

LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO 2/1995

REPORT OF INVESTIGATION UNDER SECTION 462(1) LOCAL
GOVERNMENT ACT, 1993

RE: COUNCILLOR RICHARD JOHN NIVEN,
ORANGE CITY COUNCIL.

STATEMENT OF DECISION

INTRODUCTION

This matter arose out of a complaint made in May 1994 to Councillor John Davies, then Mayor of Orange City Council, by another Councillor who requested that his identity be kept confidential. The complaint was that a fellow Councillor, Richard John Niven, had failed to declare a pecuniary interest in an item of business before the Council's Planning Committee which Councillor Niven had chaired on 2 May 1994. Councillor Davies, who had not been present at the meeting, consulted the Council's General Manager who sought an opinion from the Council's solicitors, Messrs Sly & Weigall.

Sly & Weigall furnished an advice by letter dated 12 May 1994 which contained the following:

“From the information furnished with your facsimile of **11 May 1994** it appears that the relevant background to this matter can be summarised as follows:

1. at its meeting on 2 May 1994, the Planning Committee considered a development application seeking a review of traffic facilities at 20 Sale Street, Orange (Item 3.C), along with submissions received from members of the public concerning

the possible installation of a median strip in Sale Street (Late Item A);

2. One of the submissions received by Council in relation to the possible installation of a median strip in Sale Street was a letter from the firm of Baldock, Stacy & Niven acting for an objector to the proposal, advising that the objector “. . . *fully intends to take legal action to challenge any decision Council may make with respect to the construction of a median strip in Sale Street pursuant to the provisions of the Environment Planning and Assessment Act 1979*”;
3. Council's Administration Manager recalls Councillor Niven advising the Planning Committee meeting of 2 May that there was a letter from Baldock, Stacy & Niven in the list of correspondence set out in Late Item A, but as he had nothing to do with the matter he would not be declaring an interest; and
4. Councillor Niven took part in the debate or discussion and voted on whether to deal with Late Item A at the same time as Item 3.C, the consideration of the correspondence referred to in Late Item A and the development application referred to in Item 3.C.

From the letterhead of the firm of Baldock, Stacy & Niven it appears that Richard J Niven is a principal of that firm and therefore would receive financial advantage from the firm acting for the objector to the above mentioned proposal.

It seems clear that Councillor Niven would have had a reasonable likelihood or expectation of appreciable financial gain to him as a member of a firm that had a pecuniary interest in the matter. Particularly given the stated intention to institute proceedings should Councillor approve the proposal, it could not be argued that the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the Councillor might make in relation to the matter even if it did not.

It therefore appears to us that Councillor Niven had a pecuniary interest in this matter as defined in sections 442 and 443 of the *Local Government Act 1993* and should not have taken part in the consideration or discussion of the matter, or voted on any question relating to the matter, in breach of s.451 of that Act.”

Section 442 of the Local Government Act 1993 provides as follows:

“442. (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 or another person with whom the person is associated as provided in section 443.

(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.”

Under section 443 of the Act a person has a pecuniary interest in a matter if the pecuniary interest is the interest of the person or of an associate of the person as described in this section. Associates include the person’s partners in a business or profession. (Section 448 is not relevant here)

Section 451 of the Act provides as follows:

“451. (1) A councillor or a member of a council committee who has a pecuniary interest in any matter with which the council is concerned and who is present at a meeting of the council or committee at which the matter is being considered must disclose the interest to the meeting as soon as practicable.

(2) The councillor or member must not take part in the consideration or discussion of the matter.

(3) The councillor member must not vote on any question relating to the matter.”

On 17 May 1994 Councillor Davies wrote to the Department of Local Government enclosing the letter of advice from Sly & Weigall. After preliminary inquiries, the Department invited Councillor Niven’s comments. He wrote to the Director-General on 13 September 1994. He stated in his letter that at the meeting in question the Council's Planning Committee was considering an application by the owners of 20 Sale Street, Orange for a change in the traffic flow from Council's carpark through the premises at 20 Sale Street, Orange. He claimed that the possibility of a median strip along Sale Street was, “never on the Council's Agenda and was completely out of

the question.” He repeated this in relation to the letter from his firm that gave rise to the complaint being made against him. He said:

“ . . . I stated to the meeting at the time that I did not believe that the letter from Baldock, Stacy & Niven required me to declare an interest as it did not relate to the property at 20 Sale Street, Orange but to the question of a median strip which as previously advised was never on Council's Agenda or even being considered.

I have no doubt whatsoever that the matter being determined by Council had no relation whatsoever to the contents of the letter from Baldock, Stacy & Niven or the question of any median strip and in fact the letter of objection to the median strip was irrelevant to the matter being considered by Council.”

When the preliminary inquiries were completed, the Department decided to formalise the complaint. The then Acting Director-General of the Department incorporated particulars of the grounds of the complaint in a statutory declaration and on 27 January 1995 authorised a formal investigation pursuant to section 462(1) of the Act. Council's files were examined by the Department's investigation officers. Councillor Niven, Councillor Davies and a number of the Council's officers were interviewed.

When the investigation was completed a report was prepared and presented by the Director-General to the Tribunal on 29 September 1995.

Section 469 of the Act provides that the Pecuniary Interest Tribunal, after considering a report presented to it, may conduct a hearing into the complaint. Section 470(1) provides that if the Pecuniary Interest Tribunal decides not to conduct a hearing into a complaint, it must provide a written statement of its decision which must include the reasons for the decision.

DECISION OF THE TRIBUNAL AND REASONS

Having considered the Director-General's report of the investigation, the Tribunal has decided not to conduct a hearing into the complaint. In the

Tribunal's opinion, the facts and circumstances ascertained by the investigation of the complaint establish that there is insufficient substance to the complaint to warrant a hearing by the Tribunal.

The pecuniary interest of a person, that is to say, the person's or the person's associates' prospects of financial gain or loss, must relate to the matter with which the Council is concerned at the Council or Council committee meeting in question before the obligations of a Councillor under section 451 can arise.

The sole basis for suggesting that the section applied to Councillor Niven in this case was that a member of his firm was acting for a client who was objecting and threatening legal action against the Council if it decided to install a median strip in Sale Street.

Whether or not, on appearances at the time the complaint was made, there was reason to suspect that a breach of section 451 may have occurred, the facts disclosed by the investigation reveal that, at most, there was only an oblique and tenuous connection between Councillor Niven's supposed prospects of financial gain or loss and the matter actually before the meeting for decision. In the view of the Tribunal, it is highly doubtful that any finding of a contravention by Councillor Niven could properly be made on those facts; but, even if in some way it could be said that there was a breach, it was, in the circumstances, too inconsequential to call for any action by the Tribunal.

The question turns on making a reasoned assessment of what was the "matter" with which the Council was concerned at two relevant meetings, a meeting of the Council's Planning Committee on 2 May 1994 and a meeting of the Council on 5 May 1994.

If the matter for decision was a proposal to install a median strip in Sale Street, Councillor Niven would certainly have had a pecuniary interest in that matter and would have been bound by the requirements of section 451. Councillor Niven does not dispute this. He told the investigators that, if that had been the case, he would have disclosed his interest and withdrawn from the meeting, but he has consistently denied that the installation of a median strip in Sale Street was a matter for decision at the meeting and has claimed that the evidence will support his view.

Having considered the material contained in the Director-General's report, the Tribunal has concluded that in substance Councillor Niven's view is correct for the reasons which follows:

1. The Orange City Council operated a public carpark with access to Sale Street. The land was owned by the Council. The owners of adjoining land, 20 Sale Street, on which a liquor outlet called Liquorland was established, wanted there to be vehicle access to their land from the Council's carpark. Access was blocked by bollards and chains installed on the carpark. On 21 September 1993, the owners of 20 Sale Street had lodged with the Council a development application "*To review traffic facility of 20 Sale Street*" in which various options for traffic flow were put forward. (Council records and Minutes designate this application "Planning Application" (or "Development Application" 43/94)
2. Because the development application had traffic implications it was referred to the City of Orange Traffic Committee which on previous occasions had considered traffic matters in connection with 20 Sale Street. As well as the Council, other interests such as the police, transport, roads and traffic authorities and local

citizens were represented on this committee. Ms Heather Nicholls, a planning adviser with the Council, reported the application for variation of the traffic facilities at 20 Sale Street to a meeting of the Traffic Committee on 12 April 1994. The Minutes of that meeting record that the committee considered that a decision whether to grant permission to the owner of 20 Sale Street to gain access from the Council carpark *“was really a Council decision and the Traffic Committee could not comment further on this matter.”* The Minutes also record that the Traffic Committee considered that in order to minimise the disruption to the traffic flow in Sale Street only left hand turns should be permitted for vehicles leaving both 20 Sale Street and the carpark and *“to ensure this occurred, the Traffic Committee recommended to the Manager of Planning Approvals that a median strip be installed in the centre of Sale Street.”* The Traffic Committee also recommended that if the Council was to grant approval for vehicular access from the carpark exit lane on to 20 Sale Street, *“Option A”* as contained in the applicant’s submission should be adopted. The Minutes concluded: *“As this matter was only advice to the Manager of Planning Approvals, and would be contained in the report by the Manager of Planning Approvals, no actual recommendation was required by the Traffic Committee.”*

3. Under the Council’s procedures, the development application had to go to the Council’s Planning Committee. For the assistance of the Committee, Mr Allan Renike, the Council’s Manager Planning Approvals, prepared a report on the development application. The report was dated 27 April 1994 and was addressed to the General Manager of the Council. This report mentioned the options for traffic movement put

forward by the applicant but then pointed out that the first issue to be resolved was whether the Council was prepared to allow direct access from the public carpark to the property 20 Sale Street at all. The report emphasised the importance to the Council of preserving future development opportunities using its parking areas. It pointed out the risk of impeding such future development by permitting access to private property directly from public carparks and put forward as the view of Council staff that the Council should adhere to a policy of restricting such access. The report also pointed out that where such access had recently been allowed Council had advised the applicants that the granting of the access should not be taken to be the granting of a legal right of way easement or the like and that Council could at any time in the future restrict such access with the owners of the properties who had benefit from the arrangement being required to make alternative arrangements at their own cost. The report urged that if the Council decided to support any of the options put forward by the owners of 20 Sale Street, notice advising that the arrangement was not to be taken as granting any legal rights of access should be included in the approval. In this connection, the report recommended that Council should obtain legal advice upon the effectiveness of such a notice to protect the Council's interests because, although such notices had been given in the past, there was nothing before the Council to indicate that there could be no recourse against the Council by persons who were benefited by the access to complicate and possibly jeopardise any negotiation for future development of the public car parking areas if access was afterwards denied.

4. Mr Renike's report then turned to the subject of traffic considerations in the event that Council decided to permit access from the Sale Street carpark to 20 Sale Street. The report quoted extracts from the Minutes of the Traffic Committee meeting of 12 April 1994 referred to in paragraph 2 above and went on to comment, *"As can be seen the Traffic Committee recommends that if Council is to grant consent to this proposal Option A should be adopted and that a median strip should be constructed in the centre of Sale Street so as to ensure that vehicles turn left only when exiting the subject land and Council's carpark."* After reviewing the traffic flow implications in the applicant's proposed options, the report contained the following:

"From a traffic management point of view it would be desirable to require vehicles to turn left only into Sale Street. However, as was experienced with the placement of the median strip in Summer Street, there is an impact upon businesses that front on to that roadway and already I have had an inquiry from a business owner in that area of Sale Street who is aware of the Traffic Committee's recommendation expressing real concern about the proposal to place a median strip in this area of Sale Street.

Whilst the issue of traffic management is an issue that needs to be considered with the application before Council it is suggested that due to the impact on a wide number of businesses that a median strip would generate it is suggested that the issue of the median strip be considered separately. This will allow Council to be able to address the wider traffic issues, the impact of such a facility upon businesses in the area, and enable Council to consider public submissions."

Having pointed out that the ramifications of a proposal to install a median strip were radically different from and had a far wider impact than a requirement of left hand only turns into Sale Street and suggested that the issue of a median strip be

considered by Council separately, Mr Renike concluded his report by himself dealing separately with the development application under consideration and the Traffic Committee's suggestion regarding a median strip in Sale Street.

In relation to the development application he attached a form of Notice of Approval which could be issued if Council should decide to allow access from its carpark to No. 20 Sale Street.

As to the median strip idea, he appended to his report a recommendation that Council request the Director Technical Services to prepare a report addressing the relevant issues relating to the provision of a median strip in the centre of Sale Street in accordance with the Traffic Committee's recommendations.

The attached form of Notice of Approval was designed to serve as the notice to be given pursuant to section 92 of the Environmental Planning & Assessment Act, 1979 for determination by Council of a development application. It was headed "*Development Application No. 43/94*" and identified the owner and the property 20 Sale Street, Orange. It was expressed to be a determination by resolution of the Council at its meeting to be held on 5 May 1994 which was eight days after the date of the report and was to be preceded by a meeting of the Council's Planning Committee on 2 May 1994. The notice then set forth the suggested resolution determining the application that might be passed by the Council at its meeting on 5 May 1994. This suggested resolution proposed the report submitted by the Manager Planning Approvals dated 27 April 1994 "*be noted*". It later went on to state that the Council

resolved to approve the application subject to certain matters which included the following conditions:

“1. This approval, which involves direct vehicular access on to the subject land from Council's public car park is not to be taken as the granting of any right-of-way, easement or privilege over the car parking area and that should, at any time in the future Council restrict or vary such access, then the owners of that land will be required to make alternative arrangements at their expense for access to that property. Written acknowledgment of this arrangement shall be made by the landowner within twenty-one (21) days of the receipt of this determination.

*2. Signs to the satisfaction of Council's Traffic Officer shall be placed at the Sale Street boundary of the egress of the subject land indicating **NO ENTRY** from Sale Street and **LEFT TURN ONLY** for vehicles exiting the site.*

*3. A sign to the satisfaction of Council's Traffic Officer indicating **NO STANDING** shall be painted onto the driveway adjacent to the building in question.”*

It is to be observed that the resolution proposed by this form of Notice of Approval does not raise for consideration in connection with the development application any proposal to install a median strip in Sale Street. The resolution, if passed would merely note the report of the Manager Planning Approvals without involving any decision to be made on the report's recommendation to refer the Traffic Committee's suggestion of a median strip to the Director of Technical Services for report.

5. The Development Application No. 43/94 came before the Council's Planning Committee in a confidential meeting over which Councillor Niven presided on 2 May 1994. The application was designated “*Item 3.AA*” in the business before that meeting. The report dated 27 April 1994 from the Manager Planning Approvals to the General Manager relating to the

development application was designated “*Item 3.C*” and the proposed Notice of Approval was included as “*Attachment to Item 3.C*” for the Planning Committee’s meeting.

The committee also had before it a confidential report to the General Manager from the Council's Director Environmental Services dated 28 April 1994 regarding Development Application No. 43/94. This report dealt solely and specifically with the impact of provisions allowing access between Council carparks and adjoining private property on the future use of Council land for major development. It referred in particular to the form of condition that the Council had recently been utilising, after which the report stated:

“In respect to this application, whilst it is our considered view that this condition is effective, this application and the possible long term constraints on access from a major redevelopment is of such importance that I believe the Council should obtain legal opinion on the sustaining of the condition prior to determination on Application 43/94.”

The report concluded with a recommendation that consideration of Application No. 43/94 be deferred, pending advice from the Council's solicitors on the protection afforded by the words outlined in the report as a condition of consent.

In addition to the foregoing the Planning Committee meeting had before it a large body of material that had been received by the Council a short time before the meeting. For the purposes of the meeting this material was divided into three categories. The first category was designated “*Late Item A*” It consisted of a large number of letters received from persons with business interests in Sale Street. They included a petition containing 138 signatures. They also included the letter from Baldock, Stacy &

Niven on which the present complaint against Councillor Niven is based. They all consisted of objections to the idea of installing a median strip in Sale Street. They were listed in a report made by Mr Douglas Sutherland who was the Council's Administration Manager. The report is dated 2nd May 1994 and is addressed to the General Manager of the Council on the subject of "*Median Strip in Sale Street*" and is headed "*Late Item To be dealt with in conjunction with Item 3.C*". Above Mr Sutherland's signature appears the recommendation: "*That the above letters be noted.*" The other two categories of material consisted of a petition received by the Council on 2nd May 1994 containing 232 signatures and two letters received on 29 April 1994 that were labelled "*Late Item B*". These also objected to the installation of a median strip in Sale Street.

6. The Minutes of the Planning Committee's confidential meeting on 2 May 1994 record that the committee considered the report of the Director Environmental Services dated 28 April 1994 and that the committee considered in conjunction with Item 3.AA, Item 3.C (the report of the Manager Planning Approvals on 20 Sale Street dated 27 April 1994), Late Item A, (the report of the Administration Manager listing letters and petition objecting to a median strip in Sale Street dated 2 May 1994), another petition received on 2 May 1994 containing 232 signatures and Late Item B (the two letters received on 29 April 1994). The Minutes show that the Planning Committee dealt with all of the material before it by separating it into two categories. Firstly, as to the Development Application No. 43/94 relating to 20 Sale Street, Orange, it recommended to Council that consideration be deferred pending advice from the Council's solicitors on the protection afforded by the words outlined in the report of the

Director Environmental Services dated 28 April 1994 as a proposed condition of consent. Secondly it recommended to Council that Item 3.C., Late Item A., the petition containing 232 signatures and Late Item B. "*be noted*".

It is to be observed that the above manner of dealing with the material before the Planning Committee was fully in accord with the view expressed by the Manager Planning Approvals in his report of the development application dated 27 April 1994 that the question of a median strip in Sale Street was different from the development application relating to 20 Sale Street and should be treated as a separate matter. It should also be observed that the recommendation to Council made by the Planning Committee meeting in relation to the reports, letters and petitions received on the subject of a median strip in Sale Street was merely that they "*be noted*". This is consistent with the view that the Planning Committee did not consider that a proposal to install a median strip in Sale Street was a matter for consideration by that committee in dealing with the development application in relation to 20 Sale Street which was about to come before the Council for determination. Moreover, the failure of the Planning Committee to take up or make any reference to the recommendation of the Manager Planning Approvals to refer the question of a median strip to the Director Technical Services for report is consistent with the Planning Committee disregarding, or treating as irrelevant to a consideration of the development application with respect to 20 Sale Street, the recommendation of the Traffic Committee at its meeting of 12 April 1994.

7. The Development Application No. 43/94 next came before the Council at its Ordinary Meeting on 5 May 1994 where it was designated Item 5.AA. The Minutes of the Planning Committee meeting of 2 May 1994 in relation to that Development Application (designated as Item 3.C. before that committee) were also before the Council meeting. Resolutions were passed that these two items of business be referred to the Committee of the Whole Council for consideration at its meeting later that day, Item 3.C. to be discussed by the Committee of the Whole on a confidential basis.

The Minutes of the meeting of the Committee of the Whole record that a motion was moved and seconded that the Planning Department be requested to prepare an instrument of refusal relating to the development application for 20 Sale Street, and that the same set of Items which the Planning Committee had recommended to the Council "*be noted*" be dealt with by the Council by again being "*noted*". An amendment to this motion was moved and passed by the Committee of the Whole and having become a motion before that committee was put to the meeting and carried. It was in the following terms:

"RECOMMENDATION:

- 1. That the chain between the Council Car Park and 20 Sale Street be removed to allow temporary access to the property for a 3 month trial period.*
- 2. That vehicles exiting from 20 Sale Street be permitted to Turn Left Only.*
- 3. That Council advise that access of Council's public car parks is not to be taken as the granting of a right-of-way, easement or privilege over the car parking area and that should, at any time in the future, Council restrict or vary such access, then the owners of that land will be*

required to make alternative arrangements at their expense for access to that property.”

It is apparent from the recommendation that the Committee of the Whole resolved to make to Council that the recommendation of the Planning Committee that consideration of the development application relating to 20 Sale Street be deferred was not accepted in that the Committee of the Whole decided to recommend that approval be given to temporary access from the Council's carpark to 20 Sale Street for a trial period with exiting vehicles limited to left turn only into Sale Street. However the Minutes contain no evidence to suggest that the Committee of the Whole had before it or gave any consideration to a proposal to install a median strip in Sale Street either in conjunction with the consideration of the development application for access from the Council's car park or as a separate matter

8. Council officers who were involved in the matter or attended the relevant meetings were interviewed by the investigators. Whilst there was some variation in their recollections the overall impression from these interviews is that the meetings on 2 and 5 May 1994 gave either no attention or only scant attention to the Traffic Committee's idea of a median strip in connection with the control of traffic entering Sale Street from No. 20. They support Councillor Niven's claim that in no real sense was a median strip ever on the Council's agenda in relation to the development application regarding No. 20 Sale Street. Salient observations on that question which were made by Council officers to the investigators follow.

9. Mr Renike, the Manager Planning Approvals, was not at the Planning Committee meeting on 2 May 1994. He had prepared the report on the development application for that meeting and gone on leave. In relation to his report, he told the interviewers that he did not see the issue of a median strip as an issue which was before the Planning Committee or the subsequent Council meeting for its consideration, and pointed out that his own view as expressed in the report was that the median strip issue was a separate matter. With regard to the Traffic Committee's recommendation, he said that it was his view that it was unrealistic to talk about a median strip in the context of the Liquorland development application.

10. Ms Heather Nicholls, Planning Adviser to the Council, described the Traffic Committee's idea of a median strip in Sale Street which had generated the public reaction resulting in the Council being *"bombarded with a string of letters all objecting to a median strip in Sale Street believing that it was required by this 20 Sale Street development application which was before the Council"* as a *"bit of a furphy, if anything."* She was aware of the circumstances in which the Traffic Committee originally came up with the median strip idea. She said that it preceded and had nothing to do with the development application for 20 Sale Street. The idea had come up in consequence of an inspection by the Traffic Committee of a temporary roundabout at the corner of Kite and Sale Streets at the insistence of the local primary school which was concerned with safety aspects for school children crossing the street. She said that the press got hold of the Traffic Committee's recommendation and *"an element of the community then decided, 'good grief, this is going to affect us, we don't like this' and therefore lobbied Council all*

based, I think incorrectly, that 20 Sale Street was the reason that all that had been generated.” Ms Nicholls was present at both the Planning Committee and Committee of the Whole meetings on 2 and 5 May 1994. She said that she did not believe Mr Renike’s recommendation in his report that Council refer the question of a median strip to the Director of Technical Services for a report was adopted at those meetings. When the investigators pointed out to her that the Minutes recorded that Mr Renike’s report was “noted”, Ms Nicholls said that the term “noted” is interpreted always at the Orange City Council as meaning that the Council requires no further action to be taken. In her words “To be noted means thanks for coming and on with the next one.”

11. Mr Michael McFadden, the Council's Development Engineer was at the meeting of the Planning Committee on 2 May 1994. He said that he was not quite sure where all the public fuss about a median strip was coming from because Council had no actual plan to install a median strip which he knew from being on the engineering side of such a matter. He said, *“People seem to think there was an agenda (within the Council) to put a median strip in there, but, as I said, from the engineering point of view, we never sort of discussed whether we would actually do that or not.”* When it was put to him that the recommendation flowed from the Traffic Committee, he said, *“It was, I think it was an idea that could have been used to direct traffic, but Council in the past has been loath to put these median strips in so there’s a lot of recommendations coming from the Traffic Committee, but they are never accepted by Council.”* He said that he believed that the public objections were stirred up by opponents

of the Liquorland development itself and was part of “*scare tactics*” used by those opponents.

12. Mr Sutherland, the Administration Manager who had produced the report for the Planning Committee listing the letters and a petition which became “*Late Item A*” at the Planning Committee meeting, was present at and had a clear recollection of the meeting. He told the investigators that he considered the issue of a median strip in Sale Street as being a “*very minor matter*” in relation to the probability of it ever going ahead, because no decision had ever been made as to its size or location, so that if it ever went ahead it was a long way off. He said that he did not relate the letters of objection that had been received to the development application for 20 Sale Street and pointed out that in his report, Late Item A., he did not refer to 20 Sale Street and recommended to the meeting that the letters of objection “*be noted*”. When asked to explain the significance of the term “*be noted*” in Orange City Council circles, he said, “*That means no, that means in this Council no action is necessary.*” He later said, “*Certainly in the 20 years that I have been here the term ‘noted’ for this Council is very very clear and means just that.*” He explained that one of his roles as Administration Manager was, following a Council meeting, to issue an instruction on each and every item as to what staff members need to do and, he said, “*When I have a report noted it means that’s it. It’s finished.*”

With respect to the business before the Planning Committee meeting on 2 May 1994, Mr Sutherland said that the median strip suggestion was before the committee only as something referred to in a report. He said that there was no discussion at

the Planning Committee meeting on the issue of a median strip. He said, *"I recall it very clearly. It wasn't mentioned."* When his recollection was challenged by the interviewer, he said, *"Oh I think somebody said, 'This is a damn silly idea.' It just didn't get any credence. It didn't get any, it wasn't a goer."* He was later asked, *"And there was a very clear view amongst the Councillors that you recall hearing make comments about it that it definitely was not going to be something Council would consider?"* and he answered, *"That's how I recall it. I can recall that at the Planning Committee. At the Council meeting I don't recall, I can't recall it being discussed fullstop."*

13. Mr Allan Dwyer formerly Director of Corporate Services and General Manager of Orange City Council from July 1994 was present at both the Planning Committee meeting on 2 May 1994 and the subsequent Council meeting on 5 May 1994. He expressed strong views to the effect that a median strip in Sale Street was not on the agenda of those meetings and was not considered by the meetings. He said that the issue whether access should be permitted from Council's carpark to the Liquorland property was pretty volatile but the suggestion of a median strip in Sale Street was *"really only a suggestion from one committee to the other and was not, never, a serious issue anyway."* As to the bundle of letters of objection that were tabled before the Planning Committee, he said that they *"really weren't seriously individually considered at the Planning Committee meeting and they really, it was an issue that didn't really warrant close attention anyway because there was nothing for the Council to determine on it."* He was asked by the interviewer whether the installation of a median strip was an option relating to the approval of the 20 Sale Street

development application. He replied, *“No. It was never, it was never promoted as an option. It was a suggestion by the Traffic Committee that it be looked at, but I wouldn’t say it was ever promoted as a serious option I don’t think they would seriously consider that for a second.”* The interviewer then put it to Mr Dwyer that for the Council to come to that decision they must have considered the issue and he replied, *“Well it was suggested I think by the Traffic Committee but the practicality of such a thing is just preposterous. You are restricting your access to the Council’s major car park and then the egress to it so much that you will just cause, you would create havoc down there. The traffic congestion would be just such that you wouldn’t be able to cope with it.”* He was then asked whether he recalled any specific discussion at the Planning Committee on the issue of the median strip? He replied, *“Not specifically. I recollect that Councillor Niven acknowledged at the end of the meeting that when he was flipping through the bundle of separate papers that went out that his firm had actually sent a letter of some sort in, but he was unaware of that at the time and he made some comment about it being irrelevant anyway.”* In relation to Councillor Niven he made the further comment, *“But he was certainly of the impression, as we all were, that it really wasn’t an issue. I mean, as I said, it’s just preposterous to even think about it, the traffic congestion it would cause.”* With regard to the use of the word *“noted”* in relation to the report of the Manager Planning Approvals that was before the Planning Committee, his view coincided with that of Mr Sutherland that the word *“noted”* meant that the matter was not to be taken further. Mr Dwyer was asked whether he considered that the Council could just have ignored the issue of a median street altogether when

considering the development application with respect to 20 Sale Street. He replied, *"I am sure the Council didn't seriously consider the median strip. I mean they noted the recommendation from the officer and to me that wasn't the issue at all. I mean the issue was whether or not Liquorland, 20 Sale Street, should have access from Council's car park and the precedent that would set for future development of that site. But the median strip was really a totally different issue, totally."*

14. On the issue of what was the "matter" with which the Council was concerned at the time of the meetings in question, the question has to be asked, how did it come about that, if the installation of a median strip in Sale Street was not on the Council's agenda at the time of those meetings, there was a flood of letters as well as petitions involving more than 500 persons objecting to such a proposal received by the Council shortly before the meetings took place. According to the General Manager, Mr Dwyer, he found out by accident that it was all caused by an ex-staff member who had been employed in the Council's engineering section and had read the report to the Planning Committee on the development application for 20 Sale Street before the Business Paper went out. He said that this ex-staff member had relatives who owned a store in Sale Street and the ex-staff member coordinated all the opposition that Council received just prior to the meetings by ringing around and organising objections. Other Council officers who were interviewed also considered that the objections had been organised because a number of letters in identical terms had been received.

SUMMARY OF REASONS

The foregoing review of the material contained in the Director-General's report of his investigation serves to show that a finding that the installation of a median strip in Sale Street was "*a matter with which the Council was concerned*" and the meetings in question were "*meetings at which that matter was being considered*", within the meaning of section 451 of the Act, would be quite artificial. Whilst being a substantial issue in itself, it was peripheral to the real issue then before the Council to the point of having no prospects of being considered or dealt with by those meetings either in connection with the development application regarding 20 Sale Street or separately. In fact, in spite of the large body of objections from members of the public received on the question of a media strip, it was virtually disregarded by the meetings. It had only risen at all by way of a suggestion from the Traffic Committee which the report of the Manager Planning Approvals had dealt with by pointing out that it raised wider and different issues and, if it was ever to be considered, should be dealt with separately from the development application for 20 Sale Street presently before the Council for determination. It is apparent that both the Planning Committee and the Committee of the Whole Council took the same view. They merely "*noted*" the report and the objections to a median strip, which meant in Orange City Council that that issue required no consideration or decision by the meetings and no action by Council staff and they focused their whole attention on the development application for access from the Council's carpark to No. 20 Sale Street.

It could not be said that the question whether there should be a median strip in Sale Street did not come to the attention of the Councillors present at the meetings but, having regard to the way the question came up, it equally could not be said that it became a question for consideration or decision at the meetings.

The fact that there was a hullabaloo generated amongst those in the local community who would be affected if a median strip was installed appears to have resulted from an unfounded misapprehension by a member of the Council's staff that the matter was or would be on the agenda at the meetings at which the objections were directed. This was not and, as it turns out, was never likely to be the case.

The result is that, on the material in the Director-General's report, an essential ingredient of the operation of section 451, namely, the "matter" in which the alleged pecuniary interest exists being before the Council or Committee meeting for consideration or decision, is lacking in this case.

The Director-General has carried out a thorough investigation which leaves no reason to suppose that a hearing would produce any substantial evidence to the contrary of what has been stated in the above summary. For the reasons earlier given, it would appear, therefore, that the complaint that there was a breach by Councillor Niven of section 451 of the Local Government Act 1993 could not be substantiated. Accordingly, as mentioned already, the Tribunal has decided not to conduct a hearing.

LATE LODGEMENT BY COUNCILLOR NIVEN OF PECUNIARY INTEREST RETURN FOR PERIOD 1 JULY 1992 TO 30 JUNE 1993

A separate item in the complaint made by the Acting Director-General against Councillor Niven in this matter was that his pecuniary interest return for the period 1 July 1992 to 30 June 1993 was dated later than the lodgement date fixed by the legislation for such returns.

Section 449 of the Local Government Act 1993 requires Councillors to lodge with the General Manager within a fixed period a written return

disclosing their pecuniary interests and other matters as prescribed in the legislation. By virtue of section 449(3) and clause 53 of Schedule 7 of the Act the due date for the lodgement of a pecuniary interest return for the period ending 30 June 1993 was 31 December 1993. The complaint against Councillor Niven was that his return for that period was dated 19 January 1994. The Department's investigators added this apparent contravention of the Act to their other inquiries. The Director-General's report includes a report of the circumstances in which Councillor Niven's return came to be dated out time. For present purposes, it is sufficient to quote from the report:

"During preliminary inquiries it came to attention that Councillor Niven's Disclosure of Pecuniary Interests and Other Matters Return for the 1992-1993 year, due on 31 December 1993 was dated 19 January 1994. Councillor Niven indicated that he would have completed and lodged the return in accordance with the instructions of Council's staff, and felt that if it was late it was an administrative problem within the Council. He did acknowledge that the ultimate responsibility to lodge the return by the due date was his. Councillor Niven's version of events is consistent with information obtained during the investigation that follow-ups and forms issued by the staff to all Councillors were not provided prior to the due date. It is noted that during the Department's separate inquiries into other pecuniary interest issues the Council advised that the returns for the 1992-1993 year were forwarded to Councillors by the then General Manager by memo dated 7 January 1994. In this memo the General Manager advised the Councillors that the Returns 'Should have been completed within three months of the 30 June last year, but have been delayed pending the printing of new forms.'"

A copy of the General Manager's memo dated 7 January 1994 is contained in the present report to the Tribunal. It is addressed to all Councillors and it shows that the Councillors of Orange City Council were not provided by the Council's administration with the necessary forms or reminded of their obligations to lodge returns until a week after the date for lodgment had expired.

The investigators also ascertained that the returns of nine Orange City Councillors were, like Councillor Niven's, dated after 31 December 1993. In relation to those apparent contraventions the present report states:

“For the Tribunal’s information, issues arising from the non-lodgment of returns by other Councillors were considered separately by the Department of Local Government, and were the subject of correspondence with the Council on 19 June 1995 confirming that the Council had reviewed its procedures and reinforcing the seriousness of breaches of the legislation. It was decided not to proceed with a formal investigation under section 462(1) of the Act on the basis that remedial action was promptly taken once the administrative error was brought to attention.”

Councillor Niven completed his return within 12 days of the General Manager’s memo, ending up being only 19 days out of time with his return.

As the lateness of the General Manager’s memo contributed to Councillor Niven’s contravention, Councillor Niven promptly responded by rectifying the breach, numerous other Councillors were similarly affected and the Council’s administration undertook to establish remedial measures to prevent a repetition in the future, the Tribunal sees no reason in this case to pursue the matter further and will not conduct a hearing into this item of the present complaint.

However, it should be said that the apparent laxity on the part of the Orange City Council, its Councillors and administration that led to wholesale breaches by Councillors of the pecuniary interest requirements of the legislation at the time in question is disturbing as well as disappointing. The requirements of the Act for Councillors and others to provide, by lodging written returns, a public record of their pecuniary interests to which ratepayers and other concerned persons may have resort by inspection of the Register is one of the means adopted by the legislation to promote its objectives of honesty in the exercise of statutory powers and public

confidence in the integrity of local government. Further, the furnishing of returns within the stipulated time is a statutory obligation which Councillors and designated persons are legally bound to observe.

In these circumstances, Councils, Councillors, Council staff and other persons subject to the disclosure requirements of the Act must expect this Tribunal to take a serious view of contraventions. The fact that the current legislative provisions were new at 1 July 1993 when the present Act came into force is not a weighty excuse for laxity when the Act gave six months for the returns to be lodged against the more than ample three months for return periods subsequent to 30 June 1993.

The Tribunal has been advised by the Department that it has taken steps to have Councils tighten and make more effective their procedures for reminding Councillors of their statutory obligations in regard to pecuniary interests and assisting them to comply. The Tribunal is aware that a number of Councils have adopted such procedures. The ultimate responsibility rests upon each Councillor personally to ensure that he or she obeys the law but it is clearly in the public interest for Councils and Council administrators to provide effective support and encouragement to Councillors to perform their obligations in order to avoid the need for and the disruption and costs occasioned by the exercise of the investigative powers of the Director-General and the disciplinary powers of this Tribunal. The Department has reported to the Tribunal that the remedial measures introduced by the Orange City Council appear to have been successful. With the exception of one Councillor who was not re-elected at recent elections, all Councillors lodged their pecuniary interest returns for the 1994/1995 period well within the statutory lodgment date.

Pursuant to section 470 of the Act this Statement of Decision will be furnished to the Director-General as the complainant. Copies will be furnished to Councillor Niven and the Orange City Council.

DATED: 13 October 1995



K J HOLLAND Q.C.
Pecuniary Interest Tribunal