JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Your Ref: LE.LL.1
Our Ref: AT: 3951/17 & A507645

Cr Keith Dunlop
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13 August 2015

Dear President Dunlop

Shire of Ravensthorpe Fencing Local Law 2015

Thank you for your letter dated 22 June 2015 enclosing various explanatory materials in relation to the above named Local Law. The Joint Standing Committee on Delegated Legislation scrutinised the Local Law at its meeting on 12 August 2015 and resolved to contact you about the following two matters.

Clause 5(1)

It states:

> ***5. Sufficient Fences***
>
> *(1) Unless by agreement between the owners of adjoining properties, a person shall not erect a dividing fence or a boundary fence that is not a sufficient fence.*

This clause is contrary to section 5 of the *Dividing Fences Act 1961* which defines 'sufficient fence' as meaning:

> *(a) any fence prescribed by a local law as a sufficient fence for the part of the local government district in which the dividing fence or boundary fence is, or is to be, erected; or*
>
> *(b) any fence of the description and quality agreed upon by the parties concerned which does not fail to comply with any local law referred to in paragraph (a),*

Clause 5(1) of the Shire's law implies that as long as the adjoining property owners agree to the type of fence they want to erect, they are not required to erect a 'sufficient fence'. Clause 5(1) is void and thus inoperative because it is inconsistent with section 5 of the *Dividing Fences Act 1961*.[1] For this

[1] See section 3.7(1) of the *Local Government Act 1995* and section 43(1) of the *Interpretation Act 1984*.

reason the Committee requests the words "*Unless by agreement between the owners of adjoining properties*" be deleted from clause 5(1). The clause needs to be amended to read (consistently with the 2014 WALGA Model[2]):

> ***5.1 Sufficient fences***
>
> *(1) A person shall not erect a dividing fence or a boundary fence that is not a sufficient fence.*

I advise that the Shire's clause was in WALGA's former *Fencing Model Local Law* from October 2003 but by early 2005, WALGA had changed the clause at the former Committee's behest. Further, the former Committee reported this issue to the Parliament.[3]

Clause 19

It states:

> ***19. Objection and Appeal***
>
> *Where the local government* ***exercises a discretion*** *pursuant to this local law, an affected person has a right of objection an appeal under Part 9 of the Local Government Act 1995.*
>
> (The discretion being referred to here is that in clause 9. It provides that the Shire may give its written consent to the erection or repair of a fence which does not comply with the requirements of the Local Law.)[4]

WALGA's equivalent of clause 19 states:

> ***Objections and review***
>
> *When the local government* ***makes a decision*** *under clause 3.2,[5] the provisions of Part 9 Division 1 of the Local Government Act 1995, and regulation 33 of the Local Government (Functions and General) Regulations 1996, apply to that decision.*

There are 2 issues with the Shire's law.

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2 The Shire's clause was in WALGA's former Fencing Model local law in October 2003. By early 2005, WALGA had changed the clause at the former Committee's behest.

3 See Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 8, *Issues of concern raised by the Committee between June 9 2003 and December 19 2003 with respect to Local Laws*, 19 April 2004, pp14-15.

4 It states: *(1) Notwithstanding clause 5 and clause 6, the local government may give its written consent to the erection or repair of a fence which does not comply with the requirements of this Local Law. (2) In determining whether to grant its consent to the erection or repair of any fence, the local government may consider, in addition to any other matter that it is authorized to consider, whether the erection or retention of the fence would have an adverse effect on— (a) the safe or convenient use of any land; or (b) the safety or convenience of any person.*

5 Approval is needed for electrified or razor wire fences.

- First, it fails to include a reference to regulation 33[6] which was gazetted by the Governor at the request of the Minister for Local Government and Communities in 2011. Regulation 33 is important because it prescribes the Form to be used when a person lodges an objection or appeal.
- Second, the clause only refers to an objection or appeal being raised when the Shire "*exercises a discretion pursuant to this local law*", omitting the "*making of a decision*" (as in the WALGA Model).

The Committee is of the view that making a decision and exercising discretion are not the same thing. Discretion exists when a decision-maker has the power to make a choice about whether to act or not act, to approve or not approve, or to approve with conditions. The role of the decision-maker is to make a judgement taking into account all relevant information.

Legislation often compels a decision-maker to act in a particular way. Where the words 'shall' or 'must' are used in legislation, there is usually no discretion available to the decision-maker. For example, if the legislation states that an application must be received by a specific date, the decision-maker must refuse the application if it is not received by that date. However, where the legislation uses the word 'may', the decision-maker is given a discretionary power to deal with a matter and has a choice to make. This choice will often involve an element of judgment about the decision.

The Committee noted that the only reference to "*exercising a discretion*" in the Local Law is in the Heading to clause 9. The whole of clause 9 states:

> ***9. General Discretion of the Local Government***
>
> *(1) Notwithstanding clause 5[7] and clause 6[8], the local government may give its written consent to the erection or repair of a fence which does not comply with the requirements of this Local Law.*
>
> *(2) In determining whether to grant its consent to the erection or repair of any fence, the local government may consider, in addition to any other matter that it is authorized to consider, whether the erection or retention of the fence would have an adverse effect on—*
>
> > *(a) the safe or convenient use of any land; or*
> >
> > *(b) the safety or convenience of any person.*

Part 9 of the *Local Government Act 1995* allows objections and appeals but only in relation to "decisions". It states:

> ***9.1. When this Division[9] applies***

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6 It states: **33. Objections to decisions, form of etc. prescribed (Act s. 9.5).** *(1) The form in which an objection may be made under section 9.5 of the Act is the form set out in Form 4 in Schedule 1. (2) The manner in which the objection may, within the time permitted by section 9.5 of the Act, be lodged with the local government is by giving a copy of it to the CEO.*

7 Clause 5 is titled: **Sufficient Fences**

8 Clause 6 is titled: **Fences Within Front and Secondary Setback Areas**

9 Titled: **Division 1 — Objections and review**

> *(1) This Division applies when a local government* ***makes a decision*** *under this Act as to whether it will —*
>
> > *(a) grant a person an authorisation under Part 3 or under any local law or regulation that is to operate as if it were a local law; or*
> >
> > *(b) renew, vary, or cancel an authorisation that a person has under any of those provisions.*
> >
> > *….*
>
> **decision** *means a decision or notice that, in accordance with section 9.1, causes this Division to apply.*

Part 9 applies to "decisions", not 'discretions'. The Committee therefore requests that clause 19 be deleted and a new 19, reflective of the 2014 WALGA Model be inserted. It should state:

> ***19. Objection and Appeal***
>
> *When the local government makes a decision under clause 3.2 the provisions of Part 9 Division 1 of the Local Government Act 1995, and regulation 33 of the Local Government (Functions and General) Regulations 1996, apply to that decision.*

Request for undertakings

The Committee requests that the Council of the Shire of Ravensthorpe provide undertakings to, within 6 months:

- Amend clause 5(1) so that it states:

  5.1 Sufficient fences

  (1) A person shall not erect a dividing fence or a boundary fence that is not a sufficient fence.

- Amend clause 19 so that it states:

  19. Objection and Appeal

  When the local government makes a decision under clause 3.2,[10] *the provisions of Part 9 Division 1 of the Local Government Act 1995, and regulation 33 of the Local Government (Functions and General) Regulations 1996, apply to that decision.*

- Provide the Committee with a copy of the minutes of the meeting at which the Council resolves to provide the undertakings.
- Not enforce the above two clauses in a manner contrary to the undertakings.
- Make any consequential amendments arising from the undertakings.
- Where the Local Law is made publicly available, whether in hard copy or electronic form, that the law be accompanied by a copy of these undertakings.

[10] Approval is needed for electrified or razor wire fences.

Noting that a Council meeting is 14 September 2015, the Committee requests the undertakings be provided by Friday, 18 September 2015.

If you have any questions, please contact Ms Anne Turner, Advisory Officer (Legal), on 9222 7828 or via the mailbox at: delleg@parliament.wa.gov.au

I advise that the Committee has no objection to you discussing this matter with the Department of Local Government and Communities, WALGA or the Shire's legal advisers.

Yours sincerely

Mr Peter Abetz MLA
Chairman