

**LOCAL GOVERNMENT PECUNIARY INTEREST  
AND DISCIPLINARY TRIBUNAL**

**PIT No.1 of 2003**

**DIRECTOR GENERAL, DEPARTMENT OF  
LOCAL GOVERNMENT**

**RE: COUNCILLOR DAVID TAYLOR, WEDDIN  
SHIRE COUNCIL**

**STATEMENT OF DECISION**

**INTRODUCTION**

1. The Tribunal received, in February 2005, a report from the Director General, Department of Local Government, of an investigation into a complaint, dated 19 February 2003, by the Director General pursuant to s.460 of the *Local Government Act 1993* that Councillor David Taylor, being a councillor of Weddin Shire Council, had committed breaches of Chapter 14, Part 2 of the *Local Government Act 1993*.
2. The terms of the complaint by the Director General were as follows:

"It is alleged by the Director General, Department of Local Government, that contrary to Chapter 14, Part 2 of the *Local Government Act 1993*

("the Act"), Councillor David Taylor:

1. At the meeting of 13 December 2001 took part in the consideration and discussion of, and voted on resolutions regarding Development Application numbered DA25/2002 lodged by P&S Mawhinney
  2. At the meeting of 18 April 2002 took part in the consideration and discussion of, and voted on resolutions regarding Development Application numbered DA72/2002 lodged by P&S Mawhinney
  3. At the meeting of 18 April 2002 took part in the consideration and discussion of, and voted on resolutions regarding Development Application numbered DA25/2002 lodged by P&S Mawhinney
  4. failed to disclose his interests on 13 December 2001 pursuant to section 451 of the Act.
  5. failed to disclose his interests on 18 April 2002 pursuant to section 451 of the Act."
3. Having considered the Director General's report, and some additional valuation material, the Tribunal determined to conduct proceedings into the complaint and on 25 July 2005, issued a Notice of Decision to Conduct Proceedings, which detailed the alleged breaches of the *Local Government Act 1993* and furnished particulars of the alleged contraventions.
4. Following certain correspondence from Garden & Montgomerie, solicitors, on behalf of Councillor Taylor and following directions given by the Tribunal on 5 September 2005, the proceedings into the complaint were heard by this Tribunal on 31 October and 1 November 2005. Submissions were received on 1 November 2005 from Mr M. Robinson, of counsel, on behalf of the Director General, including written submissions, and from Mr G. Casey, solicitor, of Garden & Montgomerie, on behalf of Councillor Taylor.

## **BACKGROUND**

5. Councillor David Taylor was first elected to Weddin Shire Council in 1995. He has

continued as a councillor since then. Councillor Taylor resides in Caragabal and is a farmer and grazier by occupation. Councillor Taylor is a member of several community groups in Grenfell.

6. Peter and Shirley Mawhinney at all relevant times have operated a grain and seed business, under the name of Best Western Stock Feeds, at 1 Grafton Street, Grenfell ("No.1"). Grafton Street is also known as Mid Western Highway. During the course of the events with which the Tribunal is here concerned, the Mawhinney interests acquired 3 Grafton Street, Grenfell ("No.3") for the purposes of storage sheds and work shops and thereafter both No.1 and No.3 were operated by the Mawhinney interests as a grain and seed business.
7. Philip James Taylor and Judith Anne Taylor are and have been at all relevant times the owners, as joint tenants, of 9 Grafton Street, Grenfell ("No.9"). Philip James Taylor is Councillor David Taylor's brother. Therefore, of course, Judith Anne Taylor is Councillor David Taylor's sister-in-law.
8. In and prior to 2001 the grain and seed business at No.1 necessitated the weighing of grain and seed delivered to the storage facility and, to this end, utilised a weighbridge which was located on No.1 and adjacent to the northern boundary being the boundary fronting Grafton Street. The Tribunal will return to the detail of the weighbridge and its operation later in this statement.
9. By Development Application 25/2002 P. and S. Mawhinney sought from the Weddin Shire Council development consent for the dismantling of the then existing on-site weighbridge and its re-erection on the eastern boundary of No.1 being approximately 18 metres from the eastern boundary. The Tribunal will return to the further detail later in this statement. It is the eastern boundary which adjoins No.3 and which in turn is, at a distance, adjacent to No.9 owned by Philip and Judith Taylor.
10. Judith Taylor, having been notified by Council of the development application, wrote a

submission to the Council objecting to the proposal on the basis that the proposed relocation of the weighbridge would unduly impact upon the amenity of No.9, particularly having regard to considerations of the impact of noise and dust.

11. Council officers prepared a report for Council on the said development application.
12. The said report noted that the relocation of the weighbridge was for safety reasons in that there were occasions when trucks blocked the entrance to the site at the existing weighbridge, thus creating a traffic hazard on the Mid Western Highway. The report noted that the relocation should not change internal traffic conditions as the trucks already travel via this location. The Tribunal will return to the evidence concerning traffic movements later in this statement.
13. The said report in dealing with the submission of Judith Taylor said:
  - "• **Noise** - noise can be both subjective as well as genuine, but as Taylor's house is set back from their front boundary it places the dwelling parallel and opposite to the proposed weighbridge. As there are no structures or vegetation on the three intervening allotments noise from vehicles using or waiting to use the weighbridge may create a nuisance within the dwelling. The nuisance would be noise from vehicles braking, idling and moving off again. It is the developers' responsibility not to create or to reduce the potential for such a nuisance.
  - **Dust** - can be both subject as well as genuine, but as Taylor's house is set back from their front boundary it places the dwelling parallel and opposite to the proposed weighbridge. As there are no structures or vegetation on the three intervening allotments any movement of air would not be distributed or diverted and may possibly carry dust directly towards the dwelling. The developer has sealed part of the traffic area within the site to reduce dust and the developer has verbally given an undertaking that the approach and runoff areas of his proposal will also be sealed. It is the developers' responsibility not to create or to reduce the potential for such a nuisance."
14. The report also observed that landscaping, imposed in previous developments, had not

established properly and that that type of condition could no longer be relied upon to minimise the adverse affects on neighbouring properties:

"This will be more a problem with this development, as it will result in additional truck noise along the eastern boundary. It is considered that a physical barrier is required for effective and immediate noise and dust control and to reduce visual impact."

15. The said report recommended that consent be given to the development application subject to a number of conditions, including conditions for landscaping so as to reduce the visual impact from public and private land. A condition was recommended that vehicles not use compression braking while on the premises and conditions were also recommended in relation to dust. The recommendation in relation to a barrier was that a condition be imposed in the following terms:

"An effective barrier is to be erected along or near the eastern boundary so as to reduce to a minimum the impact of vehicle noise on adjacent and nearby properties while vehicles are using or waiting to use the weighbridge. A proposal is to be submitted to and approved by Council prior to any work on the barrier being carried out. The design of the barrier shall be of earth, timber, masonry or a combination of materials and shall take into account the height of the exhausts of vehicles utilising the facility."

16. Councillors, including Councillor Taylor, had the said report from the council officers at or prior to the Council meeting of 13 December 2001.

#### **THE MEETING OF COUNCIL - 13 DECEMBER 2001**

17. Councillor Taylor was present at the meeting of the Council when it considered, discussed and voted upon the said development application. Indeed, he voted in favour of the application. He did not disclose to the meeting any pecuniary interest in the said matter. He did not consider he had any relevant pecuniary interest. His evidence in this respect is discussed below.

18. At the said meeting the Council imposed various conditions in the following terms:

- "6. The site is to be **landscaped** so as to reduce the visual impact from public and private land. The landscaping is to be established within 6 months of the date of this consent. The landscaping is to be maintained to ensure their growth and protected from damage from livestock or machinery. Dead trees, shrubs or plants are to be replaced within 3 months of dying.

*Reason - to ensure that the landscape and scenic quality of the area is not detrimentally affected and to assist in the reduction of visual impact as a consideration required under the provisions of Section 79C of the Environmental Planning and Assessment Act and the associated Guidelines.*

7. Vehicles are not to use compression braking while on the premises. Signs are to be erected adjacent to all entrance gates of the property and be clearly visible and legible at all times to persons entering the property.
8. An effective barrier is to be erected along or near the eastern boundary so as to reduce to a minimum the impact of vehicle noise on adjacent and nearby properties while vehicles are using or waiting to use the weighbridge. A proposal is to be submitted to and approved by Council prior to any work on the barrier being carried out. The design of the barrier shall be of earth, timber, masonry or a combination of materials and shall take into account the height of the exhausts of vehicles utilising the facility.

*Reason conditions 7-8 - to reduce to a minimum the impact of the development on the surrounding environment.*

9. Reinforced concrete footings are to comply with Australian Standard 2870.

*Reason: to ensure compliance with the relevant standard*

10. Activities occurring at the premises in conjunction with the business operations must be carried out in a manner that will minimise emissions of **dust** from the premises.
11. **Dust** generated by the development must be prevented from polluting any natural waterway. It is the developers' responsibility to control dust generated by the development.

12. The approach to and runoff from the weighbridge is to be sealed as well as any land within the allotment that will be traversed by vehicles using or waiting to use the weighbridge.

*Reason - conditions 10 & 12 - to ensure that nuisance and environmental degradation due to waste water, noise, effluent, general waste, outdoor lighting and dust is controlled, to preserve water and air quality, existing water resources, and to protect adjoining land uses as a consideration required under the provisions of Section 79C of the Environmental Planning and Assessment Act and the associated Guidelines and Clause 7(d) and (e) of IDO No.1 - Weddin."*

### **3 GRAFTON STREET, GRENFELL**

19. As at December 2001, and inferentially for a not inconsiderable period of time before that, No.3 was a vacant block of land which was largely overgrown with grass and weeds and which was used, by persons unknown, for parking old machinery and the like.
20. As at December 2001, the evidence would suggest that Peter and Shirley Mawhinney did not own or have any relevant interest in No.3.
21. As a consequence of condition 8 of the said development consent the Council, apparently, required the construction of a high wall (70m x 3m) along the eastern boundary of No.1. In his record of interview with a senior investigator from the Department of Local Government, Councillor Taylor explains that the Mawhinneys thought the cost was too great so they purchased No.3 and put in a development application to construct storage sheds "to stop the noise flowing across". The evidence suggests they lodged the DA and after approval acquired No.3 in July 2002.
22. The Mawhinneys lodged a development application no.72/2002 for the erection of two structures 22.8m x 6.1m each containing 7 separate storage bays and one 24.4m x 9.4m shed containing two workshops/garage bays along the eastern boundary of No.3.

23. Following notification various residents, including Mrs Taylor, from No.9, objected to the proposed development. Generally, the objections were on the basis of noise and dust, loss of privacy, potential hazards being stored chemicals and the residents' land being devalued.
24. The council officers prepared a report on the development application and dealt with the objections. In dealing with the noise objection, the council officers noted that there would be structures between the driveway/turning area and the potential for noise to be carried directly towards adjacent or nearby dwellings is reduced. In relation to dust, the council officers noted that not only would there be structures between the driveway/turning area and the adjoining residential properties, but that the developer had shown on the plans that the driveway area was to be sealed. The other objections were also dealt with. The council officers recommended that the development application be approved subject to a number of conditions.

#### **COUNCIL'S MEETING OF 18 APRIL 2002**

25. On the said day the Council considered the development application and the council officers' report. Councillor Taylor was present when the said item of business was discussed, considered and voted on. He voted in favour of the development application. He did not declare any pecuniary interest as he considered that he had none.
26. At the said meeting the Council imposed various conditions in line with those recommended by the council officer's report.
27. The council officer also prepared a report in relation to Condition 8 of Development Approval 25/2002 relating to the erection of an effective barrier along the eastern boundary of No.1. The report recorded that the Applicant had requested that the Council assess Development Application 72/2002 in light of that Condition 8 and that, even though the condition stated that an effective boundary was to be erected along the eastern



boundary, it did not limit what that barrier was to be constructed of or the style of the barrier. The report records, in substance, the Applicant's request that tree planting already carried out in accordance with 25/2002, the landscaping proposed in DA 72/2002 and the proposed structures be accepted as an effective barrier for the purposes of Condition 8 of DA 25/2002.

28. At the said meeting, again with Councillor Taylor present, the Council resolved to accept the alternative as submitted by the Applicant subject to completion of DA 72/2002 by 30 September 2002.

## **PECUNIARY INTEREST PROVISIONS**

### **"[s 442] What is a "pecuniary interest"?"**

**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."

### **"[s 443] Who has a pecuniary interest?"**

**443** (1) For the purposes of this Chapter, a person has a pecuniary interest in a matter if the pecuniary interest is the interest of:

- (a) the person; or
- (b) another person with whom the person is associated as provided in this section.

(2) a person is taken to have a pecuniary interest in a matter if:

- (a) the person's spouse ... or a relative of the person ... has a pecuniary interest in the matter;

...

(3) However, a person is not taken to have a pecuniary interest in a matter as referred to in subsection (2):

(a) if the person is unaware of the relevant pecuniary interest of the ... relative ... or ..."

The definition of "relative" provides as follows:

""Relative", in relation to a person, means any of the following:

- (a) the ... brother ... of the person ... or of the person's spouse;
- (b) the spouse ... of a person referred to in paragraph (a)."

29. The primary issue in the proceedings before the Tribunal was whether or not Councillor David Taylor had a pecuniary interest in the sense of whether there was a reasonable likelihood or expectation of appreciable financial gain or loss to Philip and Judith Taylor, both being relatives of Councillor Taylor for the purposes of the Act. This issue, in turn, involves a consideration of valuation evidence as set out and discussed below.

## **NON-VALUATION EVIDENCE**

30. The Tribunal had the benefit of an aerial photograph depicting the site and surrounding properties including how No.9 is set back from the street alignment, whereas No.5 and No.7 are not so greatly set back with the consequence that, prior to the erection of the said sheds, there was an area between No.1 and No.9 that was unobstructed by any relevant structure. The aerial photograph also reveals that this area is relatively unbuilt up in comparison with the denser residential developments closer to the centre of the town.

31. The Tribunal also had the benefit of a series of photographs of the site and surrounding areas, including photographs showing the said set back and photographs from the Taylors'

property looking over the said relatively cleared area towards trucks situated upon the new weighbridge. The photographs show the location of various structures on No.1 including the old weighbridge. The area to, from and around the structures where the vehicles would pass is depicted in the photographs as now being sealed. The photographs also reveal the height and location of the sheds erected pursuant to 72/2002.

32. Councillor Taylor was interviewed for the purposes of the investigation and in relation to the first meeting acknowledged that he had voted in favour of the development application, that he knew his sister-in-law was an owner of No.9 and that she had objected to the development on a basis including the impact of noise and dust. When asked whether he was aware that those impacts might be likely or expected to have an appreciable financial impact, namely a loss or diminution or reduction in the value of Mrs Taylor's property, Councillor Taylor responded that he was not aware of that and when asked why he did not declare a pecuniary interest in the matter, he responded in these terms:

"A. I think it's just something that I possibly overlooked and I thought the relationship was very remote and I did ask the mayor prior to going back after supper into the meeting and I just happened to say to the mayor, I said, you know, do you think I should declare a conflict of interest, and he sort of shook his head and he said, "Well, it's up to you." So I thought, just being so remote, I just thought, well, you know, I'll stay in the meeting.

Q. When you say the relationship is remote, what do you mean by that?

A. Well, I have nothing to do with it, absolutely nothing. We don't speak, and my brother, I think he wouldn't have - it didn't worry him at all, whether the development went ahead or not, he wasn't concerned at all. My sister-in-law has always drumming up objections for any development down in that end of town. She causes a lot of trouble and a lot of problems. I think our ex Mayor can speak on that. In fact I've got no time for her because the way she handles things and the way she goes about things, and the general approach to the whole - as far as employment developments and the advantages they have got for the town - well, she seems to go against all that."

33. When Councillor Taylor was asked in relation to the second development application for the erection of the sheds and whether he was aware at the time of the meeting that it may

have an impact on Mrs Taylor's property, his response was:

"A. No, I didn't think it would have any impact at all. In fact, I think it would have improved the value because when you see the block prior to the development, I mean it was only just long grass and old dead machinery lying all over it, and what the Mawhinneys have done, they've cleaned it all up and made it very presentable. It is an asset to the town, as well as employment, you know, creating more employment.

Q. You've just mentioned that you didn't think it would have an impact but you did mention that it may have improved the value of her property, so you didn't consider that to be an impact?

A. When you've got a rubbish dump, what, two or three doors down - you know, transformed from what it was to what it is now, I think it would have to be an improvement; they are not an eyesore or anything, they are well-presented and they are well constructed and I don't see any problems at all, and I think it would have to probably add value to it.

Q. So did you consider during the meeting that it would improve the value?

A. No, not at the time. No. I was virtually sick of the way she carries on and her attitude towards any development down in that area. I mean this is not the first time it has gone on - it goes on, everything that happens down that end of town, she seems to have problems with it.

Q. I guess the next question would then be, did you consider declaring your pecuniary interest at that meeting?

A. I don't think I did because I sat in on the first one and I don't think I'd even give this one a second thought. I think I just stayed in the meeting."

34. Councillor Taylor in the interview was asked a question which elicited a response relating to a development by Bromar Engineering across Grafton Street from Mrs Taylor's property which was a development application for a new engineering workshop and offices and it seems clear from the exhibits before the Tribunal that the development consent was granted on 19 July 2001. In respect of that development, Mr Taylor said:

"My sister-in-law, there was a development across the road, she rang up, that was prior to that December meeting, a development by Roma [sic] Engineering - and the same thing occurred there and she rang up and

made threats to me, threatening to sue council for everything she could get from the council, so I declared a conflict of interest over that matter and I thought, well, I'm not going to be involved and tied up with this sort of rot - so I baled out, and I did declare a conflict of interest and that development was passed unanimously. As I stated before the noise, - there'd be more noise coming from the trucks down the highway, using their exhaust brakes and their engines - rather than coming from the weigh bridge at Mawhinneys."

35. Councillor Taylor gave oral evidence before the Tribunal including evidence of the operation of trucks delivering grain before the introduction of the new weighbridge. His evidence was that the trucks would enter the premises from Grafton Street near the old weighbridge and, if the weighbridge was empty, he would enter it driving in a westerly direction, if necessary, reversing to get the correct angle. Having completed the weighing operations he would then back off and make the deliveries to silos or other storage areas. He would then drive past the location where the new weighbridge is now situated and would enter the old weighbridge, waiting his turn if necessary, to be reweighed empty. He would then reverse out of the old weighbridge and exit the premises. Sometimes if there are a number of trucks waiting upon his entry to the premises then he would do a loop around the old building to come back and line up to be ready to weigh and, in doing so, would drive past the area where the new weighbridge is now located. In these circumstances he would drive past the location of the new weighbridge twice.
36. In relation to the new weighbridge, it seems clear that it involves one as opposed to three weighings for different parts of the truck, that the new weighbridge is electronic rather than mechanical. It is still, of course, necessary for the trucks to be weighed on the new weighbridge full, to deliver the grain, to circle the premises and to be weighed empty before leaving the storage facility. They are still weighed twice, once full and once empty.
37. The evidence given by Councillor Taylor is consistent with that given in a statement by Peter Mawhinney.
38. Councillor Taylor gave oral evidence concerning a conversation which he says he had

with the Mayor prior to the first meeting. His oral evidence that the conversation took place prior to the meeting is consistent with his interview referred to above, but is not consistent with a statement from the then Mayor, Councillor Simpson, who says that there was a discussion after the meeting, but not before. Councillor Simpson did not agree with the proposition that Councillor Taylor had sought advice as to whether or not he ought to declare a pecuniary interest in the particular matter. It is clear to this Tribunal, from reading Councillor Simpson's statement, that his recollection of the events, after this lengthy time, is far from clear. The Tribunal accepts that there was a conversation between Councillor Taylor and the Mayor prior to the meeting dealing with the DA and the Tribunal accepts Councillor Taylor's evidence that there was a discussion as to whether or not he ought to declare a conflict of interest. It seems clear to this Tribunal that the Mayor gave advice to the effect that it was Councillor Taylor's decision, that he ought to make it and that he ought to be very sure or careful. There is an inconsistency between the said interview and Councillor Taylor's oral evidence as to whether the Mayor said anything to the effect that "it's fairly remote". No such words were attributed to the Mayor in the said interview. The Tribunal is not satisfied that those words were used by the Mayor in that conversation. Not only is there the said conflict, but it ought to be borne in mind that this conversation took place at tea time during the course of the Council meeting. Further, the Tribunal is not prepared to ascribe to the Mayor the meaning of the word "remote" which Councillor Taylor thought was relevant, namely the fact that his relationship with his sister-in-law was remote in a sense of being estranged. Such "remoteness", of course, can in fact have nothing to do with whether or not there is a pecuniary interest for the purposes of the *Local Government Act 1993*. Councillor Taylor's understanding of the provisions of the *Local Government Act* in this regard, was revealed by his answers to be seriously lacking.

39. Councillor Taylor was asked about the Bromar Development across the road from the Taylors' property. Councillor Taylor agreed that in relation to that development application he had declared a pecuniary interest and that the consent was 19 July 2001, namely before the development application meetings with which these proceedings are concerned. While it was in circumstances where Mrs Taylor had rung Councillor Taylor

and according to Councillor Taylor "virtually threatened" him, if the development was approved, he nevertheless declared a pecuniary interest in circumstances where his sister-in-law had complained about dust, noise, vermin and electrical interference all having an adverse impact on her property.

## **VALUATION EVIDENCE**

40. Kenneth Robertson is a certified practising valuer who commenced employment in 1966 with the New South Wales Valuer General's Department. He retired from the New South Wales Department of Commerce (State Valuation Office) in July 2005, although he still is engaged by that Department as a contract valuer. He has been located in the Dubbo, Mudgee, Orange, Griffith, Deniliquin and Parkes office and has extensive experience in statutory valuation for rating and land tax purposes. He also has experience in resumption valuations, asset valuations and valuations for Property Consultancy including cottages, industrial complexes, complexes, commercial and rural properties. He has 25 years of valuation experience in the town of Grenfell, including cottages and values for rating and taxing.
41. Mr Robertson agreed in cross-examination that a large percentage of his work was valuing properties for the purposes of land tax and rating purposes which involves "land value" which involves the unimproved capital value of properties. For the last 30 years most of his time has been looking at the unimproved capital value of properties but he has done a lot of valuing for acquisition purposes. When valuing for acquisition purposes, that involved looking at the improved capital value, market value, of the properties.
42. Mr Robertson's primary valuation report dated 18 November 2002 concludes that the relocation of the weighbridge under DA 26/2002 would impact on Mrs Taylor's property as the location of the weighbridge is now 60m closer to her property resulting in an increase in noise from the vehicles using it.

It ought be observed that there was no acoustic report or measurements done to support the underlying assumption that there would be an increase in noise. It also does not appear what assumptions, if any, were made by Mr Robertson as to the truck movements before and after the new weighbridge was installed. Reading the report as a whole, his conclusion appears to be based upon the proposition that the old weighbridge was approximately 150m from Mrs Taylor's property and, after relocation, the distance would be reduced to approximately 90m. The assumption appears to be that prior to the installation of the new weighbridge the trucks using the old weighbridge did not travel or utilise the area in the vicinity of the new weighbridge. Factually, if that assumption were made, it is incorrect.

43. Mr Robertson, when asked whether the amendment to DA 26/2002 would have any impact on Mrs Taylor's property, referring to the deletion of the landscaping, concluded that it would adversely impact on her property as the purpose of the landscaping was to reduce to a minimum the impact of the development on the surrounding environment. The landscaping required would have reduced the noise on Judith Taylor's property.
44. When asked whether the development under DA 72/2002 would have any impact on Mrs Taylor's property, Mr Robertson concluded that "any ongoing expansion of the seed and grain business" "would affect the saleability of residential cottages in the area".
45. Mr Robertson concluded that the overall adverse affect on Mrs Taylor's residence would be in the range of 5-10% of the improved value, which would be in the range of \$85,000 to \$90,000.
46. Mr Robertson's further letter of valuation dated 25 March 2003 does not significantly, in the Tribunal's opinion, add to his first report. A couple of matters would appear clear. In relation to the amendment to DA 26/2002, in regard to the landscaping, it is not clear to this Tribunal that Mr Robertson appreciated that the deletion or reconsideration of Condition 8 of DA 26/2002 was in the context of DA 72/2002 effectively substituting a barrier for that provided by Condition 8. The barrier was now to be the sheds approved



under DA 72/2002 rather than that contemplated by Condition 8 of DA 26/2002.

The second matter which ought to be noted is that when discussing the impact of DA 72/2002 Mr Robertson answers the question in relation to an expansion of the seed and grain business affecting the saleability of the residential cottages in the area. He does not explain why. In circumstances where the zoning of the land comprising No.3 always permitted, with Council consent, such commercial or industrial activity, and in circumstances where the vacant land was previously used for the purposes referred to above, it is unexplained by Mr Robertson, if there was an ongoing expansion of the seed and grain business, how that would affect the saleability of the residential cottages.

The third matter to be observed is that Mr Robertson does not seek to differentiate the extent of the impact for each part of the questions which were asked. He deals with the matter in the context of an overall adverse impact of the range set out above. He was asked in March 2003 for each point to be assessed individually and to reflect whether each matter would result in the reasonable likelihood of an appreciable financial gain or loss to the value of Judith Taylor's property. The letter of 25 March 2003 addresses each matter in terms of a reasonable likelihood of an appreciable reduction in value and in each case says that the reduction in value is difficult to quantify in money terms but would form part of an overall adverse impact in the range of 5-10%.

47. When cross-examined, Mr Robertson spoke about what he assumed in relation to the truck movements. He referred to the fact they would have to be weighed when they were loaded and reweighed unloaded. He assumed that prior to the new weighbridge that trucks would have driven past that location, query once only, but he said that you would not have had the stopping and idling and the increased activity from being reweighed at the weighbridge. The assumption which he made is partly borne out by the evidence of Councillor Taylor, namely that sometimes it would only be necessary for the trucks to pass the location of the new weighbridge once, whereas when relocated it was necessary for the trucks on every occasion to not only pass that location, but to stop, idle and, after weighing, to move off.

48. A valuation report was tendered on behalf of Councillor Taylor. It was prepared by Mr James Patterson who from September 1980 has been involved in valuing property, initially in the Sydney CBD area, but from about July 1990 onwards in the area covered by Cowra, Forbes, Parkes, Boorowa, Grenfell and the other areas listed in his CV. Since that time his work has involved compiling detailed valuation reports for determining, inferentially, market value and allowing the instructing party to understand the process and rationale for the final valuation involving, as it did, the correlating and analysing of sales evidence.
49. His "kerbside" inspection of No.9 was undertaken and, in addition, he apparently acquired from Mr Mawhinney some information concerning truck movement prior to the resolution of 13 December 2001. That information is partially consistent with the evidence of Councillor Taylor involving, as it does, one trip past the new weighbridge location, not the present two. In those circumstances, it is a little difficult to understand why he says in his report that "it would appear that the resolutions passed by Council on 13 December 2001 did not increase the traffic flow on the eastern side of the subject property". He does say that several of the Council's conditions for the relocation of the weighbridge, such as the sealed road surfaces and the signs on-site indicating that truck drivers not use compression braking, has probably lessened any noise and dust impact on the neighbours. With respect to Mr Patterson, this asks the wrong question when one is considering the question required to be asked by the Act. The question is a pecuniary interest in the matter being considered by the Council, not a pecuniary interest taking into account all the conditions which may be imposed by the Council upon the development approval.
50. Mr Patterson goes on to consider DA 72/2002 and concludes that the structure was built in part to reduce noise from the grain mill and also the fact that the old dilapidated machinery would have been visually unappealing. He concludes that, if before and after valuations were undertaken by an experienced valuer, it would have been very hard to justify any variation in value due to the Council resolutions.

51. Mr Patterson was not available for cross-examination.

## SUBMISSIONS

52. Mr Robinson of counsel for the Director General submitted that when considering s.442 of the *Local Government Act 1993* as to what is a reasonable likelihood or expectation of an appreciable financial gain or loss to an appropriate person the test, as established by a number of authorities, is that it is an interest that is intended to attach to chances or possibilities as well as to probabilities of financial gain or loss.

53. The Tribunal is of the opinion that there is no doubt that this is the interpretation adopted by this Tribunal in the past and it is an interpretation which this Tribunal considers to be plainly correct. As this Tribunal said in *Director General, Department of Local Government and Co-Operatives Re Councillor Graeme Frank Roberts, Hastings Council* (PIT No.1/1995)

"The idea of remoteness in subsection (2) of section 442 is not consistent with the suggestion that subsection (1) was intended to require a state of probability of financial gain or loss to exist before a pecuniary interest could arise. Reading both subsections together it is evident the concept of pecuniary interest is intended to attach to chances or possibilities as well as to probabilities of financial gain or loss, otherwise there would be no room for the notion of remoteness depriving an interest of the status of a pecuniary interest for the purposes of the Act. An interest as remote as that described in subsection (2) could not qualify under subsection (1) as being an interest that a person had in a matter "because of a probability of appreciable financial gain or loss". Being too remote to be a probability it would fail to be a pecuniary interest under subsection (1) with the result that the remoteness proviso in subsection (2) would never be applicable to it; it would never had any work to do.

It is clear that neither on the history of the legislation or the language used in section 442 can it be argued that a pecuniary interest was intended to exist only where there was a certainty of financial gain or loss. Both "likelihood" and "expectation" admit the possibility of failure and indicate that the language is being addressed to chances or possibilities as well as

probabilities and to cases where the nexus between the Council's decision in a matter and the accrual of financial gain or loss to the person may be subject to contingencies, uncertainties and the risk of non-fulfilment. This being so, subsection (1) of section 442, or at least the word "expectation" contained therein, should be interpreted as applying to cases where the prospects of financial gain or loss fell short of being a probability but consisted of a reasonable chance or possibility. This still leaves subsection (2) to operate as a proviso excluding cases of remoteness or insignificance."

54. This interpretation and construction of s.442 has been expressly adopted and applied by this Tribunal in a number of cases. Mr Casey on behalf of Councillor Taylor did not suggest that the sections ought to be construed otherwise than in accordance with these principles.
  
55. Mr Robinson submitted that the Tribunal ought to accept the evidence of Mr Ken Robertson, valuer, in preference to the valuation evidence of Mr James Patterson. In addition to his oral submissions, Mr Robinson relied on written submissions in relation to this question. He emphasised the relevant experience in the Grenfell area, the fact that Mr Robertson had before him the relevant council officers' reports and the Council Minutes and the fact that he inspected the properties from a number of perspectives. He emphasised that Mr Robertson, in his submission, addressed the correct question, namely the likely affectation of the development applications as it would have been able to be foreseen as based on the proposals that were before the Council and not by reference to future or subsequent developments. He also emphasised that Mr Robertson's evidence about the "doubling" of the activity consequent upon the proposed construction of a new weighbridge was unchallenged. He submitted that Mr Patterson, on the other hand, had relatively little experience in the Grenfell area, he was not called to give evidence to support his report or be exposed to cross-examination, he did not examine the relevant Council papers and he seems to have relied upon an imprecise and untested conversation with Mr Mawhinney. In Mr Robinson's submission, Mr Patterson addressed the wrong question in relation to the first development application. Further criticisms were made by Mr Robinson of Mr Patterson's evidence, including that he did not address the correct interpretation of s.442 as referred to above.

56. Mr Robinson also submitted that it is important to approach the question under s.442 upon the basis of the proposition contained in the development application and to answer the question posed by the section on that basis. One ought not, he submitted, to ask the question posed by s.442 upon the basis of the development consent which was in fact granted by the Council with all the attached conditions, many of which were designed to ameliorate adverse impact. To ask the question posed by s.442 in the latter way would not only involve a misconstruction of the section, but would frustrate the policy. An argument about whether or not to impose conditions and, if so, which ones, could very well involve pecuniary interest considerations as well as the more fundamental question of whether or not to approve the application at all.
57. The Tribunal did not understand Mr Casey's submissions to take issue with this proposition.
58. Mr Robinson submitted that if within the meaning of s.442 there is a likelihood or expectation of appreciable financial loss or gain, then it is no answer that the amount of the loss, if appreciable, cannot be specified in precise dollar terms. Such a proposition was stated by this Tribunal in *The Director General, Department of Local Government, Re Councillor Pamela Virgona, North Sydney Council* PIT 3/1998 at page 61.
59. The lastmentioned proposition, in this Tribunal's opinion, is plainly correct. Again, the Tribunal did not understand Mr Casey, on behalf of Councillor Taylor, to contend otherwise.
60. Mr Robinson addressed submissions to each of the three matters which came before the Council and drew support for his submissions from the terms of the council officers' reports and the conditions which were imposed by the Council for the purpose of minimising the foreshadowed adverse environmental impact, including upon Mrs Taylor's property.

61. Mr Casey on behalf of Councillor Taylor submitted that the Tribunal ought to accept the evidence of Mr Patterson, rather than Mr Robertson. It was submitted, in substance, that Mr Robertson's experience was primarily limited to valuation work for the Valuer General, State Valuation Office and that the bulk of his work was doing unimproved capital valuations of properties for land tax and rate purposes, whereas Mr Patterson had been involved throughout his career in establishing the market value of properties.
62. Mr Casey submitted that Mr Robertson's lack of objectivity ought to be taken into account and he addressed submissions how that lack of objectivity had been demonstrated. Mr Casey submitted that Mr Robertson's evidence had demonstrated that he did not know the difference between a development application and the Council business papers on the other and that this was a sorry reflection on his so-called expertise.
63. Mr Casey submitted that there was no evidence of what noise emanated from the old weighbridge and there had been no noise tests or observations made in relation to noise from the new weighbridge. There had been a total lack of enquiry, it was submitted, on these matters of noise and indeed traffic flows both before and after the change in the weighbridge location. It was submitted that the complications of the manoeuvres involved in the old weighbridge would more than compensate for the proximity of the new weighbridge to the Taylors' property, particularly when considered in light of the fact that the old weighbridge was a mechanical one, whereas the new one was electronic, inferentially quieter, and faster. Mr Casey submitted that Mr Robertson in part of his report addressed deletion of Condition 8 in isolation whereas in fact it was part of the consideration of DA 72/2002 involving the erection of the sheds. This again, it was submitted, demonstrated a lack of appreciation of the facts and a lack of expertise and objectivity.
64. Mr Casey addressed the evidence relating to truck movements before and after the new weighbridge and submitted there was certainly no evidence that noise with the new bridge was greater than it was before. He submitted that, contrary to Mr Robertson's assumption in his report, any question of expansion of the seed and grain business was

not supported by the evidence and, in any event, was an irrelevant consideration.

65. Mr Casey further criticised the reasoning and objectivity of Mr Robertson's report. He submitted that one of the fundamental difficulties in the case was that there were two distinct occasions when it was alleged that Councillor Taylor had failed in his responsibilities and Mr Robertson has given no dollar term value to any alleged appreciable loss for either occasion. Rather, he has given a global estimate for all three scenarios considered by him.
  
66. It was submitted by Mr Casey that little weight should be given to the interview with Councillor Simpson as it was plain that he had difficulty in his recollections. It was submitted that there was no evidence of doubling of the trucking activity in the relevant location and, in any event, the doubling of the activity does not necessarily mean a doubling of the noise affectation. It was pointed out that the development application was not in evidence and that one ought to be mindful of the fact that the Council could have been using the development application as an opportunity to remedy an existing state of affairs rather than one which was being generated by the application.
  
67. Mr Robinson pointed out that Mr Robertson's evidence was that he had done a lot of acquisition work over 30 years covering the central west New South Wales. In reply he submitted that, in relation to the first meeting, the case against Councillor Taylor was compelling, though conceded that in relation to the second development application the Tribunal may consider it not as compelling a case as the first. Mr Robinson objected to the submissions that Mr Robertson lacked objectivity, particularly in circumstances where such a proposition had not been fairly put to him. Further, it had not, it was submitted, been put to him that his methodology was flawed. Mr Robinson also made submissions in relation to traffic movement both before and after the installation of the new weighbridge.

## FINDINGS

68. The Tribunal has already dealt with many of the submissions and evidence in the course of the discussion above.
69. This Tribunal is of the opinion that the proposal to relocate the weighbridge to the eastern boundary of No. 1 Grafton Street, Grenfell, at its lowest, involved a chance or possibility of appreciable adverse financial impact to Mr and Mrs Taylor's property at No.9 Grafton Street. The proposal, one can clearly infer, did not involve any noise impact amelioration steps. The weighbridge was now some 60 metres closer to Mr and Mrs Taylor's property and although, as submitted by Mr Casey, there were no acoustic reports, one can readily infer an adverse impact because of the increase in noise. Not only was the weighbridge now approximately 60 metres closer, it was no longer partially enclosed and the trucks, rather than driving past the eastern boundary, were now required to brake, stop, idle and then move off again in a location with a clear, uninterrupted environment to Mr and Mrs Taylor's property.
70. In addition, it seems clear from the evidence of Councillor Taylor that when there were no other trucks waiting the old weighbridge could be utilised in circumstances which only involved driving past the eastern boundary on one occasion. One infers that this was primarily in the off season. On other occasions it was necessary to drive past the eastern boundary on two occasions whereas now it is necessary, on all occasions, for the trucks to be in the location of the eastern boundary twice in order to be weighed full and empty. There are approximately 60 vehicles on a regular basis per month, except in December/January, when the harvest occurs. In these months, the clear inference is that the number of vehicles is significantly more.
71. The Council officer's report on development application 25/2002 clearly, and in this Tribunal's opinion rightly, acknowledges the possibility of adverse impact from noise and dust to Mr and Mrs Taylor's property and it was in an attempt to ameliorate these impacts inherent in the development application that the conditions were recommended and



ultimately imposed by the Council.

72. In this regard, the Tribunal accepts the evidence of Mr Robertson that there would be a reasonable likelihood of an appreciable reduction in the value of the Taylors' property, not only because of the closer proximity but also the other factors referred to above. In this respect, the Tribunal prefers this evidence to that of Mr Patterson which in this respect appears to be predicated upon the assumption that there would not be an increase in traffic flow on the eastern side of the subject property. Also, Mr Patterson, in arriving at his conclusion, takes into account the Council conditions, at least in relation to compression braking and sealing of roads in arriving at the conclusion which he does. In the Tribunal's opinion, that does not address the question required by s.442. As submitted by Mr Robinson, the "matter" with which the Council was concerned was the development application not the development as ultimately approved by the Council with whatever conditions the Council saw fit to impose. In the Tribunal's opinion Mr Patterson is, here, not addressing the question required for s.442. The Tribunal accepts the affectation would be appreciable even though a precise dollar value has not been ascribed.
73. In the Tribunal's opinion, Councillor Taylor had a pecuniary interest in relation to development application 25/2002 which was before the Weddin Shire Council on 13 December 2001. He did not disclose his pecuniary interest as required by s.451 of the *Local Government Act 1993* and he was present at the meeting of the Council when that development application was being considered and discussed and voted upon. He was prohibited from doing so by s.451(2).
74. It is, on the evidence before this Tribunal, unclear as to all the circumstances in which this occurred. On one reading of the interview with Council Taylor as extracted in paragraph 32 above, it was possibly a matter which he overlooked. An alternative reading of the evidence would lead to the view that Councillor Taylor considered that because he had an estranged relationship with his sister-in-law, that meant he did not have a pecuniary interest for the purposes of the Act. As stated above, assuming the

estranged relationship that can have absolutely no bearing upon whether or not there is a pecuniary interest for the purposes of the Act. If this is a correct understanding of Councillor Taylor's evidence, it demonstrates that in 2001, even though he had been a councillor since 1995, that he had an understanding of the pecuniary interest provisions of the legislation which was seriously deficient.

75. The Tribunal is not relevantly satisfied that Councillor Taylor had a pecuniary interest in either of the matters dealt with by the Weddin Shire Council at its meeting on 18 April 2002. The Tribunal is not satisfied that either the decision to approve the erection of the sheds on No.3 Grafton Street, or the decision in effect to accept the sheds and landscaping in satisfaction of the condition No.8 of the development consent 25/2002 would involve a reasonable likelihood or expectation of appreciable financial loss to Mr and Mrs Taylor.
76. The evidence of Mr Robertson in these two regards does not satisfy this Tribunal to the contrary. His reports do not make clear his appreciation of the reasoning behind the amendment to DA 25/2002 in the context of the erection of the sheds and his rationale in respect of the sheds in terms of an expansion of the business is, in this Tribunal's opinion, not convincing. It is not explained how it is said in an area so zoned "any" ongoing expansion of the seed and grain business would affect the saleability of residential cottages in the area, even assuming that such an expansion took place. If his evidence is to be understood as a physical expansion of the area then, bearing in mind the sheds would operate as a noise buffer from the weighbridge, bearing in mind that the land was previously vacant and overgrown and used for the storage of old machinery, the Tribunal is not satisfied that there was, in this respect, a reasonable likelihood or expectation of appreciable financial loss.
77. In the Notice of Decision to Conduct Proceedings it was suggested there may be an issue of whether Councillor Taylor was not taken to have a pecuniary interest because he was unaware of the relevant pecuniary interest of his relatives (s.44B(3)) and whether within the meaning of s.457 he did not know or could not reasonably be expected to have known

that the matters under consideration were matters in which he had a pecuniary interest. As the facts turned out, Councillor Taylor, at all relevant times was fully aware of all relevant facts such that neither section of the Act could afford him any relief. The fact that he may not have appreciated the consequences of such fact is not here relevant to the question of whether he breached the Act. Mr Casey, correctly in the Tribunal's opinion, did not address any submission to these sections.

78. The Tribunal would intend that once the parties have had an opportunity to consider these reasons, that the matter come back before the Tribunal to deal with any evidence and/or submissions as to what consequences ought to follow from these findings.

DATED: 29 November 2005

