LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO. 2/1998

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: COUNCILLORS ALLAN LESLIE BENNETT, GUISEPPE STALTARE AND BERNADINO ZAPPACOSTA, GRIFFITH CITY COUNCIL

STATEMENT OF DECISION

Dated: 7 May 1999

I N D E X

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THE COMPLAINT

On 4 January 1999 the Tribunal received from the Director-General, Department of Local Government, his Report of an investigation into a complaint made by him on 20 July 1998 pursuant to section 460 of the Local Government Act, 1993, that Allan Leslie Bennett, Guiseppe Staltare and Bernadino Zappacosta, each being a Councillor of Griffith City Council, committed breaches of section 451 of that Act with respect to consideration by the Council's Planning Review Committee at a meeting of that Committee on 5 June 1997 and with respect to consideration by the Council at meetings of the Council held on 1 July, 2 September and 16 December 1997 and 10 February 1998 of questions relating to a proposal to amend the Griffith Local Environmental Plan 1994 (Griffith LEP) to provide for excision rights with an entitlement to have a dwelling on both the excised lot and the residue lot on all land zoned Rural 1(a) in the Griffith LEP.

The complaint alleged that each of the Councillors had a pecuniary interest, within the meaning of the Act, in the proposal and at the meetings

above mentioned failed to disclose their interest to the meeting and took part in the consideration and discussion of, and voted on, questions relating to the matters in contravention of the provisions of section 451.

After considering the Report, the Tribunal decided to conduct a hearing into the complaint and on 18 January 1999 notified the parties of its decision. The Tribunal's Notice particularised the allegations on which, as it appeared to the Tribunal from the Director-General's Report, the complaint was based.

Each of the Councillors was provided with a copy of the Director-General's Report and documents attached thereto. Correspondence took place between the Tribunal and the parties in the course of which each of the Councillors indicated that they desired to contest allegations contained in the Tribunal's Notice and that they wished to make submissions to the Tribunal and would be appearing without legal representation in the proceedings. The hearing was appointed by the Tribunal for 15 and 16 March 1999 at the City of Griffith.

THE HEARING

Mr Michael Lawler of counsel, instructed by Ms Jean Wallace, legal officer of the Department of Local Government, appeared at the hearing to represent the Director-General.

The Director-General's Report of the investigation with all documents attached to it, being treated by the Tribunal as evidence and information before it for the purposes of the hearing, was admitted as Exhibit A. The Tribunal's Notice of Decision to Conduct a Hearing dated 18 January 1999 became Exhibit B and the correspondence between the Tribunal and the parties were admitted as Exhibits C – O inclusive.

As foreshadowed by them, each of the three Councillors appeared in person and made submissions.

As the Director-General was relying on a valuation report from the New South Wales State Valuation Office on the values of the Councillors' lands which they disputed, the Director-General called Mr Grant Russell Kennett,

the Griffith Real Estate Valuer who had prepared the report, to give oral evidence on which he was cross-examined by the Councillors.

Councillors Bennett and Zappacosta each gave oral evidence on which they were cross-examined by Mr Lawler.

The proceedings at Griffith were recorded and a transcript produced to which references will be made by the letter “T" followed by the page and line number.

In the course of the hearing Mr Lawler furnished to the Tribunal and each of the Councillors an outline of submissions to be made by the Director-General on certain legal issues arising out of the complaint. For purposes of identification these submissions have been marked Exhibit P.

Mr Lawler tendered at the hearing a statement dated 15 March 1999 by Mr Eric Poga, formerly Griffith City Council’s Water and Sewer Manager, relating to an estimate made in 1998 when he was employed by the Council of the cost of extending the town’s water main to the properties of a number of persons including Councillor Zappacosta. The accuracy of this statement was disputed by Councillor Zappacosta so the Tribunal declined to admit it as evidence before the Tribunal until further inquiries were made. The document was then marked 1 for identification and since then Exhibit Q.

After the conclusion of the hearing Councillor Zappacosta provided the Tribunal with a letter dated 7 September 1998 that he had written as spokesman for himself and the other interested property owners to the General Manager of the Council requesting a preliminary cost study of an extension of the town water supply to their properties and a copy of a plan showing the location of the properties on the reverse side of which were handwritten notes. These documents were provided to the Tribunal to support Councillor Zappacosta’s assertion that Mr Poga’s statement (Exhibit Q) was inaccurate. The copy of the documents produced by Councillor Zappacosta has been marked Exhibit R.

After the hearing the Director-General made further inquiries of Mr Poga in consequence of which he furnished an amended statement dated 31 March 1999 accepting that his original statement was inaccurate and that

Councillor Zappacosta was correct in his own assertions as to the estimate of the costs in question both in total and for each property owner, as Councillor Zappacosta had contended. Mr Poga's amended statement has been marked Exhibit S.

The foregoing records all of the material that is before the Tribunal for the purpose of determining the Director-General's complaint.

THE EVENTS GIVING RISE TO THE COMPLAINT

The course of events which led to the Director-General's complaint was summarised in the Tribunal's Notice of Decision to Conduct a Hearing (Exhibit B). Although the three Councillors strongly contest the conclusions drawn by the complaint from those events, the facts themselves were not disputed by any of the Councillors. Therefore, for the purposes of this Statement of Decision, the Tribunal proposes to state the relevant facts to which reference was made in the Notice. Reference to the documents attached to the Report will be made only when it is necessary to do so for the purposes of elaboration.

Background To Meeting of Planning Review Committee 5 June 1997

The first meeting to which the complaint relates is a meeting of the Council's Planning Review Committee on 5 June 1997.

At the time of this meeting the development and subdivision of land in the Griffith City Council area was controlled by the Griffith LEP 1994 which provided that, in respect of land zoned Rural 1(a), the Council could not consent to the subdivision of land for the purpose of agriculture which would result in an additional dwelling erected in pursuance of the Plan being situated on a new allotment that formed part of an existing holding. The provision of rights to use Rural 1(a) holdings for subdivision and residential purposes was a controversial topic which had been considered but rejected by the Council at the time of its adoption of the Griffith LEP 1994. It will be necessary to refer to the relevant provisions of the Griffith LEP 1994 in more detail later.

The Griffith City Council consisted of 12 Councillors. The three Councillors the subject of the complaint had been elected at the election held on 9 September 1995. Councillor Zappacosta was elected for his third term having been previously elected in 1987 and 1991. At the time of the events in question he was the Deputy Mayor. He lived at Hanwood, a suburb of Griffith, and was a viticulturist. Councillors Bennett and Staltare had been elected to serve on the Council for the first time. Councillor Bennett also resided in Hanwood. In partnership with his wife he was a tour coach operator at Griffith and they owned a farm at Hanwood used mainly for growing citrus. Councillor Staltare resided and worked on a farm at Tharbogang growing citrus and grapes.

At its meeting on 30 April 1996 the Council, on the motion of Councillors Zappacosta and Staltare, resolved to establish a committee to review what was called the Griffith LEP 1994 "Excisions and Dwelling Rights" policy, and further that the Council's representatives on the Committee would include five Councillors named in the motion, Council staff and three community representatives determined by the Council following public advertisements.

Councillors Zappacosta, Staltare and Bennett were included in the five Council representatives nominated by the motion. The Committee became known as the Council's Planning Review Committee.

On 2 July 1996, on the motion of Councillors Bennett and Staltare, three persons were appointed as community representatives on this Committee.

At its inaugural meeting on 30 July 1996 the Planning Review Committee appointed Councillor Zappacosta to be its Chairman. Thereafter and prior to 5 June 1997 the Committee met on a number of occasions to consider questions which included the adoption of an "Excision and Dwelling Rights" policy and advertised for and received public submissions on the question.

Planning Review Committee Meeting 5 June 1997

The Planning Review Committee met on 5 June 1997 with Councillor Zappacosta in the Chair and Councillors Bennett and Staltare in attendance. On a motion which Councillor Staltare seconded, the Committee resolved to recommend to the Council as follows:

> **"That Council support the concept of all individual portions/allotments having individual dwelling rights provided that each portion/allotment can demonstrate that it has satisfactory drainage and other necessary services such as a formed road and access.**
>
> **Should Council support this concept it will be necessary for a submission to be prepared by the Department of Urban Affairs and Planning to vary the provisions of the Griffith LEP 1994."**

On a further motion which Councillor Bennett seconded the Committee resolved to make a second recommendation to the Council in the following terms:

> **"Council support a proposal to make submissions to the Department of Urban Affairs and Planning to vary the Griffith LEP 1994 to provide for excision rights in land zoned 1(a) rural.**
>
> **The excision right would only relate to existing holdings as defined in the Griffith LEP 1994 namely:**
>
> **"Existing Holding" means:**
>
> **(a) the area of a farm, lot, portion or parcel of land as it was as at 18 April 1989; and**
>
> **(b) if, as at 18 April 1989, a person owned 2 or more adjoining or adjacent lots, portions or parcels of land, the combined area of those lots, portions or parcels as they were at that date, and**
>
> - **Only provide for (1) excision per holding**
> - **Provide for maximum excision of 5000 sq/m**
> - **Provide for dwelling entitlements on the excised lot and the residue holding**
> - **Include a covenant if possible to protect legitimate agricultural industry**
> - **Necessary services being available or provided – including drainage, effluent disposal, road and access, phone and power**
> - **The provision of a suitable buffer and the creation of a building envelope on the excised portion."**

Council Meeting 1 July 1997

At the meeting of the Council on 1 July 1997 attended by the three Councillors a motion was moved by Councillor Zappacosta and seconded by Councillor Staltare that the Council adopt the recommendation of the Planning Review Committee as quoted above. This motion did not proceed to a vote because on a motion for amendment moved by other Councillors the Council resolved that it would consider a report on all aspects of providing excision rights in relation to the Griffith LEP and would invite a representative of the Department of Urban Affairs and Planning to the meeting of the Council at which that report was discussed.

Background To Council Meeting 2 September 1997

The Council held a meeting on 12 August 1997 at which Councillors Bennett, Staltare and Zappacosta were present. At this meeting representatives of the Department of Urban Affairs and Planning and of the Department of Agriculture addressed the Council on the question of rural subdivisions with dwelling entitlements explaining the views and policies of their respective departments on those issues. Thereafter, on a motion moved by Councillor Zappacosta, the Council resolved to discuss further the recommendations of the Council's Planning Review Committee on those issues at its next meeting.

Council Meeting 2 September 1997

The three Councillors were present at the next meeting of the Council on 2 September 1997. When the subject of rural subdivision with dwelling entitlements came before the meeting for consideration, two Councillors who were opposed to the Planning Review Committee's recommendations moved that the Council adhere to its existing policies in relation to that subject. This motion was passed and became the Council's resolution thereby defeating for the time being the proposals recommended by the Planning Review Committee.

Background To Council Meeting 16 December 1997

Councillors Bennett, Staltare and Zappacosta did not take the course of attempting to overcome the rejection of the Planning Review Committee's recommendations by moving a rescission motion at the next meeting. It was the practice of the Council that when a proposal was defeated it could be put forward again after three months. Following this practice Councillor Zappacosta waited until the Council meeting of 16 December 1997 to resurrect the issue. In anticipation of that meeting, Councillors Zappacosta and Staltare gave notice of a motion to be moved by them. The motion was in the same terms as the two recommendations of the Planning Review Committee which have already been quoted above except that the provision, "Include a covenant if possible to protect legitimate agricultural industry" was omitted. It was Councillor Zappacosta who decided to make this omission from the Notice of Motion.

Council Meeting 16 December 1997

At the Council's meeting on 16 December 1997 Councillors Zappacosta and Staltare moved the motion of which they had given notice. The motion was carried and became the Council's resolution.

Background To Council Meeting 10 February 1998

The next meeting of Council after its meeting on 16 December 1997 was to be held on 20 January 1998. The Council's General Manager made a report for the Council's consideration at that meeting.

This Report attached a letter which the Council had received from a Mr Michael O'Meara which raised the question whether Councillors would have had a pecuniary interest in the matter of varying the Council's LEP 1994 to allow for individual portions on rural property to have dwelling rights as to which the Council at its meeting on 16 December 1997 had passed the resolution noted above. The Report stated that Mr O'Meara's letter had been referred to Council's solicitor for advice and attached copies of the correspondence. The Report then summarised the relevant provisions of the Local Government Act relating to disclosure of pecuniary interests, including

sections 442, 443, 448, 451 and 458. The Report referred also to the sections of the Act which related to making an investigation of complaints of contravention of those provisions, reports to the Pecuniary Interest Tribunal of such investigations and the powers of the Tribunal to deal with complaints. The General Manager's report concluded as follows:

> **"Options Available to the Council**
>
> **The advice received from council's solicitor is that the resolution passed at the last meeting is valid notwithstanding that a number of councillors may have overlooked declaring a pecuniary interest in the matter. One option is for that resolution to remain and continue to be acted on. If that is the wish of the council, councillors need to be aware of the potential ramifications should any person lodge a complaint with the Director-General that the provisions of the Local Government Act 1993 pertaining to pecuniary interests have not been complied with.**
>
> **As always, the decision as to whether or not to declare a pecuniary interest rests with each individual councillor.**
>
> **A second option is for the council to rescind the resolution contained in minute 963 and to apply to the Minister in accordance with section 458 of the Local Government Act seeking the Minister to allow councillors with a pecuniary interest in this matter to participate in the discussions and a vote, on the basis that the number of councillors prevented from voting would be so great a proportion of the whole as to impede the transaction of business.**
>
> **If it is the wish of the council to rescind the previous resolution, I can seen no reason why a notice to that effect could not be submitted to this meeting, ruled as a matter of urgency and dealt with at this meeting. The notice would need to be signed by three councillors.**
>
> **RECOMMENDATION**
>
> **Council determine what action, if any, it wishes to take in respect of minute number 963 of the council meeting of the 16 December 1997."**

The reference in this recommendation to Minute 963 is a reference to the resolution adopting the proposal put forward in the motion by Councillors Zappacosta and Staltare which had been passed by the Council on 16 December 1997.

The General Manager's report was considered by the meeting of the Council on 20 January 1998. Councillors Bennett, Staltare and Zappacosta were present. Councillor Bennett moved a motion which was seconded by

Councillor Zappacosta that the Council resolve that "Council take no further action in relation to" the letter from Mr O'Meara. This motion was passed by the Council.

After the meeting of 20 January 1998 three opposing Councillors joined in giving notice of a motion to be moved at the forthcoming next meeting of the Council on 10 February 1998 that the resolution, Minute 963, passed by the Council at its meeting of 16 December 1997, the text of which was set out in the Notice of Motion, be rescinded.

Council Meeting 10 February 1998

Councillors Bennett, Staltare and Zappacosta attended the meeting of the Council held on 10 February 1998.

The motion to rescind resolution Minute 963 of which notice had been given was put to the meeting and defeated. The above three Councillors voted against it.

THE ALLEGED PECUNIARY INTERESTS

The obligations of Councillors, members of Council Committees and certain other persons, in relation to business of Councils in respect of which they have financial interests are contained in Chapter 14 of the Local Government Act, 1993. The provisions which are relevant to the present complaint are as follows:

> **"451. (1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the interest to the meeting as soon as practicable.**
> **(2) The councillor or member must not take part in the consideration or discussion of the matter.**
> **(3) The councillor or member must not vote on any question relating to the matter."**
>
> **"446. A member of a council committee, other than a committee that is wholly advisory, must disclosure pecuniary interests in accordance with section 451."**

The expression "pecuniary interest" is described in section 442 of the Act which provides:

> **"442. (1) For the purposes of this Chapter, a pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person … …**
>
> **(2) A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter or if the interest is of a kind specified in section 448."**

The provisions of section 448 mentioned in subsection (2) of section 442, so far as material to the present complaint, are as follows:

> **"448. The following interests do not have to be disclosed for the purposes of this Chapter:**
>
> **… …**
>
> - **an interest in a proposal relating to the making, amending, altering or repeal of an environmental planning instrument (other than an instrument that effects a change of the permissible uses of:**
>
> **(a) land in which the person or another person with whom the person is associated as provided in section 443 has a proprietary interest (which, for the purposes of this paragraph, includes any entitlement to the land at law or in equity and any other interest or potential interest in the land arising out of any mortgage, lease, trust, option or contract, or otherwise); or**
>
> **(b) land adjoining, or adjacent to, or in proximity to land referred to in paragraph (a),**
>
> **if the person or the other person with whom the person is associated would by reason of the proprietary interest have a pecuniary interest in the proposal)"**

A further provision to be taken into account on the question whether the person has committed a breach of section 451 is section 457 which provides as follows:

> **"457. A person does not breach section 451 … … if the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest."**

The Question of "Appreciable Financial Gain"

The basis of the complaint that the three Councillors contravened section 451 of the Act is that they each had a pecuniary interest in the matters dealt with at the meetings because of a reasonable likelihood or expectation of appreciable financial gain if the recommendations by the Planning Review Committee were adopted and put into effect. The financial gain was alleged to be an increase in the value of properties in which the Councillors had a proprietary interest which would be brought about by attaching to "existing holdings" of land zoned Rural 1(a) the excision and dwelling rights proposed

by those recommendations. All three Councillors contested the view that there would be any such appreciable financial gain to them.

The evidence established and the Councillors did not dispute that each of them had a proprietary interest in properties which were zoned Rural 1(a) and were "existing holdings" within the terms of the resolution recommended by the Committee and passed by the Council on 16 December 1997. The properties, each of which was owned by the Councillor and his wife, were as listed hereunder:

Councillor Bennett – Farm 44, Cox Road – Lot 82, DP 751709

Councillor Staltare – Farm 1748, Sergi Road – Lot 117, DP 756035; Lot 1, DP 821524; and Lot 1260, DP 751709 and Farm 1749 Hillston Road – Lots 115 and 116, DP 756035

Councillor Zappacosta – Farm 301 Hanwood Road – Lot 921, DP 751709 and Farm 132 Ben Martin Road – Lot 170, DP 751709

CHANGES PROPOSED TO GRIFFITH LEP 1994 IN RELATION TO LAND ZONED RURAL 1(a)

The Griffith LEP 1994 is Attachment 43 to Exhibit A.

As regards the present complaint, it is sufficient to consider the development controls in the LEP as they affected land which was both zoned Rural 1(a) and also defined as an "Existing Holding" under that LEP. The reason is that the recommendation of the Planning Review Committee and the motion put forward to the Council which ultimately became the Council's resolution expressly limited the proposed introduction of "Excision Rights" and "Dwelling Entitlements" to land of that description. The terms of the proposal defined an "Existing Holding" in the same words in which that expression was defined in clause 5 of the LEP. Essentially, an "Existing Holding" was the area of a parcel of land, or the combined area of two or more adjoining or adjacent parcels of land in the one ownership, as it existed at 18 April 1989.

Under the LEP, the general restrictions on the use and development of land varied according to the zone in which it was located. For each zone the aims and objectives of the zone were listed and the purposes for which

development might be carried out were separately described for each zone under the headings, “Without Development Consent”, “Only with Development Consent” and “Prohibited”. It was stipulated that, except as otherwise provided by the plan, “The Council must not consent to the carrying out of development unless the Council is satisfied that carrying out of the development is consistent with one or more of the objectives of the zone within which the development is proposed to be carried out” and, “In the determination of a development application, the Council must take into consideration the aim or aims of the zone or zones in which the development is proposed to be carried out.” Attachment 43, clauses 9, 10.

The aims and objectives of the Rural 1(a) zone are set out in 10 paragraphs in the Development Control Table to clause 10 of the LEP. They are principally directed to the preservation and protection of the land for agricultural purposes, preventing its fragmentation as rural land and maintaining its long-term viability and agricultural potential: see paras.(a) – (b), (f), (h) and (i). The word “agriculture” is defined in clause 5 of the LEP to cover numerous irrigation and dry land farming pursuits and activities and includes the keeping or breeding of livestock.

Under the same table to clause 10, the purposes for which development could be carried out in the Rural 1(a) zone without development consent were limited to agriculture (other than some forms which involved the intensive keeping of animals) and home occupations. Those prohibited were “dual occupancy detached; integrated housing development; motor show rooms; residential flat buildings.” Any other purpose was permissible only with development consent and, as required by clause 10(3) and (4), would need to be consistent with the aims and objectives of the zone.

As the proposed changes to the LEP under consideration were directed to introducing “Excision Rights” and “Dwelling Entitlements” on both the excised lot and residue holding, but only one “Excision” per “Existing Holding”, attention has to be given to the then existing LEP controls over subdivision and the erection of dwellings on land in the zone. Part 3 of the LEP contained the “Special Provisions” of the plan.

In relation to the sub-division of land, clause 11 provides that a person shall not sub-divide land to which the plan applied except with the consent of the Council. Clause 12 deals with "sub-division for agriculture" in zone 1(a) and contains the following:

> **"(2) The Council may consent to a sub-division for the purpose of agriculture to create an allotment on which a dwelling is erected only if the area of the allotment is at least 20 hectares for horticultural land, 200 hectares for irrigation land and 500 hectares for dry land (that is neither horticultural land nor irrigation land).**
>
> **(3) The Council shall not consent to the sub-division of land for the purpose of agriculture which would result in an additional dwelling erected in pursuance of this plan being situated on a new allotment that formed part of an existing holding."**

As regards the erection of dwellings on land zoned Rural 1(a), clause 17(2) provided that a dwelling might be erected with Council consent on vacant land within that zone but only if the land had an area of at least 20 hectares where the land was used for horticulture, 200 hectares where the land was used for irrigation purposes and 500 hectares where the land was neither irrigated nor used for horticulture. Sub-clause (4)(a) of clause 17 provided that, despite sub-clause (2) a dwelling might be erected with Council consent on vacant land consisting of an existing holding.

By clause 18 particular provision is made for the erection of "additional dwellings" on land in Rural 1(a). This clause allows for one additional dwelling to be erected on that land with the consent of Council where certain specified conditions exist. They are:

> **"(a) a dwelling could be erected on the land in accordance with clause 17 if it had been vacant; and**
>
> **(b) no additional access to an arterial road is required from the land; and**
>
> **(c) separate ownership of the proposed dwelling could only be achieved by a sub-division of the land; and**
>
> **(d) in the opinion of the Council, the dwelling to be erected or created on the land will not interfere with the purpose for which the land or adjoining land is being used; and**
>
> **(e) the additional dwelling is erected on the same lot as an existing dwelling."**

The combined effect of the provisions of clauses 12, 17 and 18 which have been quoted above, in relation to land which constituted an existing holding and was zoned Rural 1(a), was that, notwithstanding the prohibition on the use of land in the zone for the purpose of "dual occupancy detached" (which is defined in clause 5 to mean the erection of two detached dwelling houses where none exists or the erection of a second and detached dwelling house where one already exist on the land), and notwithstanding the minimum area provisions for a dwelling which were laid down by clause 17(2), one additional dwelling could, with the Council's consent, be erected on the land provided the additional dwelling was erected on the same lot as an existing dwelling and the other conditions specified in clause 18(2) were satisfied.

This would leave the operation of clause 12(3) untouched, that is to say, the requirement that the Council shall not consent to a sub-division of the land which would result in the additional dwelling being situated on a new allotment that was formerly part of the existing holding would continue to apply.

It follows, therefore, that the position under the Griffith LEP 1994 was that, although under certain conditions there could be two separate and detached dwelling houses permitted on the area of land comprised in an "Existing Holding" in the Rural 1(a) zone, the intention of the plan was that, so far as the two dwellings were concerned, the area of land on which they stood would remain intact as a parcel under one ownership and the dwellings could not be passed into separate ownership by means of a sub-division of the land so as to have each dwelling on its own separate block. In the opinion of the Tribunal, the provisions of conditions (c) and (e) in clause 18(2) confirm that this was the intention.

The proposal of the Planning Review Committee and the resolution subsequently passed by the Council was to effect a change the principal element of which would be to permit that which was impermissible under the existing LEP, namely a sub-division of the land in question to create a separate lot for the purpose of erecting on the new lot a dwelling house that could be held in separate ownership from the existing house which would

remain located on the residue of the original parcel of land. However, according to its terms, the proposal was intended to go even further, namely, to introduce into the LEP a "right" in the existing owner to sub-divide the land coupled with "entitlements" attached to the ownership of each of the excised lot and the residue holding to maintain or erect a dwelling house on each of the lots. Making provision for such rights and entitlements by way of amendment to the existing LEP could possibly run into conflict with the aims and objectives laid down for the particular zone Rural 1(a). However, the terms of the proposal were drawn up as policy and not as a document to have instant legal operation and therefore it would probably not be right to read into them an intention more radical than to over-ride or qualify the operation of clause 12(3) of the existing LEP. Even so, the proposed change, if adopted and worked into the existing LEP as an amendment, would affect the permissible use and development of the land to which the proposal was intended to apply.

A legal question to be considered later will be whether the proposal came within the provisions of section 448 of the Act, and if so, to what effect.

The Tribunal's Notice to the parties, in clause 6.4, stated, as part of the allegations against the three Councillors, that the proposed amendment to the LEP would change the permissible use of the properties of the Councillors identified above, in that, it would provide excision rights and dwelling entitlements allowing the land to be sub-divided and used for residential purposes which were prohibited under the existing the LEP and that the effect of the proposed amendment would be to permit intensification of the use of the land and in effect change land in a Rural 1(a) zone from essentially farmland to a limited form of rural residential land. The paragraph concluded, "These proposed changes, if adopted and carried into effect, were calculated to produce an appreciable increase in the value of the land." This allegation was based upon valuations obtained by the Director-General during the investigation of the complaint from the State Valuation Office to which reference should now be made.

The Effect Of The Proposed Changes To The LEP On The Value Of The Land

In the course of the investigation into the complaint the Director-General initially wrote to Mr Grant Kennett who was the senior valuer in the State Valuation Office at Griffith inquiring whether he would provide a detailed valuation report in relation to a number of properties if required to do so at a later date. The letter listed 13 farms including the five owned by Councillors Bennett, Staltare and Zappacosta. The letter explained that the Department's inquiries were in the context of a complaint about possible breaches of the pecuniary interest provisions of the Local Government Act by a number of Councillors on Griffith City Council. The letter quoted the text of the resolution adopted by the Council on 16 December 1997 and stated that the information then available to the Department indicated that several Councillors owned Rural 1(a) land which may be affected by the proposal. The question Mr Kennett was requested to consider was, "Whether, in your professional opinion, the Council's consideration of the proposed amendment to the Griffith LEP would result in a quantifiable change in the value of the properties listed." Exhibit A, Attachment 17.

The Valuer-General's Office made a preliminary investigation of the properties, doing so on the assumption that all necessary services could be provided to both an excised lot and residue holding as well as a suitable buffer zone and building envelope, these being part of the criteria for land to which the proposal would apply. In a letter dated 1 July 1998 to the Director-General the valuer stated that where a property conformed to the criteria of the proposed amendment to Griffith LEP, a "before" and "after" valuation approach had been adopted to provide a general comment as to the enhancement in value of the property, and the ability to quantify that enhancement in value. The letter stated, "The main influence on enhancement of value is location. That is, the proximity of the property to the urban areas within the shire and the likely demand for a rural residential holding in that locality." The results of this preliminary investigation were set out in a table attached to the letter. In this table five of the 13 properties were

eliminated because they did not qualify as "existing holdings". Three were considered to have a "minimal enhancement of value" which was "not readily quantifiable". The remaining five were the properties of the three Councillors as to which the comment was, "Significant enhancement of value, readily quantifiable." Exhibit A, Attachment 18.

On 20 July 1998 the Director-General advised Mr Kennett that it had been decided to proceed with the complaint and requested a formal valuation advice, without inspection on a "before and after" basis of the five properties in which Councillors Bennett, Staltare and Zappacosta had an interest. Exhibit A, Attachment 26.

The valuation advice subsequently received by the Director-General is contained in Attachment 27 to Exhibit A. It is dated 20 August 1998 and states that its purpose was to provide an estimate of the added value that would accrue to various properties near Griffith if the Griffith LEP 1994 was to be amended to allow excision rights and dwelling entitlements in respect of "Existing Holdings" in the Rural 1(a) zone. It also stated that the estimates were provided without detailed inspections of the subject properties. The basis on which the estimates were arrived at is stated as follows:

> **"In the determination of the added value that would accrue to these properties if the LEP was amended in accordance with the Council's resolution, consideration has been given to recent sales of similar types of properties, i.e. single dwelling home sites located in rural locations. (See Schedule herewith)**
>
> **The sale prices of these sites vary according to the standard of services available, proximity to Griffith, views and aspect.**
>
> **In addition, the estimate of the added value that would result from excision rights and dwelling entitlements being allowed in respect of the subject properties has been expressed as a nett amount, i.e. the value that the hypothetically excised parcel of land would add to the total value of the existing holding taking into account sub-division costs, development costs, existing services, access and location." The report concluded by listing the properties and the valuer's estimate of added value. They were as follows:**

PROPERTY	**ADDED VALUE**
***Councillor Bennett*:**	
Farm 44 Cox Road	**$17,000**

***Councillor Staltare*:**	
Farm 1748 Hillston Road	**$25,000**
Farm 1749 Hillston Road	**$25,000**
***Councillor Zappacosta*:**	
Farm 301 Hanwood Road	**$49,000**
Farm 132 Ben Martin Road	**$32,000**

On the face of it these amounts would indicate that each of the three Councillors stood to benefit by a substantial financial gain in the value of their properties if the Griffith LEP 1994 was to be amended to allow the proposed excision rights and dwelling entitlements. However, such a conclusion was strongly contested by each of the Councillors and the issues raised by them at the hearing will need to be determined in considering whether they had a pecuniary interest in the outcome which obliged them to act in conformity with the requirements of section 451 of the Act. Before dealing with those issues, the Tribunal will deal with some legal issues which need to be determined.

"A MEMBER OF A COUNCIL COMMITTEE OTHER THAN A COMMITTEE THAT IS WHOLLY ADVISORY" – THE FUNCTION OF SECTION 446

Section 446 originally provided that "A member of a Council Committee must disclose pecuniary interests in accordance with section 451".

By an amendment which commenced on 23 June 1995 (Local Government Legislation Amendment Act, 1995, No.12, 1995) the words "other than a Committee that is wholly advisory" were inserted after the word "Committee".

Because the complaint alleges that the Councillors contravened section 451 in relation to business transacted by the Planning Review Committee at its meeting on 5 June 1997, two questions arise in relation to the amended section.

Firstly, are the words "A member of a Council Committee" intended to include a Councillor who is a member of such a Committee or only those

members who are not also Councillors? If the former, section 446 would require the Councillor to comply with section 451 unless the Committee was "wholly advisory" in which case the second question arises, namely, was the Planning Review Committee at the relevant time a Committee which was "wholly advisory". If it was "wholly advisory", section 446 would not require the Councillor to comply with section 451 at meetings of that Committee.

If the section applies only to members who are not also Councillors, any obligation on a Councillor to comply with section 451 at meetings of a Committee of which the Councillor was a member would not arise from section 446 but from the operation of sections 444(b) and 451.

Section 444 provides:

"444. A Councillor::

(a) must prepare and submit written returns of interests in accordance with section 449, and

(b) must disclose pecuniary interests in accordance with section 451."

For the Director-General it was submitted (Exhibit P) that the phrase "member of a Council Committee" refers to lay persons and does not include Councillors, and that the Planning Review Committee in this case was not "wholly advisory". On the other hand, Councillor Bennett contended that the Planning Review Committee was always only an advisory committee, that he and his fellow Councillors regarded it as such and that they were exonerated by section 446 from declaring any pecuniary interest which they might have had in matters before the Committee's meetings: T100/4-32.

There are a number of provisions in the Act and Regulations that refer to Council Committees and members of Council Committees to which reference may be made but none of them expressly differentiates between Councillor members and non-Councillor members of such committees in the performance of their functions on the committees. However there are indications that, in the provisions relating to disclosure of pecuniary interests and abstinence from participation at meetings, whether Council or Committee meetings, the Councillors were dealt with as being in a separate category from other persons who were subject to duties of disclosure under Chapter 14 of the Act.

In a succession of sections (sections 444 – 447) obligations of disclosure are imposed upon four different descriptions of person as if each was a separate and distinct class for the purpose of the pecuniary interest provisions of the Act. The implication from this is that each was regarded and being treated as an exclusive class for the purpose of defining the obligations of disclosure. If this is so, the words "a member of a Council Committee" in section 446 would not be intended to include a Councillor because the obligations of a Councillor to make disclosures had already been separately stipulated by section 444.

As counsel for the Director-General pointed, out section 451 imposes an affirmative obligation upon Councillors as such whereas the inclusion of a Councillor in section 446 would be achieved only by implication, a method not to be attributed to a legislature which was intent on defining obligations by reference to separate descriptions of person.

One of the separate classes was "a designated person" whose obligations were laid down by section 445. Included amongst those defined by section 441 of the Act as "designated persons" for the purposes of Chapter 14 is a person (other than a member of the senior staff of the Council) who was a member of a Committee of the Council identified by the Council as a Committee whose members are designated persons because the functions of the Committee involved the exercise of the Council's functions under the Act (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the member's duty as a member of the Committee and the member's private interest. Other persons defined as "designated persons" by section 441 were the General Manager and other senior staff of the Council and persons other than those who were members of staff of the Council or a delegate of the Council who held a position identified by the Council as the position of a designated person. In this context, the reference to "a member of a Committee of the Council" as a designated person would not appear to contemplate a member of a Committee of the Council who was an elected Councillor. Another reference to "a member of a Council Committee" appears in the fifth

description in section 448 of interests which do not have to be disclosed for the purposes of Chapter 14. This interest is described as "an interest of a member of a Council Committee as a person chosen to represent the community or as a member of a non-profit organisation or other community or special interest group if the Committee member has been appointed to represent the organisation or group on the Committee." Again, the expression "a member of a Council Committee" does not appear to be intended to include a Councillor serving on the same Committee.

Counsel for the Director-General also pointed out that section 451(1) draws a distinction between Councillors and members of Council Committees through the use of the disjunctive: "A Councillor or a member of a Council Committee …". The same disjunctive distinction is repeated in sub-sections (2) and (3) of section 451. This would indicate that the intention of the provisions of section 451 were that a Councillor who had a pecuniary interest in a matter with which the Council was concerned and who was present at either a meeting of the Council or a meeting of a Committee at which the matter was being considered would be obliged to disclose the interest to the meeting and otherwise comply with section 451.

The dictionary adopted for the purposes of the Local Government Act by section 3 of that Act does not define the word "Committee" or the expression "member of a Council Committee". Although Part 3 of Chapter 12 of the Act makes reference to a Committee of the Council in setting down the powers of a Council to delegate its functions, the Act itself does not provide for the establishment of Committees and the appointment of Committee members. In Part 3 of Chapter 12, section 377(1) provides that a Council may, by resolution, delegate to the General Manager or any other person or body any function of the Council other than those listed in the section. Section 379 provides that a regulatory function of a Council under Chapter 7 of the Act must not be delegated or sub-delegated to a person or body other than, amongst others, "(a) a Committee of the Council of which all the members are Councillors or of which all the members are either Councillors or employees of the Council".

The establishment of Council Committees has been left to the making of a regulation pursuant to the power under the Act to make regulations on any matter necessary or convenient to be prescribed for carrying out or giving effect to the Act: section 748. The Local Government (Meetings) Regulation 1993 made under that section, in clause 3, defines the word "Committee", in relation to a Council, as meaning a Committee established under clause 29 of the regulation or the Council when it has resolved itself into a Committee of the Whole.

Under Regulation 29, Council may by resolution establish such Committees as it considers necessary to consist of the Mayor and such other Councillors as are elected by the Councillors or appointed by the Council. Regulation 30 requires a Council to specify the functions of each of its Committees when the Committee is established but provides that the Council may from time to time amend those functions.

Regulation 32 contains provisions which may impinge upon the operation of section 451 in relation to a Council Committee. This regulation provides that a Councillor who is not a member of a Committee is entitled to attend and speak at a meeting of the Committee but is not entitled, however, to give notice of business for inclusion in the Committee's agenda, move or second a motion or vote on a matter. A question may arise whether a Councillor non-member of a Committee exercising the right under Regulation 32 to attend and speak at a meeting of the Council who has a pecuniary interest in a Council matter with which the Committee is dealing is nonetheless obliged by sub-section (1) of section 451 to disclose his interest to the meeting and whether the right under that regulation to speak at the Committee meeting is subject to or over-rides the prohibition in sub-clause (2) of section 451. The Tribunal would incline to the view that section 451 would over-ride the regulation in the case of any Councillor who had a pecuniary interest in the matter in question but it is unnecessary to decide the point in the present proceedings. In regard to the Local Government (Meetings) Regulation 1995 it is sufficient for present purposes to observe that provisions of the

regulation cast no light on the questions to be determined by the Tribunal in relation to the meaning of section 446 of the Act.

There being an ambiguity in the expression "a member of a Council Committee" in section 446, regard must be had to section 33 of the Interpretation Act, 1987 which requires that the construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule …) shall be preferred to a construction that would not promote that purpose or object. The construction of those words for which the Director-General contends would mean that at a meeting of a Council Committee which was a wholly advisory Committee an elected Councillor who was a member of the Committee who had a pecuniary interest in the matter with which the Committee was dealing would be obliged by section 444 to comply with the provisions of section 451 but lay members of the Committee who had a pecuniary interest in the matter and whose obligation to conform with section 451 depended upon section 446 of the Act would not be obliged to disclose their pecuniary interest or otherwise comply with section 451. If Councillor Bennett is right, both Councillors and non-Councillors who are members of a wholly advisory Committee are to be treated alike, that is to say, none of them being obliged to declare their interest or otherwise comply with section 451. For the purposes of section 33, the question is, which of these two positions represents the purpose of object underlying the Act which has to be promoted by the construction to be adopted. A reason that could be advanced for preferring Mr Lawler's to Mr Bennett's submission is that the weight and influence of a non-Council member of a Committee who has a pecuniary interest in a matter stays in the Committee room but a Councillor who is a member of the Committee brings his weight and influence to bear not only in the Committee room but also into the Council Chamber where the power to make decisions resides.

Mr Lawler relied on section 33 to support the Director-General's contention but he also relied on section 34 of the Interpretation Act which, in

the Tribunal's opinion, placed the Director-General's contention on firmer ground.

Section 34 provides for the use, in certain circumstances, of extrinsic evidence in the interpretation of a statutory provision if the extrinsic material is capable of assisting in the ascertainment of the meaning of the provision. The Director-General's submission relied upon sub-section (2)(f) of section 34 which expressly authorises consideration of: "The speech made to a House of Parliament by a Minister or other Member of Parliament on the occasion of the moving by that Minister or Member of a motion that the Bill for the Act be read a second time in that House." The Director-General's submission set out part of the proceedings in the Legislative Council on 8 June 1995 on the second reading of the Local Government Legislation Amendment Bill 1995, Bill No. 12, Schedule 1, clause 10 which had been moved by the Attorney-General. The Hansard record of the proceedings recorded that the Honourable I Cohen moved an amendment which would have had the effect of removing from section 446 the words "other than a Committee that is wholly advisory." Mr Cohen said (Hansard (Legislative Council) 8 June 1995, p.934, col.1):

> **"The Government provision would allow members of advisory committees to not disclose pecuniary interests, my amendment is straight forward: it simply removes that provision. While advisory committees have no formal powers to make decisions, they often have significant impact on the actions and directions of Councils and could further the pecuniary interest of the members of the advisory committee. Currently it is not mandatory for a Council to require members of advisory committees to sign a register of pecuniary interest. The Government position would further weaken disclosure provisions. A member of an advisory committee would not have to disclose a pecuniary interest, even if a particular matter being discussed was one in which that member had a pecuniary interest. In the interests of open and transparent local council decision making, the Greens believe that the disclosure provisions should be streamlined. … …"**

The Attorney-General rejected the proposed amendment and in doing so said as follows (Hansard p.934, col.2):

> **"The Government recognises the motivation of the honourable member but cannot accept the amendment. As the law now stands, many people are unable**

> **to offer their expertise as members of advisory committees to local government because of the all embracing pecuniary interest provisions. This often precludes people who have something valuable to offer from taking part in discussions that would assist the Council in its policy-making activity. As the Government's proposal will affect only advisory committees, that is those that can only make recommendations to councils, the amendment is considered to be unnecessary and one that could cause more problems than it solves."**

It was submitted for the Director-General that the Attorney-General's statement of reasons for rejecting the attempt to amend the Bill identified the purposes of Parliament in passing section 446 in its present form and also supported a conclusion that in that section the phrase "A member of a Council Committee" was intended to refer only to lay members of such committees and therefore did not extend to include Councillors.

Conclusion

In the Tribunal's opinion, the fact that in the framework of sections stipulating the obligations of disclosure of pecuniary interests at meetings separate categories of person are designated, of which Councillors are one and members of a Council Committee are another, tend to a conclusion that the words "A member of a Council Committee' in section 446 were not meant to include Councillors. This conclusion is consistent with and supported by the explanation given by the Attorney-General in the Legislative Council on the second reading of the Bill for rejecting the proposed amendment to the Bill. The Tribunal concludes, therefore, that, in relation to the Planning Review Committee meeting on 5 June 1997, Councillors Bennett, Staltare and Zappacosta were not excused by section 446 from compliance with section 451 of the Act whether that Committee was "wholly advisory" within the meaning of the section or not. This conclusion makes it unnecessary to determine whether the Planning Review Committee was "wholly advisory" but some observations in relation to that question in the present case are warranted.

The Tribunal is of the opinion that a finding on the facts of the present case that the Planning Review Committee was a "wholly advisory" committee within the meaning of the section would be justified. The requirement in

Regulation 30 that a Council must specify the functions of its committees when the committee is established was only barely complied with by the resolution which the Council passed on 30 April 1996 that "A Committee be established to review Council's Local Environmental Plan, Excisions and Dwelling Rights policy." Exhibit A, Attachment 45, Item 296. The responsibility for making a statement of the Committee's role appears to have been left to Mr John Porter, the Council's Director Environmental Services, who is recorded in the Minutes of the Inaugural Planning Review Committee meeting held on 30 July 1996 under the heading, "Role of the Committee", as having made a statement to the Committee as follows:

> **"John Porter advised members on the envisaged nature of the Committee which would be concerned with policy direction, philosophy and principles rather than individual or specific proposal. Members were advised of the Code of Conduct and conflict of interests requirements. The Committee would be an advisory committee with the objective of making recommendations to Council regarding planning directions as enshrined in Council's planning instruments, plans and policies."** Exhibit A, Attachment 47

The words of exemption in section 446 distinguish advisory functions from others and recognise that a committee may have both advisory and other functions but the exemption applies only to a committee which has no other functions. The question is, what distinguishes advisory from other functions? According to The Australian Concise Oxford Dictionary the word "advisory" means giving advice; constituted to give advice (an advisory body) and the word "advice" means words given or offered as an opinion or recommendation about future action or behaviour, also information given.

Mr Lawler submitted for the Director-General that some content must be given to the word "wholly" and suggested that a "wholly advisory" committee would be one that provided advice to a Council on some specific matter and did nothing more. He also suggested that the character of a committee could be judged by what it did as well as by what it was set up to do. The Committee in the present case received public submissions, formulated a policy and then presented a specific and detailed recommendation for adoption by the Council. Mr Lawler submitted that, by reason of the

Committee's having engaged in such activities it should not be considered as having been "wholly advisory".

In the Tribunal's opinion, while due force has to be given to the word "wholly", the features of the Planning Review Committee on which Mr Lawler relied to distinguish it from a "wholly advisory" committee do not provide a satisfactory basis for excluding a committee from the description. No doubt it may be said that a committee expressly constituted for the purpose or whose sole function was to report to the Council information, opinion or advice, including expert advice, and nothing else would fit the description but the performance of even those limited functions could involve the committee in conducting some form of investigation including seeking public submissions before making its report or tendering its opinion or advice to the Council. The fact that this was done by way of a recommendation to the Council would not necessarily alter the character of the committee.

A more satisfactory distinction was that offered by Councillor Bennett in pointing out that the Planning Review Committee had no power to decide or change anything, had been told that it was an advisory committee and that its function was to make recommendations to Council regarding policy and planning directions.

The question whether any particular committee is "wholly advisory" within the meaning of those words in the context of section 446 is one of those questions where each case must be decided on its own merits. In the present case, the Tribunal would have found that the Planning Review Committee was a "wholly advisory" committee but, as already stated, this conclusion would not have brought the Councillors who served on the Committee within the exemption in section 446 because that exemption did not apply to them. Their obligations were governed by section 444.

"OTHER THAN AN INSTRUMENT THAT EFFECTS A CHANGE OF THE PERMISSIBLE USES OF LAND" – SECTION 448

On the question of the effect of section 448 of the Act in the present case, there is no basis for denying that the Planning Review Committee's recommendation and the motion put to the Council meeting on 16 December

1997 constituted "A proposal relating to the … … amending, altering … … of an environmental planning instrument" within the meaning of those words in the section; but questions have arisen as to the meaning of the phrase "an instrument that effects a change of the permissible uses of land" contained in the exception described by the words in brackets. The questions arose in the matter of the Director-General and Councillor Virgona of North Sydney Council, PIT3/1998. They were dealt with by the Tribunal in its Statement of Decision in that matter dated 23 April 1999 and the Tribunal proposes to apply to the issues which arise in the present case the same principles as it applied to similar issues in that case. However, for the purpose of determining the present complaint, it is not proposed to restate all of the contentions of the parties and the considerations and arguments that are canvassed at length in that decision.

The central point at issue was whether the words in question were to be regarded as technical planning terms to be interpreted by reference to the Environmental Planning & Assessment Act, 1979 and decisions of the courts on the meaning and application of the provisions of that Act. A contention that they were so regarded was used to support two lines of argument. The first was that the phrase "change of permissible uses" applied only when what was proposed was a change or movement of specified uses between the columns or provisions in an LEP which stated what was permitted without or with consent, on the one hand, and what was prohibited on the other. The second argument was that a sub-division of land was not a "use" of land and therefore a proposed change of the provisions of an LEP governing sub-division was not a proposal to change permissible uses of land.

The Tribunal declined to construe the language in section 448 by reference to the Environmental Planning & Assessment Act and held that it was to be construed in the context of the disclosure of interests provisions in Chapter 14 of the Local Government Act by reference to which the words should be given broad meaning. The Tribunal rejected the two arguments stated above which were based on the narrower view. The Tribunal held that the concept of "use" of land in the phrase "a change of the permissible uses

of land" certainly extended to the sub-division of land for a purpose, such as, "the purpose of selling individual lots or retaining part and selling or carrying out works or erecting a building on the remainder."

As to the word "permissible" in that phrase, the Tribunal held as follows:

> **"The nature and extent of the liberty at law to do any of these things with, to or on land may affect the value of the land. Restrictions on that liberty capable of affecting value may take many forms, including, conditions to be fulfilled, requirements to be satisfied, consents to be obtained, procedures to be followed, standards to be met and so on. Restrictions may be absolute in the sense that a thing may be prohibited altogether. In relation to consents, the restrictions may extend beyond the requirement to obtain consent to limits on the power to give consent, the circumstances in which it may be exercised, the requirements to be met and the procedures to be followed by the person seeking the exercise of the power. All these variants on the liberty to use land, treating the use of land in the broad sense already mentioned, may be considered to be included in the concept of permissibility within the ordinary meaning of the word "permissible" and, in the opinion of the Tribunal, when the expression "permissible uses of land" in section 448 is read in the context of Chapter 14 of the Local Government Act, they should all be taken to be encompassed by that expression."**

As pointed out earlier, the change intended to be brought about by the proposal here in question was that the sub-division of an existing holding of land zoned Rural 1(a) for the purpose of having a dwelling on both the newly created lot and the remainder of the former holding, which was not a permissible use of the land under the existing Griffith LEP, was to be made a permissible use of the land. In the Tribunal's view, this proposal was clearly a proposal for an instrument that would effect a change of the permissible uses of the land in which each of the Councillors in question had a proprietary interest within the meaning of that provision of section 448 and, if the change affected the value of the land such that a pecuniary interest as described by section 442 would arise, then the exemption from disclosures in section 448 would not apply.

Councillor Bennett contended that the permissible use of the land was not being changed because at no time was it proposed to change the zoning of the new lot that would be created by the proposed excision. He said, "… … but the additional allotment that was to be created through excisions, there

was never any indication that that was to be rezoned to anything but 1(a), and 1(a) being the rural zoning, that's what the farms are in at the present.": T100/47.

As indicated above, the Tribunal considers that the expression "change of the permissible uses of land" should have a wide interpretation. In the Tribunal's opinion, the change contemplated is not to be restricted to a change of the kind that may be effected by a rezoning of land. As sub-division of land for a particular purpose is, in the Tribunal's view, a use of land within the meaning of the section, a change of the LEP to permit a sub-division for the purpose of erection of a dwelling where a sub-division for that purpose was currently prohibited by the LEP is a change of the permissible uses of land for the purposes of the section.

If the adoption and carrying into effect of that proposal would or would be likely to increase the value of their lands to an appreciable extent, it would follow that the Councillors were not excused by section 448 from disclosing their interests in the proposal. This is the next question to be considered.

WHETHER THE COUNCILLORS HAD A PECUNIARY INTEREST – THEIR CONTENTIONS ON THE ISSUE OF CHANGE TO THE VALUE OF THEIR LAND

The question whether a person has a pecuniary interest in a matter for the purposes of the Act calls for an objective judgement. It is a judgement which does not depend upon the subjective opinions or beliefs of the individual or the individual's motives for action. It is a judgement which the individual has to make in the first instance but he or she is expected to be as objective about it as the Tribunal must be if called on to determine a complaint.

In the present case, attention has focused on whether the proposed changes to the LEP would affect the value of the land but this question arises in pursuit of the question posed by the terms of both section 442 and section 448, that is, whether, depending on the outcome of the matter for decision, there was "a reasonable likelihood or expectation of appreciable financial gain or loss" to the person. The prospects of gain or loss envisaged by these

words include reasonable chances as well as probabilities. If the prospects are so remote or the gain or loss is so significant that the interests could not reasonably be regarded as likely to influence any decision a person might make in relation to the matter, it will not be considered to be a pecuniary interest.

The foregoing statement of the manner in which the question whether a person has a pecuniary interest is to be approached summarises the principles on which the Tribunal acted in dealing with the case of Councillor Roberts, Hastings Council, PIT1/1995 in which the Statement of Decision is dated 3 August 1995. The Tribunal's views expressed in that case were arrived at after a close consideration of the legislation, its history and decisions of the courts on the subject. The same views have been applied by the Tribunal in numerous cases decided since that case and the Tribunal finds no reason to depart from them in the application of the legislation to the present case. The contentions put forward by the Councillors in the present case have to be considered with the foregoing principles in mind.

Acting In Response To Constituents' Demands – Duty to Serve The Interests Of The People

All three Councillors said that they promoted the introduction of excision rights with dwelling entitlements because that is what the constituents, the ratepayers, required and they were only serving the interests of the people they represented.

Councillor Zappacosta told the Tribunal that he pursued the issue because of "the insistence by a number of members of the community who want that facility." He said, "As a Councillor I felt it was my duty as elected member to pursue or carry out their wants and their needs." He said that he considered his actions in support of them "public spirited": T62/3-20. He also claimed that the members of the community who wanted the facility were not after financial gain. He said that they wanted, "predominantly the ability to put a dwelling on the excised lot for their succession scheme to retire or live on the excised lot and allow their children to farm the remainder … … they were the main concerns … … I wasn't aware of any financial gain … … not

once did any of them say I want to do it because I can put a house on and sell it.": T71/32 – T72/19 He said that the demand for excision and dwelling rights "were not for the purpose of developing but to enable sons and daughters to build houses.": T73/43

Councillor Staltare said that his concern was to bring to the Council "the voice of the people" who wanted this change for Griffith. At the close of the evidence he told the Tribunal, "The only thing I'd like to say is that this zoning that we've come up with through our Committee was wholly and solely for our town. I felt that we needed this flexibility … … it is quite a unique town. Many in the area are second and third generation farmers and like to stay there with their parents and grandkids.": T122/42

Councillor Bennett described their actions as those of "just simple people who have put our hands up and stand for local government to try and do the best we can for our local ratepayers and fellow citizens.": T15/2

For those who believe in the cause which is being pursued, such motives for action do credit to a Councillor but they do not excuse a Councillor from the obligations under the Act with regard to pecuniary interests. Furtherance of the hopes and desires of constituents or of what is conceived to be for the public good may incidentally give rise to a reasonable likelihood or expectation of appreciable financial gain or loss and, if it does, then, whether or not this is the purpose behind the demand of the constituent or the action of the Councillor, section 451 is uncompromising in its demands, its language is that the Councillor "must" disclose the interest and "must not" take part in the debate or vote.

General Policy Matters

The same considerations apply to another ground put forward by all three Councillors as a reason for either having no need to consider whether they had a pecuniary interest or not having to disclose it if they did.

Councillor Bennett told the Tribunal that throughout he believed that he was not required to declare a pecuniary interest: T111/30-41. Asked how he came to have that belief he said:

> **"I guess at the time we were dealing with the whole Council area. We weren't dealing with one individual portion of land. And that was probably the primary reason why I made the decision at that time. So in my mind it was then viewed as a policy matter and that's what I would have based my decision on at the time."**: T111/46-52

Councillor Staltare said, as to the subject of disclosing pecuniary interests, "I didn't really think that it related directly to me dealing with this policy that would cover the whole town, not just me personally.": T122/48-52

This simple philosophy was expressed more comprehensively by Councillor Zappacosta who, after having expressed the view, "If it was a policy matter before Council meetings, pecuniary interest was not an issue": T62/40, later in his evidence told the Tribunal:

> **"… … in my 12 years, a practice whereby we as Councillors obviously abide by a certain ruling … … if we are dealing with policy matters, matters which cover the whole Council area and not specific to one person, group, area, whatever, where it's a policy matter, we as Councillors always felt rest assured and felt comfortable that there was no conflict of interest involved at all. It's not uncommon for Griffith City Councillors to have debates and discussions on various policy matters and changes and amendments and it's not uncommon, over the last 12 years in my experience, where we have debated issues on policy without having to bring the conflict of interest in the issue. That being the case, the LEP review committee which was set up fell into that category of policy changes and it never occurred to me that I should be thinking about pecuniary interest. I was certainly surprised when it was raised."**: T126/7-29

As Mr Lawler pointed out, Councillor Zappacosta's assertion of a general rule or practice within the Council is not consistent with the number of occasions recorded in the Council's Minutes that are before the Tribunal on which various Councillors declared pecuniary interests and abstained from participation when general policy matters were before the Council. The Council's General Manager, Mr Robert Behl, was interviewed by the Department's Investigating Officers on 2 September 1998. He was asked whether he could account for the view of some Councillors that there was no question of pecuniary interest if it is a matter of policy. He said, "Well I don't know what they base that on." He also said, "… …. We've certainly always

spelt out that you've got to declare an interest in any matter, rather than if it's a policy one don't worry about it.": Exhibit A, Attachment 30, p.23/25 – 38

However the view came to be held by the three Councillors before the Tribunal, there is absolutely no basis for such a general view and it is clearly wrong. It is perfectly obvious that a Councillor may have prospects of financial gain or loss that would answer the description of pecuniary interests in section 442 arising out of the adoption of a general policy or a policy applying to a particular area or a section of the community as well as a decision affecting only themselves (or their associates where section 443 of the Act applies).

The policy of the Act is that persons who have financial interests in matters before the Council, general or particular, should not be deciding them unless the Act itself says that they may do so. Sections 448 and 452 address that question and specify with some particularity the matters an interest in which does not have to be disclosed or as to which the prohibitions in section 451 against participation in the debate and voting do not apply. The proposal for excision rights with dwelling entitlements was not excused from the operation of section 451 by either of those sections. Moreover, the proposal which the Councillors purported to treat as one of general policy was directed specifically to land zoned Rural 1(a)which was also an "Existing Holding", a description of land which applied to lands held by the three Councillors themselves.

The only thing that might be said for the Councillors in mitigation is that they appear to be not alone in holding their views about general policy matters. The "General Policy" excuse has been put forward by some Councillors in other cases before the Tribunal to excuse their failures to comply with section 451. The philosophy sounds to the Tribunal like someone's "Rule of Thumb" idea for assisting Councillors in making a decision whether they should declare a pecuniary interest. It's origin is not known to the Tribunal, but, whatever the source, it is to be hoped in the interests of Councillors themselves that it is not spreading and will not be propagated through Councils and Councillors. It is fallacious and the

Tribunal would like to see further education of Councillors to make sure that it disappears.

No Intention To Carry Out Excision On Their Own Land

The next point to be considered is that all three Councillors sought to answer the Valuer's assessment of added value accruing to their land if the proposed excision rights with dwelling entitlements had become attached to the land, by asserting that they had not considered, or had no intention of, ever exercising such rights themselves if the proposal had come into effect, and that they were only acting to benefit others in the community who wanted to have that facility. Councillor Bennett told the investigators that he did not see pecuniary interest as a problem because, he said, "I don't see that there is a benefit or loss to me unless I actually excise or sell my farm.": Exhibit A, Attachment 31, p.29/48; and, "I had no intention of either at the moment.": p.30/2, 37/27. He said that he had never considered the possibility that his land could increase in value before he excised or sold: p.47/21 – 37; T109/56 – T110/3. Councillor Staltare gave the same responses to the investigators: Exhibit A, Attachment 29, pp.22/6 – 23; 23/35 – 24/11; as did Councillor Zappacosta: Exhibit A, Attachment 28, pp.35/23, 37/1; T72/9 – 14.

In the Tribunal's opinion, there are several reasons why the absence of an intention of the part of the Councillors to exercise on their own holdings the new rights which would be conferred by the proposed change to the LEP would not prevent them from having a pecuniary interest in that proposal. The first is that an issue whether a proposal which could confer a financial benefit on a person was a pecuniary interest within the meaning of the Act, cannot be left to depend on whether the person was intending to take advantage of the benefit if the proposal was adopted. This would leave the system open to wholesale abuse especially in the cases of changes of the permissible uses of land in an LEP.

The second is that any increase in the value of the land in the present case would accrue regardless of a Councillor's present intentions. They could change their minds, there was nothing to stop them from doing so in the future in the event of a change of circumstances. The same may be said for

all those rural land holders who, according to Councillor Zappacosta, were only concerned to be able to provide for their retirement and succession within their own families. Their circumstances and interests would be liable to change and the value of the proposed new rights would already be there to be exploited for their financial benefit.

Thirdly, if the existence of a pecuniary interest depends on whether or not there is a change in the value of land, the valuation process requires, as Mr Kennett, the valuer, pointed out, that the valuer imagines a hypothetical sale of the particular piece of land, so whether the owner intended to sell or not is not an issue. Therefore it was not part of his consideration of possible changes in value in the present case, "whether or not it is likely that the present owner would have any intention to excise": T41/36 – 45

The Councillors' Challenges To The Valuer's Assessments

The challenges of the individual Councillors to Mr Kennett's assessments of increases in the value of their respective holdings should now be considered; but they have to be considered in the context that the question for the Tribunal is not whether in each case Mr Kennett's assessment is dollar accurate but whether or not it provides material for a conclusion, on the balance of probabilities, that the land stood to gain an increase in value of an appreciable amount, an amount which was not so insignificant that a person could not reasonably be regarded as likely to be influenced in any decision the person might make in relation to the matter. It is not necessary to be able to make a precise quantification of the amount before that conclusion may be reached.

All three Councillors objected that Mr Kennett's assessment that there would be an increase in the value of the lands was unsound because of the number of holdings that would receive the benefit of the proposal which, they contended, would result in a flood of such properties on the market with no increase in value but possibly a decrease as supply exceeded demand: Councillor Bennett T36/11-38; Councillor Staltare T36/53 – T37/14; Councillor Zappacosta T125/50. Mr Kennett rejected this proposition because, he said, in his lengthy experience that had never happened in

reality. He said that the valuer assumes a hypothetical vendor/purchaser situation in which properties come onto the market at intervals of time. He said that a valuer takes account of the circumstance that properties are reasonably marketed and the state of the market at the particular time. He also said that at the time here in question there was a strong demand for the type of rural homesites in the Griffith area being considered and he had made his assessment accordingly: T36/11-38; T37/16-28. Councillor Zappacosta himself acknowledged that there was a "heavy demand" for small lots of the kind that would be made available by the proposed excision rights: T73/43

Councillor Bennett's Property

Councillor Bennett (whose criticisms of the valuations Councillor Staltare adopted as applicable to his own property: T36/53) criticised the comparable sales on which Mr Kennett had relied, pointing out that, whereas Councillor Bennett's property was in zone 1(a), a number of the comparable sales used by Mr Kennett were in zone 1(c), "Rural Residential developments" and their values were higher. Councillor Bennett suggested to Mr Kennett that it was "not a fair comparison". Mr Kennett replied that the comparison was valid because he had taken the differences between the two zones into account, allowing for variations in services, situation and locality and in consequence had put less value on Councillor Bennett's block than on zone 1(c) blocks: T37/47 – T34/31-45.

Councillor Bennett asserted that, in relation to his farm, the hypothetically excisable block would be more valuable attached to his farm than excised from it, that excising it would decrease the value of the remainder and that the annual income attributable to the block would be lost. Mr Kennett replied that it was "very very rare for such decrease to occur" in the kind of case being considered: T34/4-53.

Councillor Bennett also put forward to the Tribunal and to Mr Kennett an exercise which he carried out on the basis that, as his holding was worth, according to him, $12,000 per acre as citrus land, the loss of 5,000 square metres from his farm if he carried out an excision would so reduce the value of his farm as to offset any profit from the sale of the excised block to the

point where the profit would be "insignificant": T34/55 – T35/35. Mr Kennett told the Tribunal that he had valued the loss to Mr Bennett's farm at $8,000 in arriving at the added value which he had assessed for Councillor Bennett's farm and in doing so he had used the current market value for citrus orchards: T120 – T121.

Councillor Staltare's Property

Councillor Staltare put to Mr Kennett that he had over-stated the added value to his holding because there was no sewerage in the vicinity of his property, and for a sub-division there would have to be land clearing, repiping, driveway widening and other works, the cost of which would outweigh the benefits of excision. Mr Kennett's field notes which he had with him in the witness box showed that he had made allowances for such costs in arriving at what were net figures for the estimates of added value to Councillor Staltare's land. He told the Tribunal that even if there was some impact on the irrigation methodology on the farm he had made a more than generous allowance for the costs involved in a sub-division and that he seriously doubted whether Councillor Staltare's property would finish up with a lower added value: T39/36 – T40/37.

Councillor Zappacosta's Property

As mentioned earlier in this decision Mr Kennett had assessed the added value of Councillor Zappacosta's Farm 301 Hanwood Road at $49,000 and Farm 132 Ben Martin Road at $32,000.

Councillor Zappacosta challenged Mr Kennett to explain how he could have valued his property so high having regard to the services which, under the Planning Review Committee's proposal, had to be available for a lot to be excised and the fact that Farm 132, which Councillor Zappacosta called his "main property" was all planted with grapevines, the value of which on the excised lot he would lose, and there would be "huge expense" for access and the provision of other facilities: T40/39; T41/50 – T42/32.

Mr Kennett told the Tribunal that he had had a copy of the Planning Review Committee's proposal and was aware of the services which had to be available. He said;

> **"The valuation process is a matter of comparison and opinion which is what I've done. I have compared hypothetical blocks with blocks that do exist and have been sold, taking into account the relative differences. I drew on available evidence and 30 years experience in the industry. Taking everything into account I come up with a reasonable summation of the situation."**: T41/18-34

In relation to Farm 132, Councillor Zappacosta had pointed out that it had no town water supply connected. Mr Kennett told the Tribunal that he had allowed "access costs, survey and power" and mentioned a figure of $50,000 in a way which later caused some doubt as to what he had meant, a doubt which was aggravated by an error in the transcript which came to be corrected when Mr Kennett was later recalled: see T41 – T42; T115/46 – T119/27. There is nothing to be gained in explaining here the error in detail because Mr Kennett's intended meaning was made perfectly clear by his later evidence to which reference will be made shortly. Further, it should be mentioned that whilst Mr Kennett was giving his evidence on the first occasion, Councillor Zappacosta said that Council officers had advised him that it would cost him $30,000 just to supply town water to his land and that this cost would have made an excision of his farm property prohibitive: T42/35.

When Mr Kennett returned to the witness box he explained, by reference to his field notes, the exact basis on which he had assessed the added value of Councillor Zappacosta's land. In making the assessment he had not allowed the cost of extending town water to the property because he had taken the property as it was without town water and had made a direct comparison with sale no. 4 in his schedule of comparable sales which he considered comparable because it also had no town water. It had gravel road access and only a fair location. He had then put a gross value on Councillor Zappacosta's property of $53,000 before costs. He had then calculated and deducted the cost of survey, Council fees, extension of power, access, value of farming land lost by the excision and selling charges, totalling $21,000

which, deducted from the gross figure, gave the net figure of $32,000 which Mr Kennett assessed to be the added value.

This process meant that Mr Kennett had not allowed an amount for the cost of extending the town water supply to the farm. However, Mr Kennett explained, he then would have used a higher gross figure to start with because he would have been looking at comparable sales of properties which had been sold with town water connected and that would have lifted the gross, he said, to probably $65,000 instead of $53,000: T117/43 – T119/54. Deducting from the gross of $65,000 the amount of $21,000 allowed by Mr Kennet for costs plus the amount of $30,000 estimated for water extension, a total deduction of $51,000, the net added value for Councillor Zappacosta's Farm 132 would come back from the original assessment of $32,000 to $14,000.

Regarding the abovementioned sum of $30,000 costs for extension of town water, the issue between Councillor Zappacosta and Mr Poga's initial statement (Exhibit Q) which was mentioned at the beginning of this decision, was whether the sum of $30,000 was an estimate for connection to Councillor Zappacosta's property alone, as Mr Zappacosta claimed, or was a sum to be divided between all of the six owners who were seeking the estimate, as Mr Poga claimed. As it may have been thought that Mr Poga's claim put Councillor Zappacosta's credit in doubt, it should be recorded, in fairness to him, that in Mr Poga's later statement provided to the Tribunal (Exhibit S) Mr Poga agreed that he had been wrong and that Councillor Zappacosta's statement of the position was correct.

Conclusion

Considering in a general way the question whether there would have been added value to the land, the probability would seem to the Tribunal to favour the view that, assuming, like those of the three Councillors, the properties were within a reasonable distance of urban facilities, the value of the properties in the Rural 1(a) zone to which the proposal in question would apply would be enhanced by the addition of the proposed excision and dwelling rights.

According to the evidence there was strong demand for blocks of the kind which the proposal intended would be allowable by excision and, that being so, there would also be a strong demand for properties which became entitled to the facility that the proposed excision rights with dwelling entitlements would confer upon the landowner.

The position prior to the Griffith LEP 1994 when excision was permissible under the then existing LEP is a fair guide as to what was likely to occur with the re-introduction of excision rights. Mr Kennett told the Tribunal that at least 250 to 300 small holdings were excised from farms and sold before the 1994 LEP came into force, so, he said, there must have been some financial benefit to owners because they were actually doing it. He said that there was a market value at that time because he could recall putting $20,000 - $25,000 on the excised blocks back then: T37/48-58; T38/11-46. He also said that there was a stronger demand in the Griffith area for such sites presently compared to pre-1994 and that, "even the 5,000 metre blocks that perhaps had minimal value back in 1994 are worth a considerable amount of money now": T39/23-23

As already mentioned, existing landholders who were not presently proposing to exercise their right of excision for the purposes of sale would, if the proposal was adopted, have immediately conferred upon them the option to carry out an excision when it suited them. The existence of that option must be expected to have some monetary value. Even Councillor Zappacosta, after appearing at first to avoid the question, implicitly acknowledged to Mr Lawler that there were people who would benefit financially from the proposal:

"Q. Is it the case that a number of your relatives were in a position where they would be able to take advantage of the addition of dwelling rights to an existingly held block that had no dwelling rights or, alternatively, the excision from an existing block if the policy ultimately found itself manifested in the Local Environmental Plan?

A. I'm just trying to think who my relatives are that have portions without dwelling rights and who have holdings that – I really can't answer that because, again, I would have to say that it's a policy matter, which I have said more than

once here today, and on the policy matter I didn't think I had to declare a pecuniary interest.

Q. The question was, do you have relatives who would benefit from the proposed amendment?

THE TRIBUNAL: You mean benefit financially or benefit in the sense of being able to reorganise their family domestic situation?

MR LAWLER: Q. Benefit financially?

A. I couldn't answer that. It's up to them whether they make a financial deal or not.

Q. (Referring to the investigator's interview with Councillor Zappacosta, Exhibit A, Attachment 28). Transcript, Tab 28, page 22, line 45, where you were asked this question: The Act requires disclosure if there's a financial benefit to a relative. Do you have relatives who would be in a position of being a landholder who would benefit from the proposed amendment?

A. Yeah, I suppose I would, yes."": T82/4-37

In coming to its conclusion the Tribunal has taken into account the contentions of the three Councillors relating to their respective properties and their cross-examination of Mr Kennett. In the Tribunal's opinion, Mr Kennett fairly answered their criticisms most of which were being made without the Councillors knowing the detail of how Mr Kennett had gone about making his assessments. Having regard to his qualifications, expertise and 30 years of experience in the Griffith area, as well as his independence as a witness, Mr Kennett's evidence and opinions on the question of added value is, in the Tribunal's view, entitled to considerable weight. On the whole of the evidence relating to this subject, the Tribunal concludes that an appreciable increase in the value of each of the Councillors' properties would have ensued from the adoption of the proposal here in question, an increase of such an order that it could not be considered so insignificant that it could not reasonably be regarded as likely to influence the person's decision in relation to the proposal.

THE TRIBUNAL'S FINDING ON THE COMPLAINT

For the foregoing reasons the Tribunal finds that at the time of each of the meetings identified in the complaint each of Councillors Bennett, Staltare and Zappacosta had a pecuniary interest within the meaning of the Act in the

matters under consideration at those meetings relating to the proposal to introduce excision rights with dwelling entitlements into the Griffith LEP.

The Tribunal further finds that section 451 of the Act applied to the Councillors in respect of their pecuniary interests in those matters and that each of them failed to comply with the requirements of that section.

As to the possibility of a defence under section 457 (quoted above), which provides that a person does not breach section 451 if the person did not know and could not reasonably be expected to have known that the matter under consideration was a matter in which he or she had a pecuniary interest, the Tribunal has held in previous cases that the test to be applied under this section is objective, that is to say, the question is whether the person knew the facts which, under the Act, would constitute a pecuniary interest in a matter, not whether, subjectively, they held a view, opinion or belief that they did not have, or that those facts did not give rise to a pecuniary interest for the purposes of the Act. An example may be seen in the case of Councillor Roberts, Hastings Council (mentioned above) at pp.47-50.

Applying that test here, none of the Councillors would have a defence under section 457 because they all knew, or could reasonably be expected to have known, the facts which constituted their pecuniary interest.

The Tribunal therefore finds that the complaint has been proved.

ACTION UNDER SECTION 482

Section 482(1) of the Act provides:

> **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.**

In deciding what action if any the Tribunal should take if it finds a complaint against a Councillor has been proved the Tribunal takes into account all of the circumstances in which the contravention occurred, the explanations given by the Councillor for the breach, the Councillors' attitude to the

performance of statutory obligations in relation to pecuniary interests, matters personal to the Councillor and any other relevant matters. Obviously the situation will vary from case to case and each case must be judged on its own merits.

The Tribunal accepts the claim made by the Councillors that they did not go out deliberately to increase the value of their land. Any suggestion that they might have done so was offensive to and strongly resented by Councillor Zappacosta in particular: T47/9; T126/32. It should be recorded that Mr Lawler told the Tribunal on behalf of the Director-General that it was considered that the evidence would not support a submission that there was a conscious intention on the part of the Councillors to seek to bring about the changes to the LEP in order to increase the value of their land: T48/6-15.

Having regard to the evidence which they have given, the Tribunal can accept that the purpose of all three Councillors was to achieve a change for which there was a substantial demand in the community in the rightness of which they believed. As Councillor Zappacosta said, "I've worked as much as I could in pursuing what I felt was right.": T89/17-37. However, it is difficult to accept that they were unaware of the possibility of financial gain accruing to some of those members of the community who were seeking the change even if at the time the events took place the three Councillors harboured no intention of taking advantage of it for themselves.

On the evidence it is more likely that they failed to give proper consideration to the question of pecuniary interests, in Councillor Zappacosta's case because he had been active on the issue of excision and dwelling entitlements for Rural 1(a) land for many years without pecuniary interests being raised as an issue: T48/54 – T49/11; T54/30 and, as to all three, because they were misguided by erroneous views about their obligations when serving community demands or dealing with matters of general policy.

Some blame for the failure to perform their statutory obligations with respect to pecuniary interests was sought to be placed on Council staff and the Department of Local Government. Councillor Staltare complained that

from the time they got the Planning Review Committee up and running, "there was no mention specifically that we may be heading in the wrong direction from our General Manager, or other staff.": T14/42-46. Councillor Zappacosta complained that as the Committee had been looking at matters of general policy and the general good of the whole community, it was "a sad day … … when the Department of Local Government could not have come to the City Council, come to the Advisory Committee and seen a representative and say this is what you intend to do for the good of the community, these are some of the issues you must overcome.": T12/42-54. Councillor Zappacosta also complained of "insufficient guidance" from those who should know: T55/57, pointing to the fact that even their own General Manager, Mr Behl, had admitted to the investigators when he was interviewed about the present complaint that until he had received the letter from Mr O'Meara which was considered at the Council meeting of 20 January 1998, Mr Behl had been unaware of the implications for Councillors in the exception in section 448 relating to changes of an LEP. In fact at his interview on 2 September 1998 (Exhibit A, Attachment 30) Mr Behl told the investigators that he'd never really considered the pecuniary interest aspects of the matter until he had looked at the Act after receiving Mr O'Meara's letter, thought that Mr O'Meara's complaint was "probably valid" and referred it to the Council's legal advisor: Attachment 30, p.16/37. Mr Behl told the investigators that none of the Councillors had sought his advice on their participation in matters relating to excision rights in the context of the proposed amendments to the LEP. He said, "I am at fault in that I failed to detect that particular clause, and so I think it's reasonable in the case of the Councillors that they could have overlooked it.": Attachment 30, p.23/21-23.

As to Councillor Zappacosta's criticism of the Department for failure to give guidance, the Tribunal is aware from the numerous cases that have come before it that the Department has put out publications and circulated information to Councillors on their obligations under the pecuniary interest provisions of the legislation. The Tribunal is also aware that from time to time General Managers of Councils have gone out of their way to ensure that

every Councillor is made aware of the obligations and the relevant statutory provisions. Even Councillor Zappacosta himself could not claim to be as ill-informed as he appeared to be making out to the Tribunal when giving his evidence. On an earlier occasion he had expressed himself quite differently as to the awareness of members of the Council's Planning Review Committee of the legislative requirements in relation to pecuniary interests. In a letter dated 6 May 1998 he wrote, under the title of Deputy Mayor and Chairman of the LEP Review Committee, to the Director-General commenting on the complaint (Exhibit A, Attachment 15). He stated, "My Committee was well briefed on the 'Disclosure of Interest' requirements with many members recording incidences of interest." When in the course of his cross-examination Mr Lawler drew Councillor Zappacosta's attention to the above statement in his letter he agreed that the need to disclose pecuniary interests was a matter raised in the Committee but he sought to say that the statement in his letter was intended to refer to only "non-pecuniary interests" of the kind dealt with by the Council's Code of Conduct under "Conflicts of Interest": T57/41 – T58/13. However, when later the Tribunal pursued this question with Councillor Zappacosta, after some resistance, he agreed that by "interests" he had meant to include pecuniary interests and in saying that many members of the Committee had recorded "incidences of interest" he had meant to include pecuniary interests as well as non-pecuniary interests: T69/43 – T70/27; T71/2-14.

The legislative provisions in question are expressly directed to Councillors themselves. Attempts to educate and keep Councillors fully aware of their responsibilities with regard to pecuniary interests are to be applauded and encouraged but ultimately Councillors are expected to take responsibility for their own actions. That would seem to the Tribunal to be one of the qualifications required of a person who undertakes the office of Councillor. It is a mark of their fitness for that office. The Tribunal is not satisfied on the evidence in the present case that the Councillors in question were not sufficiently informed or advised of their responsibilities in regard to pecuniary interests. That does not mean that it is always easy to decide

whether an interest in a matter is pecuniary for the purposes of the Act but the Tribunal does not consider that the present case would have occasioned real difficulty to any of the three Councillors if they had put their minds to it. If the pecuniary interest provisions of the Act are to work it is incumbent on Councillors to be always alert to the possibility of a pecuniary interest in Council business and apply their own minds to the question. As it is their responsibility, they cannot expect Council staff or others to take the initiative when some matter comes up in which they might have a pecuniary interest, although Council staff, General Managers in particular, are not to be discouraged from doing so.

In the Tribunal's view the most serious aspect of the present matter is the deliberate failure by the Councillors when, on 20 January 1998, their attention had been forcibly drawn to the pecuniary interest implications in the matter and they deliberately rejected an opportunity which was offered to them to attempt to put it right and avoid the risk of a complaint, an investigation and a hearing by this Tribunal if they failed to do so. The letter dated 17 December 1997 from Michael O'Meara to the General Manager was quite specific. It named Councillor Zappacosta as the proposer of the motion which the Council had adopted at its meeting on 16 December 1997 and stated, "It is obvious this change of policy would confer a considerable financial benefit on the subject land to the owner of such land. A local valuer has calculated this benefit to be between $10,000 - $20,000 depending on location." The letter went on to assert that this would raise the issue of pecuniary interest both in regard to the members of the Committee making the original recommendation and Councillors at the meeting. The letter asked the General Manager to check Councillors' annual returns to see whether there was a pecuniary interest involved through land beneficially affected and owned by any of the Councillors and to advise what action the General Manager proposed to take: Exhibit A, Attachment 56.

The General Manager's report to the meeting concerning Mr O'Meara's letter has already been quoted in full. The question is, why did Councillors Bennett, Staltare and Zappacosta reject the second option, which was as for

the Council to rescind the resolution and apply to the Minister for a dispensation under section 458 of the Act whereby, in circumstances similar to those that had arisen in the present case, the Minister might, conditionally or unconditionally, allow a Councillor or a member of a Council Committee who had a pecuniary interest in a matter with which the Council is concerned and who was present at a meeting of the Council or Committee to take part in the consideration or discussion of the matter and to vote on the matter.

It was Councillor Bennett who moved the motion, seconded by Councillor Zappacosta, that the Council take no further action in relation to Mr O'Meara's letter. The motion was passed.

When cross-examined about this meeting Councillor Bennett told the Tribunal that he thought that it was "proper" for him to participate on a vote as to whether or not any further action be taken in relation to that letter: T110/42. Councillor Bennett was asked what steps he had taken in the light of Mr O'Meara's letter to ascertain whether or not he had a pecuniary interest in the matter of the rescission motion which later came before the Council on 10 February 1998. Councillor Bennett said, "I reassessed my position on the matter and the discussions and throughout the issue of excision and dwelling rights and I still at that time believed that I was not required to declare a pecuniary interest." In relation to the earlier Committee proceedings he said, "I still believe that there was not a necessity to declare a pecuniary interest.": T111/30-42.

Councillor Staltare complained that at the meeting on 20 January 1998 the General Manager had given them two options, "So even at that late stage our General Manager was possibly unclear whether it was 100 per cent pecuniary interest on our behalf." He said that the choice which the three Councillors made was to battle on to the end to bring the change for Griffith that the people wanted: T14/47; and he "stood by it all the way through.": T123/2.

Councillor Zappacosta told the Tribunal that, although it named him specifically, he saw Mr O'Meara's letter as applying to the whole of the Council and, he said, "I saw absolutely nothing wrong with agreeing with not

having anything to do with the follow-up.": T63/17-43. He also said that his attitude to the suggestion in the letter that Councillors who owned land affected by the proposed change stood to gain between $10,000 and $20,000 was, "What rubbish": T64/12. When asked why he rejected the opportunity at the meeting on 20 January 1998 to rescind the previous resolution and apply to the Minister for permission to proceed under section 458 of the Act, he answered:

> **"Because I looked at the clause (he was referring to section 364 of the Act which provides that a decision still stands even if Councillors with pecuniary interests have voted on a matter in breach of the law) and at the time that we had progressed down the track so far and suddenly we have this – what, I suppose, could be referred to as a bit of a hiccup in the movement forward in the progress. The General Manager simply said the recommendation, asked Council what it wants to do about it, one or two, and I suppose one could ask the question that maybe there should have been a preferred option advice to the Council, should have been along the line of "I strongly recommend you do one rather than doing either or", so in the absence of any strong recommendation, the fact that it came at such a late stage, the issue was treated the way it was."**: T75/50 – T76/6.

It was suggested to Councillor Zappacosta the reason that he did not want to go along with the second option offered by the General Manager was that on the second time around he might lose the day because if they had to get the excision proposal through again some Councillors including Councillors Staltare and Bennett might have to abstain from voting. Councillor Zappacosta acknowledged that there was opposition to the proposal for change, the vote being, he thought, six votes to five in favour of the proposal. However, he claimed that the prospect of losing a repeat of his motion never entered his mind: T75/27 – T76/41. As to the meeting on 10 February 1998 when the opposing Councillors' rescission motion was rejected, Councillor Zappacosta was asked to explain why he participated in the vote against that motion when the question of a pecuniary interest in the matter had been clearly raised against him and others by Mr O'Meara's letter as well as the possibility of a complaint and investigation. Councillor Zappacosta said, "Again, as I said earlier, it was a last minute effort to stop the whole process towards reviewing the LEP in the excisions and dwelling rights and I saw no

reason to change my mind." He added, "I knew within my mind I had no pecuniaries, full stop. I certainly disagree with the valuation that was placed before us in Mr O'Meara's letter.": T83/12-49.

For reasons about to be mentioned, the Tribunal is satisfied that Councillor Zappacosta was so dedicated to achieving the excision and dwelling rights policy which he had so long espoused, that the Tribunal cannot accept that Councillor Zappacosta never had it in his mind that if the General Manager's second option had been taken at the meeting of 20 January 1998 his cause, which up to that point had succeeded, might be irretrievably lost. That prospect alone would have been enough to persuade Councillor Zappacosta to reject the second option irrespective of whether he believed he had a pecuniary interest in the matter or not.

Councillor Zappacosta was the driving force behind the creation of the Planning Review Committee and every action that thereafter occurred in the attempts to establish the excision and dwelling rights in the Griffith LEP.

In the course of his interview with the Department's investigators (Exhibit A, Attachment 28) he explained that his interest in the subject went back a number of years to when he was serving his second term in the Council. He said that there used to be excisions permissible until the Council resolved in 1994 to discontinue the right to have excisions as a result of a resolution of an LEP Review Committee to update the LEP. He explained that he favoured retention of excisions and received a lot of representation from people who were concerned at the proposals to discontinue the right. He had the support of some other Councillors but they didn't hold the majority vote with the result that the decision to scrap excisions from the LEP was passed. He said, "Hence as a member of that LEP Review Committee I continually talked about the reintroduction on the excisions and dwelling rights.": p.6/48-7/22. He said that after the new Council was elected in 1995 he was very much encouraged to continue what he described as "My crusade to re-introduce the excisions and the dwelling rights.": p.8/10.

Councillor Zappacosta told the investigators the Planning Review Committee "was my instigation, I continually pushed for it.": p.9/28. He

referred to that Committee as "my Committee" in his letter to the Director-General of 6 May 1998 (Exhibit A, Attachment 15) and in his interview with the investigators: p.11/3-9.

In regard to the debate at the Council meeting of 2 September 1997 on the question of adoption of the Planning Review Committee's recommendations, Councillor Zappacosta told the investigators, "I think I led the charge" and that he later spoke and voted against the amendment which proposed that there be no change: p.21/25, 41 – 45. When asked about the debate at the Council meeting of 16 December 1997, at which Councillor Zappacosta succeeded in having his proposal adopted by the Council, he said, "Those who were violently against it got up and spoke violently against it, and – like all good Council debates." He was then asked, "You obviously voted in favour of your own motion?" and he answered, "I'll stand, as I long as breathe, on the issue, yes.": p.25/38-42.

Whilst he was in the witness box the Tribunal drew Councillor Zappacosta's attention to all of the foregoing statements which had been made by Councillor Zappacosta to the investigators and then put this to him:

> **"Now, those statements, all of which are quotes of your own words, would suggest the possibility of somebody who doesn't really allow obstacles to get in the way of something they think is right to achieve and raise the possibility that you would have been determined – if you were not consciously determined – to disregard your obligations under the Local Government Act to disclose pecuniary interests and refrain from participating and voting because it would have prevented you from achieving a heartfelt objective. Would that be a wrong inference to draw?"**: T87/45

Councillor Zappacosta commenced a long answer with the words, "Can I start from the beginning?" He then proceeded to give an account of the campaign he had conducted as a Councillor within the Council from the time he was on the 1994 Review Advisory Committee, the majority of which had favoured discontinuing the allowance of excisions. There is no need to repeat the detail here but it was plain that he had worked hard and conscientiously with unremitting zeal to achieve the reintroduction of excision and dwelling rights.

In the course of his answer he explained the statements he had made to the investigators. He said:

> **"When I spoke to the Department I was quite frank as you indicate you read out. I was quite sincere what I was trying to do because I felt deep in my heart there was nothing wrong with it, it was quite okay. We are elected representatives, elected to carry out the wishes of the people and in order to make changes someone had to carry the torch and start moving up and shaking mountains and moving rocks etc., and I was encouraged by community support and I just continued on my work."**

He concluded his long answer with the words, "That's all I want say, your Honour. I've worked as much as I could in pursuing what I felt was right.": T87/58 – T89/37.

At the commencement of the hearing in Griffith, after Councillor Zappacosta had made a few opening remarks, Mr Lawler stated the position which the Director-General took in regard to the matter in order to put the Councillors, all appearing in person as they did, on notice of the case which the Director-General was putting before the Tribunal. He said this:

> **"Lest there be any misunderstanding as to the Director-General's position I think I should place on the record, having regard to what he (Councillor Zappacosta) just said, that the Director-General is seeking to be as fair as possible in the sense of drawing to the attention of the Tribunal possible exemptions which may have applied in relation to the 5 June meeting (section 446), and the potential exemptions in relation to all of these meetings (section 448). But the Director-General's position is that those exemptions don't apply, and when one looks at the substantive merits of the matter there has been a flagrant disregard for the pecuniary interest provisions. And there has been a persistence in participation by these three Councillors in the deliberations of Council where they had a pecuniary interest, notwithstanding that it had been brought to their attention, and indeed, it went so far as resolving to take no further action on a letter of complaint that there had been a breach of the pecuniary interest provisions of the Act.**
>
> **And the Director-General will be submitting at the end of the day that unless the technical potential defences – if I can compendiously summarise it that way, apply, that the Tribunal would take a stern view of the breaches in this case."**:T13/40 – T14/9

In the course of his opening address, Mr Lawler referred to the events that took place at the meeting of the Council on 20 January 1998 when the three Councillors rejected the second option offered by the General Manager. Mr Lawler told the Tribunal that the Director-General submitted that the events that occurred at that meeting significantly aggravated the circumstances of the breaches of the Councillors of their pecuniary interest obligations and suggesting that the last thing that they should have been involved in was moving and supporting a motion that no further action be taken on Mr O'Meara's letter: T30/31-47.

CONCLUSION

The Tribunal is charged with the responsibility of taking appropriate action when a complaint of a contravention of the pecuniary interest provisions of the Act has been proved.

In the present case the Tribunal has given careful consideration to the circumstances in which the breaches occurred, the explanations given by the Councillors and the submissions made by Mr Lawler on behalf of the Director-General.

In the Tribunal's opinion, the conduct of the three Councillors at the meeting on 20 January 1998 together with their subsequent persistence in voting down the rescission motion at the meeting on 10 February 1998 raises, in the circumstances in which it occurred, a question as to their fitness for civic office, a question which requires consideration to be given to the power of the Tribunal to disqualify a person from holding civic office for up to five (5) years.

After giving the matter serious consideration and with much hesitation, the Tribunal has decided that, having regard to the long period, a very long period in the case of Councillor Zappacosta, during which the Councillors were assiduously working on the proposal for excision rights and dwelling entitlements without any question being raised or complaint made from either inside or outside of the Council as to whether they had a pecuniary interest which prevented them from participating in the matter, and, having regard to the fact, which on the evidence the Tribunal accepts, that regardless of

whether there could be any financial advantage to them in respect of their own properties if they succeeded in their endeavours, they were not motivated by financial self-interest but by a belief that they were serving a need in the community, disqualification from civic office would be too harsh a sanction to impose in this case.

The Tribunal has decided that, instead, the three Councillors should serve the maximum period of suspension applicable to them. As Councillor Zappacosta himself acknowledged when he told the Tribunal, "I feel a little bit uncomfortable and guilty because being one of the older Councillors on Council, I felt that I should have been more aware of the fact that there may have been a pecuniary interest": T56/1, he ought to be considered to be more responsible than the other two Councillors for the failure to comply with the legislation.

However, the Tribunal will not distinguish between the three Councillors for the purpose of imposing a sanction under section 482. They espoused a common cause and showed a united front throughout their campaign within the Council, at the investigation of the complaint against them, and in the hearing before this Tribunal. They did not ask, and in the opinion of the Tribunal do not deserve and, as the Tribunal believes, would not expect to be treated differently from one another. The Tribunal will order that Councillors Bennett, Staltare and Zappacosta each be suspended from civic office for the period of two months commencing on 14 May 1999 and expiring on 14 July 1999.

Pursuant to section 484 of the Act the Tribunal will provide this Statement of its decision to each of the Councillors and to the Director-General and, in due course, to the Griffith City Council and such other persons as the Tribunal thinks fit.

DATED: 7 May 1999

PECUNIARY INTEREST TRIBUNAL
ORTA RECENS QUAM PURA NITES
LOCAL GOVERNMENT NSW

K J HOLLAND Q.C.

Pecuniary Interest Tribunal