

**LOCAL GOVERNMENT
PECUNIARY INTEREST AND DISCIPLINARY TRIBUNAL**

LOCAL GOVERNMENT ACT 1983

LGPIDT 01/2011

**DIRECTOR GENERAL, DEPARTMENT OF PREMIER AND CABINET
RE: COUNCILLOR GLENYS FRANCIS, PORT STEPHENS COUNCIL**

DETERMINATION

1. This proceeding concerns a complaint pursuant to Chapter 14 of the *Local Government Act 1993* in relation to Councillor Glenys Francis, a Councillor of the Port Stephens Councils.
2. The complaint concerns certain action undertaken by Cllr Francis on 25 May 2010 at the Council Committee Meeting and the subsequent Council Ordinary Meeting. It is alleged that Cllr Francis breached s.451(1) by failing to disclose a pecuniary interest in a matter before the Council and also breached s.451(2) by taking part in Council's deliberations and voting on the matter before the council.
3. At the hearing before the Tribunal held on 5 September 2011 Cllr Francis appeared in person and the Director General was represented by Mr Robinson of Counsel.

FACTUAL BACKGROUND

4. Cllr Francis owns property at Raymond Terrace. Raymond Terrace, together with other adjoining suburbs, is in the vicinity of the

Williamstown Air Base at which operations undertaken by the Australian Defence Department via the Australian Air Force are undertaken. Those operations have the consequence of the generation of aircraft noise and as a result there is issued from time to time projections of aircraft noise footprint known as ANEF (Australian Noise Exposure Forecast). The forecast map is identified by reference to a year of future projection and superseded from time to time as aircraft noise footprints change as a function of the operation of the airport.

5. The previous relevant aircraft noise footprint was the ANEF 2012. Clr Francis' property was, under that footprint, located in the 20-25 Noise Contour.
6. The relevance of the location of her property to the noise contour had a direct connection to the Council's Development Control Plan (made pursuant to the *Environmental Planning and Assessment Act*). In the Development Control Plan 2007, part B2.13 entitled "aircraft noise" related to all land identified within ANEF Contours as identified in "figure B2.2 ANEF chart". The chart was not so much the ANEF forecast issued by the Australian Defence Department but rather a chart that was adopted by the Council and reproduced as figure B2.2 in the Development Control Plan.
7. Notwithstanding permissible land uses within the various zones to which part B2.13 may have related, the Development Control Plan contained a table which set out various types of development and identified with respect to each of those types of development whether the development was "acceptable", "conditionally acceptable", or "unacceptable" as a function of where particular land fell in relation to a series of alternative noise contours. If land fell in a contour which was less than the 20 ANEF then the table was not engaged. The ANEF ranges then dealt with the range 20-25, 25-30, 30-35, 35-40, and 40+.

8. Clr Francis' land, as referred above, had prior to the relevant meeting been located in the 20-25 ANEF. The land holding was larger than a standard residential allotment and one of the land uses that was permissible in the zone was subdivision, so as to create additional allotments for residential use.
9. Pursuant to DCP 2007 where land is located within the 20-25 ANEF "subdivision of residential land" is identified as being "conditionally acceptable".
10. Alternatively, for each of the contours for more intensive noise beyond the 20-25 ANEF (including the 25-30 ANEF) subdivision of residential land is identified as being "unacceptable".

THE NEW ANEF

11. In October 2009, with the proposed introduction of the new Joint Strike Fighter, the Department of Defence released an ANEF 20-25 map for the Williamstown Airbase. Together with that map, the Department of Defence also released another map showing a comparison between the previous ANEF 2012 and the new ANEF 20-25 map. The extant DCP map (figure B2.2) was based on the ANEF 2012 map.
12. In response to the release of the ANEF 20-25 map the Port Stephens Council prepared a draft aircraft noise policy, a draft planning proposal and a draft amendment to the Port Stephens Development Control Plan 2007 so as to adopt, in essence, as a replacement of figure B2.2 the ANEF 20-25 map.
13. The effect of the being of the ANEF 20-25 map was that Clr Francis' land moved from within the 20-25 ANEF to the 25-30 ANEF. As referred above this meant with respect to the matter of "subdivision of residential land" (the matter the subject of the Director General's focus)

such subdivision moved from being "conditionally acceptable" to "unacceptable".

14. The matter that was to be considered by the Council on 25 May 2010 was the adoption of the aircraft noise policy together with the endorsement of the draft amendment to the Development Control Plan to be applied as council policy in the interim period pending resubmission of the amendment following public exhibition and presumably also up until adoption of it. Accordingly, whilst the Development Control Plan had not formally been amended at or by the Council meeting the intended draft would operate as a formal council policy until that adoption. This would have the effect of, in essence, moving properties out of one ANEF, into another, for the purpose of the application of the DCP.

15. The matter of the aircraft noise policy was not the first occasion upon which the policy was circulated within the Port Stephens Local Government area. On 15 April 2010 the Council had written to all land owners affected by the ANEF map, including Cllr Francis, advising of the introduction of the ANEF 20-25 map and advising that the land is predicted to be affected by aircraft noise directing attention to "... a table advising building site acceptability and noise attenuation requirements ...".

16. The business papers for a meeting to be held on 25 May 2010 were delivered to all councillor's by way of courier of 21 May 2010. Those business papers included information relevant to the consideration of the aircraft noise policy to be considered by the Council Committee Meeting and the Ordinary Council Meeting to be held on 25 May 2010.

17. On 25 May 2010 the Council Committee Meeting was held to discuss the agenda for the Ordinary Meeting. That committee meeting was open to the public and the committee recommended that the council

endorse the draft aircraft noise policy and make resolutions consistent with what was ultimately the decision of the council.

18. Subsequent to the committee meeting the council met in an Ordinary Meeting. Clr Francis was present at that meeting but made no declaration of interest in relation to the matter concerning the adoption of the aircraft noise policy, participated in consideration of it, and participated in the vote concerning the matter.

19. Ultimately at the Ordinary Meeting the council resolved as follows:

- "1) Endorse the draft Aircraft Noise Policy, draft planning proposal and draft amendment to Port Stephens Development Control Plan 2007 for public exhibition for a minimum of 28 days;
- 2) Resolve to forward the planning proposal to the NSW Department of Planning which:
 - a) addresses the provisions for aircraft noise management in Port Stephens, and
 - b) amends Clause 26(a) of the Local Environmental Plan for the Defence and Airport Related Employment Zone land adjacent to Newcastle Airport, and
- 3) Endorse the draft amendment to the Port Stephens Development Control Plan (Attachment 3) to be applied as Council policy in the interim period pending resubmission of that draft amendment to Council following public exhibition."

20. As referred above the aircraft noise policy, through the adoption of the ANEF 20-25 noise contour, had the effect of identifying Clr Francis' land within the 25-30 noise contour and, with the application of the development table in a Development Control Plan, meant that subdivision of residential land thereby became "unacceptable" rather than "conditionally acceptable" as was the previous position.

21. The Director General alleges that failure to disclose the pecuniary interest at the Committee Meeting and in the Ordinary Meeting of the Council, as referred above, and the participation in the meeting(s) thereafter, constituted breaches of s.451(1) and (2) of the *Local Government Act*.

DUTIES OF DISCLOSURE

22. Division 3 of Chapter 14 of the *Local Government Act* is concerned with the "disclosure of pecuniary interests at meetings". That Division contains two requirements, the first is to disclose the nature of the interest, and the second is not to participate in the meeting of the council in relation to the subject matter of the disclosure.

23. In terms s.451(1) dealing with disclosure is as follows:

- "1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council 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."

24. In so far as duties after the disclosure are concerned, s.451(2) in terms provides as follows:

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

25. The duties contained in s.451(1) and (2) are mutually exclusive and simply because there may have been a disclosure of interest does not

then mean that one does not also need to comply with the obligation in s.451(2) to not participate in the meeting.

26. Both s.451(1) and (2) are predicated upon a councillor having a "pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council at which the matter is being considered".

A PECUNIARY INTEREST

27. The concept of a "pecuniary interest" is defined in s.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 the reasonable likelihood or expectation of appreciable financial gain or loss to the person."

28. The concept of a pecuniary interest is not absolute and a qualification is contained in s.442(2) which provides as follows:

"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."

29. There were no elements of s.448 that were raised by the parties said to be engaged for the purposes of exemptions from interests which are required to be disclosed.

30. That notwithstanding, of tangential relevance is the exception to the requirement to disclose an interest in s.448(g) which is 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:

i) land in which the person ... has a proprietary interest ..."

31. Thus if the matter before the council relates to a proposal to amend an environmental planning instrument then that of itself does not constitute an interest which needs to be disclosed except if the amendment proposes to effect a change of the permissible uses of land in which the person has a propriety interest. This section is mentioned because it is of passing relevance to the issue concerning the pecuniary interest of Clr Francis; it though is not engaged in this case.

APPRECIABLE FINANCIAL GAIN OR LOSS

32. The Director General produced at the hearing a valuation report which had been included in the Director General's investigation report assessing the quantum in the change of value in Clr Francis' land as result of the adoption of the Development Control Plan.

33. As referred above Clr Francis' land was larger than a standard residential allotment (having an area of 3037sqm) and was able to be subdivided so as to create additional allotments.

34. Clr Francis' land was located within the "2(a) Residential" zone pursuant to the Port Stephens Local Environmental Plan 2000, and within the zone pursuant to item (4) of the land use table subdivision was permissible with consent.

35. Notwithstanding that subdivision was permissible with consent, the provisions of DCP 2007 were engaged and when considering an application the subdivision the council was required to take into account the provisions of any relevant Development Control Plan: see *Zhang -v- Canterbury City Council* (2001) 51 NSWLR 589 at [74], and *Botany Bay City Council -v- Premier Customs Services* (2009) 172 LGERA 338.

36. Although the Development Control Plan amendment effected by the aircraft noise policy did not have, strictly speaking, the effect of prohibiting a subdivision there is no doubt that in the circumstances of the prescription to take into account the Development Control Plan the alteration in the ANEF had the effect of making it more difficult. The valuation report described the change as one in which:

“effectively this prohibits further development of the site for subdivision/dual occupancy.”

37. As referred above there was no absolute prohibition, however the Tribunal accepts that the effect of the aircraft noise policy would have been to make any subdivision significantly more difficult, it being converted from “conditionally acceptable” to “unacceptable” in the DCP. The valuation report estimated the decrease in value of Clr Francis’ land in order of \$120, 000. Whilst this may not be an accurate assessment of the actual decrease in value, the Tribunal accepts in the circumstances of the case (particularly as the matter before the council was concerned with an amendment to a Development Control Plan, adopted as a interim policy until formal amendment), that there was nonetheless as a result of the decision of the council on 25 May 2010 a decrease in the value of Clr Francis’ land. Whilst it is difficult to put an exact figure on that amount (or even accepting the amount the subject of a valuation) it is self evident that the amount of the loss in value was an appreciable amount.

38. Accordingly the Tribunal is satisfied that the matter before the Council did involve a pecuniary interest of Clr Francis as, as a result of the decision of the Committee Ordinary meeting of council, there was a reasonable likelihood of an appreciable financial loss to Clr Francis, where that loss is reflected in a decrease in value of her land.

DUTIES OF DISCLOSURE

39. As referred above, the minutes of the meeting make it apparent that Cllr Francis was present at both the Committee Meeting and the subsequent Ordinary Meeting of the council.
40. The minutes of the meeting also make it clear, and that Cllr Francis did not deny, that she failed to make any disclosure of pecuniary interest at either the Committee Meeting or the Ordinary Meeting.
41. In circumstances where the Tribunal has found that Cllr Francis did have a pecuniary interest in the matter before the meeting, accordingly the Tribunal finds that Cllr Francis has breached s.451(1) by failing to disclose that pecuniary interest.
42. Furthermore, the minutes of both the Committee Meeting and Ordinary Meeting confirm Cllr Francis' participation in the consideration of the matter before the council (the aircraft noise policy) and the Council's voting in relation to it. Again, where there has been a finding of pecuniary interest, the Tribunal also finds that Cllr Francis has breached s.451(2) by participating in the consideration and voting on the matter in which she had a pecuniary interest.

CONSEQUENCE

43. Having determined that Cllr Francis has breached s.451(1) and (2) the question then becomes what consequence there should be upon such a finding. The parties at the hearing proceeded on the basis that the Tribunal would determine the issues of breach and consequence.
44. If the Tribunal finds that the complaint against a councillor's proved pursuant to s.482(1) the Tribunal may:

- "a) counsel the councillor, or
- b) reprimand the councillor, or
- c) suspend the councillor from civic office for a period not exceeding 6 months, or
- d) disqualify the councillor from holding civic office for a period not exceeding 5 years, or
- e) suspend the councillor's right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 6 months (without suspending the councillor from civic office for that period)".

45. In essence the hearing before the Tribunal was primarily concerned with the question of consequence, Clr Francis not substantially resisting any findings concerning breach of s.451. In this respect Clr Francis tendered before the Tribunal a statement raising matters going to the question of consequence, or amelioration of it.

46. Clr Francis was elected to Port Stephens Council in 1995 and is currently in her fourth term as a councillor. Clr Francis attended training on the Model Code of Conduct for Local Councils in NSW when it was first introduced in 2004 and also took part in Council organised training on 17 November 2008 after the Model Code of Conduct was revised, and again on 20 April 2010. The organised training sessions included material on the pecuniary interest provisions of the Local Government Act.

47. In her statement in mitigation to the Tribunal Clr Francis observed that she has been an active participant in the council for many years and has chaired some 20 committees of the council. She has observed she has been actively involved in getting some form of resolution to the whole of aircraft noise issue since 2002 when, as acting Mayor she attempted to get the then Defence Minister to the negotiating table on behalf of the people in Port Stephens who continue to elect her.

48. She advised the Tribunal that since the investigation of the matter she has become extremely cautious in relation to matters which declares a

pecuniary interest and in which she participates. She observed that since the matter before the council the ANEF contours have returned to the ANEF 2012 contours with the effect that her property has now returned to the 20-25 ANEF.

49. This matter, self evidently, was relied upon by Clr Francis to indicate that on balance she ultimately did not receive or have any pecuniary interest in the matter before the council on 25 May 2010. Whilst that return in ANEF may demonstrate that, today, there might not be diminution in value of her land, the relevant time for enquiries as to whether a person has a pecuniary interest is at the time when the duty to make a disclosure or not participate in a meeting arises. In the circumstances of s.451 that point in time is the point in time of the meeting. Although relevant to the question of consequence the fact that the value of her land may have been restored does not absolve Clr Francis of the duty. At time when the meeting was held the consequence of the meeting was a diminution in value of her land.

50. She also listed an extensive community involvement in and advocacy on behalf of many groups within the Port Stephens area and her active work with the community is to be commended.

51. In her submissions to the Tribunal at the hearing before the Tribunal Clr Francis openly accepted, as she had done in all interviews with representatives of the Director General, that she participated and voted in respect of the policy. However, she said did not deliberately mean to breach the Act and believed that because of the width of the effect of the ANEF change that there was no specific pecuniary interest upon her. As this Tribunal has said on many occasions in the past Councillors are required to consider the effect of a matter before the council upon them personally and that duty is not modified by the fact that it also may affect persons other than themselves.

52. Clr Francis referred to the fact that she had previously declared interests and exempted herself in council meetings, and she conceded at the hearing that she has since become aware of how the valuation process is affected by changes in the Development Control Plan. She, as referred above, did not deny the breach but said that the question of aircraft noise had been an ongoing one for many years and did not think that there was any great significance in relation to it. She reiterated that if she did breach the Act that it was not intentional and that since the meeting on 25 May 2010 she has made disclosures of pecuniary interest in relation to aircraft noise and other councillor's have followed her lead.

53. The Director General submitted that whilst Clr Francis had from early in the investigation period accepted that it was an "obvious mistake" that because of the amount in decrease in value of her land it was a significant and flagrant breach of the Act. The Director General submitted that there should be a significant consequence order against the councillor, that it was within a serious category if not the most serious category of breach relating to a core provision of Chapter 14. The Director General submitted that the case is not similar to the Tribunal's decision in *Clr D'Amico, Lane Cove Council (PIDT 02/2005) 19 October 2006* in that Clr Francis was apparently involved in the council on the platform of aircraft noise. The Director General submitted that this was more serious than in *Clr D'Amico* because of warning that have been given to the councillor via the letter from the council to effected owners and that there had been some warnings during the meeting from other councillor's to Clr Francis that she should declare a pecuniary interest.

54. The Director General also pointed the fact that Clr Francis was an experienced councillor who had declared pecuniary interests before, had received extensive training and should have known better. The significant financial loss as a result of the decision of the council also makes a significant consequence order relevant.

55. Clr Francis in reply referred to her impeccable record and long standing position in the community having never been in court before, that she never denied she had an interest in any investigation nor before the Tribunal, and that she had never run on a "no aircraft noise" policy but that she did believe that she had a representative role for the community and that when she saw the 4500 or so people were affected by the aircraft noise ANEF changes she felt obliged to participate in the council meeting but that she was not attempting to do anything deceitful.

56. Having regard to all the matters set out above and in particular the frankness with which Clr Francis has approached both the investigation by the Director General and the hearing before the Tribunal, and noting also in particular that the decrease in the value of Clr Francis' land has not been realised by Clr Francis in any actual way, and more importantly that with the passage of time that decrease has been restored, and having regard to previous Tribunal decisions the Tribunal is of the view that the appropriate consequence is that pursuant to s.482(1)(b) Clr Francis be reprimanded.

Date: 8 November 2011



Adrian Galasso SC

Local Government Pecuniary Interest and Disciplinary Tribunal