LOCAL GOVERNMENT PECUNIARY INTEREST & DISCIPLINARY TRIBUNAL

LOCAL GOVERNMENT ACT, 1993

PIDT No 2/2007

DIRECTOR-GENERAL, DEPARTMENT OF LOCAL GOVERNMENT

RE: COUNCILLOR ERNEST BENNETT, KYOGLE SHIRE COUNCIL

DETERMINATION

1. This proceeding concerns an alleged breach of s.451 the *Local Government Act 1993* by Councillor Ernest Bennett of Kyogle Council.

2. On 13 April 2007 the Director-General of the Department of Local Government advised the Tribunal, pursuant to s.465 of the *Local Government Act*, of his approval of an investigation pursuant to s.462 of the Act into the conduct of Councillor Bennett. The terms of reference for the investigation were to investigate the conduct of Councillor Bennett in respect of:

    1. Failing to declare a pecuniary interest in, taking part in the consideration and discussion of, and voting at the ordinary meeting of Kyogle Council on 17 May 2004, in respect of a matter concerning the construction standards of rural roads and developer contributions; and

2. Failing to declare a pecuniary interest in, taking part in the consideration and discussion of, and voting at the ordinary meeting of Kyogle Council on 21 February 2005 in respect of Item 10A.2 'Minutes Road Network Committee' concerning amendments to the Public Gates Bypass Management Plan to remove the requirement to maintain the road 20 metres either side of a public gate or grid,

both contrary to s.451 of the *Local Government Act 1993.*

3. On 5 August 2008 the Director-General advised the Tribunal, pursuant to s.468, that he had conducted an investigation pursuant to s.462 into the conduct of Councillor Bennett, and submitted a report of the investigation for consideration by the Tribunal.

4. Having considered the report of the investigation, pursuant to s.469 of the Act on 18 September 2008 the Tribunal determined to conduct proceedings into the complaint against Councillor Bennett. Those proceedings where conducted at a hearing on 12 December 2008. At the hearing Mr Bennett was represented by Mr Holmes, solicitor, and the Director General was represented by Mr Robinson, of counsel.

5. The claimed breaches of s.451 relate to two meetings of the Kyogle Council, the first on 17 May 2004, and the second on 21 February 2005.

The 17 May 2004 Meeting

6. On 17 May 2004 an Ordinary meeting of the Kyogle Council was held. Prior to that meeting an agenda was distributed together with a report to councillors containing certain information and recommendations.

7. One of the recommendations concerned the issue of the road standards for roads within the local government area. The relevant recommendation was as follows:

> "That council receives and notes the minutes of the road network committee for their meeting of Wednesday May 6th, 2004.
> That council endorses the recommendations contained therein."

The agenda for the meeting contained a background statement and attached a copy of the road network committee's report. Item seven of that report referred to the 'Road Network Classification System' and contained a statement to the effect:

> "The road network committee proposes to council the following amendments to the Kyogle Council road classification system construction standards".

8. As part of the recommendations was the aspect relative to the claimed breach, namely that:

> "Alteration for the minimum standard of arterial roads and collector roads to reduce formation width from eight metres to six metres."

9. There was also a recommendation within the committee's minutes that council adopt the amended Kyogle Council road classification system construction standards as detailed in the attachments to the report. It was that recommendation to which the recommendation in turn to the council was directed, with effect, so it is claimed, (on adoption of the recommendation) to reduce the minimum standard road width for rural collector roads.

10. At the time of the meeting the agenda contained a statement reminding councillors of the need to declare a pecuniary interest and provided for declarations of interest by councillors and staff.

11. The minutes of the meeting record that Councillor Bennett was present at the meeting, and are silent as to any declaration of interest by Councillor Bennett. The minutes record that Councillor Bennett moved a motion that the council receives and notes the minutes of the road network committee for the meeting of 6 May 2004, but that in addition the minimum standard for where the road is sealed for arterial and collector roads be 5.4 metres on 6 metre shoulders with a desirable 6 metre seal on 6 metre shoulders, and for regional roads the minimum seal width be 6 metres on 6 metre shoulders with a desirable width of 8 metres seal on 8 metre shoulders. That motion was put to the vote and was lost, and a substitute motion put by another councillor simply adopting the minutes of the Road Network Committee Meeting was put to council and was carried. The minutes record Councillor Bennett and two other councillors as having voted against that motion.

Matters related to the 17 May 2004 Meeting, generally

12. The land within the Kyogle Shire was governed by an Interim Development Order (made pursuant to the *Local Government Act, 1919*, and which is a deemed environmental planning instrument for the purposes of the *Environmental Planning and Assessment Act, 1979)* which, in relation to certain rural allotments, enabled the creation of concessional allotments, and which also had a 40 hectare minimum subdivision standard. There was also in place a contributions plan adopted by the council pursuant to s.94 of the *Environmental Planning and Assessment Act* which provided for the payment of contributions as a function of certain types of development being approved by the council.

13. At the time of this meeting Mr Bennett had three holdings in the area. The first was described as a holding related to 'Theresa Creek Road', from which

two of the possible three concessional allotments had already been created, thereby leaving one allotment available for creation. The next property was known as the property related to 'Theresa Creek Road and Bruxner Highway', of which there were available three concessional allotments, all of which had not yet been subdivided. The final holding was that related to 'Pigman Road', which, as with the Theresa Creek/Bruxner property, had three concessional allotments available, all of which remained.

14. The reduction in the road classification system related to only one of the three properties, namely the Theresa Creek Road property. Theresa Creek Road was a sealed collector road which had not, at the time of the meeting, been constructed to the minimum standard then in place (namely eight metre wide formation width). The issue then related to the effect of the matter before the council upon the remaining concessional allotment, for the Theresa Creek Road property.

The Meeting of 21 February 2005

15. An ordinary meeting of the Kyogle Shire Council was held on 21 February 2005. As with the earlier meeting, an agenda for the meeting was distributed to Councillors prior to the meeting and within the agenda, and accompanying report, there was contained a number of recommendations flowing from the minutes on the council's road network committee meeting held on 7 February 2005 including that:

> "Council adopt the document titled 'Kyogle Council Road Network Management System' and the policies and management plans contained therein, as per the hard copy presented to Council and stamped as 'final addition' and as amended from time to time."

16. The agenda attached a document labeled "Draft Kyogle Council Road Management System", and contained within that document was the 'Kyogle Public Gates and Bypasses (Cattle Grid) Management Plan'. The agenda recorded the history of the council's previous resolution to place the draft policy on public exhibition and two amendments that had been effected as a result of that exhibition, including section 8.2 having been modified to reflect changes in maintenance lengths associated with public gates and grids. In so far as is relevant to the complaint considered by the Tribunal, the draft Public Gates and Bypasses (Cattle Grid) Management Plan provided that:

> "All costs associated with the construction and maintenance of public gates and bypasses is the responsibility of the owner of the land parcel the public gate permit has been granted to. This also applies to the full width of the road pavement for 20 metres either side of the bypass structure."

17. Item 8.2 of the policy contained the following statement under the heading 'maintenance standards':

> "The owner is responsible for the maintenance of the road carriageway for a distance of 20 metres either side of the structure as identified in the Roads (General) Regulation 2000. The owner may not carry out maintenance works on the carriageway unless previously approved by the council. Council may carry out maintenance of the carriageway within this distance from the structure at the owner's expense."

18. The Draft Network Management System also reproduced regulation 70 from the *Roads (General) Regulation* 2000 which provided:

> "The holder of a gate permit must ensure that the road approaches to the gate are maintained in good condition for such distance (not exceeding 20 metres) from each side of the gate, or for such width, as the roads authority may determine when granting the permit. Maximum penalty: 10 penalty units."

19. Thus, although the Regulation prescribed a maintenance requirement, the extent of that requirement was to be 'as the Roads Authority may determine when granting the permit'. The agenda item sought to effect the prescription of such a distance at 20 metres 'for... either side of the bypass structure.'.

20. As with the previous meeting the agenda item contained a statement reminding councillors and staff to consider declaration of pecuniary interest, and specifically provided for the making of such declarations within the agenda itself. The minutes of the meeting record Councillor Bennett as being present at the meeting, and are silent as to any declaration of interest by Councillor Bennett in the matter the subject of the complaint.

21. Following some alterations to the manner in which the roads committee recommendations were to be addressed, it was determined that the Public Gates and Bypass Management System was to be addressed by the council individually. When the Plan was considered by the council the minutes record Councillor Bennett as moving a motion that the requirement to maintain 20 metres either side of the public gate or grid as contained within the Plan be removed. The minutes then record the following dialogue between councillors:

> "Councillor Peter Lewis asked whether any councillor had a grid/gate on a public road which maybe effected by this decision?
> Councillor Bennett said he had a grid, which would be affected by the decision.
> Councillor Peter Lewis asked whether any councillor would stand to save money if this decision was made this way?
> Councillor Bennett said he would, but he was making policy.
> Councillor O'Neill said he may be affected by the decision as he was not sure whether he had a registered grid on his property or not.
> The General Manager advised that councillors should have regard to the pecuniary interest requirements and whether there might be a pecuniary benefit."

22. The minutes record that the council resolved that in so far as the Public Gates and Bypasses Management Plan was concerned, the requirement to maintain 20 metres either side of the public-gate/grid be removed. That resolution was pursuant to a motion moved by Councillor Bennett. The minutes also record that the council resolved that in relation to the Public Gates and Bypasses (Cattle-Grids) Management Plan, that the requirement to maintain one metre on sealed road be removed. That resolution was on a motion moved by Councillor Bennett.

Matters related to the 21 February 2005 Meeting, generally

23. The grids policy related to the fact that many allotments within the shire were dissected by public roads, and that in order to sufficiently fence paddocks within the allotments so that rural activities may be undertaken the issue of retaining of stock within paddocks where roadways existed was addressed by the installation of a 'stock grid'. Such a grid permitted the passage of a motor vehicle, but prohibited the passage of livestock because it consisted of a series of rails which livestock would not be able to walk across, and hence were retained within the paddock. The grids policy permitted an application for the installation of a grid, but in so far as it relates to the present proceeding, required the owner of the grid to upkeep the roadway one metre each side of the grid. Thus if the road contained pot-holes etc, within this one metre area, then as per the grids policy it was the responsibility of the owner of the grid to maintain that one metre area.

24. The roads committee recommended that this requirement be altered such that the responsibility for maintenance extended twenty metres either side of a grid, or public gate.

25. As referred above, during the course of the meeting Mr Bennett was asked if he owned a grid, to which he answered in the affirmative. The complaint to the Director-General (from the General Manager), and the Director-General's report of investigation, confirmed that Mr Bennett owned one grid at the time of the meeting, but was also equivocal about whether Mr Bennett also had an interest in another four grids. At all times prior to the proceedings Mr Bennett asserted that he had interests in only one grid, a position which was confirmed by the General Manager of the Council in an affidavit prepared on 10 December 2008.

26. By a mathematical approach of assessing the upkeep per kilometre of road and then dividing that proportionately down to a lineal meterage relevant to the extent of maintenance reflected in the policy, it was claimed by the council, and adopted by the Director-General, that the effect of the recommendation of the roads committee was that the cost of maintaining the road could be as high as $148 per annum, per grid.

The Local Government Act

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

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

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

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

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

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

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

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

"(1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable.
(2) The councillor or member must not be present at, or in sight of, the meeting of the council or committee:
(a) at any time during which the matter is being considered or discussed by the council or the committee, or
(b) at any time during which the council or committee is voting on any question in relation to the matter.
(3) For the removal of doubt, a councillor or a member of a council committee is not prevented by this section from being

> present at and taking part in a meeting at which a matter is being considered, or from voting on the matter, merely because the councillor or member has an interest in the matter of a kind to in section 448"

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

> A person does not breach section 451 or 456 if the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest.

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

The Meeting of 17 May 2004

The Evidence and the Parties' Submissions

34. The Director-General submitted by reference to material before the Tribunal that the council would have required, as a condition of any consent to create a concessional allotment, and the upgrade of the road for the full frontage of that allotment. Mr Winter from the council set out the costings relevant to such a course. In an affidavit prepared by Mr Piggitt (the General Manager of the council), Mr Piggitt confirms that such a condition would have been required in any grant of consent.

35. The Director-General submitted that the concept of pecuniary interest attaches to chances or possibilities. In the circumstances of the meeting of 17 May 2004 the claimed pecuniary interest was said to have reflected itself in the reduced cost of exercising the concessional allotment rights. This reflects itself in an appreciable financial gain, namely the reduced amount of money that would have to be spent in order to comply with a condition of consent in the creation of the remaining concessional allotment, effected by having to construct a narrower road.

36. The Director-General also submitted that the circumstance was made even more the worse by Mr Bennett's attempts to have the minimum standard reduced even further during the course of the meeting, a position that was rejected by the council, but that notwithstanding the 'matter' for the purposes of s.442 and s.451 was sufficient to have required the declaration of pecuniary interest by Mr Bennett.

37. Mr Bennett submitted that a draft management plan for the shire had been adopted by council on 13 May 2004, before the relevant meeting. Although it was to have been the subject of public submission and exhibition, it represented a commitment to upgrade the road irrespective of the grant of any consent. By the time of the meeting of 17 May 2004 the council was already going to have done the road upgrade. The adoption of the plan of management represented a positive statement that the council was going to upgrade the road, and hence even though there may have been a condition of consent to construct the road, it was meaningless because the council would have already undertaken the work.

38. Mr Bennett submitted that historically the management plan drafts are inevitably adopted and employed.

39. Mr Bennett submitted that there was no reasonable likelihood of an appreciable financial gain, and that that question must be tested at the time of the meeting, and not with any benefit of hindsight. He submitted that the greater the number of conjectures involved the less likely there to be a pecuniary interest. He said that it was an objective test and that each component in the chain of conjecture must be determined at the time of the meeting. It was submitted that there were a series of links in the chain of conjecture, all of which, except one, were broken sufficiently for there to be no pecuniary interest. Those links included the desire to subdivide land, the subsequent need to lodge a development application, the granting of a consent, the need for access to Theresa Creek Road (which was the one link which was conceded to exist), the need for the council to form a view in terms of s.94, existence of a valid s.94 matter, the imposition of a condition pursuant to s.94, the imposition of another condition for the carrying out of the works, the acceptance by Mr Bennett of the condition, the non-challenging of the condition by Mr Bennett, the condition of the road at the time of grant of consent, and the fact the upgrade of roads are in any case the council's responsibility.

40. It was submitted that the management plan was part of the council's statutory obligations and not an exercise in creative writing. It was said that the road works on Theresa Creek Road were identified to be undertaken within the current year, but the management plan went out to three years and that, because of the identification of the works as such Mr Bennett was entitled to expect/assume the imminence of those works.

41. The Director-General submitted in response that the management plan did not represent a public commitment and that it was not confirmed to being the case. Mr Piggitt also deposed to the possibility of all works not being undertaken. As events transpired, the fact of the matter was that Theresa Creek Road was not upgraded for the entire 651 metre frontage of Mr

Bennett's property, and that some 300 metres was left un-constructed. This remaining 300 metres was said to have represented an appreciable financial gain in the hands of Mr Bennett because there would have been a saving for Mr Bennett in relation to any development consent that he was to obtain until a point at which the road works were actually undertaken. He was said to have obtained the benefit in the sense that the $30,000 that would have ordinarily been required to upgrade the road was reduced to about $15,000 representing the uncompleted part of the road works.

Determination of the Road Standard Matter

42. The Tribunal observes, as contained in the investigation report, that the council had adopted a Section 94 contributions plan. There is no claim by the Director-General that the effect of the decision was to reduce the amount that would have been paid by Mr Bennett had he made an application for, and been granted, development consent for subdivision of the concessional allotment after the meeting with the alteration of the road standard effected.

43. Instead, it was said that the difference, represented as an appreciable financial gain, was in the reduced cost that would have been the necessary result of a condition imposed on any development consent or subdivision of that concessional allotment, which condition would have required the proponent for development (Mr Bennett) to have undertaken road works to the minimum collector road standard, even despite the Section 94 contributions plan.

44. There are two difficulties with this submission.

45. The first is that by the terms of the Section 94 contribution plan itself, the cost of road upgrade for all roads, and in particular the subject road, was expressed to be a cost to be undertaken by the council, itself. Then, in so far as private landowners were concerned, the impost upon them was to be collected via contributions sought pursuant to the Section 94 contribution plan. In the

circumstances of the present case where it is conceded that there was to be no alteration in the contribution amount flowing from the change in the minimum road standards provision, it is clear that the effect of the decision of the council was not to alter the Section 94 contribution. But more importantly it was via that mechanism, namely the Section 94 contributions regime, that the council contemplated the collection of monies for the construction of the roads. If then at the time that it granted the development consent it also imposed a condition requiring the construction of the road to the minimum standard then, on the observation of the Tribunal, there would have been an element of 'double-dipping'. That is, the council would require the undertaking of the road works, and also require a contribution to be paid by the proponent for development for those same road works which, by the s.94 Contributions Plan, it had represented that it would carry out the works. Such a situation would either be invalid as a matter of application of the *Environmental Planning & Assessment Act*, or at the least would have entitled the proponent for development to seek an amendment to or refusal of a Section 94 type condition of consent pursuant to S.94B(3) of the EP&A Act.

46. As part of this difficulty is also the observation that the imposition of such a condition is not necessarily consequential upon the making of an application for the creation of a concessional allotment. Although the General Manager, Mr Piggott indicated that 'ordinarily such a condition would be imposed', it is more correct to say that ordinarily such a condition may be recommended by council officers to the council (whether in chambers or by a delgate, as the decision maker) to be imposed. Recommendations do not necessarily flow to form part of conditions of consent.

47. If this matter was the only barrier to the issue, in the opinion of the Tribunal it would have been insufficient to operate as disqualifying of a pecuniary interest as defined in s.442. This is because s.442 speaks of a 'reasonable likelihood or expectation' of the appreciable financial gain or loss. Certainty is

not the key to s.442. In the opinion of the Tribunal where the General Manager of the council has said on oath that such a condition would ordinarily form a recommendation for approval, it would be fair in the present circumstances to conclude that if the financial gain (or loss) flowed through the imposition of such a condition, a recommendation to impose such a condition fell within the concept of a 'a reasonable likelihood', albeit that it was not certain.

48. The Director-General relied heavily on the submission that s.442 speaks of chances or possibilities. In the Tribunal decision of *Councillor Graeme Frank Roberts,* Hastings Council, 3 August 1995, the Tribunal addressed the concept of chances or possibilities as flowing from the definition section, s.442:

> "Both 'likelihood' and 'expectation' admit the possibility of failure and indicate that the language is being addressed to chances or possibilities as well as probabilities and to cases where the nexus between the council's decision in the matter and the accrual of financial gain or loss to the person maybe subject" (at pages 19 & 20)

49. This interpretation was confirmed in the subsequent Tribunal decision of *Councillor Donald John Fern*, Bega Valley Shire Council, 13 March 1998 at page 30. The Tribunal further confirmed this position in its decision of *Councillor James Morrison Treloar*, Tamworth City Council, 11 May 2000 at page 30.

50. Although the Tribunal has construed the phrase 'reasonable likelihood or expectation' as admitting of chances or possibilities, as well as probabilities, it is important to recognise that within the terms of the phrase 'reasonable likelihood', chances or possibilities which are too distant would not qualify so as to engage the concept of a pecuniary interest. Alone the concepts of likelihood or expectation self-evidently bespeak of probability, and within the

concept of probability there is of course the potential for the gain or loss to not eventuate.

51. Those concepts have been recognised by the Tribunal in the decisions referred above. The adjective 'reasonable' where used in s.442 relaxes somewhat the threshold of a probability to include, as the Tribunal has determined in the past, chances or possibilities. However the composite phrase 'reasonable likelihood or expectation' should not be construed as including a chance or possibility however slight or distant. If, in another realm, one was to express the occurrence of an event as occurring with a 'reasonable likelihood or expectation', one would not align that concept with, to use the vernacular, a long shot.

52. Such a limitation was recognised by the Tribunal in *Councillor Ricardo D'Amico*, Lane Cove Municipal Council, 21 July 2006 where at [87] Mr Officer QC said:

> "In each case the question which arises is whether there is a 'reasonable likelihood or expectation of appreciable financial gain or loss". As has been made clear in numerous decisions of this Tribunal, that phrase is to be understood as 'applying to cases where the prospects of financial gain or loss fell short of being a probability but consisted of a reasonable chance or possibility".

53. The introduction of the notion of 'reasonable' as adjectival of the chance or possibility by Mr Officer QC in the opinion of this Tribunal supports the construction adopted above, namely that there are to be limits upon the chance or possibility.

54. That approach is to construe the provisions of s.442(1) alone. To the extent that there may be considered some ambiguity in that construction however the matter is put beyond doubt by s.442(2) which specifically provides that:

> "A person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter..."

55. The reference to the term 'remote' in s.442(2) at least in a superficial way is coincident with the construction of s.442(1) in terms of the phrase 'reasonable likelihood...'. Although the word 'remote' in s.442(2) is directed to whether the interest is likely to influence any decision, and that may be regarded as a different notion of remoteness (as distinct from focusing on the chances of the gain or loss), in a practical sense the concept is the same. If the possibility (to use the words of previous Tribunal decisions) or the chance is so slim then it may be said that the interest is so remote as not being likely to influence any decision the person might make in relation to the matter. Thus to use the example set out above, if there was a far distant chance of a pecuniary interest being reflected to the person so that it is a long shot it may be difficult to conceive that it was likely to influence any decision a person might make in relation to the matter.

56. Thus, both because of the terms of s.442(1) and the provisions specifically contained in s.442(2), whilst the defined concept of 'pecuniary interest' may be considered to include chances or possibilities, there must be a limitation upon such chances or possibilities, a limitation which is derived from the express words of s.442(1), and the proscription contained in s.442(2).The extent of such limitation must obviously be determined on a case by case basis. This notwithstanding that test is not a subjective one having regard to the personal views of the person at the time of the alleged breach, but is to be determined:

> "... on an objective judgment of the facts and circumstances, that is, a judgment based on facts and indicia unaffected by personal feelings or opinions and not upon a subjective judgment which is based on personal and individual feelings, beliefs, opinions or perceptions."

See *Councillor Peter Kemper*, Uralla Council, 7 April 2004 [41].

57. The second difficulty with the submission of the Director-General relates to, as a matter of fact, whether there could be said to have been a reasonable likelihood of the appreciable financial gain or loss at the time of the meeting of 17 May 2004. This is because, by that date, the council had adopted a management plan which had identified Theresa Creek Road as being the subject of upgrading the works, presumably to the minimum standard (whatever that may be). As a matter of fact at the date of the meeting 17 May 2004, objectively speaking, Mr Bennett and anyone else who owned land fronting Theresa Creek Road would be entitled to assume that in the current financial year the council was proposing to upgrade the road.

58. Mr Piggott the General Manager of the council also attested in relation to the recommendation to impose a condition requiring upgrading works as referred above, that in circumstances in which the upgrading works had already been undertaken then the council would not have imposed such a condition. As at the date of the meeting of 17 May 2004 therefore the factual circumstances relevant to testing whether a breach of s.451 had occurred, or more importantly whether there was a pecuniary interest for the purposes of s.442, were that:

- There was no extant development application for the creation of a concessional allotment
- There was a proposal to reduce the road standards from eight metre to six metre road reserve
- Any development consent for the concessional allotment would have required upgrading of the road (presumably fronting the allotment)
- The council was proposing to upgrade the road in any case

- If the road was upgraded no condition to upgrade the road would have been imposed upon the landowner
- The s.94 contributions for recoupment of the cost of the road upgrade was not to change.

59. In the circumstances of the present case, limiting determination of the question at the date of the meeting, namely 17 May 2004, in the opinion of the Tribunal it cannot be said that Mr Bennett had a pecuniary interest for the purposes of s.442. This is because, viewed objectively at that date, and particularly because of the management plan, there was no reasonable likelihood or expectation of an appreciable financial gain or loss because Mr Bennett was entitled to assume that, consistent with the management plan, the road upgrading was to be carried out by the council. That financial consequence had already been perfected by the council's decision, before 17 May 2004, to undertake those works.

60. Although, as the Director-General submits, factually, those works ultimately were not carried out in their entirety, that matter is not relevant to determining the breach at 17 May 2004. Section 442 speaks of 'a reasonable likelihood or expectation', and viewing the facts as they existed at 17 May 2004 in an objective way, it is difficult to conclude that in the face of a management plan there was a reasonable expectation of a loss reflected in the imposition of a condition of consent for the subdivision of a concessional allotment. It appears that, at the time of the meeting, viewed objectively, there was no potential for a gain or loss. This is because to the objective observer the council was for all intents and purposes going to construct the road works in any case. The fact that it did not, subsequently, undertake all of the works is irrelevant to the question of whether there was a pecuniary interest at the date of the meeting.

61. Added to this is the effect of the s.94 contribution plan which would have sought a contribution for the recoupment of those works in an amount which

was precisely the same either with or without the amendment to the road work standard.

62. The Director-General submitted that even accepting the management plan is a complete answer (presumably to the assertion that there was a failure to declare a pecuniary interest), that matter does not get away from the period between 17 May 2004 until the works were actually undertaken in December. However in the opinion of the Tribunal this question misconstrues the timing of the test, and the nature of the 'matter'. If at the time of the meeting, objectively viewed, there was no reasonable likelihood or expectation of appreciable financial gain, and that is because of the expectation that the council itself would undertake the works which would ordinarily be the subject of the condition of consent, but which would not be so if the works were undertaken by the council, then the reasonable expectation or likelihood does not resurrect itself subsequently simply because the works might be deferred.

63. It is also relevant to note that at the date of the meeting there was certainly no current development consent containing such a condition; and there was no pending development application for the creation of the concessional allotment. The gain or loss could only ever occur upon the grant of a development consent. Whilst in the absence of the management plan it may said that that constituted a reasonable likelihood, provided that an application for consent was made and the consent was actually granted, with the intervention of the management plan that circumstance changed.

64. Mr Bennett submitted that even if there was a pecuniary interest then he is entitled to the exemption provided by s.448 as a person liable to pay a charge. Because the Tribunal has determined that there is no pecuniary interest with respect to this matter for the reasons set out above, this submission is not strictly speaking required to be determined. However if it was of relevance the

Tribunal would have determined it against Mr Bennett's submission. This is because, for the purposes of s.448, a s.94 contribution condition could not be regarded as the type of charge contemplated by s.448. Rather that concept is defined by reference to s.501 which provides for the ability for a council to impose an annual charge for certain services including:

- Water supply services
- Sewerage services
- Drainage services
- Waste management services (other than domestic waste management services)
- Any services prescribed by the regulations

65. Section 496 of the *Local Government Act* also provides for the making and levying of an annual charge for the provision of domestic waste management services. It would thus appear that where the concept of 'rates and charges' is used by reference to an interest by a person paying such in s.448(b), it is by reference to those terms as utilised in the *Local Government Act*, but not more broadly. In any case on the facts of the present complaint, there was no alteration to a s.94 contribution even if it be considered to be a 'charge' for the purposes of s.448(b).

66. For the reasons set out above the Tribunal finds that the complaint against Mr Bennett with respect to the council meeting on 17 May is not proved.

The Grids Matter

67. As referred above the consequence of the Council's decision in relation to the meeting of 21 February 2005 was, at its maximum, a greater impost on the owner of a grid of a potential maintenance cost of $148 per annum.

68. The primary question for the Tribunal in that respect, by reference to the definition of pecuniary interest in s.442 of the *Local Government Act*, is whether such amount constitutes an '... appreciable financial gain or loss...' to the person? Further, even if such an amount of money is not, of itself, an appreciable financial gain or loss, the related question is whether, as an annual maintenance impost, whether actually or potentially, such a sum of money could be regarded as an appreciable financial gain or loss for the purposes s.442?

69. The phrase in s.442 is an 'appreciable financial gain or loss'. The concept of a gain or loss is relatively easy to identify, as is the notion of a gain or loss being financial in nature. In *Councillors Redmond & White*, Sutherland Shire Council, 4 November 1997 the Tribunal noted that s.442 was concerned with interests of a financial character, which interests may arise in different ways (page 21).

70. Reference was made by the parties before the Tribunal to the decision of *Councillor Hampersum*, Kempsey Shire Council, 24 March 1998. In that decision the Tribunal was concerned with the participation of a councillor in a debate regarding the reimbursement to the councillor of expenses totaling $567.50 cents. The Tribunal was of the view that such a sum was an appreciable sum of money. It is to be noted in that decision that Mr Holland QC as the presiding Member formed that view without any apparent reference to any dictionary definition of the term, and his view as to that quantum comprising an appreciable sum of money certainly does not appear to have been, by reference to the Determination, in response any submissions on the topic.

71. As set out above, the gain or loss as a financial one must be 'appreciable'. *The Local Government Act* does not assist in this regard and hence it is appropriate

to have regard to what is ordinarily considered to constitute an appreciable financial gain or loss.

72. The Macquarie Dictionary (4th Edition) defines 'appreciable' as:

> "1. Capable of being perceived or estimated; noticeable
> 2. Fairly large."

73. In his submissions to the Tribunal the Director-General urged the dictionary definition of "appreciable" from the Oxford English Dictionary Online (2008, 2nd edition 1989) which defined 'appreciable' as:

> "1. Capable of being estimated, weighed, judged of, or recognised by the mind.
> 2. Capable of being recognised by the senses, perceptible, sensible."

74. The two definitions bare a significant degree of similarity, but there is one important difference between them. Both talk about an ability to perceive (the gain or loss), and there would seem to be no issue with the adoption of that component of the adjective. The Oxford Dictionary definition goes further to contemplate an ability to quantify the gain or loss, and it is presumably this component of the definition upon which the Director-General relies. However, quite importantly, the Macquarie Dictionary definition speaks of appreciable being a concept defined as '2. Fairly large".

75. A sensible reading of s.442(1) and the use of the phrase 'appreciable financial gain or loss' would tend to suggest that the Macquarie Dictionary's notion of a fairly large financial gain or loss is the appropriate approach. Nothing is gained by limiting the notion of 'appreciable' to the concept of being able to be perceived. If the word 'appreciable' was not used as part of the composite phrase and the definition of a pecuniary interest simply stood as an interest because of a reasonable likelihood or expectation of a financial gain or loss,

then it would self-evidently be the case that there would be no gain or loss unless it could be perceived. The notion of 'appreciable' in that instance has no work to do.

76. The next concept urged by the Director General, of an ability to quantify the loss, if that be assumed to be directed to the notion of specificity, equally is probably not what was contemplated by the insertion of the adjective. If a financial gain or loss is in the realm of hundreds of thousands of dollars, but one cannot identify the actual gain or loss with specificity, then it would seem an absurd result that no financial gain or loss would flow for the purposes of the defined term. Equally, concepts such as 'reasonable likelihood or expectation', because they are speaking about future events (whether as probabilities, or possibilities in the nature discussed above) are not in the opinion of the Tribunal concerned with such specificity, as is one of the other definitions of the notion of 'appreciable'. Many decisions of this Tribunal have been made on the basis of valuation evidence which by definition relates to a value within a range, rather than actual specificity.

77. But in the opinion of the Tribunal in order to qualify as a pecuniary interest under s.442(1) the financial gain or loss must be 'fairly large'. That flows from a construction of the phrase contained within s.442(1). As with the analysis set out above in terms of 'reasonable likelihood or expectation', that construction is reinforced by reference to s.442(2) where the legislature has proscribed as a pecuniary interest an interest which is 'so... insignificant that it could not reasonably be regarded as likely to influence any decision...'. Even though that proscription is directed to the interest rather than the gain or loss it is self-evident that the notion of insignificant on the one hand and fairly large on the other, leave a significant grey area between. The two concepts can reside together because one is operating as a definition whereas the other is a proscription. However in the circumstances of the present case what has to be found is that there is a fairly large financial gain or loss, occurring as a

reasonable likelihood or expectation (including as a chance or possibility as discussed above).

78. In the full Federal Court decision of *Industry Research and Development Board -v- Unisys Information Services Australia Limited* (1997) 77 FCR 552 the full Federal Court considered the adjective 'appreciable' as part of the composite phrase 'an appreciable element of novelty' as relevant to a taxation case. At 558E the court said:

> "Further more, the word 'appreciable' means 'capable of being perceived or estimated; noticeable' or 'fairly large' (the Macquarie Dictionary, (2nd Ed 1992), page 80). The word is similarly defined in the New Shorter Oxford English Dictionary (1993, page 101) to mean 'worth esteeming' and 'able to be estimated or judged; perceptible; considerable'. This meanings make apparent that any use of the word necessarily avoids application of the de minimis principle."

79. In the Tribunal decision of *Councillor Graeme Frank Roberts*, Hastings Council, 3 August 1995, Mr Holland QC at pages 22-30 summarised the history of s.442. At page 26 the Tribunal Member referred to two options offered for discussion by the July 1991 Independent Commission Against Corruption discussion paper entitled 'Conflicts of Interest and Local Government' which referred to the definition of pecuniary interest by reference to either a financial gain or loss being 'not trivial, insignificant, or valued at less than $500', or on the other hand being left to judges to determine according to the facts of each case that is brought before them. The analysis was undertaken by Mr Holland QC for the purposes of determining whether the interest was to depend upon probabilities to the exclusion of possibilities but the summary traces the history of the composite phrase 'appreciable financial gain or loss' by reference to the decision of McLelland J. in *Attorney General ex Rel. Anka (Contractors) Pty Ltd -v- Legg* (1979) 39 LGRA 399. As Mr Holland QC sets out at page 25, McLelland J. was predominantly dealing with the concept of remoteness in the notion of

pecuniary interest, and, after referring to the decision of Gowans J. in *Downward -v- Babington* (1975) 31 LGRA 314, said at page 402:

> "After considering certain earlier cases his Honour formulated and applied the proposition that 'a councillor should be held to have a pecuniary interest in a matter before the council if the matter would, if dealt with in a particular way, give rise to an expectation which is not too remote of a gain or loss of money to him.' I respectfully adopt this as a useful statement applicable to s.30A; it is open to the observation that the expression 'expectation which is not too remote' raises questions of degree, but it may well be that the statutory expression does not permit any greater precision. Perhaps another way of putting the matter is to say that there is a pecuniary interest if there is a reasonable likelihood or expectation of appreciable financial loss or gain."

80. That passage appears to be the source of the composite phrase 'appreciable financial gain or loss', and in the analysis that follows it appears that the legislature, when it adopted the notion of pecuniary interest, preferred the second option put forth by ICAC, namely to be determined by judges on a case by case basis (rather than inserting a statutory prescription of its quantum by reference to a dollar amount). The legislature then imported the last sentence of the passage from the decision of McLelland J. in and as part of the definition of pecuniary interest. But that does not mean that the composite phrase should not have work to do and it would be an almost unworkable situation if even the *de minimus* financial gains or losses operated to create a pecuniary interest.

81. In the subsequent Tribunal decision of Mr Holland QC in *Councillor John Norman Frank Fisk*, Burwood Council, 4 November 1996, the Tribunal Member again referred to the decisions of *Downward* and *Anka.* At page 45 Mr Holland QC said:

> "... Gowans J. excluded the case where the expectation of monetary gain, saving or loss was 'too remote' and McLelland J., in describing a pecuniary interest added the adjective 'appreciable' to the words 'financial gain or loss'.
>
> If these considerations were to be applied to the present case, the word 'appreciable' would exclude the insignificant but would not, in the Tribunal's opinion, require a calculation or valuation to be made of the monetary worth of a material benefit so long as it was a benefit of a financial character and one which a reasonable person would prefer to retain than to loose. That test is satisfied here for the reasons already given. Though not capable of any precise calculation, it would be correct to say on the evidence that appreciable savings could flow to Mr Fisk from having Mr Chama looking for a vehicle for him without charge."

82. That paragraph would tend to suggest that the alternative of an ability to quantify the financial gain or loss was rejected by Mr Holland QC. That was an alternative that was put forth by the Director-General at the hearing of this proceeding. That approach to 'appreciable' is equally rejected by this Tribunal.

83. Mr Holland QC was of the view that appreciable would exclude the insignificant and referred to 'appreciable savings'. This tends to suggest that he approached the adjective consistent with the dictionary definition of it being 'fairly large'. As set out above, in any case, the notion of insignificant is specifically proscribed in s.442(2).

84. If the notion that Mr Holland QC adopted of 'a benefit of a financial character which a reasonable person would prefer to retain than to lose' was meant to suggest that it should be 'fairly large' then that approach is one with which this Tribunal agrees. That would appear to be the only sensible construction of that approach, Mr Holland QC having said that appreciable does not bespeak the notion of 'insignificant'. Any financial gain or loss, however insignificant, is obviously something someone would prefer to retain rather than lose (or

vice-versa, where appropriate). Thus on balance in the opinion of the Tribunal the proper approach is that it must be regarded as an appreciable one, and being one fairly large.

85. The order of magnitude of the claimed financial loss in the grids matter of the second meeting raises the question of whether such a loss is an appreciable one. As referred above in the decision of *Councillor Hampersum* the Tribunal was satisfied that the amount of some $568 satisfied such a description. It is appropriate to consider the concept where it is not self-evidently a significant quantity or sum of money in the circumstances of each case. The decision of *Hampersum* was decided in 1998 and it may well be that the passage of some ten years since then has adjusted the concept of what might be regarded as a 'fairly large' financial gain or loss. Social relativity obviously has changed and the price of general commodities have also changed such that the sum $568 in 1998 may be viewed entirely differently today. In any case the amount here is significantly less than $568.

86. In the circumstances of the present case the Tribunal is not satisfied that the sums of money relative to the effect of the decision by the council satisfied the description of an 'appreciable financial gain or loss'. This is because when viewed as a single impost, even at the high point of the range, the maintenance of a grid (and Mr Bennett had only one grid) was not an appreciable gain. It may not be that it is an insignificant amount for the purposes of s.442(2); however that does not mean that it automatically satisfies the description of an appreciable financial gain or loss. It could not be said on any sensible construction of the notion of an appreciable financial gain or loss, that such an impost, to use the dictionary definition in the Macquarie Dictionary, was 'fairly large'.

87. That is to assess the financial gain or loss as a singular payment, at the high point of its range. The Director-General submits further that appropriate

regard is to be had to the matter as an impost for the life of the Cattle Grid. That is, the sum may be a small amount of money annually, but if one aggregates the annual charges over a period of years than it may become an appreciable financial gain or loss. That submission is directed to increase the effective quantum of the financial loss because all one does is simply add up that annual impost over a number of years, and self-evidently arrive at a larger sum of money which might approach the notion of a fairly large financial gain or loss.

88. Such a submission is available where the aggregation process results in an appreciable gain or loss. But here, because each impost is of a relatively insignificant sum of money and is an annual amount only, it is difficult to accept that the total effect of that total sum, effectively accumulated over a number of years, is to result in an appreciable financial gain or loss. Having to pay $100 this year, if that amount be assumed to not constitute an appreciable financial loss, is hard to imagine having an effect on a person a full year later when the same relatively insignificant sum of money has to be expended again.

89. There are two additional practical matters which confirm that there was not an appreciable gain or loss in the present circumstances.

90. The first is the quantum of the effect. That quantum went as high as $148 per grid, per annum as part of the Director-General's report of investigation. However that amount appears to have been reduced as conceded even by the Director-General. Mr Bennett submitted by a process of mathematical calculation that it may have gone as low as $5.70 per annum. If the quantum of the amount is somewhere in the range of $5-$148, but certainly less than $148, it is even more difficult to conclude that such an amount is an 'appreciable financial gain or loss', viewed in a contemporary way. Whilst the Tribunal would not want to be heard to say that the amount $148 is not a

valuable amount of money, the legislature has specifically inserted as adjectival of the financial gain or loss the notion of 'appreciable'.

91. The second difficulty with the case against Mr Bennett, even if it was considered to be a pecuniary interest satisfying the description of an appreciable amount of money, is the factual circumstance of the Grids Policy. That factual circumstance involves the concession by the council, through Mr Piggott, that the maintenance works on the roads are undertaken by the council, approximately once every five years, and even when undertaken do not reflect in a request for contribution to the maintenance costs to the owners of the grids. It is difficult in the circumstances of the present case to align any notion of a practical appreciable financial gain or loss to the theoretical exercise of what the maintenance of the road might consist of. Whilst it is true that for the purpose s.442 an appreciable financial gain or loss would exist if there is the creation of an obligation, or a primary obligation, to undertake the maintenance works which reflects in that financial gain or loss, the circumstances of the present case are simply that, notwithstanding that strict legal obligation, the council at no time suggested that it was an obligation that was enforced.

92. Furthermore, an issue that appears to have been overlooked by both parties to the hearing is whether the amendment to the grid policy would have affected existing grids, or would operate only with respect to future grids. Regulation 70 of the *Roads Act* tends to suggest that the power to impose conditions for the grant of permit to construct a grid arises only at the time of the grant. Thus if a grid is permitted to be installed and if there is no temporal aspect of the right to have the grid, then as a matter of construction of the *Roads Act* and the regulations thereto there would appear to be no ability for a retrospective amendment to those conditions. Thus even if the policy changed to 20 metres, if a person held a permit with the requirement to maintain it to one metre, then the change in policy would have no effect.

93. As observed above, it was conceded that Mr Bennett had an interest in one grid. The terms of that permit were not before the Tribunal. It is difficult therefore to ascertain whether the change in policy would have had any effect whatsoever on Mr Bennett's circumstances regarding the existing grid. If the permit was in perpetuity, then the change in policy would not have affected his existing permit. Alternatively if there was a limited period for the permit then, equally, it would not have affected his grid permit for the remaining period of the permit. Regardless of the quantum of the effect of the change in policy it could not therefore be said that there was any pecuniary interest in the sense contemplated by s.442. There is no suggestion, and there was no submission, that the policy was to operate retrospectively. Even if that submission had been made it is doubtful that the legislative regime, in the absence of a specific retrospective operation, would have had that effect.

94. There was no suggestion that there was a pending application by Mr Bennett for additional grids, and hence the policy change had no practical effect on him.

95. Mr Bennett submitted that the requirement to maintain the road constitutes a charge for the purposes of s.448. This is not, strictly speaking, required to be determined, however the Tribunal would have rejected this submission. Any condition of the permit to construct a grid to maintain 20 metres either side of the grid is not (by reference to the definition of a charge set out above), sufficiently a charge for the purposes of s.448. Rather it is a condition, *simpliciter*, for the installation of the grid.

96. One matter that neither Mr Bennett nor the Director-General referred to in submissions before the Tribunal was the matter that Mr Bennett himself had averted to at the meeting of 21 February 2005, namely that in relation to the grids matter he would save money but that 'he was making policy' (to use his

words). That topic was not relied upon by Mr Bennett at the hearing before this Tribunal, but it is a matter to which the Tribunal would want to make reference in this Determination. As has been made plain in the past by this Tribunal matters of policy, or motivations on the grounds of public duty or other (even good) motives, including even the person voting against their own interests, do not excuse a breach of Chapter 14. Quite simply if a person has a pecuniary interest the declaration must be made and they must not vote at all: see *Councillor John Norman Frank Fisk*, Burwood Council, 12 November 1996 at pages 45-46; see also *Councillors Redmond-White*, Sutherland shire Council, 4 November 1997 at page 37.

97. For the reasons set out above the Tribunal finds the compliant against Mr Bennett with respect to the council meeting on 21 February 2005 is not proved.

6 March 2009

Adrian Galasso SC

Local Government

Pecuniary Interest and Disciplinary Tribunal