

IN THE SUPREME COURT
OF QUEENSLAND

Brisbane

No.10711 of 1998

Before the Hon. Mr Justice Shepherdson

[re: Robertson & Anor]

IN THE MATTER of the *Local Government Act 1936* (as amended)

and

IN THE MATTER of an application by Neil Fooi-Fong Robertson and Geraldine Fooi-Fong Robertson for a Declaration in respect of certain by-laws of the Beaudesert Shire Council

REASONS FOR JUDGMENT - SHEPHERDSON J.

Judgment delivered 2 September 1999

CATCHWORDS: LOCAL GOVERNMENT - TOWN PLANNING - applicants license to carry on dog kennel business was revoked by the respondent (Beaudesert Shire Council) for non-compliance with standard kennel licensing conditions - applicant sought declaration that by-law 17(b) of Beaudesert Shire Council requiring registration of dog kennels passed by the respondent is invalid because of non-compliance with the procedure set out in sub-s31(27)(iii)(b)(i) or (ii) of the *Local Government Act 1936* - whether by-law 17(b) provides for, regulates or controls the administration of the town planning scheme within the requirements of sub-s31(27)(iii)(b)(i) or (ii) of the *Local Government Act 1936* and is therefore invalid.

Kwiksnax Mobile Industrial General Caterers Pty Ltd v Logan City Council and Others (1994) 1 Qd R 291 considered

Local Government Act 1936 sub-s 31(27)(iii)(b)(i), (ii) and (iii)

Counsel: Mr Cochrane for the applicant
Mr Hinson SC for the respondent

Solicitors: Gilshenan & Luton for the applicant
McAuliffe & Associates for the respondent

Hearing date: 20 August 1999
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1 This application by Mr and Mrs Robertson began by a Notice of Motion seeking primarily declarations that Chapter XLV of by-laws made by the Council of the Shire of Beaudesert ("Beaudesert Shire Council") in 1991 and published in the Government Gazette in 1993 together with Chapter XLV of earlier by-laws made by the same Council are invalid and of no force and effect.

2 The earlier by-laws concerning Chapter XLV in respect of which declaratory relief was sought were made in 1978 and 1986. In each case Chapter XLV dealt with "DOGS". The 1986 by-laws repealed the then existing "Chapter XLV - DOGS" and inserted a new "Chapter XLV - DOGS".

3 The by-laws gazetted on 8 April 1993 and which had been made by the Beaudesert Shire Council on 28 May 1991 repealed existing "Chapter XLV - DOGS" and inserted a new" Chapter XLV - DOGS" in its stead.

4 During argument it became apparent that Mr Cochrane who appeared for the applicants sought declaratory relief in respect of the 1991 by-laws only - the earlier Chapters XLV had been repealed and declaratory relief in respect to those earlier chapters is unnecessary.

5 In addition, Mr Cochrane conceded that the declaratory relief which he sought was limited to by-law 17 of the 1991 Chapter XLV by-laws. That by-law reads:

Registration of Premises as a Kennel

17(a) A person may apply to the Council by application made in the prescribed form and accompanied by the prescribed fee for premises to be registered as a kennel.

(b) The Council may in its discretion register such premises as kennels if in its opinion they are suitable for the keeping of more than two dogs at the same time and for the breeding of dogs and are suitably situated. The registration may be subject to any conditions which the Council may impose and shall be revocable upon breach of any such conditions or for any other cause which the Council deems sufficient. A person shall not use any premises or cause or permit or suffer any premises to be used as a kennel unless such premises are registered as a kennel pursuant to this clause and comply with the provisions of the Town Planning Scheme for the Shire of Beaudesert.

(c) This registration may also restrict the total number of dogs which may be kept to a maximum number for which the council considers the premises are adequate.

(d) Every such registration shall unless previously revoked, remain in force for 12 months from the date of initial registration and no longer. An application for the renewal of such registration shall be lodged with the Council together with the prescribed fee at least two weeks prior to renewal."

6 The motion before me had been adjourned from chambers to the civil list with orders being made that the applicant deliver points of claim and that the Council deliver a defence.

7 The orders have been complied with and the applicants in fact have amended their initial points of claim.

8 The application came on for hearing in the civil list. Exhibit 1 is a helpful document which sets out the applicants' amended points of claim and the respondent Council's attitude i.e. admission, denial or otherwise to each point.

9 The trial has been on affidavit evidence. The applicants are the registered proprietors of land at 17-23 Buccan Road, Buccan described as Lot 13 on RP 123661 in the Parish of Moffatt.

10 In September 1992 the applicants bought this land together with the business of Canine Boarding and Breeding Kennels then being operated on that land. Since then and up to swearing of Mrs Robertson's affidavit on 14 April 1999 they have continued to operate these kennels on that land.

11 Since buying the land the applicants have held a "licence" from the Beaudesert Shire Council to operate these kennels on that land - at least until 25 June 1996.

12 On 27 June 1996 the Chief Executive Officer of Beaudesert Shire Council wrote to the applicants a letter which read:

"Re: Professional Breeder and Boarding Kennel on land described as L13 RP 123661 Parish Moffatt situated 17-23 Buccan Road, Buccan

I refer to the above and advise that Council gave further consideration to this matter at its meeting held on 25 June 1996.

As a result of this meeting I have been directed to advise that Council, in accordance with s17(b) of its Local Law XLV (dogs), has revoked your professional breeder and boarding kennels licence for land described as L13 RP 123661 Parish Moffatt situated at 17-23 Buccan Road, Buccan for non-compliance with standard kennel licensing conditions, special conditions of the licence and Council's kennel policy.

You are further advised that Council will allow a period of thirty (30) days from date hereof for compliance."

13 It is important to note that under the relevant town plan for Beaudesert Shire Council the subject land enjoyed an existing lawful fettered use.

14 In its letter dated 7 November 1985 written to the applicant's predecessors in title "Sheila D Walker and Muriel C Brown", Beaudesert Shire Council confirmed and acknowledged the existence of this use.

15 After receipt of the Council's letter dated 27 June 1996 the applicants' solicitors requested the Council to give a statement of reasons for its decision.

16 By letter dated 23 December 1996, McAuliffe and Associates, solicitors for the Council wrote to Goodfellow and Scott the applicants' then solicitors, setting out those reasons. This letter included the following statement:

"Whilst the property has existing lawful fettered use rights for a maximum of seventy five (75) dogs under the Town Planning Scheme, the property is licensed for a maximum of (40) dogs under the Dogs Pre-existing local law."

17 I have before me a document which the parties agree is a certified true and correct copy (dated 20 January 1997) of the Town Planning Scheme for Beaudesert Shire Council published in the Queensland Government Gazette of 9 February 1985 as subsequently amended. At p 41 in Part IV appear the provisions in respect of "EXISTING LAWFUL FETTERED USES". I shall later refer to parts of this document.

18 Mr Cochrane's attack on the validity of by-law 17 of the current Chapter XLV is that the requirements of sub-s 31(27)(iii)(b)(i) and (ii) of the *Local Government Act 1936* were never complied with and therefore the by-law is invalid. I mention in passing that the heading in the present application incorrectly cites *Local Government Act 1993*.

19 Mr Hinson SC for Beaudesert Shire Council has argued that sub-s 31(27)(iii)(b)(i) and (ii) did not and do not apply, that sub-s 31(27)(iii)(b)(iii) applied, that the requirements of that latter subsection were met and the by-law is valid. He concedes that if Mr Cochrane is correct then the applicants are entitled to the declaratory relief sought.

20 I now set out the relevant statutory provisions:

"31. (27) Passing of by-laws (i) Every resolution making a by-law shall be passed at a special meeting of the Local Authority called for that purpose.

(ii) After the passing of a resolution making a by-law, the Local Authority shall deposit in the public office of the Local Authority and thereafter keep open for inspection thereat a copy of the by-law until after the expiration of the date specified, in accordance with subparagraph (b) of paragraph (iii) of this provision, in the notice published as prescribed by that paragraph.

(iii) After the copy of the by-law has been deposited in the public office of the Local Authority in accordance with paragraph (ii) of this provision, the Local Authority shall by advertisement publish a notice at least once in a newspaper and, in the case of a by-law specified in clauses (i) and (ii) of subparagraph (b) of this paragraph, the Gazette, giving notice-

- (a) of the general purport of the by-law;
- (b) that a copy of the by-law has been deposited in the public office of the Local Authority and is open to the inspection of any person at that office up to and including a date specified in the notice being a date that;
 - (i) in the case of a by-law to provide for regulate and control the administration and execution of a town planning scheme or in the case of a by-law to provide for, regulate and control the administration and execution of amendments of a town planning scheme determined by the Local Authority to be required upon any review made pursuant to subsection (4) of section 33 of this Act, is not earlier than ninety days after the date of the publication of the notice in the Gazette or newspaper whichever last occurred or, where the notice is published in the Gazette and in a newspaper more than once, not less than ninety days after the date of the first publication of the notice in the Gazette or newspaper whichever last occurred;
 - (ii) in the case of a by-law to amend any by-law providing for, regulating and controlling the administration and execution of a town planning scheme, is not earlier than thirty days after the date of the publication of the notice in the Gazette or newspaper whichever last occurred or, where the notice is published in the Gazette and in a newspaper more than once, not less than thirty days after the date of the first publication of the notice in the Gazette or newspaper whichever last occurred;
 - (iii) in any other case, is not earlier than twenty-one days after the date of the publication of the notice in a newspaper or, where the notice is so published more than once, after the date of the first publication thereof.

(c)

21 There is no dispute that a copy of the by-law in question was open to inspection for a period of 21 days or more but less than the 90 days referred to in sub-s 31(27)(iii)(b)(i) and the 30 days referred to in s31(27)(3)(b)(ii).

22 The question before me is whether by-law 17 "provides for, regulates and controls the administration and execution of a town planning scheme" or, "amends any by-law providing for, regulating and controlling the administration and execution of a town planning scheme".

23 Mr Cochrane relies particularly on *Kwiksnax Mobile Industrial General Caterers Pty Ltd v Logan City Council and Others* (1994) 1 Qd R 291 - a decision of Thomas J (as he then was).

24 In *Kwiksnax*, the plaintiff succeeded in attacking a local authority by-law because the local authority had failed to comply with sub-s 31(27)(iii)(b)(i) of the *Local Government Act*. In that case the by-law in question concerned the use of stalls, "STALLS" being widely defined. The plaintiff there engaged in various forms of catering and its activities included a special mobile form of catering through the use of vans or small trucks which visited premises to sell foodstuffs, mainly to the working community, for morning tea and lunch. Each van had a run which daily took it to about 30 sites. Thomas J found the dominant feature was the extraordinary breadth to the by-law in question (p 296). He said the by-law required a special stall licence and that its operation might be seen as impinging directly upon the effect of the town planning scheme whether or not it was intended by the Council as a town planning measure.

25 He said the by-law "seriously cuts across the operation of the town plan in that it is in substance an amendment of the right of the use of structures on land or of land for a purpose". (p 298)

26 Is by-law 17 in substance an amendment to the town planning scheme of the Beaudesert Shire?
Does by-law 17 seriously cut across the operation of that town planning scheme?

27 Mr Cochrane does not dispute that in terms of s 31 of the *Local Government Act 1936* the by-law in question has been made in the exercise of the statutory power to make by-laws.

28 Mr Hinson's submissions are that Chapter XLII of the by-laws of the Beaudesert Shire Council provides for, regulates and controls the administration and execution of the town planning scheme; he further submits for a by-law to be characterised as of the kind described in sub-s 31(27)(iii)(b)(i) a by-law must:

- (a) have as its subject matter a provision or provisions of a town planning scheme;

- (b) operate upon that provision or those provisions by administering and executing them in one of the three ways specified in the relevant sub-section namely providing for, regulating and controlling the administration and execution of the town planning scheme.

29 In my view By-law 17 must be considered in the light of the town planning provisions of Beaudesert Shire as to purposes for which the applicants' land can be used. The parties agree that the land is in the "rural" zone and that, were it not for the subject land having an existing lawful fettered use the following are the purposes which concern living dogs for which the land can be used:

1. Hobby kennels - only when such lawful conditions as are considered appropriate by the Council are complied with.
2. Commercial kennels - only with consent of Council.
3. Domestic pets - without consent of Council.
4. Animal Husbandry (which does not include commercial kennels, domestic kennels, domestic pets) - without consent of Council.

30 Each of the above four purposes is defined in Part I - "Definitions" in the Beaudesert Shire Town Planning Scheme.

31 The last two purposes can now be excluded from the discussion.

32 By-law 17 is apt to cover both commercial kennels and hobby kennels.

33 The last sentence of by-law 17(b) reads:

"A person shall not use any premises or cause or permit or suffer any premises to be used as a kennel unless such premises are registered as a kennel pursuant to this clause and comply with the provisions of the Town Planning Scheme for the Shire of Beaudesert."

34 Its effect is to forbid the use of the subject land as a kennel unless the two stated requirements are met. They are:

1. Registration of the premises pursuant to by-law 17.

2. That such premises comply with the provisions of the town planning scheme for the Shire of Beaudesert.

"Premises" is defined in by-law 1 of Chapter XLV as follows:

"Includes any land, building or other structure, or any part thereof, any vehicle as defined by the *Traffic Act 1949* (as amended) or any moveable dwelling. The term does not include a dwelling house."

35 The second of these two requirements is met as the applicants' land has the lawful fettered use attached to it by operation of the Town Planning Scheme of the Shire of Beaudesert.

36 Mr Cochrane argues that in the absence of registration of the premises as a kennel the by-law prohibits that use and thereby cuts across the Town Planning Scheme. It seemed to me he relied rather heavily on the choice of "use" in the phrase "a person shall not use" in by-law 17(b).

37 He argues that by-law 17(b) provides for, regulates and controls the administration of the town planning scheme and therefore falls within sub-s 31(27)(iii)(b)(i) or (ii).

38 He sought to gain some support from *Kwiksnax* in which Thomas J said (at p 297):

"If the by-law is in substance an amendment of the town planning scheme I should think that the s 33(5) procedure would need to be followed and that this could not be avoided by dressing up the measure as a supplementary by-law."

39 As already mentioned, in *Kwiksnax* Thomas J held the particular by-law "seriously cut across the operation of the town plan". This statement suggests that whether a by-law cuts across the operation of a town plan is a test which may be applied in order to deal with the point at issue in the present case, namely does by-law 17 provide for, regulate or control the administration and execution of the town planning scheme of Beaudesert Shire?

40 The town planning scheme's effect on the use of the subject land derives from the town planning scheme itself. It is the scheme which legitimises the lawful fettered use. The requirement that premises on the subject land be registered as a kennel is in my view ancillary to the provisions of the town planning scheme.

41 I can readily understand the local authority being concerned to ensure as far as it can that
premises on which kennels are to be conducted should be registered - matters of public health and
safety and the ability to control those matters on the subject land readily come to mind as reasons for
requiring such registration. Registration enables the local authority to supervise and ensure that any
conditions which it imposes on registration are met.

42 The by-law in question was made in exercise of a power given by s 31 of the *Local
Government Act 1936*.

43 By-law 17 does not in my view proscribe or cut across the use to which under the Town
Planning Scheme the land is lawfully entitled to be put. Although it imposes an extra condition on
that use, namely, registration of the premises as a kennel by-law 17 is ancillary to the existing lawful
fettered use. This being so, I am unable to see that the by-law cuts across the provisions of the town
planning scheme although I recognise that registration impinges on the use.. Furthermore, it cannot
be regarded as an amendment to the town plan and nor can it be regarded as an attempt by the
Council to by-pass or ignore the existing lawful fettered use attached to the land. That use remains
unaffected.

44 Mr Cochrane has failed to persuade me that by-law 17 and particularly by-law 17(b) provides
for, regulates and controls the administration and execution of the town planning scheme of
Beaudesert Shire or alternatively, any by-law providing for, regulating and controlling the
administration and execution of the same town planning scheme.

45 For reasons I have given the application must fail.

46 I therefore dismiss the application with costs to be taxed or assessed.