LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO. 4/1998

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: COUNCILLOR WILLIAM PETER SMITS, SNOWY RIVER SHIRE COUNCIL

STATEMENT OF DECISION

Dated: 30 June 1999

I N D E X

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STATEMENT OF DECISION

THE COMPLAINT

On12 January 1999 the Tribunal received from the Director-General, Department of Local Government, a Report of an investigation into a complaint made by the Director-General on 31 August 1998 pursuant to section 460 of the Local Government Act, 1993, that William Peter Smits, being a Councillor of Snowy River Shire Council, contravened section 451 of that Act at meetings of the Council's Environmental Services Committee held on 5 March 1996, 5 November 1996 and 1 July 1997 and at meetings of the Council held on 19 March 1996, 19 November 1996, 20 May 1997 and 15 July 1997 with respect to consideration by those meetings of proposals to amend the existing Snowy River Local Environmental Plan by adopting a new Local Environmental Plan for the whole Shire.

It was alleged that Councillor Smits had a pecuniary interest, within the meaning of the Act, in those proposals and that, in contravention of the provisions of section 451 of the Act, failed to disclose his interest to the meetings and took part in the consideration and discussion of and voted on questions relating to the proposals.

After considering the Report, the Tribunal, pursuant to section 469 of the Act, decided to conduct a hearing into the complaint and on 20 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. Councillor Smits was provided with a copy of the Director-General's Report and the documents attached thereto. After correspondence between the Tribunal and the parties in the course of which Councillor Smits indicated that he desired to contest some of the allegations and would represent himself in the proceedings, the Tribunal appointed 29 March 1999 at Cooma Court House for the hearing.

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. Councillor Smits appeared in person.

The Director-General's Report of the investigation and the documents attached to the Report, was treated by the Tribunal as evidence and information before it for the purposes of the hearing and was admitted as Exhibit A. The Tribunal's Notice of Decision to Conduct a Hearing dated 20 January 1999 became Exhibit B. Correspondence with the parties was admitted as Exhibits C – J and N.

The Snowy River Local Environmental Plan No. 4 (NSW Government Gazette No.193, 16 December 1981) was Exhibit K. The Snowy River Local Environmental Plan No.5 (NSW Government Gazette No. 57, 30 April 1982) was Exhibit L. The Snowy River Local Environmental Plan 1997 (NSW Government Gazette No.79, 15 May 1998) was Exhibit M.

At the hearing, Councillor Smits tendered a letter dated 10 September 1998 and a brochure relating to a proposed interview which had been sent to him from the Investigation Branch of the Department of Local Government. This was admitted as Exhibit O.

At Councillor Smit's request, Mr Tony John Day, one of the Department's Senior Investigators who had interviewed Councillor Smits in relation to the complaint, went into the witness box to answer questions by

Councillor Smits. Subsequently Councillor Smits gave oral evidence to the Tribunal and was cross-examined by Mr Lawler.

Councillor Smits and Mr Lawler both made oral submissions to the Tribunal in the course of the hearing.

The proceedings were recorded and a transcript produced to which references will be made by the Tribunal by the letter "T" followed by the page and line numbers.

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

BACKGROUND TO THE COMPLAINT

The events which led to the Director-General's complaint were briefly summarised in the Tribunal's Notice of Decision to Conduct a Hearing (Exhibit B). Whilst Councillor Smits strongly contested the view that he had a pecuniary interest as defined by the Act in the matters under consideration at the meetings which he attended he did not dispute the facts relating to the meetings. He told the Tribunal at the hearing that he did not deny being present at the meetings or participating or voting. He said to the Tribunal:

> **"I would like to address the Tribunal on the aspect that, in my view, I did not have a pecuniary interest in the matters being considered at those various meetings and, even if I did, that such interests were so remote and so insignificant that they would not have a bearing on those decisions made by Council from time to time."**: (T4/44-58)

Some of the issues raised by the complaint and Councillor Smits' contentions will require detailed consideration by the Tribunal but it is convenient to begin with a brief summary of the background events to which reference was made in the Tribunal's Notice (Exhibit B).

From 18 December 1981 development and subdivision of land in the Snowy River Shire Council area was controlled by the Council's Local Environmental Plan No.4 (LEP4) and also became subject to the provisions of a Regional Environmental Plan for the Shire area which operated in parallel with the Council's own LEP.

On 30 April 1982 LEP4 was amended by the Council's Local Environmental Plan No.5 (LEP5) which permitted a subdivision of 34 lots to

be created on the outskirts of the village of Berridale. This particular subdivision became known as the "Ivy Cottage Estate".

Under the combined operation of LEP4 and LEP5 the lots in the Ivy Cottage Estate were zoned Rural 1(a) under which zone the land could be used for the purposes of agriculture without consent and one single dwelling was permitted on each lot. In effect, the lots in the Ivy Cottage Estate could not be further subdivided, dual occupancy and the use of the land for purposes inconsistent with the purpose of agriculture were prohibited. (Exhibit K, Exhibit A, Annexure 9, 7/15-31)

Councillor Smits was elected to the Snowy River Shire Council in September 1995 prior to which he had served as the Council's Shire Clerk and General Manager since moving to Berridale in 1987. Before that Councillor Smits had been employed as a Local Government Officer by five other country Councils. He described his experience as that of "an itinerant Local Government Officer" spanning a period of 30 years, finally coming to settle in Berridale. (T8/44; Exhibit A, Annexure 15, p.3)

In 1988 Councillor Smits and his wife, as joint tenants, purchased one of the lots in the Ivy Cottage Estate, Lot 12, DP701757, O'Brien Avenue, Berridale, having an area of 1.849 hectares (which equals about 4.57 acres and 18,490 square metres). They built a house and established their home on the land and have continued to live there ever since.

Being zoned Rural 1(a) and subject to the operation of LEP4 and LEP5, Councillor Smits' land was subject to the restrictions on use and subdivision described above.

In 1994 the Council decided to review its existing Local Environmental Plan. Between 1994 and 1996 the Council's senior staff made a number of reports to the Council and to its Standing Committee, the Environmental Services Committee, on matters involved and issues arising out of the proposed review.

In 1996 the Council's Director of Environmental Services, Mr Vivian Norman William Straw, prepared a report for presentation to a meeting of the Environmental Services Committee to be held on 5 March 1996. The subject of the report was a draft of a new Snowy River Local Environmental Plan

being prepared as Stage-1 of a two-stage LEP process intended to completely revise the Shire's planning and development controls. The report described the objective and the two-stage process by which it was proposed to introduce the new controls throughout the Shire. The report also described for the benefit of Councillors the main elements of the proposed draft Local Environmental Plan Stage-1. It pointed out that the existing number of zones within the Shire was considerably reduced in the draft, broadening their range of permissible development, after which the report stated as follows:

> "**As mentioned above, the number of small zones in the Shire has been greatly reduced and several of the Shire's small towns which currently have a multiplicity of zones have had their range of zones reduced to one zone, the Zone 2(v) – Village, within which any urban development is permissible and it is proposed during the Stage 2 planning process or shortly thereafter to develop DCP's (Development Control Plans) which will identify development precincts within the villages, indicating the location of development types."** (Exhibit A, Annexure 19, Business Paper, p.31)

Under the Stage-1 draft LEP attached to the report, the zoning of the land contained in the Ivy Cottage Estate, including Councillor Smits' land, would be changed from its zoning as Rural 1(a) to the proposed new zone, Zone 2(v) – Village. So far as the provisions of this proposed Stage-1 draft LEP extended, the change to Village zoning meant that the restriction of uses of the land to agriculture and the erection of one single dwelling with no right to subdivide the land were removed, development for a wide range of uses became permissible with the Council's consent, including dual occupancy and integrated housing and the Council could consent to subdivision of the land. (Exhibit M; Clauses 13, 31, 33 Exhibit A, Annexure 9, p.8/31-41)

Mr Straw's report went before the Council's Environmental Services Committee at its meeting on 5 March 1996 with a recommendation that the Committee deliberate on the draft plan, making changes as it saw fit and recommend to the Council to adopt the result for public exhibition as soon as the requisite certificate under the Environmental Planning & Assessment Act, 1979 had been obtained from the Department of Urban Affairs and Planning.

The report initiated the series of meetings of the Environmental Services Committee and the Council which were attended by Councillor Smits and are the subject of the present complaint.

At each of the meetings matters relating to development and adoption by the Council of the draft Stage-1 LEP were considered and voted upon. It is unnecessary to detail the business transacted at these meetings and the participation of Councillor Smits in the proceedings at the meetings. They were referred to in the Tribunal's Notice of Decision to Conduct a Hearing (Exhibit B) and are not disputed by Councillor Smits.

Allegations Made To The Minister And Department Of Local Government Regarding Pecuniary Interest – Preliminary Inquiries

The Director-General's Report to the Tribunal informed the Tribunal that both the Minister for Local Government and the Department of Local Government received correspondence from various people alleging that staff and Councillors of Snowy River Shire Council may have a pecuniary interest in the Council's proposal to amend its Shire wide Local Environmental Plan. The pecuniary interest allegations centred upon staff and a Councillor having a possible pecuniary interest in the review of the LEP as a result of their either residing, and/or owning property, in Berridale or in the nearby Ivy Cottage Estate. The perceived pecuniary interest of staff was that they may have a vested interest in promoting a change to the Council's LEP which would be of financial benefit to them. In respect of Councillor Smits the alleged breach of the pecuniary interest provisions was that the proposed change of zoning of his property would allow, with Council consent, a subdivision and more flexibility with the land. (Exhibit A, Report p.3)

The allegations led the Department to make inquiries with the Council on 23 May 1997 which resulted in the Council's General Manager, Ronald Douglas Malcolm, writing to the Department on 18 June 1997. (Exhibit A, Annexure 1)

The General Manager's letter explained that the development by the Council of new land use plans was being done in two distinct stages, the first

to broadly define proposed land use strategies in the Shire and include those strategies in the draft new LEP which was then on exhibition, the second to examine in closer detail a range of issues in consultation with the community and present another draft LEP that would see the whole process complete. The letter attached a list of 24 issues to be considered and dealt with in the Stage-2 LEP process. The letter also explained that the State Government, in tandem with the Council was reviewing its Regional Environmental Plan which set out issues which the State considered significant in terms of land use in the Shire and was specific to the Shire in that it did not affect any Shire except the Snowy River Shire.

The letter referred specifically to the Ivy Cottage Estate in the Village of Berridale and to the fact that the Council's Strategic Planning Manager, Mr Peter Bruno Reynders, owned and resided on one of the lots within that estate which, the letter said, was zoned "Rural Residential". The letter stated that the "infrastructure" in that estate constrained any further development.

In relation to the whole of the Berridale Village the letter stated that it was proposed that it would be zoned "Village" in the new LEP Stage-1 allowing the Council the flexibility to determine future development by the use of a Development Control Plan which had not yet been prepared and would not be prepared by Mr Reynders.

On the question of Mr Reynders having a pecuniary interest in the proposed rezoning of the Berridale Village, the letter stated on that 4 October 1994 Mr Reynders had made a declaration to Council of his interest in the housing estate in Berridale in relation to future strategic planning work on that estate.

As to Councillor Smits, the letter stated that he owned a house in the Ivy Cottage Estate but was not directly involved in the planning process otherwise than as a Councillor on the full Council.

After listing the names of all the Councillors the letter went on to state:

> **"The Stage 1 draft LEP now on exhibition puts a freeze on any future rural smallholdings and in that sense development potential is reduced on rural land. As publicly declared by Council, Stage 2 of the planning process involves identification of those areas in the Shire deemed suitable for future rural**

smallholdings. This process has not yet commenced. The issue of rural smallholdings is controversial in this Shire with a group of rural landowners opposed to any restrictions on their capacity to create new rural smallholdings.

All Councillors (particularly farmers) owning rural land are affected by the temporary freeze on rural smallholdings in so much as they do not have the flexibility at this point to sub-divide their land into rural smallholdings."

The letter then stated that in relation to Stage-2 of Council's LEP process, it might be prudent for all Councillors to seek "exemption" from pecuniary interest provisions as, on the General Manager's own knowledge of their land ownership, it could be argued that the majority of Councillors have to some extent a pecuniary interest in terms of section 442 and 448. The letter said that he would address that issue and take it up with the Mayor and the Director of Environmental Services, Mr Straw.

State Valuation Office – Question Of Added Value

On 10 December 1997 the State Valuation Office was requested by the Investigations Branch of the Department of Local Government to assist the Department's preliminary inquiries into possible pecuniary interests of staff and Councillors of Snowy River Shire Council by providing a valuation for properties which the Department listed in a schedule. The request was for valuation estimates under three headings – Existing Zonings, Proposed New Zonings under a draft LEP exhibited May/June 1996 and Proposed New Zonings under a draft LEP re-exhibited May/June 1997. Listed in the schedule were the properties of Mr Reynders and five Councillors, including Councillor Smits.

On 22 December 1997 the Area Manager of the State Valuation Office responded by letter to the Department's request. (Exhibit A, Annexure 3) As to the two LEP proposals (May/June 1996 and May/June 1997) the letter stated that there was no significant difference between the two as far as values were concerned. The letter then went on to supply the valuation information which had been requested in respect of each of the persons listed in the Department's schedule. The information given was prefaced by the statement, "The valuation information supplied to you relates to what is

considered to be the "market's appreciation" of the proposed change in zoning." With regard to Councillor Smits the following appears:

> **Land owned by William Smits**
>
> **Lot 12, DP701757, O'Brien Avenue, Berridale. Area 1.849 hectares.**
>
> **This subdivision was created under L.E.P. 5 on 30 April 1982 which created a maximum of 27 allotments between 4,000 and 10,000 square metres, and seven allotments ranging in area between 10,000 and 20,000 square metres. On viewing the Deposited Plan 34 lots have already been created.**
>
> **The change of the zoning to 2(v) may allow a wider range of possible uses and there is some potential to subdivide this lot into say two lots of approximately 9,000 square metres.**
>
> **This, of course, would be "with consent" so the proposal would be put on exhibition and public comment/submissions may present some problems for the applicant.**
>
> **In addition to this normal subdivision costs including Council contributions would have to be met by the applicant.**
>
> **<u>Conclusion</u>:- Some potential does exist but there is a risk. A hypothetical prudent purchaser would weigh up this risk and make allowance for it in the amount he/she is prepared to offer for the land."**

In the schedule attached to this letter the value of Councillor Smits' land under the then existing zoning was stated to be $38,000. The value of the land under the proposed new LEP was stated to be $45,000, an increase of $7,000. The Director-General relied upon this estimate of increase in the value of Councillor Smits' land to support a contention that Councillor Smits had a pecuniary interest in the change of zoning proposed for the draft Stage-1 LEP dealt with by the meetings of the Environmental Services Committee and the Council in which he participated. Having regard to some of the arguments and submissions made by Councillor Smits to the Tribunal at the hearing, which will be considered in due course, there are some matters relevant to the question of change of land values attributable to the proposed change of zoning which are mentioned in the State Valuation Office's letter and should be mentioned here.

With respect to the land owned by Mr Reynders, the letter pointed out that the land value of that site and other comparable sites had fallen between 1996 and 1997 and that it was considered that the wider possible range of

uses of the land had no real effect on its value. The letter went on to say, "It is also important to note that values in the Town of Berridale and surrounding area have not changed significantly since the early 1980s e.g. the land of Lot 28, DP701757 in 1981 was $28,000 and it is now $32,400." The letter continued by stating that it should be noted that the commercial area of Berridale is not strong, a number of shops close for a significant part of the year, there was no change in values between 1996 and 1997 and, "Additionally, the proposed change in zoning is not considered to affect the values because of the limited demand in this area."

In relation to lands owned by the other four Councillors whose names were listed in the Department's schedule, the letter stated that there was either no increase in value or none of any significance attributable to the changes proposed by the new draft LEP. It was noted that in the neighbouring towns of Anglers Reach and Adaminaby there was either no demand or only limited demand for residential land in those localities and that in Adaminaby land values had fallen in the previous 12 months. (Exhibit A, Annexure 3)

First Response By Councillor Smits

By letter dated 2 February 1998, the Acting Director-General of the Department of Local Government informed Councillor Smits that the Department had received information suggesting a possible breach by him of the pecuniary interest provisions of the Local Government Act, stated the substance of the allegations and invited his comments in order to facilitate the Department's inquiries into the matter as well as ensuring that the Department fully understood Councillor Smits' position. (Exhibit A, Annexure 4)

Councillor Smits replied to the Acting Director-General's letter on 18 March 1998. The letter contained the following comments by Councillor Smits with respect to the suggestion of a possible breach by him of the pecuniary interest provisions of the Local Government Act:

"The location of the residence on the land in question is such that one or more additional residences could be located on the remaining vacant land provided approval for such further subdivision could be obtained.

However:

1. **The Council has indicated an intention not to allow further subdivision on existing rural residential lands and has indicated that this intention be embodied in a D.C.P. to be drafted in conjunction with phase 2 of the L.E.P., and**
2. **The Council could not, even if it was of a mind to do so, approve further subdivision of the rural residential land of which I am the joint owner for the reason that the present services serving the estate were designed only for a 30 lot subdivision and are of a capacity that will preclude further subdivision.**

I am of the view that the person(s) making the allegation is unaware of not only the restriction on further subdivision due to lack of capacity of the services presently available but also the stated intention of Council of not allowing further subdivision of existing rural residential lands." (Exhibit A, Annexure 5)

Comments By The Council's Director Of Environmental Services On The Development Potential Of Councillor Smits' Land

On 27 May 1998 the Department followed up the statements made by Councillor Smits in his letter to the Department of 18 March 1998 by writing a letter to the General Manager of the Council asking him to provide advice from the appropriate Council staff on the question whether subdivision consent for additional residences on Councillor Smits' land could be obtained from the Council. (Exhibit A, Annexure 6)

In response to this request a letter dated 22 July 1998 was written to the Director-General by Mr Straw, the Director of Environmental Services. The letter contained the following:

"CONFIDENTIAL

Dear Sir

Following up on your letter of 27 May 1998 (FF96/0354 DTS/27760), Council makes the following comments against your questions. At the time of writing a new instrument (LEP 78) has been gazetted (15/5/98), just prior to your letter. It

is assumed that your reference to the present scheme refers to LEP 4 which was in place on that date

1. **The previous planning scheme relevant to the land was LEP 4 which was amended by LEP 5 to allow subdivision of 34 lots on the land. This subdivision has been completed. Mr Smits lives on one of the resultant lots and no further subdivision was permitted under that plan. Under the new plan gazetted on15 May 1998, Mr Smits' land clearly has subdivision potential.**
2. **Given the size of Mr Smits' land, in the event of a refusal by Council of a subdivision Clr Smits would have a right of appeal through section 99 of the EPA Act.**
3. **The land was rezoned from rural to village and Council has no resolution to limit subdivision of village land. LEP 1997 Clause 28(1) attaches Schedule 2 to the LEP which prohibits re-subdivision of rural residential land. The subject land is not included and has a theoretical minimum lot size of 700m^2. During the next 12 months, Council anticipates preparing a D.C.P. to provide such a limit.**
4. **Council has not been tested on the above issue. NB. No development applications have been lodged to date.**
5. **Council is proposing to limit development and subdivision in the village of Berridale and specifically within the Ivy Cottage Estate through a DCP in phase 2 of Council's LEP. The details of the DCP have not yet been worked out.**
6. **Council will be in a position to approve further lots in Ivy Cottage Estate, there are infrastructure limits, eg. supply of electricity which limit part of Ivy Cottage Estate.**
7. **In the past Council has reluctantly delayed approval of a dual occupancy development due to the infrastructure problems but eventually these were overcome and consent granted.**
8. **An appeal in a court would have to have at least an even chance of success provided the number of lots created were reasonable. Under the previous plan (LEP4) the chances of a successful appeal would have been slim.**
9. **In regard to Mr Smits' land, feasible options by an applicant might include an undertaking to significantly upgrade the electricity supply to the locality and to design large lots rather than subdivision to a minimum size. Alternatively a cluster housing development with say two or three dwellings within one building may be feasible under say strata or community title legislation.**

10. Attached is a map showing the approximate location of the dwelling house on his land.

11. In July 1997 when Council was voting on these issues, he would have been in a position to be aware of the above issues." (Exhibit A, Annexure 8)

The complaint against Councillor Smits made by the Director-General on 31 August 1998 (Exhibit A, Annexure 12) followed the receipt by the Department of Mr Straw's letter.

INTERVIEWS

Following the Director-General's formal complaint, interviews were conducted by the Department's Investigation Officers as follows:

Councillor Smits, 14 September 1998 (Exhibit A, Annexure 15)

The General Manager, Mr Malcolm, 15 September 1998 (Exhibit A, Annexure 14)

The Manager, Strategic Planning, Mr Reynders, 15 September 1998 (Exhibit A, Annexure 10)

The Director, Environmental Services, Mr Straw, 16 September 1998 (Exhibit A, Annexure 9)

The interviews were recorded and the Annexures referred to are transcripts of those recordings included in the Director-General's Report to the Tribunal.

RELEVANT PROVISIONS OF THE LOCAL GOVERNMENT ACT, 1993

There are a number of provisions of the Local Government Act which require to be considered in relation to the complaint against Councillor Smits. They are as follows:

"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 or another person with whom the person is associated as provided in section 443.

(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."

By section 443 a person is taken to have a pecuniary interest in a matter if, amongst others, the person's spouse has a pecuniary interest in the matter of which the person is aware.

Section 448, referred to in subsection (2) of section 442 above, describes six different types of interest which are exempted from the obligation in the Act to make disclosures of interests. The sixth of these exemptions is material in the present case but it existed in two different forms over the course of the meetings here in question. The sixth exemption was amended by the Local Government Amendment Act, 1996 No.69. The amendment commenced on 11 November 1996 (NSW Government Gazette No. 122, 7199). At the time of the Environmental Services Committee meetings of 5 March 1996 and 5 November 1996 and the Council meeting of 19 March 1996 the sixth exemption took the following form:

> **"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 has a pecuniary interest; or**
>
> **(b) land adjoining, or adjacent to, land referred to in paragraph (a); or**
>
> **(c) other land in proximity to land referred to in paragraph (a), if the change in uses would affect the value of the land referred to in paragraph (a)."**

In relation to the Environmental Services Committee meeting of 1 July 1997 and the Council meeting of 19 November 1996, 20 May 1997 and 15 July 1997 the amended form of the exemption provided:

> **"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)"

Sections 444 to 447 state what disclosures of interests are to be made by different classes of person. Section 444(b) provides that a Councillor must disclose pecuniary interests in accordance with section 451. Section 446 provides that a member of a Council Committee, other than a Committee that is wholly advisory, must disclose pecuniary interests in accordance with section 451. Section 451 provided 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."

Section 457 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 at the meeting was a matter in which he or she had a pecuniary interest."

THE ALLEGED PECUNIARY INTEREST OF COUNCILLOR SMITS

The pecuniary interest alleged against Councillor Smits was set out in the Tribunal's Notice (Exhibit B) in the following terms:

"**10.1. The business before the Council's Environmental Services Committee and the Council at the meetings listed above concerned proposals to make an environmental planning instrument which would effect a change of the permissible uses of Councillor Smits' land within the meaning of the provisions of section 448 of the Local Government Act, 1993.**

10.2. The proposed new LEP would locate Councillor Smits' land in the village of Berridale zoned as Zone 2(v) - Village wherein, with Council consent, virtually any use might be permitted including use for residential purposes (including dual occupancies) commercial or other uses appropriate to a village, thereby providing the land with a potential for subdivision and development which it lacked under the existing LEP and which if adopted by the Council and carried into effect was calculated to produce an appreciable increase in the value of the land.

11.1. It is alleged that by reason of the facts set out in paragraph 10 above, there was a reasonable likelihood or expectation of appreciable financial gain to Councillor Smits if the proposed new LEP containing rezoning of his land to Zone 2(v) – Village under that LEP was recommended by the Environmental Services Committee to the Council for adoption by the Council and the Council were to adopt that LEP and carry it into effect."

THE CENTRAL ISSUES ON THE QUESTION WHETHER COUNCILLOR SMITS HAD A PECUNIARY INTEREST

A number of questions of law and fact incidental to the complaint which need to be dealt with by the Tribunal may be deferred at present in order to come directly to the central issues raised by Councillor Smits in his responses to the Director-General and the Department's Investigators and in his evidence and submissions to the Tribunal at the hearing.

As mentioned earlier, Councillor Smits strongly disputes that he had a pecuniary interest in the matter of the proposed changes to the existing LEP as they would apply to the land in the Ivy Cottage Estate owned by him and his wife. The meaning and application of section 442 and the sixth exemption in section 448 of the Act are critical to that question.

The inter-relation between these two sections has recently been considered by the Tribunal in two cases, Councillor Virgona, North Sydney Council (PIT3/1998, Statement of Decision 23 April 1999) and Councillors Bennett, Staltare and Zappacosta, Griffith City Council (PIT2/1998, Statement of Decision, 7 May 1999). In both of those cases, as in the present case, the pecuniary interest alleged by the complaint consisted of "an interest in a proposal relating to the making, amending, altering or repeal of an environmental planning instrument" within the meaning of those words in

section 448. The question was whether the interest came within the exception, "other than an instrument that effects a change of the permissible uses of land (etc.)" and, therefore, was not exempted from disclosure by section 448.

The Tribunal dealt with that question principally in Councillor Virgona's case where it was contended that the changes which the draft LEPs proposed did not amount to a change of the "permissible uses of land" within the meaning of those words in the section. The changes included changes of provisions relating to subdivisions as to which it was argued that a subdivision of land was not a "use" of land for the purposes of the exception and, therefore the exemption applied. The Tribunal rejected these contentions for the reasons which are fully set out in its Statement of Decision in Councillor Virgona's case to which reasons the Tribunal adhered in the Griffith City Councillors' case: Councillor Virgona, pp.46-49; Griffith City Councillors, pp.28-31.

The changes of the permissible uses of Councillor Smits' land which would be effected by the draft LEP considered at the meetings in which he participated included changes in relation to permissible subdivision of the land but also changes of other permissible uses, all of which, in the opinion of the Tribunal, answer the description, "an instrument that effects a change of the permissible uses of land" as those words were interpreted by the Tribunal in the two cases abovementioned. Councillor Smits has never contended otherwise but, as he appeared before the Tribunal without legal representation, it is appropriate to draw attention to the previous rulings of the Tribunal on the meaning and application of section 448. Councillor Smits' contentions centred on the succeeding provisions of the exception referring to the existence of a pecuniary interest arising from the changes of the permissible uses of the land in question proposed by the draft LEP. In this connection account has to be taken of the fact that the wording of the exception was changed by amendment on 11 November 1996. Prior to the hearing the Tribunal drew Councillor Smits' attention to the amendment in a letter dated 24 March 1999 (Exhibit N) in which the Tribunal expressed the opinion that the change of wording made no substantial difference to the

issues arising out of the complaint. In Councillor Virgona's case the Tribunal referred to both forms of the exception as quoted above and expressed the view that the intention of both forms was that there was to be no exemption from disclosure if the matter was a change of uses proposed by an environmental planning instrument that would affect the value of the person's land. As to the meaning of the amended form of words, the Tribunal held:

> **"The exception operates when the particular land of the person (or land adjoining, or adjacent thereto), is the subject of, or is included in an area which is the subject of, a proposal that affects a change of permissible uses of the land and the person has a pecuniary interest in the proposal in consequence of the person's ownership of the firstmentioned land.**
>
> **The person will have a pecuniary interest in the proposal if there is a reasonable likelihood or expectation of financial gain or loss if the proposal be adopted or rejected by the Council. Thus the concept which constitutes the exception is a proposal for change which involves a prospective change in the value of the person's land."** (Councillor Virgona, above, pp.46-47)

The Tribunal now turns to consider Councillor Smits' contentions on the question of a pecuniary interest in the course of which he took issue with the view of the valuer from the State Valuation Office that the proposal in the Stage-1 draft LEP would increase the value of his land.

Councillor Smits' Contentions

Councillor Smits commenced by saying to the Tribunal:

> **"I claim there was no failure on my part to declare a pecuniary interest since, in my opinion, such a pecuniary interest did not exist, and that even if such a pecuniary interest did exist, … that it was so insignificant that it could not be regarded as being likely to influence any decision a person might make as per section 442 of the Local Government Act, 1993."** T6/11

He went on to say that after a great deal of serious thought he had come to the view that in fact "there are two scenarios of pecuniary interest in this instance." The submissions which followed, using his own words where appropriate, may be summarised as follows:

1. **"The first scenario is that of a gain, in terms of section 442(1) which may or may not be appreciable, that might or might not accrue to me, and when I say "me" I include my wife and my family, as a result of Council's decision to bring about a**

new LEP in 1997, and with the introduction of the village zoning into that plan to encompass all of the lands within the Berridale Village.

It is observed, and I agree with the observation that a gain will accrue to me as a result of the creation of the potential to subdivide my land provided Council consent can be obtained and I, as subdivider can meet the various conditions of subdivision. That is what I perceive to be the likelihood of an appreciable gain in terms of the Act. The potential to subdivide will also be with the land and will remain with the land no matter who owns the land and whether or not we decide to subdivide.

I emphasise the gain is based purely on the potential to subdivide and it is evidenced by the advice received from the State Valuation Office … …. The essence of my contest in this scenario is whether or not the gain is appreciable or substantial. I do not dispute the existence of the gain. I only wish to demonstrate that, in fact, the gain cannot be considered to be appreciable in terms of section 442(1) of the Act."

Councillor Smits then endeavoured to make the two points in relation to his "first scenario" which follow:

(a) The State Valuation Office advice and valuation **"was merely a desk valuation"** not supported by evidence of comparable sales. He said that in his knowledge and experience valuations by that office are greatly influenced by actual sales taking place in the market place where there is a willing buyer and a willing vendor with sales taking place in the ordinary course of business but to his knowledge no sales of blocks of land in the Ivy Cottage Estate equivalent to his block had taken place before, during or after the creation of the LEP. Therefore, without seeking to denigrate the expertise and honesty of the staff of the State Valuation Office, he queried the amount of $7,000 as being a **"reasonable"** estimate of gain resulting from the creation of the subdivision potential for his land. He said to the Tribunal:

"I say this particularly in the light of the depressed state of the land market at Berridale. It is my contention that Berridale has ceased to be a snow destination as it once was. The market for land in Berridale will continue to be depressed and any premium for subdivision potential, as forecast by the State Valuation Office would, in my view, very quickly evaporate and dissipate."

As to the poor state of the land market in Berridale, Councillor Smits instanced the case of the Snowy River Shire Council subdividing some

land in the early 1980s and 18 years later the Council was selling some of the land for overdue rates because of the depressed state of the market: T7/5-53

(b) Assuming that $7,000 as a premium for the land's subdivision potential was a valid estimate, whether not that figure could hold true for the future, **"$7,000 as a percentage of the total valuation of my property, say $300,000, … … works out at a percentage of some 2.3 per cent … … which is not even set in concrete, (and) cannot be considered to be an appreciable gain in terms of section 442(1) of the Act when such gain only relates to a potential to subdivide in what can only be described as a potentially depressed land market in Berridale."**: T7/55-8/14

2. **"The second scenario is that of an expectation of an appreciable gain as a result of subdivision actually taking place following the obtaining consent from Council and meeting the various conditions of consent. So here I am not talking about the potential to subdivide I'm talking about the actual act of subdivision.**

I can only have an expectation of a gain in this scenario if, indeed, I have an intention to subdivide at the time of the creation of the LEP or at some time in the future. Any future intention to subdivide has to be considered only as being part of the potential to subdivide. I want to say here very clearly and unequivocally I never had, I have not now and will never have in the future, any intention to subdivide our land of an area which we presently call "home"."

Councillor Smits went on to refer to his career as **"an itinerant local government officer for some 30 years"** and the desire of himself, his wife and family to **"put down some roots"** when they came to Berridale in 1987 with the intention of making his service in the Snowy River Shire Council his last as a Council Officer. He went on to say:

"So, having acquired our Ivy Cottage Estate in 1988, and having come to love the area, we quickly decided to build a home and settle down for what we thought, it was all time, if at all possible, in order to meet our requirements for privacy, tranquillity, piece of mind and being able to run a few animals, we needed at least 10,000 square metres then and we will envisage that we need the same area of land in the future.

In all modesty, I can say that we have one of the finest 5-acre blocks in the Berridale district, with all services provided, and no amount of subdivision reward is going to entice us to consider subdivision and in the process destroying the amenity of the property we presently own. And despite what Council Officers may have inferred or alleged I have never, and I am going only

to say this once, I have never expressed to anybody a desire or an intention to subdivide our land now or in the future. If anybody says that I have made such statements in the past I can only conclude they are telling an untruth.

Therefore, since not having any intention to subdivide, in my perspective I cannot be deemed to have had an expectation of an appreciable gain and hence I have no pecuniary interest." T8/16-T9/27

Councillor Smits proceeded to put forward two further contentions on the question whether the changes of permissible uses of land proposed by the Stage-1 draft LEP would result in an increase in the value of his land. In doing so he made reference to his letter to the Department dated 18 March 1998, the relevant parts of which have already been quoted above. As to the first point made by that letter, namely, that subdivision of his land for the erection of additional residences could not occur because the Council had indicated an intention not to allow further subdivision of existing rural residential lands, Councillor Smits explained to the Tribunal that he had misinterpreted the draft of the new LEP at the time he wrote the letter and had since realised that, as his "rural residential land" was to become zoned "Village" the intention expressed by Council no longer applied to it. He told the Tribunal that the realisation of his misinterpretation completely destroyed his argument and invalidated the comment he had made in the paragraph numbered 1 in his letter. However, he told the Tribunal that he adhered to the argument put forward in the paragraph numbered 2 in his letter, namely, that even if the Council was minded to approve the subdivision of his land the capacity of the existing services to the estate would preclude further subdivision: T9/30-T13/2. His contentions with regard to further subdivision being precluded by incapacity of existing services constitute the third ground on which Councillor Smits claimed that he did not have a pecuniary interest, which follows:

3. Councillor Smits told the Tribunal that at Council level there had been a great deal of discussion around the capacity of the services that serve the Ivy Cottage Estate which arose when there was an application for a dual occupancy on Lot 13 which is adjacent to Councillor Smits' Lot 12. Councillor Smits said that the application remained unresolved and that

not one application for a dual occupancy had been granted to the date of the hearing. He told the Tribunal as follows:

"Ivy Cottage Estate was designed as a rural residential subdivision with 34 blocks and there remains a degree of uncertainty at the level of Council Officers as to whether or not the services currently in place will allow further subdivision of the estate.

It is inevitable that the lack of services, that includes not just electricity but also water, sewer and drainage, this lack of capacity will arise again in the future when development applications under the Village zoning are submitted, either for subdivision or for dual occupancy. But the crucial question here is who is going to pay for the upgrading of those services if required and, in the absence of consensus amongst the landholders, a stalemate is inevitable.

As such, the argument still stands, stands up as, in my view, a valid argument to counter the allegations made against me." T13/17-49

Councillor Smits had addressed the same argument to the Department's Investigators when he was interviewed on 14 September 1998: (Exhibit A, Annexure 15, p.30/14-p.31/17) In that interview he told the Investigators that the infrastructure of the Ivy Cottage Estate was adequate only for the number of blocks already in the subdivision and he said, **"Particularly in relation to the supply of electricity, and if dual occupancy was to be permitted, the electricity system would need to be upgraded at quite an enormous cost, Council wasn't prepared to bear that cost."** (Exhibit A, Annexure 13, p.30/21) He went on to tell the Investigators that it was not possible to pass that cost on to prospective developers because the estate subdivision had reached its ultimate size with no further lands within it to be subdivided and that meant that the applicant would have to bear all of the costs for extending the capacity of the electricity system: T30/27-38

4. The fourth ground advanced by Councillor Smits rested on the fact that the Stage 1 draft new LEP was intended to be only a first step of the review process to be followed by a Stage-2 LEP and a series of DCPs all of which would finally determine the development controls applicable to Councillor Smits' land and other land in the Ivy Cottage Estate and the remaining area of the Village of Berridale.

The basis of Councillor Smits' argument was that the DCP for Berridale had **"not yet seen the light of day"** with the result that the potential for development of the land in question was **"still shrouded in a mist of uncertainty"**. He submitted, **"The initial blanket approval for subdivision by Council is certainly in place by means of Village zoning. However, the more detailed provisions governing such concept are still being kept a secret."** He then instanced an application which had been made by a landholder within the estate who had bought Lots 17 and 18 for the purpose of grazing and breeding Alpacas but, due to the lack of a development control plan for the estate Council Officers faced great difficulty in being able properly to consider the application. Councillor Smits went on:

"The point I make is if you are having problems getting approval for alpacas what sort of problems would we not have in the case of subdivision?

So the point I am making here finally is the lack of the DCP being in force at the present time, in my view, would preclude Council from making any valid assessment of any development application for subdivision that might be made by any person and yet, in the face of this great uncertainty and lack of detail, I stand accused of a breach of the provisions of the Act in respect of a matter, the details of which are still to be worked out and publicised." T13/51-T14/42

In so far as the foregoing submissions by Councillor Smits involved statements of his intentions and other matters of facts, they were adhered to by him after he had been sworn to give evidence in the witness box: T31/42-51.

The Tribunal's Conclusions

On the question of what principles apply in deciding the question whether a Councillor or other person had a pecuniary interest, the Tribunal takes the view that in considering whether there is a pecuniary interest within the meaning of section 442, the words in subsection (1) are to be construed as including reasonable chances or possibilities as well as probabilities of financial gain or loss accruing from the Council's decision in the matter. The Tribunal also takes the view that the answer to that question was intended by the legislation to rest upon an objective judgement of the relevant facts and circumstances and not on the personal individual feelings, opinions or

perceptions of the Councillor or other person involved. The basis of these views are to be found in the Tribunal's decision on the complaint against Councillor Roberts, Hastings Council, PIT1/1995, 3 August 1995, pp.18-19, 30-32 and do not need to be repeated here. Those principles will be applied in the present case where the particular issue to be considered is the prospects of the changes of permissible uses under the proposed new LEP resulting in an appreciable increase in the value of Councillor Smits' land.

Councillor Smits acknowledged at the outset of his submissions to the Tribunal that, as he put it, a gain would accrue to him as a result of the creation of the potential to subdivide his land, provided that Council consent could be obtained and the subdivider could meet any conditions, and that this potential attached to and would remain with the land no matter who owned it and whether or not he and his wife decided to subdivide it. His subsequent contentions made it clear that he did not mean by this to be conceding that he therefore had a pecuniary interest within the meaning of the Act but his initial concession provides a starting point for dealing with that issue.

Whilst Councillor Smits referred only to the potential to subdivide his land, the proposed change of zoning to Village also considerably extended the range of possible land uses. The effect of that aspect of the changes that would be effected by the new LEP on the value of land must also be taken into account.

As to the potential for further development, including subdivision, the prospects of any further development of the land were most unfavourable if the land remained zoned Rural 1(a). There was concern that rural smallholding development and rural residential development was occurring almost randomly in the Shire. As the General Manager explained to the Investigators, this had led to the draft Stage-1 LEP putting a freeze on any further rural subdivision with a view to considering whether in Stage-2 the Council would "continue the laissez-faire approach to further rural smallholdings subdivision, or develop a plan to constrain the development of rural residential subdivision to specific areas where the land was environmentally more capable of absorbing that type of development… …": (Exhibit A, Annexure 9, p.3/33-4/33; Annexure 14, p.17/12-20) It was this

aspect of Stage-1 of the draft LEP that led Councillor Smits erroneously to contend in the first point of his letter of 18 March 1998 that further subdivision of his own land would not be allowed by the Council. However the rezoning of his land to "Village" relieved it from the doubts and difficulties that attended the prospect of developing land zoned Rural 1(a). This in itself was calculated to make the land more attractive to a prospective purchaser.

As to the land's potential for subdivision, Councillor Smits in his letter dated 18 March 1998 conceded that the location of his house on the land was such that one or more additional residences could be located on the land if approval for a further subdivision could be obtained. In the course of his evidence he said to the Tribunal, "By reason of the location, I indeed would have probably a potential for two additional blocks, one on each side of the house.": T46/51-47/4 He made this statement after being asked to state his view of "the potential for subdivision from the physical point of view, and the availability of frontages and services and so on." T46/52

Councillor Smits also acknowledged that if subdivision of his land was possible he would not need to part with any of his land to secure the benefit of any increase in value as he could obtain an approval and then continue to hold the land with the benefit secured and able to be realised at some time in the future as he wished: T41/21; however, he pointed out that a liability for additional rates could offset any gain: T64/17.

The valuer from the State Valuation Office assessed the land to have an increased value under the "Village" zoning because of the wider range of possible uses and the potential to subdivide the land into two lots of approximately 9,000 square metres.

Mr Straw, the Council Officer primarily responsible for the rezoning of the Berridale Village area (he had directed where the lines were to be drawn to define the area: Exhibit A, Annexure 9, p.15/1-44), told the Director-General in his letter of 22 July 1998 (Exhibit A, Annexure 8) that under the new LEP Councillor Smits' land "clearly has subdivision potential"; that the Council had no resolution to limit subdivision of land in the Village; that the land had a theoretical minimum lot size of 700 square metres for residential blocks; that although the Council was proposing to limit development and

subdivision in the Village of Berridale and specifically within the Ivy Cottage Estate through a Development Control Plan in Stage-2, the details had not yet been worked out, and that the Council would be in a position to approve further lots in the Ivy Cottage Estate subject to infrastructure limits, for example supply of electricity.

The Investigators asked Mr Straw what he considered the outcome would be if an application for approval of subdivision of Councillor Smit's land was lodged as at the time of the interview and was assessed against the new Stage-1 LEP. Mr Straw replied:

> **"It would depend on the density of the subdivision application … … - if they were larger than 3,000 square metres, it would be very difficult for Council to refuse them. If they were smaller than that, I think we could put up some fairly good merit arguments; economic issues would be one issue that the Court would have to look at or the Council would have to consider fairly well because there's lots of lots in town of that sort of size that haven't sold in the last 18 years. You know, there's an oversupply of that, so I think those sorts of – it could be refused on those sorts of issues if it was below 3,000 square metres. Certainly if it got down to the 700 square metre end you'd have a – the closer you get to that, the stronger the argument you've got. Traffic issues wouldn't be a problem because the roads are adequate. There may be a problem with electricity if you went to – you know, at the smaller end of that sort of scale – but I think – yeah, what did we say it was, two hectares, you'd probably get three, four, maybe about four lots, five lots, with the 3,000 square metre size, three or four lots. That would probably have some merit, and I think it would be fairly difficult for Council to refuse that."** (Exhibit A, Annexure 9, p.10/38-11/15)

Mr Straw later pointed out to the Investigators that Councillor Smits' land, compared to others in the Ivy Cottage Estate, was a large block of around two hectares, "so obviously there's some potential to subdivide." (Exhibit A, Annexure 9, p.14/23)

In relation to Mr Straw's reference to Councillor Smits' land being a "large block" in the Ivy Cottage Estate, it is relevant to mention here that the Director-General's Report, Exhibit A, contains a letter dated 1 September 1994 addressed to the General Manager of the Snowy River Shire Council from the Executive Manager, Engineering of Monaro Electricity, at that time

the electricity supplier to the Ivy Cottage Estate, who had been requested by the Council to look at the options for the rezoning of lots in the Ivy Cottage Estate. (Exhibit A, Annexure 28). The letter attached a plan of the estate showing where rezoning could take place and stated, "There is no limit to rezoning on the Northern leg of O'Brien Avenue. On the Eastern leg there can be no rezoning on the Southern side. The can only be six lots rezoned on the northern side." The annexed plan contained distinguishing forms of hatching to show the location of the three sections of the estate referred to. The "Northern leg", as to which there would be no limit to rezoning on electricity supply grounds, consisted of Lots 2 to 15 inclusive and, therefore, included Councillor Smits' land which is Lot 12. It would appear from the lot boundaries shown on the plan that four of the lots in the Northern leg could be regarded as large blocks compared to the other lots with Councillor Smits' block being, if not the largest, the second largest.

The Monaro Electricity's letter and plan establish two things: Firstly, compared to all the other lots in the Ivy Cottage Estate, the size of Councillor Smits' land, 18,490 square metres, would permit subdivision into a minimum of two and a maximum of six lots larger than the 3,000 square metres per lot which Mr Straw considered would be difficult for the Council to refuse. It also shows that the valuer's estimate of increased value on the basis of only a two-lot subdivision of 9,000 square metres each may be treated as conservative. Secondly, the letter and plan establish that, in the view of the electricity supplier itself, there was no lack of capacity so far as electricity supply was concerned to service a subdivision of Councillor Smits' land.

The Investigators also sought the views of Mr Reynders as to the prospects of Councillor Smits obtaining the consent of the Council to a subdivision of his land. Mr Reynders told the Investigators that the Council would have to consider it "on merit", there being two points of view, one, that the original design of the Ivy Cottage Estate subdivision was to provide a range of lot sizes, small ones, medium sized ones and big ones, because there was felt to be that kind of a range of lifestyles being looked for and therefore it ought to be kept that way or, the other, that the Council could consider that there was actually nothing wrong with having more smaller lots.

Mr Reynders put the supposition that there was an application to make two or three lots out of Councillor Smits' land and said:

> **"Council says no, and the applicant goes to Court, it is my view that the Court may well say this sort, range of lifestyle stuff with having these old rural smallholdings, are all over your Shire available anyway and nobody wants to buy them, is a pretty weak sort of story on the basis of which you would refuse this. If you don't have the Development Control Plan in place there is I think at least 50 per cent chance that the Council will lose its case, at the moment."** (Exhibit A, Annexure 10, p.15/18-34

In the Tribunal's opinion, the foregoing considerations favour a conclusion, on the balance of probabilities, that the changes proposed by the draft Stage-1 LEP were, from the viewpoint of a prospective purchaser, calculated substantially to increase the value of Councillor Smits' land.

"Appreciable" Gain – Section 442(1)

In his contention that any gain in value was not "appreciable" within the meaning of section 442(1), Councillor Smits' first point (1(a) above) was to the effect that the estimate of the valuer, $7,000, should not be accepted due to the depressed state of the land market in Berridale and the absence of comparable sales to back the estimate up.

The relevant contents of the advice received from the State Valuation Office (Exhibit A, Annexure 3) have been already stated. They demonstrate that the valuer was well aware of the state of the market and he himself had made a point of drawing attention to it in his advice. In the Tribunal's opinion it is clear from the advice that the valuer not only took the points made by Councillor Smits fully into account but observed considerable care in arriving at his assessment. Having regard to the qualifications, expertise and field experience of the valuers employed in the State Valuation Office, it would be reasonable for the Tribunal to accept the estimate contained in the advice. As mentioned above, there are reasons for treating the assessment as conservative. The Tribunal accepts and proposes to act upon the assessment while pointing out that the question is not whether the valuer got the amount right but whether, under section 442(1), the amount of the gain or loss was "appreciable".

Councillor Smits' second point (1(b) above) was that, as $7,000 was only 2.3 per cent of the total value of his property and related only to a potential to subdivide in a depressed market, it should not be considered "appreciable". However, he frankly conceded when cross-examined that, considered apart from the total value of his own property, $7,000 was "not an insignificant amount of money for someone in his position": T47/6-22

In the Tribunal's view, the point of comparing the amount of gain or loss with the total value of the land has relevance to the question whether the interest of the person in the matter before the Council was "insignificant' within the meaning of section 442(2) but not to the question whether it was "appreciable" within section 442(1). In the opinion of the Tribunal, the prospective gain in the value of the land under the changes proposed by the new LEP should be considered to have been "appreciable" in the requisite sense.

"Insignificant" – Section 442(2)

Considered in relation to section 442(2), the word "insignificant' is not at large. The question there is whether the person's interest in the matter is so insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter. Councillor Smits contended that this was "a matter of subjective judgement" which, when applied to him and his family circumstances, that is, their desire to maintain the amenity of their property and the enjoyment of living on it unsubdivided as it was, meant that the amount potentially to be gained by subdivision of the land would not be an influence in any decision Councillor Smits might make in relation to the rezoning of his land under the LEP: T59/42

Councillor Smits' argument may be considered by some to be a reasonable interpretation of the section but the Tribunal's view is that it is not correct. In the Tribunal's opinion, section 442 is to be regarded as laying down in general terms criteria by which to measure in an objective way, in whatever factual situation is being considered, the existence or non-existence of a pecuniary interest in the particular matter before the Council for decision. The standard laid down by section 442(2) is therefore to be applied

hypothetically by considering the conduct to be expected of a reasonable person in the circumstances under consideration. The Tribunal has applied this view of the section in previous cases (see, for example, Councillor Fern, Bega Valley Shire Council, PIT4/1997, Statement of Decision 13 March 1998, pp34-35) and can see no good reason to depart from it in the present case. If individual personal feelings such as those expressed by Councillor Smits were to govern the application of the criteria or standards as to the existence of a pecuniary interest expressed in section 442(2), those standards or criteria would vary according to each particular person's attitudes or idiosyncrasies with the result that inconsistencies and confusion in the application of the provisions of the Act which would follow. In the Tribunal's opinion, such an intention is not to be attributed to the legislature and is avoided by applying objective standards.

In the Tribunal's view, the prospects of future gain from expansion of the range of permissible uses of the land and the ability to subdivide it in the future which could be expected if the new draft LEP was adopted would, in the circumstances of the present case, not be so insignificant that they could not reasonable be regarded by a reasonable person likely to influence any decision the person might make in relation to the matter. Circumstances affecting people's lives and living conditions are liable to change and, whilst there may be no intention presently to alter those living conditions, the ability to do so if desired in the future would be something that a reasonable person would rather have than not have. For these reasons, the Tribunal does not accept Councillor Smits' argument that he did not have a pecuniary interest because his interest was insignificant within the meaning of section 442(2).

No Intention By Councillor Smits To Subdivide His Land

Councillor Smits' next contention, namely that because he had no intention to subdivide his land the potential to subdivide it was no value to him and therefore he had no likelihood or expectation of gain that could constitute a pecuniary interest, must be rejected.

The question is whether the change of permissible uses under the new LEP would be likely to result in an increase in the value of the land. As the

Valuer pointed out (Exhibit A, Annexure 3, para.2) the assessments which he made related to what was considered to be the "market's appreciation" of the proposed change in zoning. In other words, the valuation of the land was an objective assessment of its value in the market place regardless of the intentions of the present owner. A similar question arose in the case of the three Griffith City Councillors to which reference has already been made. Each of the Councillors claimed that they had no intention of taking advantage for themselves of the subdivision rights, the introduction of which they were espousing on the Council. The Tribunal rejected their respective personal intentions as an answer to the allegation in the complaint in that case that they had a pecuniary interest in the matter, an allegation which was supported by a valuer's assessment of added value accruing to their respective lands if the proposal to vest the land with subdivision rights was to be adopted. The reasons given by the Tribunal are equally applicable in the present case.

The first was 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 could not be left to depend on whether the person was intending to take advantage of the benefit if the proposal was adopted because this would leave the system open to wholesale abuse especially in the case of changes of the permissible uses of land in an LEP. Another reason was that any increase in the value of the land would accrue regardless of the Councillor's present intentions. The Councillor in question could change his or her mind and there would be nothing to stop the Councillor from doing so in the future in the event of a change of his circumstances. As Councillor Smits himself recognised, the potential to subdivide land would, in a sense, be attached to the land and remain available to be exploited at any time for the owner's financial benefit. A further reason was the fact that, in the valuation process, the valuer considers a hypothetical sale of the particular piece of land so that whether the owner was intending to sell or not was not taken into consideration: the **Griffith City Councillors case** (above), pp.36-37. Applying the same considerations here, Councillor Smits' expressed

intentions as to subdivision of his land at present or in the future do not determine the question whether he had a pecuniary interest.

Services To The Land Inadequate to Permit Subdivision

The weight of the evidence is contrary to Councillor Smits' contention that inadequate services to the land would preclude the possibility of further subdivision even if the proposed rezoning of the land made subdivision permissible with the consent of the Council. (Councillor Smits' letter 18 March 1998, Exhibit A, Annexure 6) The contention was partially supported in relation to electricity supply to the Ivy Cottage Estate by Mr Straw's letter of 22 July 1998 (Exhibit A, Annexure 8, paras.6, 7) but Monaro Electricity's letter to the Council of 1 September 1999 (Exhibit A, Annexure 28) establishes that the inadequacy did not exist in the section of the estate where Councillor Smits' land was located. At the hearing, Councillor Smits told the Tribunal that the lack of services which he had in mind included not just electricity but also water, sewer and drainage. However, Mr Reynders told the Investigators that the Ivy Cottage Estate had fully sealed roads, was fully sewered with underground sewer and had underground power and reticulated water. He said to the Investigators that the Estate was part of the infrastructure of Berridale, and so, looking from the outside you could say "Why should the people of Berridale be able to have dual occupancy, but in the Ivy Cottage Estate you could not?": (Exhibit A, Annexure 10, p.11/33)

Councillor Smits suggested in his submissions that the possibility that an applicant for subdivision approval might be required to pay for the upgrading of any services involved would diminish or neutralise the value of any subdivision potential but this would obviously depend on the number of lots proposed by the applicant because that would govern the level of any increases in demand for services. The advice given by the State Valuation Office's Valuer discounts that possibility in relation to Councillor Smits' land. The Valuer based his estimate of the increase in the value of the land on the assumption of only a two-lot subdivision. This would minimise any increase in the demand for services, and, as his advice stated, in arriving at his assessment of the increase in the value of the land, he took into account the

"normal subdivision costs including Council contributions (that) would have to be met by the applicant." He also indicated that his estimate made allowance for the risks involved in realising the subdivision potential of the land for which risks hypothetical prudent purchasers would make allowance in the price they would be prepared to offer for the land (Exhibit A, Annexure 3).

Councillor Smits' submission that the lack of services would preclude the Council from consenting to any subdivision of his land is not consistent with the views expressed by Mr Straw and Mr Reynders as to his prospects of success if an application for subdivision approval was made.

Uncertainty In The Absence Of The Stage-2 LEP And Development Control Plan Affecting The Land

Councillor Smits' fourth contention was that the development potential of land in the Village Zone of Berridale could not be assessed until the Stage-2 LEP and Development Control Plans for Berridale had been decided by the Council.

Mr Reynders told the Investigators that he would expect the contemplated Development Control Plans to place some restrictions on land use in the Ivy Cottage Estate but this would be for the Council to decide sometime in the future: (Exhibit A, Annexure 10, p.18/26-38; p.20/7-21/25).

Mr Straw told the Investigators that the publicly announced plan was to attempt to bring in the new Development Control Plans within two years after the new Stage-1 LEP. He also told them that the intent was to provide, in the Development Control Plan for Berridale, for precinct development including dual occupation and other residential development: (Exhibit A, Annexure 9, 6/1; 9/18-10/8).

Councillor Smits' view that the absence of the Development Control Plan would preclude the Council from making any valid assessment of an application by him for approval to subdivide his property is contradicted by the views of Mr Straw and Mr Reynders on the prospects of success of an appropriate subdivision proposal.

Those prospects existed as a result of the rezoning of the land to "Village". That was a first step. It relieved his property from the existing

restrictions on the use, including subdivision, of the land. The prospect of further decisions yet to be made by the Council would not exclude a pecuniary interest in the first step. It advanced his prospects of financial gain in the future. Councillor Smits does not contend and the evidence does not suggest that the rezoning by the Stage-1 LEP was liable to be reversed by the proposed Development Control Plans or Stage-2 LEP, only that approvals for forms of land use and lot sizes within the zone were likely to be further regulated.

In the Tribunal's opinion, the fact that there may be some uncertainty as to the manner or form of future regulation and, therefore, as to the possible outcomes of development or subdivision applications made possible by the rezoning, does not prevent a pecuniary interest from arising in relation to the Council's initial proposal to rezone the land. It does not follow from the fact that there are secondary decisions affecting the land to be made by the Council at a future time that a person could not be regarded as having a pecuniary interest in the primary decision. Such uncertainty as arises from the possibility of future action by the Council enters into the assessment as a risk factor. No doubt if the risk is considered to be too great the assessment would be that the rezoning added nothing to the value of the land.

In the present case, the Valuer took the risk into account but concluded that, notwithstanding the risk, the land would be appreciably increased in value. In the Tribunal's view the evidence supports the Valuer's conclusion.

THE TRIBUNAL'S FINDING ON THE QUESTION OF PECUNIARY INTEREST

After fully considering Councillor Smits' contentions the Tribunal has concluded on all of the evidence and information before that at the time of the meetings in question Councillor Smits had a pecuniary interest in the proposal in the draft Stage-1 new LEP to rezone his land to Zone 2(v) – Village because of a reasonable likelihood or expectation of financial gain accruing to him from an increase in the value of his land which would be occasioned by the rezoning. In the Tribunal's opinion, Councillor Smits' interest in the matter was not so remote or insignificant that it could not

reasonably be regarded as likely to influence any decision a person might make in relation to the matter, within the meaning of section 442(2). The Tribunal also concludes that Councillor Smits' interest was not of a kind specified in section 448. It came within the provisions of the exception from the sixth exemption provided by that section and, accordingly, he was not excused from complying with section 451 of the Act.

MEETINGS OF THE ENVIRONMENTAL SERVICES COMMITTEE

The Councillors in the **Griffith City Council case** were all members of a Council Committee which, in the view of the Tribunal, was "wholly advisory" within the meaning of section 446 of the Act. This raised the question whether the Councillors were excused by section 446 from disclosing their pecuniary interests in matters before that Committee. The Tribunal held that they were required by section 444(b) to disclose pecuniary interests in accordance with section 451 and that section 446 did not apply to them irrespective of whether the Council Committee in question was "wholly advisory". (The sections of the Act just referred to have already been quoted above).

A different question arises in the present case in relation to Councillor Smits' participation at meetings of the Council's Environmental Services Committee in the discussion of matters in which he had a pecuniary interest without declaring that interest to the meetings. Councillor Smits was not a member of the Environmental Services Committee at any of the meetings in question. He had been appointed by the Council as alternate member to the Councillor from his Ward who was the appointed member of the Committee. As alternate member Councillor Smits had no vote on the Committee unless he sat as a member in the absence of the Councillor for whom he was the alternate. In fact the appointed Councillor was present and sat as member at all of the meetings attended by Councillor Smits.

The General Manager told the Investigators that it was the practice of the Snowy River Shire Council to allow all Councillors to attend and participate in the discussion and debate at meetings of the Council's Committees whether members or not but they were not permitted to vote:

(Exhibit A, Annexure 14, p.5/42-9/18). Councillor Smits attended and participated in the Environmental Services Committee meetings in accordance with that practice: (Exhibit A, Annexure 15, p.4/29-6/3).

Statutory regulation of Council Committees is to be found in the Local Government (Meetings) Regulations 1993 made in pursuance of section 748 of the Local Government Act, 1993. Regulation 32 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 to give notice of business for inclusion in the Committee's agenda, move or second a motion or vote on a matter. The question arises whether a Councillor who is not a member of a Committee but who attends a meeting of the Committee, whether purporting to exercise the right given by Regulation 32 or in pursuance of a practice adopted or allowed by the Council, and speaks at the meeting is obliged by subsection (1) of section 451 to disclose to the meeting a pecuniary interest in the Council matter with which the Committee is dealing. The question also arises whether the prohibition against taking part in the consideration or discussion of the matter overrides the right given by Regulation 32 to speak at a meeting of a Committee. It was unnecessary to decide those questions in the **Griffith City Council case** but they require to be decided in the present case because the complaint against Councillor Smits alleges that he contravened section 451 of the Act in relation to meetings of the Environmental Services Committee as well as meetings of the Council.

Section 451 of the Act is directed specifically to the conduct of persons having pecuniary interests in matters being considered at meetings. Section 451(1), in relation to Councillors, provides that a Councillor 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" with which the matter is being considered must disclose the interest to the meeting as soon as practicable. Subsection (2) of section 451 provides that the Councillor must not take part in the consideration or discussion of the matter. By contrast, Regulation 32 is not directed to the question of participation at Committee meetings of Councillors with pecuniary interests in the matters before the

Committee. Moreover, section 748(1) of the Act under which the Local Government (Meetings) Regulation was made, provides that the Governor may make regulations "not inconsistent with this Act." In these circumstances, it would seem to the Tribunal that, either Regulation 32, in so far as it entitles a Councillor who is not a member of a Committee to speak at a meeting of the Committee, should be construed as not intended to apply to a Councillor with a pecuniary interest in the business of the Committee or to relieve such a Councillor from the obligation under section 451(1) of the Act to disclose his interest to the meeting, or that aspect of Regulation 32 should be treated as being beyond the power to make regulations in section 748(1) and therefore void. In the Tribunal's opinion the better view is to construe the regulation as not intended to interfere with the operation of section 451; but, on either view, section 451 should be held to apply to Councillors notwithstanding the provisions of Regulation 32. The result for the present case is that Councillor Smits was bound to conform to the requirements of section 451 in relation to Environmental Services Committee meetings which he attended as well as the Council meetings in question. (The Tribunal's discussion of the foregoing issues relating to Council Committees in the **Griffith City Council case** is to be found at pp.19-28 of its Statement of Decision in that case).

"GUT FEELING" AND "CONSCIENCE" NO CERTAIN GUIDE TO PECUNIARY INTEREST

In the course of his interview one of the Investigators asked Councillor Smits this question:

> **"What do you understand when someone says, has a Councillor got a pecuniary interest in a matter before Council? What comes to your mind as to whether that Councillor has or has not an interest?"**

Councillor Smits gave the following answer:

> **"Well, he has the prospect of receiving an appreciable, or he's got a likelihood of receiving, an appreciable financial gain or loss as a result of the – his decision in the Council matter. Yes, in my mind it's quite clear. I must admit here, I use a different method, which was passed on to me by an old friend of mine in local government who said, "Don't worry about too much about the legalities of it and the technicalities. Just use your own gut feeling and your gut**

> **feeling will tell you whether or not you have a pecuniary interest." That's what I generally use. My conscience tells me whether or not I have one. But that's about – that's just a little aside, but technically and legally, yes, I understand what's meant by the term and I understand it fully."** (Exhibit A, Annexure 15, p.27/41-28/13)

In his opening statement to the Tribunal at the hearing, Councillor Smits said to the Tribunal:

> **"My conscience is clear in that I have spoken and written the truth at all times and I might refer to my reference to what I call gut-feeling sentiments which were explained to Departmental Officers in the interview they conducted. Gut-feelings is the same as conscience, I would think, but my gut-feeling is I am comfortable with the arrangements. I am comfortable with myself, with my actions as a Councillor, and my gut feeling tells me that I certainly would not have any appreciable gain from the actions from (sic) Council."** T14/56-T15/9

When persons who are subject to the Act are considering whether they have a pecuniary interest in a matter, they would obviously be wise to heed a gut feeling or sense of conscience that they had a pecuniary interest; but a gut feeling and conscience that tells them that they do not have a pecuniary interest in a matter is no sure guide. Such feelings are too individually private and personal to be a reliable, sound or sufficient basis for determining the questions posed by the provisions of the Act.

What is required of the person, as also of the Tribunal, is an objective judgement based not on feeling but on reason. It may be of assistance to Councillors if they were to consider the view that an independent fair-minded outsider might take of the circumstances. Some Councillors who have been before the Tribunal have scoffed at the idea that they might consider the likely public perception of whether or not, in the circumstances, they had a pecuniary interest in a matter; but to do so helps to bring the mind into an objective focus as well as taking account of the fact that one of the goals of the legislation is to promote public confidence in local government decision making.

The issue whether, under section 442, an objective or subjective judgement has to be made is a continuing problem for Councillors and others affected by the Act and has arisen in complaints before the Tribunal so often

that the view of the Tribunal as expressed in the case of Councillor Roberts, where it was fully considered, should be repeated here for the benefit of those who, like Councillor Smits, may believe that conscience is a reliable `or the only guide:

> **"It is a question of legislative intention as to which, in the present case, there appears little room for doubt. The language of the section evokes an objective approach. The familiar device in the common law and legislation of using the words "reasonable" and "reasonably" to call for an objective assessment to be made of a situation is present in both limbs of section 442. In subsection (1) it is a "reasonable likelihood or expectation" that has to be established. In subsection (2) the assessment to be made is whether, because of remoteness or insignificance the interest in question "could not reasonably be regarded" as likely to influence any decision.**
>
> **The opposite view is untenable. If the existence of a pecuniary interest were to depend on the subjective judgement of each Councillor or other person affected by the legislation it would admit the influence of personal prejudice and bias, confusion where persons affected by the same circumstances differed in their judgements, and abuse by the dishonest. It would make the legislation unworkable."**
>
> **It is the Tribunal's view that section 442 calls for an objective judgement in each case as to whether in the circumstances of that case a pecuniary interest came into existence. And, who is to make that judgement? In the first instance it is the Councillor or other person, they being expected to know where their interests lie; but the judgement they are required to make is an objective one; and if there is a complaint and the matter comes to the Tribunal, it is for the Tribunal to make the judgement, and the judgement may be that they got it wrong.**
>
> **This will appear to be hard lines for a conscientious Councillor who, faced with the question, makes an honest judgement and is found to have been wrong. This objection has often been raised and recognised in the cases and has always been met with the same answer, an answer driven by considerations of public interest and the need to promote public confidence in the integrity of the exercise of power in local government. Two examples will suffice. In *Downward* v. *Babington* (supra) Gowans J. said (at p. 320):**
>
> > ***"... What has to be examined for the purpose of determining what gives rise to the existence of a pecuniary interest is not the motives or actions of the Councillor in dealing with the matter at the meeting but the contract or proposed contract or other matter in which the municipality is concerned which is being considered at the meeting.***

> ***If when that matter is placed alongside the Councillor's interests it appears that he has a direct or indirect pecuniary interest in the matter, the obligation lies upon him to do what the statute requires him to do. Since the Councillor is the one who knows where his own interests lie, it is for him to make the comparison and ask himself the right questions and get the right answers. If he does not, and does not refrain as required, he will come within the statute and incur its penalty, unless he can exculpate himself under (an exculpatory provision of the legislation)."***
>
> **In *Re Greene and Borins* (supra) the court said (at p. 270):**
>
> ***"Nor is it of any consequence how the vote was caste, the outcome of the vote, or the motive of the municipal official. The very purpose of the statute is to prohibit <u>any vote</u> by one who has a pecuniary interest in the matter to be considered and voted upon. It is only by strict observance of this prohibition that public confidence will be maintained.***
>
> ***I express some sympathy for one called upon subjectively to make this pre-vote decision but make it he (or she) must. In the present case, Alderman Borins says that he did in fact consider the matter and concluded that no conflict existed. This was, at the same time, a recognition by him of his high duty <u>and</u> recognition that he was in a position where he might be said to be in conflict. He did not seek outside advice, which course he might have taken. He chose, rather, to take the risk, by not declaring his interest and refraining from voting that a court on an objective test could find him in breach ... ..."*** (PIT1/1995, Statement of Decision, 3 August 1995, pp.30-32)

Whilst the Tribunal respects Councillor Smits' appeal to his gut feeling and conscience in deciding whether he has a pecuniary interest in a matter, it considers that this approach has led him into error in the present case. The Tribunal considers that on an objective test Councillor Smits had a pecuniary interest in the outcome of the proposal before the Council to rezone his land "Village" under draft Stage-1 LEP.

"THE COMMON INTEREST" EXCUSE

Councillor Smits was asked at his interview whether any discussion took place at meetings as to whether any staff or Councillor may have had a pecuniary interest in the Council's consideration of the proposed LEP. Councillor Smits' answer was as follows:

> **"… There was general discussion. There was a consensus that all Councillors at the time had an interest in common, it was termed an interest in common, because there was concern expressed about Councillors being land owners and being affected by the LEP. There was consensus that we all had an interest in common but the ultimate advice from the General Manager was to the effect**

> **each Councillor has to make his or her own mind as to whether they should declare such interest."** (Exhibit A, Annexure 15, p.7/22-35)

Councillor Smits went on to tell the Investigators that the expression "interest in common" as opposed to "interest of an individual" was the sort of terminology used by the General Manager and fully understood by Councillors. Councillor Smits said that there were similar discussions when the Council set rates and charges. He said that practically all of the Councillors owned land in the Shire which would be affected and had a similar interest in the draft LEP. (Exhibit A, Annexure 15, p.7/37-8/7) When it was pointed out to him that there was a specific exemption in the Act from the prohibition in section 451 against participation in the debate and from voting on questions relating to the fixing of rates and fees (section 452(e)), Councillor Smits told the Investigator that consideration of the draft LEP was "sort of, well accepted as a similar circumstance (of an "interest in common") and was made use of." T16/4-17.

In the course of the Council's review process the Council had to consider proposed amendments to provisions of the draft new LEP as to which there was public controversy and differences of opinion between the Councillors. At a meeting of the Council on 19 November 1996 Councillor Smits proposed a motion that the Council have a "cooling off period" by deferring its decision on the proposed amendments until they had been considered by the Environmental Services Committee on 3 December 1996: (Exhibit A, Annexure 22, Item 229/96). Councillor Smits told the Investigators that his proposal for a cooling off period was to receive further input from concerned landholders as there was a great deal of public discontent with the Council's proposed decisions relating to rural smallholding subdivision which under the draft plan in the Stage-1 LEP was to be removed altogether from the existing LEP4: (Exhibit A, Annexure 15, p.14/27-15/9). When asked whether there was further discussion between Councillors at this time about the "pecuniary interest/interest in common" issue, Councillor Smits said:

> **"No, we – my perception was at the time that we were all acting under this concept of interest in common which had been discussed previously and Councillors generally were of the view that if we all started making these**

> **declarations we wouldn't have enough members left for a quorum and that prompted the advice we received from the GM in June of 1997 but prior to that time there was concern that we would be running out of Councillors to form a quorum. And we were all – had all peace of mind to act under this concept of interest in common."** (Exhibit A, Annexure 15, p.14/21-15/25)

When asked what section of the Act this concept of interest in common was based, Councillor Smits said:

> **"I don't think it's – it didn't come out of the Act at all from memory. It may have been based on some case law. It was – I do not recall the source of the information because when it came to Council it was well received and it may have come out of meetings from the Shire's Association or some other conference and it was gladly accepted."** (Exhibit A, Annexure 15, p.15/27-39)

Councillor Smits went on to suggest that the concept would also have been part of the advice to Councillors from its General Manager: (Exhibit A, Annexure 15, p.15/41-45); but when the General Manager was asked about advice given to the Councillors in a formal letter of 23 June 1997, which was put before a meeting of the Environmental Services Committee on 1 July 1997, the General Manager told the Investigators that "The only advice I gave to Councillors is that they were only in a position if they had a pecuniary interest to debate the issue if they were given an exemption, either conditionally or unconditionally by the Minister." (Exhibit A, Annexure 14, p.13/20-15/30; Annexure 29; Annexure 24, p.18; Annexure 25, p.26).

Apart from Councillor Smits' statements to the Investigators, there is nothing in the material before the Tribunal to suggest that the General Manager gave any advice to the Councillors that the existence of a common interest amongst the Councillors in any matter before the Council for decision or in any matter involving changes of development controls affecting land owned by the Councillors or their relatives or other associates excused the Councillors from observing the requirements of section 451 of the Act. The common interest concept as described by Councillors Smits in the passages above does not conform to the requirements of the legislation and, if Councillor Smits is correct that this concept is generally accepted by the Councillors of the Snowy River Shire Council, it needs to be corrected so that

Councillor Smits and other Councillors will not run foul of the error in matters relating to the Stage-2 LEP and the formulation of future Development Control Plans or any other matter of Councillor business.

The Tribunal must express concern at the existence of the "common interest" concept referred to by Councillor Smits because similar ideas have been expressed by Councillors in other cases recently before the Tribunal relating to proposals for environmental planning instruments which effect changes to the permissible uses of land. In the other cases the terminology was different but the substance was the same.

In **Councillor Virgona's case** (see above), she took the position that she was only required to declare an interest when the matter referred to her property or her street specifically and was free to ignore her interests when the draft LEPs were being dealt with as a whole. She claimed that this view was also taken by other North Sydney Councillors: PIT3/1998, Statement of Decision, 7 May 1999, pp.11-12, 18.

In the case of the Griffith City Councillors, all three Councillors claimed that they and their fellow Councillors pursued a practice in relation to the declaration of pecuniary interests which distinguished policy matters, that is, matters which cover the whole Council area and are not specific to one person, group, or area, from matters dealing with an individual portion of land relating directly to the Councillor. As one of those Councillors expressed it, "Where it's a policy matter, we as Councillors always felt rest assured and felt comfortable that there was no conflict of interest at all." He said, "The LEP Review Committee which was set up (to consider changes to the LEP which would permit subdivision of certain agricultural land for the purpose of erecting dwellings which was currently prohibited) fell into that category of policy changes and it never occurred to me that I should be thinking about pecuniary interest."

In that case the Tribunal's decision was as follows:

> **"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.": PIT2/1998, Statement of Decision, 7 May 1999, pp.35-36

Councillor Smits may have thrown some light on the possible source of the foregoing erroneous concepts when he said that the "common interest" philosophy may have come out of meetings from the Shire's Association or some other conference and it was gladly accepted by the Councillors. Once again the Tribunal would express the hope that all such theories be rejected by Councillors in favour of the provisions of the legislation, such as sections 448 and 452, which specifically define what matters are exempt from the disclosure of interests provisions of the Act.

MINISTERIAL EXEMPTION, SECTION 458. COUNCILLOR SMITS' PRO FORMA LETTER, 16 JULY 1997

Reference has been made to the General Manager's letter to the Department of 18 June 1997 (Exhibit A, Annexure 1) in which he advised the Department that he would take up with the Mayor and Mr Straw the question of all Councillors seeking an "exemption" from the pecuniary interest provisions of the Act because it could be argued that the majority of the Councillors would have to some extent a pecuniary interest in relation to Stage-2 of the Council's LEP process in terms of sections 442 and 448. The "exemption" in question related to section 458 of the Act which provides as follows:

> **"458. The Minister may, conditionally or unconditionally, allow a councillor or a member of a council committee who has a pecuniary interest in a matter with which the council is concerned and who is 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 if the Minister is of the opinion:**
>
> **(a) that the number of councillors prevented from voting would be so great a proportion of the whole as to impede the transaction of business; or**
>
> **(b) that it is in the interest of the electors for the area to do so."**

Reference has also been made to an advice subsequently given by the General Manager. This was a memorandum dated 23 June 1997 addressed to the Mayor and Councillors on the subject of "LEP Stage-2 work and provisions relating to pecuniary interests in NSW Local Government Act" (Exhibit A, Annexure 29). The advice contained in the memorandum expressly drew attention to the fact that Stage-2 would involve detailed consideration of a "Rural Residential Strategy" in respect of which it could be argued that all Councillors who owned rural land could be "appreciably affected by the outcome." It also referred to the proposal to develop "Development Control Plans" for the Shire's Villages, including Berridale, as to which it could be argued that Councillors owning land (or their relatives) in those locations might stand to gain (or lose) on the outcome of the process. After referring to the provisions of section 448 of the Act and stating the options open to Councillors, including an application under section 458, it

requested Councillors to consider their position and advise the General Manager directly on their preference for dealing with the issue. The memo concludes that although normally it was for each Councillor (and staff member) to test their own position and reach their own conclusion, the likely impact of the new LEP was so broad as to warrant a whole of Council perspective on the possible impact of allegations of pecuniary interest.

As mentioned earlier this memorandum was referred to at the meeting of the Environmental Services Committee on 1 July 1997. Between that date and the Council meeting of 15 July 1997 Mr Straw prepared a pro forma letter, copies of which were to be distributed to all Councillors at that meeting for the purpose of obtaining their signatures and having them return the signed letters to the General Manager where they would be available for use in connection with the contemplated application to the Minister under section 458: (Exhibit A, Report, p.22; Annexure 14, p.7/5-11, p.13/44-14/45).

The Council's files contained signed copies of this form of letter from all of the Councillors except one. The letter headed, "Confidential", was addressed to the General Manager. The text of the letter, under the heading "Pecuniary Interests, draft LEP 1997", was as follows:

> **"I wish to advise that when the Draft Shirewide Local Environmental Plan is brought to either the Environmental Service Committee, or a Council Meeting for a final vote, I will/will not declare a pecuniary interest.**
>
> **My reason(s) for declaring an interest is/are that:**
>
> **1. I own land which may receive an appreciable gain or loss as a result of the plan or I own land adjacent to or adjoining land which may receive an appreciable gain or loss.**
>
> **2. A relative owns land which may receive an appreciable gain or loss as a result of the plan.**
>
> **3. Other** _____
>
> _____
>
> **(Strike out whichever is not applicable)"** (Exhibit A, Annexure 30)

The copy of the letter signed by Councillor Smits is dated 16 July 1997. In the sentence, "I will/will not declare a pecuniary interest" Councillor Smits struck out the words "will not". Although the letters signed by the other Councillors contain various markings or notes on the text of the letter which

follows the above sentence, Councillor Smits was the only one who struck out any part of the sentence, with the result that the letters from all of the Councillors made no election in the letter as to whether they would or would not declare a pecuniary interest in the matter of the draft Shirewide Local Environmental Plan when it came before the Environmental Services Committee or a Council meeting for a final vote. However, the Director-General relied strongly on the letter which Councillor Smits had signed as constituting an acknowledgement and admission by him that he had a pecuniary interest in the proposed LEP both in respect of his own ownership of the land and the ownership of his wife.

The Investigators ascertained that on 16 July 1997 the General Manager had made an application to the Minister for a general exemption under section 458 and on 18 August 1997 the Minister had advised the Council that where its business was impeded by lack of a quorum he would consider applications under section 458 from those individual Councillors who sought it. As the original letters signed by the Councillors remained in the Council's records it appears that, in fact, they were never used by the Council staff for any purpose: see Exhibit A, the Report, p.22.

The Investigators took the matter up with Councillor Smits in the course of his interview after he had told them that the purpose of the General Manager's memorandum of 23 June 1997 which preceded the date of his letter was to alert Councillors to the need to make declarations of pecuniary interests more so than they had been doing in the past because the LEP Stage-2 would be looking at matters in greater detail: (Exhibit A, Annexure 15, p.17/20-41). As to the fact that in the form of the letter signed by Councillor Smits he had elected to state that he would be declaring a pecuniary interest, the Investigators sought to obtain an explanation from Councillor Smits as to why he had signed the letter; (Exhibit A, Annexure 15, p.24/15-27/32). Councillor Smits said:

> **"My intent was to convey to the GM that I would be making declarations at the appropriate times, if I deemed to have one. I wasn't saying I had one at the time, only as and when I deemed myself to have a pecuniary interest. It was a standard letter."**: p.25/3

He also told the Investigators that the purpose of the letter was to ensure that there would be a record on the file to assist staff in dealing with declarations of pecuniary interests but when it was pointed out to him that it would not achieve that purpose when it was only a generalised notice of intention to do what the Act required Councillors to do in any event, Councillor Smits said that he thought that the letters were done for the sake of obtaining a general overview of interests held by Councillors generally: (Exhibit A, Annexure 15, p.25/25-35). Finally, when asked to state what he understood he was doing by signing the letter he said:

> **"With the benefit of hindsight, and looking at this confidential letter signed by me, I signed it, I don't necessarily agree with the content of it because to this day I do admit I own land which is a subject of the LEP. I have a strong view that I do not stand to – as per the Act, I do not have any likelihood, not even a reasonable likelihood, of any appreciable gain from the ownership of this land. I am somewhat confused as to why I signed it actually.** (Exhibit A, Annexure 15, p.26/36-43).

In giving evidence at the hearing Councillor Smits was cross-examined at length on the question why he had signed the letter if, as he had claimed to the Investigators and stated to the Tribunal, at all times he confidently believed and was of the opinion that he did not have a pecuniary interest in the matter within the meaning of the Act: T32/11-T39/40. He insisted in cross-examination that the wording of the letter was not "fundamentally incompatible" with his statements to the Tribunal that he was always firmly of the view that he did not have a pecuniary interest; but it appeared to the Tribunal that Councillor Smits had some difficulty in maintaining that position.

He sought to do so firstly by claiming that the wording of the letter was interpreted by him and by all other Councillors as relating only to the future: T34/27; T34/55-T35/9; T36/16-21. When it was suggested to him that the purpose of the General Manager in obtaining the letters was to support an application to the Minister to exercise his powers of exemption under the Act by conveying to the Minister that the Councillors would be prevented from carrying out the business of the Council because of their pecuniary interests, Councillor Smits asserted that there was some confusion in the minds of the

Councillors generally including himself: T35/20-T36/11. He then claimed that he had not read the document very carefully and when it was pointed out to him that he had read it sufficiently well to strike out the words "will not" he said that he did so because he understood the letter to be conveying an intention to make declarations in the future as they may arise: T36/14-21 When it was pointed out to him that if his letter did not mean that he would be declaring a pecuniary interest in the matter in the future it would be misrepresenting to the Minister his position in relation to the draft Shirewide Local Environmental Plan, Councillor Smits said:

> **No, I certainly would not put my signature to any document that was untrue. But one must keep in mind the circumstances under which, in which these statements were submitted to Councillors, and they were difficult times. Councillors were under stress. Councillors, indeed, were confused because we were talking of blanket exemptions. We were talking about all sorts of things and, as I say, this memo was dropped on to the Council table. I did not read my copy of it terribly carefully, as I have confirmed in the interview with Mr Day (one of the Investigators). I made the comment I wondered why I even signed it, but it was my conviction at the time that I was making – giving an undertaking for the future:** T37/24-44; T38/16, 34

Notwithstanding the wording of the document, and the force of the submissions on behalf of the Director-General as to its significance, the Tribunal considers that there are reasons in the evidence why it should not place undue weight on the document as an admission by Councillor Smits that he had had a pecuniary interest in the proposals contained in the draft Stage-1 LEP. His claim that there was confusion amongst the Councillors as to the intent and purpose and the use to be made of the document is supported by the fact that none of the other Councillors were prepared to strike out words to indicate whether they would or would not declare a pecuniary interest. The General Manager made statements to the Investigators in the course of his interview which support Councillor Smits' claim that the Councillors were given to understand, firstly, that the letters were sought with the intention of attaching them to the application to the Minister to support a request for an exemption in relation to future work by the Council on the draft Stage-2 LEP and Development Control Plans and,

secondly, that there was a general view held by the Councillors that it was only in the Stage-2 process of the LEP that they felt that they might have some "exposure' to the pecuniary interest requirements of the Act and a perception by them that "if there was a pecuniary interest element that it was more than likely to arise in Stage-2.": (Exhibit A Attachment 14, p.16/37-17/36)

As to the utility of the letters the General Manager said to the Investigators:

> **"Now as you'll see from the file, the form was only adequately filled out by one or two Councillors. The balance of the forms were left in such a situation that any manager, the director or myself, couldn't draw any ready conclusion from the forms that were returned. Subsequently, the Minister's letter arrived … … was then tabled at the meeting and at that stage, I think both – certainly I felt – and I can't speak for Viv Straw, felt that we'd done as much as we'd reasonably could to address that issue before Council. It was then up to the individual Councillors."** (Exhibit A, Annexure 14, p.17/36-18/1)

The General Manager also indicated that no instructions were given to the Councillors on what was required of them in filling out the form: (Exhibit A, Annexure 15, p.18/3).

For the foregoing reasons, the Tribunal does not rely upon Councillor Smits' pro forma letter to the General Manager in arriving at its conclusion that Councillor Smits had a pecuniary interest in the matter in question.

CONFLICT WITH MR REYNDERS

In the course of his interview (Exhibit A, Annexure 10, pp.21/30-26/32), Mr Reynders, in an unresponsive reply to a question, volunteered to the Investigators a conversation which he alleged he had had with Councillor Smits on an occasion when Mr Reynders was giving Councillor Smits a lift home in his car after a seminar at Jindabyne. According to Mr Reynders, Councillor Smits mentioned the complaint which had been made against him by the Director-General, as to which Mr Reynders told Councillor Smits that he should respond by making submissions "genuinely and honestly", whereupon Councillor Smits said to him, "But I actually put that house there to subdivide later and see how I go.": (Exhibit A, Annexure 10, 21/40-22/1).

Shortly afterwards Mr Reynders made a further voluntary statement to the Investigators, "So I thought, "Gee, you deliberately put that house there so that it would be a residue block and so you also knew that when the new plan came in that suddenly, you know, there is your chance.": (Exhibit A, Annexure 10, p.23/39-42)

As Mr Reynders was interviewed after Councillor Smits' own interview had been completed on the previous day, these allegations were not put to Councillor Smits by the Investigators. Councillor Smits presumably did not become aware of them until he was given a copy of the Director-General's Report after the Tribunal had decided to conduct a hearing into the complaint.

Counsel for the Director-General cross-examined Councillor Smits about the alleged conversation when he was in the witness box. Councillor Smits told the Tribunal that he recalled the occasion and the fact that he had mentioned to Mr Reynders in the car the complaint that had been made against him. He said that he knew that Mr Reynders had been affected by actions on the part of certain people in the town who had complained about Mr Reynders because of his ownership of land in the Ivy Cottage Estate, so, because of that, he casually told Mr Reynders that he too had had a complaint: T43/29-41. Councillor Smits did not dispute that Mr Reynders may have offered him the advice that he should respond to the complaint by making submissions genuinely and honestly but Councillor Smits strongly disputed Mr Reynders' assertion that Councillor Smits told him that he had located his house on his land to subdivide at a later date. T45/29-55.

Counsel then invited Councillor Smits to respond to the "unsolicited thought" that Mr Reynders had volunteered to the Investigators that Councillor Smits had deliberately located the house to be a residue block and that Councillor Smits knew that the new plan would be his chance to subdivide. Councillor Smits swore that he had never said anything to Mr Reynders which would justify any such thought. He swore that he had never discussed the location of his residence on the land with Mr Reynders. As to the suggestion by Mr Reynders that the house had been deliberately located with a view to future subdivision, Councillor Smits said:

"That is totally untrue because the house is in the middle of the block towards the rear of the block, in fact. The only reason why that house was placed in that position was the existence of a pre-existing farm dam which contains water and we wanted our house to have water frontage, and water frontage in Berridale is pretty rare, and that is the only reason why the house was located in that location."

MR LAWLER: Q. "But the fact remains, doesn't it, that the location of the house is such that an additional house could be built on the property if subdivision proceeds?"

A. "If one has five acres, 10,000 square metres, it doesn't matter where you put your house. There is always a potential for further subdivision." T46/1-47

Councillor Smits told the Tribunal that he remembered exactly what he had said to Mr Reynders about his house: "I said we built a house on that block of land without any regard to future subdivision because we want to leave it intact. We want to leave it to enjoy (living there)": T42/47-T43/1

The Investigators interviewed Mr Straw on the day after Mr Reynders had been interviewed. They asked Mr Straw whether Councillor Smits had ever evinced an intention to subdivide his property or had any discussions with Mr Straw on the subject. When Mr Straw said, "No", he was asked whether he was aware of any discussions Councillor Smits had had with other persons, to which Mr Straw replied that Mr Reynders had indicated to him "That Bill Smits had been aware of the potential for subdivision if the new plan went through." He added, "I don't recall anybody ever saying to me that he was going to subdivide, but that he was aware of the potential to subdivide.": (Exhibit A, Annexure 9, p.17/16-18/2)

It is one thing to suggest that Councillor Smits recognised that under the proposed rezoning in the draft Stage-1 LEP there would be a potential to subdivide his land. In the evidence and material before the Tribunal, Councillor Smits, recognising, amongst other things, that his was a large block of land, has never denied that. His contentions to the Investigators and the Tribunal has been, in essence, that the potential to subdivide was only theoretical, that other adverse factors meant that there would be no appreciable gain to him and that the alleged increase in the value of the land,

the validity of which he disputed, would be of no signifiance to him in any event because he and his family had no intention ever to subdivide their land.

It is quite another thing, however, to allege or imply that in considering his position with respect to the Stage-1 draft LEP, Councillor Smits recognised and was influenced by the fact that the proposed new LEP would give him an opportunity to achieve the subdivision for which he had planned and always intended by having suitably located his residence on the land for that purpose and that Councillor Smits participated in the meetings in question with an intention to subdivide in his mind. The latter allegation and implication appears to the Tribunal to be what Mr Reynders had in mind in volunteering the statements which he made to the Investigators. Indeed, when, in answer to questions as to Councillor Smits' prospects of success if in fact he applied for a subdivision, Mr Reynders, after telling the Investigators, as mentioned above, that he thought that Councillor Smits' chances before the Council or the court would be much greater if he made his application in advance of the proposed Stage-2 Development Control Plan, added, "And of course that's what he has in mind." (Exhibit A, Annexure 10, p.21/33).

Mr Reynders was not available to give evidence at the hearing. The Tribunal reserved for further consideration whether it would be sufficiently material to a decision on the complaint to require a further hearing to receive the evidence of Mr Reynders in the witness box with Councillor Smits having the right to cross-examine him. The Tribunal has considered the question in the light of the evidence presently before it and has come to a conclusion that a further hearing would not be warranted. The Tribunal's reasons follow.

The suggestion in Mr Reynders' statements to the Investigators that Councillor Smits was contemplating or intending to apply for approval of a subdivision of his land if the LEP went through was expressed as a reflection of Mr Reynders' own thoughts, not Councillor Smits' words, and is not supported by Mr Straw's account of what Mr Reynders told him of the conversation. Councillor Smits has denied the suggestion on his oath. His account of the reasons for the location of the house on the land makes more sense than the suggestion that its location was dictated by an intention of

future subdivision which would have had to be formed when the house was constructed in 1988, at which time the zoning of the land prohibited subdivision and there was no change of zoning in contemplation by the Council. The sketch plan which shows the location of the house on the land (Exhibit A, part of Annexure 8) is consistent with Councillor Smits' explanation.

If the conflict between Councillor Smits' and Mr Reynders' versions of the conversation persisted at a further hearing, a factor which would need to be considered in assessing the reliability of Mr Reynders' version would be that he demonstrated to the Investigators that he was not impartial in his attitude or feelings towards Councillor Smits. He took it upon himself to make unsolicited and irrelevant disparaging remarks about Councillor Smits both of a personal nature and in respect of his professional abilities. As Mr Reynders' remarks were not only unsolicited by the Investigators but had no relevance to the validity of the complaint against Councillor Smits which they were investigating, the Tribunal does not propose to repeat them in this Statement of Decision. Mr Reynders made no secret to the Investigators of a hostile attitude on his part towards Councillor Smits, telling them that he did not enjoy working under him when he was General Manager, did not get on with him and, according to him, he had never had a good relationship with him. If what Councillor Smits told the Tribunal in his evidence was true, Mr Reynders' feelings were one-sided. As to their relationship, Councillor Smits told the Tribunal that he did not agree that they had not had a good relationship. He said, "No, we usually get on quite well, actually. I mean, even despite what Mr Reynders might say in the transcript, we had little – few things in common and I enjoyed working with him. He was an academic planner. He is a deep thinker and I got on well with him." Councillor Smits said that the relationship never deteriorated and it came "As a bolt out of the blue" to read what Mr Reynders said in his interview: T41/30-46.

In all the circumstances, the Tribunal concluded that a further hearing to receive Mr Reynders' testimony would be as likely to prolong as to resolve the conflict between him and Councillor Smits as to what was said by Councillor Smits on the occasion in question and would be unlikely to assist

the Tribunal to determine the essential issues involved in the complaint against Councillor Smits. The Tribunal has, therefore, decided that it should simply disregard the alleged conversation in Mr Reynders's car in determining the complaint.

THE TRIBUNAL'S FINDING ON THE COMPLAINT

The Tribunal has already expressed its finding that Councillor Smits had a pecuniary interest within the meaning of the Act in the matters under consideration at the meetings of the Environmental Services Committee and the Council referred to in the complaint relating to the proposals contained in the Stage-1 draft LEP.

The Tribunal further finds that section 451 of the Act applied to Councillor Smits in respect of his pecuniary interest in those matters and that he failed to comply with the requirements of that section at those meetings.

The Tribunal has considered 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 a number of previous cases that the test to be applied under this section is also 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, the person held a view, opinion or belief that he or she 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, Councillor Smits would not have a defence under section 457 because he knew, or could reasonably be expected to have known, the facts which constituted his pecuniary interest.

For the above reasons and the reasons previously stated in this Statement of Decision the Tribunal finds that the complaint against Councillor Smits has been proved.

ACTION UNDER SECTION 482

There remains for the Tribunal to decide what action it should take under section 482(1) of the Act which, at the time of the breaches, provided:

> "**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."**

Each case is to be decided on its own merits, taking into account all of the circumstances in which the contravention occurred, the nature and importance of the contravention, the explanations given by the Councillor for his or her conduct, the Councillor's state of knowledge and attitude towards the performance of the statutory obligations imposed upon Councillors in relation to their pecuniary interests, and other relevant matters, including the public interest.

The Tribunal does not consider that Councillor Smits' contraventions can be considered as relatively minor breaches for which counselling or a reprimand would be sufficient or appropriate action by the Tribunal.

Decisions by Councils on proposed changes of permissible uses of land under a Local Environmental Plan which may affect the value of a Councillor's land are a subject matter which should put all Councillors who own relevant land on full alert, not only to the possibility that they may have a pecuniary interest in the matter but also that they may be perceived by others, including members of the local community, as having a pecuniary interest, and that their conduct in Council on the matter is likely to be subjected to close scrutiny. In this field disclosure by Councillors of pecuniary interests is of particular importance.

Councillor Smits was a qualified and experienced senior local government officer with many years of experience as Shire Clerk and General Manager before he became a Councillor. To his credit he did not seek to take refuge before the Tribunal in professions of ignorance or mistake or

seek to blame others for his conduct as some others before him have done. Though he told the Tribunal that his practice was to rely on gut-feeling and conscience in considering whether he had a pecuniary interest, and that in both of these respects he felt comfortable with his conduct in the present case, he sought to make it clear to the Investigators and the Tribunal that he had made his own deliberate assessment that he did not have a pecuniary interest in the matter, within the terms of the Act.

He told the Investigators that he had not sought any advice from staff or any legal advice but had made up his own mind in the light of the facts known to him and his knowledge of the Ivy Cottage Estate: (Exhibit A, Annexure 15, pp.29/10-16). As mentioned earlier, he told them that he had no problem with not having declared a pecuniary interest over the extended period of time of the meetings on the draft LEP, "As I do not consider, by definition, in the Act that I do have a pecuniary interest.": (Exhibit A, Annexure 15, p.32/15). He also said that he was fully aware of the relevant sections of the Act, including section 448: (Exhibit A, Annexure 15, p.32/20-33/15).

In the Tribunal's opinion, the potential for financial benefit to accrue to Councillor Smits from the rezoning of his land to "Village" and for that potential to be regarded as likely to influence the decision a Councillor might make on the matter was clear from the outset and was clearly likely to be perceived to be so by others. In the Tribunal's view, it was so clear that, if Councillor Smits wished to ensure that he would be complying with his legislative obligations, it behoved him to seek some legal advice even though he himself was prepared to argue that he did not have a pecuniary interest. His other option was to choose to decide the question for himself and take the risk that he might be found to have come up with the wrong answer. He chose the latter and must be prepared to accept the consequences.

Councillor Virgona was disqualified by the Tribunal from holding civic office for three years and the Griffith City Councillors were suspended from civic office for two months for their contraventions of the pecuniary interest provisions of the Act in relation to changes of environmental planning instruments affecting the value of their lands. There were significant differences between those cases and the present. In the Tribunal's opinion,

disqualification would not be warranted by Councillor Smits' breaches in the present case but he should be made to serve a period of suspension from civic office. The period is to commence on 5 July 1999 and end on 2 August 1999. The Tribunal will issue an Order accordingly.

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

DATED: 30 June 1999

K J HOLLAND Q.C.
Pecuniary Interest Tribunal