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TRANSCRIPT OF PROCEEDINGS

TRANSCRIPT IN CONFIDENCE

O/N H-999748

INDEPENDENT PLANNING COMMISSION

MEETING WITH APPLICANT

**RE: REQUEST FOR GATEWAY DETERMINATION REVIEW –
OLD SOUTH HEAD RD ROSE BAY**

PANEL: **CHRIS WILSON
SOO-TEE CHEONG**

ASSISTING PANEL: **ANDREW McANESPIE**

APPLICANT: **ANDREW DUGGAN
CHRIS O’CONNOR
NATALIE VINTON
TROY FLAHERTY
TURVEY TO
REV KENT CRAWFORD**

LOCATION: **IPC OFFICE
LEVEL 3, 201 ELIZABETH STREET
SYDNEY, NEW SOUTH WALES**

DATE: **11.02 AM, THURSDAY, 28 FEBRUARY 2019**

MR C. WILSON: Okay. Thank you for all for coming. Before we begin, I would to acknowledge the traditional owners of the land on which we meet and pay my respects to their elders past and present. Welcome to the meeting today on the request for a Gateway determination review seeking to list the Rose Bay Uniting Church and Wesley Hall Group at 518a Old South Head Road, Rose Bay as an item of local heritage under schedule 5 of the Woollahra LEP 2014. Specifically Woollahra Municipal Council is seeking a review of condition 1 of the Gateway determination, which states:

10 *The planning proposal is to be updated to include a reference to a savings provision to apply to any DA, or development application, lodged but not determined. Furthermore, Council is also requesting that reconsideration be given to it being authorised as the local plan making authority.*

15 My name is Chris Wilson. I'm the chair of this IPC panel. Joining me on the panel is Soo-Tee Cheong. My other attendee is Andrew McAnespie from the Commission Secretariat. In the interests of openness and transparency and to ensure the full capture of information, today's meeting is being recorded and a full transcript will be produced and made available on the Commission's website. This meeting is one part of the Commission's process of providing advice. It is taking place at the preliminary stage of this process and will form one of several sources of information upon which the Commission will base its advice.

25 It is important for the Commission to ask questions and attendees and to clarify issues whenever we consider it appropriate. If you're asked a question and you are not in a position to answer, please feel free to take the question on notice and provide any additional information in writing, which we will then put on our website. We will now begin. Firstly, I would just like to acknowledge that we found out this morning you've brought legal representation. I will just make it clear for the record that we won't be entering into any legal discussion in relation to the matter. On that basis, you've requested the meeting, and we will throw it over to you guys.

35 MR T. TO: Thank you, Commissioner. We have sought to understand the review justification that the Council has made to support its request. To try and expedite the process, I've prepared a short outline which the Commission will consider in due course in its deliberations. So I will provide three copies.

MR WILSON: Yes. Thank you.

40 MR TO: I'm not going to obviously read it. It - - -

MR WILSON: No. That's okay.

45 MR TO: - - - sets out in greater detail the particular reasons why the Uniting Church says that the reasons proffered by the Council ought not be accepted as justifying a change to the Gateway determination conditions. And, I mean, this is a curious

review request. We know that this is a planning proposal for a proposed local heritage listing. We know what the Gateway determination says. The Department thought it was – and the Greater Sydney Commission thought it was of sufficient strategic merit to have the proposal proceed.

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The two conditions that are really the essence of the challenge and the review are procedural matters. They're not directed to the substance of the listing per se. So hence the Council is seeking that the savings provision requirement be deleted and that it be given plan making delegation. That's really it. That's a fairly confined process. What's important to remember, at least from the proponent's point of view, the Church's point of view, is that we aren't seeking to engage in the merits of the heritage listing. We're not seeking to engage in the merits of the development application that the Commission knows is before the Land and Environment Court. That's set to commence on 13 March, just over a week's time. That said, I do want to make a couple of introductory comments.

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In the table before the commissioners is the present model for the development application that is about to go before the Land and Environment Court for determination. The reason why I'm pointing this out is because, like many applications in the court and before councils, it has evolved over time. What doesn't necessarily clearly come out from the Council's original planning proposal document, nor its review request, is that the scheme that the Council was dealing with, and, indeed, the court was dealing with, up until December was markedly different to the one that we see depicted in the model. And it's useful for the Commission to realise that. The original scheme had effectively the back half of the Church demolished and the whole of the Wesley Hall component demolished and the proposed new buildings wrapping around. I think we see the text in some of the Council's descriptions about that. The current scheme preserves the entirety of the Church, proposes removal of the Wesley Hall component.

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As I say, we don't see this review request, given its confined nature, to be engaging in the merits of that debate. That's going to be for the Land and Environment Court to determine in due course. And so when we realise that context and come to the Council's justification for the review request, we rather think that the Council's approach really seeks to enter into the merits of that debate and to effectively in some respects invite the Commission to do the same thing, and we don't think that's an appropriate task or step, nor the function of the Commission in reviewing what is effectively the procedural aspects, savings provision, delegation.

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Now, there's a few main themes in the Council's justification. The first one is that the inclusion of the savings provision will somehow be inimical to the proper process for heritage management in this state. Now, that's a really high and wide claim, and it's not one that the Commission should find demonstrated, nor is a good reason to change the savings provision. In essence, the Council is saying unless the savings provision is removed, this Church and its significance won't be appropriately protected, won't be appropriately examined in the context of the Land and Environment Court proceedings, and that's just demonstrably wrong.

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The Council, as it has been permitted to do by the court, has in answer to the amended scheme of December of last year brought forward amended contentions. It's a document dated February of this year. It has raised what I will broadly call the heritage contentions. It occupies extraordinarily some eight pages of contentions about the asserted impacts of the scheme on the heritage significance of the Church building and the site. There's no reason to think that the court is not going to determine that matter in an independent way guided by the evidence that the parties will no doubt bring forward through their expert heritage consultants and the like. So it's just simply not the case that the heritage protection measures in this state are going to be undermined in any way should the savings provision remain. In fact, given the timing of the hearing, it's questionable what difference it will make at all.

The second key point I want to make about the Council's justification is that it says not including – or rather including the savings provision is going to be inconsistent with interim heritage order schemes for protection, and that's another submission which is quite broad and should not be accepted by the Commission. I think the Department has pointed out in its document, and so far as the Uniting Church is aware, the Council has never sought to engage the interim heritage order provisions. It has never sought to make one. It has never sought to have one applied.

Rather, it seeks to get the ability to, in effect, elevate the heritage importance of this item in the context of an existing court appeal, and the reason why it does so and why it hasn't gone down the IHO route is something that the Commission might take note of, because as the Commission will be aware, the provisions for the making of an IHO are balanced. They're balanced for good reasons for the protection of the heritage values involved but also the interests of the parties who might be affected. So upon the making of an IHO, there's an appeal right afforded to a landowner as to that matter. Now, the reason why that step hasn't been taken and why the Council has chosen instead to try and remove savings provisions and secure its own unilateral ability to make a plan should be considered and contrasted in that context.

When those matters are considered, it's apparent that the Commission in imposing these conditions on the determination were alive to this matter, alive to the consequences of tipping the scales, as it were, in favour of one party or another when there is a court proceeding on foot and the court is going to independently determine the issues, and it thought for sound reasons that is not good administrative practice. It is not a practice that's consistent with principles about not altering the law. And I'm not saying that in an appropriate case that doesn't happen and that the power is undoubtedly there to do it, but it's exercised very sparingly and only in appropriate circumstances.

There's nothing in the Council's justification that really points to that kind of exceptional case here. We're not talking about an unlisted item that is of state or even national significance here that is about to be irretrievably lost. It's that sort of territory that one might expect a delegate or the Commission giving a Gateway determination might think that's an appropriate circumstance to perhaps allow a change in the playing field, if I can use that metaphor. It's not this case.

What it comes back down to is a relatively simple proposition. The Council in seeking the removal of the savings provision requirement and in seeking an ability to unilaterally make the plan obviously perceives it will obtain probably an advantage in the Land and Environment Court proceedings. That's probably illusory for the reasons that I adverted to earlier. But illusory or not, the process for plan making shouldn't be used in that way, and that's why the conditions are appropriate. They don't preclude the process from proceeding. They don't preclude the plan making process and the consultations that are otherwise required from going ahead. Nor – if at the end of that process it's appropriate to list, that can happen. That will still happen.

There is a further reason that the Department has cited which also supports this main idea. The Department identified that there was a difference of opinion as to – that is, between the Church and the Council about how much of the Church ought to be listed, and having considered those competing views, the Commission thought it's not appropriate to let one of those parties to the competing views be the sole arbiter of that outcome. And that's another reason and quite a good reason why the Council ought not be left in the position of having plan making delegation, because as it stands, without delegation, both parties will get the utmost opportunity to put their positions forward about the extent of the listing and someone independent, not partial to that argument, will get to make that decision. It's for those reason and the reasons in the - - -

MR WILSON: Okay.

MR TO: - - - document that we - - -

MR WILSON: So this is seemingly substantially different than what's in our documentation. Is Council aware of this revised scheme?

MR A. DUGGAN: Absolutely. This is – the plans were formally amended in the court just before Christmas. Those - - -

MR WILSON: What, through a section 34 mediation process or - - -

MR DUGGAN: Not in section 34. Just an application - - -

MR: It's just a motion.

MR WILSON: Yes.

MR DUGGAN: Those plans were exhibited in January and submissions received, and it's on the basis of these plans that Council has issued its current statement of facts and contentions.

MR WILSON: Okay.

MR DUGGAN: So – and joint conferencing has occurred based upon these plans. So Council is more than aware of these plans.

5 MR TO: I should add I haven't provided the Commission with a copy of the facts and contentions that – the amended facts and contentions that the Council has filed. It's not my document, and - - -

MR WILSON: No. That's okay. I'm not too sure - - -

10 MR TO: I'm constrained in that respect because of the processes of the court.

MR WILSON: Yes. No. That's fair. I was just interested to hear - - -

MR TO: The Council may be able to provide it you.

15 MR CHEONG: I think the document has to come from the Department anyway.

MR TO: Has it?

20 MR DUGGAN: No. No. That's right. I don't think

MR TO: It's a lengthy document, and the heritage contention - - -

MR WILSON: No.

25 MR TO: - - - contention, as I said, was eight pages long.

MR WILSON: Okay. So this is the one as exhibited. So there was 35 – I think 34 letters of objection and one submission in support and petition. Yes. That's the one we're referring to. That's - - -

30 MR DUGGAN: So following the re-exhibition in January, that number is down to, I think, 19.

35 MR WILSON: Okay. So we don't have information of that re-exhibition.

MR DUGGAN: No.

MR WILSON: That's – a little bit. I mean, look, it may or may not have bearing on what we consider, but it's a bit disappointing we don't have that information.

40 MR TO: Yes. I realised when I was reading the papers that they were addressing the earlier scheme, and I thought that's why it was useful to point - - -

45 MR WILSON: Yes.

MR TO: - - - out the change, but – yes. It's - - -

MR WILSON: Okay. Just in terms of IHO, because – so we met with the Council this morning, and we have a meeting with the Department next Monday. One of the questions we put to the Council is, you know, why not an IHO. I guess the question to you is probably your understanding of when an IHO can be used and can't be used. We understand the prerequisites for an IHO, but in terms of timing, I guess can an IHO be sought when something is before the court, for instance?

MR TO: Yes.

MR WILSON: Okay.

MR TO: Absolutely.

MR WILSON: There's no - - -

15

MR TO: Parallel regimes.

MR WILSON: Providing you meet the – I think there's two critical – yes. yes. Okay. I shouldn't be asking that. But, I mean, your understanding is that an IHO can be sought provided you meet the prerequisites. Yes?

20

MR TO: Indeed. And as I understand it, if the IHO were in place, the effect of that would be to require an approval under the Heritage Act to do something to the protected item, and in turn that requirement for an approval could be dealt with under the integrated provisions of the Planning Act, so that you would end up back in the same - - -

25

MR WILSON: Yes.

MR TO: - - - context of really the Land and Environment Court being able to determine the issue.

30

MR WILSON: All right.

MR TO: But, as I say, here, Council has filed its contention - - -

35

MR WILSON: Well, they say it's section 60 or something, is it?

MR TO: Well, it's 58 approval - - -

40

MR WILSON: Okay. Sorry.

MR TO: - - - or something like that.

MR WILSON: Yes. Okay.

45

MR TO: And I might have the section number wrong - - -

MR WILSON: Right. Okay.

MR TO: - - - in one way or another, but - - -

5 MR WILSON: All right. But as far as you're aware, there's no fundamental problem with seeking one at any time, provided you meet the - - -

MR TO: No. And this process has been going on – I think I've mentioned in the paper that the Uniting Church first met with the Council to discuss the
10 redevelopment of the site sometime in March, early March 2017. So this has been on foot for a couple of years.

MR WILSON: Was there discussion between the Council and the applicant in relation to – we note the divergence of – or the difference in heritage significance of
15 the two main reports. Both were done consistent with relevant guidelines.

MR TO: Yes.

MR WILSON: But was there attempts on both parts to bring – I mean bridge the
20 gap between the divergent - - -

MR TO: I wasn't there, but I understand so.

MR C. O'CONNOR: Yes. That happened – sorry. Chris O'Connor. I'm - - -
25

MR WILSON: Yes.

MR O'CONNOR: - - - Endeavour Property, representing the Church in a development management capacity. We met with Council originally in March 2017,
30 and from the very beginning we understood that while the site wasn't listed and still isn't listed, it obviously represents some landmark qualities for the area, and we wanted to do something sympathetic for the site that represented the memory of the Church and also delivered the objectives the Church required.

35 Council pretty – just didn't provide us any advice, didn't give us any kind of indication on what might be acceptable to them and what they might support. We then – as you might know, a sale process occurred, which attracted some negative interest from the community, which resulted in this heritage listing sort of proceeding. Subsequent to that, the Land and Environment Court process occurred.
40 Through that process, the court suggested that we would meet with Council and engage in an informal sort of conciliation conference type process.

In that process, we developed four different design schemes which sort of assessed the option to retain all of the church and pretty much not really touch any of, you
45 know, the fabric or any significant alterations, and it proceeded right up to the fourth option, which was demolition of the rear hall and still full retention of the front hall. That scheme that we proceeded with was the third option, which was slightly less

sort of, you know, development potential, which we were happy to concede on. Council at that point still didn't really give us any clear direction on whether that would or wouldn't be acceptable. They said that it would be essentially subject to further heritage advice and it would have to come out - - -

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MR S. CHEONG: When was that?

MR O'CONNOR: That was in – that was late last year. That was about October last year, I think.

10

MR DUGGAN: October, November. Yes.

MR O'CONNOR: Yes. So it was essentially said that it would have to be subject to further heritage advice and they wouldn't be able to comment on whether it would be acceptable or not.

15

MS N. VINTON: I think we met with them three times.

MR WILSON: Okay.

20

MS VINTON: First to discuss what the issues were with the previous scheme from a heritage perspective, which was the point I first got involved. And then the second meeting was to show them the heritage options, but the heritage specialist wasn't there. So then we had a third meeting with the heritage specialist and planners to go through the options.

25

MR CHEONG: My question – can I - - -

MR WILSON: Yes. Go.

30

MR CHEONG: Similar to what you were asking, the present scheme in front of us, what have the Council – what view has the Council expressed on this latest scheme?

MR TO: I will try to do it in a summary way. The Council are still not satisfied that this scheme is an appropriate response to the significance that they say the church has, and that's why they've raised the heritage contention in their facts and contentions. That's a matter on which the parties will have to lead expert evidence and the court will need to determine.

35

MR DUGGAN: But certainly it did result in a number of contentions dropping away to do with certainly floorspace and heights, and this is now completely compliant with the height control, more than compliant with the FSR control, about 30 per cent less than the maximum. It's quite a relatively modest scheme of only six apartments – six three bedroom apartments, and then adaptive re-use for the Church for potentially retail premises or business premises. And then this wing off to the side of the church, the DA envisaged the Uniting Church staying involved in the site

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and continuing to offer outreach and other social services out of this portion of the site here.

5 MR O'CONNOR: Sorry to interrupt, but just for the benefit of the Commission, the discussions that I had mentioned with Council were without prejudice. However, it was our intention through that exercise to develop a design scheme that was suitable for – satisfied Council and the Church's objectives.

10 MR WILSON: Okay. Any more questions, Soo-Tee?

MR CHEONG: No. I didn't – no questions from me.

15 MR WILSON: Have you got anything more to add in relation to the request, the review?

MR TO: Other than to say what I've said before that we just think the determination should stand in the way that it has been issued. There's no good reason to change it.

20 MR WILSON: Okay. Well, I think that's – we have – it would have been nice to have that additional information, but we will request that. It's a bit disappointing. But otherwise, look, we appreciate you coming in. We understand the situation of both parties. We're yet to hear from the Department, so we will hear from them on Monday. And then I think we're due to make our recommendations at the end of next week or by 8 March anyway. So – yes. That's where we're up to at the moment. I don't think there's anything more we need to add just at the moment.

MR A. McANESPIE: Just – yes. You understand that this will be placed on the Commission's website, so it will become a public - - -

30 MR TO: Public.

MR McANESPIE: Public document. Yes.

35 MR TO: Intended to - - -

MR WILSON: And something was also handed to us - - -

MR McANESPIE: The letter from - - -

40 MR WILSON: - - - this morning from Council which we're going to have to put on – it's going to be on the website anyway. So – just, look, you know – so – which is a little bit interesting.

45 MR DUGGAN: I'm just informing Mr To. He hasn't seen the letter before. So I'm just trying to give him some – it's obviously part of the current court proceedings.

MR WILSON: Yes. So we're obliged to put it on our website, given that was handed to us by one of the parties. Okay. Done. Thank you very much for coming in.

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RECORDING CONCLUDED

[11.28 am]