

MEMORANDUM

TO: Ann-Marie Mori
FROM: Nicholas Jessen
DATE: 19 April 2018
SUBJECT: **Animal and Bees Bylaw Review**

OVERVIEW

1. Thank you for your instruction. You seek advice regarding the lawfulness of provisions within the proposed Animals and Bees Bylaw ("**the Bylaw**"). The provisions would require owners to ensure that their cats are microchipped and registered and that cats over six months are de-sexed. These provisions would be additional to existing controls in the Bylaw including the limit of three cats on private land in the urban area.
2. This opinion has provided on an urgent basis. We wish to qualify our advice by noting that further time with the materials including further research material in relation to issues concerning cat proliferation, cat nuisance, and national and local strategy would be of further interest or potential influence to this advice. Because of time constraints we have reviewed the material provided to us and done further brief research on the issue.
3. A bylaw will be invalid if it is:
 - (a) Ultra vires;
 - (b) Repugnant to the general law;
 - (c) Unreasonable;
 - (d) Inconsistent with the Bill of Rights.
4. This advice considers the vires and the reasonableness of the rule, as they are identified by you as the primary grounds of uncertainty. We have not identified any particular concerns in relation to repugnancy with general law or inconsistency with Bill of Rights.
5. The background material you have provided identifies an issue relating to nuisance caused by cats. This nuisance is identified in the determination report and is also addressed by the SPCA. The controls in question appear to be targeted at reducing the population of cats with consequential reduction in cat related nuisance. Given the broadness of the empowering provisions in the Local Government Act 2002 ("**LGA**") we consider that the provisions in the bylaw are sufficiently within the scope of the LGA.

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6. There is a moderate risk that the provisions as drafted are unreasonable. In summary, the areas of general concern:
 - (a) The extent of the nuisance problem that is sought to be addressed by the proposed provisions does not appear to be thoroughly understood or quantified in the Palmerston North context;
 - (b) It is arguably unreasonable to impose a bylaw to regulate a nuisance problem that is loosely defined and where the efficacy of the bylaw cannot be measured and may be ineffectual;
 - (c) In light of (a) and (b) it is arguable that the proposed provisions may be disproportionate to the nature of the problem;
 - (d) The proposed controls do not relate to stray cats. Accordingly, as a corollary to the points above the proposed provisions may not reasonably target the nuisance.
7. The courts have adopted a high standard of unreasonableness when intervening on matters involving a degree of political judgment and complex assessments of economic, social and political assessment.¹ A Court will either quash a bylaw or amend it to the extent necessary to make it valid.²
8. We suggest that the Council ought to give further consideration to the extent to which the provisions are a reasonable response to the nuisance problem. The corresponding benefit of the bylaw should be proportionate to its infringement of a public right. It may require a consideration of potential amendments to the proposed provisions to reduce risk of legal challenge regarding reasonableness. See paragraph 23 below.

SUBSTANTIVE LIMITATIONS

Ultra vires

9. If a bylaw purports to regulate matters outside the scope of the relevant empowering provision, it is invalid or ultra vires. It is a matter of statutory interpretation to determine whether the bylaw is authorised either expressly or by implication by the relevant empowering provision.
10. The empowering provision for the cat clauses in the Bylaw is s 146(a)(v) of the LGA, which gives a territorial authority to make bylaw for the purpose of regulating the keeping of animals. Section 146 does not limit to the general bylaw making powers in s 145, which permits the making of bylaws for 1 or more of the 3 purposes provided. The cat clauses appear to have the purpose of protecting the public from nuisance but in equal measure satisfy s 146 because the provisions regulate animals.
11. The pre-drafting stage of the Bylaw indicated that there was a nuisance problem associated with cats in the city. The material provided indicates that the rising cat population and

¹ *Wellington City Council v Woolworths New Zealand (No 2)* [1996] 2 NZLR 537.

² Bylaws Act 1910, s 17.



potential for increased issues associated with an over-population of cats has given rise to a variety of nuisances.³

12. The empowering provisions of the LGA are broad, which has reduced the potential for claims that bylaws are ultra vires. It is our view that the bylaw is within the scope of s 146(a)(v).

Unreasonableness

13. The generality of the empowering provisions may increase the vulnerability of the bylaw to challenge for unreasonableness.⁴ If a bylaw or a provision of a bylaw is unreasonable, then it is invalid. The traditional approach to determining the reasonableness of a bylaw is set out in *Kruse v Johnson*.⁵

14. Bylaws are unreasonable if, they are found to be partial and unequal in their operation as different classes; if they [are] manifestly unjust; if they disclose bad faith; if they involve such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men...

15. The principles of *McCarthy v Madden*⁶ are typically cited in relation to unreasonableness:

- (1) The Courts will scrutinise bylaws which are not subject to Government or executive confirmation more closely than other bylaws;
- (2) The Courts should generally defer to the assessment of the local community through their elected representatives about what bylaws are appropriate for their area. However, the Courts must still assess the productive benefits and negative effects of a bylaw after taking the following matters into account:
 - (a) the surrounding facts (such as the nature of the locality and the situation or "perceived problem" the bylaw is designed to remedy);
 - (b) whether or not public or private rights are unnecessarily or unduly infringed.
- (3) A bylaw which affects a "public right" common to all people (such as the right to use roads for traffic purposes) will be scrutinised more closely than a bylaw which only affects the rights of the people within the local community:
 - (a) a bylaw which regulates public rights must take into account the existing general legislation regulating those rights;
 - (b) a bylaw which infringes public rights without producing a corresponding benefit to the local community will generally be unreasonable;

³ Ann-Marie Mori "Summary of Options Analysis For Draft Animals and Bees Bylaw Consultation" (Agenda of Planning Strategy Committee, 2 October 2017) at 5.1.1.

⁴ Dean Knight "Power to make bylaws" (2005) NZLJ 165.

⁵ [1898] 2 QB 91.

⁶ [1914] 33 NZLR 1251.

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- (c) a bylaw which affects a public right common to people throughout different local authority districts must take account of or be harmonised with bylaws in surrounding districts.

16. *Police v Hall*⁷ is a case where a bylaw was struck down despite being intra vires. The Council had a bylaw to restrict drinking in public places (under previous powers). The Court determined that the bylaw was ineffectual against the hard core of unruly youths it was designed to combat and that the benefits would not outweigh its negative effects.
17. Although there is a high standard of unreasonableness before a Court will interfere, we consider that a court is likely to take a more rigorous approach to reviewing bylaw restrictions which more greatly interfere with rights.

Analysis

18. Our concern with the bylaw as drafted principally relate to the requirement for mandatory desexing. This provision is towards the extreme end of the spectrum in terms of controls possible within bylaws and is likely to invite intense scrutiny as a consequence. In these circumstances, it would be appropriate that the Council is basing its decision on clear link between the nuisance that is sought to be addressed and the effect of the proposed control. We are not convinced that the information demonstrates how or whether the proposed control would effectively control the nuisance problem.
19. It is not clear on the information available what proportion of domestic cats older than 6 months in Palmerston North are desexed. The New Zealand Cat Management Strategy indicates that 93% of *companion cats* are desexed. I am not aware of local data, however if the figure holds, given the application of the bylaw only to owned cats then the effect of the control to reduce cat populations may be negligible .
20. It is not clear on the information whether the nuisance problem arises from the behaviour of domestic or stray cats. Indeed, a telling statement from the Agenda dated 2 October 2017 is that “...*the scale of the nuisance problem is largely unquantified.*”⁸
21. Information suggests that cat behaviour that appears to be the targeted nuisance, for example excrement, fighting and noise are normal behaviours. Insofar as the Bylaw relates to domestic cats, it is not clear that the desexing requirement would lead to a reduction in these nuisance events aside from the generalised theory that less cats equals less nuisance.
22. A requirement for mandatory desexing of all domestic cats without any qualification is an onerous requirement. That in itself is not a concern but we consider it does expose the council to greater risk of challenge and in these circumstances it would be prudent to establish a clear cause and effect link between the proposed control and the nuisance problem as well as the corresponding benefit to the community. For the purpose of determining reasonableness of a provision, the proportionality of the interference with a public right with the benefit resulting to the community will be highly relevant.

⁷ [2001] DCR 239.

⁸ Above n 2, at 5.1.1.3.

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23. We are aware that other councils are looking into the issue of cat control by bylaws or other methods. The Wellington City Council bylaw was introduced with a microchipping requirement similar to what is proposed here. A benefit of microchipping is to provide the Council with a greater base of information in relation to the extent of the problem and relative contributions to the problem by feral and domestic cats. It may also assist the SPCA in its functions as the lead animal welfare agency to determine with ease whether animals are owned or stray. This information may also be helpful as a means of informing future decision-making and targeted regulatory or non-regulatory controls.
24. Ultimately, whether the provisions are unreasonable or not will be a question of fact that will need to be determined by a Court. There would appear to be several options available to the Council as a means of reducing the legal risk addressed above. While certainly not proposed as a conclusive list of options, any of the following may help:
- (a) Remove the desexing requirement from the Bylaw and proceed with a microchipping requirement as an interim measure and to assist the SPCA and possibly with collection of information. I understand that no operational processes have been prepared or considered in relation to mandatory microchipping requirements which suggests that this is a premature control until such resourcing and operational decisions have taken place;
 - (b) Remove both proposed controls i.e. microchipping and desexing and await further national guidance or regulation. If regulations arise then certainly it demonstrates *reasonableness*, however it would at the same time render bylaws for the same purpose redundant. I understand that Whangarei District Council has recently adopted this approach;
 - (c) Amend the proposed controls to make them less onerous, for example, so that they apply only to *new cats*. This provision may have an equivalent effect over a longer time period (i.e. the lifespan of a cat) but ultimately would be just as onerous. We suggest that this option, while less onerous on existing cat owners, would also be as a consequence less effective.
 - (d) Alternatively, the Council could leave the provisions in as drafted and debate the provisions further. If this is a preferred option, we suggest further work and time is spent on detailed research and analysis of the proposed problems so that it can be accurately articulated and therefore reduce risk if the provisions are subsequently adopted.
25. Finally, we invite the Council to consider the enforceability of the proposed controls. It is not clear that the Council has a clearly established means of compelling compliance with the proposed provisions or otherwise has the systems planned and funded to support implementation of the Bylaw.
26. Addressing the risk in its totality, we consider there are concerns with the provisions such that we consider there is a moderate legal risk. Consequences of a successful legal challenge would be that the specific provisions would be amended or removed.

27. We would be happy to consider or discuss further options to address potential unreasonableness. Our preliminary view is that in light of the factors above, it may simply be slightly premature to impose such mandatory requirements.

Yours faithfully

CR LAW



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