



## CONFIDENTIAL AND LEGALLY PRIVILEGED MEMORANDUM

**TO:** Kent Duston  
**FROM:** Chen Palmer New Zealand Public and Employment Law Specialists  
**DATE:** 27 July 2016  
**SUBJECT:** Legality of Wellington City Council's Proposed Animal Bylaw

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### INSTRUCTIONS

- 1 You have instructed us to advise you on the legality of the Wellington City Council's ("**the Council**") proposed animal bylaw in relation to cats ("**the proposed bylaw**"). The proposed additional clauses at issue are the limit of three cats per household (over six months' old) and the requirement that all cats be microchipped and registered.
- 2 You have also asked for advice on challenging the proposed bylaw by application for judicial review, should it be passed by the Council.
- 3 The accuracy of the following advice is subject to the facts you have provided us with.

### EXECUTIVE SUMMARY

- 4 The Council has the power to make bylaws under the Local Government Act 2002 ("**LGA**") and the Health Act 1956 for the promotion and protection of public health and to protect the public from nuisance. It does not have the power to make bylaws for the protection of wildlife, this being the role of the Governor-General, acting on the recommendation of the Minister of Conservation, under the Wildlife Act 1953.
- 5 If the Council decides to adopt the proposed bylaw on the basis of the evidence and reasoning in the statement of proposal and summary of information to date, in my view, the bylaw may be challenged by judicial review and/or under the Bylaws Act 1910 on the following grounds:
  - (a) Lack of probative evidence and/or error of law: The Council has not provided sufficient probative evidence of the mischief the proposed bylaw is said to protect against (that is, nuisance and public health issues). The evidence provided, a Council survey of Wellington residents, and two *New Zealand Herald* articles, do not support the Council's contention that cat behaviours (excluding predation of wildlife) amount to a nuisance, or the existence of a toxoplasmosis threat specific to Wellington. Nor has the Council clarified in its statement of proposal (or elsewhere) how the proposed bylaw addresses the perceived problems, or identified the costs involved with the proposed bylaw compared with each of the alternative options. This lack of sufficient evidence to substantiate the perceived problems may also breach the right of those affected by the proposed bylaw to

natural justice, as this undermines their right to adequate information to make an informed and intelligent response to the proposed bylaw.

- (b) Improper purpose, *ultra vires* and/or consideration of irrelevant factors: Although the Council acknowledges that it does not have the power to make bylaws for the protection of wildlife, this rationale nevertheless appears to be the true reason for the proposed bylaw, in other words, the central and dominant purpose. Various press releases and information published by the Council on the proposed bylaw include reference to the protection of wildlife, and the Council's Biodiversity Strategy states that the Council planned to review the animal bylaw so that the bylaw could be used to minimise the impact of pets on native biodiversity. If the Council proceeds to implement the proposed bylaw for this improper purpose, the bylaw will be *ultra vires*. Even if protection of wildlife is not the central and dominant rationale for the proposed bylaw, to the extent that the protection of wildlife materially influences the Council's decision-making, the Council's decision could also be challenged on the basis that it has taken into account a legally irrelevant factor. The protection of wildlife is irrelevant to the objectives underlying the Council's bylaw-making powers under ss 145 and 146 of the LGA and the Health Act.
- (c) Predetermination: The Council's apparent preference for the proposed bylaw over any of the alternative options identified suggests that the Council may have unlawfully predetermined its decision on the proposed bylaw, contrary to s 82(1)(e) of the LGA. The alternative options are only given brief consideration in the statement of proposal, suggesting that the Council may have gone through the motions of meeting the applicable legislative requirements under the LGA and pre-emptively "written off" the alternatives in favour of the proposed bylaw. In particular, the Council does not assess whether the proposed bylaw is in proportion to the significance of the matters affected, and nor does it assess the benefits and costs involved with each option to determine which is the most appropriate, as required under s 155 of the LGA. However, to successfully challenge the bylaw for predetermination, it must be established that there was actual predetermination, not just an appearance of the same, which is a high threshold.
- (d) Unreasonableness: The Council has not provided sufficient evidence of the perceived problems that the proposed bylaw is said to address (nuisance and threat to public health), and has failed to explain how the proposed restrictions on cat ownership address the perceived problems. Accordingly, the Council has not demonstrated that the proposed bylaw will actually remedy the perceived problems, or that it is the most appropriate response to these problems, compared to the other alternatives identified, which may be less intrusive and costly to cat owners. Therefore, the Council's decision (should it decide to implement the proposed bylaw) may be open to challenge for unreasonableness.

- 6 Any challenge and its chances of success would depend on the nature of the Council's final decision, and I can advise you further, if that is needed.