LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO. 3/1998

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: COUNCILLOR PAMELA EMMA VIRGONA, NORTH SYDNEYCOUNCIL

STATEMENT OF DECISION

Dated: 23 April 1999

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STATEMENT OF DECISION

THE COMPLAINT

On 17 December 1998 the Tribunal received from the Director-General, Department of Local Government, his Report of an investigation into a complaint made by the him pursuant to section 460 of the Local Government Act, 1993, that Pamela Emma Virgona, being a Councillor of North Sydney Council, committed breaches of section 451 of that Act with respect to consideration by the Council at Council meetings held on 15 and 29 September 1997 of questions relating to a Draft Heritage Local Environmental Plan and a Draft Heritage Development Control Plan and with respect to consideration by the Council at its meeting on 14 April 1998 of questions relating to the Draft North Sydney Local Environmental Plan 1998.

After considering the Report, the Tribunal decided to conduct a hearing into the complaint and on 11 January 1999 gave the parties notice of that decision. The Notice particularised the allegations on which the complaint appeared to the Tribunal from the Director-General's Report to be based.

Correspondence between the Tribunal and the parties ensued, after which the Tribunal appointed a hearing for 22 March 1999.

THE HEARING

Councillor Virgona instructed Mr J F Whitehouse of Minter Ellison, Lawyers, to represent her in the proceedings. In response to the Tribunal's Notice of its decision to conduct a hearing into the complaint, Mr Whitehouse advised the Tribunal that Councillor Virgona wished to contest the allegations contained in the Notice but did not wish to appear or be represented at any hearing other than to make written submissions. He also advised the Tribunal that Councillor Virgona did not wish to call any witnesses and that if all of the attachments to the Director-General's Report were tendered no additional documents needed to be tendered on Councillor Virgona's behalf. In a subsequent letter to the Tribunal dated 1 March 1999 Mr Whitehouse advised, for the assistance of the Tribunal, that on the basis of the facts and allegations outlined in the Tribunal's Notice of 11 January 1999, Councillor Virgona would be contending that, by virtue of the provisions of section 442(2) of the Local Government Act, 1993 she did not have a pecuniary interest in the matters before the Council in question.

Prior to the hearing Mr Whitehouse furnished to the Tribunal a Planning Report relating to the subject matter of the complaint which had been prepared by Mr Richard Barnsley Smyth, a Planning Consultant. He subsequently forwarded to the Tribunal written submissions on behalf of Councillor Virgona. A copy of the Planning Report and the submissions were provided to the Director-General.

On 19 March 1999, written submissions prepared by Mr Michael Lawler of counsel, on behalf of the Director-General in response to Mr Whitehouse's submissions were received by the Tribunal. Mr Whitehouse responded with additional written submissions which were received by the Tribunal on 22 March 1999, the day of the hearing.

Mr Lawler, instructed by Ms Jean Wallace, Legal Officer of the Department of Local Government, appeared to represent the Director-General.

The Director-General's Report to the Tribunal, with all documents attached to it, was treated by the Tribunal as being evidence and information before it for the purposes of the hearing. It became Exhibit A. The Tribunal's Notice of Decision to Conduct a Hearing dated 11 January 1999 became Exhibit B. Correspondence between the Tribunal and the parties were admitted as Exhibits C to O inclusive. Mr Whitehouse's written submissions were identified as Exhibit P, Mr Smyth's Planning Report, Exhibit Q, the Director-General's written submissions, Exhibit T and the additional submissions from Mr Whitehouse, Exhibit U.

At the request of the Director-General, Mr Smyth, the Planning Consultant, had been summoned by the Tribunal to attend the hearing to give oral evidence. He was cross-examined by Mr Lawler.

The Director-General's Report contained a valuation advice by Mr Mark Glanville of the State Valuation Office dated 3 November 1998: Exhibit A, Attachment 34. An addendum by Mr Glanville to that advice dated 17 March 1999, a copy of which had been provided to Mr Whitehouse, was tendered at the hearing. It became Exhibit S.

Mr Lawler supplemented his written submissions with oral submissions.

The proceedings were recorded and a transcript produced. References to the transcript will be by "T" followed by the page and line number.

At the conclusion of the hearing, there having been no appearance by or on behalf of Councillor Virgona and new matter having been put before the Tribunal, the Tribunal on 22 March 1999 wrote to Councillor Virgona's solicitors to give Councillor Virgona an opportunity to deal with the new matter. A copy of the transcript of the proceedings and of the Exhibits List was enclosed. The new matter was identified as being the oral evidence of Mr Smyth, the addendum to the Valuer-General's Report (Exhibit S) and the oral submissions of Mr Lawler. The Tribunal invited Councillor Virgona to furnish a valuation report if she wished and any further submissions she might wish to make. This letter and subsequent material needs to be

identified. The Tribunal has had the letter of 22 March 1999 marked as Exhibit V in the proceedings.

Subsequently Mr Lawler furnished additional submissions dated 25 March 1999 which have been marked Exhibit W, further submissions by Mr Whitehouse dated 31 March 1999 were received and marked Exhibit X, and final submissions for the Director-General commenting on these last submissions from Mr Whitehouse were received on 5 April 1999 and have been marked Exhibit Y.

Mr Whitehouse's submissions dealt with the valuation evidence relied upon by the Director-General but no evidence by a qualified valuer has been furnished to the Tribunal on Councillor Virgona's behalf.

One further document needs to be recorded as it was inadvertently omitted from the Exhibits List of documents considered by the Tribunal. This is a letter dated 1 March 1999 from Minter Ellison to the Tribunal to which Exhibits L and M are replies. The letter dated 1 March 1999 from Minter Ellison will be identified as Exhibit L.1A.

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

THE FACTS RELATING TO THE DRAFT HERITAGE LEP AND COUNCIL MEETINGS 15 AND 29 SEPTEMBER 1997

As mentioned above Councillor Virgona has not disputed the allegations of fact based on the material contained in the Director-General's Report (Exhibit A) which were set out in the Tribunal's Notice of Decision to conduct a hearing dated 11 January 1999 (Exhibit B). For the purposes of this Statement of Decision the Tribunal proposes to state the relevant facts to which reference was made in this Notice without giving references to the attachments to the Report except where it is necessary to do so for the purposes of elaboration.

At the time of the Council's meeting of 15 September 1997 the development of land in the North Sydney Council area was controlled by the North Sydney Local Environment Plan 1989 (which will be abbreviated to NSLEP'89) and the North Sydney Development Control Plan 1991

(NSDCP'91). These instruments included provisions for the control of development of Heritage buildings and Heritage Conservation Areas.

The Council had procured heritage studies to be carried out with a view to better management of Heritage assets in the Council's area.

In June 1996 the Council's Conservation Planner submitted a report to the Council recommending that the Council adopt drafts of a Local Environmental Plan and Development Control Plan which proposed amendments to the existing heritage controls, the redefinition of Heritage Conservation Areas and a review of the Schedule of Heritage Items contained in NSLEP'89. This report recommended that the Council adopt the drafts and apply for the certificate required by section 65 of the Environmental Planning & Assessment Act, 1979 to enable the draft instruments to be placed on public exhibition.

On 8 July 1996 the Council resolved to adopt the draft instruments for the purposes of obtaining the section 65 certification.

Subsequently the draft instruments received certification and were placed on public exhibition from 1 May to 31 July 1997 during which period they were widely advertised in the Council's area, notices were posted to resident and non-resident owners of properties affected by the draft amendment and a large number of submissions were received by the Council.

Following the public exhibition Council staff prepared for submission to the Council a Draft Local Environmental Plan and Draft Development Control Plan which were referred to as "Draft Heritage Local Environmental Plan (Amending the 1989 North Sydney Local Environmental Plan) and Heritage Amendments to the 1991 North Sydney Development Control Plan." These two draft instruments incorporated the proposed amendment to NSLEP'89 and NSDCP'91 which had been publicly exhibited. They also incorporated further proposed amendments arising out of those submissions which had been received and further consideration by Council's staff. The draft plans as so amended were made the subject of a report dated 10 September 1997 prepared by the Council's Conservation Planner and endorsed by the

Council's Director of Planning and Environmental Services. The report with the amended draft plans attached made the following recommendations:

> **"1. THAT Council consider the submissions received on the Draft Local Environmental Plan and Draft Development Control Plan**
> **2. THAT Council adopt the Draft Local Environmental Plan and Draft Development Control Plan, as amended, and attached to this report.**
> **3. THAT the Draft Local Environmental Plan and required documentation be forwarded to the Department of Urban Affairs and Planning – Sydney North Branch – in accordance with S.68 of the Environmental Planning and Assessment Act, 1979.**
> **4. THAT the Minister be requested to make the Plan under Section 70 of the Environmental Planning & Assessment Act, 1979.**
> **5. THAT a certified copy of the Development Control Plan be forwarded to the Department of Urban Affairs and Planning – Sydney North Branch – for information.**
> **6. THAT public notice of the adoption of the Development Control Plan be given in accordance with Clause 20 of the Environmental Planning & Assessment Act, Regulation 1994.**
> **7. THAT those who made submissions, affected owners and all precincts be notified of Council's decision.**
> **8. THAT a further report be prepared on the assessment of the possible additional items identified in this report and the preparation of an Archaeological Study and Zoning Map to identify areas of archaeological potential in the North Sydney Council area, and the associated cost of this."**

The above report with the attached documents was circulated to Councillors with the Business Papers for the Council meeting which was to take place on 15 September 1997. It was received by Councillor Virgona before the meeting took place.

Councillor Virgona and her property

Councillor Virgona was elected as a Councillor for the North Sydney Council, representing the Tunks Ward, at a by-election in June 1992 and again at the local government elections held on 9 September 1995: Exhibit A, Attachment 9, pp.1-2; Exhibit 10.

She owns and resides in a dwelling at 1 Davidson Parade, Cremorne, being Lot 16, DP12587, Parish of Willoughby, County of Cumberland, containing 532 square metres of land.

This land was zoned Residential "B" and designated and shown on the plan map as Residential 2(b) under NSLEP'89: Exhibit A, Attachment 13, Clause 8; NSLEP'89 Plan Map (with amendments), Part Exhibit R. That LEP

contains “Part 4 – Heritage Provisions” which controlled development of Heritage Items and Heritage Conservation Areas which had been identified for the purposes of that plan: see clauses 35-39. It contained a list of the properties which were designated Heritage Items. They were listed in Schedule 2 to the LEP (at page 74): see clause 36(1). The Heritage Items and Conservation Areas under this LEP were shown on a plan entitled “North Sydney Local Environmental Plan – Heritage Items and Conservation Areas”: see Plan, part Exhibit R.

Councillor Virgona’s property was not listed as a Heritage Item in Schedule 2 and was not contained in a Heritage Conservation Area under NSLEP'89.

The Draft Heritage Local Environmental Plan submitted to the Council for its consideration and adoption at the Council meeting on 15 September 1997 contained a proposed new Heritage Schedule in which Councillor Virgona’s property and 12 other properties in Davidson Parade, Cremorne, were all listed as Heritage Items of “Regional Heritage Significance.” The Draft Heritage LEP which contains this proposal is an attachment to a report to the General Manager from the Council’s Conservation Planner for the meeting of 15 September 1997 which is in Exhibit A, Attachment 16. The listing of Councillor Virgona’s property in Schedule 2 is at page 22 of this attachment to that report. The Draft Heritage LEP also contained proposed amendments to “Part 4 – Heritage Provisions” of the NSLEP'89 (see clauses 35-41D).

It will be necessary later to make more detailed reference to the provisions of NSLEP'89 and the amendments thereto proposed by the 1997 Draft Heritage LEP for the purpose of comparing their respective effects upon Councillor Virgona’s property.

Proceedings at Council Meeting 15 September 1997

Councillor Virgona was present at the Council meeting of 15 September 1997 when the Draft Heritage LEP and the Council’s Conservation Planner’s report with the recommendations to the Council quoted above came forward for consideration.

In the course of the proceedings on the matter four motions relating to the question whether the recommendations in the Conservation Planner's Report should be adopted went to the vote. Each of the motions proposed that the report be adopted but subject to a qualification. The four motions were as follows:

> **"(1)** That the report be adopted, subject to 173/179 Walker Street being deferred to a site meeting."
>
> An amendment to this motion, **"That the report be adopted subject to all references in the Local Environmental Plan and Development Control Plan to Montague Street being changed to Montague Road"** was passed and became the motion. ***Councillor Virgona voted against the amendment.***
>
> **(2)** The amendment having become the motion, a further proposed amendment to that motion, **"That the report be adopted subject to deferral of listing of 18 and 20 Harriette Street, pending demolition of 14 Harriette Street"** was put and lost. ***Councillor Virgona voted against the motion.***
>
> **(3)** A further amendment was moved and seconded, **"That the report be adopted subject to the properties in Davidson Parade except for No. 9 and the properties at 66 and 76 MacPherson Street being deferred from the Heritage Schedule for a further report on their deletion after a site or in-house meeting."** The Minutes record the following: ***"Councillor Virgona declared an interest in this item and left the Chamber taking no part in debate."*** That proposed amendment was put and lost. ***Councillor Virgona did not vote.*** The Minutes record that Councillor Virgona then returned to the Chamber.
>
> **(4)** The original motion with the first and only successful amendment was then put to the vote and carried. ***Councillor Virgona voted against the motion.***

In the result the Council resolved **"That the report be adopted subject to all references in the Local Environmental Plan and Development Control Plan to Montague Street being changed to Montague Road."**

Except for the motion in paragraph (3) above, Councillor Virgona did not disclose a pecuniary interest to the meeting but participated in the voting as noted. (Exhibit A, Attachment 17).

Following the above meeting, Councillor Virgona joined in a notice of motion proposing that the Council rescind the resolution which Council had passed at the meeting adopting the Draft Heritage LEP. The notice of motion proposed that in lieu of that resolution the Council resolve to re-notify owners of properties "newly affected by listing" as proposed Heritage Items to enable those owners to comment before adoption of the draft by the Council for its

submission to the Department of Urban Affairs and Planning in pursuance of section 68 of the Environmental Planning & Assessment Act.

Proceedings at Council Meeting 29 September 1997

The rescission motion in which Councillor Virgona had joined was due to come up for consideration by the Council at its meeting of 29 September 1997.

Prior to the meeting a report from the Council's Conservation Planner was prepared and circulated to Councillors describing the action which Council and its officers had already taken since 1994 to publicise the proposed heritage amendments and detailing the procedures which the Council had followed to notify all affected land owners individually. This report recommended that in order to avoid delaying the protection which the Draft Heritage LEP would afford to interim Heritage Items and new Conservation Areas, it be adopted by the Council without further notification and forwarded to the Minister for gazettel.

The meeting on 29 September 1997 resolved to receive the Conservation Planner's report as information to be considered in connection with the rescission motion.

The rescission motion went to the vote and was carried. Councillor Virgona made no disclosure of a pecuniary interest in the matter and voted in favour of the motion.

A motion was then put to the meeting that the report, which had been adopted with a qualification by the resolution passed at the meeting of 15 September 1997 but now rescinded, be now adopted with the same qualification as before, but subject to the further qualification that the listing as Heritage Items of specified properties, one of which was Councillor Virgona's property, be deferred pending an urgent site meeting. Before this motion was put to the vote at the meeting an amendment to the motion was proposed in the terms of the alternative motion which had been foreshadowed in the notice of motion to rescind but with the addition of the proposal for deferral of listing as Heritage Items the specified properties which included Councillor Virgona's property. This proposed amendment

was put to the meeting and lost. Councillor Virgona voted in favour of the amendment. She made no disclosure of a pecuniary interest.

The amendment having been lost, the original motion for qualified adoption of the Draft Heritage LEP was put to the meeting and carried. Councillor Virgona made no disclosure of a pecuniary interest and voted in favour of the motion.

The result was that Council passed a resolution adopting the Draft Heritage LEP subject to, amongst other qualifications, the listing of her property as a Heritage Item in the Draft Heritage LEP being deferred pending an urgent site meeting.

THE FACTS RELATING TO THE DRAFT NORTH SYDNEY LEP 1998 AND THE COUNCIL MEETING 14 APRIL 1998

Following the qualified adoption of the Draft Heritage LEP by the Council's resolution of 29 September 1997 the site meeting was held on 25 October 1997 at Davidson Parade. It was attended by Councillor Virgona as the owner of 1 Davidson Parade and an architect, Mr Owen Havilland, whom she had employed to advise her in relation to a proposed subdivision and further development of her property which she then had under consideration. Whilst she abstained from voting on the matter at this meeting, she spoke to the meeting as a resident of Davidson Parade expressing opposition to her property and others in Davidson Parade being listed as heritage items in the Council's Draft Heritage Local Environmental Plan but she also expressed support for the area of Davidson Parade being listed as a Conservation Area.

A report of the above site meeting was prepared by the Council's Conservation Planner and endorsed by the Council's Manager Strategic Planning for presentation to a Council meeting to be held on 17 November 1997. This report contained recommendations to the Council which included a recommendation that the Council define Davidson Parade as a new Conservation Area in the Draft Heritage LEP and exclude the individual houses in Davidson Parade from the Heritage Schedule and that the affected owners and residents be notified.

The above report and its recommendations came before the Council at is meeting on 17 November 1997. The several recommendations in the report were dealt with separately by the Council. When the recommendation regarding Davidson Parade was reached Councillor Virgona declared an interest in that item of business and left the Chamber taking no part in the debate. In her absence a motion adopting this recommendation was passed by the Council at this meeting.

Councillor Virgona's Property Prior to 14 April 1998

The position of Councillor Virgona's property prior to the Council meeting of 14 April 1998 was that it remained zoned Residential B under the NSLEP'89 and had ceased to be listed as a Heritage Item in the Heritage Schedule of the Draft Heritage LEP but had become located in the proposed new Conservation Area under the Draft Heritage LEP that was proposed to operate as an amendment to NSLEP'89 as and when it became approved and gazetted under the provisions of the Environmental Planning & Assessment Act.

Draft North Sydney Local Environmental Plan (Amendment) 1998 (DLEP'98)

The relevant Council business at this meeting was consideration by the Council of a proposal that the Council adopt a Draft Local Environmental Plan which would amend and replace the existing North Sydney Local Environmental Plan 1989. The proposed new Draft LEP was referred to as the North Sydney Local Environmental Plan (Amendment) 1998 and was abbreviated to DLEP'98.

A report on the proposed new Draft LEP was prepared by the Council's Manager Strategic Planning and was furnished to the Council's General Manager for circulation to Councillors prior to the meeting.

This report made reference to the Draft Heritage LEP which had already been adopted by the Council. The report stated that the heritage provisions amendments the subject of that Draft LEP were currently being negotiated with the Department of Urban Affairs and Planning and had been

excluded from the North Sydney Draft LEP 1998 but would be incorporated into the DLEP'98 when gazetted. The report attached and made comments upon the proposed new Draft Local Environmental Plan.

Under the heading "Land Use Strategy" the basic aspects of a revised residential/land use strategy were listed, including, "Reduce pressure for redevelopment in Conservation Areas by downzoning to Residential "A" and Residential "B" to reflect existing detached/semi-detached and terrace/town-house style development respectively.

The proposed DLEP attached to this report contained the heading, "Part 2 Development Control Tables – General Provisions for the Development of Land" followed by a heading "Land Use Zones" under which Clause 8 provides that the land use zones were to be as shown on the plan map. The copy of the Draft North Sydney Local Environmental Plan 1998 as at 7 April 1998 is part of Exhibit R. The plan shows Councillor Virgona's land as zoned Residential "A".

Clause 10 of the DLEP'98 provides that the Council "must not consent" to the carrying out of any development unless the Council is satisfied that the development is consistent with the specific aims of the plan and the objectives of the zone to which the land is subject. Clause 11 sets out the Zoning And Permissible Use Table, under which, the objectives of Residential "A" Zone are stated to be:

> **"(a) Maintain lower scale residential neighbourhoods of mainly detached and semi-detached housing; and**
>
> **(b) Assist in the conservation of heritage and other sensitive areas."**

Part 3 of this DLEP contains "Special Provisions". In this part Division 1 is headed, "Subdivision". Under the heading, "Controls on the Subdivision of Land", Clause 15(1)(a) sets out one of the objectives of the controls of subdivision as being to "Ensure new development and subdivisions maintain the existing residential character as reflected in allotment size and associated housing density." Clause 15(2) provides that subdivision may only be carried out with consent. Under a heading "Minimum Allotment Size" in Residential Zones, Clause 15(3) provides: "The Council must not consent to any

subdivision of land which creates an allotment of an area less than the minimum area for the zone as specified in the following table."

Under the following table the minimum area per allotment for land Zoned 2(a) (which is the same zone described above as Residential "A") is 450 square metres.

The report of the Council's Manager Strategic Planning and the attached DLEP'98 is contained in Attachment 28 to the Director-General's Report, Exhibit A.

As mentioned earlier, Councillor Virgona's land was zoned as Residential 2(b) under NSLEP'89. The corresponding provision of NSLEP'89 dealing with the subdivision of land (Part 3 – Special Provisions, Division 1) provided in Clause 10 that land to which the plan applied could not be subdivided without development consent and, under the heading "Minimum Allotment Size in Residential Zones", clause 11(1) provided that a person "shall not subdivide land" within a zone specified in the table to the clause unless the area of each allotment to be created by the subdivision would be not less than the area specified against that zone. The minimum area specified in the table for Zone 2(b) was 200 square metres.

As Councillor Virgona's land was 532 square metres the Council could consent to a sub-division of her land permitting two dwellings. The proposed new LEP'98 would, in terms, prohibit the Council from giving development consent to such a proposed subdivision.

Proceedings at Council Meeting 14 April 1998

The report of the Council's Manager Strategic Planning on the proposed new North Sydney Local Environmental Plan 1998 came before the meeting of the Council held on 14 April 1998. The report contained five recommendations.

It was moved and seconded that the report be adopted subject to the addition of a clause 6. The proposed clause 6 was:

> **"That applications made after the granting of the section 65 certificate be assessed under the existing statutory controls and the draft LEP."**

This clause was designed to enable the Council in dealing with development applications made after the granting of a certificate under section 65 of the Environmental Planning & Assessment Act for public exhibition of the draft plan to take into account the provisions of Draft LEP'98, although it was not yet in force, pending its final approval and gazettal, however long that might take. It reflected the provisions to like effect of section 90(1)(a)(ii) of the same Act in relation to a draft environmental planning instrument placed on exhibition under section 66(1)(b) of the Act.

Two motions proposing amendments to the original motion to adopt the report including the additional clause 6 were put to the meeting and were lost. Councillor Virgona made no disclosure of a pecuniary interest in the matter and voted against both amendments.

The original motion was then put to the Council and was carried. Councillor Virgona voted in favour of the motion. The motion thus adopted by the Council as its resolution was in the following terms:

"1. THAT Council resolve to prepare a draft Local Environmental Plan for the North Sydney Local Government Area and to adopt the draft instrument attached to this report.
2. THAT the Department of Urban Affairs and Planning be informed of Council's decision in accordance with Section 54 of the Environmental Planning & Assessment act, 1979.
3. THAT the Draft Local Environmental Plan be forwarded to the Department of Urban Affairs and Planning for certification under Section 65 of the Environmental Planning & Assessment Act, 1979.
4. THAT when the s.65 certification has been issued, the Draft Local Environmental Plan be placed on public exhibition for a period of 60 days in accordance with the Environmental Planning & Assessment Act Regulation.
5. THAT public notice of the exhibition be given.
6. THAT Applications made after the granting of the Section 65 certificate be assessed under the existing statutory controls and the draft LEP."

THE ALLEGED PECUNIARY INTEREST

Section 442 of the Local Government Act, 1993 provides:

"442. (1) For the purposes of this Chapter, a pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated as provided in section 443.

(2) A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter or if the interest is of a kind specified in section 448."

It is not necessary to refer further to section 443 which is mentioned in subsection (1) of section 442 but it is necessary to quote the relevant provisions of section 448 as in force at the time of the meetings which are the subject of the present complaint. Those provisions are as follows:

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

The basis on which it was alleged that Councillor Virgona had a pecuniary interest in the matters under consideration at the meetings in question were expressed by the Tribunal in its Notice of 11 January 1999 to Councillor Virgona (Exhibit B) as follows:

> **"4.1. The Draft Heritage LEP and Draft Heritage DCP with which the Council was concerned at its meetings on 15 and 29 September 1997 and the Draft North Sydney LEP 1998 with which the Council was concerned at its meeting on 14 April 1998 constituted proposals to make an environmental planning instrument which would effect a change of the permissible uses of land in which Councillor Virgona had a proprietary interest, within the meaning of the provisions of section 448 set out above.**
>
> **4.2. A substantial factor in the value of Councillor Virgona's property, 1 Davidson Parade, Cremorne, was its potential for subdivision and further development. A reduction of that potential was calculated to reduce the value of the property.**
>
> **4.3. If the proposed Heritage Schedule of the Draft Heritage LEP before the Council at the meetings of 15 and 29 September 1997 with Councillor Virgona's property listed in the Heritage Schedule as a Heritage Item had been adopted by the Council her property would have become liable to restrictions on its permissible use and development greater than those applying to it under the existing North Sydney LEP 1989. The potential for subdivision and further development of the property would have been substantially reduced resulting in an appreciable reduction in its value.**

4.4. The rezoning of Councillor Virgona's property which would be effected by the adoption by the Council of the proposed Draft North Sydney LEP 1998 at its meeting on 14 April 1998 would exclude a subdivision of the property of the kind proposed by her in the development application lodged on her behalf on 3 April 1998 and the possibility of any further subdivision of the property, thereby reducing its development potential with a resultant appreciable reduction in its value."

The references in the above paragraphs to reduction in the value of Councillor Virgona's property and the reference in paragraph 4.4 to a development application lodged in relation to her property on 3 April 1998 will be dealt with later.

The Tribunal's Notice went on to specify the pecuniary interest which was alleged to arise out of the facts as stated in paragraphs 4.1 to 4.4 above:

"5.1. It is alleged that, by reason of the foregoing facts, there was a reasonable likelihood or expectation of appreciable financial loss to Councillor Virgona if –

5.1.1. The Council at its meetings of 15 and 29 September 1996 had resolved to adopt the draft Heritage LEP with Councillor Virgona's property listed in the Heritage Schedule as a Heritage Item; and/or

5.1.2. The Council at its meeting on 14 April 1998 were to adopt the Draft North Sydney LEP 1998 with the rezoning of her property from its existing Residential 2(b) to Residential 2(a) zone with a minimum area per allotment of land so zoned set at 450 square metres."

THE ALLEGED CONTRAVENTIONS OF SECTION 451

Sections 451 and 457 contain the following provisions:

"451. (1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the interest to the meeting as soon as practicable.

(2) The councillor or member must not take part in the consideration or discussion of the matter.

(3) The councillor or member must not vote on any question relating to the matter."

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

As expressed in the Tribunal's Notice of 11 January 1999, the contraventions by Councillor Virgona were alleged to be as follows:

"6.1. It is alleged that apart from the instances specified above where Councillor Virgona declared an interest, left the Council Chamber and did not vote, Councillor Virgona failed to declare a pecuniary interest in the matters being considered at the meetings of the Council on 15 and 29 September 1997 and 14 April 1998 which have been specified above in

relation to those meetings and that she took part in the consideration or discussion of, and voted on, those matters.

6.2. It is further alleged that Councillor Virgona's interest in those matters was not so remote or insignificant that it could not reasonably be regarded as likely to influence any decision a person might make in relation to the matters, within the meaning of section 442(2).

6.3. It is further alleged that Councillor Virgona knew or could reasonably be expected to have known that the matters under consideration at the meetings were matters in which she had a pecuniary interest."

THE QUESTION OF REDUCTION OF THE VALUE OF COUNCILLOR VIRGONA'S PROPERTY

In support of the allegations in paragraph 4.3 and 4.4 of the Tribunal's Notice with regard to an ensuing "appreciable" reduction in the value of Councillor Virgona's property, the Director-General relied upon reports he had obtained from the Valuer-General. Mr Mark Glanville who made the reports for the Valuer-General is a qualified and registered valuer. His initial report was dated 3 November 1998 (Exhibit A, Attachment 34). The Director-General had requested the Valuer-General to advise on the value of Councillor Virgona's property before and after each of two events, namely, the Council's adoption of the Draft Heritage LEP on 15 September 1997 and the adoption by the Council of the Draft North Sydney LEP on 14 April 1998.

In the course of describing the property to be valued the report states, under the heading "Zoning", that the subject land is located within a Heritage Conservation Zone under the North Sydney Local Environmental Plan 1989 and is zoned Residential 2(b). It should be mentioned at this point that the report is in error in stating that the land was in a Heritage Conservation Zone under the NSLEP'89. As mentioned above, Councillor Virgona's property became part of a proposed new Heritage Conservation Area for the purposes of the Draft Heritage LEP as it was varied by the Council at its meeting on 17 November 1997.

The valuation report noted that an application had been lodged at North Sydney Council to subdivide Councillor Virgona's property to create two lots, one of an area of 330.3 square metres and the other 201.7 square metres and that the current controls under the NSLEP'89 allowed for one dwelling per 200 square metres under Residential 2(b) zoning.

The valuation report contained a number of statements under the heading "Comments". They include the following:

> **"It is understood from the development application and various conversations with Council Officers, that the implementation of the Heritage LEP, and the wider LEP changing the density, would reduce the possibility of subdividing the subject property. Whilst it is considered not impossible to develop the site, as being presently attempted, it is considered more difficult with the development controls of LEPs being in place. I note with interest the comments made by the Conservation Planner – Eden Shepherd, about the development being sought "The subdivision of the property will result in the partial demolition of the existing dwelling." This demonstrates the difficulty that may be encountered if the dwelling was classified as a Heritage Item.**
>
> **It is further understood that if a change in zoning from 2(b) to 2(a) had taken place, the property would be precluded from being subdivided. Therefore, it follows that if the site's potential is reduced, due to the more limited opportunities available, the property is not considered as valuable."**

The valuation report concludes by stating the basis of valuation and the valuation in the following terms:

> **"BASIS OF VALUATION:**
>
> **1. Regard has been given to the value of the house and land under the zoning 2(b) which has the potential for subdivision into two Torrens title lots and also prior to a potential heritage listing on the subject property.**
>
> **2. It is considered that IF the draft Heritage LEP had proceeded and the subject property had been included as a Heritage item there would be far less potential to subdivide a second block from the original parcel, and this would result in a lower value for the subject property.**
>
> **3. The valuations have been determined having regard to comparable sales. Sales have been examined of properties where the house is situated on a small land content, and visa versa where houses enjoy a larger land content, similar to that of the subject property.**
>
> **VALUATION:**
>
> **1. The value of the subject land as at 14 September 1997 zoned Residential 2(b) and within the Heritage Conservation area with potential to subdivide the property into two Lots is considered to be Seven Hundred and Forty Thousand Dollars ($740,000).**

2. **The value of the subject land as at 16 September 1997, the day after the draft heritage LEP was due to take effect is considered to be Seven Hundred Thousand Dollars ($700,000).**
3. **The value of the subject land as at 13 April 1998 the day before the Draft North Sydney LEP was announced changing the zoning from Residential 2(b) to 2(a) and assuming that the property still fell under the classification of Heritage Conservation the value is considered to be Seven Hundred and Sixty thousand Dollars ($760,000).**
4. **The value of the subject land as at 15 April 1998 the day after the Draft North Sydney LEP was announced rezoning the property to Residential 2(a) which totally reduces the possibility of further subdivision is considered to be Seven Hundred and Twenty Thousand Dollars $720,000).**

As will be seen, Mr Smyth, in his Planning Report, did not agree with the opinions and values expressed in the valuation report and they came under strong criticism in the submissions of Mr Whitehouse received before the date of the hearing. The Director-General drew Mr Glanville's attention to the fact that he had wrongly assumed the Councillor's property was located within a Heritage Conservation Zone under NSLEP'89. Mr Glanville then furnished the addendum to the report which was tendered at the hearing (Exhibit S). As views expressed in this addendum attracted further strong criticism in the written submissions made to the Tribunal after the hearing it is appropriate to quote its contents:

> **I was directed by the Department of Local Government to make a number of assumptions in valuing the subject property. One of the assumptions that I was asked to make in my report namely the assumption that Councillor Virgona's property is located within a Heritage Conservation Zone under NSLEP is incorrect. That assumption does not affect the valuations number 3 and 4 on page 6 of my report. The values I have assessed in those paragraphs recognise the potential to subdivide the land.**
>
> **In valuing any property a comparative analysis is undertaken of market transactions of properties with similar characteristics. These purchasers are assumed to make reasonable enquiries, particularly in relation to properties with development potential, in relation to the uses to which the land may be put. Any proposal for a future change affecting land use, even if not having**

reached the stage where the proposal has been accepted will have an impact on value, the degree of affect will depend on the purchasers assessment of the probability/likelihood/risk of the proposal being carried into effect.

In my opinion and experience, the inclusion of a property as a heritage item or a proposal for such an inclusion places a blight on the property in the eyes of a hypothetical purchaser and therefore affects the market price of the property. In the mind of a hypothetical purchase such a listing immediately equates with increased difficulties in developing the property to maximise its potential with these controls.

A valuation is an assessment of the value that a property may attract in the market place, the valuer's opinion is formed by:

- **experience**
- **principle, in this case a principle that a property with a subdivision potential is more valuable than the same property without subdivision potential;**
- **investigation of comparative sales;**
- **investigation of planning controls affecting the underlying potential of that property**

A valuer assessing value of a property with subdivision potential would consider, by reference to comparative sales the likely cumulative market value of the subdivided properties and apply an appropriate discount for profit and risk, acquisition and disposal expenses, and allowances for costs in undertaking the venture.

I confirm the valuation opinions in my report and note that:

- **Opinion 1 – assumes a potential to subdivide the property.**
- **Opinion 2 – assumes a reduced potential to subdivide the property as a result of the property being listed as a heritage item.**
- **Opinion 3 – assumes a potential to subdivide the property under the current zoning of the property.**
- **Opinion 4 – assumes no practical potential to subdivide property as a result of the proposed zoning change.**

The opinions above are based on the detailed points in "PURPOSE and VALUATION" in my main report."

COUNCILLOR VIRGONA'S DEVELOPMENT APPLICATION

On 3 April 1998 Owen Havilland Architects lodged with the Council on Councillor Virgona's behalf a development application dated 31 March 1998 which she had signed to signify her consent as owner of the property 1 Davidson Parade, Cremorne. The application sought approval for a subdivision of the property into two lots together with a construction of alterations and additions to the existing dwelling and the construction on the subdivided lot of a new dwelling. Drawings by Owen Havilland dated March 1998 showing the proposed development accompanied the application and were amended by further drawings delivered later to the Council on 1 June 1998.

As mentioned earlier, the subdivision proposed by the application would divide the 532 square metres of Councillor Virgona's land into two lots, Lot 1 consisting of 330.3 square metres and Lot 2 consisting of 201.7 square metres. The original dwelling house with alterations and the addition of a first floor was to be located on Lot 1 and a separate single storey dwelling house was to be erected on Lot 2. The proposal involved the execution of some demolition works to the rear of the existing building. A copy of the original development application is attachment 29 to Exhibit A.

Attachment 35 to Exhibit A contains a report on the development application. The report was prepared by Anthony Rowan, one of the Council's Planning Consultants, for a meeting of the Council to be held on 15 June 1998. This attachment also contains "Conservation Comments" by Eden Shepherd, the Council's Conservation Planner, dated 11 May 1998 and a copy of the Minutes of an "On-Site Meeting" held at Councillor Virgona's property on 4 July 1998. This meeting was chaired by the Mayor of the Council and a number of residents attended to have their say about the proposed development.

It will be necessary to refer to the above reports and events again later. For present purposes it is relevant to mention that in the Tribunal's Notice of 11 January 1999 (Exhibit B) reference was made in paragraph 3.1.10 to the fact that the zoning of Councillor Virgona's land as Residential

2(b) under NSLEP'89 allowed the Council to consent to a subdivision permitting one dwelling per 200 square metres. It was also stated in that paragraph that under the proposed NSDLEP'98 the minimum allotment size for a dwelling for land contained in Zone 2(a) under the proposed NSLEP'98 would be 450 square metres which, if the draft of that proposed LEP was adopted by the Council, would prohibit the Council from approving the two lot subdivision which Owen Havilland Architects were proposing for Councillor Virgona's land by the development application lodged on her behalf on 3 April 1998.

The processing of Councillor Virgona's development application after 14 April 1998 provides material which, in the view of the Tribunal, is of some relevance to issues which the Tribunal has to determine and will be dealt with later in this decision. However, it is convenient to mention here that Council's planning staff and Director of Planning and Environmental Services in a report to the Council for a meeting held on 7 September 1998 recommended that the application be refused on the basis that amended plans filed by the applicant did not reflect major design changes required by special conditions which had been proposed if the application were to be approved. The recommendation in the report that Council resolve to refuse consent set out reasons which included that the proposal was contrary to clause 39 of NSLEP'89 and clause 41 of NSLEP'97 (referred to here as LEP 1998) in that it would detract from the conservation area and in that the development resulted in a bulk and scale that was considered to be excessive and would detract from the character of the area. (Exhibit A, Attachment 36)

At its meeting on 7 September 1998 the Council refused the development application. Councillor Virgona lodged an appeal to the Land & Environment Court of New South Wales. The appeal was heard in that court on 7 December 1998 by Dr J Roseth, Conciliation and Technical Assessor, and was upheld. The development application was approved subject to conditions annexed to the judgement. A copy of the judgement has been provided to the Tribunal and has been referred to in submissions received from Councillor Virgona's solicitors.

COUNCILLOR VIRGONA'S LETTERS AND INTERVIEW

The formal complaint by the Director-General in this matter was made and notified to Councillor Virgona on 27 August 1998: Exhibit A, Attachments 5, 6. Prior to that date the Director-General had made preliminary inquiries in the course of which letters were written to Councillor Virgona inviting her to comment on the allegations that she had contravened section 451 of the Act. She replied firstly by a letter dated 5 July 1998 explaining her actions in relation to the Council meetings in question and enclosing a copy of a letter dated 3 July 1998 addressed to her from Richard Smyth Planning Consultants Pty Ltd and signed by Mr Smyth: Exhibit A, Attachment 2. She wrote a further letter to the Director-General dated 29 July 1998 containing further explanations: Exhibit A, Attachment 4.

Following the making of the complaint investigation officers of the Department interviewed Councillor Virgona. The interview was conducted on 1 October 1998 in the presence of Mr Smyth whom she had brought with her as her consultant planner and adviser. The interview was recorded and later transcribed. The transcription is Attachment 9 to Exhibit A. It was a lengthy interview in the course of which Councillor Virgona, with some intervention by Mr Smyth, in answer to questions by the investigating officer gave her version of events and explanations for her actions.

At the end of the interview Mr Smyth sought time for Councillor Virgona to furnish a written response to some of the questions that had been asked once she had an opportunity to be advised by her lawyer and he had had an opportunity to comment himself. The investigators agreed to allow further time for this to be done and, on 14 October 1998 Councillor Virgona wrote a further letter to the Director-General in which she made comments and offered explanations: Exhibit A, Attachment 39.

The submissions made to the Tribunal on Councillor Virgona's behalf by her solicitor did not rely upon the information or explanations given by her and Mr Smyth to the Director-General and the investigators in the letters and interview referred to above. The submissions relied upon matters of law and contentions put forward as establishing that Councillor Virgona did not have a

pecuniary interest within the meaning of the legislation and was not obliged to conform to the provisions of section 451 of the Act in relation to any of the meetings the subject of the complaint. The submissions, written and oral, made on behalf of the Director-General were to the contrary. The Tribunal proposes at this stage to deal with these opposing submissions.

LEGAL SUBMISSIONS

Submissions For Councillor Virgona

Mr Whitehouse's submissions (Exhibit P) referred to the matter before Council meetings in September 1997 as "The Draft Heritage LEP" and the matter before the Council on 14 April 1998 as "The Draft Comprehensive LEP". The submissions relied upon both limbs of section 442(2), that is to say, a person does not have a pecuniary interest in a matter (a) 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 (b) if the interest is of a kind specified in section 448. The more important limb in these submissions was the latter.

The relevant provisions of section 448 have already been set out. They refer to "an environmental planning instrument". This is defined in the Dictionary adopted under section 3 of the Local Government Act, 1993 as follows: "Environmental Planning Instrument has the same meaning as in the Environmental Planning & Assessment Act, 1979."

So far as material, section 4(1) of that Act provides that an environmental planning instrument means "A State environmental planning policy, a regional environmental plan, or a local environmental plan."

The submissions accepted that the deliberations of the North Sydney Council at the meetings here in question were all deliberations regarding "proposal(s) relating to the making, amending, altering or repeal of an environmental planning instrument" in terms of section 448 of the Local Government Act, 1993. The submissions then proceeded upon the proposition that any interest of Councillor Virgona in the proposals were subject to the second exclusion from the definition of pecuniary interest in

section 442(2) and section 448 unless it could be established that the environmental planning instruments in question effected a change of "permissible uses" in relation to her property.

The expression "change of permissible uses" is not defined in the Local Government Act. Referring to this fact, the submissions proceed to advance a proposition, which becomes critical in the arguments that follow, to the effect that Councillor Virgona was exempted from compliance with section 451 of the Act in relation to the meeting in question by the relevant provisions of section 448. The proposition is that, as the terms "change of the permissible uses" are terms specifically relating to the contents or provisions of environmental planning instruments made under the Environmental Planning & Assessment Act, 1979, and "hence are technical planning terms", reference needed to be made to the Environmental Planning & Assessment Act to ascertain their meaning.

The following is a summary of the submissions which flowed from this proposition:

1. Whilst the word "use" is not defined by the Environmental Planning & Assessment Act it is referred to in the definition of "Development" in section 4(1) of that Act. The definition that was then quoted in the written submission had not commenced to operate until 1 July 1998. Corrected in the later submission, Exhibit U, the definition relied upon was as follows:

   "Development" in relation to land, means:

   (a) the erection of a building on that land,

   (b) the carrying out of a work in, on or over or under that land,

   (c) the use of that land or of a building or work on that land, and

   (d) the subdivision of that land,

   but does not include any development of a class or description prescribed by the regulations for the purposes of this definition."

   An environmental planning instrument may contain provisions relating to a range of matters referred to in section 26, one of which is:

   "26(1)(b) controlling (whether by the imposing of development standards or otherwise) development."

"Development" is given an extended definition under section 4(2)(e) (the submission referred to (f) which did not come into force until after the relevant time) as follows:

> "The carrying out of development includes a reference to the erection of a building, the carrying out of a work, the use of land or of a building or work, or the subdivision of land as the case may require."

The submission noted that subdivision was separately defined in "section 4B. At the relevant time section 4(2)(d) was the provision which separately defined the subdivision of land. It was there defined as a reference to, amongst other things, any division of land in two or more parts which, after the division, would be obviously adapted for separate occupation, use or disposition.

2. "Use" is one of the components of the definition of "development" which is a separate element. The meaning of use and uses in environmental planning instruments has been elucidated by the courts to establish that use in planning law is the purpose describing to what end activities are undertaken in a building, works are undertaken, structures are erected or land held. Although a use of land may be accompanied by the erection of buildings or structures or the carrying out of work, use does not of itself involve the undertaking of physical works on land or the erection of buildings or structures. The submission referred to **Parramatta City Council v. Brickworks Ltd (No.3)** (1972) 26 LGRA 437 per Gibbs J at 452-453 adopting the principles outlined by the Privy Council in **Newcastle City Council v. Royal Newcastle Hospital** (1959) 4 LGRA 154 at 156; **Vumbaca v. Baulkham Hills Shire Council** (1979) 39 LGRA 309 at 318-319.

   A clear distinction between "use" and the other elements of the definition of "development" such as building, work, structure, demolition and subdivision was made in **Mangano v. Holroyd Municipal Council** (1972) 26 LGRA 357 where at 361 Jacobs JA found that the development consent was expressed as a consent for the use of land and not a consent for the erection of a building and at 362 referred to Barwick CJ in **Gange**

v. Sullivan (1966) 116 CLR 418 at 430 regarding the distinct concepts of use and buildings/structures.

3. A subdivision of land is not a use of land. For this proposition the submission relied upon a statement by Sugarman J in **Ex parte Arnold Homes Pty Ltd; Re: Blacktown Municipal Council** (1962) 9 LGRA 268 at 271: *"The mere "subdivision" of land in the defined sense is not the doing of any of those things which are specifically mentioned in the definition of "development" under section 342T(1). It is not, that is to say, the erection of a building, or a carrying out of a work, or a use of land either for a purpose which is different from the purpose for which it was last used or at all."* Referring to the fact that the exception from the exemption relating to environmental planning instruments in section 448 used the words "a change of the permissible uses" and not the words "a change of the permissible developments", it was contended that, by using the word "uses", the legislature was clearly indicating that an environmental planning instrument which changed the permissibility of elements of the definition of development other than the use of land were exempt from the pecuniary interest provisions. However, the argument proceeded, even if the term "a change of permissible uses" was considered to mean "a change of the permissible developments", for the reasons outlined in the next paragraph, it did not change the ultimate conclusion.
4. The argument then raised the question, what is meant by "a change of the permissible" in the words "a change of the permissible uses" in section 448 of the Local Government Act. The submission proceeded to refer to sections 76, 76A and 76B of the Environmental Planning & Assessment Act. As Mr Whitehouse's subsequent submissions (Exhibit U) acknowledges, sections 76A and 76B were introduced by amendments and were not in force until 1 July 1998 and prior to those amendments the relevant provisions for the purpose of his submissions were in section 76 of the Environmental Planning & Assessment Act.

In the Environmental Planning & Assessment Act, as it was at the relevant time, section 76 is contained in "Part 4 Environmental Planning Control". The section provides as follows:

> **"Restriction on Development.**
>
> **76. (1) Subject to this Act, where an environmental planning instrument provides that development specified therein may be carried out without the necessity for consent under this Act being obtained therefor, a person shall not carry out that development on land to which that provision applies except in accordance with the provisions of that instrument.**
> **(2) Subject to this Act, where an environmental planning instrument provides that development specified therein may not be carried out except with consent under this Act being obtained therefor, a person shall not carry out that development on land to which that provision applies unless:**
> **(a) that consent has been obtained and is in force under this Act; and**
> **(b) the development is carried out in accordance with the provisions of any conditions subject to which that consent was granted and of that instrument.**
> **(3) Subject to this Act, where an environmental planning instrument provides that development specified therein is prohibited, a person shall not carry out that development on land to which that provision applies."**

The argument then proceeded to the following conclusion:

> **"The first two categories (in the above version of section 76, subsections (1) and (2)) are permissible development, while the third (subsection (3)) is prohibited, reflecting the development control tables in environmental planning instruments. Thus "a change of the permissible uses" refers to a change of uses between the permissible columns and the prohibited column, a change which may be made in the Development Control Table of an LEP or in the Special Provisions of a LEP."**

5. In dealing with the contents of environmental planning instruments, section 26(b) of the Environmental Planning & Assessment Act refers to the control of development by the imposition of "development standards". As the Act stood at the relevant time "development standards" was defined in section 4(1) of the Act as follows:

> **"Development standards means provisions of an environmental planing instrument in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: … …"**

The definition goes on to specify in 15 subparagraphs specific aspects of development in respect of which such requirements or standards might be fixed. To indicate the nature of these it is convenient and sufficient to

refer to the first five paragraphs subparagraphs although none were set out the submission. They are:

> **"(a) The area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,**
> **(b) The proportion or percentage of the area of a site which a building or work may occupy,**
> **(c) The character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,**
> **(d) The cubic content or floor space of a building,**
> **(e) The intensity or density of the use of any land, building or work,**
> **… …."**

In relation to development standards, the argument in the submissions proceeded with the assertion that a development standard was a provision of an environmental planning instrument regarding how development was carried out, but it was not a prohibition on development. The original written submission (Exhibit P) referred to the decision in **North Sydney Municipal Council v. P D Mayoh Pty Ltd (No.2)** (1990) 71 LGRA 222 per Mahoney and Clark JJA and the citation in that case, at 236, of the decision in **Kruf v. Warringah Shire Council** (Land & Environment Court, 15 December 1988, unreported). In Mr Whitehouse's ultimate written submissions (Exhibit X) a number of additional decided cases were referred to on the question whether the provision in a local environmental plan was a prohibition or a development standard: **Quinn O'Hanlon v. Leichhardt Municipal Council** (1989) 68 LGRA 114; **Challister Limited v. Blacktown City Council** (1992) 76 LGRA 10 at 15-21.

It was submitted that the clearest way of deciding whether a provision is a development standard or a prohibition was by reference to a statement made by Mahoney JA in **Mayoh's case** at 234: *"There is, in my opinion, a distinction in the provisions between a provision which in form provides: "on land of characteristic X no development may be carried out" and a provision which in form provides: "on such land development may be carried out in a particular way or to a particular extent"*.

6. The submissions in Exhibit X drew further on the judgement of Mahoney JA in **Mayoh's case** on the question of the proper approach of a court in

ascertaining the meaning of legislation. At page 233 Mahoney JA had stated that the task of the court was to discern the intention of the instrument which was to be derived from the words which had been used and the meaning of them in their context. The approach of Mahoney JA in **Mayoh's case** had been followed and applied by Pearlman CJ in **Scott Revay & Unn v. Warringah Shire Council** (1995) 88 LGERA 1 at 5.
(The Tribunal would add that Mahoney JA, having expressed the view in **Mayoh's case** on which this submission is based, went on to support it by quoting a lengthy passage from the judgement of Gibbs CJ in **Cooper Brookes (Wollongong) Pty Ltd v. Commissioner of Taxation (Cth)** (1981) 147 CLR 297 at 304-305, in which, after stating that it was elementary and fundamental principle that the object of the court, in interpreting statute, was to see what was the intention expressed by the words "used", he went on to say, *"Of course, no part of a statute can be considered in isolation from its context – the whole must be considered.")*

Mr Whitehouse's submission (Exhibit P) then turned to apply the foregoing considerations to the particular issues arising under the complaint.

As regards the Draft Heritage LEP the question was whether that draft instrument proposed "A change of permissible uses" in relation to Councillor Virgona's property. It was submitted that there was no change of permissible uses in relation to land either listed as a "Heritage Item" or included in a "Conservation Zone". It was submitted that all that the Draft Heritage LEP purported to do was to require consent for certain development some of which was previously permissible without consent, to add to the documentation requirements for a development application and to add to the heads of consideration to be taken into account on development applications.

It was submitted that the instrument did not change any of the permissible uses of land included either as a Heritage Item or in a Conservation Area and, as such, Councillor Virgona, by virtue of the second exception specified in section 442(2) of the Local Government Act, 1993, did not

have a pecuniary interest in the Draft Heritage LEP. It was submitted, therefore, that the proposition in paragraph 4.3 of the Tribunal's Notice of 11 January 1999 (Exhibit B) that if the proposed Heritage Schedule of the Draft Heritage LEP before the Council at the meetings of 15 and 29 September 1997 listing Councillor Virgona's property as a Heritage Item had been adopted by the Council her property would have become liable to restrictions on its permissible use and development greater than those applying to it under the existing NSLEP'89, was incorrect as a matter of law.

Turning to the Draft Comprehensive LEP, and the question whether that instrument proposed "a change of the permissible uses" in relation to Councillor Virgona's property, the submissions asserted that the proposed change of zoning from Residential 2(b) under NSLEP'89 to the proposed zone Residential 2(a) under the Draft Comprehensive LEP in relation to clause 15(3) of the Draft Comprehensive LEP setting a minimum area of 450 square metres for subdivision by comparison with the minimum area of 200 square metres for subdivision set by clause 11 of the NSLEP'89, resulted in no more than a change of "development standards". It was submitted that, as such, the provisions of clause 15(3) of the Draft Comprehensive LEP provided no change from permissible to prohibited use of Councillor Virgona's land.

It was further submitted that as clause 15(3) was dealing with the subdivision of land, it did not effect a change of the permissible uses of the land because subdivision was not a use of land.

These submissions further asserted that the minimum allotment standards proposed under clause 15(3) of the Draft Comprehensive LEP would be amenable to change by way of an objection under State Environmental Planning Policy No.1: Development Standards. (The reference to State Environmental Planning Policy No.1 is to a State Environmental Planning Policy made under the provisions of section 39 of the Environmental Planning & Assessment Act under which an applicant for development consent may make an objection that compliance with a development

standard is unreasonable or unnecessary in the circumstances of the case, and the Council (or the Land & Environment Court on appeal) may, if it is satisfied that the objection is well founded, grant consent to the development application despite the development standard).

It was submitted that, for the foregoing reasons, Councillor Virgona did not have a pecuniary interest in the draft Comprehensive LEP in relation to the subdivision provisions because she came within the second exception contained in section 442(2) of the Local Government Act.

It was submitted that, therefore, the conclusion in paragraph 4.4 of the Tribunal's Notice that the rezoning of Councillor Virgona's property which would be effected by the adoption by the Council of the proposed Draft North Sydney LEP 1998 at its meeting on 14 April 1998 would exclude a subdivision of the property of the kind proposed by her in the development application lodged on her behalf on 3 April 1998 and the possibility of any further subdivision of the property, was incorrect as a matter of law.

After concluding the foregoing submissions, the written submission drew attention to some changes made by the Draft Comprehensive LEP in relation to permissible developments on Councillor Virgona's property although they had not been referred to in the investigation report to the Tribunal or the Tribunal's Notice nor had they formed the basis of any complaint against Councillor Virgona. These changes were identified by comparing the Development Control Table for the Residential 2(b) zone in clause 9 of the NSLEP'89 with the Development Control table for the Resident 2(a) zone in clause 11 of the Draft Comprehensive LEP. The differences were that development prohibited but proposed to be permissible consisted of the erection on the land of Community Notice Signs, Real Estate Signs, Remediation, Telecommunication Facilities and Temporary Signs. (There was no change in the table from development permissible to proposed to be prohibited) It was submitted that these particular changes were minor, insignificant and trivial and, therefore, fell within the first exception contained in the definition of pecuniary interest under section 442(2) of the Local Government Act.

Based upon the foregoing submissions, it was submitted, finally, that Councillor Virgona did not have a pecuniary interest as alleged and hence did not act in breach of section 451 of the Local Government Act, 1993.

Submissions For the Director-General

The principal written submissions for the Director-General made in reply to the written submissions on behalf of Councillor Virgona are contained in Exhibit T. They are directed entirely to the question of whether the sixth exemption in section 448 of the Local Government Act applied to the pecuniary interests alleged against Councillor Virgona in the Tribunal's Notice of Decision to Conduct a Hearing so that, by virtue of section 448, they were not interests which had to be disclosed for the purposes of Chapter 14 of the Act. The submissions are summarised in the following paragraphs:

1. The real issue is whether Councillor Virgona's interest is caught by the bracketed words in the sixth exemption in section 448, that is, whether the proposed Draft Heritage LEP and the proposed Draft Comprehensive LEP were proposals relating to an instrument "that effects a change of the permissible uses of (Councillor Virgona's) land". That issue gives rise to the questions (a) whether the phrase "change of permissible uses" and the word "use" should be construed as technical planning law terms or be given their broader ordinary and natural meaning, and (b) whether the phrase "change of permissible uses", if construed by reference to its technical legal meaning as a part of planning law, be confined to a reference to a movement of specified uses between the "permitted" and "prohibited" sections or columns of the Development Control Table for land of the relevant zone within the LEP or should have a broader meaning and, (c) whether a subdivision could constitute a "use" of land within the meaning of the section.
2. The submissions challenged the assertion in the argument for Councillor Virgona that by utilising the word "uses" the legislature was clearly indicating that an environmental planning instrument which changed the permissibility of elements of the definition of development other than the use of land were exempt from the pecuniary interest provisions. The

Director-General's submissions were to the effect that when the construction of the sixth exemption in section 448 is undertaken in accordance with recognised principles of statutory construction, as it should be, it does not produce the result asserted by the submissions for Councillor Virgona. The submissions relied upon a number of propositions as to the principles to be followed in the construction of statutes. *"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolite or improbable"*: **Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.** (1920) 28 CLR 129 per Higgins J at 161-2. *"If there is ambiguity or the results of such a construction are absurd or inconsistent then traditionally the court can have resort to the purposive approach to interpretation through an application of the "Mischief Rule":* Pearce & Geddes **Statutory Interpretation in Australia (4th Edn)** section 2.2. In cases of ambiguity where several meanings are possible, section 15AA (meaning section 33) of the **Interpretation Act, 1987** requires the adoption of a meaning that furthers the purpose of the legislation. Where words have a well-established legal meaning it will be taken, prima facie, that the legislature has intended to use them with that meaning unless a contrary intention appears from the context: **AG (NSW) v. Brewery Employees Union of NSW** (1908) 6 CLR 469 at 531. However, "The court will not treat a group of words as having a technical legal meaning merely because they would convey to a lawyer the same meaning as a known technical legal phrase: **Webb v. McCracken** (1906) 3 CLR 1018 per O'Connor J at 1027. The submissions relied on a passage from the judgement of Priestly JA in **Gamers Motor Centre (Newcastle) Pty Ltd v. NatWest Wholesale Australia Pty Ltd** (1985) 3 NSWLR 475 at 483-4 in

dealing with the case where the words in question have a range of meanings including legal as well as ordinary meanings. The passage concluded: *"The object of the approach is not to find the legal as opposed to the "ordinary", but to find from the range of legal and ordinary meanings, which in any event will seldom be in watertight compartments, the meanings best suited to the statutory document as a whole."*
In view of the fact that the sixth exemption in section 448 had been amended by Act No.69 of 1996 (the amended provisions commenced on 11 November 1996) it was submitted that the Tribunal was at liberty to have regard to the legislative history of the provision but it was suggested that a comparison of the pre and post-amendment form in the provision did not appear to assist as the phrase "effects change of the permissible uses of the land" remained unchanged. The Tribunal will deal with this suggestion in due course.

3. As to the ordinary and natural meaning of "use" and "permissible uses", resort to the Macquarie Dictionary yields a large number of meanings for the word "use" of which the first is "to employ for some purpose … …". The Concise Oxford Dictionary relevantly defines the word as "availability, utility, purpose for which a thing can be used." Both dictionaries define the word "permissible" as "allowable". Reference was made to a statement of Stirling J in **British Motor Syndicate Ltd v. Taylor & Son** (1900) 1 Ch. 577 that *"The first meaning assigned to the word "use" in* ***Johnson's Dictionary*** *is "to employ for any purpose"*; *it is therefore, a word of wide signification",* which was approved by the Court of Appeal in **Shell-Mex & BP Ltd v. Clayton** (1955) 3 All ER 102. It was then submitted "That on its ordinary and natural meaning, the phrase "permissible uses of land' refers to employing land for any purpose – in other words, that which is allowed to be done to, with or upon the land."
4. The submissions contended that even considered as a technical legal term the word "use" had a very broad meaning which, it was suggested, was illustrated in the proposition made for Councillor Virgona that "use in planning law is the purpose describing to what end activities are

undertaken in a building, works are undertaken, structures are erected, or land held." It was suggested that the breadth of the legal concept of "use" of land as a technical legal term was also illustrated by the decision of the Privy Council in **Newcastle City Council v. Royal Newcastle Hospital** (supra) in which the Privy Council held that it was not correct to say that an owner of land could not be said to use the land by leaving it unused because an owner could use land by keeping it in its virgin state for his own special purposes as did the hospital in keeping a large area of undeveloped land outside the grounds of the hospital for the purpose of getting fresh air, peace and quiet to the advantage of the hospital and its patients. Other examples were given. It was submitted therefore that "The erection or extension of a dwelling and subdivision of Councillor Virgona's property were within the technical legal meaning of the term "use" in planning law as well as within the ordinary and natural meaning."

5. As to the submissions for Councillor Virgona constructed on the definition of "development" in the Environmental Planning & Assessment Act, it was submitted for the Director-General that the elements of the definition of "development" in that Act were not to be treated as mutually exclusive categories and there was no authority or principle which would support the argument in the submissions that by utilising the word "uses" in the Local Government Act, the legislature was indicating that an environmental planning instrument which changed the permissibility of elements of the definition of development other than the use of land was to be exempt from the pecuniary interest provisions of the Local Government Act.
6. The conclusions as to the meaning of "use" and "permissible use" as expressed in the submissions for the Director-General may be summarised as follows:
   (a) The Director-General conceded that because section 448 used the phrase "permissible uses of land" in relation to an "environmental planning instrument" and that term was defined by reference to the Environmental Planning & Assessment Act there was an arguable case for giving the words in question the technical meaning they had

acquired in the context of planning law; but contended that the present case was one where on any view there was ambiguity attaching to the meaning of "use" and this required the purpose of the legislation to be considered. In this connection, it was contended that the "manifest statutory purpose of Chapter 14, of which section 448 is part, was to prevent Councillors from participating in decisions of Council in which they have a personal financial interest thereby to improve the integrity and transparency of local government decision making." It was submitted that the narrow construction put forward in the submissions for Councillor Virgona conflicted with the furthering of that purpose. It was submitted that section "15AA (meaning section 33) of the Interpretation Act, 1987"required the "purposive approach" and that, as Chapter 14 was manifestly remedial in nature, reliance can be placed on the "Mischief Rule" of interpretation, i.e. an interpretation that suppresses the mischief and advances the remedy is to be preferred: **Haydon's case** (1854) 76 ER 637 at 638. (The reference to section 15AA should be read as section 33. Section 15AA, in the same terms, is in the Commonwealth Acts Interpretation Act, 1901).

(b) The submission sought to place most emphasis upon the statutory context in which section 448 was found. It was submitted that this supported the broad interpretation. It was pointed out that the first four kinds of interest exempted from disclosure (the fifth does not relate to Councillors) were interests shared with others generally. It was suggested that it would be anomalous to adopt a narrow construction of the sixth exemption which would result in interests which were not shared with others generally being excluded.

7. With regard to the contention that the phrase "a change of permissible uses" referred to a change of uses between the permissible columns and the prohibited columns made to the Development Control Table of an LEP or by the Special Provisions of an LEP, it was submitted that to confine the meaning of the phrase in that way would conflict with the manifest purpose of the legislation and with decisions of the courts that restrictions

on use found elsewhere in an environmental planning instrument can, on a proper construction, amount to a prohibition that is not amenable to the State Environmental Planning Policy No.1. Objection Procedure.

8. As to the contention that a change of a development standard even if it related only to the use of land was not "a change in the permissible uses" within the meaning of section 448, it was submitted that:

    (a) Regard has to be paid to the question whether a restriction claimed to be a development standard is, upon a careful analysis of the environmental planning instrument, a prohibition of development." Reference was made to cases such as **Woollahra Municipal Council v. Carr** (1985) 62 LGRA 263; **Napper v. Shoalhaven City Council** (Stein J, Land & Environment Court of New South Wales, No.40091 of 1987, 26 February 1988).

    (b) The existence of the mechanism of State Environmental Planning Policy No.1 providing a possibility of relief against restriction on use in an LEP does not affect the meaning of a "permissible use of land" in section 448 of the Act. A change of a restriction which was a true development standard could be such as would greatly increase the value of the land in question and be properly described as a "change of permissible uses of the land". An illustration was given of a substantial change in the floor space ratio set for commercial buildings which would greatly alter the size of the building permitted on the land.

9. The submissions for the Director-General contested the view that a subdivision of land was not a use of land. As mentioned above, the submissions for Councillor Virgona relied upon a statement of Sugarman J in the **Arnold Homes case** as an authority for the proposition that subdivision of land was not a use of land. It was pointed out in the submission for the Director-General that the proposition by Sugarman J was not necessary to the decision in that case because on either view the applicant was not entitled to the relief sought. It was also pointed out that

the view expressed by Sugarman J was expressed on the question whether the subdivision under review was a development within the meaning of the then section 342T of the Local Government Act and, being directed towards the meaning of a particular definition of the word "development" in other legislation, could not be considered as binding on the Tribunal and was of little or no utility in the construction of section 448.

The submission relied on the words of Lord Upjohn in **Ogden Industries Pty Ltd v. Lucas** (170) AC 113 at 127:

> **"It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supercede its proper constructions and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.**
>
> **No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgement."**

The submission contended that subdivision came within the broad interpretation of "use" and that, as a matter of common sense a subdivision can be considered to be a use of land.

10. It was submitted finally that the phrase "changes to the permissible use of land" in section 448 should be given a broad, purposive construction, so that any change to what is allowed to be done on, to or with land is caught.

In relation to the Draft Heritage LEP, it was submitted that this was a proposal to effect a change in the permissible use of the land owned by Councillor Virgona because that which was allowable without consent would after the change be no longer allowable without consent.

In relation to the Draft Comprehensive LEP, it was submitted that the proposed change in zoning which would be brought about was one that would remove her existing entitlement to subdivide her property with the result that, if subdivision came within the meaning of "use" of land, as the

Director-General contended, the Draft Comprehensive LEP would affect a change in the permissible uses of the land.

THE TRIBUNAL'S RULING ON THE MEANING OF SECTION 448

As there is no authority on the meaning of the provisions of the Local Government Act here in question the Tribunal must arrive at its own independent view. The written submissions of the parties demonstrate that there is considerable room for debate and the Tribunal is indebted to Mr Whitehouse and Mr Lawler for the care taken in the submissions they have made for the assistance of the Tribunal.

Debatable though it is, the Tribunal, after much consideration, has arrived at a firm conclusion as to the proper construction of the legislation.

The Tribunal proceeds on the basis, virtually common ground between the parties, that its task is to ascertain the intention of the legislature from the words used, read in their context, giving effect to their ordinary and grammatical meaning and, in case of ambiguity, preferring a construction that, consistently with the language and the context, would promote the purpose of object of the Act.

Critical to the present case, in the Tribunal's view, is the principle that the words whose meaning is in issue must be considered in their context. To repeat the already quoted words of Gibbs CJ, in **Cooper Brookes** which Mahoney JA cited in **Mayoh**, *"Of course no part of a statute can be considered in isolation from its context – the whole must be considered."* Giving this principle its proper force in the present case, the Tribunal does not agree that the narrow interpretation propounded by the submissions for Councillor Virgona is correct.

It seems to the Tribunal that these submissions, while appearing to embrace the view of Mahoney JA that the words were to be considered in their own context, proceeded to consider their meaning in a very different context, thereby to arrive at what, in the opinion of the Tribunal, is an erroneous conclusion. The warrant put forward for doing so was the reference in the Local Government Act to the Environmental Planning &

Assessment Act, 1979 for the meaning of the expression "environmental planning instrument."

In the Tribunal's view, the existence of this reference in the Local Government Act is not enough to override the requirement that the meaning of the provisions of section 448 of that Act should be considered in the context of that Act. It is to that context that the Tribunal should first turn.

The opening words of sections 442 and 448 use the expression "for the purposes of this Chapter." The Chapter is Chapter 14 headed "Honesty & Disclosure o Interests." It contains an Introduction, in the third paragraph of which, it is stated that the Chapter requires that the pecuniary interests of Councillors, Council delegates and other persons involved in making decisions or giving advice on Council matters be publicly recorded and, more importantly for present purposes, requires Councillors and staff to refrain from taking part in decisions on Council matters in which they have a pecuniary interest.

Section 442 already quoted above, describes what a "pecuniary interest" is for the purposes of Chapter 14. It states in subsection (1) that a "pecuniary interest" is an "interest" that "a person" has "in a matter", "because of" "a reasonable likelihood or expectation of appreciable financial gain or loss to the person." (The reference to "another person …etc" in that subsection may be disregarded in the present case).

The section recognises that there may be other interests that a person may have in a matter but selects for description as "pecuniary interests" for the purposes of the Chapter only those interests related to the matter which are of the financial character described by the section. So far as presently material, subsection (2) provides that if the interest in a matter is of the kind specified in section 448 a person "does not have a pecuniary interest" in the matter.

For the purpose of disclosure of interests the "person" can be a Councillor (section 444), a designated person (section 445), a member of a Council committee (section 446) or an adviser to the Council (section 447). The disclosures required vary with the class of person.

Councillors and designated persons must lodge written returns disclosing specified kinds of interests: sections.449, 450, Schedule 3. Under those provisions all of the interests which are subject to compulsory disclosure in written returns have financial implications capable of affecting or influencing a person in the performance of duty. (There is provision for voluntary disclosure of any other interest, benefit, advantage or liability "whether pecuniary or not": Schedule 7, Part 2, clause 12).

Councillors and members of Council committees (except "wholly advisory" committees) must disclose "pecuniary interests" in accordance with section 451. That section is concerned with matters being considered at meetings. It is directed to controlling the conduct of Councillors and members of Council committees present at meetings who have a "pecuniary interest" in any matter under consideration at the meeting. The section has already been quoted but bears repeating in the present context. The section provides:

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

In passing, it may be noted that section 452 relieves a person from the prohibitions against taking part in the consideration or discussion of and voting on certain particular kinds of question, the nature of which is specified in the section, but the obligation to make a disclosure to the meeting of a pecuniary interest in those matters is not relaxed.

Designated persons (Council staff and others described by section 441) must disclose in accordance with section 459 any pecuniary interest in any Council matter with which the person is dealing so that it may be passed to another to deal with.

A person giving advice to the Council or a Council committee on any matter is required to disclose to the meeting in accordance with section 456 any pecuniary interest the person has in the matter.

The foregoing provisions of Chapter 14 provide the context in which the meaning of the provisions of section 448 must be considered. The context may be summarised as a scheme of legislation designed to safeguard the public interest by procuring honest and impartial decision making in local government, a scheme which seeks to achieve this goal by, firstly, requiring Councillors and others involved in the decision making process to disclose their interests and, secondly, prohibiting them from taking any part in the decision on any matters in which the interest they have is a financial interest such as would or might conflict with their public duty.

The Environmental Planning & Assessment Act provides a context markedly different from that of the Local Government Act. Whilst, as just pointed out the purpose of Chapter 14 of the Local Government Act is to protect the public interest in honest decision making by controlling the conduct of Councillors and others who have financial interests in the outcome, the purpose of the relevant part of the Environmental Planning & Assessment Act is to protect the public interest in the quality and condition of the environment by controlling development. These very different objects are clearly stated in the Environmental Planning & Assessment Act.

Section 5 provides:

"5. Objects

The objects of this Act are:

(a) to encourage:

(i) the proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of land for public purposes,

(v) the provision and co-ordination of community services and facilities, and

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats,

(b to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment."

Part 3 of the Act deals with **Environmental planning instruments.** It contains sections 24 and 25:

"24. Making of environmental planning instruments and the application of objects thereto.
Without affecting the generality of any other provisions of this Act, an environmental planning instrument may be made in accordance with this Part for the purposes of achieving any of the objects of this Act.

25. Statement of aims etc. in environmental planning instruments.

(1) An environmental planning instrument shall state the aims, objectives, policies and strategies whereby that environmental planning instrument is designed to achieve any of the objects of this Act.

… …

(3) where a provision of an environmental planning instrument is genuinely capable of different interpretations, that interpretation which best meets the aims, objectives, policies and strategies stated in that instrument shall be preferred."

Added to fact that the objects of the two Acts are radically different, the presence of subsection (3) in section 25 shows how inappropriate it could be to treat the words "change of the permissible uses", which are not defined in either Act, as "technical planning terms (for which) reference needs to be made to the Environmental Planning & Assessment Act to ascertain their meaning;" as was submitted for Councillor Virgona (Exhibit P, paragraph 2.6). The Tribunal does not accept that submission and will now seek to ascertain the meaning and intent of those words in their proper context.

Although only one part of section 448 has to be considered here, for a proper consideration of the problem, the section, as in force at the relevant time, should be set out in full:

"What interests do not have to be disclosed?

448. The following interests do not have to be disclosed for the purposes of this Chapter:

- **an interest as an elector;**
- **an interest as a ratepayer or person liable to pay a charge;**
- **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 or a section of the public that includes persons who are not subject to this Part;**

- **an interest as a member of a club or other organisation or association, unless the interest is as the holder of an office in the club or organisation (whether remunerated or not);**
- **an interest of a member of a council committee as a person chosen to represent the community or as a member of a non-profit organisation or other community or special interest group if the committee member has been appointed to represent the organisation or group on the committee;**
- **an interest in a proposal relating to the making, amending, altering or repeal of an environmental planning instrument(other than an instrument that effects a change of the permissible uses of:**
  (a) land in which the person or another person with whom the person is associated as provided in section 443 has a proprietary interest (which, for the purposes of this paragraph, includes any entitlement to the land at law or in equity and any other interest or potential interest in the land arising out of any mortgage, lease, trust, option or contract, or otherwise); or
  (b) land adjoining, or adjacent to, or in proximity to land referred to in paragraph (a),
  if the person or the other person with whom the person is associated would by reason of the proprietary interest have a pecuniary interest in the proposal)."

Each of the exemptions listed is described as an "interest" that does not have to be disclosed. As only "pecuniary interests" have to be disclosed under the Chapter, it might be supposed that all of the interests described were considered to be examples of "pecuniary interests" because if they were not there would be no need to exempt them from disclosure. However, an examination of the first five of the exemptions proves this not to be the case as the fourth is expressed to be indifferent to financial interest ("whether remunerated or not") and the first and fifth might or might not involve financial interest. It appears to the Tribunal that, as to the first five exemptions, the legislature is not concerned to consider whether the interest described involves a pecuniary interest within the meaning of section 442(1) but is saying that, irrespective of whether those interests are pecuniary, they do not have to be disclosed; however, when it comes to the sixth exemption it is a different matter. In relation to the sixth exemption one of the matters to be considered is whether the interest of the person in the subject matter is a "pecuniary interest" as that term is described in section 442(1).

Apart from this consideration, the Tribunal agrees with the submission of counsel for the Director-General that the other five exemptions in the

section are too heterogeneous to assist in ascertaining the meaning of the sixth exemption.

There is no dispute that the Draft Heritage LEP and the draft NSLEP'98 were "proposal(s) relating to the making, amending, altering or repeal of an environmental planning instrument" within the meaning of those words in the sixth exemption. The dispute is as to the meaning of the words in parenthesis. Those words state an exception from the exemption, in other words, they describe an interest which is not exempted by the section from disclosure and which is not to be regarded as an "interest of a kind specified in section 448" within the meaning of those words in section 442(2).

The submissions of the parties focused almost exclusively on the phrase "a change of the permissible uses of the land" but, in the opinion of the Tribunal, it is important to keep the words of the exception in their entirety in mind when considering that particular phrase because there are two other elements that, with the environmental planning instrument in contemplation, combine to constitute the exception. The exception operates when the particular land of the person (or land adjoining, or adjacent thereto), is the subject of, or is included in an area which is the subject, of a proposal that affects a change of permissible uses of the land and the person has a pecuniary interest in the proposal in consequence of the person's ownership of the first mentioned land.

The person will have a pecuniary interest in the proposal if there is a reasonable likelihood or expectation of financial gain or loss if the proposal be adopted or rejected by the Council. Thus the concept which constitutes the exception is a proposal for change which involves a prospective change in the value of the person's land.

If this is correct, the prospect of a change in land value as a result of a change of permissible uses must be considered as a factor to be taken into account in the inquiry as to the scope, meaning and intent of the words, "a change of the permissible uses of" the land.

The element of a change of uses affecting the value of the land was mentioned in so many words in the form of the exception which preceded the present one. The previous form was in the following terms:

- **an interest in a proposal relating to the making, amending, altering or repeal of an environmental planning instrument, other than an instrument that effects a change of the permissible uses of:**
  (a) land in which the person has a pecuniary interest; or
  (b) land adjoining, or adjacent to, land referred to in paragraph (a); or
  (c) other land in proximity to land referred to in paragraph(a), if the change in uses would affect the value of the land referred to in paragraph (a)."

This form of words suffered the anomaly that paragraph (a) referred to a "pecuniary interest" of a person in the land whereas, by section 442(1) a "pecuniary interest" was an interest in a matter which a person had because of a prospect of financial gain or loss. Paragraph (c) showed that the intention was that there was to be no exemption from disclosure if the matter was a change of uses proposed by an environmental planning instrument that would affect the value of the person's land. The anomaly has been removed by the new version but, in the Tribunal's interpretation of the new form of words, the previous intention has not changed.

Returning to the phrase "a change of the permissible uses of land", considered at large the concept of "use" of land, in its ordinary and natural meaning, is not confined to the mere use of the land itself, such as by holding it for a purpose, using the land physically, such as for quarrying, or carrying out works or erecting a building on it. The concept would extend to the use of works or a building already erected on the land. It would extend to alterations or additions to such works or buildings. It would certainly extend to subdivision of the land for a purpose such as the purpose of selling individual lots or retaining part and selling or carrying out works or erecting a building on the remainder.

The nature and extent of the liberty at law to do any of these things with, to or on land may affect the value of the land. Restrictions on that liberty capable of affecting value may take many forms, including, conditions to be fulfilled, requirements to be satisfied, consents to be obtained, procedures to be followed, standards to be met and so on. Restrictions may

be absolute in the sense that a thing may be prohibited altogether. In relation to consents, the restrictions may extend beyond the requirement to obtain consent to limits on the power to give consent, the circumstances in which it may be exercised, the requirements to be met and the procedures to be followed by the person seeking the exercise of the power. All these variants on the liberty to use land, treating the use of land in the broad sense already mentioned, may be considered to be included in the concept of permissibility within the ordinary meaning of the word "permissible" and, in the opinion of the Tribunal, when the expression "permissible uses of land" in section 448 is read in the context of Chapter 14 of the Local Government Act, they should all be taken to be encompassed by that expression.

It would be strange reasoning if a change of permissibility as to the use of works or buildings on the land that substantially increased or decreased its value to the person was exempt from disclosure but a change with the same effect that related only to use of the land as distinct from works or buildings on it had to be disclosed when either would be likely to give rise to a conflict between financial interest and public duty. The same may be said of changes of permissibility that related to the subdivision of land, development standards in the use of the land for the purpose of works or buildings, or the obtaining of consents and so on. In the opinion of the Tribunal such an anomaly should not be attributed to Parliament as its intention when the expression "use of land" is amenable to the broad interpretation that avoids the anomaly. It seems to the Tribunal, that for the purposes of Chapter 14 of the Local Government Act, Parliament would have intended the words to have the wide meaning that avoids rather than that narrow meaning advanced by Councillor Virgona that would give rise such an anomaly.

It follows from the foregoing analysis that the Tribunal does not accept the propositions in the submissions for Councillor Virgona to, or to the effect of, the following:

1. "By utilising the word "uses" the legislature was clearly indicating that an environmental planning instrument which changed the permissibility of elements of the definition of development other

than the use of land were exempt from the pecuniary interest provisions" (Ex P, para.2.11)

2. A subdivision of land is not a "use" of land within the meaning of section 448 (Exhibit P, para.2.10)
3. The words "a change of the permissible" in the phrase "a change of permissible uses" in section 448 "refers to a change of uses between the permissible columns and the prohibited column" in the Development Control table or in the Special Provisions of an LEP (Exhibit P, para.2.12)
4. In an environmental planning instrument, "the addition or change to a development standard (even if it relates to only the use element of the definition of development) is not "a change of the permissible uses" in terms of section 448 of the Local Government Act, 1993." (Exhibit P, para.2.14)

In the opinion of the Tribunal none of these propositions expresses the intention of the legislature in using the words in question in section 448 of the Local Government Act when considered in the context of that Act.

The next question is whether the exception (in section 448) applies to Councillor Virgona in relation to the matters dealt with at the Council meetings in question. The matter to be considered is whether the Draft Heritage LEP and/or the draft NSLEP'98 were proposals relating to an environmental planning instrument which effected "a change of the permissible uses of" Councillor Virgona's land, as those words have been construed by the Tribunal, such as to "appreciably" affect the value of that land. This raises two matters for consideration, the changes proposed and their effect, if any, on the value of the land.

As earlier explained, if the Draft Heritage LEP as presented to the Council in September 1997 was, after adoption by the Council, to become the law, Councillor Virgona's property would have become a Heritage Item and subject to the Heritage Provisions under the new Heritage Schedule and new Part 4 proposed by that draft. The change in the permissible uses of her land which would be thereby effected may be summarised as follows:

1. Use of the land for the erection of dwelling houses or for home occupations which were previously permissible without development consent would be no longer permissible without development consent.
2. Other forms of use, such as for attached dwellings or subdivision, which were permissible with development consent but were not subject to requirements, considerations, documentation and procedures of the kind laid down by the Heritage Provisions, would become subject to those provisions.
3. Use of the land by way of development for any of the purposes described in the nine sub-paragraphs of clause 37(1) of the proposed new Part 4 of the Draft Heritage LEP would be permissible only with development consent. In relation to a Heritage Item, these purposes included demolishing or damaging it, altering it by making non-structural changes to the detail, fabric, finish or appearance of its exterior except for necessary maintenance which did not adversely affect its heritage significance and erecting a building on or subdividing land on which the Heritage Item was located.
4. With respect to obtaining the Council's consent to any of the uses for which consent was required in relation to a Heritage Item, the proposed Part 4, in clauses 38, 39 and 40, made stipulations which would confront and need to be satisfied by an applicant for that consent. The stipulations included:

   (a) provisions imposing an obligation on the Council to take into consideration the impact of the proposed development on the heritage significance of the Heritage Item and to assess the effect of the proposal on significant structural fabric, stylistic and other specified features and on the contribution those features made to the heritage significance of the item.

   (b) provisions prohibiting a Council from granting consent to a development application in relation to a Heritage Item until it had

considered a "statement of heritage effects" or, if the Heritage Item was of regional heritage significance, as was proposed for Councillor Virgona's property, a "conservation plan". These were defined in clause 36(1) of the draft, the latter involving preparation of the plan by a person with qualifications acceptable to the Council.

(c) A stipulation that a Council must not grant consent to an application for approval of the demolition of a Heritage Item until it had considered the heritage significance and structural condition of the item and specified features of its proposed replacement as well as a "heritage assessment", "structural engineer's report" and "contextual assessment" each of which, as defined in clause 36(1) of the draft, could be onerous and expensive requirements for an applicant to satisfy. Further stipulations in the draft in relation to demolition of a Heritage Item were that the Council must not grant consent unless at the same time it granted consent to a development application for proposed new development on the site and before granting consent had notified the Heritage Council and taken into consideration any comments received from that Council.

In the opinion of the Tribunal, all of these proposed changes made the Draft Heritage LEP a proposal relating to the making of an environmental planning instrument "that effects a change of the permissible uses of" Councillor Virgona's land, within the meaning of the exception in section 448.

The relevant changes proposed by the draft NSLEP'98 were the rezoning of Councillor Virgona's land to Residential "A" and the imposition of a minimum area per allotment of 450 square metres in a subdivision of land in that zone. The rezoning made the land the subject of the "Objectives of the Zone" set forth in clause 11 of the draft and of clause 10 which provided that a Council must not grant consent to the carrying out of any development unless it was satisfied that the development was consistent with the specific aims of the plan and the objectives of the zone to which the land was subject. The objectives in clause 11 were to maintain lower scale residential

neighbourhoods and assist in the conservation of heritage areas. The Part 3 – Special Provisions of the draft in which the minimum allotment sizes were laid down subjected the land to (a) the requirement that subdivision might only be carried out with consent, (b) the Objectives of the Subdivision controls, which included ensuring that new development and subdivision maintained the existing residential character "as reflected in allotment size and associated housing density", and (c) the stipulation that "The Council must not consent" to any subdivision of land which created an allotment of less than the minimum area laid down. For Councillor Virgona's land this would, if given effect, be a radical change in the permissible use of her land for subdivision for the purpose of a number of the developments and activities which were to be permitted in the new zone, including a two lot subdivision for the erection of another dwelling house such as she was contemplating and as was permissible under the existing NSLEP'89.

In the opinion of the Tribunal, the draft NSLEP'98 contained proposals that would effect a "change of the permissible uses of her land" within the meaning of those words in section 448.

On the question of the effect, if any, of the changes described above on the value of Councillor Virgona's land, the Tribunal has taken into account not only the valuation reports of the Valuer-General's office, the views of Mr Smyth, the criticisms of the valuation reports in the submissions of Mr Whitehouse and the submissions of Mr Lawler but also other material before the Tribunal relevant to the question.

In his Planning Report (Exhibit Q) Mr Smyth, taking the same approach as Mr Whitehouse, contended that inclusion of a property in a heritage category in a local environmental plan did not change the "permissible uses" of the land but he took no account of the particular context in the Local Government Act in which the meaning of the words had to be ascertained: T11/34-50. However, he also contended that such inclusion did not in any way reduce the potential for subdivision and further development of Councillor Virgona's property and this contention goes to the question whether the value of the land was affected by the change.

The basis of this contention was made clear in Mr Smyth's oral evidence where, as to the potential use of land, he sought to draw a distinction between "restrictions" on what was permissible under the land use table in an LEP and the "considerations" required to be taken into account by a Council before giving consent to a proposed development. He said, "providing you get your considerations right then you should be able to get consent to it": T9/51-T10/2. Mr Smyth declined to accept that, because they were potentially grounds of refusal, heads of consideration involved in the consent process represented obstacles to obtaining consent to the use of land. He said that he preferred to think of them as "factors for consideration" but had to agree that they could be determining factors: T9/4-20, T10/13-T11/28.

Mr Smyth's Planning Report sought to discount the Draft NSLEP'98 adopted by the Council on 14 April 1998 on the ground that it was a first step in a process that could take years with substantial changes being made to the draft rezonings and only might result in the proposed re-zoning of Councillor Virgona's property. The Report also declined to give any weight to the change of the minimum area per allotment of land in the proposed new zone for her land on the ground that it was a development standard, not a prohibition or a use, and therefore subject to objection and relaxation under Statement Environmental Planning Policy No.1.

On the basis of the foregoing contentions Mr Smyth stated in his Report that he totally disagreed with the view expressed in the Valuation Report (Exhibit A, Attachment 34, p.5) that if the Draft Heritage LEP had proceeded and the subject property had been included as a Heritage Item there would be less potential to subdivide a second block from the original parcel, and this would result in a lower value for the subject property. According to Mr Smyth, the circumstances envisaged would not change the development potential of the property "and therefore in my opinion the value should not change either." He expressed the same opinion in regard to the adoption by the Council of the Draft NSLEP'98.

When asked while giving oral evidence what advice he would give to someone in the market place who was considering the purchase of a property subject to proposed change of zoning affecting the permissible use of the land, Mr Smyth said, “Well, I’d certainly advise them to have no regard to a change in a long term plan”: T17/32. He said that the reason he would give this advice was because if the proposed new LEP was only in the start process they would probably have sufficient time before gazettal to do what they wanted to do under the existing plan: T18/10-17.

Mr Smyth readily conceded that he had no qualifications or expertise in law or valuation of land: T6/5, T11/52-56; but denied that he had adopted the role of advocate for Councillor Virgona in putting his views forward to the Tribunal: T12/5-43. At this stage the Tribunal is interested in the soundness of Mr Smyth’s views as they relate to value even though he lacks expertise and notwithstanding grounds for suspicion of bias. Before dealing with them, the submissions of Mr Whitehouse regarding the question of value should be mentioned.

The submissions are contained in Exhibit X, p.4, para.4. The Director-General had written a letter dated 20 August 1998 seeking a valuation report. In relation to the rezoning and change of minimum allotment size for subdivisions in the NSLEP'98. The letter stated that the proposed controls “would prohibit the subdivision of Councillor Virgona’s property”: Exhibit A, Attachment 32. The submissions criticised this instruction to the Valuer-General, called the “threshold assumption”, as wrong in law. They also criticised as wrong in law assumptions made in the Valuation Report, Exhibit A, Attachment 34, regarding the meaning of the two draft LEPs under consideration and contended that as a result that Report was of little assistance. The addendum to this Report tendered at the hearing, Exhibit S, was treated as follows: “The further Valuation Report of 19 March 1999 proceeds to make a series of vague generalisations about heritage listing, which we would submit are silly.”

The submissions in Exhibit X went on, firstly, to contend that the Councillor’s successful appeal to the Land & Environment Court proved that

the Draft Heritage LEP did not affect the development potential of her land because Dr Roseth who heard the appeal said he would have approved it even if the Draft Heritage LEP had been made and, secondly, to repeat the contention that the minimum lot sizes laid down by the NSLEP'98 were only development standards and then to claim that Councillor Virgona would have succeeded in having an objection under State Environmental Planning Policy No.1 upheld to achieve the subdivision proposed in her development applications.

These submissions concluded that, even if Councillor Virgona had a pecuniary interest in the two draft instruments, neither made a material difference to the development potential, and hence the valuation of her property. The final submission was, "However, our submission is that Councillor Virgona did not have a pecuniary interest in either draft LEP, and in those circumstances the valuation evidence is irrelevant."

The submissions for the Director-General in reply, Exhibit Y, asserted that, as the words of clause 15(3) of the Draft NSLEP'98 were "Council shall not consent", the threshold assumption was correct and rejected the claims that other assumptions in the valuation report were incorrect. The Director-General criticised the submissions for overlooking the valuer's addendum, Exhibit S, submitting that value was "a question of market perception", and relying on the valuer's expert opinion that Heritage listing "places a blight on the property in the eyes of a hypothetical purchaser and therefore affects the market price of the property." It was also submitted that it was irrelevant that a given development application might ultimately be approved in the Land & Environment Court.

When all the material before the Tribunal is considered, it would seem to the Tribunal that, on the issue of the effects of the changes proposed by each of the two draft LEPs on the value of Councillor Virgona's land, the views of Mr Smyth and the submissions of Mr Whitehouse never came to grips with the question of forces in the market place.

As the Addendum to the Valuer's Report pointed out, a valuer proceeds on the assumption that a prospective purchaser would make

reasonable inquiries, particularly in regard to properties with development potential, in relation to the uses to which the land may be put, and that any proposal for a future change affecting land use will have an impact on value, the degree of which will depend on the purchaser's assessment of the risks of the proposal being carried into effect. This would appear to the Tribunal to be a sound assumption for a valuer to make.

The statement of the valuer in the Addendum relied on by the Director-General that heritage listing "places a blight on the property" referred to both the inclusion of a property as a Heritage Item and a proposal for such inclusion. The statement was introduced by the words "In my opinion and experience" and was followed by the assertion, "In the mind of a hypothetical purchaser such a listing immediately equates with increased difficulties in developing the property to maximise its potential with these controls." There is an abundance of material before the Tribunal which tends to support this assertion.

The correctness of the assertion may be illustrated firstly by Councillor Virgona's explanation when interviewed by the Department's investigating officer of her opposition to a motion proposed by Councillor Reymond at a meeting of the Council on 13 August 1996. The motion proposed that certain procedures should apply to every application for consent to proposed alterations and additions to any building which was listed as a Heritage item under the Council's LEP. The proposed procedures would require each applicant to lodge a separate assessment from a heritage consultant chosen from the Council's panel on the impact of their proposal on the heritage significance of the item, supported by detailed reasons, and also an opinion from the National Trust, the Royal Australian institute of Architects and such other bodies as the Council might determine. The motion was carried with Councillor Virgona and three others voting against it: Exhibit A, Attachment 15. Janette Ryan, the Investigation Officer conducting the interview on 1 October 1998, asked Councillor Virgona why she was against the motion. In the course of giving her answer to that question and similar questions which followed, Councillor Virgona said that some Councillors put in such motions

just “to make it harder and harder and more expensive for anybody that owns Heritage Items,” “… it’s more rules and regulations, it’s more red tape, it’s harder and harder for anyone that has a building of any significance … and that’s why I voted no, because I think we have enough rules and regulations and controls in place to deal with it anyhow: Exhibit A, Attachment 9, p.5.

Attachments 21 and 22 contain the Council records of a series of site meetings held on 25 October 1997 at properties threatened with listing as Heritage Items in the proposed Draft Heritage LEP. They include the site meeting at Davidson Parade, Cremorne which Councillor Virgona attended. It is recorded that there was unanimous opposition of residents to individual heritage listing of their houses. As recorded, the reasons given included, “this prevents demolition and redevelopment”, “any heritage listing will downgrade the value of the property”, “the less restrictions the better”, and “doesn’t think any form of heritage listing is appropriate.” The report of the meeting at another site recorded that the residents were unanimously against the heritage listing of their individual properties. As to two other site meetings it was recorded that no vote was taken but the residents had shown that they were clearly opposed, one of the grounds given being that heritage listing would prevent redevelopment.

In relation to the report on the Davidson Parade site meeting, which went to the Council at its meeting on 17 November 1997, Councillor Virgona told the investigator that the report accorded with her recollection of the site meeting: Attachment 9, p.53. She also told the investigator that she was “strongly opposed” to a Heritage Item listing for the properties but felt that it would be better for the street as a whole to be in a Conservation Area. When asked why that would be better, she said that Heritage Items listing created difficulties for individual houses, “They have to get a heritage architect, they have to get certain reports, there are … … things that one has to do and I’m not sure exactly what they are, if you own a heritage property. There are expenses that one has to go to … …”. When asked what sort of controls applied to a Conservation Area, Councillor Virgona says, “Well probably they’re similar but in a Conservation Area or street, the street is looked at as a

whole but when a property is listed as a Heritage Item on its own account then obviously there are greater restrictions on it.": Attachment 9, pp.31-31.

The passage of Councillor Virgona's own development application further illustrates the correctness of the valuer's approach to the perception by a hypothetical purchaser of the effect of listing a property as a Heritage Item.

On 10 October 1997 one of the Council's planning officers made a record of an inquiry from the office of Owen Havilland, the architect employed by Councillor Virgona, as to the prospects of her proposed subdivision. The officer's note recorded the proposal to divide into the two lots earlier described and the fact that it would require demolition of part of the rear of the existing house. The note also mentioned the proposed second storey to the existing house. The note states "Proposed Heritage Item. Unlikely to support due to changes to roof." It is apparent from other notes that Owen Havilland's office was advised of this as well as of other objections to the proposal which led the note to conclude, "Unlikely to support proposal.": Exhibit A, Attachment 18.

Reference has already been made to the report to the General Manager made by Anthony Rowan, Planning Consultant on Councillor Virgona's development application: Exhibit A, Attachment 35. This report at page 7, incorporates comments which had been received from the Council's Conservation Planner dated 11 May 1998 which include a statement, "In relation to Clause 39 of the North Sydney LEP 1989 and clause 14 of the North Sydney Draft LEP 1997 (sic) the proposal is considered unacceptable … … an amended proposal should reduce the impact of the additions to the roof form of the existing building. These should be secondary in scale to the principal roof form."

The Council's Conservation Planner so recommended in his comments on the development application. The comments noted that the property was listed within a Heritage Conservation Area in the Draft NSLEP 1998. They made an assessment of the proposed development which included criticisms on the ground of heritage conservation. One criticism was that the proposed

alterations to the existing building were not sympathetic. Another was that "generally subdivision of allotments in the Conservation Area should be discouraged. This maintains historic subdivision patterns and relationships of historic development to service infrastructure such as roads and laneways. The subdivision of the property will result in the partial demolition of the existing building."

Mr Rowan's report, at page 11, under the heading "Conservation/Heritage", discusses numerous aspects of the proposed alterations and new structures in the development application from the viewpoint of conservation and heritage which had to be considered because the land was in a proposed Conservation Area but which may not have presented problems to be dealt with if the property had not been in a Conservation Area. For example, in relation to one aspect of the proposed new structure it was stated, "This structure is considered inappropriate where the roof form of the existing cottage plays a significant role in the presentation of the dwelling within the Conservation Area." On page 12 of the report alterations to the plans are suggested for the purpose of keeping the development "in character with the established built form of the Conservation Area." Attached to the report was a set of proposed conditions of development approval, Condition 2 being based on "Heritage Conservation". This condition would require all reference to the proposed works at the first floor level to the existing building to be deleted from the plans with the applicant being invited to resubmit appropriate details of a lesser proposal in a separate development application. It went on to suggest the form which the "lesser proposal" should take. Another proposed condition, No.22, was also based on "Heritage Conservation". It required external materials and finishes to match the existing building. Mr Rowan's conclusion, expressed at page 18 of his report, and his proposed conditions of any approval indicate that, in assessing the proposed development application, the fact that it was treated as being in a Conservation Area gave rise to a need to consider the compatibility of the proposed development with the heritage considerations which applied to land in that area. Mr Rowan recommended that the Council

grant development consent subject to conditions but, as mentioned earlier, the Council rejected the application.

The processing of Councillor Virgona's development application illustrates the obstacles that a prospective purchaser would be likely to anticipate in considering the possibilities of developing and subdividing land listed as a Heritage Item in an LEP. Those obstacles would be seen to be exacerbated by a minimum area per allotment provision accompanied by an express direction to the Council in the LEP not to approve a subdivision of a lesser area even if there was a possibility of its being relaxed by means of an objection under State Environmental Planning Policy No.1.

The submissions for Councillor Virgona sought to make capital out of the fact that her appeal against the Council's rejection of her application succeeded; but the necessity to institute an appeal if the Council were to reject the proposed development and the possibility that the appeal might fail would be a further deterrent to be considered by a prospective purchaser. In the Tribunal's opinion, Councillor Virgona's success in her particular appeal is of no consequence in assessing the effect on value of a proposed listing of land as a Heritage Item in an LEP.

The Tribunal infers from the material just reviewed that the impediments, uncertainties, potential delays and expenses with respect to obtaining consent by the Council or from the Land & Environment Court to any alternations, additions or other development, including future subdivision of Councillor Virgona's land, which could ensue from the changes which would be effected by the proposals in the two Draft LEPs were likely to substantially influence the price that a prospective purchaser would be prepared to pay for her property.

The expertise and experience of a qualified valuer entitles the opinions as to the changes in the value of Councillor Virgona's property expressed in the Valuer-General's Valuation Report and confirmed in the Addendum thereto to greater weight than the views and contentions of Mr Smyth and the submissions for Councillor Virgona on the question of value; but a finding on that question rests also on the other material discussed above which, in the

Tribunal's view, supports the approach of the valuer and his conclusions that if the proposals were adopted a substantial reduction in value was to be expected.

The valuation opinion gave specific figures, a $40,000 reduction in value attributable to the proposals in either draft LEP if adopted. For the purposes of section 442(1) of the Act, it is sufficient that the difference in value be appreciable, a precise amount does not have to be specified.

The Tribunal is required by section 483 of the Local Government Act to make its findings on the balance of probabilities. On that basis, the Tribunal has no hesitation in finding on the evidence and material relating to the question of value that the proposed changes of the permissible uses of Councillor Virgona's land that would be effected by the Draft Heritage LEP and the Draft NSLEP'98 already described, would, on their adoption by the Council at the meetings in question, have resulted in a substantial reduction in the value of the property.

Conclusion

For the foregoing reasons, the Tribunal concludes that the provisions of the sixth exemption in section 448 did not operate to excuse Councillor Virgona from disclosure of her interest in the proposals in either of the Draft LEPs and that her interest in those proposals were not interests of a kind specified in section 448 within the meaning of that section or section 442(2).

THE TRIBUNAL'S FINDING ON THE COMPLAINT

The Tribunal finds that Councillor Virgona had an interest in the proposal to adopt the Draft Heritage Local Environmental Plan which was considered by the Council at its meetings on 15 and 29 September 1997 and the Draft North Sydney Local Environmental Plan 1998 which was considered by the Council at its meeting on 14 April 1998 because of a reasonable likelihood or expectation of appreciable financial loss to her if they were adopted.

The Tribunal further finds that Councillor Virgona's interest in those matters was not so remote or insignificant that it could not reasonably be

regarded as likely to influence any decision a person might make in relation to the matters within the meaning of subsection (2) of section 442. In this connection , Councillor Virgona's solicitor pointed out in his submissions in Exhibit P some changes made by the Draft NSLEP'98 of permissible developments in relation to Councillor Virgona's land which he described as minor, insignificant and trivial and, therefore, to be treated as insignificant in the sense described by this subsection. He also pointed out they had not been referred to in the investigation report or the Tribunal's Notice or the complaint against Councillor Virgona. They may be treated as falling within the first exemption in the subsection and disregarded.

The Tribunal has already made a finding that Councillor Virgona's interest was not of a kind specified in section 448.

The Tribunal concludes that Councillor Virgona had a pecuniary interest in the matters in question within the meaning of section 442 of the Local Government Act in respect of which she was obliged to comply with section 451.

Apart from the motion for amendment which referred expressly to the properties in Davidson Parade and as to which Councillor Virgona declared an interest and refrained from participation at the Council meeting of 15 September 1997, Councillor Virgona failed to disclose the pecuniary interest, took part in the consideration or discussion of the matters and voted on questions relating to the matters at each of the meetings in question. She therefore acted in contravention of the provisions of section 451 unless she is excused by the provisions of section 457 of the Act which have been quoted already.

The question under section 457 is whether she 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. This question needs to be considered separately in relation to each of the Draft LEPs.

In previous cases, the Tribunal has held that the test to be applied under the section is objective, that is to say, the question is whether the

person knew the facts which, under the Act, would constitute a pecuniary interest in a matter, not whether, subjectively, they held a view, opinion or belief that they did not have, or that the facts did not give rise to, a pecuniary interest for the purposes of the Act. An example is to be found in the case of Councillor Roberts, Hastings Council, PIT1/1995, 3 August 1995 at pages 47-50.

On that test, Councillor Virgona has no defence under section 457 because she knew all of the facts which, on the Tribunal's findings, constituted a pecuniary interest in that matter within the meaning of the Act. In the course of her interview, she told the investigating officer that in relation to the Draft Heritage LEP she didn't ever think of a pecuniary interest and sought no advice about it because it never crossed her mind: Exhibit A, Attachment 9, p.12. Whether this be so or not could not, in the opinion of the Tribunal, make any difference for the purposes of section 457 because the undisputed evidence before the Tribunal is that not only did she know that her property was proposed to be listed as a Heritage Item in the Draft Heritage LEP but in relation to the motion for amendment which referred specifically to the Davidson Parade properties she disclosed an interest and otherwise complied with the requirements of section 451.

In relation to the Draft NSLEP'98 she stated her position somewhat differently. She told the investigation officer that, for reasons that do not need to be detailed for present purposes, she had not read Draft NSLEP'98 before voting on it on 14 April 1998, that she was not aware of the rezoning of her land or the minimum allotment sizes proposed by it; but she admitted that if she had been aware of it she might have been worried about the rezoning and that if she had been aware of the minimum allotment sizes it would have been obvious that that could have been an obstacle to any future development of her property: Exhibit A, Attachment 9, pp.37-38, 47, 49. Councillor Virgona did not deny receiving before the Council meeting of 14 April 1998 the Business Paper containing a reference to the proposed NSLEP'98 and the Report of the Manager Strategic Planning which attached a copy of the Draft NSLEP'98. Having told the investigating officer that she

had not read it, she gave the explanation, "Well I never considered it and you know my attitude is, planners do all this work and whatever they decide, I accept, so I guess that's largely why I didn't read it:" Attachment 9, p.37. In the light of these admissions, it would not, in the Tribunal's view, be proper to find that Councillor Virgona could not reasonably be expected to have known that the matter under consideration at the meeting of 14 April 1998 was one in which she had a pecuniary interest. Consequently, she could not rely on section 457 as a defence to her breach of section 451 in relation to Draft NSLEP'98.

For these reasons, the Tribunal finds that the Director-General's complaint in relation to both the Draft Heritage LEP and the Draft North Sydney Local Environmental Plan 1998 has been proved.

ACTION UNDER SECTION 482

There remains the question of what action the Tribunal should take in relation to Councillor Virgona in consequence of having found the complaint to be proved.

Section 482(1) as it applies to the present case is as follows:

"482. (1) The Pecuniary Interest Tribunal may, if it finds a complaint against a councillor is proved:

(a) counsel the councillor; or
(b) reprimand the councillor; or
(c) suspend the councillor from civic office for a period not exceeding 2 months; or
(d) disqualify the councillor from holding civic office for a period not exceeding 5 years.

The Tribunal has received no submissions from the Director-General or on behalf of Councillor Virgona as to what action, if any, the Tribunal should take under the above provisions in the event of a finding that the complaint had been proved. That question was one of the issues for determination by the Tribunal listed in its Notice to the parties of 11 January 1999: Exhibit B, p.14. In his letter to the Tribunal of 22 February 1999 (Exhibit J), Councillor Virgona's solicitor advised the Tribunal that the issues as listed in the Notice were accepted as the issues requiring determination. As mentioned earlier, Councillor Virgona's solicitor had notified the Tribunal on 3 February 1999 (Exhibit E, para.3) that Councillor Virgona wished to furnish written

submissions on matters relevant to the issues before the Tribunal but did not wish to make oral submissions.

Although the Tribunal considers that Councillor Virgona, being represented by a solicitor, has already had ample opportunity to furnish contingent submissions on this question, the Tribunal has decided to give both parties the opportunity to make such submissions now that the Tribunal's findings and decision that the complaint has been proved will furnished to the parties.

The Tribunal will require such submissions to be provided on or before 4 May 1999 after which date the Tribunal proposes to complete the hearing into the complaint by deciding its course of action under section 482(1) of the Act.

In arriving at that decision, the circumstances in which Councillor Virgona's breaches occurred will be taken into account and consideration will be given to the explanations for her actions which she gave to the Director-General by her letters of 5 July 1998 and 29 July 1998 (Exhibit A, Attachments 2, 4), to the investigating officer at her interview on 1 October 1998 (Exhibit A, Attachment 9) and to the Director-General following that interview by her letter dated 14 October 1998 (Exhibit A, Attachment 39).

DATED: 23 April 1999

PECUNIARY INTEREST TRIBUNAL
ORTA RECENS QUAM PURA NITES
LOCAL GOVERNMENT NSW

K J HOLLAND Q.C.
Pecuniary Interest Tribunal