

**LOCAL GOVERNMENT PECUNIARY INTEREST
AND DISCIPLINARY TRIBUNAL**

LOCAL GOVERNMENT ACT 1993

PIDT No. 02/2005

**DIRECTOR GENERAL, DEPARTMENT OF
LOCAL GOVERNMENT**

**RE: COUNCILLOR RICARDO D'AMICO,
LANE COVE MUNICIPAL COUNCIL**

STATEMENT OF FURTHER DECISION

Dated: 19 October 2006

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INTRODUCTION

1. In its Statement of Decision dated 21 July 2006 the Tribunal found that Councillor D'Amico had a pecuniary interest in the matters relating to a proposal by Woolworths Ltd to build a retail development at Austin Street, Lane Cove which was before the Lane Cove Municipal Council meeting held on 21 July 2004 and that he committed breaches of s.451 of the *Local Government Act 1993* in relation to those matters in that he failed to disclose the nature of that interest to the meeting, he was present at the meeting when matters were considered and discussed and he was present at the meeting when the Council voted on questions in relation to those matters.
2. This Statement of Further Decision should be read in conjunction with the said Statement of Decision.
3. In the said Statement of Decision the Tribunal considered three experts' reports which were before the Council. Councillor D'Amico had, at all relevant times, read them. As found by the Tribunal, the message being sent by two of the experts' reports was clear and

unmistakable. The experts were predicting a good chance of improved business performance throughout the Village because of overall increased visitation levels and by the increasing of the size of the market available to the whole of the Village. Even if one were to discount the wording of the reports, there was still, in their expert opinions, a reasonable chance or possibility of improved business performance by other retailers within the Village, particularly those close to the Woolworths development. Councillor D'Amico, through his company Giving & Living Pty Ltd was such a retailer from leased premises at 146 Longueville Road, Lane Cove. As found by the Tribunal, those premises were approximately 50 metres from the Woolworths development.

4. Councillor D'Amico rejected the clear message of the experts' reports. As found by the Tribunal, there was no justification for him totally rejecting those expert reports. As a matter of logic, it is almost inconceivable that there would not have been a reasonable chance or possibility of increased visitation and business to Councillor D'Amico's premises as a result of the projected increase business activity and visitation to the Lane Cove shopping precinct, particularly bearing in mind its close proximity to the site of the Woolworths proposal and its location adjacent to the plaza.
5. Councillor D'Amico sought advice from a firm of solicitors acknowledged as being specialists in local government and planning law. As found by the Tribunal, the written advice which Councillor D'Amico received was seriously flawed for a number of reasons, a primary one being that Councillor D'Amico did not advise those solicitors of the three experts' reports and he did not draw those solicitors' attention to the existence of the reports. The Tribunal found that it was satisfied that Councillor D'Amico failed to do so because he formed the erroneous view that the reports had nothing relevant to say in relation to the question posed for the solicitors' advice. This view was erroneous because the reports were undoubtedly relevant to the question, albeit that Councillor D'Amico had rejected the expert opinions so far as they related to his premises. He did not inform the solicitors of the reports or his rejection of the conclusions. The Tribunal found that in this regard Councillor D'Amico acted without justification.

6. When Councillor D'Amico came to sell his business in September/October 2004 the business papers of Griffin Business Brokers clearly indicate that two features of the business relevant to its sale were its close proximity to the Woolworths development and the fact that Lane Cove Village was about to experience a major growth phase with the Woolworths development to be completed within the next 12 months and the proposed upgrade of the Village. These listed features, as found by the Tribunal, were an implicit acknowledgment that the Woolworths development had a reasonable chance or possibility of impacting favourably on the business which was being marketed. As found by the Tribunal, these acknowledgments were inconsistent with Councillor D'Amico's evidence that he did not expect any increase in business consequential upon the Woolworths development.
7. As found by the Tribunal, based on expert evidence, there was a quantifiable appreciable gain of approximately \$75,000 to the value of the business as a result of the Woolworths proposal, which gain was reflected in the purchase price achieved by Councillor D'Amico's company.
8. As found by the Tribunal, not only did Councillor D'Amico have a pecuniary interest in the sense of a reasonable chance or possibility of financial gain, the Tribunal was of the opinion that had Councillor D'Amico properly applied himself to the relevant question, he ought to have realised that he had such a pecuniary interest. The question was not whether or not such a gain would in fact ensue, but whether there was a reasonable chance or possibility of it ensuing. In light of a clear message being sent by the financial reports which Councillor D'Amico had read well before the Council meeting there was, in the Tribunal's opinion, no justification for him coming to any other conclusion. Likewise, if Councillor D'Amico had properly applied himself to the relevant question, he ought to have realised that the advice which he had obtained from Mr Clark was seriously flawed, if for no other reason than that Councillor D'Amico had not made available to him the said financial reports, nor had he alerted him to the clear message which they carried.

SUBMISSIONS

9. With the agreement of the Director General and Councillor D'Amico, the question of what consequences ought to flow from the Tribunal's findings was dealt with by written submission.

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10. Counsel for the Director General , submitted that in the present case the appropriate penalty to be applied is one of disqualification from holding civic office for a significant period (s.482(1)(d) of the Act), or alternatively, that he be suspended from civic office for a significant period, together with a suspension of his right to be paid a fee or for remuneration during that determined period of suspension. (Subsequently in the Director General's Submissions of Reply Counsel on his behalf, properly in the Tribunal's opinion, withdrew the submission that a period of suspension could be coupled with a suspension of a right to be paid a fee or other remuneration. As acknowledged, the wording of the Act does not permit the Tribunal to combine the respective penalties set out in s.482(1) of the Act.)
11. Counsel on behalf of the Director General drew attention to the Tribunal's findings, as summarised above, together with the finding that when he briefed his solicitor to give advice on the matter before the Council Councillor D'Amico provided an unfair estimation of the distance of the proposed development from his business premises, namely 200 metres, which the Tribunal found to be a gross exaggeration.
12. It was submitted that the breaches found were serious breaches of core provisions of Chapter 14 of the Act. The breaches were not of no consequence. The value of the business in fact significantly increased as a result of the development proposal in the order of \$75,000 and the difference enriched the Councillor as his company sold the business and gained the benefit . It was submitted that in addition by lobbying so hard in favour of the proposal (even as part of his election platform before he was elected to the

Council), the Councillor allowed himself to be locked into a position whereby in order to save political face, as it were, he was always likely to take positive action in order to support the development proposal. It was submitted that councillors should not permit themselves to be locked into publicly expressing, declaring or permitting support for particular proposed developments in unqualified terms in circumstances where they may have a pecuniary interest and may not be able to vote on it. Such conduct plainly creates unnecessary pressure on the councillor to seek to avoid the operation of Chapter 14 of the Act.

13. It is submitted that Councillor D'Amico made a completely unsatisfactory attempt to obtain legal advice in order to shore up his already fixed position that he did not have any pecuniary interest. It was submitted that, in giving instructions to his solicitor for advice, Councillor D'Amico failed to seek advice from a person who was qualified in the relevant and necessary disciplines including accounting, valuation or town planning, he failed to provide the solicitor with plainly relevant experts' reports, he failed to provide him with full and correct instructions and he grossly exaggerated some parts of the instructions, namely the distance from the proposed development and the affectation of the business generally.
14. It is submitted the breach was flagrant in the sense that the facts which gave rise to the breach were patent for all to see "or at least all who cared to properly apply their minds to the questions raised by" the provisions of the Act (see *Councillor David Taylor, Weddin Shire Council PIT 1/2003* dated 22 March 2006). It is submitted that Councillor D'Amico failed to exercise any necessary due care in dealing with the matter and the possible affectation of the proposed development of his business.

COUNCILLOR D'AMICO'S SUBMISSIONS

15. Councillor D'Amico made written submissions and, in addition, provided a significant number of references.

16. The references were from:

- (a) the Mayor of Lane Cove Municipal Council, Mr Ian Longbottom;
- (b) the Dixie Walters Director of Lane Cove Occasional Child Care Inc.;
- (c) Councillor Anne Smith, Deputy Mayor of Lane Cove Council;
- (d) Mr G. Stufano;
- (e) Jocelyn Gregory, Director, Hamilton & Co Real Estate;
- (f) Ron Taylor, Director, Ray White Lane Cove;
- (g) John Nicotina, Partner, Philip Goldman & Co Solicitors;
- (h) Anthony Roberts;
- (i) Tony and Tina D'Amico, Councillor D'Amico's parents.

17. All the references speak in glowing terms of Councillor D'Amico's character and his commitment to serving the local community both as a councillor and as a member of the Lane Cove Occasional Child Care Committee, and as its president and Councillor D'Amico's service on the Council's Bushland Management Committee. Councillor Longbottom expressed the view that the Tribunal's findings were as a result of a number of accumulating errors of judgment and that he did not believe that Councillor D'Amico acted with deliberate dishonesty or wilfully failed to apply himself to the tasks. On Councillor D'Amico's behalf, it was submitted by Councillor Longbottom that either a reprimand or, if absolutely required, a short suspension from office would be appropriate and that Councillor D'Amico had expressed to him the fact that he was very embarrassed about the proceedings and, in Councillor Longbottom's view, he is extremely unlikely to

offend again.

18. In the said references Councillor D'Amico was consistently referred to as being honest, reliable, professional and hardworking and a person of integrity. It is said that it would be totally out of character for Councillor D'Amico to knowingly breach his obligations in order to procure some benefit. Councillor D'Amico's parents' reference advocated that the matter end without any penalty whatsoever. It was pointed out that the proceedings had adversely affected Councillor D'Amico's health and it was submitted that Councillor D'Amico had not actually gained anything at all. It was submitted that the Tribunal was not justified in acting on the valuation evidence as it did.
19. Councillor D'Amico's first submission was that, having read the Statement of Decision, he was at a loss and felt totally humiliated. It was never Councillor D'Amico's intention to breach the Act in any way. It should be said that, accepting that Councillor D'Amico never had any subjective conscious intention to breach the Act, such an intention is not necessary for a breach of the Act to be committed. As decisions of this Tribunal have made abundantly clear, whether or not the Act has been breached is to be determined by objective considerations, not subjective intentions, although it is acknowledged that the question of a subjective intention is relevant to the question of what consequences ought to flow from a breach.
20. Councillor D'Amico points out that he is a diligent and thorough person who works hard, striving to balance work with family interests. He submits that because of these pressures he is "always rushing" and that "perhaps that is what may have happened here." The Tribunal does not accept that submission. The time frame shows that, both before and after his election to the Council, Councillor D'Amico had more than adequate time to properly digest and consider his position and, after his election as a Councillor, to consider the experts' reports and their clear implications. Nowhere in the evidence has it been suggested by Councillor D'Amico to the contrary.
21. Councillor D'Amico points out that he takes his responsibility as a councillor very

seriously and that while some deliberations have been difficult, he always makes them based on what is right but also what is fair.

22. In his submission, Councillor D'Amico makes it plain that he does not agree with this Tribunal's Statement of Decision. There is no acknowledgment in the submission that he accepts that he breached the Act, there is no acknowledgment that he understands or accepts the reasoning process which led to the Tribunal's decision and there is certainly no contrition for the clear breach which has been established.
23. Councillor D'Amico submits that on the question of penalty it ought to be taken into account that he is a committed family man who has earned the respect of his fellow neighbours enough to be elected to represent them in the Council. He is afraid of losing face with the people of Lane Cove. He has always acted with the highest morals and standards and, in the retailing businesses he has been involved in for nearly 16 years, he has never had complaints to the contrary. Councillor D'Amico expressed the hope that this Tribunal understands that he has learned more from going through this investigation how vulnerable one's life and reputation are, especially when seen by residents or the general public.
24. Councillor D'Amico also arranged for Toni Thomas to write to the Tribunal concerning the sale of the Giving & Living business. She was one of the purchasers. It is said that Councillor D'Amico spoke to her regarding the proposed Woolworths development and the decision of whether she went ahead with the purchase was a decision she made in consideration with many others. The Director General in his Submissions in Reply suggests that the Tribunal should reject the submission as the author is unable to be identified or its contents verified. It is also submitted by the Director General that the document is irrelevant to the question of penalty. The Tribunal intends to accept the submission, although bearing in mind what it says, the relevance of it is marginal.

DIRECTOR GENERAL'S SUBMISSIONS IN REPLY

25. The Director General submits that Councillor D'Amico has not expressed any remorse and indeed, to the contrary, he does not agree with the Tribunal's determination as to the breach, but merely feels humiliated and is merely concerned about losing face with persons within the Local Government area. It is submitted that Councillor D'Amico does not understand the Tribunal's decision in that he is "at a loss". As referred to above, it is submitted that Councillor D'Amico offers a number of excuses for his conduct including that he was always rushing, but that none of these factors had played any significant part in his sworn oral evidence before the Tribunal and the Tribunal should accordingly give them little weight. It is submitted that Councillor D'Amico has not learned the appropriate lesson from the proceedings and the Tribunal's determination in that he indicates that the only lesson he has learned from the investigation is how "vulnerable" is his reputation as seen by residents of the general public. The Director General refers to a submission by the Mayor Ian Longbottom where the latter discusses the Tribunal either directing or accepting an undertaking from Councillor D'Amico to undertake training in his pecuniary interest obligations. It is noted in the Submissions in Reply that no such undertaking had been offered by the Councillor.
26. As to the remainder of the character references and testimonials, it is pointed out that some of them do not show on their face that the deponents were each aware of the nature of the allegations against the Councillor or of the Tribunal's determination that he had plainly breached the Act and, accordingly, should be given little weight.

COUNCILLOR D'AMICO'S FURTHER SUBMISSION

27. By letter dated 2 October 2006 the Councillor wrote a "personal letter" to the Tribunal expressing certain matters which the Councillor wished to bring before the Tribunal before the decision on penalty was made.
28. Councillor D'Amico said he was truly and deeply sorry for what he had done and that he

could understand how the public could have misunderstood his actions as dishonest or gainful. He honestly believed that he was doing the right thing in obtaining his own legal advice, although he now realises that the advice he obtained was wanting and he should have tested and questioned that advice. He asked that the Tribunal accept his naivety in these matters as he had never dealt with lawyers at this level and never thought to question the advice.

29. What this part of the submission demonstrates is that Councillor D'Amico still has not either expressly or by implication acknowledged that the legal advice that he obtained was wanting primarily because of his failure to provide the lawyers with the experts reports or at least alerted them to their existence and their significance.
30. Councillor D'Amico says that he understands the importance of having honesty, standards and morals in governance and he has always tried to abide by these codes in all his life, and especially as a councillor. It was submitted that he never intended to ever do the wrong thing and he wants to move forward and learn from the experience, not be punished for it. He believes the experience will make him an even better councillor.
31. Councillor D'Amico agrees with the Mayor's letter and would welcome training on pecuniary interest and to report to the General Manager. Councillor D'Amico says he would also welcome any other training or community service which the Tribunal saw fit.
32. Councillor D'Amico submits that he has learned a great deal from the experience and that he feels it has made him a better person. It has taught him humility, courage, to be thorough, to ask questions and to know he never wants to go through this situation ever again in his life. "I accept your finding on the matter."

DIRECTOR GENERAL'S FINAL SUBMISSIONS

33. In response to the "personal letter" the Director General objects to the receipt of it by the Tribunal into evidence, it being untested and brought forward at a late stage in the

proceedings well after the timetable for provision of the same had concluded. Alternatively it was submitted that, if the Tribunal did receive the letter into evidence, then the Tribunal should consider the Councillor's now stated "true and deep" contrition in the circumstances that it comes very late in the day and only after he had been found guilty of breaching the Act, that he has had the benefit of reading two sets of written submissions from the Director General on penalty and that he now appears to understand the gravity of and potential effect of the penalty options under consideration by the Tribunal. It was submitted that the letter from Councillor D'Amico does not evince any real understanding or appreciation of the nature of or gravity of the found breach of the Act and that the Tribunal should accordingly accord the letter little weight.

CONSIDERATION

34. Section 482(1) of the *Local Government Act 1993* provides:

"482 Decision of a Pecuniary Interest and Disciplinary Tribunal - pecuniary interest matters

- (1) The Pecuniary interest and Disciplinary 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 6 months, or
 - (d) disqualify the councillor from holding civil office for a period not exceeding 5 years, or
 - (e) suspend the councillor's right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 6 months (without suspending the councillor from civic office for that period)."

35. There is no doubt on the uncontested evidence before this Tribunal that Councillor

D'Amico is a man of honesty and integrity. While it was originally submitted by Counsel on behalf of the Director General that Councillor D'Amico had intentionally withheld relevant information from and gave misleading information to the solicitor, this Tribunal for the reasons set out in its Statement of Decision of 21 July 2006 was not prepared to draw these conclusions. The Tribunal has made no finding that Councillor D'Amico acted in an intentionally dishonest manner or that he consciously or intentionally set out to breach the provisions of the Act.

36. It is also clear from the evidence before this Tribunal that Councillor D'Amico is a totally committed councillor serving the Lane Cove community in a variety of commendable ways. For reasons set forth in its Statement of Decision of 21 July 2006, this Tribunal is of the opinion that it was Councillor D'Amico's total commitment to the community and the delivering of the Woolworths development which he saw as of great benefit to the community which seriously distracted him from properly carrying out his duties under the Act and from properly and diligently considering whether or not he had a pecuniary interest. In this sense, he was blinded by the commitment as he saw it to the community, rather than properly applying his mind to the questions raised by the Act and giving due care to the determination of the question of whether or not there was a possible affectation of the proposed development on the business.
37. Having so said, the breaches of the Act which have taken place are grave. They involve core provisions of Chapter 14 of the *Local Government Act 1993*. Not only did Councillor D'Amico fail to properly apply himself to the relevant question, as found by this Tribunal, there was no justification for the Councillor to reject the two experts' reports which he did. The message contained in the two experts' reports was clear and unmistakable and it was almost inconceivable that there would not have been a reasonable chance or possibility of increased business to the Councillor's business as a result of the matter before the Council. If he had properly and diligently addressed the question, it ought to have been plain to him that he did in fact have a pecuniary interest. The problem was compounded by Councillor D'Amico, for no justifiable reason, not giving to his lawyer the experts' reports which were plainly relevant to the question the

lawyers were asked to advise on.

38. The seriousness of the breaches that occurred are magnified by the fact that the value of Councillor D'Amico's business significantly increased as a result of the development proposal. That increase was in the order of \$75,000 which was realised by the Councillor when he sold the business in September/October 2004 after the Council's resolution in question.
39. The Tribunal also takes into account that it has serious reservations as to whether or not Councillor D'Amico genuinely appreciates the gravity of his conduct and the breaches which have occurred. It was plain that until his letter of 2 October 2006 Councillor D'Amico did not accept the Tribunal's findings, he did not accept the gravity of the breaches and he demonstrated no contrition at all for what had occurred. Such expressions, as are contained in his letter of 2 October 2006 in this regard ought to be read in light of his earlier submissions and the fact that they were only forthcoming after reading the Director General's submissions on penalty which drew attention to these matters.
40. The Tribunal does not have power to order that Councillor D'Amico undertake any form of training on pecuniary interest matters and while in his letter of 2 October 2006 Councillor D'Amico expressed the view that he would welcome such training, no undertaking is offered to this Tribunal. While it may be viewed as a technical approach, Councillor D'Amico's letter of 2 October was written after the Submissions in Reply on behalf of the Director General in which it was expressly pointed out that no such undertaking had been made by the Councillor himself.
41. Taking into account the totality of the evidence and the totality of the submissions on behalf of the Director General and on behalf of Councillor D'Amico, this Tribunal is of the opinion that the gravity and circumstances of the breaches dictate that one of the two consequences proposed by the Director General be imposed. The Tribunal considers that the breaches that took place in the present case were flagrant in a sense that the facts

which gave rise to the breach were patent for all to see, or at least all who cared to properly apply their minds to the questions raised by the provisions of the *Local Government Act 1993*. Councillor D'Amico had ample time to so apply his mind, but he did not do so.

42. The Tribunal is of the opinion that Councillor D'Amico's breach of the Act warrants him being suspended from civic office for a period of 5 months. The period of suspension will be postponed for a short time to enable Councillor D'Amico and the Council to re-organise their respective schedules so as to avoid undue disruption to the Council's business and Councillor D'Amico's affairs as a result of the suspension.

THE TRIBUNAL'S ORDER

43. The Tribunal's order is as follows:

The Local Government Pecuniary Interest and Disciplinary Tribunal, **HAVING FOUND** that a complaint made by the Director General, Department of Local Government, pursuant to s.460 of the *Local Government Act 1993* that against Councillor Ricardo D'Amico being a councillor of Lane Cove Municipal Council contravened Chapter 14, Part 2 of that Act in respect of the consideration by the Council at a meeting of 21 July 2004 of a proposal by Woolworths Ltd to build a retail development at Austin Street, Lane Cove has been proved.

Pursuant to s.482(1) of the Act, the Tribunal **ORDERS** that Councillor D'Amico be and he hereby is suspended from civic office for a period of 5 months commencing on 1 November 2006 and expiring on 31 March 2007.

44. The Tribunal's order will be furnished to Councillor D'Amico, the Director General and Lane Cove Municipal Council forthwith.
45. Copies of the Tribunal's Statement of Further Decision will be provided to Councillor

D'Amico and the Director General in accordance with s.484(1). Pursuant to s.484(3) copies will also be provided to Lane Cove Municipal Council and such other persons as the Tribunal thinks fit.

Date: 19 October 2006



B.P. Officer QC
Pecuniary Interest And Disciplinary Tribunal