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Our ref: 1014621

12 May 2016

Myfanwy Emeny
Team Leader Parks, Sports & Recreation
Wellington City Council
By email

Dear Myfanwy

BYLAW REGULATING CATS HARMING NATIVE WILDLIFE

Introduction

- 1 You have asked for our advice on whether Council has the power to regulate cats to protect native wildlife. More specifically, you have asked for our advice on whether:
 - 1.1 Council can create a bylaw to regulate cats for the purpose of lessening their impact on native wildlife;
 - 1.2 A cat harming wildlife can constitute a public nuisance; and
 - 1.3 A definition of public nuisance within the Bylaw has any effect on whether a cat harming wildlife can constitute a public nuisance?
- 2 Our previous advice, dated 29 February 2016, addresses the ability of Council to regulate cats more generally through Bylaws. We do not repeat that advice and instead attach it as Appendix 1 and we cross reference it where relevant.

Overview

- 3 In summary, our views are:
 - 3.1 Council has the power under section 146(a)(v) of the Local Government Act 2002 (**LGA 2002**) to regulate the keeping of cats through a Bylaw. That is a broad power and we consider it includes regulating cats for the purpose of protecting wildlife. This is subject to the section 155 test being met under the LGA 2002 and the usual

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requirements for making a Bylaw (validity, certainty, reasonableness, etc).

3.2 There is uncertainty over whether a cat harming wildlife can constitute a public nuisance for the purpose of section 145 of the LGA 2002. However, as we consider Council has the power to regulate the keeping of cats under section 146(a)(v) of the LGA 2002 for the purpose of protecting wildlife, we have not considered whether a cat killing wildlife can constitute a nuisance any further, as the Council does not need to rely on the nuisance provision.

3.3 A definition of nuisance under the Bylaw cannot extend the meaning of nuisance outside of what is covered by section 145 of the LGA 2002.

4 The reasons for these views are set out below.

Empowering provisions

5 Council has bylaw-making powers under section 145 of the LGA 2002:

A territorial authority may make bylaws for its district for 1 or more of the following purposes:

- (a) protecting the public from nuisance;
- (b) protecting, promoting, and maintaining public health and safety;
- (c) minimising the potential for offensive behaviour in public places.
(our emphasis)

6 Council also has specific bylaw-making powers under section 146 of the LGA 2002:

Without limiting section 145, a territorial authority may make bylaws for its district for the purposes—

- (a) of regulating 1 or more of the following:
 - (v) keeping of animals, bees, and poultry:
(our emphasis)

7 We have not located any other relevant empowering provisions.

Keeping of animals

8 Council has the power to regulate the keeping of cats under section 146(a)(v) of the LGA 2002.¹ The scope of that power is that Council can regulate the owning and managing (ie keeping) of cats. Where people choose to keep a cat, the Council can place a constraint on that activity.² However, the constraint cannot lead to a prohibition of keeping cats as you are only empowered to *regulate* the keeping of cats.³

9 In our view this means the Council does have the power (under section 146(a)(v) of the LGA 2002) to place constraints on the keeping of cats through a Bylaw, where the purpose

¹ Appendix 1, paragraph [42].

² Appendix 1, paragraph [42] - [44].

³ Appendix 1, paragraph [45].

of the constraint is to protect wildlife. The reason for this is that the wording of section 146(a)(v) of the LGA 2002 is very broad and there are no express restrictions on why (or for what purpose) cats can be regulated.

- 10 Any Bylaw created under section 146(a)(v) of the LGA 2002 will have to meet the section 155 test in the LGA 2002 and comply with the usual requirements for a Bylaw (validity, certainty, reasonableness, etc) as set out in our previous advice.⁴
- 11 Council also needs to be careful that the proposed restriction actually addresses the identified problem. For example, if the problem is cats killing wildlife, a Bylaw requirement to microchip cats is unlikely to address the identified problem.

Protecting the public from a nuisance

- 12 You have also asked whether cats harming wildlife can constitute a public nuisance. This is relevant because Council has the power under section 145 of the LGA 2002 to make a Bylaw to protect the public from nuisance.
- 13 Nuisance is not defined under the LGA 2002. However, the tort of public nuisance is defined as a wrong against the public, consisting of conduct that creates an unreasonable interference with the comfort and convenience of a section of the public.⁵ Some example of Bylaws that have been held to address nuisance include:
- 13.1 A Bylaw restricting the singing in public places to the annoyance of neighbours.⁶
- 13.2 A Bylaw restricting stock-droving on certain roads.⁷
- 13.3 A Bylaw prohibiting the occupation or camping in a public place without lawful authority.⁸
- 14 In our view, there is uncertainty whether a cat harming wildlife can constitute a nuisance to a person under the LGA 2002:
- 14.1 There is uncertainty whether a cat can be the perpetrator of a nuisance as a nuisance usually involves a positive act by a person; and
- 14.2 This is further complicated by considering whether the removal of something (in this case native wildlife) can constitute a nuisance. A nuisance generally requires a positive action / effect on a person as opposed to the absence of something (in this case wildlife).

⁴ Appendix 1, paragraphs [53] - [68].

⁵ S Todd and others *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at 510.

⁶ *Kruse v Johnson* [1989] 2 QB 91

⁷ *Waipa DC v Russo* [1993] DCR 97

⁸ *Auckland Council v Occupiers of Aotea Square, Auckland Central DC* Auckland CIV-2011-404-2492, 21 December 2011

- 15 This raises some doubt on whether Council could rely on section 145 of the LGA 2002 to regulate cats for the purpose of protecting wildlife and leave the Bylaw open to challenge. However, as we consider that Council has the power (under 146(a)(v) of the LGA 2002) to regulate the keeping of cats, for the purpose of protecting wildlife, we have not considered this question further.
- 16 Please advise if you would like further advice on this matter.

The definition of nuisance under the Bylaw

- 17 You have asked whether the definition of nuisance within the Bylaw could have any effect on whether a cat harming wildlife can constitute a public nuisance.
- 18 The short answer is no. The key issue is what 'nuisance' means in section 145 of the LGA 2002. A definition in the Bylaw cannot go beyond the scope of the empowering provision. This is because Council can only make a Bylaw if it is empowered to do so under statute. A definition in the Bylaw cannot expand the meaning (although it can limit the breadth of what nuisance is controlled by the Bylaw).
- 19 As stated above, there is uncertainty whether cats killing wildlife can constitute a 'nuisance' under section 145 of the LGA 2002. On that basis, a definition in the Animal Bylaw cannot state that a cat killing wildlife could constitute a nuisance. Accordingly, a definition of 'nuisance' under the Bylaw would not help determine whether a cat harming wildlife is a nuisance.
- 20 If you have any questions, please contact us.

Yours sincerely



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APPENDIX 1 — PREVIOUS ADVICE



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29 February 2016

Jessica Clarke
Graduate Advisor
Wellington City Council
By email jessica.clarke@wcc.govt.nz

Dear Jessica

REGULATING CATS

- 1 We understand that Council are currently reviewing the Wellington City Council Consolidated Bylaw 2008 (Part 2: Animals) (**Bylaw**). As part of the review, the Council is considering the regulation of cats.
- 2 You have asked for our advice on Council's ability to regulate cats, more specifically:
 - 2.1 Whether Council can regulate domestic and feral cats on reserves under the Reserves Act 1977 (**Reserves Act**);
 - 2.2 Whether Council can regulate cats specifically on a reserve, by creating a bylaw under section 146(a)(v) of the Local Government Act 2002 (**LGA**), or would the bylaw need to refer to animals more generally;
 - 2.3 Whether Council can establish the following constraints on domestic cats under its bylaw:
 - 2.3.1 Requiring domestic cats to be microchipped and wear a collar;
 - 2.3.2 Limiting the number of domestic cats a household may own;
 - 2.3.3 Mandatory de-sexing, except for registered cat breeders;
 - 2.3.4 Mandatory registration.
- 3 We discuss these issues below.

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OVERVIEW

- 4 In summary, our views are:
- 4.1 Council do not have the power under the Reserves Act to require cats on a reserve to be identifiable. They do however have recourse if cats found on the reserve are not identifiable under the Reserves Act.
 - 4.2 Council could advertise this ability by stating that cats are required to be easily identifiable and that if a cat is not wearing a collar and/or have a microchip then a cat found on a reserve may be seized and disposed of if there is no reputed owner.
 - 4.3 Council can seize cats that trespass on a reserve. Cats that do not have a reputed owner can be seized, sold, destroyed or otherwise disposed of by Council. If a cat does have a reputed owner, then the Council must first advertise the cat in the newspaper once a week for two weeks (in accordance with the requirements in section 96 of the Reserves Act) and then the cat can be sold, destroyed or otherwise disposed of.
 - 4.4 When making a bylaw under section 146(a)(v) of the LGA in relation to a reserve, the bylaw can refer to cats specifically. It does not have to apply to all animals.
 - 4.5 We consider that all the constraints outlined in paragraph 2.3 above can be imposed by Council, in principle, under section 146(a)(v) of the LGA on the basis that all the constraints are concerned with regulating the owning and managing of cats. We also note that there is an additional bylaw making power under section 145 of the LGA, if Council considers that there is a nuisance and these constraints are to address that nuisance.
 - 4.6 Any bylaw would need to comply with the general principles associated with the creation of a bylaw, as well as the procedural requirements.
- 5 The reasons for our views are set out below.

POWER TO REGULATE CATS UNDER THE RESERVES ACT 1977

- 6 Council has power to prosecute people for allowing or causing animals to trespass on a reserve without permission under section 94 of the Reserves Act 1977.
- 7 Section 94 provides:
- (1) Every person commits an offence against this Act who, without being authorised (the proof of which shall be on the person charged) by the Minister or the Commissioner or the administering body, as the case may require,—
 - (b) causes or allows any cattle, sheep, horses, or other animals of any kind whatsoever to trespass on any reserve; or

8 The first issue is whether the term 'animal', as used in section 96 of the Reserves Act, includes cats. Animal is defined in section 2 of the Reserves Act as:

any mammal, bird, reptile, amphibian, fish (including shellfish) or related organism, insect, crustacean, or organism of every kind; but does not include a human being. .

9 In our view, the definition is wide enough to include cats. Accordingly, Council does, in principle, have the power to prosecute people for causing or allowing their cat to trespass on a reserve.

10 The difficulty with section 94(1)(b) is that Council would have to establish, beyond reasonable doubt, that a person has 'caused' or 'allowed' a cat to trespass on a reserve. There needs to be some link between the actions of the cat and the actions of the person who is prosecuted. To establish that a person 'caused' a cat to trespass on a reserve Council would require proof that a person either took a cat onto the reserve or actively encouraged a cat to trespass on a reserve (eg calling it onto a reserve). In relation to what is required to establish that a person 'allowed' a cat to trespass on a reserve, the High Court in *Turner v South Taranaki District Council* was required to interpret the term 'allow' in the context of an offence provision under the Dog Control Act 1996.¹ Miller J stated:²

The phrase "must not allow" carries the action. Like its synonym "permit", "allow" in its ordinary meaning implies knowing action. The cases are divided, however, on whether it imports *mens rea* at all, and if so what sort of knowledge the prosecution must prove. Most depend very much on the statutory setting. I will not survey the cases. The proposition I draw from them is that in a regulatory setting such as this one, "allow" normally connotes actual knowledge of what is being allowed (or wilful blindness), which is tantamount to acquiescence. Mere negligence will not do. The prosecution must establish such knowledge if the defendant puts it in issue.

11 To establish that a person 'allowed' a cat to trespass on a reserve, Council would need to prove beyond reasonable doubt that a person knew that a cat was trespassing on a reserve and did not take steps to prevent it. In our view, Council would generally face great difficulty establishing this element as it requires a degree of control. Cats, by nature, roam freely. When a cat is outside, an owner does not generally know where a cat is at any given moment. It is also more difficult to establish this element with a cat, as opposed to most other animals (eg a grazing horse or a dog). This is because there are currently almost no restrictions on what an owner must do or not do with a cat.³ This is contrasted with a dog where there are specific restrictions on a dog control owner. For example an owner must ensure that a dog is under control at all times.⁴

12 However, this does not mean that Council cannot rely on this provision. If Council could establish the elements beyond reasonable doubt then it could undertake a prosecution under section 94 of the Reserves Act. An example of when Council may be able to establish the

¹ *Turner v South Taranaki District Council* [2013] NZAR 1046.

² At [39].

³ There are still some restrictions, for example an owner must not allow to cause a nuisance under the Health Act 1957. But these restrictions will only be relevant in extreme circumstances.

⁴ Dog Control Act 1996, s 5.

- element is if an owner was told that their cat was trespassing on a reserve. If the cat continued to trespass, then the Council may be able to establish that the owner 'allowed' the cat to trespass.
- 13 In any event, Council has the power to seize cats that trespass on a reserve, in certain circumstances.
- 14 The Council has the power to seize animals trespassing on a reserve under section 96 of the Reserves Act, if it is an administering body of that reserve. Section 96(1) of the Reserves Act deals with cats that have no reputed owner and provides:
- (1) All cattle, sheep, horses, or other animals of any kind whatsoever which are unbranded and have no reputed owner and are found trespassing on a reserve—
 - (a) may be seized by any person generally or specifically authorised in writing in that behalf by the administering body of the reserve or, if the reserve is not under the control and management of an administering body, by any person similarly authorised by the Commissioner; and
 - (b) shall thereupon be deemed to be forfeited to the administering body or the Crown, as the case may be, and the administering body or the Commissioner may cause them to be destroyed, sold, or otherwise disposed of as it or he or she thinks fit.
- 15 Section 96(2) of the Reserves Act deals with cats that have a reputed owner and provides:
- (2) Where cattle, sheep, horses, or other animals of any kind whatsoever which are branded or which have a reputed owner are found trespassing on a reserve,—
 - (a) the administering body of the reserve or, if the reserve is not under the control and management of an administering body, the Commissioner may issue once a week for 2 consecutive weeks, in some newspaper circulating in the locality, a notice calling on the owner or reputed owner to remove the cattle, sheep, horses, or other animals from the reserve, or from any other place to which they may have been transferred pending their removal by the owner or their disposal pursuant to the provisions of this subsection, and giving warning that if they are not removed within 14 days from the date of the first notice they will be destroyed, sold, or otherwise disposed of; and
 - (b) if any such cattle, sheep, horses, or other animals are not removed within the time mentioned in the notice, the administering body or the Commissioner, as the case may be, may cause them to be destroyed, sold, or otherwise disposed of, and no liability shall attach to the administering body or the Crown or the Commissioner or any other person for any damage occasioned thereby.
- 16 The crucial issue is what is required for a cat to 'trespass' on a reserve. We address this concept further below.
- 17 Following seizure of a cat, the Council has different powers depending on whether the cat has a 'reputed owner' or not.

Trespass

- 18 Trespassing is not defined in the Reserves Act.
- 19 There are different uses of the word 'trespass'. In the civil context (ie the tort of trespass) trespass is defined as:⁵
- The civil wrong of trespass consists of setting foot on the land of another, or remaining there, without that other's permission, express or implied, unless there is some other legal justification for doing so.
- 20 There is also the criminal use of trespass under the Trespass Act 1980, which means:⁶
- Entering or remaining on the land of another without that other's authority, express or implied.
- 21 However, the concept of trespass in the civil and criminal context generally applies to a person. In terms of section 96 of the Reserves Act, the section clearly applies to animals. On that basis, the above definitions do not apply.
- 22 It is commonly understood that trespass means to go onto someone's land without permission.⁷
- 23 The Reserves Act gives people the express power to enter a reserve unless that right is prohibited or restricted.⁸ This statutory right does not extend to animals. On that basis, unless Council specifically allows cats to enter a reserve, they would trespass if they enter a reserve.

Reputed owner

- 24 Council have different powers depending on whether the cat has a reputed owner or not.
- 25 Reputed owner is also not defined in the Reserves Act. The term 'reputed' is defined in the New Zealand Oxford Dictionary as:
- Passing as being, but probably not being.
- 26 In our view, 'reputed owner' means the person who supposedly or allegedly owns the cat, but may not be the legal owner. Accordingly, the term reputed owner means that if Council has a reasonable belief that a cat has an owner (ie that it is not feral) then it will have a reputed owner. For example, if the cat had a microchip or a collar, that would be enough to establish the cat has a reputed owner. If there is no microchip or collar then the cat may well have an owner but the Council will have no means of identifying them. In which case, Council are entitled to treat the cat as if it has no reputed owner, unless there something else

⁵ *Wilcox v Police* 10 CRNZ 704 at 706.

⁶ *Wilcox v Police* 10 CRNZ 704 at 708.

⁷ This is the common usage as defined in the *Collins English Dictionary* (HarperCollins Publishers, 2006) at page 948.

⁸ See sections 17 - 23 of the Reserves Act.

to put it on notice. For example, a person tells the Council that the cat is owned by John Smith.

Consequences

27 Where a cat does not have a reputed owner then a person specifically authorised in writing by the Council, can seize a cat trespassing on a reserve. The cat, is then deemed to be forfeited to the Council and the Council can cause the cat to be destroyed, sold or otherwise disposed of as it thinks fit.

28 Where a cat does have a reputed owner section 96 of the Reserves Act does not provide that Council can seize cats (as it does when a cat does not have a reputed owner). In relation to the powers that the Council does have, section 96(2) provides:

a notice calling on the owner or reputed owner to remove the cattle, sheep, horses, or other animals from the reserve, or from any other place to which they may have been transferred pending their removal by the owner

29 It is arguable that the power to seize a cat is implied from this section. However, there is a risk that Council do not have the power to seize cats where there is a reputed owner. It is clear that Council could use this section to tie a horse to a gate or to move the horse to another property. However, there is some uncertainty that this applies to seizing a cat, and by implication, detaining a cat (eg putting it in a cage). The distinction is important, because if Council do not have the power to seize a cat (including detaining the cat in a cage), then the section becomes unworkable as the cat can wander freely and Council cannot detain a cat. It is clear that the section does apply to cats and on that basis, the power to seize a cat can be read into the section.

30 In addition, Council is required to take further steps before the disposal of a cat with a reputed owner. The Council can remove a trespassing cat from the reserve or keep it on the reserve. The Council may issue a notice in a local newspaper, once a week for two weeks, calling on the owner or reputed owner to remove the cat from the reserve or other place where the cat has been transferred. The notices must warn that if the cat is not removed within 14 days from the date of the first notice, that the cat will be destroyed, sold or otherwise disposed of by the Council.

31 Following publication of two notices, if the cat is not removed within the required timeframe, then Council can cause the cat to be sold, destroyed or otherwise disposed of.

32 While section 96 of the Reserves Act does not empower Council to require cats to be easily identifiable on reserve land (ie a collar and/or microchip), the section does provide an enforcement mechanism if cats are not easily identifiable. Council could advertise that cats are required to be easily identifiable and that if a cat is not wearing a collar and/or have a microchip, the cat may be seized and disposed of unless a reputed owner can be identified. This may have the effect of people micro chipping, or otherwise making cats identifiable.

Bylaw

33 For completeness, we note that in addition to these powers, Council can make a bylaw under section 106(1)(b) of the Reserves Act for:

The exclusion of horses, dogs, or other animals therefore, and their destruction if intruding therein.

- 34 This section empowers the Council to specifically exclude cats from entering a reserve by way of a bylaw. Based on our conclusions above, we consider that cats are already excluded from a reserve (unless expressly allowed). Therefore going through a bylaw making process, to exclude cats from a reserve, is redundant.

Section 146(a)(v) of the Local Government Act 2002

- 35 You have asked whether Council can regulate cats on reserves, by creating a bylaw under section 146(a)(v) of the LGA, without the need for the bylaw to refer to animals more generally.

- 36 Section 146(a)(v) of the LGA provides that a territorial authority may make bylaws for its district for the purposes of regulating the:

Keeping of animals, bees, and poultry.

- 37 'Animal' is not defined in the LGA. In our view, the term 'animal' is wide enough to include cats. This is supported by Supreme Court case (equivalent to the current High Court) of *Wilton v Mount Roskill Borough Council* which considered the validity of a bylaw that regulated the maximum number of cats that could be kept without a licence.⁹ One of the empowering provisions relied on was section 286 of the Municipal Corporation Act 1954 (now repealed) which was similar to section 146(a)(v) of the LGA:

'regulating or licencing the keeping within the district of any animals, reptiles, birds or bees....

- 38 In that case, the word animal was held to include cats.

- 39 On that basis, when making a bylaw under section 146(a)(v) of the LGA, the bylaw can refer to cats on reserves (or just cats) specifically. There is no requirement to regulate all animals.

POWER TO ESTABLISH CONSTRAINTS ON CATS

- 40 You have asked whether Council can establish the following constraints on domestic cats under its bylaw:

- 40.1 Requiring domestic cats to be microchipped and wear a collar;
- 40.2 Limiting the number of domestic cats a household may own;
- 40.3 Mandatory de-sexing, except for registered cat breeders;
- 40.4 Mandatory registration.

- 41 There are three key considerations for Council to consider:

⁹ *Wilton v Mount Roskill Borough Council* [1964] NZLR 957.

- 41.1 First, whether the constraints fall within the ambit of the relevant empowering provisions.
- 41.2 Secondly, what other considerations could invalidate the bylaw.
- 41.3 Thirdly, ensuring there is a robust process.

Empowering provisions

42 Section 146(a)(v) of the LGA empowers Council to make bylaws for the purpose of regulating the keeping of animals, bees and poultry. As cats are animals, Council can regulate the keeping of cats. In light of the above, we consider what the terms 'keeping' and 'regulate' mean.

43 'Keeping' is not defined in the LGA. However, 'keeping' is defined in the Shorter Oxford English Dictionary as:¹⁰

The action of retaining as one's own; the owning and managing of animals, a business etc.

44 On that basis, Council can regulate the owning and managing (ie keeping) of cats. In other words, where people choose to own a cat, Council can place constraints on that activity. In terms of how far those constraints go, we turn to consider what 'regulate means'.

45 'Regulate' is not defined in the LGA. However, there is a distinction between regulating an activity and prohibiting an activity. *Constitutional and Administrative Law in New Zealand* provides:¹¹

A delegated authority to regulate, administer, manage or control and activity does not permit a total or substantial prohibition of that activity.

46 Accordingly, Council can regulate the keeping/owning of cats, but cannot cause a total or substantial prohibition of the keeping/owning of cats.

47 We address each constraint below:

- 47.1 Council can require owners to microchip their cats and to ensure that cats wear a collar, as the constraint is involved with the regulating of the keeping of cats and does not result in the prohibition of owning cats.
- 47.2 In relation to limiting the number of cats, this provides a partial prohibition of the owning of cats. However, as it does not provide a substantial or total prohibition, in our view, Council can impose this constraint. In addition, Palmerston North District Council has a bylaw limiting the number of cats. Clause 8.1 of the Palmerston North Animals and Bees Bylaw 2011 provides:

¹⁰ *Shorter Oxford English Dictionary* (5th ed, Oxford, New York, 2002) at page 1485.

¹¹ PA Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014).

No person may keep more than three cats on any private land with an area less than 2,000m² in the urban area without a permit issued under this Bylaw.

- 47.3 Council can require owners to de-sex their cat/s, as the constraint is involved with the regulating of the keeping of cats (ie the type of cat that can be kept — de-sexed) and does not result in the prohibition of owning cats.
- 47.4 Council can require owners to register their cat/s as the constraint is involved with the regulating of the keeping of cats and does not result in the prohibition of owning cats.

Additional power — section 145 of the LGA

- 48 We also note that Council has the power under section 145 of the LGA to make bylaws for its district for the purpose of:

Protecting the public from nuisance.

- 49 To rely on section 145 of the LGA, Council has to establish that cats are creating a nuisance and the bylaw is to address the nuisance. The word nuisance, as used in section 145 could include both nuisances in the popular sense and also a nuisance in the legal sense of a private or public nuisance as a cause of action.¹²

- 50 The frequently cited case on nuisance is *Kruse v Johnson* [1898] 2 QB 91, where the Court upheld a bylaw prohibiting singing in public places to the annoyance of neighbors.¹³ Lord Russell CJ stated that the courts should support where possible the intentions of the local authority. When considering an allegation based on unreasonableness, the court should be cautious. A bylaw would not be unreasonable merely because particular Judges thought it could go further than what was prudent, necessary or convenient or did not have some qualification or exception which the judge thought ought to be there. However, the Court held that a bylaw would still need be reasonable, vires etc.

- 51 Accordingly, if Council considers that cats are creating a nuisance then a bylaw could be created to address that nuisance. There must be some link between the bylaw and the nuisance it is intending to address.

- 52 In our view, section 145 of the LGA does not open up any further constraints on cats than can be imposed under section 146(a)(v). However, a bylaw can be made under more than one empowering provision and both sections 145 and 146(a)(v) of the LGA could be cited if the bylaw is intended to address a nuisance.

Validity of bylaw

- 53 Even if the constraints fall within the empowering provisions, there are other validity considerations that can cause a bylaw to be invalid. We discuss these below.

¹² Local Government Act 2002 (online looseleaf ed, Brookers) section 145.

¹³ As cited in Local Government Act 2002 (online looseleaf ed, Brookers) section 145.

54 Section 17 of the Bylaws Act 1910 provides:

Part of bylaw only may be deemed invalid

If any bylaw contains any provisions which are invalid because they are ultra vires of the local authority, or repugnant to the laws of New Zealand, or unreasonable, or for any other cause whatever, the bylaw shall be invalid to the extent of those provisions and any others which cannot be severed therefrom.

55 There are four possible validity issues that could be encountered in implementing the bylaw:

55.1 Repugnancy;

55.2 Reasonableness;

55.3 Consistency with the New Zealand Bill of Rights Act 1990 (**NZBORA**); and

55.4 Certainty.

Repugnancy

56 A bylaw will be invalid if it is 'repugnant' to another law of New Zealand. A finding that a bylaw is 'repugnant' requires more than proof that the bylaw deals with a matter covered by statute or a right recognised at common law.

57 However, where a bylaw purports to alter a fundamental rule of common law, specific statutory authority may be required.¹⁴ Domestic animals are personal property. The common law principle of absolute ownership of personal property is a significant one. As such, a bylaw which interferes with absolute property rights could be deemed invalid by reason of repugnance.

58 Furthermore, the legal status of domestic animals as personal property may create issues of repugnance with specific legislation, for example, criminal offences for intentionally destroying personal property.¹⁵

59 However, the Council already has a bylaw in place which enables it to seize and impound personal property, including domestic animals. For example, Part 2 of the Bylaw states:

3.1.4 All animals, other than domestic/owned cats, found at large and not within their owner's property may be seized and impounded by an authorised officer.

3.1.5 The Council may sell, re-home or otherwise dispose of, any animal seized and impounded under clause 3.1.4 that has not been claimed or returned within 7 days after it was seized and impounded.

¹⁴ See *Northcote Borough v Standard* (1970) 13 MCD 43 (MC), in which a bylaw relating to the control of dogs purporting to place the onus of proof on a defendant was held invalid as repugnant to common law principles.

¹⁵ See sections 269(1) and 269(2)(a) of the Crimes Act 1961.

Reasonableness

- 60 A bylaw may be declared invalid so far as its provisions are unreasonable. The test for reasonableness considers a number of factors, but most importantly in this case:
- 60.1 As the bylaw may seek to interfere with a right common to many members of the public, it will be more closely considered for reasonableness than bylaws affecting more particular activities.
- 60.2 Existing general legislation on domestic cats (being the subject of the bylaw) will be closely considered to assess the bylaw's reasonableness.¹⁶
- 60.3 An assessment of reasonableness will also closely examine the benefit(s) of the bylaw.

Consistency with the NZBORA

- 61 A bylaw will be invalid if it is inconsistent with the NZBORA. If a bylaw prima facie breaches a right or freedom under the NZBORA, it is only consistent with the NZBORA if it is a 'reasonable limit' on that right 'demonstrably justified in a free and democratic society'.
- 62 There is one right under the NZBORA which could be breached by a bylaw implementing the proposal. Section 21 of the NZBORA provides:

Unreasonable search and seizure

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

- 63 As the proposed bylaw could involve the seizure, impounding, examination and possible euthanasia of personal property, it would need to be shown that the bylaw places only a reasonable limit on the right provided by section 21 which can be demonstrably justified in a free and democratic society.

Certainty

- 64 A bylaw will be invalid if it is not certain and positive in its terms. A bylaw must provide a clear statement of the course of action to be followed or avoided.
- 65 The certainty of a bylaw implementing the Proposal will necessarily depend on its wording, process and controls, and (as noted above) would be best addressed at a later stage.

Conclusion on invalidity

- 66 We do not have information as to the need for these bylaws. Any outcome as to the validity will depend on the necessity for these measures. The analysis of these matters can be undertaken in more detail once the proposal is developed further.

¹⁶ For example, the Animal Welfare Act 1999, and the Animal Welfare (Companion Cats) Code of Welfare 2007.

67 In addition, to any consideration on the validity of a bylaw, any bylaw process must also be robust as it is also subject to challenge.

Process for making a bylaw

68 You will be familiar with the bylaw process, but generally:

68.1 Section 155 of the LGA provides that before commencing the process for making a bylaw, the Council must determine whether a bylaw is the most appropriate way of addressing the perceived problem. Logically, this requires:

68.1.1 Identifying what the perceived problem is;

68.1.2 What the options are for addressing it; and

68.1.3 Determining whether or not a bylaw is the most appropriate way of dealing with that problem.

68.2 If the Council determines that a bylaw is the most appropriate way of addressing the perceived problem, then it must determine whether the proposed bylaw:¹⁷

68.2.1 Is the most appropriate form of bylaw; and

68.2.2 Gives rise to any implications under the NZBORA.¹⁸

69 Having considered these matters and determined that it is appropriate to proceed, the Council must then consult on the bylaw using the special consultative procedure set out in section 156 of the LGA. These factors will all need to be carefully addressed if this proposal is developed further.

70 If you have any questions, please contact us.

Yours sincerely



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¹⁷ LGA, s 155(2).

¹⁸ A bylaw cannot be inconsistent with the New Zealand Bill of Rights Act 1990 (section 155(3) of the LGA).