LOCAL GOVERNMENT PECUNIARY INTEREST & DISCIPLINARY TRIBUNAL

LOCAL GOVERNMENT ACT, 1993

PIDT No 1/2007

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: COUNCILLOR JOHN FINKERNAGEL, SHOALHAVEN CITY COUNCIL

DETERMINATION

1. This proceeding relates to alleged breaches of s451 of the *Local Government Act 1993* by (former) Councillor John Finkernagel of Shoalhaven City Council.

2. On 22 March 2007 the Tribunal received from the Director General, Department of Local Government, notification pursuant to s465 of the approval of an investigation pursuant to s462 into the alleged breach(s) of the Act. On 1 February 2008 the Tribunal received from the Director General a report of an investigation in relation to the complaint against Mr Finkernagel. On 25 February 2008 the Tribunal issued a Notice of Decision to Conduct proceedings, which were ultimately heard on 9 & 10 October 2008. At the hearing of the proceedings Mr Finkernagel appeared in person and the Director General was represented by Mr Robinson, of counsel.

Background Facts

3. Mr John Finkernagel was first elected as a councillor of the Shoalhaven City Council on 14 September 1991. He did not serve between 1995-1999, but was again elected as a councillor on 11 September 1999, and re-elected on 27 March 2004. He was not re-elected at the State council elections held on 13 September 2008. During the period in which Mr Finkernagel was a councillor he served as Deputy Mayor and Assistant Deputy Mayor at different times, and has been a member of various committees and sub-committees of the council.

4. Prior to the meetings of council the subject of the complaint in this proceeding Mr Finkernagel had purchased two lots (lots 6 & lots 17) in a paper-subdivided estate known as the 'Verons estate' within the Shoalhaven local government area. Two other lots (lot 9 & lot 19) were owned by brothers of Mr Finkernagel (in the case of lot 9, jointly with that brother's wife).

5. The alleged breaches against Mr Finkernagel relate to three meetings of the council held on 2 November 2005, 24 January 2006, and 28 March 2006.

6. For some time Councillor Finkernagel had been concerned about the issue of the safety of roads within four paper-subdivision estates, including the Verons estate in which he and his brothers owned land. Within those estates lands had the physical character of being essentially undeveloped, but had been subdivided into smaller allotments. Also there were a series of roads through the estates in which the question of ownership of the roads was uncertain. The roads, generally, were formed but remained as un-graveled and un-tarred roads and were infrequently upgraded. In addition because the roads were remote and there was some uncertainty about the ownership of them, they

tended to attract youths and/or unregistered vehicles, all of which concerned Mr Finkernagel from a safety aspect.

7. In a series of letters over a not insignificant period of time Mr Finkernagel had attempted to have what he perceived as a dangerous situation addressed by the council assuming ownership of the roads and then proceeding to make them safe.

8. On 20 September 2005 the council had resolved to accept as public roads all of those roads contained within the four estates, including the Verons estate. Mr Finkernagel had, as part of that council resolution, declared a pecuniary interest in that decision and had complied with the relevant provisions of the *Local Government Act* in consequence of that declaration

Meeting of 2 November 2005

9. The resolutions of 20 September 2005 included a resolution that the council consider a further report on the implications of upgrading the roads so as to 'meet risk management standards as rural access roads'. A councillor briefing was held on that topic on 10 October 2005 and a report to the council for the meeting on 2 November 2005 was to address the earlier resolution of 20 September 2005.

10. On 2 November 2005 there was an ordinary meeting held of the Shoalhaven City Council. A report of the General Manager was prepared and provided to councillors prior to the meeting. The report dealt with the topic 'Paper-Subdivision Roads'.

11. The report by the General Manager, in so far as the Verons estate was concerned, gave an outline summary of the history of the roads and their present condition, with a series of recommendations for expenditure to

'minimise risk'. This included the installation of some signage, some minor improvement to the access of Sussex Inlet road, the clearing of vegetation to a six metre width and the provision of turning circles, the replacement of a culvert, and the upgrading of the road in two locations. The total of the recommended expenditure to minimise risk was $77,500. The report also noted there would need to be an upgrade of the Sussex Inlet road 'as the development progresses' and that interim repairs to the culvert had already commenced. The report also then dealt with an options summary which, in relation to the Verons estate, essentially repeated the recommended 'minimise risk' expenditures (albeit grouping them and re-assessed their value), and also included an option for 'upgrade to rural gravel road standard' for an amount of $550,000.

12. The report then discussed various funding options, and made certain recommendations including, as relevant to the Verons estate, that 'council vote and authorise the following expenditure to minimise public liability hazards to roads in the 'paper-subdivisions'... Verons estate $65,000'. Recommendation (c) was that:

> "Council consider the allocation of funds to the expenditure to $66,000 to undertake detailed investigation, design and cost estimates for the upgrading to a rural road standard of roads within the Nebraska, Verons and Jerberra estates in future works programs."

13. The meeting was held on 2 November 2005 and the minutes of that meeting record Mr Finkernagel as being present. The minutes also do not record Mr Finkernagel as declaring a pecuniary interest. There appeared to be no issue before the Tribunal of Mr Finkernagel's presence, and in fact the minutes record Mr Finkernagel as having voted on (albeit against) a resolution on the topic of '1555 - paper-subdivision roads'. With respect to that item the council resolved that:

> "a) council erect signs indicating that roads within... Verons... estate are not maintained by council
> b) council make application for a special rate to undertake road improvements within the estates, such rate to be based on the estimated cost of upgrading
> c) council advise that it is unable to fund works during the current financial year due to a fully allocated budget."

Meeting of 24 January 2006

14. An extra-ordinary meeting of the Shoalhaven City Council was held on 24 January 2006. Prior to the meeting a report dated 24 January 2006 giving notice of the meeting and dealing with one of the matters to be considered at that meeting was circulated.

15. That report was headed 'small lot rural subdivisions – proposed special rates for rezoning investigations and road construction'. The report dealt with the four small lot subdivisions which 'may require construction [internal road networks] depending upon the outcome of strategic and rezoning investigations.' The Verons Estate was specifically addressed and with respect to this estate it was noted that:

> "State government has imposed a moratorium on zoning proposals until completion of Sussex Inlet settlement strategy... at this stage rezoning investigations are not funded. Direction from council is therefore needed regarding the funding of this project, e.g. special rate or s94."

16. The options for road construction were discussed, including the Verons Estate. Various costs were set out and it was noted that full scale road services cannot be defined until after studies and rezoning is finalised. A section entitled 'special rating issues' then addressed collection of the funds required via a special rate. With respect to the Verons Estate a table set out an 'average annual cost per property for road works over ten years to complete road works', indicating a rate of $237 for the 2007 and 2008 years, $2607 for the

2009 and 2010 years, and $5925 for the 2013-2018 years. It was noted that 'these are significant costs to be imposed on landowners who have no guarantee that their property has future development potential."

17. The recommendation in the report included that council include in its current submission to the Minister for Local Government under s.508A an application for an above rate pegging increase for the various estates. Additionally there was a recommendation that 'council borrow an amount... to fund the rezoning costs for Verons Estate' and 'council borrow an amount... to fund preliminary investigations, road design and costings for the ... Verons... estate'. Additionally there was a recommendation that council borrow an amount... to fund interim road works to gravel standard in... Verons... estate'.

18. The last recommendations appear to have been consequential upon the recommendation for the above rate pegging component of the report, that is, a recommendation to levy rates which were in essence to repay funds to be borrowed by the council to undertake rezoning investigation work, and road work.

19. The minutes of the meeting record Mr Finkernagel as being in attendance. The minutes also record no declaration of pecuniary interest by Mr Finkernagel. In relation to the matter the subject of the report Mr Finkernagel is recorded as having voted against a motion put in terms of the recommendation (with one additional component of motion namely that 'council expedites the community consultation processes'). The minutes record Mr Finkernagel as having an extension of time to speak on the matter, and some agitation from the public gallery. The evidence by Mr Finkernagel at the hearing was to the effect that his position was against the motion because of the significant impost that it would have imposed on persons whom owned land within the estates, and presumably the agitation from the public gallery was from persons

who would have had to have paid significant rates in consequence of the motion being carried.

Meeting on 28 March 2006

20. An ordinary meeting of the Shoalhaven City Council was held on 28 March 2006. Prior to that meeting the General Manager and the Director, Planning, had prepared a report for consideration by councillors.

21. The topic for the report was headed 'Sussex inlet settlement strategy – update' and its purpose was said to provide Council with an update of the status of the project and to outline recent changes made to the content of the draft strategy following representations from the New South Wales Department of Planning.

22. The report detailed the outcome of a recent meeting with the Department of Planning together with additional information requested. A section of the report headed 'changes to the document' indicated that:

> "1. The only change to the suggested actions for each area investigated in the strategy is the action associated with Verons Estate. The wording of this action has been changed from 'the potential for rural residential development (one dwelling per lot) will be investigated' to the following wording 'the potential for rural residential development (maximum one dwelling per lot) will be investigated."

The report recommended that the proposed alterations (comprising the one set out above, and additional ones not related to the Verons Estate) be endorsed by Council and that following final comments from the Department of Planning the draft strategy be placed on public exhibition for a certain period, and that the matter be reported back to Council following the exhibition period.

23. The minutes of the meeting held on 28 March 2006 record Mr Finkernagel as being in attendance on that occasion. In relation to item number 431, the subject of the report outlined above, the minutes record a resolution by Council that:

> "a) In respect of the Verons Estate the settlement strategy indicates Council's objective to allow a two hectare subdivision over the parcels of land outside the Swan Lake catchment area and retain the restriction of the maximum of one dwelling on parcels of land within the Swan Lake catchment area.
> b) The other proposed alternations (sic) to the draft strategy as outlined in the report being endorsed by Council.
> c) The draft strategy be placed on public exhibition for a six week period and that the matter be reported back to council following the exhibition period."

The minutes do not record a disclosure of pecuniary interest by Mr Finkernagel.

24. The resolution as set out above, in essence, reflected the recommendations contained in the report to Council. However it contained an additional resolution, namely 'a)' above, being that the council was to thereinafter have an objective to allow a two hectare subdivision over parcels of land within the Verons Estate which were outside the 'Swan Lake catchment area'. The allotments within the Verons Estate were generally eight hectares in size. The pre-existing subdivision minimum standard within the Verons Estate was 40 hectares. Mr Finkernagel owned land which was outside of the Swan Lake catchment area, and hence resolution a) applied to his land.

25. Thus, in accordance with that resolution, all of the land within the Verons Estate but outside the Swan Lake catchment area could be subdivided ultimately if the relevant environmental planning instrument was amended, to a size of two hectares.

26. In evidence by Mr Finkernagel before the Tribunal, as will be set out below, Mr Finkernagel indicated that this matter was raised for the first time during debate within the council and that he was surprised about the subject matter of the resolution. That notwithstanding, as indicated above, the minutes record Mr Finkernagel as having been present at the meeting when that matter was raised by the council and resolved by council.

The Settlement Strategy

27. The Sussex Inlet Settlement Strategy (SISS) formed part of the Director-General's report of investigation and was thereby tendered in evidence before the Tribunal. The executive summary of that document described it as a settlement strategy for the Sussex Inlet area and that it was a strategic planning document which provided a broad framework to guide the future development of an area. The document itself noted (page 6):

> "The settlement strategy does not rezone land for development. It identifies land that will be further investigated for possible rezoning through the normal planning process, as governed by the *Environmental Planning & Assessment Act, 1979.*
> However, the settlement strategy is designed to provide some certainty for the community by identifying clear medium to long-term planning intentions for the area."

28. That position was repeated in the next section of the document including a description of how the process for the rezoning of land (ultimately by the Minister for Planning) would be undertaken. The strategy itself set out the demographic of the area together with general land use strategy topics. Various options were discussed including (page 28) in so far as the Verons Estate was concerned:

> " • Provision for one dwelling per lot within the Verons Estate, but with the necessary infrastructure to be provided at the cost of landowners".

29. It is to be recalled the subject matter of the report to the council meeting was to amend this wording so that the intention was that rather then there being an effective automatic one dwelling per allotment, it was expressed as a 'maximum', albeit a maximum of one.

30. The Verons Estate was itself specifically addressed at section 3.3.3 (page 31). The report described the area generally and stated:

> "It is considered appropriate within the context of the settlement strategy to provide some directions for this area. Given the need to balance environmental concerns... while also addressing landowner expectations and providing certainty over time, it is considered appropriate to investigate the ability of a maximum of one dwelling per allotment, and not permit further subdivision of these lots at this time. It is also considered appropriate for the landowners to fund the construction of roads and required infrastructure. The area is likely to remain un-sewered and not be connected to the water supply system...
>
> While it is acknowledged that the development in this area is likely to have some environmental impact, limiting the development to a maximum of thirty-two dwellings is considered likely to see these impacts being minimised and managed...
>
> Action three: the potential for rural residential development (maximum one dwelling per lot) will be investigated.

31. Thus in terms of the SISS as at the date of the relevant council meeting, that document considered retaining the present subdivision arrangement and investigating an alteration for the controls of the area which would permit one dwelling for each of the existing allotments. The text of the report intimated an effective one dwelling per allotment but the action item instead referred to a 'maximum one dwelling per lot'. The report to the council made this

approach consistent (to a maximum). However, in addition, the resolution of the council appears to have altered significantly the underlying approach of the report to retain the existing subdivision pattern as it was at the date of the meeting by indicating, to use the words of the resolution, '...council's objective to allow a two hectare subdivision...'.

32. The subsequent version of the SISS also formed part of the Director-General's report. This draft is dated April 2006 and indicates that the matters the subject of the resolution of council were incorporated, namely a maximum of one dwelling per allotment to be investigated together with the investigation of a two hectare subdivision potential for areas outside the Swan Lake catchment. The time frame was indicated to be 'short term'.

The Legislative Requirements

33. Chapter 14 of the Local Government Act, headed 'Honesty and disclosure of interests', sets out various duties and obligations of Councillors who hold that office pursuant to the Local Government Act.

34. Part 2 of Chapter 14 is particularly relevant to the proceedings.

35. The fundamental obligation of a Councillor relevant to this matter is s444 which provides that:

> "A Councillor:
> (a) ...
> (b) must disclose pecuniary interests in accordance with section 451"

36. The phrase 'pecuniary interest' is a phrase defined in section 442 as follows:

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

37. Section 443 addresses the identity of persons with a pecuniary interest. As relevant to this matter s.443 provides:

(1) For the purposes of this Chapter a person has a pecuniary interest in a matter if the pecuniary interest is the interest of:
    (c) the person, or
    (c) the person's spouse or de facto partner or a relative of the person, or a partner or employer of the person, or
    (c) a company or other body of which the person, or a nominee, partner or employer of the person is a member.
(2) (Repealed)
(3) However, a person is not taken to have a pecuniary interest in a matter as referred to in subsection (1) (b) or (c):
    (a) if the person is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative, partner, employer or company or other body, or
    (b) just because the person is a member of, or is employed by, a council or a statutory body or is employed by the Crown, or
    (c) just because the person is a member of, or a delegate of a council to, a company or other body that has a pecuniary interest in the matter, so long as the person has no beneficial interest in any shares of the company or body.

38. As set out above, Mr Finkernagel owned two lots within the Verons Estate and as such he would have had, if otherwise qualified, a pecuniary interest in those lots for the purpose of s.443(1)(a). Two of his brothers owned, each, another lot in the Verons Estate and thus Mr Finkernagel would also have, if otherwise qualified, the pecuniary interest in his brother's lots for the purposes

of s.443(1)(b). This is because in that circumstance the interest is of the person's (Mr Finkernagel's) relative (his brothers).

39. There was no issue regarding s.443(3)(a) as Mr Finkernagel was openly aware of and acknowledged his brothers' ownership of the lots.

40. The definition section covering a pecuniary interest, s.442, itself contains two categories of exception from a pecuniary interest. These are as contained in s.442(2) and may be grouped as that:

- 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 s.448.

41. The principle position of Mr Finkernagel during the investigation process undertaken by the Department of Local Government, and in the hearing before the Tribunal, was that certain of the specified interests in s.448 were relevant so as to exempt his interest in the meetings from being a pecuniary interest for the purposes of s.442.

42. Section 448, as relevant to this matter, and as relied on by Mr Finkernagel, provides as follows:

> "The following interests do not have to be disclosed for the purposes of this Chapter:
> (a) ...
> (b) an interest as a ratepayer or a person liable to pay a charge,
> (c) an interest in any matter relating to the provision of a service or the supply of goods or commodities is offered to the public generally, or to a section of the public that includes persons who are not subject to this Part,
> (d) 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 in the permissible uses of:

(i) land in which the person or a person, company or body referred to in section 443 (1) (b) or (c) has a propriety 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

(ii) land adjoining, adjacent to or in proximity to land referred to in subparagraph (i),

if the person or the person, company or body referred to in section 443 (1) (b) or (c) would by reason of the propriety interest have a pecuniary interest in the proposal, ..."

43. Where there is a pecuniary interest, the obligation of disclosure, provided by s.444 as set out above is as contained in s.451 which provides as follows:

"(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 nature of the interest to the meeting as soon as practicable.

(2) The councillor or member must not be present at, or in sight of, the meeting of the council or committee:

(a) at any time during the which the matter is being considered or discussed by the council or the committee, or

(b) at any time during which the council or committee is voting on any question in relation to the matter.

(3) For the removal of doubt, a councillor or a member of a council committee is not prevented by this section from being present at and taking part in a meeting at which a matter is being considered, or from voting on the matter, merely because the councillor or member has an interest in the matter of a kind to in section 448"

44. Finally, absence of knowledge or imputed knowledge, not of the interest but of the matter before the council operates to exempt a breach of s.451 pursuant to s.457 which provides as follows:

> A person does not breach section 451 or 456 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.

45. Thus viewing the legislative provisions generally, if there is reasonable likelihood or expectation of appreciable financial gain or loss to a person (or his relative) in relation to a matter with which a council is concerned, and that matter is not one of the exempt interests, then the person will be considered to have a pecuniary interest in that matter, must disclose the nature of that interest at any meeting of the council at which the matter is being considered, and must not be present at or in sight of the meeting at any time during which the matter is being considered, discussed, or being voted upon by council.

The Evidence Before The Tribunal

46. The evidence before the Tribunal consisted primarily of the Director-General's Report Of Investigation, provided to the Tribunal pursuant to s.468(1).

47. That report contained, amongst other things, copies of the reports to and the minutes of the relevant council meetings, Mr Finkernagel's responses to the Director-General's show cause letters, a valuation advice received from the NSW Department of Commerce, and the transcripts of interviews of Mr Finkernagel and certain council officers undertaken by investigating officers. Mr Finkernagel relies upon his responses to the show cause letter and his record of interview, which he essentially repeated in evidence before the Tribunal.

48. In addition Mr Finkernagel tendered his letter dated 9 September 2008 setting out matters which he described as defenses to the allegations, and enclosing certain other material.

49. At the hearing oral evidence was given by a Mr Robinson, valuer, as author of the valuation advice and Mr Pigg, General Manager of the Shoalhaven City Council. Mr Finkernagel also gave evidence.

50. Following the conclusion of the hearing the Tribunal granted to the Director-General leave to provide further written submissions to address as aspect of "... change of permissible uses..." as that concept is addressed in s.448(g), and as applying to the matters considered at the meeting of 28 March 2006. Mr Finkernagel was given an opportunity to respond. However, as part of the Director-General's written submission an application to re-open was made to adduce evidence concerning the making of an application pursuant to State Environmental Planning Policy No 1. That application was made conditionally and I am satisfied that the condition was not engaged; alternatively I decline the application to re-open for the reasons set out below in relation to the 28 March 2006 council meeting.

The Valuation Evidence

51. The valuation evidence on behalf of the Director General was in the form of a letter by a Mr Steven Wayne Robinson. Mr Robinson was the district valuer at the Valuer General's office at Wollongong.

52. That letter was contained as an attachment to the Director-General's Investigation Report, tendered in evidence. In that letter Mr Robinson addressed, as preliminary valuation advice, the question of any increase in value of allotments within the Verons Estate by reference to the matters decided at subject of each of the three council meetings.

53. In relation to the 2 November 2005 meeting Mr Robinson stated that:

> "It would be considered that if a reasonable prospective purchaser understood that Council were allocating money for the investigation of design and cost for the upgrading of roads in the Nebraska, Jerberra and Verons Estates they would assume that Council were preparing to allow development consideration in the future for these estates.
>
> The value of the lands referred to in this advice should increase as the risk of obtaining a building approval for a single dwelling would decrease. For example, an eight hectare lot in this locality without development approval for residence (and without services i.e. roads, power etc) is considered to be worth approximately $50,000 to $60,000.
>
> These same eight hectare lots, if serviced with roads and electricity are considered to be valued around $350,000 to $450,000 at the current date.
>
> However, if these services are not constructed and building rights not available it would be assumed that a potential purchaser would pay a sum above $60,000 (if they believed that a building entitlement may ensue if Council were considering the construction of roads). A potential purchaser may pay a price of between $100,000 - $150,000 depending on what risk they believe would still be present given Council's decision."

54. In relation to the meeting of 24 January 2006 Mr Robinson stated:

> "This extraordinary council meeting discussed special rates for rezoning investigations and road construction in small lot rural subdivisions. In this submission it was proposed that a special rate variation be struck... for rezoning investigations and road construction.
>
> This decision would indicate to the potential purchaser that there would be even less risk involved in gaining building approval. However it may take 10 years to obtain a building permit.
>
> It would be expected that a prudent Purchaser would pay a sum of between $225,000 - $275,000 for the subject sites. This sum has been derived by deferring $350,000 - $450,000 (the price range

that could be achieved at 24 January 2006 with a building permit) for 10 years at 5%"

55. In relation to the meeting of 28 March 2006 Mr Robinson stated:

> "This meeting discussed the Council's objective of allowing a single building permit for the subject land and that this draft strategy be placed on exhibition for a period of 6 weeks.
>
> A prudent purchaser would assume that building permits would be inevitable (subject to Council receiving no objections to the proposal). The value of the lands referred to in this advice should increase significantly because each of the subject lots should gain development approval for a residence.
>
> This decision would indicate that the subject eight hectare lots, with a single building permit (and serviced with roads and electricity) would be near full value i.e. $350,000 to $450,000 at the current date."

56. As referred above, Mr Robinson gave evidence before the Tribunal.

57. In oral evidence before the Tribunal Mr Robinson repeated that value of the properties in the Verons estate would be in the range $350,000 to $450,000 for a fully serviced allotment of 8 hectares. He accepted in cross examination by Mr Finkernagel that the allotments were in fact not serviced and that there was no electricity or water available to them, but that at the time he prepared his valuation he believed that those services were to be supplied. Mr Robinson was taken to the unimproved value schedules for the land throughout the relevant period to confirm that those unimproved values had in fact been significantly less than (in some instances as low as about one tenth) of the value that he placed on those allotments. Mr Robinson conceded in evidence before the Tribunal that he had not inspected the lots and had not undertaken an evaluation of what the land in fact was.

58. In so far as the 24 January 2006 meeting was concerned Mr Robinson conceded that if all that was dealt with were the roads and they might take ten years to be put into effect that the valuation exercise would need to take into account a deferment of any increase in value. Mr Robinson also conceded that there had been no risk element factored into the evaluation.

59. In so far as the matters the subject of the meeting of 28 March 2006 are concerned, Mr Robinson conceded that he had not undertaken any valuation of the value of the land as two hectare allotments on the basis of resolution (a). What he did say though was that with the decision any risk associated with increase in the value of the land would be reduced, and hence value increased.

Evidence by the General Manager

60. The General Manager of the Shoalhaven City Council, Mr Russell Desmond Pigg gave evidence at the request of Mr Finkernagel. Mr Pigg confirmed that he was the author of the letter which constituted the original complaint to the Director General of the Department of Local Government, that he had sworn an affidavit which had been read in these proceedings, and that he had been the author of a letter concerned with the training of councillors. The affidavit annexed correspondence involving Mr Finkernagel and his efforts to improve road safety in the various paper-subdivided estates, including the Verons Estate.

61. Mr Pigg was cross examined by Mr Finkernagel concerning whether any records were held of attendance by councillors at the information/education sessions held by the council. Mr Pigg conceded that there were no records held of who attended, and that attendance at the workshops was not mandatory. He accepted that it was possible for a councillor to either never

attend any workshop, or if he or she did attend to not understand what was the nature of the education concerning duties under the Local Government Act.

62. Mr Pigg conceded in cross examination that Mr Finkernagel had asked him to separate from the matters that were to be presented before the Council matters concerning the Verons Estate, especially when all four paper-subdivision estates were to be considered. He could not though remember if such a request occurred in 2005 or 2006, but accepted that he had been asked at some stage and had attempted to have the matters separated. He believed it was a reasonable request and had directed his planning staff to separate out the Verons estate matters from matters concerning the other estates.

63. It appears to the Tribunal by reason of Mr Finkernagel's own evidence, set out below, that the request to separate the Verons estate matters from matters concerning the other estates in fact took place after the last of the three meetings the subject of the proceedings before the Tribunal.

The Evidence/Submissions of Mr Finkernagel

64. Mr Finkernagel gave evidence formally before the Tribunal. He also made submissions which the Tribunal has regarded as evidence where appropriate, and vice versa. As set out above Mr Finkernagel predominantly relied upon the defences set out in his letter in response to the show cause request by the Director General, and the matters contained in his transcript of interview.

65. In relation to the matters that came before the meetings Mr Finkernagel drew the Tribunal's attention to the Council's Charter in so far as its responsibilities included treating ratepayers 'fairly and equally.'

66. In so far as the report going to the council meeting on 2 November 2005 was concerned Mr Finkernagel stated that under the topic 'paper-subdivision

roads' his construction of it was that it was to meet risk management standards, that is the report was about risk management.

67. Mr Finkernagel stated that his intention was to have safety matters addressed by the council.

68. Mr Finkernagel also said in evidence before the Tribunal that he made a decision to not declare a pecuniary interest on the basis of the General Manager's report and on the basis of his view that the decision concerning it had already been made by councillors before the meeting.

69. Mr Finkernagel observed that the valuation evidence compared the allotments in the Verons estate with properties in Sussex Inlet road but that these later properties were different properties because they were serviced land on a built road, with water, electricity, and on which house could be built. He observed that one could not compare the properties with the properties in the Verons estate. He submitted that if the matter before the council was a rates matter and it was exempt then it does not matter that there was an increase in value.

70. In so far as this meeting was concerned Mr Finkernagel stated that he considered he would have to declare a pecuniary interest but as the matter concerned a special rate it was exempt. Additionally or alternatively the only matter that might not be a rate was the decision to erect warning signs through out the state which had no effect on the value of the property.

71. Mr Finkernagel then gave evidence concerning the meeting on 21 January 2006. He stated that the matter before the council was a rating matter and that there was no distinction between a general rate and a special rate. He also stated that it was a matter which did not concern him alone but also concerned other members of the public in terms of s448(c).

72. Mr Finkernagel referred to the pecuniary interest guidelines issued by the Department of Local Government in June 2006. These guidelines were issued after the meetings the subject of the complaint before the Tribunal. Mr Finkernagel directed attention to paragraph 67 in which it was said that councillors can vote on the setting and varying of rates and that there is no distinction between the sorts of rates which reinforced his position taken with respect of the 21st of January 2006 meeting.

73. Furthermore Mr Finkernagel said that the matter concerned the provision of goods and services and although there were no goods or services supplied at this time the report was concerned with the setting of a special rate for certain works.

74. Mr Finkernagel directed attention in particular to the table contained in the report that set out the rates that would be payable. He noted that in these estates people were generally at the lower socio-economic end of the scale and purchased low value land. He had had representations from people saying that they were not prepared to pay thousands of dollars per year as a special rate, especially in circumstances where their lots did not have a building entitlement. These owners were incensed about the rate model and it is for that reason that he voted against the setting of a special rate in the resolution. He said that he submitted to the council meeting that the council should negotiate something that is affordable and that what it was proposing would burden landowners with a huge debt.

75. Mr Finkernagel stated that with respect to this meeting he interpreted the matter before the council as a rate matter and that it was exempt and hence there was no need to declare a pecuniary interest.

76. Alternatively Mr Finkernagel submitted that the matter before the council involved the provision of goods and services to the public. Mr Finkernagel's

evidence/submission was that if the matter constituted an exemption in s448 then there was no need to assess whether or not there was a pecuniary interest in the matter.

77. Mr Finkernagel said that the only issue was whether the Settlement Strategy changes the land use of property.

78. The point that Mr Finkernagel took for the purposes of the exemption in s448 was that the settlement strategy did not constitute the instrument which effected a change to the land use. He directed attention to the disclaimer contained in the settlement strategy.

79. In so far as Verons estate and its position in the settlement strategy was concerned Mr Finkernagel was of the opinion that it was unlikely that properties in the Verons estate would be the subject of the recommendations in the report and the matter the subject the resolution of the council. He denied that he knew that those resolutions would increase the value of his land. He stated that he had no intention to subdivide his land.

80. Mr Finkernagel conceded that if he could subdivide his land into two hectare lots that would increase the value of the land. In this respect the Tribunal notes that the valuer called by the Director General did not value the land on this basis however the Tribunal accepts that it is almost self-evident that an ability to subdivide one allotment of eight hectares into four allotments of two hectares in the area concerned would constitute an increase in value of the land. Certainly Mr Finkernagel himself, who in evidence before the Tribunal pointed to his experience in his brother's real estate office, accepted that result.

81. Mr Finkernagel stated in evidence before the Tribunal that the reinstatement of a building entitlement in his opinion would have required a declaration of interest, but he did not see that occurring for some time. Mr Finkernagel accepted that he had read the Local Government Act some time before the first meeting and that he had previously declared a pecuniary interest. He accepted that he could have left the room and the meeting at any time. He accepted that in hindsight it may well have been prudent for him to have left the meeting once the Mayor raised the motion concerning the reduction of the minimum hectare subdivision area.

82. In so far as the separation of the Verons estate matters was concerned Mr Finkernagel in evidence stated that once he requested the General Manager to separate the Verons estate matters out from the other paper estates matters in matters before the council such a separation did in fact occur. Accordingly in so far the evidence of Mr Pigg was concerned it would appear that Mr Finkernagel did not ask the General Manager to separate the Verons estate matters out until after the three meetings that were the subject of the proceedings before the Tribunal. This was because in each of those meetings the Verons estate matters had not been separated.

83. He accepted that he had written numerous letters to various bodies to attempt to improve the conditions with respect to the paper-estates. He accepted that the land owners within the paper estates described him as their spokesperson but he felt constrained to being so because of the pecuniary interest obligations under the Local Government Act.

84. Mr Finkernagel said that he believed that he made proper decisions without any pecuniary interest.

85. He stated that he was unable to effect the attendance of witnesses and that he would have been in a better position if the witnesses that he wanted (namely the Minister for Local Government and the Director General) were present to assist him in his interpretation of the pecuniary interest provisions. In this respect the Tribunal refers to its earlier decision ruling upon a request by Mr Finkernagel to have issued against the Minister and the Director General summonses to appear at the hearing.

86. Mr Finkernagel submitted that his position was as he had previously stated in writing in response to the show cause letter to the Director General of the Department of Local Government and in the record of interview with officers of that department.

87. Mr Finkernagel said that there was a long history with respect to paper-estates especially in the Shoalhaven area. There was a large number of holdings that were subdivided in the late 1890's – 1900's which were approved by the state government but not physically developed. In some cases roads had been constructed within them. Originally every allotment had a building entitlement until about 1964 when an interim development order removed the building entitlement from lots, especially those in single ownership.

88. Within the Verons estate there were 32 lots, seven of which had been sold off by 1964, with the remaining lots having lost their building entitlement. In 1985 the council adopted a local environmental plan which zoned the land within the rural zone. The building entitlement to the seven lots which had been previously sold still retain their entitlement today.

89. He stated that one of the allotments the subject of the complaint (lot 9) was owned by his brother, Alan, and that that was in separate ownership as at 1964 and has hence retained its entitlement.

90. He stated that lot 6 came onto the market which he bought for his son for an amount of $16,500. Subsequently he purchased lot 17 for his daughter. Both allotments had an area of approximately 8 hectares, but neither had a building entitlement. Subsequent to purchase, because it was rural land, he had submitted development applications for vineyards which had been approved. He had undertaken some clearing and fenced the properties. They were developed rural properties. He stated that within the Verons estate roads existed in about 1987 but they had overgrown subsequently. Although it was a well formed road the road was not maintained by council as the council claimed that the private land owners owned the roads.

91. He stated that he represented land owners in all four estates predominantly because of the public liability of council not maintaining the roads which remained open to the public. As the roads were open to the public he observed that people were driving unregistered vehicles on what was in essence a rough bush track in which the vehicles would slide in poor conditions.

92. He stated that he has also run beef cattle on one of the allotments and has a shed with some machinery in it. He stated that he went to the property almost daily but every time he did he was confronted by 'morons' on the roads. He also contacted the police department but was told they were private roads. Accordingly he observed there was a dilemma in terms of ownership of the roads and predominantly the responsibility for their upkeep.

93. He stated that he knew most of the landowners in the Sussex Inlet area and had been lobbied extensively by them. Associations were formed to pursue the issues with the council. During this time, especially with respect to the Jerberra estate there were significant issues with respect to public liability. He stated that the properties had been bought as a nest egg for his children. Mr Finkernagel produced photographs of the roads establishing their poor

condition and instances in which culverts had failed. The issue with respect to the roads was similar across all of the estates.

94. The climate in which he found himself was one in which he considered that he represented the landowners with respect to this topic in an environment in which the landowners formed the view that they were being prevented from using the land for the purpose with which they had purchased it.

95. In so far as the allegations were concerned Mr Finkernagel, as set out above, raised three components of exemption. The first was by reference to s448(b) in so far as the payment of rates is concerned and his claim that the matters that were before the council were rating matters and hence exempt. Further he stated that because of the wider application of the matters before the council they fell within the provisions of s448(c) namely the provision of services or goods to a section of the public. The first two meetings involved matters that were essentially road works or a rate or a framework plan and were provided to persons beyond himself and hence the matter fell within the exemptions. Finally in so far as the settlement strategy was concerned he was of the view that it did not effect the change in land uses as the only thing that does effect change in land use is a local environmental plan, and a settlement strategy was not such an instrument.

96. In so far as this last matter is concerned he directed attention to the terms of the settlement strategy which, in terms, stated that the settlement strategy does not effect a rezoning of the land.

97. Mr Finkernagel noted that at a meeting occurring before the first meeting the subject of the complaint by the Director General, on 6 September 2005, Mr Finkernagel had in fact declared a pecuniary interest on the matter before the council.

Director General's Submissions

98. The Director General submitted in relation to the meeting of 2 November 2005 that the options put to the meeting included a significant upgrade to the road through the estate, and that the options represented a significant step in relation to those roads.

99. Although the label for the General Manager's report was 'paper-subdivision roads', the 'matter' before the council was about 'minimising public risk'.

100. In this respect the Tribunal notes that even though the motivation for the matter before a council maybe a public interest one, if the matter satisfies the description of a pecuniary interest for the purposes of the local government act it does not lose that classification simply because the motivation was not one that was personal to a councillor.

101. The Director General submits that in relation to this meeting the decision ultimately taken by the council was not the 'matter'. Rather the matter before the council was the recommendation.

102. Furthermore the Director General submits that it was irrelevant that prior to the meeting other councillors had caucused and Mr Finkernagel apprehended that the decision was inevitably going to go a particular way. That did not change the nature of the 'matter' that was before the council.

103. In so far as the meeting of 24 January 2006 was concerned, the Director-General submitted that the meeting plainly raised a pecuniary interest not so much by reference to the 'special rates' aspect of the meeting, but because of the other matters to be addressed at the meeting. It was said that there was nothing more plain than that the meeting was dealing with the Verons estate. Whilst this may be true, the Tribunal observes that to the extent that the

Verons estate was being dealt with it was via the mechanism of the proposal to impose a 'rate'.

104. The Director General submitted that it would be wrong for the Tribunal to focus on the ultimate decision reached by the council in order to determine whether there was a breach for the purpose of s451 because the focus is upon the 'matter with which the council is concerned', citing the tribunal's decision in *Councillor Wy Kanak*, PIDT 2/2000, 1 March 2002.

105. It was accepted by the Director General that there is no distinction for the purposes of the Local Government Act between a general rate and a special rate (a special rate being the subject of the relevant reports in this proceeding) for the purposes of operating as an exception to the requirement to declare a pecuniary interest: see s501-503. It was said though that the 'matter' was a composite matter that included matters pertaining to a pecuniary interest and that the councillor stayed within the meeting and spoke at the meeting, in breach of s451.

106. In so far as the matter on 22 March 2006 was concerned the Director General submitted that this meeting constituted the clearest breach of s451 of the Local Government Act. It was said that the draft settlement strategy, the matter to which the meeting was directed, established that its purpose was to investigate a broad range of development opportunities. Prior to the strategy it was submitted dwellings could not be approved on Mr Finkernagel's (and his brothers') allotments in the Verons estate, but that afterwards there would be subdivision to two hectare minima. It was said that those two matters (the ability to approve dwellings, and a subdivision back from eight hectares to two hectares) constituted a radical change. Furthermore the strategy in its terms referred to the process going to the Department of Planning to enable the rezoning moratorium to be lifted.

107. The Director General submitted that the local environmental plan stood in the way of a subdivision of Mr Finkernagel's land, or the development of the subject land. The land was zoned rural 1(d), and pursuant to clause 10 a subdivision could not be effected in relation to the subject land because the minimum area for allotments was far greater than the eight hectare area of Mr Finkernagel's land (the minimum subdivision standard was 40 hectares).

108. The Director General submitted that there were amendments to the controls by reducing the minimum lot subdivision from 40 hectares to two hectares and that that was a major change. The ability to put a dwelling house on each allotment was a settlement strategy matter, but all of that was exacerbated by the Mayoral minute. It was said (by reference to page 34) that the settlement strategy proposed to effect a radical change to the permissible zoning.

109. The Director General submitted that Mr Finkernagel had two opportunities to declare a pecuniary interest. Firstly it was abundantly clear before the meeting that the matter with which the meeting was to be concerned was a matter in which he would have a pecuniary interest. Secondly, during the course of the meeting when the Mayor raised the matter, if there was not a pecuniary interest as part of the report there was certainly a pecuniary interest during the course of the meeting.

110. The Director General finally submitted that by reference to regulation 251 of the Local Government (General) Regulations, the failure to cast a vote is a vote in the negative. This submission was made because Mr Finkernagel indicated that in relation to this third meeting he did not cast a vote, and therefore did not participate. However the duties of disclosure are clear and they are not qualified by a failure of a councillor to cast a vote. The person must simply not be at the meeting and must comply with the prescription to depart from the meeting. This is quite aside from the deemed negative vote by the failure to cast a vote. However with the application of regulation 251 the

submission of Mr Finkernagel must be rejected – he has taken to have voted in the negative, and hence to have breached s451.

Determination

111. For the purposes of this hearing, as referred above, there were three instances in which it is claimed that the duty within Chapter 14 of the Local Government Act to disclose a pecuniary interest and abstain from participation in the voting with respect of the matter arose, comprising the three meetings.

The Meeting of 2 November 2005

112. The report from the General Manager, as referred above, identified the matter the subject of the meeting as being with respect to 'paper-subdivision roads'. More particularly the matter concerned an issue consequential upon the resolution on 20 September 2005 to accept as public roads certain roads contained within the four paper-subdivision estates. In particular, one resolution on 20 September 2005 was to the effect that 'Council consider a further report on the implications of upgrading of the roads to meet risk management standards as rural access roads.'

113. One of the estates was the Verons Estate in which Mr Finkernagel had an interest as the registered proprietor of two allotments; and for the purposes of s.443(1)(b), two of his brothers either owned or were joint owners in additional lots.

114. It may be said that generally the matter would have benefited Mr Finkernagel's land, albeit in so far as there was an approach to address risk management standards as rural access roads. In this respect it is important to

note that the roads already existed, but the issue concerned the upgrading of the existing roads.

115. As referred above s.442 requires, in order for an interest to be regarded as a pecuniary interest to which the relevant duties apply, a reasonable likelihood or expectation of appreciable financial gain or loss. Section 448 provides certain exemptions to disclosure for the purposes of the Chapter. Those exceptions which may be relevant to this matter are:

> "(b) An interest as a ratepayer or person liable to pay a charge,
> (c) An interest in any matter relating to the terms on which the provision of a service or the supply of goods or commodities is offered to the public generally, or to a section of the public and includes persons who are not subject to this part,"

116. As set out above, Mr Finkernagel submitted that if an exception existed there is no need to assess whether or not there was a pecuniary interest in the matters. The Tribunal accepts that submission as an approach to determining a breach of Chapter 14. Although the natural order of the provisions in Chapter 14 start with the concept of pecuniary interest, as a matter of construction of Chapter 14 as a whole if a person is able to establish an exemption, in a practical sense it is not necessary to establish that a pecuniary interest existed in the first place. But if no pecuniary interest is established in the first place, then the need for qualification for the exemption does not arise.

117. Dealing with the s.448 exemptions firstly, the recommendation from the Director-General, for the purposes of establishing at the outset what the 'matter' was, in so far as the Verons Estate was concerned, involved a recommendation to authorise certain expenditure to minimise public liability hazards to the roads. For the Verons Estate it was in the amount of $65,000. There was also a recommendation for the expenditure of funds to undertake detailed investigation design and cost estimates for the upgrading to a rural road standard of roads within, inter alia, the Verons Estate.

118. At the point of the identification of the matter for consideration at the council there does not appear to be any engagement of the exceptions contained in s.448. There was certainly no aspect of the payment of a rate involved in the recommendation. Next, in so far as s.448(c) is concerned, the subject matter of the matter as described in the General Manager's report does not fit within the description of 'the provision of a service or the supply of goods or commodities' for the purposes of s.448(c) as that phrase is to be properly understood.

119. It would seem, by reference to the resolution of council (Number 1555, 2 November 2005), that during the course of the meeting the matter of a rate was raised so as to undertake road improvements within the estates. Upon that matter occurring it is arguable that, for the purposes of s.448(b) Mr Finkernagel thereupon had an interest as a ratepayer or a person liable to pay a charge. Hence in so far as the matter of road improvements being raised on 2 November 2005 is concerned, the interest was not one which was required to be disclosed during the course of the meeting, as provided in s.448(b).

120. That leaves though the question of whether, prior to the meeting, there was a duty to declare a pecuniary interest. It is to be recalled in this respect that the agenda item for the meeting and the report to council did not identify as a recommendation the levying of a rate. Rather, it dealt with the topic via the authorisation of some expenditure to minimise public liability hazards to roads, and the allocation of funds to undertake investigation design and cost estimates for the upgrading of the roads to a rural road standard.

121. For the purposes of s.448 neither of those topics would operate as an exemption to a duty to disclose an interest, if such a duty otherwise existed.

122. As referred above, s.442 requires that there be a reasonable likelihood or expectation of appreciable financial gain or loss. What is required then is there to be a reasonable likelihood or expectation of an appreciable financial gain or loss by reason of either the expenditure to minimise public liability standards to the roads in the Verons Estate, or the expenditure of funds to undertake detailed investigation design and cost estimates for the upgrading to a rural road standard. In the circumstances of the present case that would reflect in either an increase or decrease in the value of the allotments within Verons Estate for it to qualify as a pecuniary interest for the purposes of the Local Government Act.

123. That gain or loss is claimed by the Director-General to be evidenced by the 'preliminary evaluation advice' prepared by Mr Robinson. In his valuation report he expressed the opinion that if a reasonable prospective purchaser understood that council were allocating money for the investigation and design and costs for the upgrading of roads they would assume that council were preparing to allow development consideration in the future for these estates. He expressed the view that the present value of the allotments was between $50,000 - $60,000, and that the same allotments, if serviced with roads and electricity, are considered to be valued around $350,000 - $450,000.

124. Notwithstanding that opinion the Tribunal is not satisfied that the effect the matter put before the council meeting of 2 November 2005 reflected an appreciable financial gain in the order of magnitude of the ranges set out above. This is because the 'matter' had nothing to do with the allotments being provided with electricity, serviced with roads (to any better standard), nor, importantly, provided with a building entitlement. There was nothing in the matter before the council that directly, or even indirectly, provided for these matters. But it was these matters that operated as assumptions in the valuation evidence giving rise to the increased valuation.

125. At best the claimed appreciable financial gain could only be an increase in the value of the allotments because of a proposed investigation by the council for the upgrading of the roads to 'rural road standards'. As referred above, the allotments already existed, were already rural, and already had roads accessing them, albeit to a lesser standard. There is no sufficient valuation evidence of an increase in the value of the allotments consequent upon the actual matter before the council.

126. Furthermore in so far as the provision of signs around the roads is concerned, the position with respect to the reasonable likelihood of any appreciable financial gain is even less apparent. There was no evidence that the erection of such signage would have resulted in an increase in value of the lots within the estate.

127. The Tribunal observes that the report dealing with the 2 November 2005 meeting in fact was about risk management of the roads and not the upgrade of the roads *per se.* Even if that be the case though, if such management reflects in a pecuniary interest as defined under the Local Government Act then the motivation for the topic is irrelevant. However in the circumstances of the present case the Tribunal cannot be satisfied that the risk management addressed in the 2 November 2005 meeting of itself satisfied a description that resulted in 'a likelihood of appreciable financial gain...' to Mr Finkernagel.

128. Accordingly for the purposes of s.442 the Tribunal considers that Mr Finkernagel did not have a pecuniary interest in the matter the subject of the meeting of 2 November 2005 prior to the meeting commencing. In so far as matters discussed during the course of the meeting, that position does not appear to have changed, and in so far as there was any change, the change was one that engaged an exemption to any pecuniary interest for the purposes of s.448(b).

Meeting of 24 January 2006.

129. As more comprehensively summarised above, the 'matter' the subject of this meeting was a matter concerning 'proposed special rates for rezoning investigations and road construction'. This matter was consequential upon the resolution of the meeting 2 November 2005.

130. Although the body of the General-Manager's report concerned an assessment of costs for the undertaking of certain (road) works within the estates, including the Verons Estate in which Mr Finkernagel and his brothers had interests, the matter before the council focused upon the levying of a special rate for the allotments in each of the estates. These rates were sought for the purposes of addressing 'rezoning investigations, interim road works, and final road works'.

131. But for the matter before the council involving a levying of a special rate, it may have been the case that components of the matter before the council involved in rezoning investigations and road upgrades would have fallen within the realm of the type of interest that would satisfy as a pecuniary interest for the purposes of s.442, subject to there being satisfaction that there was a reasonable likelihood or expectation of appreciable financial gain. These types of matters lend themselves to market perception of increased underlying value, as was the evidence of Mr Robinson.

132. In the preliminary valuation advice Mr Robinson was of the view that:

> "This decision would indicate to the potential purchaser that there would be even less risk involved in gaining building approval. However, it may take ten years to obtain a building permit."

He then expressed a view that the prudent purchaser would pay within a range of consideration determined by deferring his estimate of the range of value for the land fully serviced for ten years at five percent.

133. This notwithstanding, in the circumstances of this meeting the components of action and expenditure which would have effected any increase in value of lands within the estate were to be, at all relevant times, merged into a process whereby a special rate was to be levied. This was a consequence of the resolution on 2 November 2005.

134. There was also a rezoning investigation involved in the subject matter of the meeting. However even in this respect the matter before the council was a matter concerning the imposition of the rate (to collect money for the rezoning investigation).

135. Even if there was a rezoning investigation alone, it is not apparent that with respect to the Verons Estate (the only matter by which Mr Finkernagel could have had a pecuniary interest) there was any proposal for a change in land uses. The report itself noted (as referred above) that landowners had no guarantee of future development potential.

136. Whilst it may be the case that matters concerning road upgrades and rezoning, whether individually or together, would have resulted in a reasonable likelihood of an appreciable financial gain to Mr Finkernagel by means of an increase in value of his and his brothers' land, the Act exempts from declaration as a pecuniary interest, as relevant here, an interest as a ratepayer. Because the meeting concerned the imposition of a special rate so as to fund the road upgrade and rezoning investigations, which rate Mr Finkernagel would have had to have paid, the 'matter' before the council is properly characterised as an interest of Mr Finkernagel as a ratepayer. Section 448(b)

does not distinguish exemptions for rates which might or might not result in a pecuniary interest, but rather exempts all interests as a ratepayer.

137. However, once the rate is collected, subsequent decisions concerning actual road upgrade and rezoning, as and when they are 'matters' before the council, would no longer be exempt.

138. Accordingly, for the purposes of s.448(b) in and as part of the meeting on 24 January 2006 the Tribunal is satisfied that Mr Finkernagel had an interest as a ratepayer or a person liable to pay a charge, as an owner of allotments within the Verons Estate to which the special levy was to applied. In those circumstances, for the purposes of s.448 that interest was not one which was required to be disclosed for the purposes of Chapter 14.

139. When the resolution was made by council, an additional matter was determined by the council and that is that:

> "(e) Council expedites the community consultation process".

140. It is unclear whether the consultation process was directed to the SISS, or directed to consultation with landowners within the estates concerning the levying of the special rate. The General Manager's report, at page 14, would tend to suggest that it is the latter, and that what was contemplated was, to use the words of the report, the provision of '... an opportunity for the landowners to make submissions prior to the final adoption of the management plan...'.

141. If this is the case, and it appears that it is, then the valuation approach to a minimisation of risk for a building entitlement appears to be irrelevant to what was actually the subject of the decision. It would appear that the expedition of the consultation process was a consultation process within the realm of the

levying of the special rate, but not so as to alter the characteristics of the allotments.

142. Accordingly for the purposes of Chapter 14 the Tribunal is of the view that in so far as the matter before the council meeting of 24 January 2006 is concerned Mr Finkernagel had an interest described in s.448(b) which was not required to be disclosed.

The Meeting of 28 March 2006

143. As referred above this meeting involved the Sussex Inlet Settlement Strategy (SISS). The SISS involved a broad draft strategy with respect to the Sussex Inlet, including the Verons Estate in which Mr Finkernagel and his brothers held interests.

144. The report to the ordinary meeting by the General Manager specifically dealt with the proposed change to the Verons estate amending wording in relation to alterations to permit one dwelling per lot to 'the potential for rural residential development (maximum one dwelling per lot) will be investigated'.

145. Mr Finkernagel has claimed that in relation to the SISS that an exemption arises by reason of s.448(g). His primary claim to that exemption is that as a matter of construction of the SISS, and according to its own terms, it was not a document which purported to amend the permissible uses of land which he or his brothers held an interest.

146. However it is abundantly clear that the SISS constituted a forerunner to, ultimately, the making of an environmental planning instrument. Whilst it is the case that it would not have, even if adopted unconditionally, effected any change of itself to the circumstances of land owned by Mr Finkernagel, it was a necessary and inevitable part of that process: see for example *Councillor*

Ricardo D'Amaico, PIDT02/2005, 21 July 2006 at [24] – [25]; and *Councillor Lynette Lawry*, PIDT2-2006, 5 December 2007 at [67] – [68].

147. The relevant phrase in s.448(g) is concerned with '... a proposal relating to the making, amending, altering or repeal of an Environmental Planning Instrument...'. The paragraph is concerned with a 'proposal' and not just the actual making amending altering etc. The concept of a proposal in other contexts, for example the law relating to compulsory acquisition of land, is a far wider concept than the simple making of the Environmental Planning Instrument: see for example *RTA -v- Perry* (2001) 52 NSWLR 222 at [42]; see also *Walker Corporation Pty Ltd -v- Sydney Harbour Foreshore Authority* (2008) 82 ALJR 489 at [53] and [54].

148. The settlement strategy itself contained a disclaimer to the effect that the settlement strategy did not rezone land or perpetuate any change in land use in relation to the land. The Director General said that such a disclaimer is irrelevant for the purposes of s448(g). In this respect Mr Finkernagel drew the Tribunal's attention to the settlement strategy as finally made in which the disclaimer was moved to the outset of the settlement strategy report.

149. The Tribunal agrees that such a Disclaimer is not relevant for the purposes of s448(g). This is because whilst s448(g) talks about an environmental planning instrument (effecting a change in permissible land uses), the relevant starting point is not simply the making of the environmental planning instrument, but rather a matter relating to a 'proposal' to make one. The concept of a 'proposal' is thus fairly wide. Even if it was not, then it is to be observed that a council actually never makes an environmental planning instrument. This is because environmental planning instruments constitute either local environmental plans (made by the Minister for Planning), regional environmental plans (made by the Minister for Planning), or state

environmental planning policies (made by the Governor): See Part 3 of the *Environmental Planning and Assessment Act, 1979.*

150. Thus 'a proposal relating to the making of an environmental planning instrument' would include all aspects of it, including in the instant case the settlement strategy which constituted the starting point for the ultimate making of one.

151. In the circumstances of the present case the Tribunal is satisfied that the matter before the meeting on 28 March 2006, in so far as it is related to the SISS, concerned a proposal relating to the making amending altering or appeal of an Environmental Planning Instrument.

152. Such a situation is not of itself an interest which is required to be disclosed pursuant s.448(g) unless that proposal concerns an alteration that 'effects a change of permissible uses' of land in which the relevant person has a proprietary interest. As referred above Mr Finkernagel held a proprietary interest in two lots within the Verons Estate, and two of his brothers also held proprietary interests in lots within the same estate.

153. In so far as the SISS was concerned, and more particularly in so far as it was concerned with the Verons Estate, the principal matter related to that estate was as contained in section 3.3.3. In summary the report was directing attention to the investigation of the ability for a maximum of one dwelling per lot. This change was in the circumstances of a recognition of the size of the existing allotments. The question then becomes whether such a change is sufficient to 'effect a change in permissible uses' of the land.

154. When read as a whole the Shoalhaven Local Environmental Plan prior to the SISS provided that dwelling houses were permissible with consent within the rural 1(d) zone. This permissibility is derived from the land use table forming

part of Clause 9 of the LEP. Importantly however Clause 9(2) provided for reference to the land use table 'except as otherwise provided by this plan...'. Hence the land use table , as a matter of construction of the LEP, is not to be read in isolation of other provisions of the LEP.

155. One of the other provisions of the LEP relevant to the permissibility of the construction of dwellings is clause 10(3)(a) which provided for a minimum allotment size of 40 hectares for the construction of a dwelling on land within the relevant zone and with respect to the particular allotments. Extracts of the LEP formed exhibit G of the proceedings, and exhibit J in the proceedings comprised the LEP as at 22 February 2008 which reconstituted Clause 10 as Clause 14.

156. When the LEP is read as a whole, with respect to Mr Finkernagel's land, it is apparent that although dwelling houses were generally permissible within the rural 1(d), unless the allotment was at least 40 hectares in size a dwelling house could not be approved. In those circumstances prior to the SISS it could not said that a permissible use of Mr Finkernagel's land, or his brothers' land, was for dwelling houses. The SISS sought to change that situation, and accordingly the protection afforded by s.448(g) was not available.

157. The Director General also submitted, generally, that a conversion to 'rural residential development' self evidently means a rezoning which disengages the exemption. However the Tribunal is of the view that a change in the label of a zone does not constitute a sufficient engagement of s448(g) without a change in the permissible land uses.

158. During the course of the hearing the Tribunal raised the question, in the interpretation of s.448(g), of whether in the circumstances of the overall application of Environmental Planning Instruments applying to the land there could be said to in fact be a change of permissible uses. This is because of the

dispensation provisions of State Environmental Planning Policy No. 1 ("SEPP 1"). This would involve an approach which commenced with a recognition that the provisions of Clause 10 (Clause 14) were, properly construed, development standards and which were able to be the subject of an application Pursuant to SEPP1. Hence, it may be said, prior to the SISS dwelling houses were permissible with consent (albeit utilising the provisions of SEPP1), and in the SISS environment they were equally permissible with consent (without the need to use SEPP1).

159. The Tribunal afforded the parties an opportunity to make further written submissions in relation to this matter, of which all parties availed themselves. As part of that process the Director-General sought leave to reopen so as to read two affidavits dealing with the prospect of any objection pursuant to SEPP1 being upheld. That application, on its terms, was made only if the Tribunal did not accept that the upholding of an SEPP1 objection was unlikely.

160. In the circumstances of the present case that question does not strictly arise because of the terms of s.448(g). The relevant question for the purposes of the exception is whether there was a proposal to change the permissible uses as a matter of statutory interpretation, not whether or not, if permissible, any particular use would have received consent, was likely to have received consent, or was unlikely to have received consent.

161. Accordingly on that basis leave to reopen to the extent that it is sort by the Director-General is declined.

162. Furthermore if that ground is not the only ground relied upon by the Director-General for leave to reopen the Tribunal would, as a matter of discretion, refuse leave to reopen. The matters the subject of the complaint are now some three years old, not insignificant time was afforded to the Director-General to

prepare evidence in support of his position, Mr Finkernagel is self-represented, Mr Finkernagel complained in his written submission in reply of the untested nature of such evidence (albeit that the Director-General afforded an opportunity for the deponents to be cross-examined, if required), and there is no apparent reason why the evidence could not be brought as part of the hearing before the Tribunal: see generally *Mosca -v- RTA* [2007] NSWLEC 79 at [17].

163. Finally, it is arguable that an approach which establishes what is permissible, or not prohibited, by reference to the dispensation provisions of SEPP1 fails to properly address the question of whether any relevant environmental planning instrument makes uses permissible: see *Hill -v- Blacktown City Council* (2007) 154 LGERA 418 at [24] – [39], and especially [28]. It is the notion of "permissible uses" that is fundamental to s.448(g).

164. Instead the proper approach in this respect is to focus upon the terms of s.448(g) which is directing attention to the alteration of an Environmental Planning Instrument which amends the permissible uses. The proposal in the present situation was in relation to the Shoalhaven Local Environmental Plan. That Local Environmental Plan did not permit the use of dwelling house before it was contemplated, via the SISS, that such a restraint would be amended. Whilst an objection pursuant to SEPP1 might theoretically be able to be used, that is irrelevant to the s.448 exemption. Quite simply if the SISS intention (as a proposal) resulted in the amendment of an Environmental Planning Instrument in the way contemplated then on Mr Finkernagel's land (in which he held a proprietary interest for the purposes of s.448(g)(i)) there would be permitted a maximum of one dwelling. This effected a change in permissible uses. And this situation extended to his brothers' land.

165. As part of this analysis the question arises as to whether the concept of 'change of permissible uses' is a term of art by reference to how that concept

would apply to land use planning statutes, or as it should be interpreted by reference to the Local Government Act. The approach set out above adopts a narrow construction of that concept by reference to the *Environmental Planning and Assessment Act*. That is because, in New South Wales, the concept of permissible uses, or concepts of land use, are defined by reference to that Act. It might be said to be sensible therefore that where one Act of Parliament speaks of a concept governed by another Act of Parliament the construction of the meaning of the term should at least be assisted by reference to the appropriate enactment.

166. It is to be recognised however that this Tribunal, constituted by other Members, has adopted a more liberal approach to defining the concept of 'change of the permissible uses'. In *Councillor Pamela Emma Virgona*, 3/1998, 23 April 1999, Mr Holland QC adopted an approach to the concept of 'change of the permissible uses' as any alteration upon the restrictions on the liberty to use land. This approach was endorsed in his subsequent decisions of *Councillor Alan Leslie Bennett* and ors., 2/1998, 7 May 1999 at pages 29-30, and *Councillor William Peter Smits*, 4/1998, 30 June 1999 at pages 16-17. Undoubtedly such a liberal approach would more easily engage the exception to the exception contained in s.448(g) in the circumstances of the present case. Thus, whether a narrow construction or a more liberal construction of the phrase is adopted, the Tribunal is of the view that the s.448(g) exemption did not apply in the circumstances of the present case.

167. This is because the SISS constituted a proposal to change the permissible uses with respect to Mr Finkernagel's (and his brothers') land. In the draft SISS that existed before the meeting, that alteration contemplated one allotment per hectare, *per se*. This approach would have constituted a change in permissible uses in the sense that dwelling houses would have been permissible (with consent) on the allotments as they existed at the time of the report. In the 'matter' before the council an alteration to permissible uses was still

contemplated, albeit that the introduction of dwelling houses on each of those allotments was to be expressed as a 'maximum', curiously a maximum of one dwelling per allotment. However the effect would have been that whereas previously there was no entitlement to the erection of a dwelling house on these allotments, in the after situation there would have been an entitlement (with consent) to a maximum of one dwelling per allotment. This, on either approach to s.448(g), involved a change in the permissible uses of the land. And in such circumstances the exemption in s.448(g) is not available to Mr Finkernagel.

168. The question then becomes, to return to s.442, whether in the circumstances of the SISS there was a reasonable likelihood or expectation of appreciable financial gain or loss, in the matter that was before the Council?

169. The valuer relied upon by the Director-General, Mr Robinson, was of the opinion that a prudent purchaser would, in the circumstances of such a meeting, assume that a building permit would be inevitable, and that the value of the lands should increase significantly because each of the subject lots should gain development approval for a residence. Whilst the quantum of that increase is, on the evidence before the Tribunal, relatively uncertain, (Mr Robinson valued the allotments with building entitlements and fully serviced at $350,000 - $450,000, from which an obvious discount for time in order to obtain such building entitlements, and the absence of services needs to be made), the Tribunal is satisfied that with a prospect of a building entitlement on each of these allotments, that prospect being made more certain by the 'proposal' in the SISS, it inevitably would be the case that the value of the subject lands would increase not insignificantly. The gain in such an instance would, although not specifically ascertainable, have been appreciable with the endorsement of the SISS by the council in the matter before it. As a matter of valuation approach there was a reasonable likelihood or expectation of that gain.

170. As Mr Finkernagel was the registered proprietor of two allotments in the Verons Estate, for the purposes of s.442 he held a pecuniary interest in the matter that was before the council. Additionally, his brothers owned two lots within that estate and accordingly as provided in s.443(1)(b) Mr Finkernagel himself held a pecuniary interest via their interests.

171. Accordingly for the purposes of s.451 Mr Finkernagel had a duty to disclose that, or those, pecuniary interests and take the consequential action prescribed in s.451. The minutes of the meeting show that he did not. Accordingly the Tribunal is satisfied that Mr Finkernagel has breached s.451.

172. That finding is on the basis of the matters contained in the report that was provided to the council, before the council meeting. That report, in and by its terms, gave rise to the duty that has been determined to have been breached. However, as set out above, it is apparent that during the course of the meeting there was a matter that involved a further change in so far as the Verons Estate was concerned.

173. As conceded by Mr Finkernagel in evidence before the Tribunal, and as is apparent from the resolution adopted by the council, during the course of the meeting there was considered a change to the minimum subdivision standard of allotments within the Verons Estate (outside the Swan Lake area) from the existing eight hectare size to two hectares. This included land that Mr Finkernagel and his brothers owned. There is no suggestion that this alteration was raised by Mr Finkernagel, and the evidence would tend to suggest that it was in fact raised by the Mayor. This alteration was sufficiently part of the discussion before the council that it was reflected in a resolution actually adopted by the council for item Number 431, resolution (a). Although Mr Finkernagel said in evidence before the Tribunal that he abstained from the

vote, there was no suggestion that he was either not present at the meeting whilst it was being considered, nor present during the vote.

174. Strictly speaking this matter is not to be considered to exacerbate the breach of duty already determined by the Tribunal. However in the event that the "first" breach might be considered to have not occurred, the creation of this new 'matter' during the course of the meeting had the potential to, of itself, give rise to the duty prescribed by s.451. That duty does not exist or end by reference simply to a report put to a council – rather it may properly be described as a constant and ambulatory duty that should be in the mind of all councillors at all times. Thus if during the course of a council meeting a matter arises that is matter that is properly construed a pecuniary interest then the duty in s.451 is at that moment engaged.

175. In the circumstances of the present case the question then becomes whether the matter constituted by the proposal to reduce the minimum subdivision standard was an interest exempted by s.448(g). In *Councillor Alan Leslie Bennett*, Id at page 29, this Tribunal (constituted by a previous Member) was of the view that proposals to amend aspects of the subdivision of land constituted a change in the permissible use of land for the purposes of s.448(g).

176. That is, as addressed above, to adopt a wide interpretation of s.448(g).

177. In the planning law context, courts in this State have held that subdivision *per se* does not constitute the 'use' of land: see *Wehbe -v- Pittwater Council* (2007) 156 LGERA 446 at [28]. On this narrower construction the proposal that arose during the course of the council meeting would not be one which satisfied the description of a 'change in permissible uses'.

178. The Tribunal, in the circumstances of the present case, however does not need to resolve whether the broader or narrower approach to construing the phrase in s.448(g) is to be adopted. This is because the resolution that was made by the council, and which arose as a matter during the course of council debate, was not just about the subdivision of land, but also (according to its terms, and self-evidently) concerned the intention to permit one dwelling on each of the parcels so subdivided. This was confirmed by the subsequent SISS which, instead of referring to a potential of 32 new dwellings in the Verons Estate (by reference to the 32 existing allotments) instead, after the resolution, referred to a 'maximum of 32-70 dwellings'. Hence, before the SISS, there were 32 allotments in the Verons Estate which, other than pre 1964 lots, had no building entitlement. In the intermediate SISS situation there was to be 32 eight hectare allotments with a maximum of one dwelling per allotment; but following the meeting of the council there was the potential for some 70 or so allotments and/or dwellings.

179. The combination of subdivision and a maximum of one dwelling for the lots so subdivided means that for the purposes of s.448(g) the proposal was one which may be considered to relate to the amendment, ultimately, of an Environmental Planning Instrument which purported to effect a change in permissible uses. This became even more so the case during the course of the meeting. Hence, even if there was no pecuniary interest in the 'matter' as it existed before the meeting, and as reflected in the General Manager's report, during the course of the meeting a pecuniary interest would have arisen quite independently of the General Manager's report, giving rise to the duty to declare the interest and take the requisite action pursuant to s.451.

180. The only remaining question then is whether that subsequent matter was one in which there was a reasonable likelihood or expectation of appreciable financial gain? In circumstances in which, as referred above, the valuation evidence before the Tribunal was that, in essence, a greater probability of a

dwelling entitlement on an allotment reflects itself in a higher value of land, it is no great leap of valuation analysis to conclude that if that situation was to exist, but that each eight hectare allotment could be subdivided (potentially) into two hectare allotments, that that would also constitute a reasonable likelihood or expectation of financial gain which was appreciable. On one view it may be more so the case with a combined ability to subdivide and erect a dwelling on each of the subdivided lots.

181. In so far as the meeting of 28 March 2006 was concerned Mr Finkernagel said that during the course of the meeting he became stunned when one of the councillors moved for a change to the subdivision standard down to two hectares, and that he had abstained from the vote (although it is to be observed that Mr Pigg stated that the vote was unanimous). In this respect it does not matter what Mr Finkernagel's voting position on the voting matter was – the obligation to declare a pecuniary interest is not enlivened by a vote one way or the other, nor the abstaining from the voting. The duty is to declare the interest and depart the meeting if a pecuniary interest exists.

182. Accordingly the Tribunal is satisfied that in so far as the meeting of 23 March 2006 is concerned Mr Finkernagel has breached his duty to declare a pecuniary interest and take the relevant action pursuant to s.451 of the Local Government Act.

Consideration of the issue of Consequence for the Breach

183. During the course of the hearing before the Tribunal the parties agreed that the Tribunal would first consider the question of whether there has been a breach in relation to any of the three meetings addressed in the hearing before the Tribunal, and if the Tribunal finds that there has been to deal with the matter of consequence pursuant to s.482 separately. In summary the Tribunal has found that:

a) Mr Finkernagel has not breached s.451 in so far as the meeting of 2 November 2005 is concerned;

b) Mr Finkernagel has not breached s.451 in so far as the meeting of 24 January 2006 is concerned; and

c) Mr Finkernagel has breached s.451 in so far as the meeting of 28 March 2006 is concerned.

184. The Tribunal does not propose making public this Determination until its determination with respect to consequence has been made.

185. The Tribunal affords to both parties until 31 January 2009 the opportunity to notify the Tribunal, and the other party, whether as part of the determination of consequence either party, or both, requires an opportunity to make oral submissions.

186. If not, the Tribunal Directs that any written submissions by the Director-General on the matter of consequence be made by 14 February 2009, and any written submissions by Mr Finkernagel on the question of consequence be made by 28 February 2009.

Date: 14 January 2009

PECUNIARY INTEREST AND DISCIPLINARY TRIBUNAL ★ LOCAL GOVERNMENT NSW ★

ADRIAN GALASSO SC
Local Government
Pecuniary Interest & Disciplinary Tribunal