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For: Clare Wooding
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Further Freedom Camping Issues - LGNZ Freedom Camping Guide

1. Following our opinion dated 2 October 2012, you asked us to undertake some further work on relation to the Freedom Camping Act 2011 (the **FCA**). This further work is as follows:

   - Consider specifically the relationship between a bylaw made under the Local Government Act 2002 (the **LGA 02**) and the intent of the FCA. Are bylaws that are made under the LGA that prevent or prohibit freedom camping without meeting the criteria for doing so in section 11(2) of FCA trumped eg on the *lex specialis derogant legi generali* (specific law overriding the general law) basis?

   - Build into your guidance our advice regarding section 11 of the FCA which looks specifically at the extent of the assessment under section 11 of the FCA.

   - Build into the guidance the implications of the Occupy Auckland/Aotea Square Decision.

2. In any event you also asked us to review a table which is in the LGNZ Guidance Document on Freedom Camping, and specifically consider the comments in the table on the relationship between the LGA 02 and the FCA, as well as the FCA and the Reserves Act 1977. (You did not ask us to review the comments about the relationship with any district plans and we have not considered those.)

Section 11 - Guidance

3. We have updated the Guidance Document for section 11. Please see **attached** our suggested section 11 paragraphs. This also incorporates the Occupy Auckland decision.

Regime / Management Approach - Guidance

4. In terms of the regime/management approach part of the Guidance Document, we have suggested changes to the wording for the three boxes relating to the Reserves Act, the LGA 02 and the FCA. Please see attached our suggested changes to this part of the Guidance Document.

5. In order to comment on the regime/management, it was necessary to come to a view on the relationship between the Reserves Act 1977 and the FCA.

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6. The starting point is section 10 of the FCA. It states that freedom camping[1] is permitted in any local authority area unless it is restricted or prohibited in an area –

   (a) in accordance with a bylaw made under section 11; or

   (b) under any other enactment.

7. Section 11 then goes on to set out the authority for making freedom camping bylaws and the process which the Council must use to make such a bylaw. Section 12(1) states that a local authority may not make bylaws under section 11 that have the effect of prohibiting freedom camping in all the local authority areas in its district.

8. Section 10(b) of the FCA appears to be an example of a statutory provision that deals with the possibility of inconsistency between statutes.[2] In other words, while the section permits freedom camping unless it is restricted or prohibited in an area in accordance with a section 11 bylaw, it also acknowledges that other "enactments" might provide for prohibitions or restrictions on camping and these other prohibitions or restrictions are not to be limited or read down.

9. With respect to section 44 of the Reserves Act, the effect of this provision is that no person is permitted to camp in a reserve or use a vehicle (eg a motor home) for accommodation purposes in a reserve unless one of the statutory exceptions applies. One of the statutory exceptions is Ministerial consent. Another exception is that the use is permitted in areas defined in management plans prepared under section 41. The reference to "camping" or temporary or permanent accommodation in the Reserves Act 1977 is wider than the definition of freedom camping in the FCA. This is because the definition of freedom camping covers camping that is within 200 m of a motor vehicle accessible area or the mean low-water springs line of any sea or harbour, or on or within 200 m of a formed road or a Great Walks Track. There are no such restrictions in the Reserves Act provision. On this basis section 44(1) would seem to cover freedom camping as that the term is defined in the FCA.

10. Therefore, reading together section 10 of the FCA and section 44 of the Reserves Act 1977, in the absence of any of the statutory exceptions in section 44(1) applying, freedom camping in a reserve, which is within a local authority area, is prohibited by virtue of that prohibition being contained in another enactment.

11. However, even though there is a general prohibition in the Reserves Act 1977 which councils may wish to rely on, there is, in our opinion, a lack of effective enforcement tools for this prohibition. In light of this, local authorities will need to consider whether a bylaw under the FCA is appropriate given that it provides a more effective enforcement regime. At this point local authorities will need to consider how these provisions can operate consistently together. The reserves management plans should match up with

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1 "**Freedom camp**" is defined in section 5 of the FCA. It means to camp (other than at a camping ground) within 200 m of a motor vehicle accessible area or the mean low-water springs line of any sea or harbour, or on or within 200 m of a formed road or a Great Walks Track, using 1 or more of the following:

(a) a tent or other temporary structure:

(b) a caravan:

(c) a car, campervan, housetruck, or other motor vehicle.

The definition specifically excludes temporary and short-term parking of a motor vehicle, recreational activities commonly known as day-trip excursions, and resting or sleeping at the roadside in a caravan or motor vehicle to avoid driver fatigue.

Local authority area is defined in section 6 of the FCA.

2 See **Statute Law in New Zealand**, JF Burrows and RI Carter, 4th Edition, p470.

any freedom camping bylaws. In addition, we refer you to our comments in paragraph 17 of this letter in relation to virtual prohibitions.

LGA 02 Bylaws Question

12. The relationship between the bylaw-making powers in the LGA 02 and the FCA would appear to be governed by section 42(1) of the FCA. Section 42(1) is example of a statutory provision where it would appear to cancel the effect of the principle *generalia specialibus non derogant* (even if this principle applies).

13. The effect of this principle is that

> *"Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do so."*[3]

14. Technically this principle applies when the former statute is the specific statute and the later statute is the more general one. In this case, the opposite would appear to apply. The LGA 02 is the earlier more general statute and the FCA is the later more specific statute (ie providing a specific bylaw making power in relation to freedom camping, as opposed to a wide variety of bylaw-making powers.) Potentially a person could argue that the more specific, statute should prevail.

15. However, section 42(1) would tend to demonstrate a Parliamentary intention that these specific provisions do not overrule other more general provisions that apply. In other words, section 42(1) renders inapplicable the application of the generalia specialibus non derogant principle even if it did apply in this case.

16. Therefore, a Council could consider using its bylaw making powers under the LGA 02 or indeed another statute which might provide powers to deal with freedom camping in some way (For example a bylaw made under section 22AB of the Land Transport Act 1998). In this respect, the LGA 02 bylaw-making powers are not necessarily "trumped". However, a Council would need to **carefully consider** the following matters before making such a bylaw:

    (a) If a local authority were to use a bylaw making power in the LGA 02 in order to defeat the effect or purpose of the FCA, then potentially there is a good argument that the local authority has used those powers for an improper purpose. As Philip Joseph notes in *Constitutional and Administrative Law in New Zealand*,[4]

> *"a power granted for one purpose must be used for that purpose and not for some unauthorised or ulterior purpose ... the law reports abound with examples of public bodies pursuing improper purposes. ... In Lower Hutt CC v AG ex rel Moulder[5], the local authority pursued an improper purpose when it stopped a street under its statutory powers of ownership and control of streets, rather than under the statutory "stopping" procedure provided. It was immaterial that the council's action may have alleviated traffic congestion and promoted the public*

3 See *Seward v Vera Cruz* (1884) 10 App Cas 59 at p 68 and also *Auckland Gas Co v Auckland City Council* [1990] 2 NZLR 420.
4 See para 22.2.2, pp 886-887.
5 [1977] 1 NZLR 184.

good. The exercise of a statutory power must not exceed what is reasonably required in the circumstances."

(b) We also note that the law provides that a bylaw may not be repugnant to the general laws of New Zealand and it must be reasonable. With respect to repugnancy, a bylaw cannot contradict the statutory or common law. There is also considerable case law on what constitutes "reasonableness" in a bylaw context.[6] If bylaws made under the LGA 02 or another statute were to have the effect of prohibiting freedom camping in all local authority areas in the district (in other words contravening section 12 of the FCA), then potentially this is repugnant to the general laws of New Zealand and raises questions of unreasonableness.

Concluding Remarks

17. Finally, when exercising statutory powers to deal with freedom camping issues, a local authority needs to be mindful that it is not exercising those powers for the purpose of defeating the effect of the FCA. Similarly, it also needs to take into account that a bylaw made under the FCA in conjunction with any other measures that may already apply (for example the prohibition under section 44(1) of the Reserves Act 1977 or bylaws made under other statutes) could potentially have the effect of creating a **virtual prohibition** on freedom camping in all local authority areas in the district. This would raise questions as to reasonableness and repugnancy of the freedom camping bylaw.

18. We would be happy to discuss these matters with you further. Please feel free to call.

Yours faithfully
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6 For example, see *Conley v Hamilton City Council* [2008] 1 NZLR 789, *Harrison v Auckland City Council* [2008] NZAR 527, and *Carter Holt Harvey v North Shore City Council* [2006] 2 NZLR 787.

Freedom Camping Act 2011

Regime	Management approach
No bylaw	- Freedom camping is considered to be a permitted activity in all parts of a district (but does not trump reserve management plans or district plan rules).
District Plan rules	- Some councils will control freedom camping via district plan rules
Reserves Act	- Freedom camping is effectively prohibited under section 44(1) of the Reserves Act 1977 in reserves unless any of the statutory exceptions apply. - Note the council will need to consider what practical enforcement options apply if it relies on this prohibition. - Where a Council makes a freedom camping bylaw, any relevant reserves management plans should be consistent with the bylaw.
Local Government Act	- Bylaw making powers under sections 145 and/or 146 of the Local Government Act 2002 but need to be exercised carefully - Bylaw able to regulate or prohibit freedom camping in the district but must not be repugnant to the general laws of New Zealand. (This would include section 12 of the Freedom Camping Act 2011.) - Bylaw must be reasonable. - No access to instant fines for bylaw breaches. The council will need to consider what practical enforcement options apply.
Freedom Camping Act	- Freedom camping is considered to be a permitted activity but some parts of a district can be designated as prohibited for freedom camping or where restrictions apply. - Access to instant fines for bylaw breaches. - Consider consistency issues as between bylaws made under the Freedom Camping Act 2011 and any reserves management plans. - Look at issue of restrictions and prohibitions in total.

The relationship between the Freedom Camping Act and other statutes is not particularly clear. Section 10 provides that freedom camping is permitted in any local authority area unless it is restricted or prohibited in an area –

(a) in accordance with a bylaw made under section 11; or

(b) under any other enactment.

Section 42 of the Freedom Camping Act also provides that "*this Act does not limit or affect the powers of a local authority under the Local Government Act 2002 or any other enactment that confers powers on a local authority.*"

Other statutes also deal with "camping" expressly (for example section 44 of the Reserves Act 1977) or contain powers that would enable a local authority to regulate freedom camping (for example, the bylaw making powers in section 145 and 146 of the Local Government Act 2002).

Section 10(b) of the FCA appears to be an example of a statutory provision that deals with the possibility of inconsistency between statutes.[1] In other words, while the section permits freedom camping unless it is restricted or prohibited in an area in accordance with a section 11 bylaw, it also acknowledges that other "enactments" might provide for prohibitions or restrictions and these other prohibitions or restrictions are not to be limited or read down.

With respect to the Reserves Act 1977, this means that the prohibition in section 44(1) (ie prohibiting the use of a reserve, or any building, vehicle, boat, caravan, tent, or structure situate thereon, for purposes of permanent or temporary personal accommodation) continues in force unless any of the statutory exceptions apply. (One of the statutory exceptions is that the use is permitted in areas defined on management plans prepared under section 41 and for the time being in force).

Councils will need to determine whether the prohibition in the Reserves Act 1977 meets current needs (taking into account the enforcement provisions in that Act). Where Councils decide to make a freedom camping bylaw under section 11 in relation to any reserves they will need to assess how the bylaws and the reserves management plans are going to operate consistently together.

With respect to other legislation such as the Local Government Act 2002, applying section 42(1) of the Freedom Camping Act 2011, the bylaw making powers of a territorial authority under the LGA 02 are not limited or affected by the Freedom Camping Act. Territorial authorities would appear to be able to use these powers to make bylaws that may in some way regulate or prohibit freedom camping. However, a Council would need to **carefully consider** the following matters before making such a bylaw:

(a) reasonableness and repugnancy considerations:
(b) exercising powers under one statute in order to defeat the purpose of another statute (ie improper purposes).

Finally, if a Council does make a freedom camping bylaw under the Freedom Camping Act, it needs to take into account any other measures that may already apply (for example the prohibition under section 44(1) of the Reserves Act 1977 or bylaws made under other statutes) which could potentially have the effect of creating a **virtual prohibition** on freedom camping in all local authority areas in the district. This would raise questions as to reasonableness and repugnancy of the freedom camping bylaw.

1 See **Statute Law in New Zealand**, JF Burrows and RI Carter, 4th Edition, p470.

Section 11 – Freedom camping bylaws

Section 11 empowers local authorities to make bylaws under the Act, and sets out the criteria which must be satisfied before making a bylaw.

The expectation is that local authorities will make new freedom camping-specific bylaws to replace the camping related provisions in current bylaws. The ability for freedom campers to clearly understand the areas in a district where they can and cannot camp is seen to be an essential part of bylaws made under the Act. The local authority must also determine whether the bylaw is necessary for one or more of the following purposes:

- to protect the area;
- to protect the health and safety of people who may visit the area;
- to protect access to the area.

In addition, the local authority must be able to show:

- be able to show that the bylaw is the most appropriate and proportionate way of addressing the perceived problem in relation to that area;
- be able to show that the bylaw is not inconsistent with the New Zealand Bill of Rights Act 1990 ('NZBORA'); and
- include either a map and/or description of the areas to which the bylaw applies.

The local authority will need to have a clear picture of the area concerned, including how it has defined the area and whether or not it has any special characteristics. For example:

- Who, as a general rule, uses the area and is the area used for any specific purpose (for example, is it a sports park)?
- Where is the area situated? Is it urban or rural?
- Is the area ecologically or physically sensitive?
- What is the nature of the vegetation in the area?
- Is there any indigenous fauna that live in the area?
- Does it contain any historic sites?
- What is the nature of the structures situated in the area (if any)? For example, are there any public facilities in the area, such as public toilets, cooking facilities, children's playgrounds etc?
- What is the relationship of Maori with the area?
- What amenity values does the area have?

Does the local authority have some **clear** evidence about the types of problems that are occurring in the area?

For example, evidence a local authority may have collected in relation to protecting an area may include the number of complaints that have been made about:

- vandalism to the area;
- damage to the area,
- injury to indigenous fauna;
- littering of the area; and/or
- amenity values not being sufficiently protected.

With respect to protecting the health and safety of people who may visit the area, the local authority may have evidence such as:

- any offences committed in the area,(including offences against the person or property offences);

- health issues, such as unsanitary conditions due to waste; and/or
- safety issues, such as traffic hazards in the area.

With respect to protecting access to the area, the local authority may have evidence such as:

- the use of the area by the general public (other than freedom campers);
- complaints about access to the area being compromised because of the presence of freedom campers; and/or
- Council officers observing any issues associated with access.

In addition to the above assessment, a local authority will also need to be satisfied that the bylaw is the most appropriate and proportionate way of addressing the perceived problem in relation to that area. One way to do this could be to complete an options analysis similar to one that might be completed for section 77 of the Local Government Act 2002. This will involve identifying and assessing all reasonably practicable options. By way of example, the types of options might include the following:

- Make a bylaw restricting freedom camping in a local authority area;
- Make a bylaw prohibiting freedom camping in a local authority area;
- Make a bylaw under the Local Government Act 2002 or the Reserves Act 1977 instead;
- Have no freedom camping bylaw for the local authority area but introduce other non-regulatory measures to mitigate the effects of freedom camping or control freedom camping (for example, more public toilets, more rubbish bins etc); or
- Do nothing.

The next step would be for a local authority to assess the options by looking at:

- costs and benefits;
- the extent to which community outcomes will be promoted or achieved in an integrated and efficient manner;
- the impact of each option on the local authority's capacity to meet its needs in relation to statutory responsibilities now and in the future; and
- other matters the local authority considers relevant.

The local authority should also consider whether any of the options identified involve a significant decision in relation to land or a body of water. If they do, then the local authority must take into account the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tape, valued flora and fauna, and other taonga.

Finally, this will then lead the local authority into the New Zealand Bill of Rights Act 1990 ("NZBORA") assessment under section 11(2)(c) of the FCA. The local authority must be satisfied that its freedom camping bylaw is not inconsistent with the NZBORA. The first step in making this assessment is determining whether or not the bylaw limits any of the rights contained in the NZBORA. The next step is to determine whether those limits are demonstrably justified in a free and democratic society.

Recent case law outlines the approach to take in determining whether or not a restriction or prohibition in a bylaw is a justified limitation. Local authorities should consider *Schubert v Wanganui District Council* [2011] NZAR 233 (the case relating to the bylaw made under the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 and *R v Hansen* [2007] 3 NZLR 1. A recent example where the District Court was asked to consider whether or not the Auckland Council's bylaw governing the use of public places was inconsistent with the NZBORA is *Auckland Council v The Occupiers of Aotea Square Auckland Central being the Occupy Auckland Group*, Unreported, 21 December 2011, District Court, Auckland, CIV-2011-404-002492. In determining whether or not the bylaw was a justified limitation of freedom of expression, peaceful assembly, and movement, the Judge asked the following questions:

- Is the objective of the perceived problem that the bylaw seeks to address important and significant?
- Is the bylaw proportionate to that objective? (This is to be gauged by answering the question whether the measure had a rational relationship with the objective.)
- To achieve that objective, did the measure interfere as little as possible with the rights and freedoms affected?

In that case, Judge M Wilson QC found that the limits in the bylaw on the use of a public space was a justified limitation in a free and democratic society.