

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

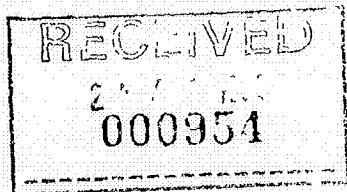
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CP113/95

UNDER the Judicature Amendment Act 1972

IN THE MATTER of a determination of the
Local Government Commission
pursuant to s101K of the Local
Government Act 1974

713



BETWEEN WILLIAM ANTONY
SAPSFORD and ROLAND
MARIO SAPSFORD

Plaintiffs

AND LOCAL GOVERNMENT
COMMISSION

First Defendant

AND WELLINGTON CITY
COUNCIL

Second Defendant

Hearing: 12 June 1995

Counsel: Dr G.D.S. Taylor for Plaintiffs
M.T. Parker for First Defendant
R.J.B. Fowler with S. Quinn for Second Defendant

Judgment: 15 JUN 1995

JUDGMENT OF ELLIS J.

Solicitors:

Foot & Co, Wellington for Plaintiffs
Crown Law Office, Wellington for First Defendant
Phillips Fox, Wellington for Second Defendant

Two ratepayers seek the urgent intervention of the Court in the statutory process for determining the basis for the upcoming local body elections in Wellington City. A decision is required by Friday. By agreement a hearing on the merits took place rather than proceeding with a claim for interim relief.

The City Council has since 1989 been elected by voting for 21 councillors from seven wards. There has been mounting public pressure to reduce the size of the Council and in 1992 the Local Government Commission urged the Council to undertake a full review. Pursuant to the Local Government Act 1974 the Council set up a Triennial Review Subcommittee in August 1993 to develop and consider options for the 1995 elections. A summary of what it did and recommended is taken from the Commission's internal report:

"10. The subcommittee's report was considered at a councillors workshop on 2 May 1994, following which the Strategic Planning and Policy Committee decided to carry out a round of public consultation prior to the Council deciding upon a formal proposal. This included public meetings, publicity in suburban and community newspapers, a letter-box drop to properties affected by possible minor boundary changes, a letter inviting comment from 80 progressive or residents associations, consultation with community boards, Maori consultation, and a discussion document.

11. The discussion document approved by the committee included four options for wards, all based on retaining 21 councillors, as follows. The subcommittee report had recommended 14-16 councillors, and did not include option (b) below:

- (a) The committee's recommended option of 7 wards as at present, with minor boundary alterations numbered (a)-(f) (see folder p.16);

- (b) Seven wards with a major boundary alteration (Wadestown from Western to Onslow);
- (c) Six wards - amalgamation of the Northern and Onslow Wards, and minor boundary alterations as in (a);
- (d) Five wards - amalgamation of most of Northern with Tawa; amalgamation of most of Western with Onslow and part of Northern; a Central Ward consisting of Lambton with Northland, Wadestown, and Wilton from the Western Ward, and Kaiwharawhara from the Onslow Ward; Southern and Eastern to remain; minor boundary alterations as in (a)."

There was plainly very wide public consultation indeed, but there is no evidence that the plaintiffs took part. Each is a member of a community group, but he does not claim to sue in a representative capacity. The Subcommittee made its report and pursuant to s101H(1) the Council resolved in August 1994 to have six wards and 16 councillors. This did not involve any significant changes to the boundaries of the Lambton Ward, at least for present purposes. It was to be renamed Central Ward. The Council gave public notice of its proposals under s101J. Subsection 1 specifies the detail to be given:

"101J. Objections - (1) The council shall, within 14 days after making a resolution under section 101H of this Act but not in any case later than the 8th day of September in the year immediately preceding the year of the triennial general election, give public notice of the proposals contained in the resolution, and shall in that notice -

- (a) Specify the communities of interest considered by the council as required by section 101L of this Act; and

- (b) Specify the ratio of population to proposed members for each proposed ward (if any) or constituency and the reasons for those proposals in terms of section 101L(3) of this Act; and
- (c) Specify the right of objection conferred by subsection (2) of this section, including the place and closing date for the receipt of objections."

It is not suggested that the Council failed in any way to comply with these requirements. Pursuant to subsection 2 objections were received from 26 persons. These did not include the plaintiffs or their local organisations. Among them however was the North Johnsonville Progressive Association which gave its grudging support for the proposed reduction of wards and councillors but stated a preference for 15 councillors elected at large. The objections canvassed a wide spectrum of opinion both as to number of councillors and wards, however none it seems directly proposed dramatic changes to Lambton Ward.

Pursuant to subsection 3 the Council considered the objections and on 19 October 1994 resolved to scrap the original proposal and revert to the status quo. Next pursuant to subsections 4 and 5 the Council received four appeals and four counterobjections. The North Johnsonville Progressive Association was one of those and it addressed the boundaries of Lambton Ward. The Association supported a substantial reduction in the number of councillors, the abolition of wards in the City apart from Tawa, but also suggested reorganising the wards and dividing Lambton Ward down Cambridge Terrace and distributing it to others and leaving four wards only (I do not recite the detail).

The Council then complied with subsection 7 which provides:

"Where the council receives any appeal under subsection (4) of this section or any counter-objection under subsection (5) of this section, the council shall as soon as practicable, but in no case later than the 15th day of January in the year of the triennial general election, forward to the Commission -

- (a) Every resolution made under section 101H of this Act or subsection (3) of this section; and
- (b) Every objection, appeal and counter-objection received by the council under this section; and
- (c) Such information concerning the communities of interest, population, rateable value, area, or other characteristics of the district or region, or any proposed ward or constituency thereof held by the council as is necessary for the purposes of section 101K of this Act."

There is no obligation in the statute to give the public copies of the appeals or counterproposals. In particular the plaintiffs did not know about the proposal to divide the Lambton Ward. The procedure thereafter is provided for in s101K, which provides:

"101K. Commission to determine wards and constituencies-

- (1) The Commission shall, before the 29th day of March of the year of each triennial general election, -
 - (a) Consider the resolutions, objections, appeals, counter-objections, and information forwarded to it under section 101J of this Act; and
 - (b) Subject to section 101L of this Act, determine the number of wards or constituencies and their names and boundaries, and the number of members to be elected by electors of each ward or constituency or, as the case may be, by the electors of the district as a whole.

(2) For the purposes of making a determination under subsection (1)(b) of this section, the Commission may, but shall not be obliged to, hold meetings with the council or any persons or organisations who have indicated a desire to be heard by the Commission.

(3) Notice in writing of every determination under subsection (1)(b) of this section, setting out the reasons for the determination, shall be given by the Commission to the council concerned, and by public notice.

(4) Forthwith upon the publication of a public notice under subsection (2) of this section, the Commission shall send a copy of that notice to -

- (a) The Surveyor-General; and
- (b) The Government Statistician.

(5) Subject to section 37ZE of this Act, the determination of the Commission made under subsection (1)(b) of this section shall be final and shall come into force for the next triennial general election."

In making its decision the Commission is required to take certain factors into account. Subsections 2 and 3 provide:

"(2) In determining whether the council is to be elected by the electors of the district as a whole or by the electors of two or more wards and in determining (where necessary) the number and boundaries of wards, the territorial authority and, where appropriate, the Commission shall ensure-

- (a) That the election of members of this council by the electors of the district as a whole or by the electors of the two or more wards whose number and boundaries are determined will provide effective representation of communities of interest within the district; and
- (b) That ward boundaries coincide with the boundaries of current statistical meshblock areas determined by the Department of Statistics and used for Parliamentary electoral purposes; and
- (c) That, so far as is practicable, ward boundaries coincide with community boundaries.

- (3) In determining the number of members to be elected by the electors of any constituency or ward, the council and, where appropriate, the Commission shall ensure that the electors of the constituency or ward receive fair representation having regard to the population of every constituency or ward within the region or district and, if the circumstances so require, the rateable values, areas, or other relevant characteristics of the various constituencies or wards."

The Commission obtained a report from one of its officers and decided to hold a hearing with the Council, appellants and counterobjectors. After considering the papers including the history of the matter before itself and the submissions at the hearing it made its determination on 28 March 1995 pursuant to s101K, with one day to spare. It decided there would be 18 councillors elected from five wards. The Lambton Ward was divided generally about Taranaki Street and that the Western portion including areas of Kelburn, Western Te Aro and Thorndon would become part of the Western Ward, while the remaining parts Eastern Te Aro, Mt Victoria and Roseneath will be incorporated in the Eastern Ward. The plaintiffs' personal areas of interest are Te Aro and Thorndon and the associations they support are so localised. Pursuant to s101M the Commission's determination will govern the 1995 elections, and the Council I was told from the bar, must take action to settle the rolls by 16 June, this Friday. The plaintiffs commenced these proceedings on 30 May and applied for interim relief. The matter was called in the Chambers List on Monday and no provision for a special hearing had been sought. The Court made time immediately available. In the context of urgency, it is noted that the plaintiffs took two months to file their claim.

The Statement of Claim propounds five causes of action:

1. The Commission has acted in breach of the rules of natural justice. If the Commission was minded to make a decision on a matter not proposed by a party it was obliged to advise the parties that it was considering this and give them an opportunity to make submissions - the abolition of the Lambton Ward was such a matter.
2. The Commission misdirected itself as to the relevant statutory provisions. It is alleged that the concept of arriving at the minimum number of councillors is not supported by statute. The Commission was required to take account of the "commonality of communities" and did not give the weight it should to providing fair representation of different communities of interest within the wards.
- 3 and 4. The Commission wrongly used its own resources in reaching its decision.
5. The Commission failed to consider the comparative communities of interest within the existing Lambton Ward.

Findings of Fact

On the information before me it is plain that neither plaintiff has been a "party" in the proceedings before the Council or the Commission, so even if the proposal was placed before "the parties", the plaintiffs would not have been involved. Further, the proposal was in essence part of the submission by the North Johnsonville Progressive Association. I am satisfied that ratepayers and community groups in the Lambton Ward, which is the inner city, do have some community or identity of interest.

On the other hand, it is equally true that each has a special parochial interest that distinguishes it from the others. Other local groups throughout any city whether central or suburban will have some common interests and some singularly their own. It is not possible in the division of a city into four or seven wards to ensure that such communities of interest are contained in any one ward and so perhaps form a stronger political or electoral base. While the creation of the Lambton Ward does recognise a central city community, it is not the only way of grouping communities. There is insufficient material before me to enable me to rationalise or decide on any particular grouping. On the other hand, I happily accept the views of the deponents including Mr Foot and the plaintiffs that the Lambton Ward did recognise one rational way of grouping ratepayers in accordance with the statute. It is more significant if there are seven wards than only four. It is also impossible for me to assess the electoral significance of having communities of interest collected into wards in any particular way. Community groups are often pressure groups, and so also often minority groups. They may or may not have real voting power.

Status of the Plaintiffs

Despite urgings from Dr Taylor I can only proceed on the basis that the plaintiffs are individual ratepayers. Individual ratepayers can in some circumstances seek relief under the Judicature Amendment Act 1972 or the prerogative writs against a local authority: *Anderson v Valuer-General* [1974] 1NZLR603 and contra *Collins v Lower Hutt CC* [1961] NZLR 250 and the discussion by the Public and Administrative Law Reform Committee's report on Standing in Administrative Law (11th Report 1978). However where a person complains that there has not been a fair hearing, s/he must have been a party to the hearing itself. Here none of the participants before the Council or the Commission complain. On the other

hand, where a biased authority grants an application that is a wrong done not only to the applicants but to the public interest generally. The position is discussed but not resolved in the above Report and also by Sir William Wade in the 6th edition of Administrative Law at pages 537 and 538. In this case I have serious doubts that the plaintiffs have sufficient interest in the matter to warrant granting them relief in any event. On the other hand I think such questions are more appropriate to the question of whether or not to grant discretionary relief. That is the way Mr Parker made his submissions.

The Scheme of the Legislation

Subject to an appeal on a question of law, the Commission's decision as to the number of wards, their names and boundaries, and the number of electors of each ward shall be final: s101K(5). Only a party to proceedings before the Commission (or the Minister) may appeal on a question of law: s37ZE (1) and the Council and those who made submissions to the Commission are deemed to be parties. I consider the plaintiffs are not parties for the purposes of such an appeal. Section 37ZM seems to reinforce this while recognising the power of this Court to exercise a supervisory jurisdiction over the Commission on a question of law. The scheme of these provisions seems to me to restrict those who can appeal on matters of law to those who participate in the proceedings before the Commission. This is also a strong indication that the plaintiffs lack status to bring these proceedings.

The sections prefixed 101 I have already referred to recognise the expertise of the Commission and give it wide powers to decide matters of constitutional policy affecting territorial authorities and in particular their electoral bases. Section 101K(2) gives the Commission a discretion

whether or not to hear the Council or anyone else. It can decide the matter on the papers. It follows that it does not have to disclose the contents of those papers to parties for consideration and further submission, let alone disclose them to the public for such. The strict time limits could not be realistically kept if such were the case. Here the range of submissions had been so wide and opinions so varied and changeable that there had to be an end to consultation and a decision on the matter made in accordance with the statutory timetable. On the facts I consider there was no obligation on the Commission to disclose the submission of the North Johnsonville Progressive Association more widely than it did, nor to indicate that it was contemplating dividing Lambton Ward. The way the Council's decisions and the various submissions were made left the issues of number and boundaries of wards, and numbers of councillors wide open.

Decision on the Causes of Action

I consider that the Commission was not obliged to disseminate the proposal to divide Lambton Ward as claimed. Accordingly there has been no breach of the rules of natural justice. The plaintiffs endeavoured to rely on an admission in the Commission's Statement of Defence that it was bound to observe the rules of natural justice. I accept Mr Parker's submission that this admission was made within the statutory framework I have analysed. The first cause of action fails.

I consider the number of councillors to be elected was at large for the Commission. Submissions ranged from four to 21. The decision to provide for 16 was open to the Commission. Its approach emphasised that the number of ratepayers was a dominant consideration as each ward had many groups with a particular interest and boundaries cannot be defined so as to collect groups with commonality of interest into one ward. This is

obvious enough. In my view the statute should be interpreted so as to give flexibility: the larger each ward the less detailed is the recognition of commonality of interest. The integrity of the old Tawa Borough is one such larger interest. I agree that the central city is another. However such a decision is one of fact not law. The second cause of action fails accordingly.

The Commission certainly used its own resources and made its own decision. The decision however was a reflection of the information presented by the Council and participants which left the choices wide open. There is no evidence that the Commission followed a course substantially beyond anything submitted to it. I reject the third and fourth cause of action accordingly.

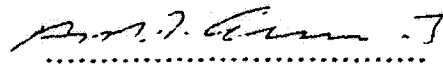
The fifth cause of action must be dismissed also for the reasons I have already given.

Discretionary Relief

For the reasons I have given in my discussion of status and the statutory regime for appeals on questions of law, even if I had found one or more of the causes of action to have been well founded, I would have refused relief.

Result and Costs

The plaintiffs' action will be dismissed. This is public interest litigation. There will be no award of costs.


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