

**LOCAL GOVERNMENT PECUNIARY  
INTEREST TRIBUNAL**

PIT NO 2/1996

DIRECTOR GENERAL, DEPARTMENT OF LOCAL  
GOVERNMENT

RE: COUNCILLOR BRUCE MACKENZIE, PORT  
STEPHENS COUNCIL

***STATEMENT OF DECISION***

Dated: 26 November 1996

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## ***STATEMENT OF DECISION***

Following a reference in 1995 from the Independent Commission Against Corruption to the Director-General, Department of Local Government, under sections 13(1)(c) and 16(3) of the Independent Commission Against Corruption Act, 1988, the Director-General, after preliminary investigations, decided on 13 March 1996 to conduct a formal investigation under section 462(1) of the Local Government Act, 1993 into a complaint that Councillor Bruce MacKenzie may have committed breaches of section 451 of that Act "in relation to the Heatherbrae Development Control Plan and Port Stephens Shire Council's Section 94 Contributions Plan - Raymond Terrace."

Section 451 provides as follows:

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

As to the expression “pecuniary interest”, section 442 of the Act provides, so far as presently material, 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 ...”**

On 15 July 1996 the Tribunal received the Director-General's Report of his investigation dated 10 July 1996 which he presented to the Tribunal pursuant to section 468(1) of the Act.

After considering the Report the Tribunal, pursuant to section 469 of the Act, decided to conduct a hearing and, on 5 September 1996, gave the Director-General and Councillor MacKenzie notice of its decision.

The hearing took place on 26 November 1996 in Sydney. Mr Simon Burchett of counsel instructed by Ms Jean Wallace, Legal Officer in the Department of Local Government, appeared for the Director-General. Mr Ronald Clifton Vercoe, Solicitor of Newcastle, appeared for Councillor MacKenzie.

The hearing was to proceed upon the Director-General's Report to the Tribunal (Exhibit “A”) and the issues set forth in the Tribunal's Notice of Decision to Conduct a Hearing (Exhibit “B”). However, as had been notified to the Tribunal by Mr Vercoe four days before the hearing, Councillor MacKenzie, who was present in the hearing room, had instructed him to offer no contest to the allegations of fact upon which the Director-General's complaint was based. Those allegations had been set out in Exhibit “B” as follows:

**“TAKE NOTICE** that the Local Government Pecuniary Interest Tribunal will conduct a hearing into a complaint by the Director-General of the Department of Local Government that Bruce MacKenzie, then being a Councillor of Port Stephens Council, committed breaches of section 451 of the Local Government Act 1993 with respect to consideration by the Council of matters relating to Development Control Plan No. 38

and the Council's Section 94 Contributions Plan concerning land in an area described as the Heatherbrae Industrial Land.

**PARTICULARS** of the alleged breaches are as follows:

Councillor Bruce MacKenzie, being a Councillor who had a pecuniary interest in matters with which the Council was concerned and being present at meetings of the Council at which the matters were being considered:

- failed to disclose the pecuniary interest to the meetings;
- took part in the consideration and discussion of the matters; and
- voted on questions relating to the matters

contrary to the provisions of section 451 of the Act.

**THE MATTERS WITH WHICH THE COUNCIL WAS CONCERNED AND THE MEETINGS AT WHICH COUNCILLOR MACKENZIE WAS PRESENT AND THE MATTERS WERE BEING CONSIDERED WERE:**

1. **14 September 1993 - Ordinary Meeting of Council**

**Background:**

The Environmental Planning and Assessment Act 1979, Section 94, empowers local councils to levy contributions from developers for public services and amenities such as road and drainage work required as a consequence of development. The Council had adopted a policy with respect to the levying of such contributions called "Section 94 Contributions Plans - No 2 - Raymond Terrace" (herein referred to as **S.94 CP No.2**).

**Meeting:**

The matter before the Council for consideration at the above meeting was a proposal to adopt an amendment of S.94 CP No.2 for the purpose levying contributions from developers of lands in the Heatherbrae Industrial Area to provide for the construction of two intersections of internal roads with the Pacific Highway, drainage works to cater for all the surface run-off within the area and the resealing of internal roads.

2. **9 November 1993 - Ordinary Meeting of Council**

The matter before the Council for consideration was a proposal to adopt with certain modifications Development Control Plan No. 38 - Industrial Land at Heatherbrae (herein referred to as **D.C.P. No. 38**) for the purpose of controlling the development of all land in the area described in the proposed plan. The plan made provision for the construction of an internal loop road with two access intersections with the Pacific Highway and drainage reserves and detention basins and specified that contributions from developers would be required for the construction of the intersections and a drainage system in accordance with the S.94 CP No.2 which had been adopted by the Council at its meeting on 14 September 1993. The plan required that internal roads be constructed to the Council's standard. The associated S.94 CP No.2 required developers to pay a contribution to the costs of any necessary resealing of internal roads not constructed to the Council's standard. The plan also identified part of the area described in the plan as being a "Possible Endangered Fauna Habitat" in respect of which any development would need to assess its value as a fauna habitat, minimise impacts on endangered fauna and provide a Fauna Impact Statement with the development application.

3. **23 November 1993 - Ordinary Meeting of Council**

The meeting had before it a recommendation by Mayoral Minute that the commencement of D.C.P. No. 38 be deferred for four months to allow it to be reviewed. The matter for the meeting was whether this recommendation should be adopted.

4. **22 February 1994 - Ordinary Meeting of Council**

The matter for consideration was whether D.C.P. No. 38 should be further reviewed.

5. **28 June 1994 - Ordinary Meeting of Council**

As a result of steps taken by the Council prior to this meeting to enable the Council to review D.C.P. No. 38, this meeting had before it for consideration a report describing seven different options for development control of the area together with a recommendation that the Council should adopt either option No. 7 showing an internal loop road (favoured by the Council's senior management committee) or option No. 3 showing a

single spine road along the centre of the area (favoured by affected landowners). Prior to the meeting the Council had met in Committee of the Whole which had resolved to recommend to the Council that option No. 3 be adopted by the Council to replace the existing D.C.P. No. 38. On a motion seconded by Councillor MacKenzie the Council resolved to adopt the recommendation of the Committee of the Whole to adopt option No. 3.

6. **4 October 1994 - Special Meeting of Council**

**Background:**

The Council's above resolution at its meeting on 28 June 1994 constituted the adoption of a proposal to vary the existing D.C.P. No. 38 with consequent changes to its S.94 CP No.2. The proposal was placed on public exhibition after which the question of variation came back to a meeting of the Council on 27 September 1994. Councillor MacKenzie was not present at that meeting. A motion was put to the meeting that the existing D.C.P. No. 38 and its accompany section 94 contributions plan in their basic form (which provided an internal loop road) with minor variations to the road layout and text of the documents as detailed in the report to the Council on 28 June 1994 be retained. An amendment to this motion was moved that the existing D.C.P. No. 38 and section 94 contribution plan be replaced with the proposed variations as recently exhibited (which provided a single spine internal road). On being put to the meeting the amendment was lost and the motion was carried.

Following this meeting, Councillor MacKenzie, with two other Councillors signed a motion to rescind the Council's decision.

**Meeting of 4 October 1994**

The rescission motion came before the Council at its meeting on 4 October 1994 where it was proposed that the rescission motion be adopted and that Council adopt the amended D.C.P. No. 38 and section 94 CP as publicly exhibited prior to the meeting of 27 September 1994. The Council passed resolutions adopting both of these proposals. The amended D.C.P. No. 38 and S.94 CP thus adopted by the Council continued to contain provisions for two access intersections with the Pacific Highway, drainage reserves and detention basins and resealing of internal roads and the requirements for

contributions by developers for the construction thereof and also the designation of part of the area as "Possible Endangered Fauna Habitat" in terms similar to those contained in D.C.P. No. 38 adopted by the Council on 9 November 1993 as mentioned above.

**The Pecuniary Interest of Councillor MacKenzie in the above matters is alleged to have been as follows:**

At all relevant times Councillor MacKenzie was a land developer engaged in the business of acquiring and subdividing parcels of land and selling subdivided lots. He owned for the purpose of his business an area of undeveloped land within the area proposed to the Council to become and subsequently becoming the subject of D.C.P. No. 38 and S.94 CP No.2. In order to subdivide his undeveloped land into lots for sale it was necessary for development applications to be made by Councillor MacKenzie or on his behalf to the Council for approval of his proposed subdivisions. Such approvals were liable to be given conditionally upon the developer satisfying conditions specified by the Council, including restrictions on the development, conditions for the execution of works and requirements for monetary contributions to be made, all at the expense of the developer. The imposition of such conditions represented costs or additional costs to the developer, the quantum of which would vary according to the number and nature of such conditions.

The proposals in relation to both the adoption and the form and contents of D.C.P. No. 38 and S.94 CP No.2 that were before the Council for consideration at each of the meetings of Council listed above, if adopted, involved the certainty or probability of costs or additional costs being occasioned to the owners of land in the subject area generally if they wished to develop their lands, the amount of such costs varying with the form and contents of the D.C.P. and its associated S.94 CP and the land holdings and plans for development of each individual owner.

At the dates of such meetings Councillor MacKenzie as one of such owners had an interest in the outcome of the proposals before the Council which was a pecuniary interest because of a reasonable likelihood or expectation of appreciable financial loss arising from adoption of the proposals by way of costs or additional costs of the development of his lands generally and in particular by way of contributions liable to be levied upon him

in respect of construction of the internal road intersections with Pacific Highway, drainage works and resealing of roads. As the area of land owned by him was the area that was proposed and came to be designated in the D.C.P. No. 38 as "Possible Endangered Fauna Habitat", the requirements of the D.C.P. relating to that area potentially involved restrictions on and additional costs of development of Councillor MacKenzie's land thereby adding to his pecuniary interest in the outcome of the proposals.

## **ISSUES TO BE DETERMINED**

Information contained in the Report by the Director-General of his investigation of this complaint (which was received by the Tribunal on 15 July 1996) indicates that it is not likely to be disputed that the meetings described above took place, that Councillor MacKenzie was present, that he did not disclose to the meetings the alleged or any pecuniary interest in the matters in question and that he took part in the consideration and discussion of and voted on the matters. On this basis, the issue for determination by the Tribunal would appear to be:

Whether, in relation to the matters dealt with at the meetings listed or any of them, Councillor MacKenzie had at the time of the meetings a pecuniary interest within the meaning of the Act to which section 451 of the Act applied.

If the Tribunal were to find that any contravention of the Act by Councillor MacKenzie has been proved, a consequential issue will be whether any, and, if so, what action should be taken by the Tribunal."

Through Mr Vercoe, Councillor MacKenzie, for the purpose of the hearing, admitted all of the facts alleged in the foregoing particulars and acknowledged that his conduct had constituted contraventions of section 451 of the Act. He also admitted that a record of interview contained in the Director-General's Report, Exhibit "A", was a true and accurate account of an interview conducted with him by Investigations Officers of the Department of Local Government on 1 April 1996.

On the basis of these admissions, the Tribunal formally found that the complaint was proved and proceeded to receive evidence and hear



submissions on the question whether the Tribunal should take any and, if so, what action pursuant to section 482(1) of the Act. The Tribunal then pronounced its decision on that question.

The evidence and submissions and the decision of the Tribunal were recorded. They are contained in the attached corrected transcript of the proceedings. The Tribunal incorporates that transcript as part of this Statement of Decision. The Tribunal decided for the reasons there given that Councillor MacKenzie should be suspended from civic office for the period of two months expiring on 26 January 1997.

In the transcript of the proceedings incorporated herein there is a passage which seeks to explain why the Tribunal did not impose a period of disqualification from civic office when, in relation to an earlier complaint, it found that Councillor MacKenzie was in breach of the legislation. The relevant part reads:

**“... a disqualification would have prevented his nomination for those elections (i.e. Council elections 9 September 1995) and effectively operated to keep him out of public office, at least civic office, for over five years.”** (Transcript 26 November 1996, p.22, line 55, to p.23, line 1)”

The reasons for this statement are fully explained in the Tribunal's Statement of Decision dated 22 May 1995 in earlier proceedings against Councillor MacKenzie (PIT No.1/1994). As that document may not be in the hands of a person reading this present Statement of Decision, the reasons should be re-stated here to avoid any confusion as to the Tribunal's powers to disqualify from civic office. The Tribunal may disqualify for any period up to 5 years. Briefly, the reasons were that the last day for a nomination for the 1995 Council elections was 9 August 1995, a period of 11 weeks and 2 days from 22 May 1995. A period of disqualification that was in effect on 9 August 1995 would have prevented Councillor MacKenzie from nominating for the 1995 elections. As the next election would be in 1999, he would have been prevented from being a Councillor for over four years, a period which the

Tribunal considered excessive. ("Over five years" as stated in the passage quoted above was an inaccuracy). To avoid this result, the Tribunal could have disqualified Councillor MacKenzie for a period short of 9 August 1995, say 11 weeks, but to disqualify for that short period would have been artificial. Moreover, under the relevant provisions of the legislation, disqualification would have caused a casual vacancy and raised the question of a by-election. Suspension from office for the maximum period of two calendar months (8 1/2 weeks) avoided such practical problems and, in terms of time, there would have been little difference between disqualification for 11 weeks and suspension for 8 1/2 weeks. Therefore, although the Tribunal considered that Councillor MacKenzie's earlier contraventions warranted a period of disqualification, it decided to impose the maximum period of suspension instead.

Pursuant to section 484 of the Act this Statement of Decision will be furnished to Councillor MacKenzie and the Director-General. A copy will be furnished to Port Stephens Council and such other persons as the Tribunal considers should receive a copy.

DATED: 26 November 1996



**K J HOLLAND Q.C.  
Pecuniary Interest Tribunal**