IN THE COURT OF APPEAL OF NEW ZEALAND

CA319/05

	BETWEEN	JAMES CHARLES MORRIS PARLANE Appellant
	AND	WAIPA DISTRICT COUNCIL Respondent

Hearing: 20 June 2006

Court: Hammond, Chisholm and Cooper JJ

Counsel: P F Gorringe for Appellant
C T Gudsell for Respondent

Judgment: 6 July 2006

JUDGMENT OF THE COURT

A The appeals against conviction are dismissed.

B In this Court, the respondent will have costs of $1,500 and usual disbursements. The orders for costs in the lower courts will stand.

REASONS OF THE COURT

(Given by Hammond J)

Introduction

[1] This is a second appeal by Mr Parlane, pursuant to special leave to appeal granted by this Court on 7 December 2005, against certain convictions entered against him for breaches of the Waipa District Urban Area Fire Control Bylaw 2000 (the Bylaw).

The Bylaw

[2] The Bylaw came about because a number of complaints were received by the Waipa District Council from residents within the urban area, concerning the lighting of "open-air fires". It provides as follows:

> 1.0 Title
>
> This Bylaw shall be cited and referred to as the 'Waipa District Urban Area Fire Control Bylaw'.
>
> 2.0 Interpretation (In this Bylaw, unless inconsistent with the context):
>
> 'Barbeque' means any fixed or portable solid fuel or gas applicant used for the cooking of food.
>
> 'Council' means the Waipa District Council.
>
> 'District' means the District of Waipa as administered by the Waipa District Council.
>
> 'Officer' means any person appointed by Council as an Enforcement Officer pursuant to Section 38 of the Resource Management Act 1991 or an Environmental Health Officer pursuant to Section 28 of the Health Act 1956.
>
> 'Open Air Fire' means any fire in the open other than:
>
> a) contained within an incinerator constructed and maintained to New Zealand Standard (NZS) 5202; or
>
> b) a barbecue; or
>
> c) traditional cooking fire.
>
> 'Traditional Cooking Fire' means any hangi or similar fire in the open air for the sole purpose of food preparation using traditional cooking methods.

'Urban Area' means an area of Waipa District designated in the First Schedule hereto.

3.0 Prevention of Nuisance Caused by Fire

a) No person shall burn, or permit, or suffer to be burnt, any matter or thing in such a manner as to cause a nuisance from smoke, odour or debris.

b) Where any Officer considers any fire to be creating a nuisance, that Officer may require the occupier or owner of the property or the person otherwise responsible for the fire to immediately take all practicable steps to abate the nuisance. Where any such person fails to abate the nuisance caused by a fire, an Officer may take all practicable steps to abate the nuisance caused by that fire.

4.0 Control of Fires in Urban Areas

a) No person shall light, or permit to be lit, an open air fire in any urban area designated in the First Schedule hereto unless that person is the holder of a written permit issued by the Council.

b) Any person desiring to light an open air fire in an urban area shall make application to the Council for a permit and shall furnish the Council with such information as it may reasonably require in relation to the application.

c) A permit may be issued upon payment of the prescribed fee (if any) and subject to such terms, conditions and restrictions as the Council may specify.

d) The Council may from time to time by resolution declare any part of the District Council to be an Urban Area for the purposes of this Bylaw.

6.0 Offences

Any person who contravenes or fails to comply with any part of this Bylaw commits an offence against this Bylaw and is liable (on conviction) to a fine not exceeding $500 and, in the case of a continuing offence, to a further fine not exceeding $50 for every day on which the offence has continued."

Mr Parlane opposes the Bylaw

[3] At all relevant times Mr Parlane was an elected councillor on the Waipa District Council. He is also a solicitor practising on his own account in Te Awamutu.

[4] Mr Parlane opposed the passing of this Bylaw. He considered it was unreasonable that residents within the Te Awamutu urban area could not have a fire outdoors. He wanted, for example, to be able to burn small amounts of rubbish in a 40-gallon drum. He considered the need for an "incinerator", let alone one complying with NZS 5202 was overly restrictive. He also maintained that there was an inconsistency in the fact that a fire could be lit in an open fireplace within a dwelling, but not outside it.

[5] In addition to his legal practice and his council obligations, Mr Parlane occasionally did real estate developments within the Te Awamutu area, in partnership with a builder.

[6] One such development was undertaken at 1070 Rewi Street Te Awamutu. That is within the urban area, and it was common ground that the property was subject to the Bylaw.

[7] Adjoining this property was a property in which a Mr Good resided. He operated a business which was the security contractor for the Waipa District Council. Because of that role, Mr Good was an officer warranted by the Waipa District Council (pursuant to s 177 of the Local Government Act 2002) to act in relation to offences against this Bylaw.

[8] Mr Parlane, through a company controlled by him, purchased the Rewi Street property subject, in broad terms, to an agreement to demolish an old glasshouse on the boundary between the two properties so that a dividing fence could be erected, and the costs of the fence shared between the new neighbours.

[9] This demolition was duly attended to, but the result of that exercise was that there remained on the property a pile of old timber and debris. Mr Parlane decided that the most efficient way to dispose of this debris was to burn it. He moved onto the site a converted 40-gallon drum as an "incinerator". It was placed on an existing concrete slab.

[10] On 22 November 2003 Mr Parlane began burning rubbish. At that time the Bylaw was in operation and there was a general fire ban applying to the whole area because of the dryness of local conditions.

[11] Mr Good's house was approximately 20 metres away from the fire location. His house began filling with smoke. He confronted Mr Parlane as to what he thought he was doing lighting the rubbish fire when it was against the Bylaw and a fire ban had been imposed. In the District Court, Judge Hubble found that Mr Good was told by Mr Parlane to "mind his own business". Mr Good knew of Mr Parlane's position on the council and because of his own role he did not want to get involved in a conflict of interest situation, so he telephoned an on-call security contractor.

[12] There was then some further discussion between Mr Parlane and Mr Good. Mr Good ascertained that Mr Parlane had no permit to light the fire. The Judge found: "Mr Parlane made it clear that he thought the urban fire law was stupid, and he was not going to abide by it …".

[13] Two days later there was an exchange between Mr Parlane and the Waipa District Council about the possibilities of getting a permit. The Judge found that "Mr Parlane indicated to Mr Tutty (on the District Council) [that] he thought the expense of applying for the permit would not be worthwhile, and was totally unreasonable".

[14] The Judge found that a further fire was lit on 29 November by Mr Parlane. He then abandoned it, leaving Mr Tutty and Mr Good to put the fire out with buckets of water. They left a note for Mr Parlane as to "what they had done and why". Thereafter the Judge found that other fires were lit by Mr Parlane with several further interactions between Mr Good and Mr Tutty.

[15] On 5 December Mr Parlane sent a letter to the council in which he attempted to "justify" his actions at some length. He said that things could be done "the easy way" or "the hard way", and "the economics of me getting fined [are] cheaper than me getting a permit". He said the cost to council would be far greater to prosecute him than simply to let the matter go. He said the harm was minimal and he asserted

that his incinerator "complies with the New Zealand standard". Mr Parlane said, "Mr Good will just have to grin and bear it".

[16] By 6 December Mr Parlane had endeavoured to obtain an "incinerator", but the Judge accepted that it did not comply with NZS 5202 "so that in the eyes of the council [Mr Parlane's] fire was again non-complying, and required a permit".

[17] The Judge observed that this factual background displayed "a pragmatic approach which unfortunately flew in the face of the apparent law, and was almost bound to precipitate a series of events … worthy of Peter Sellers".

[18] The council decided it was not going to be burnt off. It initiated prosecutions under the Bylaw with respect to the fires, and a charge of wilfully obstructing Mr Tutty, who was said to have been acting pursuant to powers conferred on him by the Health Act 1956.

[19] Mr Parlane had no merits, in the general sense, on his side at all. So he decided to attack the validity of the Bylaw, which set in train the legal arguments which have reached this Court.

[20] After a defended hearing before Judge Hubble in the District Court, Mr Parlane was convicted of six breaches of the Bylaw and one of obstruction. He was fined $1,800 and ordered to pay costs of $2,000 under s 4 of the Costs in Criminal Cases Act 1967.

[21] In the High Court, Rodney Hansen J upheld the Judge's decision in all respects (except for the charge of obstruction, which was quashed), although the reasoning of the High Court Judge was different from that of the District Court Judge.

[22] The essence of Mr Parlane's argument in the District Court and the High Court was that, as the standard referred to in cl 2.0(a) (incinerator requirements) had been "withdrawn" by Standards New Zealand before the Bylaw was passed, the prosecution could not prove that the container used by Mr Parlane was an

inappropriate incinerator. NZS 5202 had been promulgated in 1979 pursuant to what was then the Standards Act 1965. Designed to promote the design and performance of industrial, local government and commercial incinerators, the standard had in fact been withdrawn in 1999 and it had not been replaced. The fires were not therefore "open fires" requiring a permit, or so Mr Parlane maintained.

The difference in approach between the District Court and the High Court

[23] The essence of Judge Hubble's decision was that:

> … it is open to Council to refer to the standard but they have the right to rely on only part of it, or modify it as they see fit. They may, therefore, wish to adopt a standard under a previous enactment, even though that standard may itself have been repealed.

[24] On the appeal to the High Court, Rodney Hansen J held that "once revoked the standard ceased to exist in law and could no longer be incorporated into the Bylaw" (HC HAM CRI 2005-419-027 20 June 2005 at [13]).

[25] Rodney Hansen J then turned to s 17 of the Bylaws Act 1910 (which relates to severance of part of a bylaw). By reference to that provision, the Judge considered that subparagraph 2.0(a) should be severed in its entirety. The Judge concluded that the subparagraph was intended to exclude commercial operations from the ambit of the Bylaw, which meant that domestic incinerators remained subject to the ban in the Bylaw. With the revocation of the standard, such commercial operations "could no longer be defined with reference to it and necessarily became open-air fires for the purpose of the Bylaw" (at [15]). Mr Parlane's actions therefore fell within the definition of an open fire, and the convictions were upheld.

Leave is granted

[26] The High Court Judge refused leave for a second appeal to this Court, in a decision of 11 August 2005.

[27] This Court granted special leave to appeal, under s 144 of the Summary Proceedings Act 1957, on this question:

> Whether the High Court Judge was correct in proceeding, under s 7 of the Bylaws Act 1910, to sever clause 2 of the relevant Bylaw as to lighting of fires, by deleting clause 2(a) in its entirety.

[28] We observe that the reference to s 7 in the question should have been to s 17 of the Bylaws Act 1910.

[29] There was some discussion before us as to whether Mr Gudsell was entitled to argue (as he wished to) that the Bylaw was valid, and that therefore severance was neither necessary nor appropriate.

[30] Mr Gorringe was at first minded to say that the appeal was confined precisely to the severance question, although he did say he was not prejudiced by the issue having been raised, and he gave his arguments on the point.

[31] We think that the question as framed was wide enough that it necessarily encompasses both the validity of the Bylaw and possible severance of it. And it is entirely in the interests of the parties that we should resolve both questions. This for the reason that we were told from the bar that the internecine warfare between these parties still continues, and that by recent other High Court proceedings between the parties, Mr Parlane is now challenging the reasonableness of the Bylaw.

The legislation

[32] It was never in issue between the parties that, in general terms, this local authority had the power to make a Bylaw of this character as to open fires. Neither - and we think this is significant in the context of these prosecutions - was any challenge made to the formalities and procedural requirements relating to the promulgation and coming into force of this Bylaw.

[33] The argument for Mr Parlane was, and is, a very narrow one: that the Waipa District Council could not promulgate a Bylaw which incorporated reference to a standard which had been "withdrawn" by Standards New Zealand.

[34] To appreciate this point it is necessary to set out the relevant provisions of the Standards Act 1988.

> **2 Interpretation**—
>
> …
>
> 'standard' means a specification relating to goods, services, processes, or practices approved or adopted by the Council or another standards organisation, and includes modifications to any such specification:
>
> …
>
> **10 Functions of Council**—
>
> (1) The primary functions of the Council shall be to develop standards and to promote, encourage, and facilitate the use of standards in New Zealand with the object of—
>
> (a) Improving the quality of goods or services, having regard to economy in their production or supply; or
>
> (b) Promoting standardisation in industry, trade, or commerce; or
>
> (c) Encouraging and facilitating industrial development, trade, or commerce; or
>
> (d) Promoting public or occupational safety, health, or welfare.
>
> (2) Without limiting the effect of subsection (1) of this section, the Council's functions shall include the following:
>
> (a) To prepare draft standards and, when satisfactory to the Council, to approve and promulgate them as New Zealand standards:
>
> (b) To examine standards of other standards organisations and, if the Council considers it appropriate, to adopt and promulgate them (with or without modification) as New Zealand standards or to endorse them as suitable for use in New Zealand:
>
> (c) To examine New Zealand standards and, if the Council considers it appropriate, to revoke them or approve and promulgate standards to replace or modify them:
>
> (d) To undertake and promote research and educational work in connection with the development and use of standards:

…

(4) If any New Zealand standard is cited in any Act or regulation, the Council shall not amend, revise, revoke, or replace that standard except with the approval of the Minister who is for the time being charged with the administration of the Act or regulation.

…

22 Regulations, etc, may be made by referring to or incorporating New Zealand standards—

(1) Where regulations or bylaws may be made under any Act prescribing, defining, or making other provision in relation to goods, services, processes, or practices of any kind, any such regulation or bylaw may be made by referring to or incorporating in whole or in part, and with or without modification, any New Zealand standard relating to goods, services, processes, or practices of that kind.

(2) Where a bylaw is made or proposed to be made by referring to a New Zealand standard,—

(a) No resolution making the bylaw and no copy of the bylaw shall be deemed to be complete unless it has attached to it a copy of the standard or the part of the standard referred to (together with any text that the standard or part incorporates by reference) and states or shows any modification made to it by the person or body making the bylaw:

(b) The object or purport of the bylaw shall be deemed to be sufficiently stated for the purposes of any enactment requiring that public notice be given of it if the notice refers to the standard by the title and number given to it by the Council and, in the case of a bylaw referring to part only of a standard, states the number and heading of the part referred to.

…

23 Citation of New Zealand standards—

A New Zealand standard may (without prejudice to any other mode of citation) be cited in an Act, regulation, or bylaw by the title and number given to it by the Council, and any such citation shall (unless the context otherwise requires) be deemed to include and refer to the latest New Zealand standard with that citation (together with any modifications to it) promulgated by the Council before the Act was passed or the regulation or bylaw made.

24 References to New Zealand standards in other Acts, etc—

A reference in any other Act or in a regulation or bylaw to a standard, standard specification, or New Zealand standard declared or promulgated by the Council whether under this Act or the Standards Act 1965 shall be deemed to be a reference to a New Zealand standard within the meaning of this Act.

25 Proof of New Zealand standards—

(1) The fact that any specification has been approved or adopted by the Council and promulgated as a New Zealand standard shall, in the absence of proof to the contrary, be sufficient evidence that it is a New Zealand standard made and promulgated in accordance with the requirements of this Act.

(2) Without affecting any other method of proof, the production in any proceedings of a copy of a specification purporting to be a New Zealand standard shall be sufficient evidence thereof in the absence of proof to the contrary.

Validity

[35] We consider that, on the only point which is before us, this Bylaw was validly made by the Waipa District Council, and that at all times relevant to this proceeding it was in full force and effect.

[36] We emphasise that no collateral attack has been made in this prosecution on the procedure by which the Bylaw was made. And no challenge has been made – if indeed it could be made –- on public law grounds, such as lack of vires, repugnancy or unreasonableness. We are therefore not presently required to express a view on those sorts of matters.

[37] At [55] of the District Court judgment there was a holding that the Bylaw was produced in evidence to the satisfaction of the District Court Judge, pursuant to s 22 of the Bylaws Act 1910. There was no appeal against that holding. There was therefore evidence, "in the absence of proof to the contrary", of the "existence, publication, validity and provision of the Bylaw, and of the date of its coming into operation" (s 22(1)).

[38] The only thing that was said against the Bylaw related to the production in evidence, as exhibit B, of a letter under the hand of MrCraig Radford, the Update Editor of Standards New Zealand. It read: "This is to confirm that [NZS 5205: 1979 Specification for incinerators] has been withdrawn without replacement by Standards New Zealand. The withdrawal was announced in the SNZ Update Magazine dated March 1999".

[39] Mr Parlane's argument was a metaphysical one: that there must be what Mr Gorringe termed a "live animal". That is, that if the specification had been "withdrawn", somehow the subject matter of the Bylaw should be treated, to continue the analogy, as dead and buried and not in existence.

[40] The District Court Judge did not accept that argument. The High Court Judge did at [15], in these terms:

> When the standard ceased to exist, … commercial operations could no longer be defined by reference to it and necessarily became open air fires for the purpose of the bylaw.

[41] We see the matter this way. It is for the democratically elected local authority to make bylaws, of course in compliance with the Local Government Act 2002. In so doing, it is free to make use of – in whole or in part – standards which are evolved by Standards New Zealand under the Standards Act. There are clear public advantages in local authorities so proceeding (see the discussion in Palmer *Local Government Law in New Zealand* (2ed 1993) at 424-445). It is a good thing that, so far as is reasonably possible, there be uniformity of standards in New Zealand, particularly on technical matters. But Standards New Zealand does not "make" bylaws – the local authority does. It can utilise the standard, or part of it, or reject it entirely.

[42] There is no legislative restriction on the local authority as to the subject matter of a Bylaw (provided always it complies with the making requirements under the Local Government Act 2002). It could even go so far as to use a standard which had been revoked if, in its view, that was a proper standard for the purposes of that local authority. The law deals in practicalities, not metaphysics, and a copy of the standard was still extant. Of course there might still be an application under s 12 of

the Bylaws Act 1910 challenging the validity of the Bylaw, on the grounds of unreasonableness or on some recognised public law ground, but that is quite another matter.

[43] Mr Radford's letter is a curious one. The concept of "withdrawal" does not appear in the legislation. Whether the letter was endeavouring to convey revocation by another name, or quite what, is not apparent on the evidence in this case. That is, quite what lies behind the letter is not in evidence. But whether he meant withdrawal or revocation does not affect our reasoning.

[44] This case begins and ends at the same point: under s 22(1) of the Bylaws Act it was for Mr Parlane to demonstrate - notwithstanding that this is a criminal prosecution – that the Bylaw was invalid. He has made no attempt to do so, other than to point to this particular letter as evidence of the standard to which the Bylaw refers having been "withdrawn" (whatever that might mean).

[45] Whether the council knew the standard had been "withdrawn", or not, when it made the Bylaw is beside the point, for present purposes. The council had explicitly adopted that standard, and no argument has been advanced in this proceeding as to any deficiency in the way in which the Bylaw came into existence.

[46] It follows that at all relevant times there was a Bylaw; and convictions were correctly entered against Mr Parlane on the breach of the Bylaw charges.

Severance

[47] In the circumstances, we do not need to address the question of whether severance, and if so in what manner, was appropriate under s 17 of the Bylaws Act 1910. Further, we think it is inappropriate that we should express any views on that subject. For we now know that there is further litigation pending in the High Court. Any observations which may fall from us now may carry inappropriate or undue weight in the pending proceeding.

Conclusion

[48] In the result, we formally answer the question on which leave was given as follows. The Judge was not correct to sever cl 2 of the relevant Bylaw by deleting cl 2(a) in its entirety because on the evidence before the Court the Bylaw was valid.

[49] In the result, the appeals against conviction were correctly dismissed in the High Court, albeit for different reasons than those given by the High Court Judge.

[50] In this Court, the respondent will have costs of $1,500 and usual disbursements. For the avoidance of doubt, the orders for costs in the lower courts will stand.

Solicitors:
Gallie Miles, Te Awamutu for Respondent