

ITEM NO. 1

FILE NO: PSC2012-01059

**PORT STEPHENS COUNCIL ATS TOWERS**

report of: PETER GESLING, GENERAL MANAGER

GROUP: GENERAL MANAGER'S OFFICE

**RECOMMENDATION IS THAT COUNCIL:**

- 1) Makes application to the Minister to recommend to the Governor that Council be permitted to rescind the compulsory acquisition notice.

**ORDINARY COUNCIL MEETING - 2012**

	<b>Councillor John Nell</b> <b>Councillor Sally Dover</b>
	That Council make application to the Minister to recommend to the Governor that Council be permitted to rescind the compulsory acquisition notice.

The motion was lost.

**BACKGROUND**

The purpose of this report is to provide Council with further information in relation to the current legal proceedings in the Land and Environment Court and to convey submissions received from the Towers and Mackenzie families and the Worimi Local Aboriginal Land Council (WLALC), pursuant to Council's resolution of 29 May 2012 (minute no: 130).

As Council is aware, two small parcels of land were acquired by compulsory acquisition from the Towers family to allow the re-routing of the Stockton Bight Track in two locations where the road reserve was unsuitable for the construction of a road, being a sand dune and a "V" bend, after the Towers refused to agree to a land swap for this purpose.

Council staff were aware that the construction of the Track was to regularise the access to isolated parcels of land and could be used for the purpose of a haulage road for a sand mine development. Council had resolved that all construction costs would be met by the developer, Council staff believed that it was the duty of the Council, as the Roads Authority for the Track, to regularise the road reserve, to allow construction of the road. It was believed that under the Roads Act only the Roads Authority had the power to compulsorily acquire the land.

Council relied on advice from its property department, as was the practice for many years and did not obtain formal legal advice.

Following the compulsory acquisition, the Towers claimed compensation of \$50Million and did not accept that the Valuer General assessed the compensation payable at \$53,500. The Towers then appealed to the Land and Environment Court seeking compensation in excess of \$8.5Million.

The basis for the Towers' claim is that the developer had previously entered into an agreement with them to haul the sand through their land at the rate of \$1 per tonne, which was calculated to produce income for the Towers at the rate of \$1Million per year. The acquisition of the land to enable the construction of the Track, it is argued, means that the Towers will lose that royalty payment and hence are claiming that loss as compensation for the acquisition.

### **Prospects of Success and Costs**

Comprehensive legal advice has been obtained from senior counsel. While it is possible that the Court could award the Towers a large amount of compensation as claimed, it is considered more likely that they will succeed in obtaining a greater amount of compensation than that assessed by the Valuer General, but considerably less than claimed. At this stage (to contain costs) Council has not received any valuation evidence from the Towers or obtained any on its own account, meaning no accurate assessment can be made.

Because of the complexity of the case, it is estimated that any hearing would last 10 days and the costs of each party, including the required experts [3 by each side], could be in the vicinity of \$800,000. If the Towers are successful even to a small extent, it is likely that the Council would have to pay its own costs and about 80% of the Towers costs as well, possibly amounting to \$1.4Million, in addition to any compensation awarded.

### **Options**

Council may choose to contest the proceedings or it may make an application to the Minister to recommend to the Governor that the Council be permitted to rescind the acquisition notice. Whilst Council's legal advice is that such an application would have good chances of success, it is not a certainty.

### **Continuing the Case**

The basis of the Towers' claim is the loss of the benefits of their agreement with the Mackenzie family. Council is not a party to this agreement and had no involvement in it. The Council could be reliant upon the co-operation of the Mackenzie family to defend this part of the case. At the present time the Mackenzies have indicated they would co-operate with the Council.

Once valuation evidence has been obtained, Council could attempt to settle the proceedings by payment of a lump sum. However considerable extra costs would be incurred to take the case to that point, as the valuation evidence is generally only served shortly prior to the hearing.

## **Rescission**

Legal advice obtained indicates that Council would have good prospects of obtaining approval to rescind the acquisition notice. The fact that the Towers family do not oppose the rescission (see attachment 1) increases the likelihood that any application by the Council would be successful.

An adjournment has been granted by the Court for an application to be made, should the Council decide to do so.

There is a risk that the developer may make a claim for damages against the Council, should the rescission application be successful. The advice from senior counsel is that, as the developer may make an application to the Minister to acquire the land for the purpose of his development [any such application requiring the developer to pay the costs and any compensation ordered], any claim for damages would be limited, as this other option is open to him. Such a claim cannot however be ruled out.

Should Council rescind the notice, it will be required to pay all of the Towers' legal, valuation and other costs directly associated with the acquisition. It would also have to pay its own costs, which are currently \$140,000 (incl GST). There is no information available on the Towers' costs to date, but as they have engaged valuers and both senior and junior counsel, it could be anticipated that they might be equal to or greater than the Council's costs to date.

## **Submissions**

Submissions have been received from the Towers family, the Mackenzie family and the WLALC. Copies of those submissions form attachment 1 to this report. The Towers family are not opposed to the application to rescind the acquisition notice, whereas the Mackenzie family and the WALC are opposed.

The Council is obliged to consider and take these submissions into account before making a decision.

## **FINANCIAL/RESOURCE IMPLICATIONS**

If Council makes application to the Minister to rescind the acquisition notice and is successful in that application, it will be required to pay the Towers' costs which are likely to be equal to or greater than Council's costs to date (approximately \$140,000). There is also a risk that the developer may seek damages from Council if the rescission application is successful.

Should Council choose to continue to defend the current Land and Environment Court proceedings, its costs are likely to be \$800,000. In addition, it would have to pay the costs of the Applicants (Towers) should they be successful in their claim for compensation. Those costs would be similar to Council's, meaning Council would be liable for legal costs in excess of \$1million plus any compensation awarded.

## **LEGAL, POLICY AND RISK IMPLICATIONS**

There are risks associated with continuing the case and making application to the Minister to rescind the acquisition notice.

Risk	<a href="#">Risk Ranking</a>	Proposed Treatments	Within Existing Resources?
Council continues to be involved in costly proceedings with no guarantee of outcome	High	Council consider legal advice obtained as to prospects of success and costs	Yes
Council is exposed to landowner costs as well as possible damages claim by the developer if Council makes application to the Minister to rescind the acquisition notice	High	Council consider submissions received from the Towers & Mackenzie families and the WLALC as well as legal advice in relation to making an application to the Minister	Yes

## SUSTAINABILITY IMPLICATIONS

Includes Social, Economic and Environmental Implications

Should Council choose to continue the current proceedings, legal costs are likely to exceed the annual legal budget and additional costs will need to be paid from funds otherwise used for other Council activities.

Should Council choose to make and be successful in an application to the Minister to rescind the acquisition notice, the landowner costs will also need to be funded from the annual legal budget. In addition, any claim by the developer for damages possibly would have to be met from the legal budget.

## CONSULTATION

- 1) Harris Wheeler Lawyers;
- 2) Tim Robertson SC and Jason Lazarus of Counsel.

## OPTIONS

- 1) Council makes application to the Minister for rescission of the Acquisition Notice;
- 2) Council continues to defend the current compensation proceedings in the Land and Environment Court.

## ATTACHMENTS

- 1) Submissions received from the Towers and Mackenzie families and the Worimi Local Aboriginal Land Council.

**COUNCILLORS ROOM**

Nil.

**TABLED DOCUMENTS**

Nil.

**ATTACHMENT 1**



LOCAL GOVERNMENT & PLANNING ■ BUILDING & PROPERTY DEVELOPMENT & CONVEYANCING  
■ ENVIRONMENT & POLLUTION ■ BUSINESS & COMMERCIAL ■ GENERAL LAW

13 June 2012

Harris Wheeler Lawyers  
DX 7814  
NEWCASTLE

FACSIMILE TRANSMISSION: 4907 6333 - *3 pages*

Dear Sirs                      YOUR REF: FLG.78375

Re: TOWERS FAMILY V PORT STEPHENS COUNCIL - LAND &  
ENVIRONMENT COURT CLASS 3 PROCEEDINGS NO. 30230 OF  
2012

We refer to the abovementioned matter and enclose our clients submissions in relation to the Acquisition Notice.


Could you please ensure that the enclosed document is forwarded to your client, so that they have it before the close of the deadline.

Yours faithfully,  
MALLIK REES LAWYERS

.....  
Robin Mallik  
Accredited Specialist  
Local Government & Planning Law

Our Ref:     RM:311314

Encl.

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PRINCIPAL: ROBIN P. MALLIK ACC. SPEC. (LOCAL GOVT & PLANNING)  
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13 June 2012

The General Manager  
Port Stephens Council  
PO Box 42  
RAYMOND TERRACE NSW 2324

Dear Sir

Re: **Proposed rescission of Compulsory Acquisition of Land at Stockton Bight Track – Lots 3 & 5 DP1160092**  
**Section 31 of the Land Acquisition (Just Terms Compensation) Act 1991 (“the Act”)**

Section 31 of the Act relevantly provides:

*31 Rescission of acquisition notice*

*(1) The Governor may, by notice published in the Gazette, rescind in whole or in part any acquisition notice.*

*(2) An acquisition notice may not be rescinded unless a Minister has certified that it is necessary to do so for the purpose of correcting a clerical error or obvious mistake or for other good cause or that the former owners of the land have agreed to the rescission.*

We are instructed to inform council that the Towers family, the former owners of the land acquired by compulsory acquisition, *agree to the rescission.*

Project Approval 08-0142 was sought by Mackas Sands and granted by the Minister for Planning, on the basis that:

1. Access would be over land owned by the Towers family; and that
2. An agreement had been reached with them giving that access.

Mackas Sands maintained this position right through until after the Project Approval issued.

It was not until early November 2009, that Mackas Sands began to represent that access would not be given by the Towers family to the sand extraction site at the end of Lavis Lane.

The Towers Family remain ready, willing and able to give Mackas Sands the access through their land as agreed in return for the payment of a royalty.



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The acquisition of the land by the Council has placed the Council in a position where it will be required to pay significant compensation under the Act. The acquisition will impose on the Council the net present day value of the royalty payment stream which the acquisition has had the effect of enabling Mackas Sands to avoid. This is a cost which should be borne by Mackas Sands and not the ratepayers in Port Stephens Shire.

Our clients are content with their entitlement to the royalty stream as agreed and see no legitimate public purpose being served by the acquisition.

Yours faithfully,  
MALLIK REES LAWYERS

.....  
Robin Mallik  
Accredited Specialist  
Local Government & Planning Law

Our Ref: RM:311314



Our reference  
GLCLCMACK0579-007986  
Your reference  
FLG78375

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lawyers

Sydney  
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12 June 2012

Ms Lisa Gowing  
Special Counsel  
Harris Wheeler Lawyers  
PO Box 500  
Newcastle NSW 2300

Contact  
Louise Camenzuli (02) 9210 6621  
Email: louise.camenzuli@corr.com.au

Partner  
Christine Covington

Dear Ms Gowing

### **Macka's Sand Project**

We refer to your letter to Messrs Bruce and Robert Mackenzie dated 24 May 2012 and your discussion with Louise Camenzuli of our office on Friday 1 June 2012.

In response to paragraph 5 of your letter and further to your discussion with Ms Camenzuli, this letter is to confirm our instructions that our clients strongly object to Council rescinding the acquisition of the parcels of land compulsorily acquired by Council from the Towers family to create legal access to Lot 218 DP1044608 from the Stockton Bight Track.

If you have any queries, please contact Louise Camenzuli on (02) 9210 6621.

Yours faithfully  
Corrs Chambers Westgarth

Christine Covington  
Partner



## WORIMI LOCAL ABORIGINAL LAND COUNCIL

ABN 54 352 201 603

Ms Lisa Gowing  
Special Counsel  
Harris Wheeler Lawyers  
PO Box 500  
NEWCASTLE NSW 2300

2163 Nelson Bay Rd  
Willisatown NSW 2318

PO Box 56  
Tambora Bay NSW 2319

Dear Mrs Gowing,

RE: Towers Family v Port Stephens Council /  
Land Environment Court Proceedings NO 30230 of 2012

Phone: 02 4965 1500  
Fax: 02 4965 1799

I write in response to your letter dated 01<sup>st</sup> June 2012, seeking submissions from affected parties to the above noted proceedings.

[info@worimi.org.au](mailto:info@worimi.org.au)

The WLALC granted Macka's Pty Ltd access to Lot 218 DP1044608 (a.k.a The Tongue), for the purpose of commercially extracting sand. The successful commencement of this development lends itself to providing the Worimi LALC with economic sustainability (the very purpose of the Aboriginal Land Rights Act 1983, by which we are incorporated) to implement its Community Land & Business Plan which contains a number of Social and Community Benefit Schemes for our Members and the wider Port Stephens Aboriginal community.

Additionally, a point of access available to the WLALC to enter our freehold lands (contained within the Stockton Bight) via the Stockton Bight Track, provides a valuable asset to Elders, Members and Community, when wanting to gain access to 'The Tongue' and other adjoining lands of cultural significance.

Understanding and without noting the nonsensical events leading up to the current proceedings between the Towers Family and Port Stephens Council, it is our position that Council 'do not' rescind the compulsory acquisition of two parcels of land from the Towers Family for the purpose of realigning the Stockton Bight Track.

While hindsight offers up options that may have avoided the debacle currently being experienced it is our opinion that Council, in their attempt to benefit all parties affected, acted 'in good faith'.

If you have any queries, please contact me on the numbers listed above.

Yours faithfully  
Worimi Local Aboriginal Land Council

Andrew Smith  
Chief Executive Officer