

CIVIL JURISDICTION

THOMAS J

IN THE MATTER OF the Local Government Act 1936 - 1984

and

IN THE MATTER OF The Gold Coast City Council By-laws

BRISBANE

..DATE 08/01/93

JUDGMENT

HIS HONOUR: I am not sure whether the record shows it, but understand the proceedings to be in open Court, it being a public matter concerning the validity of by-laws. As I recollect, the way it was conducted was as in open Court, so I so declare.

I have concluded that By-law 32 of Chapter 14 of the Gold Coast City Council by-laws is void, and I so declare.

I publish my reasons.

I order that the respondent pay the applicant's costs of the application to be taxed.

IN THE SUPREME COURT OF QUEENSLAND O.S. No. 1349 of 1992

IN THE MATTER OF "The Local Government Act 1936-1984"

- and -

IN THE MATTER OF The Gold Coast City Council By-laws

REASONS FOR JUDGMENT - THOMAS J.

Delivered the 8th day of January, 1993

CATCHWORDS:

Local Government - power to make by-laws - ultra vires - whether by-laws prohibiting (without a permit) commerce on roads and land abutting roads is beyond power - by-laws held invalid. Local Government Act Ss.30, 31C.

Counsel: Walter Sofronoff Q.C. and G. Newton for Applicant

R. Myers for Respondent

Solicitors: Slipper and Everingham for Applicant
Gall, Standfield and Tiley for Respondent

Hearing Date: 23rd December, 1992

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On 16th October, 1992 the Gold Coast City Council made certain by-laws and these were gazetted on 11th December, 1992. The question in these proceedings is whether they are valid.

It is convenient firstly to ascertain the true scope of the by-laws and the legal effect they would produce if

valid (cf. Swan Hill Corporation v. Bradbury (1937) 56 C.L.R. 746, 756 per Dixon J.). The by-law appears in Chapter 14 under the heading "Streets and Roads".

"Conducting commercial activities

- 32.(1) Unless he is the holder of Permit issued by the Council authorising him so to do, and unless he complies in every respect with the terms and conditions of such Permit, a person shall not engage in the selling of goods or the conduct of any other commercial activity on a road, on land adjoining a road or on land under the control of Council.
- (2) In this by-law the term 'goods' includes all property both real and personal and the term 'conduct of any other commercial activity' without limiting the generality of that term includes the accosting by a person of another person with the intent or for the purpose of soliciting business.
- (3) For the purpose of this by-law 'a person' means any of the following:
 - (a) A person who physically engages in selling of goods or conducting of any other commercial activity; or
 - (b) A person who employs or engages another person to, or on whose behalf another person, engages in selling of goods or conducting of any other commercial activity."

A further by-law provides for the issue of penalty notices with respect to such activities, as to which on the spot penalties of \$50 may be imposed.

The coverage of this by-law is astonishingly wide. It prohibits, unless one first gets a permit, all commercial activity on any road and also on any land adjoining any road in the Gold Coast area. Perhaps there are a few pockets of land at the Gold Coast that do not abut any road, but town planning has been with us for an appreciable period and it seems unlikely that there are any significant areas of land that do not at some point abut a road. "Commerce" is not a term of art. It is an ordinary word

which describes "all the mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements". The term is clearly of the widest import (cf. Re Kuringai Co-operative Building Society No. 12 Limited 1978 22 A.L.R. 621, 624 per Bowen C.J. and 649 per Deane J.). The activities prohibited without permit would include the carriage of goods, the driving of taxis, the conducting of shops, all banking business and all obvious forms of commerce including those conducted by telephone. It would also, as it seems to me, prohibit more private examples of commerce engaged in within private homes, such as arrangements to change the ownership of family assets, any dealing between neighbours, and perhaps even the swapping of toys by children.

The provisions in relation to the issue of a permit prescribe no criteria and apparently give an unfettered discretion to the Council whether or not to issue a permit. No form of application is prescribed. Nothing is said about fees, but under the Council's schedule of fees and charges, permit fees are \$150 when no special fee is fixed. The Council has already resolved upon a fee of \$25 per application, to be credited against the licence fee if the application is approved, and to be forfeited if it is refused. To all practical and intents and purposes the by-law prohibits all acts of commerce within the boundaries of the Gold Coast local authority area without first obtaining a permit. Such an impediment to commerce is inconsistent with ordinary notions of it.

Perhaps covens of persons desiring to engage in spontaneous commerce might be able to meet upon a landlocked area, or perhaps they could find a canal which would not amount to land abutting a road. But more realistically, they would have to go outside the local authority area. The by-law's denial of ordinary commerce would be a startling measure anywhere in Australia, and perhaps particularly on the Gold Coast.

It would seem that the Council's main object was to prevent street touting and that it was conscious of the fact that such acts are performed not only by those who walk the streets, but in some instances, by those who have desks or booths on private property within speaking range of the street. However if that is the object of the Council, the present by-law is a graphic example of overkill. It is difficult to read down these provision or to sever or otherwise limit it to operations of any sensible proportions. It cannot, for example be limited to cases where persons are accosted. To do so would be to rewrite the by-law. It would not be a particularly difficult exercise to draw a by-law that was limited to specific acts such as touting (defined if necessary) or soliciting business or accosting persons for such purposes on a road or footpath within the Gold Coast district. However, it is enough to note that the by-law cannot effectively be read down, and Mr. Myers, counsel for the Council, did not submit that it could.

The next step is to examine the power given by the State Government to the local authority in relation to the making of by-laws. The primary sources are said to be ss.30 and 31C of the Local Government Act 1936 as amended. Section 30 is the general by-law section which gives powers concerning the good rule and government of the areas entrusted to the respective local authorities, and which then enumerates many more specific matters upon which by-laws may be made. These include roads, buildings and the use and occupation of buildings "and generally all works, matters and things in its opinion necessary or conducive to the good rule and government of the area and the well being of its inhabitants".

Section 31C however is a far more specific provision in the context of the present by-law. It was inserted by the Local Government Act and Another Act Amendment Act of 1985. It states:-

"By-laws Respecting Footpath Trading.

(1) Notwithstanding any provision of any other Act, a Local Authority has power to make by-laws regulating (including the prohibiting of) -

(a) the sale of goods;

or

(b) the conduct of any other commercial activities,

on a road under the control of the Local Authority from land or from a building or other structure erected on land abutting the road."

Mr. Myers submitted that I should hold that his client has the power to prosecute anyone who engages in commercial activity in the specified areas within the Gold Coast. He submitted that it could be assumed that the Council would not exercise the power further than was reasonably necessary. I am unimpressed with governmental authorities which create unreasonably wide prohibitions and justify them with the statement "Trust us." Wills J. expressed a similar sentiment in 1904:—

"I desire to protest strongly against one argument put forward in support of the by-laws, namely, that although they might be considered harsh and unjust if applied all round, yet the local authority may be trusted only to put them in force in cases where it would be reasonable to do so. In the first place, the local authority are not the only persons who can set the law in motion; every subject of the Crown is entitled to do so; and, secondly, I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in particular cases it will not be enforced. I think that that is as bad a ground for defending legislation as one could well have." (Stiles v. Galinski (1904) 1 K.B. 615, 625)

It may be noted that the section confers a power with respect to roads "under the control of the local authority" and land abutting such roads. This is at first glance less comprehensive than the by-law which purports to apply to all roads. Roads within the Gold Coast area are either main

roads under the control of the Director-General of the Department of Transport, or roads directly under the control of the local authority. Mr. Myers submitted that roads of the latter kind were plainly within the ambit of s.31C, whilst main roads (such as the Gold Coast Highway) were within the ambit of s.30. He further submitted that main roads were also arguably within the ambit of s.31C by reason of s.2.11 of the Transport Infrastructure (Roads) Act 1991, having regard to the definition of "road" in s.3 of the Local Government Act. There are some difficulties inherent in this submission, but I do not propose to embark upon an analysis of them. I am inclined to the view that the power given by s.31C to make by-laws is confined to by-laws relating to roads under the control of the local authority (and to land abutting such roads), and that power to make by-laws relating to other roads (and land abutting such roads) is to be found (if found at all) in s.30. However, I do not base my judgment on this view. The same result follows whether the power stems from s.30 or s.31C or from both of them.

The applicants who are challenging the by-law are companies with commercial interests. Their counsel, Mr. Sofronoff Q.C., included in his submissions that the by-law was invalid because it was unreasonable. That has not been the approach in the Australian authorities, at least since Williams v. The City of Melbourne (1933) 49 C.L.R. 142. An alternative submission is, I think, better founded. It is that the by-law has no reasonable relation to the purpose for which the power was granted. In this exercise one turns attention to the "true nature and purpose of the regulation making power". (South Australia v. Tanner (1988-1989) 166 C.L.R. 161, 164 per Wilson, Dawson, Toohey and Gaudron JJ.)

This approach is consistent with the earlier well known statement of Dixon J. in William's case above -

"Notwithstanding that ex facie there seemed a sufficient connection with between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been

adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power." (p.155).

The courts do not make value judgments on the wisdom of legislative measures, but in the context of reviewing subordinate legislation they take as practical view as possible of the operation of the by-law and see whether it is truly based on a power entrusted to the subordinate body. This naturally involves consideration of the purposes of the power.

"If Parliament confers upon a subordinate body a power to legislate for limited purposes, it authorises even legislation which may be thought unreasonable, provided that nevertheless it is really legislation for those purposes. It may indeed be held invalid on the ground that no reasonable mind could justify it by reference to the purposes of the power; (Brunswick Corporation v. Stewart); but that is only a way of stating the conclusion that no real connection with the purposes of the power can be seen." (Clements v. Bull (1953) 88 C.L.R. 572, 577, per Williams C.J. and Kitto J.)

Although their Honours were in dissent in that case I do not think this statement of principle is inconsistent with the view of the majority, or with the authorities on this subject.

The problem in the present case relates to the breadth of power which the State Government saw fit to confer upon all local authorities in The Local Government Act and Another Act Amendment Act of 1985. If one neglects the heading or side note in s.31C, it is difficult to detect any purpose or object at all, and one might conclude that unrestricted power has been given to all local authorities to prohibit commerce on all roads in Queensland under the control of local authorities and in all land or buildings abutting such roads.

However I think it appropriate to take into account the heading to s.31C which describes the subject matter as

"by-laws respecting footpath trading". Once that limitation is introduced, one has a sensible finite law-making power, and the breadth of the by-law can be seen clearly to exceed that of the given power. It may also be noted that the only relevant statement concerning this provision in the second reading speech of the Local Government Act and Another Amendment Bill of 1985 was in these terms:-

"The Traffic Act presently provides power for a local authority to control trading on a road where the whole of the activity is conducted on the road. The Act does not, however, cover circumstances where trading occurs on a road from premises abutting that road.

An example of that type of trading would be automatic banking machines which are located on private premises abutting the road, where it is necessary for persons using the machine to congregate on the footpath in order to transact business.

That type of trading can, in certain circumstances, create congestion, and it is proposed to include a provision in the Act authorising a local authority to make a by-law and the Brisbane City Council to make an ordinance to control such matters." (1984-1985 297 Q.P.D. 3734)

In my view s.31C, properly construed, does not reveal an intention on the part of the State Government to give virtually unlimited powers of control (to the extent of prohibition) of commerce in the vast majority of the State. Neither does s.30, which cannot be divorced from the legitimate objects of local government. In its context s.30 confers powers for local government purposes as these are generally understood in the community. (Ashbury Railway Co. v. Riche (1875) L.R. 7 H.L. 653; Boral Resources v. Johnstone Shire Council 1990 2 Qd.R. 18, 23-24). Such powers may be more widely viewed now than they were in 1875, but they have not nearly reached the dimensions sought by the Gold Coast City Council in the present case.

It is unnecessary to turn to the further argument presented on behalf of the applicants that the by-law is

repugnant to other legislation which expressly declares certain forms of commerce to be lawful. These expressly lawful activities include for example various banking transactions and acts by persons in possession of licences such as those under the Liquor Act. To cover this question adequately would require considerable research, and counsel did no more than make the submission in a general way. The question of repugnancy may therefore be reserved to another day.

I declare that by-law 32 of Chapter 14 of the Gold Coast City Council By-laws is void.