

27/99; [1999] VSC 465

SUPREME COURT OF VICTORIA

MELTON SHIRE COUNCIL v TANKARD

Mandie J

22 November 1999 — (1999) 106 LGERA 371

LOCAL GOVERNMENT – OWNER/OCCUPIER REQUIRED TO REMOVE UNSIGHTLY MATERIAL FROM LAND – WRITTEN NOTICE SERVED ON OWNER/OCCUPIER – FORM OF NOTICE NOT SPECIFICALLY APPROVED BY COUNCIL – WHETHER CLAIM FOR COUNCIL'S COST OF WORK ON THE LAND RECOVERABLE FROM OWNER/OCCUPIER: LOCAL GOVERNMENT ACT 1989, S225; LOCAL LAW 1, cl 706.

Local Law cl 706 requires an authorised officer to hold a reasonable suspicion of a contravention of the Local Law and then to get the form of notice which requires work to be carried out approved by council before it is served on the owner or occupier of the land. Where the form of the actual notice specifying the precise work required to be done in order to remove a contravention was not actually approved by council, it was open to a magistrate to dismiss a complaint based on s225 of the *Local Government Act 1989* seeking to recover the cost of the council's carrying out certain work on the land.

MANDIE J:

1. This is an appeal from an order of the Magistrates' Court at Broadmeadows, an appeal by the Melton Shire Council which was the plaintiff in a civil proceeding. The magistrate dismissed the complaint on 17 June 1999.

2. The complaint was based on s225 of the *Local Government Act 1989*, and it sought to recover from a person who was the owner and occupier of certain land in the municipality, the cost of the council carrying out certain work on the land, on the basis that the requirement to carry out the work was made by the council pursuant to Local Law 1 Clause 706 (and Clause 1107).

3. The magistrate found that the land was not unsightly within the meaning of Clause 706 of the Local Law, and the appeal is brought on the basis that the magistrate erred in law in holding that the land was incapable of being rendered unsightly by an accumulation of the material that had been placed on it, not being by way of buildings and other fixtures.

4. It seems to me, although not having heard submissions on either side, that it is strongly arguable having seen the photographs, that this land was unsightly or certainly that it is strongly arguable that it was open to the magistrate to so find within the meaning of the Local Law, and I would be very surprised if the magistrate was correct in his interpretation of the Local Law, but I do not need to decide that question, because it seems to me that there was another valid basis upon which the magistrate was bound to dismiss the complaint, and that simply is that the notice which purportedly required the defendant to carry out the work, was not a notice in the form authorised by Clause 706 of the Local Law.

5. Clause 706(2) of the local law entitles the authorised officer to serve on the owner or occupier, a "notice in a form approved by council". There was some evidence before the magistrate that the council have approved a general form or forms for use under this provision, but I am told that there was no evidence before the magistrate that this particular notice dated 13 August 1998 directed to the defendant had been approved by council, and Mr Taylor, who appears for the appellant this morning, informed the court that on his instructions, the council never did approve this particular notice.

6. On my reading of the Local Law, it is not a matter for the authorised officer to determine the form of the notice in any particular case, but it must be approved by the council, and that, in my view means, that in any case where a notice is to be served upon an owner or occupier,

the actual notice must be approved by the council. What is envisaged by Local Law 706 is that the authorised officer must come to a reasonable suspicion of a contravention, and he must then get the form of the notice which actually requires the work to be carried out, to be approved by council, before he serves it on the owner or occupier.

7. There are possibly other difficulties about the form of the notice as well. It does not identify the particular contravention of Local Law No.1 other than by referring to Clause 706 which creates many offences in its various sub-paragraphs. Also the notice requires all sorts of things to be removed from the property, some of which may have rendered the property unsightly, and some of which perhaps may have not. For example, if material within the fibro-cement shed was not visible, it could hardly render land unsightly; on the other hand if it was visible, then it might well render the land unsightly. These involve questions of fact which it would have been for the magistrate to determine, but there may be other real questions about the validity of this notice. However, the fundamental point, I think, is that the council cannot in my view, prove its case under s225 of the *Local Government Act*, without showing that a requirement for work to be done has been given under the Local Law, and when one goes to the Local Law, it seems to me clear that the form of the actual notice specifying the precise work required to be done in order to remove the alleged contravention must be approved by the council.

8. It is not a question of some general prescribed form being approved, but it must be a notice in a form approved by council, not a form in which blanks have to be filled in, but a form which is approved by council in every case. If that is not the intention, then the Local Law needs to be clarified.

9. There are difficulties about this Local Law, because it does not talk about the council or the authorised officer requiring any particular work to be done; it simply says the owner shall cease his contravention in accordance with a notice. So it is left up in the air what the contravention is and what the notice should say, and I consider that that gap is filled on the present drafting of the Local Law, by council actually approving the form of notice which is to be given.

10. I therefore think that whether or not the magistrate was correct in the reason that he did give, he was, for another reason which I have endeavoured to outline, entitled to dismiss the complaint.

11. Accordingly the appeal is dismissed.

APPEARANCES: For the appellant Melton Shire Council: Mr R Taylor, counsel. Robert D Taylor & Associates, solicitors. The respondent appeared in person.
