

**LOCAL GOVERNMENT PECUNIARY
INTEREST TRIBUNAL**

PIT NO. 3/1998

DIRECTOR-GENERAL, DEPARTMENT OF
LOCAL GOVERNMENT

RE: COUNCILLOR PAMELA EMMA VIRGONA,
NORTH SYDNEY COUNCIL

STATEMENT OF DECISION
ACTION BY THE TRIBUNAL UNDER
THE LOCAL GOVERNMENT ACT, 1993,
SECTION 482(1)

Dated: 7 May 1999

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STATEMENT OF DECISION

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This decision is a sequel to and is to be read with the Tribunal's Statement of Decision dated 23 April 1999 in which the Tribunal, after a hearing, found that a complaint by the Director-General, Department of Local Government, against Councillor Pamela Emma Virgona, North Sydney Council, of breaches by her of section 451 of the abovementioned Act had been proved.

The Tribunal reserved the question as to the appropriate action to be taken by the Tribunal under section 482(1) of the Act in order to afford both parties an opportunity to furnish written submissions on that question.

For the purposes of this present decision, the relevant provisions of the section should be restated:

- "482. (1) The Pecuniary Interest Tribunal may, if it finds a complaint against a councillor is proved:**
- (a) counsel the councillor; or**
 - (b) reprimand the councillor; or**
 - (c) suspend the councillor from civic office for a period not exceeding 2 months; or**

- (d) **disqualify the councillor from holding civic office for a period not exceeding 5 years.”**

On 4 May 1999 the Tribunal received a written submission from Mr J F Whitehouse of Minter Ellison, solicitors for Councillor Virgona, which enclosed a personal submission by her, and a written submission from Mr Michael Lawler, counsel for the Director-General. For the reasons set out in his submission, Mr Whitehouse suggested that the appropriate course of action for the Tribunal to take would be to counsel Councillor Virgona. For the Director-General it was submitted that the case called for strong action by the Tribunal and that it was an appropriate case for a “not insignificant” period of disqualification. Thus the Tribunal is called on by the submissions to look at the case from opposite ends of the spectrum.

The circumstances in which the breaches by Councillor Virgona occurred were related in the Tribunal’s earlier Statement of Decision. Consideration must now be given to, amongst other things, some of the explanations given for her conduct in letters she wrote to the Director-General and in the interview she had with the Department’s investigating officers on 1 October 1998 (Exhibit A, Attachment 9).

One matter for concern to the Tribunal is the number of occasions on which Councillor Virgona professed to be ignorant of matters before the Council of which she was a member which directly affected her own property and interests. This concern applies to both the Draft Heritage LEP and the Draft NSLEP’98.

She was asked by the investigators whether she was familiar with a study which had been made on behalf of the Council in 1993 of sites and areas of heritage significance which included her own property. She replied, “I am aware of it. I am aware of that study.” She was then asked whether she was aware of a report on the Draft Heritage LEP which was first considered by the Council and adopted for section 65 certification in July 1996. Before answering she had a private discussion with Mr Smyth, her town planner who was present at the interview, after which she changed her answer, saying, “No what Mr Smyth says is right, I was aware of the report but I wasn’t aware

of specific detail of the report in a lot of cases. I know that my street was discussed and I actually walked down with a heritage planner, Cherry Kemp (a Council officer) and she showed me the relevant features of the Californian Bungalow (which was the style and period of Councillor Virgona's house) which I found very interesting. Other than that I probably wasn't really aware of what was happening." She was then asked again about her knowledge of the 1993 heritage study and this time her answer was, "No, actually I wouldn't have been aware in 1993.": Attachment 9, pp.2-3

The investigator then returned to the Draft Heritage LEP that came before the Council in 1996. She said, "Well, look I can't really remember." She was asked specifically whether she recalled a draft Heritage Schedule which was proposed in that Draft LEP in 1996. She said, "I can't really say." She was then reminded that the Draft Heritage LEP was placed on public exhibition between May and July 1997 inviting comment, she said that she did not recall anything about that and that the first she knew of the draft heritage proposals was when she received the Business Paper for the Council meeting of 15 September 1997: Attachment 9, pp.3-4

It needs to be recalled here that according to reports of the Council's Conservation Planner, as well as extensive advertising in local newspapers, brochures explaining the heritage proposals had been letterbox dropped in the proposed conservation areas and posted to each resident owner, of all the properties affected by the draft heritage amendments: Exhibit A, Attachment 16, 19.

Coming back to the question of Councillor Virgona's state of knowledge of the proposal to list her property as a Heritage Item in the Draft Heritage LEP as first adopted by the Council on 8 July 1996: Exhibit A, Attachment 14; Exhibit L.2, she told the Director-General in her letter of 5 July 1998 (Exhibit A, Attachment 2) that it was in about mid-1996 that she had sought advice from Mr Smyth about the idea she had of developing her property and he had advised her that she should proceed with the type of development that eventually went into her development application that was lodged on 3 April 1998. She said in her letter that she had requested Mr Smyth to provide her

with a letter recalling his version of events. She enclosed with her letter of 5 July 1998 to the Director-General such a letter dated 3 July 1998 (part of Attachment 2 to Exhibit A) in which Mr Smyth stated “It was in mid-1996 and probably in July” that Councillor Virgona first mentioned to him the possibility of developing her property. His letter went on:

“At that time you were not in a hurry and were talking in terms of after you left Council, but I believe I persuaded you, or helped to persuade you, to do it sooner. It was some time after that, I researched the potential of your site and advised you that the current controls would allow you a small dwelling at the “back” of the property. We discussed the idea a couple more times that year, before we agreed that you would be best served by employing Owen Havilland (about mid-1997) an architect who had designed my dwelling and tended to specialise in the North Sydney area.”

Thus it appears that in the period of about 15 months leading up to the vote by the Council on 15 September 1997, Councillor Virgona was contemplating and pursuing with her advisers her plan to sub-divide her land, carry out alternations and additions to her existing house and construct another house at the back while at the same time the Council, after wide publicity and notice to individual affected owners, had adopted and was proceeding with proposals to list Councillor Virgona’s property as a Heritage Item in a draft LEP with the provisions of which, if it came into force, her plan for further development of her property might be in conflict.

In these circumstances, it would be surprising if, with his special knowledge and expertise, Mr Smyth had not explained to his client the obstacles and risks that could confront her under the draft Heritage proposals if she did not get on with her development plan and if he had not also explained to her the merits of proceeding under the current controls with a view to getting her development application dealt with before the Council proceeded further with the heritage proposals. It may be inferred from the fact, as he asserted in his own letter to her, that he advised her against waiting until she had left the Council to proceed with her proposed development and had persuaded her “to do it sooner” that he probably did so.

It would also be surprising if Councillor Virgona had not discussed the draft Heritage proposals with her architect.

However, Councillor Virgona told the investigators that she gave no consideration to the question whether the draft Heritage provisions and Heritage Items Schedule then under consideration in the Council might be an obstacle to the development of her property and that she did not think they could be: Exhibit A, Attachment 9, pp.9-10. She said, "Well, I didn't really think there would be any obstacles. I guess I hoped, or maybe I hadn't even thought about it", at which point, Mr Smyth interjected, "As I recall we discussed it and I gave you some advice that it was a matter of waiting and seeing and using a good architect and going on from there.": Attachment 9, p10. Councillor Virgona then contradicted Mr Smyth by saying that she had not discussed the provisions of Draft Heritage LEP "as such". She said she had instructed her architect, Mr Havilland, that Davidson Parade was a Heritage street and that what he planned must "retain the streetscape" and "be sympathetic".

In the ensuing part of her interview, supported by unsolicited interjections by Mr Smyth, she endeavoured to maintain to the investigators a distinction between the Draft Heritage LEP and its contents, as a document, and the subject matter of Heritage Conservation in Davidson Parade in order to make the point that she had discussed only the latter with her architect. She said, "I don't think I discussed (the draft Heritage document) as such, I only discussed what I knew about what was being planned for the street.": Exhibit A, Attachment 9, pp.10-11.

At this point in the interview the investigator appealed to Mr Smyth to refrain from making interjections as distinct from giving advice to Councillor Virgona, but, as appears from a perusal of the transcript of the interview, this appeal fell on deaf ears. Throughout the interview Mr Smyth often interrupted to speak to Councillor Virgona before she could answer questions. Although his advice on these occasions, assuming it was audible, was not recorded, her subsequent answers frequently appeared to reflect or turn upon whatever advice he had given to her before she answered the question. From time to

time he made audible interjections which were recorded consisting of giving information or making remarks that appear designed to influence or over-ride any answer Councillor Virgona might have given of her own accord. At times it was not clear whether her answers were expressing her state of mind or his. The point is that this interference by Mr Smyth throws doubt on the reliability of some of Councillor Virgona's answers as well as on his impartiality as an adviser. Indeed, it appears to the Tribunal from the transcript of the interview that Mr Smyth's presence and the nature of his participation was as much inspired by a desire to act as Councillor Virgona's protector as it was by performing the role of adviser. He appeared concerned to ensure that she gave no answers unfavourable to her position and failed to desist even after the investigator suggested that it was not reasonable for him to be putting words into Councillor Virgona's mouth: Exhibit A, Attachment 9, p.31.

In the letter she wrote to the Director-General on 29 July 1998 (Exhibit A, Attachment 4), Councillor Virgona offered an explanation of her conduct at the meetings of 15 and 29 September 1997. Part of the explanation was that when there was a specific debate on her own property or those in her street she decided she would absent herself from the debate but when the debate was general or not specifically about her own property or her own street she would attend and participate. The letter said that the reason for taking this approach was that she needed to be present to represent her constituents, there being about 60 properties in her Ward that were proposed to be added to the list of Heritage Items in the Heritage Schedule of the draft LEP. She said she had found out from her constituents that few were aware that their property had been included in the Schedule. This is why at the first meeting she opposed the adoption of the Draft Heritage LEP until these persons were notified and, at the second meeting, she supported the rescission motion.

When she was interviewed she narrowed her concern to only one constituent, claiming that the reason for her opposition to all of the motions she voted against at the first meeting was that they failed to defer the listing of 173-179 Walker Street until after a site meeting. She claimed that a Mr

Brennan had complained to her that his property in Walker Street was being added to the Heritage list as a means of stopping him from developing the property and he said he wanted a site meeting to look at his property before it was included as a Heritage Item. She said to the investigator, "So all the way through I voted against the amendments because I felt that Mr Brennan and Walker Street should have been voted to a site meeting": Exhibit A, Attachment 9, pp.5-16, p21. The investigator then pointed out to her that by voting against the adoption of the recommendations in the report on the Draft Heritage LEP she was voting against her own property being Heritage listed. She replied, "Well I wasn't aware at that stage that Davidson Parade was being included, no. I don't know, well.", after which she continued to insist that the only reason she opposed the adoption of the recommendations in the report was because she wanted a site meeting for the Walker Street property: Exhibit A, Attachment 9, p18.

Having regard to the fact that she had actually declared an interest and absented herself from the meeting on 15 September 1997 when the amendment proposing that the listing of the properties in Davidson Parade in the Schedule of Heritage Items be deferred pending a site meeting, the Tribunal cannot accept that Councillor Virgona was not aware that Davidson Parade was being included in the list of Heritage Items.

Councillor Virgona put forward a similar explanation for the course which she took at the Council meeting on 29 September 1997 in relation to the rescission motion and the motion to defer until after site meetings the Heritage listing of certain properties which included her own property in Davidson Parade. She told the investigator that she voted in favour of those motions because they meant that the listing of the Walker Street properties would be deferred until a site meeting was held: Exhibit A, Attachment 9, p26. Again, the investigator pointed out to her that the rescission motion affected the Heritage listing of her own property as well as the others that were proposed to be listed in the Heritage Schedule. She acknowledged that this was the case and then the following ensued:

JR: Did you stop to consider your obligations under the pecuniary interest provisions of the Act given that you were seeking changes to a resolution of Council that involved your property?

PV: No I didn't stop to consider it. I didn't think I had a pecuniary interest.

JR: Did you seek any advice at that stage on your obligations under the Act?

PV: No.

JR: Or whether you were in a conflict position?

PV: I was unaware that I was or might have been.”: Exhibit A, Attachment 9, p23.

One of the items of business dealt with by the Council at its meeting on 29 September 1997 was the Notice of Motion in which Councillor Virgona had joined proposing that the owners of all properties newly affected by listing in the Draft Heritage LEP as Heritage Items be renotified and given an opportunity to comment before the draft was adopted. With regard to the fact that Councillor Virgona had joined in that motion and had voted in favour of it when it was put to the meeting, the investigator asked her whether she had considered her position with respect to her pecuniary interest obligations having regard to the fact that the motion involved renotification to herself. Earlier in the interview she had told the investigator that she supposed that she should have declared an interest because she was voting on a Davidson Parade matter: Exhibit A, Attachment 9, p25; but she now answered, “As I've said all along I didn't think I had a pecuniary interest. It made no difference to me whether my property was listed as a Heritage Item”: Exhibit A, Attachment 9, p26.

Finally, as to the meeting on 29 September 1997, she was asked to give her reasons for voting in favour of the motion to adopt the Draft Heritage LEP but subject to deferral of her own property and others pending a site meeting. She replied, “Yeah. Well because Walker Street was being included in the site meetings”: Exhibit A, Attachment 9, p26.

Councillor Virgona was asked by the investigator about the site meeting for Davidson Parade that took place on 25 October 1997. Councillor Virgona had spoken at this meeting strongly opposing the listing of the Davidson

Parade properties as Heritage Items although not opposing their being included in a Conservation area. She said she remembered one of the proprietors at that meeting objecting to Heritage listing because it would restrain him from developing his property. The investigator asked why she was so strongly opposed to the Heritage Item listing of the properties. In the course of her answer she said, "I wasn't actually aware that each house would be listed separately and it was only at this site meeting I became aware that in actual fact as a Heritage listing each house would be listed separately.": Exhibit A, Attachment 9, p29

The whole series of answers which Councillor Virgona gave to the investigator, as mentioned above, about her knowledge and conduct in relation to the Draft Heritage LEP call into question Councillor Virgona's willingness or capacity to recognise or perform her obligations in relation to pecuniary interests or, alternatively, her integrity in that respect, or both. She gave contradictory answers as to her knowledge of the Heritage Study made for the Council that had identified her own property as a prospective Heritage Item. She claimed not to be able to remember the draft Heritage Items Schedule which included her property and which had been adopted by the Council in July 1996. That was the very date at which, according to Mr Smyth, she began to consult him as a planning expert about the development of her own property. In the Tribunal's view, it is not credible that between July 1996 and September 1997, with a development application in mind and consulting in this period a town planner and his specially recommended architect, she was unaware of and did not discuss with them the impending proposal to list her property as a Heritage Item or the impediments such a listing would or might present to her proposed development. How could she claim to the investigator that she didn't think there would be any obstacles arising out of the proposed Heritage listing, or that she hadn't even thought about it, when her constituents, or at least Mr Brennan, were so concerned about it and the possible effects upon their ability to develop their properties that they approached her for assistance to have the listing deferred until site meetings had been held. It is to be inferred from Mr Smyth's interjection

when he sought to recall to her mind that they had discussed the question and he had given her some advice about it that she was, in fact, well aware of the proposed Heritage listing of her property and the possibility of ensuing detriment to her development plans. Her attempt after contradicting Mr Smyth to draw a distinction between discussing the Draft Heritage LEP as a document and discussing Heritage considerations in Davidson Parade as a subject appears to the Tribunal as an attempt by her to extricate herself from the implications of Mr Smyth's interjection.

The Tribunal finds it difficult to believe that Councillor Virgona was not aware that the way she voted on the motions in which she participated at the Council meetings of 15 and 29 September 1997 had the effect of preventing the Heritage Schedule in which her property was listed as a Heritage Item in the draft LEP being adopted. Her claim that her action was only to ensure that Mr Brennan got a site meeting for his Walker Street properties before his property was listed, if not devious, must at least be regarded as dubious. Another explanation could be that she had decided simply to turn a blind eye or was carelessly indifferent to her obligations under the Act not to participate where her financial interests were involved. The explanation which she ultimately gave to the investigator, namely that she didn't stop to consider the matter because she didn't think she had a pecuniary interest requires examination.

On a number of occasions she told the investigator that she didn't ever think of a pecuniary interest in relation to the listing of her property as a Heritage Item. She said, "No, it never crossed my mind." Exhibit A, Attachment 9, p12. This was despite the fact that she had declared an interest and abstained from voting on the third motion before the Council meeting of 15 September 1997 and the motion by which the properties in Davidson Parade were changed from Heritage Item listing to location in a Conservation Area at the Council meeting on 17 November 1997. She had also refrained from voting at the Davidson Parade site meeting on 25 October 1997 where she had heard Davidson Parade property owners object to

Heritage listing on the ground that it would devalue properties and prevent redevelopment: Exhibit A, Attachment 9, pp.12, 23, 29.

In the course of the interview the investigator drew her attention to the fact that she had disclosed an interest in the item regarding Davidson Parade at the meeting of the Council on 17 November 1997. The investigator asked, "Now in declaring your interest on this occasion, what was the criteria that you used to reach that position, that you had a pecuniary interest?" Councillor Virgona's reply was, "Hang on, I don't ever think I ever thought I had a pecuniary interest, I had a conflict of interest because my house was in that street and so I was prohibited from voting. There was never a thought in my mind of a pecuniary interest.": Exhibit A, Attachment 9, p34. An obvious question is, what sort of interest did Councillor Virgona think she had that led her to comply precisely with the provisions of section 451 of the Act in relation to disclosure of pecuniary interests and abstinence from participation and voting if the interest she was declaring was not a pecuniary interest? She could not say that it was because there was no financial element involved because, firstly, she had told the investigators that the reason why she voted against the motion proposed at a meeting of the Council on 13 August 1996 which required certain procedures to be adopted by every applicant for consent to proposed alterations and additions to any building listed as a Heritage Item under the Council's Local Environmental Plan was because the proposal in the motion would make it "harder and harder and more expensive" for anybody that owned a Heritage Item and, secondly, the constituents in whose cause she succeeded in delaying Heritage listing until after site meetings were objecting to Heritage listing because of financial considerations.

In addition to her claim that when she had declared an interest and abstained from participation it was not because she considered that the interest she declared was pecuniary, she advanced another reason for not complying with section 451. She told the investigator, "I guess in this particular situation and I really admit that I was naïve, naïve in a lot of ways, a lot of instances, I was voting on the LEP as a whole and so I didn't, you know,

Davidson Parade was not separated, so when you vote on something as a whole then maybe every Councillor would have to declare a conflict of interest. Nobody else did and it wasn't brought to my attention and so innocently I voted on the LEP as a whole without regard to my property.”: Exhibit A, Attachment 9, p13. Councillor Virgona had advanced this explanation of her conduct at the meetings of 15 and 29 September 1997 in her letter to the Director-General of 29 July 1998: Exhibit A, Attachment 4. In the course of her interview she affirmed that that was her attitude. She said, “So I declare an interest in my street on one prong but then I don't declare an interest when I vote on the situation as a whole.”: Exhibit A, Attachment 9, p50.

She gave one further explanation to the Director-General in her letter of 29 July 1998, namely, that the main reason for failing to declare a pecuniary interest when she voted on a situation as a whole was, she said, “There were about 60 properties in my Ward that were to be added to the list and I needed to be present to represent my constituents.”

As regards Councillor Virgona's contravention of the Act in relation to draft NSLEP'98 which was presented to the Council meeting of 14 April 1998, the only explanation advanced by her for failing to declare a pecuniary interest in that matter was that she had gone to Port Macquarie on 31 March missing the delivery to her from the Council of the Business Papers containing the draft amending LEP, and that she did not see the papers until she returned about a week later, which would have been about a week before the meeting. She told the Director-General in her letter of 5 July 1998, “To this day I have no recollection of even looking at the paper or any plans that came with it.” In her letter of 14 October 1998 (Exhibit A, Attachment 39) she added that she was away when the papers were delivered and as the papers were substantial and technical she did not have time to read them thoroughly before the meeting. The letter said, “I did not at any stage know that the zoning of my property or that of my neighbours was being altered and therefore did not look any further. I recall I voted in accordance with the officer's recommendation to exhibit the draft for public comment.”

This last mentioned letter went on to state in relation to both the Draft Heritage LEP and the draft NSLEP'98, "If on either of these matters I have erred and not left the Chamber when perhaps I should have, then I say this was an inadvertent and innocent mistake on my part, that reflected a degree of naïveté and ignorance in the case of the draft 1998 LEP."

Councillor Virgona claimed to the investigator that she had no recollection of a debate at the meeting of 14 April 1998 of a proposal to add a clause to the terms of the recommendation in the report to the meeting for adoption of the draft NSLEP'98 to the effect that development applications made after the granting of the section 65 certificate for public exhibition of the draft were to be assessed under the existing statutory controls and the draft LEP: Exhibit A, Attachment 9, p48. As her own development application had been lodged with the Council not long before this Council meeting, the investigator obviously thought that the proposal to add the additional clause might have alerted Councillor Virgona to the desirability of examining the proposed new LEP to see whether it affected her own property and her development application. However, although Councillor Virgona had signed the development application on 31 March 1998, the day she says she went to Port Macquarie, she said that the lodgement of the development application ahead of the Council meeting of 14 April 1998 occurred without her knowledge and was coincidental with the new LEP coming up for consideration by the Council.

When the investigator drew Councillor Virgona's attention to the provisions in the draft NSLEP'98 fixing a minimum allotment size in residential zones and requiring a minimum area of allotment of 450 square metres for a sub-division in zone 2(a) to which her property had been rezoned, Councillor Virgona turned to Mr Smyth for a discussion and came back to the investigator with the answer, "I have never read this. Sorry to admit it. I have not read it." She went on to add, "Well I never considered it and you know my attitude is, planners do all this work and whatever they decide, I accept, so I guess that's largely why I didn't read it." She was then asked whether she had discussed the proposed LEP with her architect and

she said, “No, I don’t believe I did. I’m unaware really of these pages.” The next question was, “Had it been suggested to you that a draft LEP of this nature would be an obstacle to any future development of your property?” She answered, “If I was aware of it, I suppose it would have been obvious that it could have been, yes.”

Some of Mr Smyth’s interjections at the interview raise doubt as to the correctness of Councillor Virgona’s claim that she knew nothing about the proposed new LEP 1998 or any possible effect of its provisions on her property. Councillor Virgona had told the investigator that she was not concerned about the new draft LEP because they take years sometimes to go through so she had plenty of time to be concerned about it. The transcript records that she was saying to the investigator, “Well I wasn’t concerned because it was only a draft LEP” when she turned to Mr Smyth and asked him whether he wanted to say something and then turned back and said to the investigator, “Well Mr Smyth assured me that I had no concern, that I should have no concern, because it was only a draft LEP.” The investigator then asked whether Mr Smyth had told her this at the time that the draft LEP was coming up to Council for the meeting of the 14 April 1998. She answered, “I don’t know” and then said to Mr Smyth, “Were you aware it was going to Council?” Whether he answered does not appear but the transcript records that she immediately went on and said, “I wasn’t aware, so he wouldn’t have been aware.”: Exhibit A, Attachment 9, p45. However, Mr Smyth went on to inform the investigator, “... certainly I haven’t given her any advice before that meeting as far as I can recall but in terms of, well I might have, it might have.” When pressed about it Mr Smyth said, “Well let’s put it this way, I was aware there was a draft LEP coming because I heard of it at Council meetings and the Mayor kept saying, if we can get this up we can stop this and we can stop that, and it’s quite possible I said to Councillor Virgona sometime not to worry about it because the North Sydney draft LEPs have an historical record of taking years and years to get through the department and her application would have been determined long before that came in” He concluded his answer by saying, “But I certainly didn’t discuss it around the April 14

meeting.” Councillor Virgona interposed “You did not”, to which Mr Smyth said “Not the Business Paper, it could have been before then it could have been after but it’s possible before. ... Well before the April 14 meeting. I have – could have actually said to her then not to worry about it.” Councillor Virgona said, “Yes you might tell me not to worry about it, but we never discussed, “ to which Mr Smyth helpfully added, “We never discussed the content.”: Exhibit A, Attachment 9, pp.45-46

SUBMISSIONS

Turning to the submissions received by the Tribunal on the present question, Councillor Virgona’s personal submission is notable for the fact that it continues her persistent refusal to recognise that she had a financial interest in the matters in question on which she participated and voted. She states:

“I have always stood for honesty and integrity and never at any stage felt that I had a pecuniary interest in the development of my property.”

She also states:

“I feel the Tribunal has judged me purely on technical grounds. As far as I am concerned I have never used my position for my own gain.”

However the main theme of her submission is that she considers herself to have been unfairly singled out from all the other Councillors because, she says, there were 10 other property owning Councillors who like her had changes to the zoning of their property. She complains that one Councillor also had before the Council on the same night a development application for a large development of his property. She claims that another Councillor, like she, declared an interest when her street was included in a Conservation Area but not when the LEP was voted on as a whole. She asks, “Why am I different to these other Councillors?”

She also states that she feels that the General Manager could and should have given some advice to all of the Councillors regarding the draft LEPs.

She concludes:

“I reiterate, a precedent was set by the Councillors as a whole to vote on the Draft NSLEP. Why have I been singled out?”

Mr Smyth in his Planning Report (Exhibit Q) had listed the names and addresses of Councillors who, he said, owned property in North Sydney that would have been affected by the change of zoning in the draft NSLEP'98 and stated that Councillor Virgona was not the only Councillor to vote when her property was affected.

Mr Whitehouse's submission states that the fact that the majority of Councillors of North Sydney Council did exactly as Councillor Virgona did, "suggests both that the majority of the Councillors did not perceive any conflict of interest and in the absence of action by the Department of Local Government, that Councillor Virgona is being treated differently."

The submission for the Director-General began by asserting that the breaches by the Tribunal were properly to be regarded as serious, claiming that there were clear breaches of the Act, the amount of the potential diminution in the value of Councillor Virgona's property was significant and that while Councillor Virgona has consistently denied the breaches found by the Tribunal and has shown no contrition, the evidence suggests that she was in truth aware of the financial implications of the matters before the Council in which she had a pecuniary interest. It was submitted that her breaches should not be regarded by the Tribunal as "innocent."

THE TRIBUNAL'S CONCLUSION

Whilst Councillor Virgona may feel that she has been judged by the Tribunal "purely on technical grounds" the Tribunal considers that, putting all technical considerations aside, the financial interest which Councillor Virgona's property gave her in the two draft LEPs was, in the opinion of the Tribunal, plainly evident and must have been apparent to her if she had put her mind to it. She, like all Councillors, is to be expected to take the trouble to make herself familiar with the pecuniary interest provisions of the legislation and to be on the alert for Council business in which the Councillor might have a financial interest. Perhaps no better example of such business could be found than the proposals in a draft Local Environmental Plan affecting land in the Council's area. In spite of her protestations to the contrary, the evidence suggests that, even in relation to the draft NSLEP'98,

she was probably aware that, at least, there could be detrimental effects upon the potential to develop her property as she planned to do and, if this is so, she must have chosen to ignore her obligations or find excuses for not performing them. If this is not so, it would suggest an inability on Councillor Virgona's part to understand or appreciate her obligations and this raises a question of her fitness for the office of Councillor.

Mr Whitehouse, in his submissions, referred to the fact that the complaint against Councillor Virgona involved the Tribunal determining for the first time the meaning of the last exemption from the requirements to disclose interests in section 448 regarding the provisions of environmental planning instruments. He stated that a reasonable and cogent legal argument had been advanced on behalf of Councillor Virgona regarding the meaning of this exemption and, whilst the argument was not adopted by the Tribunal, recognition should be given to Councillor Virgona that prior to the Tribunal's determination there was a reasonable legal basis for suggesting her conduct did not breach the Act.

The trouble with that submission is that it was never put forward by Councillor Virgona to the Director-General or the investigator that her conduct had been based on a view of the law or legal advice that she had received that her conduct would not be in breach of the Act. The evidence would suggest that any advice which came to her on the attitude she should adopt in relation to the draft LEPs would have come from Mr Smyth and also suggests that that advice would not have been legal in nature but practical, that is to say, advice to the effect that changes to LEPs took a long time to come into effect and that if she proceeded with her proposed development without delay she would be able to get it through before the changes came into force.

In so far as Councillor Virgona sought to excuse her participation at the meetings on the ground that she was serving the wishes or interests of her constituents, it must be recognised that the legislation does not permit such motives to excuse a Councillor from complying with the requirements of the Act. Obviously the wishes and interests of constituents may be based on

financial considerations which they are free to have but which a Councillor is not free to have in a matter before the Council in which a Councillor participates. Section 451 is uncompromising in its language, it provides that the Councillor “must” disclose pecuniary interests and “must not” take part in the debate or the vote.

The position taken by Councillor Virgona that she was only required to declare an “interest”, never conceding that it was a “pecuniary interest”, when a matter referred to her property or her street specifically and was free to ignore her interests when the draft LEPs were being dealt with as a whole is a matter for concern. A good illustration of the position she takes is contained in an answer which she gave during her interview when she was asked to explain the difference between the occasion on 17 November 1997 when she disclosed her interest to the meeting and her position at the meeting of 29 September 1997 when she made no disclosure and fully participated and voted on the matter. Her answer was:

“Because September I was voting on the Council Draft Heritage LEP as a whole as a whole draft LEP and unless my property where I lived came up specifically I felt I could vote on it. But when my property came up then obviously I declared a conflict of interest. To me it – there’s no argument.”: Exhibit A, Attachment 9, p36.

There can be no justification for Councillor Virgona’s taking a different position in regard to the meeting of 29 September 1997 to that which she took at the meeting on 15 September 1997. The motions being considered at the later meeting affected her own property just as much as the motions being considered at the earlier meeting. The basis of the position she advances, purporting to distinguish the particular from the general when obviously the general includes the particular, is not only untenable but seems to the Tribunal to be a position founded on convenience rather than reason. Councillor Virgona claimed in her submission that there was another Councillor who acted as she did. The Tribunal cannot comment on that claim except to say that if the circumstances were the same the other Councillor would have been just as wrong as Councillor Virgona was.

The assertion that somehow Councillor Virgona's contravention in relation to the draft NSLEP'98 was justified because a number of other Councillors on North Sydney Council who also had property affected by the draft LEP voted on the matter was put forward by Mr Smyth in his Planning Report and it has been persisted in since then. As Councillor Virgona sees it, she's being singled out. As Mr Whitehouse puts it, the fact that other Councillors did the same suggests that they too did not perceive any conflict of interest but he too suggests that in the absence of action by the Department of Local Government against the other Councillors, Councillor Virgona is being treated differently.

It seems to the Tribunal that this kind of submission, when put forward to the Tribunal is misdirected, if not misguided. The Tribunal is constituted to hold hearings into and decide allegations of contraventions of the Act. However it is not part of its function to lay complaints or institute investigations into the conduct of Councillors. Its jurisdiction arises only after a complaint has been made in accordance with the Act, the Director-General has investigated the complaint and has furnished a report of the investigation to the Tribunal, or another authority who has investigated an allegation of a contravention of the Local Government Act has sent a report of that investigation to the Director-General who, pursuant to section 468(2) of the Act, has presented the report to the Tribunal. Once a report of an investigation into an alleged contravention has been received by the Tribunal, the Tribunal, after considering the report, must decide whether or not to conduct a hearing into the complaint. In the opinion of the Tribunal, it cannot be validly suggested that the question whether the Tribunal decides to conduct a hearing or, having decided to conduct a hearing, the question of how the Tribunal should determine the matter should be influenced by allegations or the possibility that other persons on the same Council have also committed breaches of the Act. A further point to be made is that the Tribunal has no information as to the circumstances of the other Councillors who are alleged to have acted in the same way as Councillor Virgona and is therefore in no position to give consideration to their conduct or the validity of

the allegations made against them. The Local Government Act provides a complaint procedure which includes, where the Director-General is not the complainant, a written complaint with particulars of the grounds and verification by statutory declaration being lodged with the Director-General. Under the Act, the Director-General is in a position to make preliminary inquiries in order to decide whether further action should be taken and, if so to direct the investigation. In case it is being suggested by the submissions presently being considered either that the Tribunal in some way has singled out or is a party to the singling out of Councillor Virgona or that the Tribunal could somehow have required the Director-General to conduct investigations into other North Sydney Councillors or declined to determine the complaint against Councillor Virgona unless such other investigations were conducted by the Director-General, it should be made clear that the Pecuniary Interest Tribunal is established by the Act as a completely independent Tribunal. It is not a branch of the Department of Local Government or subject to the direction of the Minister or the Director-General, nor does it have any authority over the Director-General as to the manner in which the Director-General performs his functions under Act. In the present case the Tribunal's responsibility is to determine the complaint against Councillor Virgona which it must do uninfluenced by allegations that other Councillors committed or may have committed contraventions of the Act. The Tribunal cannot give any weight to the suggestion by Mr Whitehouse that other Councillors who voted did not perceive any conflict of interest in their doing so when, as mentioned already, the Tribunal has no information on which to judge the conduct of any other Councillors if that were relevant which, in the view of the Tribunal, it is not. It should also be made clear that there is no evidence before the Tribunal which would support Councillor Virgona's claim that she was singled out for investigation.

Councillor Virgona's submission complained that the General Manager could and should have given the Councillors some advice. General Managers are certainly not to be discouraged from taking the initiative to give advice but ultimately it is the Councillor who must objectively assess their

situation and make their own decision because they are in the best position to know their own interests. Also, it would seem to the Tribunal that a person who undertakes the office of Councillor must be prepared to take responsibility for their own actions.

In the course of his submissions Mr Whitehouse criticised the investigation for having sought and placed information before the Tribunal relating to Councillor Virgona's development application which he described as "extraneous material" and which he suggested was designed to prejudice her in relation to the complaint. In the Tribunal's opinion, this criticism is unwarranted. The fact that Councillor Virgona was contemporaneously planning and proceeding with that application was a factor in the probabilities as to whether she would be likely to be alert to proposals within the Council which might jeopardise her development prospects and therefore would have acquainted herself with the details of any such proposals. Her own development application was the pursuit of a financial interest in her property which could lead to a conclusion that her interest in both the draft LEPs as they affected her development prospects would not only be financial but she would be well aware of the financial implications.

As mentioned already, two serious factors in the present case are Councillor Virgona's professions of failure, when she had access to information and opportunity, to inform herself of matters which she needed to know in order to comply with her statutory obligations of disclosure of pecuniary interests and abstinence from participation. In this respect the claims she made related both to the Draft Heritage LEP and to the contents of the draft NSLEP'98 both of which were liable to and did in fact affect her property. The other is the persistent claim of an inability to recognise her pecuniary interest. As late as her interview with the investigators she was saying, as mentioned earlier, "I actually still can't see how I have a pecuniary, where there is a pecuniary interest in this."

In the Tribunal's opinion the policy of the Act that local government decision making should be free of the influence of financial interests upon those making the decisions would be seriously undermined if explanations

and excuses such as have been put forward by or on behalf of Councillor Virgona in the present case were to succeed.

Having reviewed all of the circumstances in which the contraventions occurred and all of the submissions on what action by the Tribunal would be appropriate, the Tribunal has concluded that Councillor Virgona should be disqualified from holding civic office for a period of three years commencing 14 May 1999. The Tribunal will make an Order accordingly.

Pursuant to section 484 this Statement of Decision will be provided to Councillor Virgona and the Director-General together with copies of the Order. Copies will also be furnished to the North Sydney Council and to such other persons as the Tribunal sees fit.

Dated: 7 May 1999



K J HOLLAND Q.C.
Pecuniary Interest Tribunal