

**LOCAL GOVERNMENT PECUNIARY INTEREST
AND DISCIPLINARY TRIBUNAL**

LOCAL GOVERNMENT ACT 1993

PIDT No. 01/2005

**DIRECTOR-GENERAL, DEPARTMENT OF
LOCAL GOVERNMENT**

**RE: COUNCILLOR RONALD JAMES
FERNANCE, MOREE PLAINS COUNCIL**

STATEMENT OF DECISION

Dated: 19 June 2006

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PIT No. 1 / 2003

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LOCAL GOVERNMENT**

**RE: COUNCILLOR RONALD JAMES
FERNANCE, MOREE PLAINS COUNCIL**

STATEMENT OF DECISION

INTRODUCTION

1. On 21 September 2005 the Tribunal received a report from the Director General, Department of Local Government, of an investigation into the complaint by the Director General pursuant to s.460 of the *Local Government Act 1993* that Councillor Ronald Fernance, being a councillor of Moree Plains Shire Council, committed a breach of s.451(2) of that Act with respect to the consideration by the Council at a Council meeting on 5 October 2004 of matters relating to a Development Application 04-0107 and that at the said meeting and in respect of that matter Councillor Fernance also breached s.451(1) of the Act. It was alleged that Councillor Fernance had a pecuniary interest in relation to the said matter, that he failed to disclose the nature of that interest to the said meeting and that he was present at or in the sight of the said meeting of the Council when the matter was being considered by the Council.
2. Having considered the said report and further information sought by the Tribunal, the Tribunal determined to conduct proceedings into the complaint and a notice setting out

that decision dated 2 January 2006 was given to the Director General, Department of Local Government, and Councillor Fernance.

3. Following certain correspondence with Messrs Rhodes Kildea, solicitors for Councillor Fernance, that firm advised the Tribunal and the Director General, Department of Local Government, by letter dated 13 April 2006 that Councillor Fernance admitted both contraventions as alleged in the Notice of Decision to Conduct Proceedings.
4. Accordingly, the hearing which took place before this Tribunal on 5 June 2006 and the submissions made proceeded upon the basis of the said admissions.

BACKGROUND

5. Councillor Fernance who is a building contractor and farmer by occupation was first elected as a councillor of Moree Plains Shire Council in 2004. He has no previous experience as a councillor and, of necessity, his experience and familiarity with the pecuniary interest provisions of the *Local Government Act 1993* is so confined.
6. Prior to the Council meeting of 5 October 2004 Councillor Fernance had attended a training session conducted by the New South Wales Shires Association in which pecuniary interests were discussed. The session ran for approximately 4 hours and concentrated on a range of issues. Councillor Fernance's recollection is that the pecuniary interest part of the training session occupied approximately 15-30 minutes.
7. Councillor Fernance and his wife Lynette Fernance were, at all relevant times, the registered proprietors as joint tenants of lot 1 in DP 874738 which was known as 13A Sunnyside Road, Moree. The land was purchased in 1992 and thereafter subdivided into 5 blocks.
8. The development application which was considered by the Moree Plains Shire Council on 5 October 2004 was a development application lodged on behalf of Councillor

Fernance and his wife and sought that lot 1 be subdivided into two lots. Councillor Fernance and his wife were seeking the subdivision to enable their son to build a home on one of the lots thereby created.

9. During the development application process, Councillor Fernance became aware that council staff were going to recommend that the application be rejected on the basis that, rather than a right-of-way being granted over the land, a public road should be declared.
10. In fact, the report by council officers to the said meeting of council in respect of the said development application reflected council officers' concern relating to access and the said report recommended that the development application be refused in its current format as it did not provide adequate and safe access in accordance with council's standards and policies. The said report further recommended that council staff negotiate with the applicant regarding the provision of an appropriate road access design for the subdivision which satisfied council's specification and requirements as contained in the relevant Manual.
11. Councillor Fernance, prior to the said meeting, discussed the foreshadowed rejection of his development application with his neighbours who expressed to Councillor Fernance the view that they did not wish a public road to be declared.
12. Councillor Fernance formed the view that in the circumstances he should address the Council on this issue, although he was aware that he had a pecuniary interest with regard to the development application.

PRIOR TO THE COUNCIL MEETING

13. Councillor Fernance, on 4 October 2005, spoke to the Mayor, Councillor Tramby.
14. Both Councillor Fernance and Councillor Tramby have told the Tribunal that Councillor Tramby's advice was to the effect that he did not believe that Councillor Fernance was

allowed to raise the issue as a councillor but that he might be able to speak to the development application as an ordinary rate payer, addressing the Council during the public forum part of the meeting. Councillor Tramby advised Councillor Fernance that his understanding was that the public forum did not formally form part of the Council meeting and so Councillor Fernance would not be prohibited from speaking.

COUNCIL MEETING

15. On 5 October 2004 at the commencement of the Council meeting when declarations of interest were being dealt with, Councillor Fernance declared "a pecuniary interest" in the development application for the subdivision of 13A Sunnyside Road, Moree being item 14 in the council officer's report before the meeting.
16. The 'public forum part of the meeting' then took place and Councillor Fernance moved to the public gallery to address the Council. A transcript of this portion of the Council meeting is before the Tribunal. He talks in terms of having purchased the land and he addresses the issue of the driveway and the attitude of the neighbours.
17. The minutes of the meeting of the Council revealed that following the conclusion of the forum the Council moved onto the items of business reflected in the staff's report. The minutes reveal that Councillor Fernance was present while these items were being dealt with up until the item of business dealing with his development application. At that point of time, Councillor Fernance "declared an interest in the matter" and left the meeting. The Council resolve to approve the development application subject to certain conditions.

COUNCILLOR FERNANCE'S EXPLANATION

18. Councillor Fernance, prior to the Council meeting, knew that he had a pecuniary interest in the development application. He acknowledges that he did not declare the nature of his interest in the development application. He says that he now realises that he made a serious mistake in this regard, however, in the past when he had observed other

councillors declaring pecuniary interests, he had seen them simply state that they had a pecuniary interest without providing any further particulars. Being an inexperienced councillor, Councillor Fernance acted as he had observed other councillors doing in the past.

19. While Councillor Fernance appreciated that he had a pecuniary interest in the development application he believed, based on the advice from Councillor Tramby that he was entitled to address the meeting in the public forum in the manner in which he did. Councillor Fernance now acknowledges that he was not entitled to do so and Councillor Tramby, while stating that his advice was provided in good faith, which this Tribunal accepts, now realises that his advice was erroneous.

FURTHER EVIDENCE

20. The Moree Plains Shire Council Code of Meeting Practice dated May 2002, clause 50, dealing with disclosure of pecuniary interests and participation in meetings does not refer in terms to the obligation to disclose the nature of the interest. The Code in general terms refers to the prohibition on councillors from either making "a statement or addressing the Council before, during or after the Council's consideration of the matter."
21. Although it is acknowledged by Councillor Fernance that he had a pecuniary interest, the Tribunal notes that there was valuation evidence in the report from the Director General, Department of Local Government, clearly supporting the proposition that a before and after valuation of the subject land would demonstrate that, after approval of the development application, the land value would increase in value by approximately \$12,000 and that this increase in value from subdivision was more than a probability.
22. Councillor Tramby has stated that since the meeting of 5 October 2004 his council has obtained a copy of a circular produced by the Department of Local Government regarding councillors speaking in circumstances similar to that of Councillor Fernance. The circular was based upon this Tribunal's decision in the matter of Councillor Kemper.

Councillor Tramby states that it is now his practice to ensure that the circular is observed and that there is no repetition of councillors addressing the Council in the manner that occurred in this case. His practice now also, he advises, complies with a Department of Local Government circular dated November 2005 dealing with the issue of councillors addressing meetings as residents or rate payers. Councillor Tramby also advises that in April 2005 the Council adopted a Code of Conduct identical to the Department of Local Government Model Code of Conduct for Local Councils in New South Wales as published by the Department in December 2004.

23. Councillor Tramby says that he has always found Councillor Fernance to be honest, reliable and hard working and to be a close friend and great asset to Moree Plains Shire Council. He says that Councillor Fernance is embarrassed to be the subject of disciplinary proceedings and he has taken the whole affair very seriously.
24. Councillor Fernance has stated that since the subject meeting he has completed a Code of Conduct Awareness Workshop run by the Moree Plains Shire Council and the relevant documentation is before this Tribunal. Councillor Fernance says that he has been very embarrassed by the investigation and the proceedings, but is hopeful that there will be a positive outcome in that he is now more aware of his responsibilities as a shire councillor. In addition, he has in February and March 2006 attended certain training programs including one dealing with meeting procedures.
25. The Tribunal has before it references from Mr Harborne OAM and Justice of the Peace and Mr R. Mitchell, President of the Moree Golf Club Ltd.
26. It is clear from these references and from the other material before this Tribunal that Councillor Fernance is a man of fine character, honesty and integrity. It is clear that he is well-known and highly respected in the town of Moree and the district and that he is a valuable contributor to the well being of the local community.

SUBMISSIONS

27. Mr M. Robinson, of Counsel, on behalf of the Director General submits that the appropriate penalty is one of suspension from civic office for some period to reflect the breaches that occurred in the present case. It is submitted that a suspension is the minimum appropriate penalty. It is submitted that the breaches are serious breaches of core provisions of the pecuniary interest provisions of the Act and that it is essential that councillors declare the nature of their pecuniary interest in full at the appropriate time. It is submitted that it is also essential that they not participate in the decision-making process in any capacity. It is pointed out that the breach was not of no consequence in that the subject land increased in value as a result of the development application being approved.
28. Mr Robinson further submits that the breach was flagrant in the sense that the councillor knew of the existence of his duties of disclosure and that he had received some training well before the subject council meeting which was or ought to have been sufficient to plainly draw his attention to the relevant provisions of the Act. It is submitted that in these circumstances he should have read and understood the relevant provisions and that he ought to have kept himself informed rather than partly informed of his obligations. Instead, Councillor Fernance asked the Mayor for advice and this advice was plainly erroneous. It is submitted that the Tribunal ought to impose a penalty on Councillor Fernance that will act as a further warning and deterrent to other councillors who fail to adequately inform themselves of the applicable law.
29. Mr Johnson, of Counsel, on behalf of Councillor Fernance submitted that Councillor Fernance had come perilously close to declaring and disclosing the nature of his pecuniary interest because of the terms in which he addressed the council meeting. It was pointed out that Councillor Fernance had only been recently elected and that he had had no prior experience in local government affairs or practice. A distinction was drawn between this and other cases dealt with by this Tribunal of experienced local councillors.

30. Mr Johnson submitted that the breaches were isolated, that they had not been blundered into in the sense that he had sought advice from the Mayor who had 9 years experience as a local councillor. Further, it was submitted that Councillor Fernance had followed other councillors' practice of how pecuniary interests were declared. Councillor Fernance had received some training after his election and before the subject meeting and had attended training in April 2005.
31. Mr Johnson submitted that admissions by Councillor Fernance were full and frank and had been made at an early stage and that he had no other record of any breaches. It was pointed out that the testimonial spoke highly of him. It was pointed out that the subdivision in question was one which sought to benefit a family member rather than a subdivision for commercial gain. Mr Johnson addressed the clear factual distinctions between the present case and the case of *Director General, Department of Local Government Re Councillor Peter Kemper, Uralla Shire Council* PIT No. 4/2001 - 7 April 2004 where the councillor was disqualified from holding civic office for a period of 12 months and the decision of *Director General, Department of Local Government Re Councillor Brian Eichorn, Uralla Shire Council* PIT No. 3/2001 - 7 April 2004 where, it was submitted, more aggravated factual circumstances led to a reprimand.

CONCLUSION

32. The evidence is clear that Councillor Fernance is a man of good character, integrity and honesty.
33. It is also clear that Councillor Fernance was first appointed as a local councillor in 2004 and that the subject meeting took place on 5 October 2004. In this sense, he was, by training and experience, inexperienced as a councillor.
34. That inexperience, however, does not excuse his conduct in the present case. Councillor Fernance knew that he had a pecuniary interest in the subject development application. The development application was dated June 2004 and the Tribunal infers that

Councillor Fernance was aware of his pecuniary interest well before the meeting on 5 October. In those circumstances and in circumstances where he was and he knew he was an inexperienced councillor, he ought to have made particular effort to acquaint himself with his obligations under the Act. The starting point ought to have been that he read and familiarised himself with the provisions of the *Local Government Act 1993*. Had he done so, Councillor Fernance would have or should have been alerted to his obligation to declare the "nature of his interest" and not merely the fact that he had an interest. A reading of the Act also ought to have alerted Councillor Fernance to his obligation not to be present at or in the sight of the meeting of the Council at any time during which the subdivision application was being considered or discussed by the Council. A plain reading of those words ought to have alerted Councillor Fernance in relation to addressing the council meeting during the public forum part of the meeting.

35. Councillor Fernance had ample time in which to investigate, research and take proper advice concerning his obligations under the pecuniary interest provisions of the Act. Councillor Fernance did not satisfactorily deal with a known pecuniary interest by seeking advice from the Mayor on the day preceding the Council meeting.
36. There is no issue in these proceedings concerning the good character and repute of Councillor Fernance. There is no issue but as to his relative inexperience. There is no issue that the subdivision was motivated by family as opposed to commercial benefit, and there is no issue but that the admissions in the present case were full and frank and were made at a relatively early stage of the proceedings. The Tribunal accepts that Councillor Fernance had some training prior to the meeting in question and has embarked on other training since and the Tribunal accepts that in this Council it is highly improbable that a repetition of this or any similar conduct will occur again.
37. However, this Tribunal, unfortunately yet again, finds it necessary to state in unequivocal language that persons who seek and gain election as local councillors have an obligation to the community to take adequate steps to fully and properly acquaint themselves with the nature and extent of their legal obligations in relation to the pecuniary interest

provisions of the *Local Government Act 1993*. It is not sufficient merely to have some general understanding that the provisions are there. Further, it is not sufficient, knowing one has or may have a pecuniary interest merely to rely upon the advice of some other councillor who may or may not have a complete and accurate understanding of the obligations under the Act. Clearly, the starting point for a councillor in that circumstance ought to be a reading and attempted proper understanding of the provisions of the legislation. If that had occurred in this case, it either would have or should have alerted Councillor Fernance to his obligations and should have alerted him to the erroneous nature of the advice being tendered to him by the Mayor. If councillors are in any doubt as to their obligations, then they ought seek further advice and, if necessary, legal advice. They should also be aware of the various advisory circulars issued by the Department and the Tribunal website which contains previous decisions that discuss the obligations of councillors.

38. While the Tribunal has given serious consideration to the submission on behalf of the Director General that Councillor Fernance ought to be suspended from civic office, upon a consideration of the whole of the evidence and the whole of the submissions, the Tribunal is of the opinion that the appropriate response to the admitted breaches in the present circumstance is that Councillor Fernance be reprimanded in respect of the said breaches of the *Local Government Act 1993*. Contrary to the submissions of Mr Johnson on behalf of Councillor Fernance, this Tribunal is of the opinion that the seriousness and circumstances of the breaches warrant more than Councillor Fernance being counselled for his breaches of the Act.

THE TRIBUNAL'S ORDER

39. The Tribunal's order is as follows:

The Local Government Pecuniary Interest and Disciplinary Tribunal, **HAVING FOUND** that a complaint against Councillor Ronald James Fernance of Moree Plains Shire Council, namely that contrary to Chapter 14, Part 2 of the *Local*

Government Act 1993 he failed to disclose the nature of his pecuniary interest and he participated in the consideration at a meeting of the Council on 5 October 2004 of a Development Application 04/0107, has been proved.

Pursuant to s.482(1) of the Act, the Tribunal **ORDERS** that Councillor Fernance be and he is hereby reprimanded.

40. Copies of the Tribunal's Statement of Decision will be provided to Councillor Fernance and the Director General in accordance with s.484(1). Pursuant to s.484(3) copies will also be provided to Moree Plains Shire Council and such other persons as the Tribunal thinks fit.
41. The Tribunal's order will be furnished to Councillor Fernance, the Director General and the Moree Plains Shire Council forthwith.

Date: 19 June 2006

