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For: Clare Wooding
Senior Policy Analyst

Dear Clare

Review of "A Guide to Freedom Camping Bylaws Under the Freedom Camping Act 2011"

1. You have asked us to review the document called "*A Guide to Freedom Camping Under the Freedom Camping Act 2011*." The Guide was commissioned by the New Zealand Motor Caravan Association Incorporated.

2. You have also asked us to consider the Occupy Auckland decision (ie *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) and whether there are any implications for bylaws under the Freedom Camping Act 2011 ("**the FCA**"). In addition, you have asked us to provide some guidance around how to determine whether a bylaw is the best practicable tool and the extent of the assessment required (including the question of what sort of evidence is required for section 11).

3. In this letter, we make some general comments about the Guide first and then we review the Guide page by page. We then address your two further questions about the *Occupy Auckland* case and what sort of evidence might be required for section 11 of the FCA.

Review of Guide

General comments

4. It is evident to us that the Guide has been prepared by an organisation with a vested interest in the subject-matter. At best, the Guide provides no more than a starting point for local authorities contemplating making a bylaw under the FCA.

5. We acknowledge that section 11 sets a fairly high test for making freedom camping bylaws. However, the Guide conveys the impression that freedom camping bylaws are only to be used in very limited circumstances, such as where it is a matter of last resort or where the area concerned is so precious. We are not convinced that section 11 goes this far.

6. At the end of the Guide, we would have expected it to refer to the requirement to review freedom camping bylaws as set out in section 13 of the FCA.

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7. The Guide does not refer to the general decision-making obligations that apply to every local authority under Part 6 of the Local Government Act 2002 ("**the LGA**"). These obligations still apply even though a local authority will be exercising its powers under the FCA. We would have expected the Guide to contain some information about the interface between the two statutes.

Pages 1-4

8. No comments.

Page 5

9. In paragraph 2, the second bullet point should refer to "under any **other** enactment".

10. We are not sure of the purpose of paragraph 4. Freedom camping bylaws made under other enactments will not become invalid simply because a local authority might make a bylaw under the FCA. The only way in which a bylaw becomes invalid is for a Court to declare that the bylaw is invalid.

11. We do not agree with the sentence "*A bylaw made under the LGA, or a reserve management plan under the Reserves Act may still be enforceable under the FCA's infringement regime.*" It is not clear to us how this could happen. An infringement offence in the FCA is defined as being an offence specified in section 20(1) of the FCA. Section 20(1) only refers to breaches of bylaws made under section 11 of the FCA. Section 20 is silent on reserve management plans or their enforceability.

Page 6

12. In paragraph 7, we are not sure what is intended by the phrase "preventative mechanism".

Page 7

13. The reference to section 20(1)(e) should refer to "*fails or refuses*" and it should also refer to "*where an enforcement officer believes on reasonable grounds that the person is committing or has committed an offence **under the FCA)***".

Pages 8-9

14. No comments.

Page 10

15. Paragraph 2 is not supported by any evidence so we are unsure what the authority is for this statement. In the absence of more information about the Kapiti Coast District Council bylaw, we do not consider this example to be particularly helpful.

Page 11

16. In paragraph 2 the reference to "a problem" should be to "a **perceived** problem" (Refer section 11(2)(b) of the FCA.)

17. Paragraph 3 states that "*a local authority must satisfy the requirements for each specific area where a proposed freedom camping bylaw will apply*". As we see it, it

depends on how you define an "area". The FCA does not refer to "specific areas", only a local authority area.

Page 12

18. No comments.

Page 13

19. The heading "relevant considerations" should really be changed to "irrelevant considerations", as the commentary then mostly discusses irrelevant considerations.

20. In paragraph 3, bullet point one, we are not convinced that "the visual impacts of freedom camping" is an irrelevant consideration. In our opinion, it might, depending on the circumstances, be a relevant consideration when determining whether or not a bylaw is necessary "to protect the area". The phrase "to protect the area" is extremely wide and there is nothing to say that this does not include protecting the visual amenity or indeed the amenity values of the area.

21. In paragraph 4 it states that *"it would be prudent for the local authority to ensure that it informs the local community of the local authority's obligation to ensure that irrelevant considerations are not taken into account when considering whether a bylaw is necessary*". The common law rule that a decision-maker only take into account relevant considerations and not take into irrelevant considerations applies whenever a local authority makes a decision. However, it is not clear to us when the above statement would be made in the decision-making process or why it is necessarily prudent.

22. We note that section 82(1) of the LGA sets out various consultation principles for local authorities and section 82(1)(f) states that "*persons who present views to the local authority should be provided by the local authority with information concerning both the relevant decisions and the reasons for those decisions.*" This is where a local authority explains the decision made and the reasons for the decision. This should adequately identify the relevant considerations that have been taken into account.

Page 14

23. Paragraph 5 states that "*although the courts will generally defer to the assessment of the local community through their elected representatives about what bylaws are appropriate for their area, an objectively unreasonable bylaw will not be allowed to stand – particularly where it impinges on public rights*", and refers to two cases *New Zealand Public Service Association v Hamilton City Council* [1997] 1 NZLR 30 and the Court of Appeal decision in *Conley v Hamilton City Council* [2008] 1 NZLR 789.

24. We note that the Court of Appeal in *Conley* did say that

> *"The fourth point is that, even if this were a close run case, in our view where as here the choices being made are distinctly ones of social policy (considered, we note, in the absence of any real Bill of Rights concerns), a court should be very slow to intervene, or adopt a high intensity of review. A large margin of appreciation should apply. Parliament entrusted the location of brothels to local authorities, which are elected bodies, and Parliament has itself decided to maintain a measure of ongoing review of prostitution."*

25. This case was referred to in *Harrison v Auckland City Council* [2008] NZAR 527, where Justice Stevens summarised the test for intervention in a bylaw. Justice Stevens referred to Justice Asher's decision in *Carter Holt Harvey Limited v North Shore City Council* [2006] 2 NZLR 787. Justice Asher had said that

> *" ... the question of whether a bylaw is unreasonable is a mixed question of fact and law. Unreasonableness cannot be considered in a vacuum of the parties' submissions, and the judge's views on what is unreasonable. A bylaw is not unreasonable just because a judge thinks that it is so. The consideration of the reasonableness of the bylaws can only take place in the context of the legislative background: De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 (PC) at 80. In this case, and I suspect in most where unreasonableness of a bylaw is alleged, the answer becomes apparent when Parliament's intention is understood. "*

26. Justice Stevens went on to say that

> *"With respect, I endorse the approach outlined by Asher J. There is now much more scrutiny surrounding the enactment of bylaws. Empowering provisions have become more specific and prescriptive and have required bylaw making authorities to follow detailed statutory consultative and other processes."*

27. We mention these cases in further detail because we want to stress the point that it is not a straightforward decision as to whether or not a bylaw is reasonable or unreasonable and therefore valid or invalid.

Pages 15-16

28. No comments.

Page 17

29. In paragraph 2, bullet point 1 refers to a bylaw withstanding a challenge if it is "*consistent with the FCA and other statutes*". This appears to be a reference to the rule that bylaws should not be repugnant to the general laws of New Zealand. In our opinion, we would not reword the rule in this way as it conveys a slightly different focus from the traditional statement of the rule. If a bylaw contravenes another statute or purports to make something unlawful which the general law says is lawful, then the bylaw could be successfully challenged.

30. In paragraph 6, the Guide refers to areas that are "so precious" where a freedom camping bylaw could apply. In our opinion, the phrase "so precious" goes further than what is required by section 11(2)(a) of the FCA in relation to protecting an area and does not correctly reflect the other two purposes for which a bylaw may be made in section 11(2), ie that a bylaw is necessary to protect the health and safety of people who may visit the area or to protect access to the area.

Page 18

31. In paragraph 3, the Guide refers to "*a statutory obligation on a local authority to consider and balance the views of the community in accordance with the special consultative procedure in the LGA when making, amending or revoking a bylaw.*" We agree that there is a statutory obligation on each local authority to use the special consultative procedure as set out in section 83 of the LGA. However, what section 82(1)(e) of the LGA does say is that "*the views presented to the local authority should*

be received by the local authority with an open mind and should be given by the local authority in making a decision, due consideration."

32. Paragraph 6 states that "*the public may then make submissions on the draft bylaw and have rights to appeal any decision made with the local authority.*" In our opinion, the statement that the public may appeal any decision made with the local authority is incorrect. There is no appeal process to the local authority. The local authority makes its decision at the end of the special consultative procedure. The only way in which the decision of the local authority can be challenged or appealed is for a person to bring judicial review proceedings in the High Court.

Pages 19-21

33. These flowcharts should be read in light of our earlier comments about the various aspects of the decision-making process.

Occupy Auckland / Aotea Square decision

34. You asked us to consider the Occupy Auckland decision and advise whether there are any implications for bylaws under the FCA. Just to recap, the Occupy Auckland movement began camping in Aotea Square in October 2011. The Occupy Movement was a global movement concerned that the "*harsh reality the majority struggle with on a daily basis is created and upheld by an elite bourgeoisie they call the 1% consisting of wealthy business people, bankers and individuals holding positions of power in local and national governments.*"[1] The Global Occupy Movement launched a wave of demonstrations and protests around the world, including occupation of public areas.

35. In December 2012, the Auckland Council applied to the District Court for an injunction to restrain the Occupy Auckland Group from breaching the provisions of the Auckland Council Bylaw governing the use of public places.

36. The Bylaw was made under the authority of section 145 of the LGA, and prohibited, amongst other things,

- Activity causing an unreasonable interference with the comfort and enjoyment of the public
- Damaging public property
- Overnight camping
- Leaving unattended material in a public place
- Using amplified sound equipment
- Putting up structures
- Putting up posters
- Undertaking protest events without a permit.

37. The Council was concerned about on-going damage and other losses which it saw arising from the occupation. The Council referred to damage to grass, native trees and the subsurface membrane. It also referred to the loss of the public use of Aotea Square and losses through cancelled bookings. Judge DM Wilson QC noted that "*no one disputed that there have been and continue to be breaches of bylaws that are relevant in this case. I have found the Council's claims of damage and loss of revenue to be substantially made out.*"

1 See paragraph 4 of the District Court judgement.

38. The Occupy Auckland Group argued that the Judge should not grant the injunction because the bylaw was inconsistent with the New Zealand Bill of Rights Act 1990 ("**the NZBORA**"), and in particular, -

- Freedom of expression
- Freedom of peaceful assembly
- Freedom of association.

39. The Judge noted the relevant provisions of the NZBORA in his judgment, including section 5 which states that, subject to section 4 of the Bill of Rights, the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. (Section 4 provides that no provision of any other enactment (such as a statute or regulation) is to be impliedly repealed or revoked by reason only that the provision is inconsistent with any provision of the Bill of Rights.)

40. When the Judge considered whether the bylaw was inconsistent with the NZBORA, he first considered the District Court decision in *Auckland City Council v Finau* [2002] DCR 839. There the Council had successfully sought orders requiring the defendant to remove all signs located at his residential property and that he be restrained from erecting any further signs in breach of a bylaw. Again, there was an issue about the bylaw validity. Judge DM Wilson QC said that he would adopt the same balancing hard-look approach that was adopted in the *Finau* decision. The Judge then went on to apply the *Oakes test* (as accepted in *R v Hansen* [2007] 3 NZLR 1) to determine whether or not the bylaw was a justified limitation. He 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?

41. Judge M Wilson QC concluded that in this case

> *"The Bill of Rights does not contain an unrestrained right to camp where one wishes. I find that the limitation for use of public space which regulates that use in the light of the interest of citizens generally is a justified limitation in this free and democratic society. In that way the public spaces are more available for more of the citizens. The negative effect of constraining people from taking over and camping on public land not set aside for that purpose is a justified limitation on camping rights"*

42. The *Occupy Auckland* decision confirms the approach of the Courts in determining whether or not a bylaw is consistent with the NZBORA. In our opinion, this approach will equally apply in determining whether or not a bylaw made under the FCA is inconsistent with the NZBORA. Section 11(2)(c) of the FCA provides that "*a local authority may make a bylaw under subsection (1) only if it is satisfied … that the bylaw is not inconsistent with the [NZBORA].*" We note that a largely similar approach was adopted by the High Court in *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.

Guidance as to the extent of the assessment under section 11

43. As noted above, you asked us to provide some guidance around determining whether a bylaw is the best practicable tool and the extent of the assessment required (including the question of what sort of evidence is required for section 11). This analysis is broadly similar to the analysis required by section 155 of the LGA for bylaws made under that Act.

44. We address the extent of assessment required first. How much analysis a Council undertakes will be linked to the degree of the significance of the matter to the Council. This reflects the general decision-making obligations under Part 6 of the LGA. In this respect there is no set level as to the extent of analysis required. However, under section 11(1), a local authority needs to be satisfied that the bylaw is necessary for 1 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.

45. It will depend on how the local authority defines the area, but in our opinion, the local authority will need to have a clear picture of the area concerned and whether or not it has any special characteristics. For example, is the local authority able to answer the following questions?

- 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 on 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?

46. We also consider that a local authority will only be able to come to a view that a freedom camping bylaw is necessary (in the sense that it is reasonably necessary) for 1 or more of the 3 stated purposes in section 11(2)(a) if it has some **clear** evidence about the types of problems that are occurring in the area. For example, in relation to protecting a local authority area, what evidence does the local authority have about –

- Vandalism of the area. How many complaints have been made to the Council? Have Council officers observed any vandalism? Is it likely that vandalism occurred as a result of freedom camping?
- Damage to the area. How many complaints have been made to the Council? Have Council officers observed any damage to the area, such as damage to grass (for example by vehicles driving over the grass), plants, trees or shrubs? Has there been any damage to any structures in the area? Have there been any reports of injury to indigenous fauna? Is it likely that any of this damage occurred as a result of freedom camping?
- Littering of the area. How many complaints have been made to the Council? Have Council officers observed any litter? What is the nature and extent of the litter problem? Is it likely that littering occurred as a result of freedom campers?

- Amenity values. How many complaints have been made to the Council about the protection or otherwise of the amenity values of the area? Have Council officers observed damage to the visual amenity of the area by the number of freedom campers using the area or the regularity of freedom campers using the area?

47. With respect to protecting the health and safety of people who may visit the area, what evidence does the Council have about –

- Offences being committed in the area. How many offences against the person (for example assaults, robbery) have been committed in the area? How many property offences (for example, theft, burglary,) have been committed in the area? What is the nature of these offences? What do the Police say about the nature and severity of these offences? Are the offences associated in any way with freedom camping?
- Health issues. Have there been any complaints about waste (human or otherwise) being left in the area by freedom campers? Have Council officers observed waste that is left in the area? Has this waste created insanitary conditions?
- Safety issues. Have there been any complaints about the use of campers' vehicles in the area such that it would endanger other users (for example, people driving where children may be present or driving in such a way that causes a traffic hazard in the area)?

48. With respect to protecting access to the area, what evidence does the Council have about –

- The use of the area by the general public (excluding freedom campers). Have there been any complaints about access to the area being compromised because of the presence of freedom campers? Have Council officers observed any issues associated with access?

49. With respect to your query about how a local authority is to determine whether a bylaw is the best practicable tool, we have looked at this in terms of section 11(2)(b) (ie the local authority will need to be satisfied that the bylaw is the most appropriate and proportionate way of addressing the perceived problem in relation to the local authority area.)

50. If a local authority has completed the analysis under section 11(2)(a), then it should have a very good understanding of the nature of the perceived problem. The local authority will then need to undertake an options analysis similar to that required by section 77 of the LGA. This will involve identifying and assessing all reasonably practicable options. Again the extent to which the local authority undertakes this analysis will depend on the significance of the matter and its assessment of the compliance tolerances in section 79 of the LGA. By way of example, the types of options might include the following:

- Make a bylaw restricting freedom camping in a local authority area. This will depend on the conditions contained in the restriction
- Make a bylaw prohibiting freedom camping in a local authority area
- Make a bylaw under the LGA 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)
- Do nothing.

51. In our opinion, the options analysis should be completed broadly in terms of section 77(1)(b) of the LGA. This means that a local authority would 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.

52. Finally, under section 77(1)(c) of the LGA, 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.

53. Having completed this options analysis, in our opinion a local authority will be in a much better position to determine whether or not it is satisfied that a bylaw is the most appropriate and proportionate way of addressing the perceived problem in relation to the local authority area. It should be in a position to explain why this is the case.

54. This will then lead the local authority into the NZBORA assessment under section 11(2)(c) of the FCA which will also involve considerations of proportionality.

Conclusion

55. With the transitional arrangements in the FCA now at an end, local authorities will need to turn their minds to whether or not a bylaw made under section 11 of the FCA is required.

56. As noted in paragraph 4 of this advice the *Guide to Freedom Camping Under the Freedom Camping Act 2011* provides a at best a starting point for local authorities contemplating making a bylaw under the FCA but it does need to be read in context. It is clear that it has been commissioned by a party with a vested interest in freedom camping.

57. Section 11 of the FCA sets a fairly high test for making freedom camping bylaws. A local authority will need to have a good understanding of the purpose for which any such bylaw is necessary and the nature of the perceived problem which the bylaw will address. We have set out in paragraphs 44 to 52 an example of the analysis which a local authority should undertake.

58. The *Occupy Auckland* decision is relevant to freedom camping bylaws but while the decision involved "camping", it was primarily concerned with the right to protest in a public place and freedom of expression. Nevertheless, the case confirms the approach of the Courts in determining whether or not a bylaw is consistent with the NZBORA. Each local authority must be satisfied that its freedom camping bylaw is not inconsistent with the NZBORA under section 11(2)(c).

59. Please feel free to call us if you have any questions about our review of the Guide or the further matters addressed in this letter.

Yours faithfully
SIMPSON GRIERSON

Vivienne Wilson

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