

40TH PARLIAMENT



Report 8
JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION

*Shire of Northampton Local Government Property Local
Law 2017*

Presented by
Ms Emily Hamilton MLA (Chair)
and
Hon Robin Chapple MLC (Deputy Chair)
March 2018

Joint Standing Committee on Delegated Legislation

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EXECUTIVE SUMMARY

- 1 The Joint Standing Committee on Delegated Legislation (Committee) is of the view that the Shire of Northampton (Shire) did not follow section 3.6(1) of the *Local Government Act 1995* (Act) when it made the *Shire of Northampton Local Government Property Local Law 2017* (Local Law).
- 2 The procedure in section 3.6(1) of the Act required the Shire to 'first' obtain the Governor's approval to apply the Local Law to places outside its district before the Shire made the Local Law. The Shire had requested the Governor's approval but this was not provided until after the Local Law was made.
- 3 As the procedure in section 3.6(1) of the Act is a condition precedent to the making of a valid local law, the Local Law is invalid and offends Committee Term of Reference 10.6(a) in that it is not 'within power' of the Act.

Recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

RECOMMENDATION 1

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The Committee recommends that the *Shire of Northampton Local Government Property Local Law 2017* be disallowed.

1 Reference and procedure

- 1.1 On 1 August 2017 the Shire of Northampton published the *Shire of Northampton Local Government Public Property Local Law 2017* (Local Law) in the *Government Gazette*.
- 1.2 Upon gazettal, the Local Law stood referred to the Joint Standing Committee on Delegated Legislation (Committee). Once the Local Law was tabled in the Legislative Council, it became an instrument that may be subject to disallowance.

2 Statutory procedure for making a local law and non-compliance with the *Local Government Act 1995*

- 2.1 Local governments are empowered to make laws to enable them to perform their functions under the *Local Government Act 1995* (the Act).¹ A local law is made by absolute majority at a meeting of the Council of the local government.²
- 2.2 The procedural steps necessary for a local government to make a local law are highly prescriptive and mandatory as set out in section 3.12 of the Act.³
- 2.3 In addition to the procedural steps, if a local government seeks to apply a local law beyond the boundary of its district it must obtain the consent of the Governor before the local law is made. Section 3.6 of the Act states:

3.6. Places outside the district

(1) If the Governor's approval has been first obtained, a local government may make a local law under this Act that applies outside its district. [emphasis added]

- 2.4 The requirement in section 3.6(1) to obtain the Governor's approval is a critical step in the making of a local law. It is a condition precedent to the taking of the five further steps described in section 3.12 of the Act. A local law which does not follow section 3.6(1) is invalid.
- 2.5 The Committee maintains its view that section 3.6(1) requires a new Governor's approval on each occasion that a local law is made.⁴

3 The Local Law as passed by the Shire of Northampton

- 3.1 The Local Law sought to regulate activities on local government property in the Shire of Northampton (Shire) including beaches, jetties and bridges.

¹ *Local Government Act 1995* s 3.5.

² *ibid.*, s 3.12(5).

³ Section 3.12 of the *Local Government Act 1995* sets out five steps. Step 1 requires that at a council meeting the person presiding is to give notice to the meeting of the purpose and effect of the proposed local law in the prescribed manner. Step 2 involves the giving of a Statewide public notice and giving it (and a copy of the proposed local law) to the Minister for Local Government and other relevant Ministers. Step 3 involves the publishing and exhibiting of the Statewide public notice as if it were a local public notice. Step 4 deals with the consideration of public submissions. Step 5 concerns what occurs after the proposed law is made such as publishing it in the *Government Gazette* and giving a copy of it to the Minister(s) as well as the requirement for giving local public notice.

⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 2, *Town of Cambridge Local Government and Public Property Local Law 2016*, 14 September 2017, p 5.

- 3.2 The application of local laws to areas off the sea coast is a common practice amongst coastal local governments. Local governments may seek to regulate activities on jetties such as mooring, the loading and unloading of cargo and fishing.
- 3.3 A jetty is defined in clause 7.1(2) of the Local Law as:
- Any jetty, pier, wharf, quay, grid, slip, landing place, stage, platform (other than a platform that is a vessel for the purposes of the *Western Australian Marine Act 1982*) over any waters. [emphasis added]
- 3.4 For a coastal local government, a jetty extends from the land and over adjacent waters.
- 3.5 Since the predecessor to the Shire of Northampton was established in 1887, the Shire's coastal boundary has not changed and remains the 'Sea Coast'.⁵
- 3.6 To ensure that the Local Law applied to its jetties, which extend seaward from the Sea Coast, the Shire sought to apply the operation of the Local Law outside its district. Clause 1.5(3) of the Local Law provides:
- Subject to section 3.6 of the Act, this local law applies to an area bounded by the low water mark of the Indian Ocean and extending for a distance 200 metres seawards from the western boundary of the district.
- 3.7 While the Shire correctly identified that it required approval under section 3.6 of the Act it failed to obtain the required approval before making the Local Law.

4 Scrutiny of the Local Law

- 4.1 The Committee first scrutinised the Local Law at its meeting on 30 October 2017.
- 4.2 The Statutory Procedures Checklist accompanying the Explanatory Memorandum for the Local Law directed the Committee to the Governor's approval of the application of the Local Law beyond the boundaries of the Shire, as published in the *Government Gazette*.
- 4.3 The Governor's approval appeared in the *Government Gazette* on 1 August 2017 as follows:

LG404

LOCAL GOVERNMENT ACT 1995
Shire of Northampton
EXTENSION OF AREA OF APPLICATION OF LOCAL LAW

Department of Local Government,
Sport and Cultural Industries.

DLGSC: NR7-44

It is hereby noted for public information that the Governor has approved under section 3.6 of the *Local Government Act 1995* of the making of the *Shire of Northampton Local Government Property Local Law 2017* to the extent that it will apply outside the district of the Shire of Northampton.

DUNCAN ORD, Acting Director General.

- 4.4 The Shire's Chief Executive was contacted to clarify the actual date that the Governor approved the making of the local law that applied outside the district (rather than the gazettal date of the approval). The Chief Executive Officer of the Shire advised that the Governor's approval was provided on 20 June 2017.

⁵ For further information on the history of the Shire of Northampton and its boundaries, refer to Appendix 1.

- 4.5 The preamble to the Local Law states:
- Under the powers conferred by the *Local Government Act 1995* and under all other powers enabling it, the Council of the Shire of Northampton resolved on 16 June 2017 to make the following local law.
- 4.6 The Local Law was made by the Shire on 16 June 2017—four days prior to the Governor granting the required approval. This is inconsistent with section 3.6(1) of the Act, which requires that the Governor’s approval be obtained before making a local law.
- 4.7 On 31 October 2017, the Committee wrote to the President of the Shire of Northampton to advise him of its intention to move a motion to disallow the Local Law.

5 Conclusion

- 5.1 Committee Term of Reference 10.6(a) states:
- In its consideration of an instrument, the Committee is to inquire whether the instrument is ... within power.
- 5.2 The Local Law is invalid by reason of non-compliance with section 3.6(1) of the Act. It offends Term of Reference 10.6(a). The Committee therefore recommends to the Legislative Council that the Local Law be disallowed.
- 5.3 There are a number of benefits in recommending disallowance of invalid local laws, including ensuring that they are quickly removed from the public record, thereby reducing the risk of public misinformation.

6 Recommendation

- 6.1 The Committee makes the following recommendation.

RECOMMENDATION 1

The Committee recommends that the *Shire of Northampton Local Government Property Local Law 2017* be disallowed.



Ms Emily Hamilton MLA

Chair

APPENDIX 1

BOUNDARIES OF THE SHIRE OF NORTHAMPTON

- 1.1 The boundaries of the district of the Shire of Northampton (Shire) can be determined through an examination of the history of the Shire.
- 1.2 The Northampton Roads Board District was established by the Governor in 1887 pursuant to powers contained in *The District Roads Boards Act 1871*.⁶ In the Governor's designation of the Northampton Roads Board District under that Act, the boundaries of the district were defined as:

Bounded on the North by an East line from the Sea Coast, in the direction of Mt. Murchison, on the Murchison River. On the West by the Sea Coast, including the islands adjacent. On the South by an East line from the Sea Coast through Wokatherra trig. station to the Greenough River, thence upwards along said River; and on the East by a North line from the said River, through a spot 8 miles West of Tallering Peak.
- 1.3 The Northampton Roads Board District continued under the *Road Districts Act 1919*, which expressly gave effect to acts, matters or things subsisting and operative at the time of its passage.⁷
- 1.4 The *Local Government Act 1960* provided a mechanism to recognise former road boards as municipalities for the purposes of that Act. The effect of section 9(6)(b)(iii) of that Act established the Shire of Northampton when it provided that:

a former road district becomes a municipal district of a shire under this Act.
- 1.5 When the *Local Government Act 1995* was enacted, it contained transitional provisions which deemed existing local governments to be local governments as if established under that Act. Clause 4 of Schedule 3 provides:

(1) On the Commencement Day –
 - a. A former district becomes a district as if it had been declared to be a district under section 2.1.
- 1.6 Despite many changes to the composition of the Shire over 131 years, the coastal boundary of the Shire of Northampton is unchanged and remains the 'Sea Coast'.

⁶ *The District Roads Boards Act 1871* (34 Vict., No. 26)

⁷ *Road Districts Act 1919* (10 Geo. V No. 26) s 4.

Joint Standing Committee on Delegated Legislation

Date first appointed:

15 June 2017

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'10. Joint Standing Committee on Delegated Legislation

- 10.1 A Joint Standing Committee on Delegated Legislation is established.
- 10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.
- 10.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 10.4 (a) A report of the Committee is to be presented to each House by a member of each House appointed for the purpose by the Committee.
- (b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House's consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.
- 10.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 10.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -
- (a) is within power;
 - (b) has no unintended effect on any person's existing rights or interests;
 - (c) provides an effective mechanism for the review of administrative decisions; and
 - (d) contains only matter that is appropriate for subsidiary legislation.
- 10.7 It is also a function of the Committee to inquire into and report on -
- (a) any proposed or existing template, *pro forma* or model local law;
 - (b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
 - (c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.
- 10.8 In this order-
- "instrument" means -
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
 - (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- "subsidiary legislation" has the meaning given to it by section 5 of the *Interpretation Act 1984*.



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