

Power to make bylaws

Dean Knight, Victoria University of Wellington
discussed the grounds on which bylaws may be declared invalid,
at the LexisNexis 6th Annual Public Law Forum

Bylaws seem to be coming back into fashion. For many years bylaws have formed the backbone of the regulation of minutiae by local authorities: eg vehicle crossings, fire permits, grease traps, driving of stock on roads, etc. However, the recent local government reforms appear to have revitalised this regulatory tool. Local authorities are increasingly turning back to one of their most historic forms of regulation to deal with modern problems like commercial sex premises, brothels, GE, illuminated billboards, boy-racers, etc. This article looks at the limits on such regulation by examining the grounds on which bylaws can be declared invalid.

THE NATURE OF BYLAWS

Bylaws are one of the most powerful forms of local government regulation. The power to make bylaws gives local authorities the flexibility to respond to particular issues within their district and to respond to that mischief in a manner which is appropriate for their particular community. The term “bylaw” (or, less commonly, “by-law” or “byelaw”) is thought to have derived from “by” meaning secondary — as in secondary or subordinate legislation — or alternatively from “byr” or “by” meaning village or town (see Wade & Forsyth *Administrative Law* 8th ed (2000, OUP) at 134).

Bylaws are also a significant coercive tool. The maximum fine for breaching a bylaw is \$20,000 or, for trade waste bylaws, \$200,000 (s 242, Local Government Act 2002 (LGA)). In addition, other sanctions are also available:

- Local authorities can seek an injunction restraining a person from committing a breach of a bylaw (s 162).
- Local authorities can remove or alter any work constructed in breach of a bylaw (s 163).
- Enforcement officers can seize property materially involved in the commission of an offence against a bylaw (ss 164-168).
- Police may arrest any person breaching a bylaw prohibiting liquor in public place (s 169).

Unlike regulation through resource management processes, such as district or regional plans, there is no explicit recognition of existing use rights (although, arguably, this is implicit in the consideration of the reasonableness of a bylaw). This allows greater regulatory immediacy than some of the other coercive tools available to local authorities.

MAKING BYLAWS — PROCEDURAL REQUIREMENTS

The LGA (supplemented, in some cases, by other empowering legislation) sets out the various procedural requirements for making or amending a bylaw. Non-compliance with these procedural requirements may

invalidate the bylaw. (see, eg, *Attorney-General v Northcote Borough* [1972] NZLR 510)

First, a local authority must consider whether a bylaw is the most “appropriate” way of addressing the perceived problem and whether the proposed form of the bylaw is “appropriate”. (s 155, LGA) This process is similar to the “s 32 analysis” that must be undertaken prior to adopting a district or regional plan under the Resource Management Act 1991. In addition, the local authority must consider whether the proposed bylaw gives rise to any implications under the New Zealand Bill of Rights Act 1990; a bylaw must be consistent with the Bill of Rights. (s 155(3)), LGA)

Second, the local authority must consult the community through the special consultative procedure when making, amending or reviewing a bylaw. (s 156, LGA) The only exceptions are editorial changes and amendments to clarify meaning which are of “minor effect”, or imperial-metric conversion.

Finally, after making a decision to adopt the bylaw, the local authority must give public notice of the date on which the bylaw comes into operation. (s 157, LGA) Generally, bylaws do not require ministerial confirmation. However, some legislation requires certain bylaws to be forwarded to the relevant minister and allows for bylaws to be disallowed. (see, eg, s 72 of the Transport Act 1962) In other cases, the minister must be specifically consulted prior to making the bylaw.

Once a bylaw is operative, the LGA now requires ongoing review of those bylaws. (ss 158-160) Following that review, bylaws must then be reviewed every ten years. A review involves the reconsideration of a bylaw’s appropriateness and Bill of Rights implications using the special consultative procedure. Bylaws not reviewed expire within two years of the date by which they ought to have been reviewed.

SUBSTANTIVE LIMITATIONS

A bylaw (or any provision of a bylaw) is invalid if it is:

- ultra vires;
- repugnant to the general law;
- uncertain;
- unreasonable;
- inconsistent with the Bill of Rights.

Section 12(1) of the Bylaws Act 1910 allows any person to challenge a bylaw by applying to the High Court. The Court may quash the bylaw or amend it to the extent necessary to make it valid.

In addition, invalidity of a bylaw may be raised by way of collateral attack in a defence to proceedings based on that bylaw. The House of Lords in *Boddington v British Transport Police* [1998] 2 All ER 203 at 215-216 set out the circumstances in which collateral attack was permissible:

[I]n every case it will necessary to examine the particular statutory context to determine whether a Court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely ...

By contrast, where subordinate legislation (eg statutory instruments or bylaws) is promulgated which is of a general character in the sense that it is directed to the world at large, the first time an individual may be affected by that legislation is when he is charged with an offence under it: so also where a general provision is brought into effect by an administrative act ...

See also (prior to *Boddington*) the acceptance of collateral attack in relation to bylaws in *Brady v Northland Regional Council* (HC, Whangarei AP 25/95, 25 October 1996, Elias J).

As with other statutory instruments and administrative actions, bylaws are treated as valid unless and until they are quashed or set aside by a Court of competent jurisdiction — except perhaps in situations of flagrant invalidity. (*A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1) The applicant (or, in the case of challenge by way of collateral attack, the defendant) has the onus of proving the bylaw is invalid (see *Willcocks v Hardie* [1925] GLR 77 and *Trillo v Christchurch City Corporation* [1931] NZLR 833).

Ultra vires

If the 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 (or particular provision) is authorised, either expressly or by implication, by the relevant empowering provision.

The recent local government reforms have simplified territorial authorities' previous extensive "list" of bylaw-making powers into three general bylaw-making powers (s 145, LGA):

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.

In addition, there remain a number of specific powers available to territorial authorities such as (ss 146 and 147):

- "regulating" waste disposal, keeping of animals, bees, and poultry, and trading in public places;
- "managing" water and drainage infrastructure, reserves, recreation grounds and cemeteries;
- "preventing" the spread of fires involving vegetation;
- "prohibiting, regulating or controlling" liquor in public places.

There are also a number of specific bylaw-making powers under other legislation (eg the Dog Control Act 1996, the Prostitution Reform Act 2003, and the Transport Act 1962).

The power of regional councils to make bylaws is more limited. Section 149 of the LGA limits their powers to make bylaws in relation to forests, parks, reserves, recreation grounds, flood protection/control works or water supply works. In addition, their power to make bylaws regulating navigation and other such activities under s 684B of the LGA 1974 still remains.

Obviously, the broad empowering provisions now reduce the potential for arguments that bylaws are ultra vires. However, the generalisation of these powers may have the side-effect of making bylaws more vulnerable to challenge for unreasonableness because Parliament's intention that local authorities may regulate certain activities in certain ways is more vague than with the previous, more specific list of powers.

Some care needs to be taken with the nature of the empowering provision. For example, the power to "regulate" an activity does not include the power to prohibit or effectively prohibit the activity. In *Municipal Corporation of the City of Toronto v Virgo* [1896] AC 88 the Privy Council ruled that the power to "license, regulate, and govern, hawkers" did not include the power to "prohibit" hawkers from a certain section of the city. See also *Hamilton v Yates* [1930] NZLR 359 (fee for hawkers licence so high as to in effect amount to a prohibition) and *Lyster v Camberwell City Council* (1989) 69 LGRA 250 (total prohibition brothels without a permit not permissible).

Unreasonableness

If a bylaw or provision of a bylaw is unreasonable, then it is invalid. In England, the traditional approach for determining the reasonableness of a bylaw is set out in *Kruse v Johnson* [1898] 2 QB 91:

[Bylaws are unreasonable if], they [are] found to be partial and unequal in their operation as between 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...

In New Zealand, bylaws have generally been subjected to greater scrutiny for review for unreasonableness. Williams J in *Grater v Montague* (1904) 23 NZLR 904 pointed to the absence of the same "checks and safeguards in the public interest against unreasonable and improper bylaws" that existed in England and said the New Zealand Courts should deal with them "with a somewhat freer hand". The principles set out in *McCarthy v Madden* (1914) 33 NZLR 1251 are usually adopted as the framework for considering the reasonableness of a bylaw. These principles, expressed in contemporary language, are as follows:

- (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;
 - (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.

In addition, the Courts have directed that the reasonableness of a bylaw should not be assessed by reference to extreme cases and the bylaws should be benevolently interpreted (*Bremner v Ruddenklau* [1919] NZLR 444 and *Gisborne City v JE Openshaw Ltd* [1971] NZLR 538).

An example of a bylaw being struck down under this ground is *Police v Hall* [2001] DCR 239. The council had made a bylaw restricting drinking in public places, relying on the (then) general power to make bylaws for the “good rule of the district” and to “regulate the use of ... any ... public place”. The Court ruled the bylaw was *intra vires* the power of the council but was unreasonable. The Court based its finding on the fact that the bylaw was “virtually ineffectual” against the hard core of unruly youths it was designed to combat (its enforcement powers were limited), that is, the benefits of the bylaw would not outweigh its negative effects. In addition, the Judge said the bylaw unduly interfered with the rights of the public at large (at the time, Parliament having indicated that the right to drink in public should only be limited in narrow circumstances).

In my view, the Courts ought now to take a more deferential approach when assessing the reasonableness of a bylaw and allow a greater “margin of appreciation” to the decisions of local authorities about how their districts are to be regulated. The enhanced decision-making processes under the LGA 2002 now mean there are more significant “checks and balances” on the bylaw-making powers. In particular, local authority must complete a self-assessment of the “appropriateness” of the bylaw (effectively similar to the present *ex post facto* judicial assessment when the bylaw is challenged) and must consult their community on the proposed bylaw through the highest-order method of consultation.

Certainty

A bylaw must be certain and positive in its terms. As Joseph Raz has said, the idea that “people should obey the law and be ruled by it” implicitly recognises that the law “must be capable of being obeyed” and “capable of guiding the behaviour of its subjects”. (Joseph Raz, *The Authority of Law* (Oxford, Clarendon Press, 1979) at 212)

This principle has been adopted in relation to bylaws and other subordinate legislation. The Court of Appeal in *Transport Ministry v Alexander* [1978] 1 NZLR 306 applied this “voidness for uncertainty” and declared that a particular civil aviation regulation was invalid. The Court said the regulation was “so ambiguous that Parliament cannot have

meant the power to cover it” and was invalid because it did “not lay down a reasonably ascertainable rule”.

The High Court in *Baxter v Wellington City Council* (Wellington AP 225/02, 22 October 2002, Ronald Young J) considered a challenge to a bylaw with the following prohibition:

No person shall live or sleep in a vehicle situated on a road, or use a vehicle situated on a road for an other residential purpose, without the written consent of the City Planner.

The High Court ruled that any alleged uncertainty about the words “live” or “sleep” was coloured by the mischief that the bylaw was intended to remedy (ie, stopping people living in public places) and was not uncertain. However, an appeal against that decision was granted (by consent) by the Court of Appeal and suggests such a benevolent view may not have been adopted on appeal. A similar bylaw (prohibiting the storage of a vehicle on a street) was struck down in *Transport Department v Kendall* (1970) MCD 97 because the term “to store or keep” was vague and not obviously distinguishable from parking.

The presence of sub-delegation powers within a bylaw will not by itself invalidate the bylaw on the grounds of uncertainty. Section 13 of the Bylaws Act and s 151(2) of the LGA specifically allow sub-delegation. These provisions allow, for example, “matters of detail” to be dealt with separately from the bylaw itself by later council resolution. Similarly, dispensations from the bylaw may be dealt with on an administrative basis rather than the terms of these being expressly set out in the bylaw.

A bylaw will, however, be invalid if the discretionary power is so wide as to make the bylaw unreasonable. Whether or not the discretionary power is so wide as to make a bylaw unreasonable will depend on the circumstances of the case. If the discretionary power left to the local authority (or its officers) does not go to the very heart of the bylaw, the bylaw will generally be valid. Chapman J in *Bremner v Ruddenklau* [1919] NZLR 444 at 461 said:

[The delegation] would depend in each case on whether the particular discretion was one which ought to be confided to the particular body, officer, servant, or person named, or whether it was in the circumstances too great a discretion. The test is the greatness of the discretion, and this must be judged by the nature of the bylaw, the character of the delegation, and the status of the delegate.

The High Court in *Kelly v Wellington City Council* [1995] 3 NZLR 750 ruled a parking bylaw which left matters such as locations of the parking restriction, coupon wording, fees, stickers, hours, etc to be determined by later ordinary council resolution was acceptable.

Repugnancy

Under s 14 of the Bylaws Act, a bylaw will not be invalid solely because it deals with a matter dealt with by other laws. However, a bylaw will be invalid if it is “repugnant” to the provisions of another law.

The word “repugnant” requires more than simple proof that a bylaw deals with matters covered by another enactment. Goddard CJ in *Powell v May* [1946] 1 KB 330 at 335 said:

Obviously, [a bylaw] cannot permit that which a statute expressly forbids nor forbid that which a statute expressly

permits, though it can, of course, forbid that which otherwise would be lawful at common law, otherwise no prohibiting bylaw could be valid.

Similarly, a bylaw is not merely invalid simply because it regulates something more stringently in a particular locality than the statute (*Weston v Fraser* [1917] NZLR 549).

A bylaw will be invalid though if it has irreconcilable differences with legislation or operates “by way of addition to or subtraction from the statutory provisions, contrary to the statutory contemplation”. (Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, section 24.5) For example, in *Powell v May* a bylaw regulating street betting was held to be repugnant when it replicated legislative betting controls, but without the same statutory defences. A bylaw may also be repugnant to general law if it unduly undermines a significant common law principle. (*Paprzik v Tauranga District Council* [1992] 3 NZLR 176)

Bill of Rights

Section 155(3) of the LGA expressly requires that bylaws be consistent with the Bill of Rights. In addition, s 155(2)(b) requires local authorities to assess any Bill of Rights implications before making a bylaw.

Strictly speaking, s 155(3) is unnecessary because subordinate legislation which is inconsistent with the Bill of Rights will be ultra vires. (see *Drew v Attorney-General* [2002] 1 NZLR 58) Under s 6 of the Bill of Rights, an empowering provision (like any other provision) needs to be given an interpretation consistent with the rights and freedoms protected in the Bill of Rights. It follows that empowering provisions do not authorise subordinate legislation which is inconsistent with the Bill of Rights (except where the empowering provision clearly and unavoidably authorises limitations on the rights or freedoms).

The rights and freedoms which are most likely to be placed in issue are the freedom of expression and religion (ss 13-15 of the Bill of Rights), the freedom of peaceful assembly, association and movement (ss 16-18), freedom from discrimination (s 19), a right to be secure against unreasonable search and seizure (s 21) and right to natural justice (s 27).

As s 4 of the Bill of Rights does not apply, the question of whether a bylaw is consistent with the Bill of Rights therefore turns on whether a bylaw which prima facie breaches a right or freedom can be justified as a reasonable limit on that right or freedom under s 5. Only those reasonable limits “demonstrably justified in a free and democratic society” are permissible. The established framework for assessing this can be described as follows:

- (1) First, the objective of the measure (in this case, perceived problem the bylaw seeks to address) must be “important and significant”.
- (2) Secondly, the measure (in this case, the bylaw itself) must be “proportionate” to that objective. That is:
 - (a) The measure must have a “rational relationship” with the objective.
 - (b) In seeking to achieve that objective, the measure must interfere as little as possible with the right or freedom affected.
 - (c) The limitations must be justifiable in the light of the objective, that is, overall the productive

benefits of the measure must outweigh the negative effects.

See *R v Oakes* (1986) 26 DLR (4th) 200 and *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9. In the words of the Court of Appeal in *Moonen*, a “sledgehammer should not be used to crack a nut”.

There have been few direct challenges to bylaws based on the Bill of Rights. The District Court in *Waipa District Council v Russo* [1993] DCR 97 ruled that a bylaw regulating the droving of stock on roads did not violate the freedom of movement. The Court baldly concluded any limitation was “reasonable” — seemingly on the same basis on which it assessed the bylaw was reasonable under the *McCarthy v Madden* test. More recently, the District Court in *Auckland City Council v Finau* [2002] DCR 839 considered a challenge to a bylaw restricting signs in residential zones to one sign advertising products and services available on the site. A resident was prosecuted after he posted various political signs protesting the council’s actions in relation to water services. The District Court ruled the bylaw was “reasonable” under the Bill of Rights because of concern about the risks of uncontrolled signage on amenity and community safety and the fact there were a number of other ways the resident could enjoy the freedom to express or impart his political opinions.

I suggest some caution with both these cases. First, both cases basically applied a simple reasonableness test, rather than the more sophisticated “proportionality” test required by the Bill of Rights. Second, *Finau* seems inconsistent with the existing body of case law impressing the importance of the freedom of expression — especially of a political nature, and ensuring the limitations or rights generally are no more than necessary to achieve the policy objective. In my view, the analysis found in some of the Canadian cases dealing with challenges to bylaws under the Canadian Charter of Rights and Freedoms provide a more robust guide for assessing consistency with human rights instruments. For example, in *Ramsden v Peterborough (City)* [1993] 2 SCR 1084 the Supreme Court ruled a bylaw prohibiting all postering on public property was invalid because it breached the freedom of expression. While the purpose of the bylaw was “meritorious” (litter, aesthetic blight and associated hazards were avoided), it did not warrant the complete denial of access to a historically and politically significant form of expression. A complete ban on postering did not restrict expression as little as was reasonably possible, especially when there were many alternatives to a complete ban that would achieve the objective. See also *R v Guignard* [2002] 1 SCR 472 where a bylaw prohibiting the erection of advertising signs outside industrial zones breached the freedom of expression and was held to be invalid and *Ville de Blainville v Beauchemin* (2003) 231 DLR (4th) 706 where a bylaw restricting door-to-door activities on evenings and weekends and preventing the Jehovah’s Witnesses from their teaching and religious activities breached the freedom of religion and was also held to be invalid.

CONCLUSION

The bylaw-making power of local authorities is, on its face, broad. However, the established grounds of invalidity ensure this law-making power is kept in check by insisting that bylaws are certain, consistent with other laws (including the Bill of Rights) and reasonable. □