]

[Memorandum to the Mayor by Mr. M. Regnis dated 2nd August 1974, together with the earlier memorandum of 9th May 1973, which Mr. Shand adds at Mr. Wilcox's suggestion without conceding its relevance, tendered; admitted and marked Ex. F]

[Counsel addressed.]

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12 Order granting Final Leave
to appeal — 7 February, 1980

ORDER OF HIS HONOUR MR. JUSTICE HUNT

THE COURT ORDERS that:

1. The plaintiff be granted final leave to appeal to Her Majesty in Council.
2. There be liberty for either party to apply on 2 days notice should the need arise.
3. The costs of this application to be the costs in the appeal.

Ordered 7 February and entered 1 May, 1980.

By the Court
Chief Clerk

13. Certificate of Prothonotary as to correctness of record.

CERTIFICATE OF PROTHONOTARY OF THE SUPREME COURT OF NEW SOUTH WALES
VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

I Terence Greenwood, Prothonotary of the Supreme Court of New South Wales, do hereby certify as follows:

1. That this transcript record contains a true copy of all such orders, judgments and documents as have relation to the matter of this Appeal and a copy of the reasons for the respective judgments pronounced in the course of the proceedings out of which the Appeal arose.
2. That the Respondent herein has received notice of the order of Her Majesty in Council giving the Appellant special leave to appeal to Her Majesty in Council and also received notice of the despatch of this transcript record to the Registrar of the Privy Council.

10

DATED this day of August 1980 at Sydney in the State of New South Wales.

T. Greenwood,
Prothonotary of the Supreme
Court of New South Wales.