27 June 2018

Hurunui District Council
Attention: Freedom Camping Bylaw Review
PO Box 13
Amberley 7441
Emailed to: submissions@hurunui.govt.nz

SUPPLEMENTARY SUBMISSION ON THE HURUNUI DISTRICT COUNCIL DRAFT FREEDOM CAMPING BYLAW 2018 & PROPOSED AMENDMENTS TO THE RESERVES MANAGEMENT PLAN 2012

Introduction

1. This supplementary submission has been prepared by the New Zealand Motor Caravan Association (**NZMCA**) and should be read alongside the Association's original submission dated 07 November 2017.

2. We commend the council for agreeing to review the draft bylaw. As a result, it appears the new bylaw is more permissive towards certified self-contained (**CSC**) vehicles in some areas, which the NZMCA supports. However, we urge the council to reconsider prohibiting CSC vehicles throughout Hanmer Springs, save for four individual car parks.

General comments on the revised Statement of Proposal (SOP)

3. Importantly, the SOP outlines the legal framework and defines the scope of the council's decision-making powers under the Freedom Camping Act 2011 (**FCA**). The SOP also confirms the council is unable to make a bylaw that effectively prohibits freedom camping on local authority land across Hurunui. We recommend the council reflects on these statements when considering our submission points on Hanmer Springs.

4. We agree with the council's rationale allowing CSC vehicles to temporarily freedom camp in many settlement areas, i.e. that a motor caravan can legally park on the roadside while unoccupied and generate the same effects as if the vehicle were being used for camping; and that restrictions (as opposed to a prohibition) will allow friends and family members travelling in CSC vehicles to temporarily visit local residents. We believe this rationale should be extended to your assessment of Hanmer Springs.

5. The SOP suggests that prior to the introduction of the FCA local authorities could simply designate a few areas where people could freedom camp, while prohibiting the activity everywhere else. With respect, we do not support this view, although we accept the approach was common practice pre-FCA that went unchallenged. Established case law has determined that the power to regulate an activity has always been held not to extend to a prohibition (including the substantive effect of a prohibition). Justice Cooper briefly touched on this point in his judgement on NZMCA vs TCDC 2014 [at paragraph 49]. We mention this in the event the council considers it necessary to revert back to a more restrictive or prohibitive bylaw under the Local Government Act 2002.

Further comments on the bylaw

Definition of self-contained vehicle

6. The NZMCA supports the revised definition of a self-contained vehicle, which is consistent with the amended Standard NZS 5465:2001 and Local Government New Zealand's revised Model Freedom Camping Bylaw.

Temporary closure of an area to freedom camping

7. Earlier this year the NZMCA obtained legal advice from Lane Neave regarding the ability for local authorities to temporarily restrict or prohibit freedom camping in an area where the activity is otherwise permitted (copy attached). The advice followed our concerns with the reasoning and processes relied on by a few local authorities exercising their delegated powers. In our view, some local authorities have undermined the purpose of the FCA and special consultation requirements by effectively prohibiting all freedom camping using the temporary closure provisions contained in their bylaws. This is despite publically acknowledging the problems justifying the need for "temporary" closures are in no way attributed to those travelling in CSC vehicles.

8. Lane Neave's advice argues temporary closure provisions in FCA bylaws may be valid, provided they clearly articulate the 'particular cases' that warrant the need for temporary restrictions or prohibitions and are not so great as to be unreasonable. Their legal advice elaborates on what may constitute a particular case, while querying the validity of the temporary closure provision contained in the New Plymouth District Council freedom camping bylaw, which is worded in a similar fashion to Hurunui's draft provision. This leads us to question the validity of Hurunui's proposed wording.

   Recommendation: We urge the council to seek independent advice on this matter with a view to clarifying the particular cases that would warrant the need for a temporary restriction or prohibition on freedom camping. We also encourage the council not to rely on this provision to effectively prohibit freedom camping in an area over the long-term.

Hanmer Springs

9. Unfortunately, freedom camping is effectively prohibited across the Hanmer Springs settlement area (Map I2). While we agree Hanmer Springs is a popular holiday destination, the council's logic underscoring the need for outright prohibition is unclear and somewhat contradicts the same reasons for allowing CSC freedom camping in other settlement areas. For example,

10. **Protect the area**: the site assessment matrix suggests prohibition is necessary to protect the entire settlement area from freedom campers; however it is unclear what exactly requires protection? Parliament legislated in favour of a permissive approach to freedom camping and as such the activity should be generally permitted. In our view, a bylaw used to "protect an area" should be read in the context of the FCA as a whole, and in light of the mischief it seeks to address. Having reference to the offence provisions of the FCA and parliamentary debates, it is clear the FCA was enacted to solve the problem of indiscriminate waste disposal and the consequential effects of this on the environment. In our view, Hurunui's bylaw should not be enacted to protect an area from responsible CSC freedom campers, but rather, to protect an area from those likely to damage it.

11. Furthermore, the assessment specifically refers to Hanmer Springs as "a busy tourist centre with a high proportion of holiday homes and accommodation providers", the relevance of which is unclear in terms of the need to protect an area. This statement implies the council seeks to protect the commercial interests of holiday home owners and accommodation providers from enabling freedom camping in Hanmer Springs, which is unlawful and outside the scope of the FCA's bylaw-making requirements.

12. **Protect health and safety:** the site assessment matrix appears to suggest there is a need to prohibit all freedom camping in order to protect pedestrians and cyclists from camping vehicles, and to protect the public from indiscriminate waste disposal due to a lack of toilets in the area. Referring back to the SOP statements mentioned above, CSC vehicles can legally drive through and park in Hanmer Springs during the busy holiday periods. The council also acknowledges CSC vehicles have their own facilities on board and therefore access to public toilets is not necessary. There appears to be a disconnect between the rationale relied on to justify prohibition in Hanmer Springs versus what the council is already prepared to accept elsewhere in the district.

13. **Protect access:** the site assessment matrix argues outright prohibition is necessary to protect parking space required for local businesses and other visitors to Hanmer Springs. Responsible CSC freedom campers are also welcomed visitors who want to stay overnight in Hanmer to help support local businesses. Many towns and businesses across New Zealand are benefiting from CSC freedom campers staying in town (see for example www.mhftowns.com). Providing more opportunities for CSC freedom campers to park overnight in town will uphold the council's policy "to balance competing demands for

space" by ensuring parking rules are "fair and considerate to everyone who wants to park"[1].

14. Furthermore, according to the site assessment matrix the need to protect access only applies to the main town centre area, therefore we question the need to expand the prohibition across the wider Hanmer Springs urban area.

15. The council's proportionality test argues prohibition is the most appropriate course of action taking into account Hanmers popularity and high amenity values. It suggests freedom camping should be prohibited to ensure other visitors can enjoy the area. To reiterate, CSC freedom campers are welcomed visitors too and they can legally park in town alongside other visitors and residents alike. Taking the relevant issues into account, a fairer and more proportionate response is to restrict freedom camping to CSC vehicles across Hanmer Springs with similar restrictions applied to other settlement areas. At the very least, the council might consider only prohibiting the immediate town center area with a couple of restricted parking site options within, while ensuring the remaining urban area is generally available to CSC freedom campers (with restrictions).

16. Finally, we do not agree the council should consider the operation of a nearby NZMCA Park and DOC campsite as further justification for prohibition in Hanmer Springs. The council's site assessments and proportionality tests should only consider the local authority areas under its management or control.

Further comments on the site assessment matrix

17. While we acknowledge the need to "protect the area" has broad meaning, the reasons relied on by council must still fall within the ambit of the FCA. Section 3 of the FCA confirms the Act regulates freedom camping on land controlled or managed by local authorities, and section 20 provides the relevant offence provisions. Notably absent from these provisions is any reference to protecting private residential privacy or security by way of regulation.

18. Therefore, we do not agree the FCA was designed as a regulatory tool to protect the privacy and security enjoyed by private residential property owners. That is not to say the NZMCA feels residents have no right to privacy and security. We simply believe there are more appropriate tools and mechanisms available to deal with such matters. We also question whether there is any substantial and reliable evidence to suggest that CSC freedom camping is having a wide-spread impact on residential privacy and security any more than day visitors and parked vehicles do, particularly if freedom campers are asleep in their vehicles at night.

[1] See http://www.hurunui.govt.nz/services/parking/

19. We acknowledge the issues at Rotherham and that despite the current CSC restrictions in place these problems have not been resolved. However, we question whether this is in fact an issue caused by those travelling in non-CSC vehicles and that it may also be a matter of enforcement. The council would not be prepared to support CSC freedom camping elsewhere in Hurunui if CSC visitors were damaging Rotherham. A more proportionate response would be to continue with CSC restricted freedom camping in Rotherham and improve enforcement of the council's bylaw.

Summary

20. Thank you for the opportunity to submit on this revised draft bylaw. The NZMCA welcomes the review and strongly encourages the council to reconsider the extent of the prohibition applied to Hanmer Springs, while also taking care not to allow extraneous issues influence the decision-making process. Any unreasonable outcomes or decision-making errors may render the bylaw ultra vires.

21. Finally, the NZMCA is aware of the council's interest in registering Hanmer Springs as a Motorhome Friendly Town (MHFT)[2]. The main criterion is a bylaw (if any) that aligns with the permissive intent of the FCA and unless the council is prepared to review the current prohibition applied to the Hanmer Springs settlement area, the NZMCA is unable to consider awarding the town with MHFT status.

22. The NZMCA would like to speak to this submission.

Yours faithfully,
New Zealand Motor Caravan Association Inc.

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National Policy & Planning Manager

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[2] As per email from Rachel Elliot, Council Policy Planner on 12 September 2017 – *"The Council is also interested in the Motorhome Friendly Towns scheme and seeks comment on whether there is anything in this bylaw that would preclude Hanmer Springs from becoming a motor-home friendly town. I note there is a Council dump station with potable water on the way into the Hanmer".*

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16 February 2018

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New Zealand Motor Caravan Association Incorporated
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Dear James and Bruce

Temporary Prohibitions on Freedom Camping

1. The New Zealand Motor Caravan Association Incorporated (**NZMCA**) has asked for our advice in relation to the lawfulness of a provision in a bylaw under the Freedom Camping Act 2011 (**Act**) which allows a Council to temporarily prohibit or restrict freedom camping on short notice.

2. NZMCA has requested our view of the relevant provision in the New Plymouth District Council Freedom Camping Bylaw 2017 (the **New Plymouth Bylaw**). In addition, we understand that there are a number of other local authorities who have included similar provisions in their freedom camping bylaws (or propose to do so) and as such the NZMCA has requested advice as to whether local authorities generally have the power to issue temporary prohibitions or restrictions and, if so, whether the existence or otherwise of a bylaw provision makes a difference.

Summary

3. The Freedom Camping Act does not contain any specific bylaw-making power in relation to temporary prohibitions or restrictions.

4. However, by virtue of section 13 of the Bylaws Act 1910 we consider the Council is permitted to delegate to itself, by bylaw, the power to temporarily close or restrict camping in "particular cases". Such a bylaw must not delegate to the Council a discretion which is so great as to be unreasonable.

5. In the absence of a bylaw provision expressly delegating power to make temporary prohibitions or restrictions to the Council, the Council may not temporarily prohibit or restrict camping by a resolution pursuant to the Act.

6. We do not consider that the New Plymouth Bylaw is valid in its present form as it does not comply with section 13 of the Bylaws Act 1910. A challenge to the Bylaw may succeed in the High Court, particularly if the Council seeks to rely on the Bylaw to support an unreasonable resolution. However, if the relevant clause is amended so as to clarify the circumstances where the Council may take temporary action, it will likely be a valid bylaw provision, subject to our more detailed discussion below.[1]

[1] In addition, we note for completeness that in making any such amendment, the Council is bound to follow the special consultative procedure set out in section 83 of the Local Government Act 2002.

Background

7. On 23 December 2017 the New Plymouth Bylaw came into force. Following this, there have been media reports that the reserve at the Waiwhakaiho river mouth has been "overrun by campers" in a mixture of self-contained campervans, converted vans, cars and tents.

8. Mayor Neil Holdom has provided a written statement describing the issues with current freedom camping as "overcrowding, littering, wasting water and the visual pollution that comes with having a large number of vehicles in our most beautiful places."

9. Complaints have reportedly been received in relation to "food waste at water taps, human waste, nudity while showering in public, concerns about rubbish, vehicles parking across multiple spaces and the inability of locals to use public amenities."

10. The Council has already installed portable toilets at the site, arranged extra rubbish collections and increased security patrols.

11. The mayor's statement concluded "I am recommending to my fellow councillors we take some immediate steps to reduce the concentration of campers at Waiwhakaiho, protect our environment and ensure ongoing local access to our favourite coastal spots within the urban area of New Plymouth."

12. The Council is holding an extraordinary meeting to consider restrictions. The three options under consideration are:

    (a) Temporarily closing the Waiwhakaiho river mouth to freedom campers;

    (b) Temporarily closing the Waiwhakaiho river mouth to freedom camping as well as temporarily restricting the number of campers that can stay at the East End, Wind Wand and Kawaroa car parks;

    (c) Do nothing.

13. The mayor's preferred option is the second.

14. It does not appear there is evidence of any current issues at the East End, Wind Wand and Kawaroa car parks. The concern may be that these areas become overcrowded once Waiwhakaiho is closed to campers.

15. The relevant clause the Council will rely on is clause 9 of the New Plymouth Bylaw, which provides the following:

    "9. Council may temporarily close an area to freedom camping

    9.1 The Council may, by resolution in accordance with section 151(2) of the Local Government Act 2002, temporarily close or restrict freedom camping in any area or part of any area where the closure or restriction is considered necessary to:

        a) prevent damage to the local authority area or facilities in the area; or

        b) allow maintenance to the local authority area or facilities; or

        c) provide for better public access, including in circumstances where events are planned for that area.

    9.2 Notice will be given of any temporary closure or restriction, and the removal of any closure or restriction, in any manner the Chief Executive considers is appropriate to the reason for the closure or restriction. Where possible, not less than 24 hours' notice of any temporary closure or restriction will be given.

***The following note is explanatory and is not part of the Bylaw**: Notice given by the Council may include any of the following: a sign erected in the area; and/or advertising on the Council's website or on the radio; and/or a public notice in the paper"*

Temporary Prohibitions and Restrictions

16. The wider question is whether the Freedom Camping Act authorises a local authority to impose a temporary prohibition on freedom camping in a particular area by resolution.

17. Section 11 of the Act clearly sets out bylaw-making powers in relation to prohibitions and restrictions generally. In summary, these are as follows:

    (a) A local authority may make bylaws defining areas where camping is restricted, and the restrictions that apply, or where camping is prohibited.

    (b) A local authority may make a bylaw **only** if it is satisfied the bylaw is necessary to protect the area; to protect the health and safety of people who may visit the area; and/or to protect access to the area.

18. When making or amending a bylaw, the Council is required to use the special consultative procedure under the Local Government Act 2002. Parliament has therefore underlined the importance of proper consultation with freedom campers and others before prohibitions and restrictions are put in place.

19. However, the Bylaws Act 1910 also applies. Where a bylaw delegates to a local authority a legislative power that is intended to be exercised by bylaw, the delegation will not invalidate the bylaw if it complies with section 13 of the Bylaws Act 1910.

20. Section 13 of the Bylaws Act provides:

    "13 Bylaw not invalid because of discretionary power left to local authority, etc

    (1) No bylaw shall be invalid because it requires anything to be done within a time or in a manner to be directed or approved in any particular case by the local authority making the bylaw, or by any officer or servant of the local authority, or by any other person, or because the bylaw leaves any matter or thing to be determined, applied, dispensed with, ordered, or prohibited from time to time in any particular case by the local authority making the bylaw, or by any officer or servant of the local authority, or by any other person.

    (2) This section shall not apply to any case in which the discretion so left by the bylaw to the local authority, or to any officer, servant, or other person, is so great as to be unreasonable."

21. The meaning of this section has been given detailed consideration by the Courts and the Courts have upheld a temporary restriction made in reliance on the section. In relation to a bylaw which delegates to the Council the power to impose temporary restrictions on camping (by resolution), the delegation provision will need to satisfy the following requirements:

    (a) The power delegated to the local authority will need to clearly fall within the empowering enactment (i.e., it must satisfy the conditions of section 11(2) of the Act).

    (b) The provision must specify the "particular case" or cases where power is delegated to the Council.

    (c) The discretion left to the Council must be reasonable (i.e., it cannot be "so great as to be unreasonable").

22. The Courts are likely to require strict compliance with these requirements given the default position is that consultation must occur prior to any restrictions or prohibitions coming into place under the Act.

23. Section 13 of the Bylaws Act is directed towards instances where the Council may need to take immediate or temporary action in a "particular case".

24. The Supreme Court considered section 13 in *Bremner v Ruddenklau*[2] an older case concerning a local authority bylaw under the Public Works Act 1908. The bylaw included a provision that "The Council may from time to time determine that owing to weather conditions any road or part of a road within the county shall be unfit for heavy traffic...during the months of May, June, August and September in any year, and may order that transportation...shall cease on such road or part of road as aforesaid, and notify such order by notice affixed to any conspicuous place on the road..."

25. The Council passed a resolution pursuant to this provision closing certain roads to heavy traffic from 4 July 1918 to 4 September 1918. This resolution was challenged together with the bylaw provision authorising it.

26. The Supreme Court found that the bylaw provision and resolution were lawful as a result of section 13 of the Bylaws Act 1910. The reasons were as follows:

(a) Firstly, the Public Works Act provided that any local authority could make bylaws "providing that heavy traffic of all or any kinds shall cease during the whole or any part of the months of May, June, August and September." As a result, the bylaw provision did not go beyond the legislative power in the Public Works Act.

(b) Secondly, the Court placed a strong emphasis on the fact the bylaw provision only applied in "a particular case", namely, a case of bad weather.

(c) Finally, the Court found that the discretion left to the Council was reasonable. The Court noted that the usual bylaw-making process would take a number of weeks and, in the case of bad weather, the Council must act without delay as "to wait four or five weeks might lead to disaster." The Court noted that the discretion left to the Council must be reasonable, having reference to the nature of the bylaw and the character of the delegation. The greatest measure of discretionary authority will be that allowed to the Council itself (to be exercised by resolution) as opposed to that allowed to its individual agents.

(d) The Courts also noted that, in practice, "if the by-law came into operation so suddenly as to affect any person en-route...that person would not be liable to a penalty". This indicates the Council must enforce its discretionary powers reasonably in each case.

27. By contrast, if the Council merely delegates to itself the exact legislative power that is intended to be exercised by bylaw, without specifying "the particular case" in which the power may be exercised, the bylaw will be invalid.

28. An example of a case where a bylaw was invalid is *Auckland Harbour Board v Meredith*[3], where a bylaw gave the traffic manager of a harbour board complete authority to close any wharf or land under the control of the board to traffic generally. The Court held the bylaw in that case delegated a discretion that was too wide.

29. Bylaws have also been held to be invalid where the discretion left to the Council is too uncertain.[4]

Specific Consideration of the New Plymouth Bylaw

30. The issue is whether the discretion left to the Council in clause 9 of the New Plymouth Bylaw complies with section 13 of the Bylaws Act.[5]

31. In our view, clause 9 of the bylaw may be challenged on the following grounds:

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[2] [1919] NZLR 444.

[3] (1967) 12 MCD 97.

[4] *Carter Holt Harvey Ltd v North Shore CC* [2006] 2 NZLR 787 – relating to fees for waste cartage.

[5] We note for completeness that, while clause 9 refers to section 151(2) of the Local Government Act 2002, that provision does not apply to a bylaw under the Freedom Camping Act.

(a) The power is not sufficiently limited to "particular cases" and may be so great as to be unreasonable. We consider the following are likely to amount to particular cases justifying a delegation of power to the Council:

(i) Where routine maintenance requires temporary restrictions to be put in place this is likely to be a "particular case" which can be delegated to the Council. Wherever practicable, this should be attended to by closing only part of an area at a time and allowing camping to continue in the other part of the area, given this is the most appropriate and proportionate way of addressing the problem of routine maintenance. We do not anticipate routine maintenance would ever seriously impact the rights of freedom campers and any lengthy closure of an area on the ground of "routine maintenance" would be susceptible to a legal challenge.

(ii) Where damage has occurred, or damage is threatened by activity occurring in an area, and immediate steps are required to repair the damage or protect the area, this is likely to be a "particular case" where power can be delegated to the Council. We consider this may be the type of case where the Council could exercise the power intended to be exercised by bylaw.

(iii) However, we consider clause 9(a) as presently drafted is too broad and delegates an unreasonable level of discretion to the Council. It states a temporary closure may occur by special resolution where necessary to "prevent damage to the local authority area...". The bylaw should clarify that this power is to be exercised where damaged has occurred or there is an immediate threat of damage due to activity on the site. There should be an evidential basis for this. Without stating the "particular case" where the Council is able to exercise its power, clause 9(a) may be challenged as an unlawful delegation of bylaw-making power. Further, the type of damage which can be addressed by Council resolution must be a type of damage regulated by the Act itself. In our view, the Act regulates physical damage to the local authority area (such as damage to flora and fauna; or to any structure; or from the depositing of waste).[6]

(iv) We consider the delegation of power to provide access to an area for a public event is likely to be valid on the basis an event is a "particular case". However, the bylaw clause 9(c) covering public events is arguably drafted too broadly. The bylaw states the Council may presently close a site where it is considered necessary to "provide for better public access, including in circumstances where events are planned for the area." We consider that if the Council sought to rely on this clause for anything other than providing access to an event, the clause could be challenged as an unlawful delegation of the power under section 11(2)(a)(iii) to make bylaws to "protect access to the area". That is because the only "particular case" specified by clause 9.1(c) is the case of events planned for an area. Protecting access to an area generally is not a "particular case".

(b) The power delegated under clause 9 is not clearly circumscribed so as to fit within the empowering enactment. Clause 9 should clearly provide that the requirements under section 11 for bylaws must be met in relation to any Council resolutions, such requirements being as follows:

(i) That the resolution is the most appropriate and proportionate way of addressing the perceived problem in relation to that area;[7]

(ii) That the resolution is not inconsistent with the New Zealand Bill of Rights Act 1990;[8]

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[6] This can be inferred from the offence provisions at section 20 of the Act which regulate these types of issues but do not regulate matters such as noise or visual impacts of camping.

[7] Section 11(2)(b).

[8] Section 11(2)(c).

(iii) The resolution must define the restricted or prohibited area either by a map or by a description of its locality (other than just its legal description);[9]

(iv) Notice should be given in accordance with the requirements of the definition of public notice in section 5(1) of the Local Government Act 2002, being a notice published in one or more daily newspapers or 1 or more other newspapers which have at least an equivalent circulation in that district; and any other public notice that the local authority thinks desirable in the circumstances.[10]

32. In addition, if the Council made a resolution pursuant to clause 9 of the New Plymouth Bylaw which extended beyond a "temporary" prohibition (i.e., the resolution did not give any timeframe for the prohibition or any criteria to be met for it to be lifted), the resolution could be challenged on the basis it is ultra vires because it is not truly "temporary".

No Bylaw Provision

33. You have additionally asked for our comment as to whether the Council may issue temporary restrictions or prohibitions under the Freedom Camping Act if there is no relevant bylaw provision.

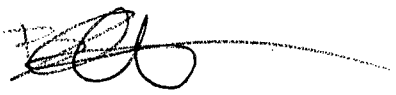
34. We do not consider such a power exists under the Act. The power to impose restrictions and prohibitions on camping is a power to be exercised by way of bylaw under the Act (or by way of powers delegated by bylaw).

35. However, where there is no relevant bylaw provision the Council may rely on its powers under other legislation and bylaws to regulate concerns where possible.[11] It may also rely on the enforcement provisions of the Freedom Camping Act which include a provision for an enforcement officer to require a person who has committed an offence to leave local authority land.[12]

Conclusion

36. The Freedom Camping Act is clear that bylaws under that Act are to expressly and clearly define restrictions and prohibitions on camping and consultation over these restrictions and prohibitions is mandatory. A bylaw which delegates broad discretion to the Council to add further restrictions and prohibitions is not consistent with the provisions of the Act and we consider the Courts are likely to strictly enforce the requirement for any delegated power to be confined to "particular cases" which will need to be specified in the bylaw.

Yours faithfully
Lane Neave



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[9] Section 11(3).

[10] By inference from the requirement in section 11(6) and (7) for the Council to meet these requirements for any "minor changes" to a bylaw where full consultation is not required.

[11] We have not carried out a detailed assessment of the extent to which other enactments could be relied upon at this point.

[12] Section 36.

07 November 2017

Hurunui District Council
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SUBMISSION ON THE HURUNUI DISTRICT COUNCIL PROPOSED CHANGES TO THE FREEDOM CAMPING BYLAW & RESERVE MANGEMENT PLAN 2017

Executive summary

1. The New Zealand Motor Caravan Association (**NZMCA**) appreciates the opportunity to submit on the proposed changes to the Hurunui District Council (**Council**) freedom camping bylaw (**draft bylaw**). We also thank the Council for the opportunity to comment on the proposed draft bylaw prior to releasing it for public consultation.

2. This submission addresses our primary concerns with the proposal (as previously discussed); including the significant impact the bylaw will have on the ability for New Zealand families to explore Hurunui in their certified self-contained (**CSC**) vehicles.

3. Prior to adopting a new bylaw, we strongly recommend the Council undertakes "site specific" assessments and reduce the broad prohibitions across settlement areas and beach and coastal environments throughout Hurunui. In our opinion, the current level of analysis is flimsy and does not demonstrate compliance with section 11(2) of the Freedom Camping Act 2011 (**FCA**).

4. We request further information (as noted below) prior to the hearing to help determine whether the perceived problems exist in certain areas and, if so, whether there is an alternative solution which is more appropriate and proportionate to those issues.

5. The Council has expressed an interest in the NZMCA's Motorhome Friendly Towns (**MHFT**) Scheme. At this stage, the NZMCA does not support the draft bylaw and therefore no towns within Hurunui are eligible to apply for MHFT status.

Introduction

6. Established in 1956, the NZMCA currently represents over 75,600 individual New Zealanders who share a passion for exploring our country at leisure in their purpose-built motorhomes and caravans. Over 2,000 individual members reside in the North Canterbury Region (including the Hurunui District).

7. NZMCA members are taxpayers, ratepayers, and domestic travellers who enjoy freedom camping in Hurunui and other districts throughout the country. Therefore all members, particularly those residing in Hurunui, will be directly affected by the bylaw.

8. The NZMCA is an advocate for responsible freedom camping and we applaud the recognition of CSC vehicles within the draft bylaw. Following requests and a groundswell of support from local government, central government, and industry operators nationwide, the NZMCA recently commissioned Standards NZ to amend the Self-containment Standard NZS 5465:2001 (at a cost of $50,000 to the Association).

9. The amendments to NZS 5465:2001 were adopted by Standards NZ in May 2017, following unanimous support from the Standards Development Committee (which included 14 representatives across central and local government and the tourism industry). The committee successfully raised the benchmark insofar as the proper access to on-board toilets is concerned.

What is freedom camping?

A traditional activity

10. The FCA is a permissive statute and provides local authorities with practical tools designed to help manage freedom camping problems in their areas. Tools include an instant fine regime in response to those caught dumping waste or damaging an area while freedom camping, and the ability for local authorities to make new bylaws that restrict or prohibit areas for freedom camping.

11. Unfortunately, some communities and decision-makers perceive freedom campers to be mainly young and unruly international visitors spoiling our environment. This is not the case. The previous parliament recognised through the enactment of the FCA that freedom camping is a traditional activity enjoyed by ten-of-thousands of New Zealand families throughout the country. When discussing the presumption of the FCA the then Minister of Conservation, Hon Kate Wilkinson, stated

> *"Freedom camping is a valued tradition in New Zealand, as we have heard, and this Government wants to ensure that it stays that way….The presumption is that people can camp unless a location is specifically restricted….This bill is purposely pro-camping,*

as we recognise that the majority of freedom campers are responsible and take great care to clean up after themselves."

12. Furthermore, when discussing the benefit of the FCA to New Zealand families the then MP for Christchurch Central, Nicky Wagner, stated

> *"The [FCA], for the first time, enshrines the right of New Zealanders to go freedom camping as a default setting. New Zealanders can camp as of right on public land and Department of Conservation land, unless there is a good reason not to allow it…In creating these by-laws, [local] authorities need to prove that there is a real problem. This bill ensures that they can no longer impose blanket bans and it will give consistency across the country… [Local] authorities can impose those by-laws within only very limited geographical areas."*

13. The National MP for Taupo, Hon Louise Upston, also gave Parliament a personal account when discussing the purpose of the FCA:

> *"…the main point I want to make is that [the FCA] is about protecting the right of New Zealand families to camp, I want to give a personal example. I was raised camping by the lakes, by the rivers, and by the beaches. I remember times with my son when staying in a camping ground was not affordable at the time. So we would pack up the borrowed tent, jump in the car, and drive to a place that was yet undiscovered. This bill protects the right of New Zealanders to have those kinds of adventures in this country because it will stop the blanket [ban] by-laws."*

14. Freedom camping is not merely an activity undertaken by young overseas tourists travelling on a shoestring budget, even though a small minority of them are usually at the forefront of the country's freedom camping issues. Ordinary, responsible New Zealanders value the opportunity to explore the country and freedom camp in a variety of settings, including residential, town centre, rural, coastal and remote areas. Because of this, the NZMCA is well-resourced to support the ability for its members (and indeed all New Zealanders) to freedom camp in a CSC vehicle, while supporting communities and encouraging decision-makers to make sensible evidence-based decisions.

Public infrastructure

15. From a strategic perspective, managing freedom camping issues through a bylaw also requires the provision of adequate infrastructure. Local authorities have a statutory obligation to provide the level of infrastructure necessary to support their residents and visitors alike. In terms of freedom camping, basic infrastructure includes wastewater dump stations, rubbish facilities, and public toilets. If necessary, there are funding options available to support these projects, including MBIE's tourism infrastructure fund and the NZMCA's public dump station / refuse bin fund.

Freedom camping benefits

16. Unfortunately, those opposed to freedom camping often claim motorhomers and freedom campers are a burden on society and contribute nothing to local economies. This is unsubstantiated and emotional rhetoric with no supporting evidence. We implore all decision-makers to separate the rhetoric from fact and acknowledge responsible freedom camping can be of significant value to your constituents and local economy.

Economic benefits

17. Motor Caravanning is estimated to be worth over **$650 million** to New Zealand' economy and ongoing research reinforces how significant the industry is to local economies. For example:

    - MBIE visitor spend data for 2016 confirms freedom campers generally spend more (and stay longer) on average than other tourists. Their figures suggest the average freedom camper spends about $100 per day;

    - According to research carried out by the Auckland Council in 2017, visitors in self-contained vehicles spend on average $288 per day while freedom camping in Auckland, compared to an average of $66 per day for non-self-contained vehicles;

    - In February/March 2014 the Central Otago District Council surveyed 1,000 campers at popular freedom camping spots across their district. According to their results the average camper spent $91 a day while visiting the district, 78% were domestic visitors, and 64% over 60 years of age. The Council's Parks and Recreation Manager, Mathew Begg, noted that this spend was quite significant to the local community;

    - An independent market research report published by COVEC in October 2012 found campervan hirer's in the year 2011 spent on average $195 per day during their travels. Tourism Industry Aotearoa publically supported these findings stating campers were contributing to communities throughout New Zealand, supporting local business and jobs, and spending was not limited to tourism operators rather spread across a wide range of businesses in the community;

    - A survey carried out in March/April 2012 at Ferry Road, Taupo (a restricted freedom camping area) showed the average motorhome visitor spent $401 per visit. Also of note, over 100 local businesses signed a petition to the Taupo District Council supporting the preservation of freedom camping at this site; and

    - Results from a 2012 survey by CB Marketing Consultants in Nelson showed the average NZMCA couple spent $117.00 per day in local businesses while visiting the small town of Murchison.

18. Obviously the above facts vary depending on the location of the district and what attractions etc. are on offer. However, the data ultimately proves freedom campers spend money, are of significant value to local economies when they're made to feel welcomed, and firmly refutes any perceived notion that motorhomers are freeloaders.

Social benefits

19. Places that permit CSC freedom camping generally suffer less from vandalism and other undesirable social behaviour as self-contained campers provide free security for the area. Many community clubs and associations nationwide have formed reciprocal relationships with the NZMCA allowing our members to park overnight for the security it provides to their facilities. This positive benefit from allowing responsible freedom camping is often overlooked when assessing the value of supporting freedom camping.

Environmental benefits

20. In addition to the economic and social benefits associated with CSC freedom camping, NZMCA members value the places they stay and take special care to look after and improve them. Members regularly volunteer their time with local organisations and authorities to tidy up sites, pick up litter, and plant vegetation. Again, this positive benefit is frequently overlooked when discussing the value of freedom camping to a community.

Additional matters to consider

21. Academic research[1] shows motorhomers are generally 'hybrid campers' frequently alternating between commercial campgrounds, DOC campsites, and freedom camping areas. Therefore, commercial operators stand to benefit the most as more motorhomers are likely to visit areas that cater for their wider needs.

22. Academic and local government research[2] suggests that when selecting a place to camp overnight, most visitors are motivated by the physical environment (e.g. views, facilities, cleanliness etc.), as well as the sites proximity to local attractions, dining, entertainment, and their next destination. Contrary to popular belief, 'free' camping is well down the list of motivating factors.

23. The domestic market is undergoing a significant growth phase with the NZMCA forecasting over 80,000 individual members by the end of 2018 and potentially 100,000 members by 2020. NZMCA members travel throughout the year, especially during the

[1] For example see Robin Kearns, Damian Collins & Laura Bates (2016): "It's freedom!": examining the motivations and experiences of coastal freedom campers in New Zealand, Leisure Studies, DOI: 10.1080/02614367.2016.1141976

[2] Ibid, Auckland Council: Freedom Camping Trial Research (2017), and Mary Hutching & Cindy Lim (2016): A study into freedom camping in Taranaki, New Zealand, Pacific International Hotel Management School.

off-peak season, and therefore provide much-needed economic support to small business communities outside the peak holiday periods.

Comments on the 'Summary of Information' document

24. This is an important document as it sets the tone for the proposal while educating the public on the perceived problems that justify the need for a revised bylaw. Unfortunately, the preamble defining freedom camping is very misleading by claiming "freedom campers do not have access to essential facilities such as toilets and waste disposal facilities." This is disappointing, particularly when there is a collaborative effort between the industry and local government to educate the public on the difference between CSC and non-CSC vehicles. It is also unclear why this definition was deemed appropriate when the bylaw explicitly recognises CSC vehicles. Presumably the Council is aware CSC vehicles provide on-board toilets and waste disposal facilities.

25. The document also explains the key criteria for making bylaws under the FCA. However, unlike the Statement of Proposal, it fails to mention any decisions must also be the most appropriate and proportionate response to the perceived problem(s). Undertaking a proportionality test is a fundamental step in the bylaw-making process and reference to this section of the FCA helps submitters understand how and why decisions are balanced to avoid introducing unnecessary limitations.

26. Submissions are heavily influenced by the commentary and quality of evidence supporting these proposals. In turn, decision-makers are influenced by the nature of the submissions received. People need to be properly informed in order to be given the opportunity to make well informed submissions and recommendations. This process is compromised when the Council's main documents provide inaccurate information and/or fail to include important information.

27. Given the significance of this proposal, the Council should have done a better job advertising what CSC vs. non-CSC freedom camping is and how the FCA requires the Council to make appropriate and proportionate decisions. We request the Council keeps this issue in mind when deliberating on the bylaw.

Comments on the draft bylaw

28. The NZMCA is primarily concerned with the broad prohibition that applies across the mapped settlement areas and beach and coastal environments. The prohibitions are reasonably extensive and deny visitors in CSC vehicles access to desirable areas such as (but not limited to) Hanmer Springs and seaside settlements such as Gore Bay. From the information provided to date, it appears the Council has not demonstrably considered the problems (if any) that are relevant to each individual settlement area.

29. We believe the proposed outcome is unnecessary and the supporting rational does not comply with section 11(2) of the FCA. Further, the extent of each prohibition represents an unreasonable limitation on the ability for responsible freedom campers in CSC vehicles to explore Hurunui and stay in the most desirable public locations.

Amenity Values

30. The Council considers prohibiting all freedom camping (including CSC vehicles) across settlement areas is necessary to protect "certain amenity values". This justification is unduly vague given the wide (and desirable) areas covered by the prohibition. Given the "certain amenity values" are not clearly defined, it is impossible for the NZMCA to assess whether prohibition is the most appropriate and proportionate way of addressing the perceived problem. It is also unclear whether the Council undertook the appropriate proportionality test in this regard. If it has, we would appreciate a copy of this assessment prior to the hearing.

31. If the amenity values are visual amenities, we note reference to visual amenities is notably absent from the FCA and a bylaw made for the purpose of addressing any or all visual amenity effects may be open to challenge, particularly if those effects are largely subjective (i.e. in response to residents' complaints that they do not like the look of motorhomes parking in their streets) or can be alleviated through appropriate and proportionate restrictions.

32. Until the "certain amenity values" are defined more clearly, it is difficult to for us to understand which settlement areas this justification applies to. It would be helpful for the Council to provide further clarification in this regard. For example, if the issue is visual amenity effects, is this a perceived problem in terms of areas with ocean views? Does it apply to other mapped settlement areas? A better understanding of the Council's reasoning in relation to "amenity values" is critical in terms of the NZMCA being able to make a fully informed submission, and Council complying with its consultation obligations.

33. In the meantime, it is difficult to accept prohibition is necessary when CSC vehicles are entitled to lawfully park overnight (unoccupied) within these areas. From a visual effects perspective, is there any fundamental difference between an occupied and unoccupied vehicle parked on the road or public car park? If not, the restriction is unreasonable and a disproportionate response to the perceived problem.

Risks Associated With Parking on Road-Sides

34. There is no evidence to suggest every roadside throughout the mapped settlement areas experiences high volumes of traffic, pedestrians and other users that would warrant outright prohibition. We believe the majority of roadsides experience relatively low volumes, particularly at night when people generally freedom camp. In which case, the

prohibition is unnecessary. Where the volume of traffic is higher than usual during the day, the most appropriate and proportionate response could be a restriction on hours of camping rather than an outright prohibition.

35. Furthermore, under the FCA freedom camping excludes "temporary and short term parking of a motor vehicle" and "recreational activities commonly known as day-trip excursions." This means the bylaw will not prevent the owner of a motor caravan from freedom camping in a permitted area and then parking in a mapped settlement area while going on a "day trip excursion". Nor can the bylaw prevent a vehicle owner from temporarily parking in a mapped settlement area. Therefore, the bylaw will not mitigate the risk from high volumes of traffic and pedestrians given it cannot prevent a freedom camper from parking in the area.

36. We do not consider the proposed prohibition will achieve its health and safety objective given the highest volume of traffic and pedestrians occurs during the day when motor caravans are also permitted to park for day-trip excursions or temporary parking. The risk to health and safety from a high volume of traffic and pedestrians is much lower overnight at the time when freedom camping would occur.

No Facilities

37. The Council has noted in support of its proposed prohibition across settlement areas and beach and coastal environments that facilities are not always available. Prohibition is not the most appropriate and proportionate response to this problem for CSC vehicles which do not require external facilities.

Protecting Road-Side Parking for Residential Properties and Businesses

38. We do not agree that it is appropriate for any local authority to deny New Zealanders the right to undertake a public activity on public land in favour of protecting residential and commercial street-side parking. Nor do we believe this approach is necessary across all settlement area roadsides. Is the Council aware this approach also denies Hurunui residents and ratepayers the ability to freedom camp within their hometowns, or host their visiting family and friends who may wish to freedom camp overnight outside of their private properties (on the street-side)?

39. Furthermore, most businesses usually only require parking during daylight hours, while freedom camping generally occurs overnight. The Council's concern (if legitimate) would be more appropriately and proportionately addressed by restricting the hours of camping so as to protect access during business hours.

40. The bylaw cannot prevent motor caravans from parking in settlement areas temporarily or while their owners go on day-trip excursions in the area. Therefore, the intended

purpose of the prohibition will not be achieved. Conversely, when many businesses are closed in the evenings it is likely there will be plenty of space for both residents and freedom campers to share the mapped settlement areas.

Beach/coastal areas

41. It appears the Council intends to prohibit all freedom camping at the beach. We acknowledge this environment can contain some sensitive marine areas that are worthy of protection (e.g. sand dunes, tussock grass, nesting areas), however, the Council's definition of this area appears much broader and includes areas where vehicles are lawfully permitted to park during the day. In which case, it is unfair and nonsensical to protect an area from motor caravans via a freedom camping bylaw but continue to enable other vehicles unrestricted access to the same areas during the day.

42. "Beach/coastal areas" as a basis for protecting the area is not sufficient in order to explain what it is about each area that requires protection. This is an overly basic description of the area, not an explanation for why section 11(2)(a)(i) of the FCA applies. Again, the Council is taking a 'blanket' approach as opposed to considering the problems (if any) that are relevant to each beach or coastal area.

Health & safety risks from tides

43. Justifying prohibition on the basis of health and safety risks from tides and extreme weather events is not particularly convincing. While tides might potentially be relevant to freedom camping in tents, it seems very unlikely to pose much of a risk to most camping vehicles given their mobility and ability to vacate an area at short notice. Extreme weather events may be as much of a risk in other parts of the Hurunui district as they are at the beach. Again, there has not been any apparent effort by the Council to consider the risks involved with specific beaches and coastal areas.

Access to public beach/coastal environments needed

44. This reason as a justification for section 11(2)(a)(iii) applying seems weak. It is not at all clear from the Council's analysis how exactly freedom camping will harm current access so as to warrant outright prohibition. There is no consideration of the particular access routes that exist to various beaches and coastal areas.

Suggested amendments

45. Research undertaken by the NZMCA and other independent organisations (including local authorities, academic institutes, and research companies) confirms New Zealanders enjoy freedom camping in residential/urban areas when visiting friends and family, or wanting to patronise local businesses. Parking overnight in town and supporting local

businesses is the underlining purpose the MHFT partnership, of which the Council has expressed an interest in since 2014. The research confirms freedom campers in CSC vehicles also navigate towards the coast, which is not surprising given beach-side camping is a quintessential kiwi way of life.

46. The Council cannot argue the bylaw upholds the permissive intent of the FCA when it effectively denies New Zealanders the ability to enjoy freedom camping in the most desirable areas. The current approach falls well short of the criteria for becoming an official MHFT.

47. In lieu of the urgent further information requested, the NZMCA recommends restricting freedom camping to CSC vehicles in all settlement areas save for any specific prohibited areas. This is a more reasonable and consistent approach with the premise of the FCA. Lumsden (Southland) is one of many good examples to follow. We also recommend removing the blanket prohibition across all beach and coastal environments, save for any specific prohibited areas.

Definition of a 'certified self-contained vehicle'

48. The proposed definition includes the phrase "…and any subsequent amendments". This suggests the Council will automatically enforce the provisions of any future amendment to NZS 5465, prior to amending the bylaw. We have received legal advice from Simpson Grierson (attached) explaining the risks with this approach why the Council should review the bylaw following each amendment to NZS 5465, to avoid issuing invalid infringement notices. Taking onboard this legal advice, we recommend relying on the definition of a self-contained vehicle provided for in the Model Freedom Camping Bylaw (download a copy from Local Government New Zealand's website):

> ***Self-contained vehicle*** *means a vehicle designed and built for the purpose of camping which has the capability of meeting the ablutionary and sanitary needs of occupants of that vehicle for a minimum of three days without requiring any external services or discharging any waste and complies with New Zealand Standard 5465:2001, as evidenced by the display of a current self-containment warrant issued under New Zealand Standard Self Containment of Motor Caravans and Caravans, NZS 5465:2001.*

<u>Comments on the proposed amendments to the Reserve Management Plan 2012</u>

49. With regards to complying with the Reserves Act 1977, legal advice and that received from the Department of Conservation suggests the Council can use the delegated powers that it received from the Minister of Conservation back in 2013 to permit freedom camping in certain reserves, e.g. local purpose, scenic and recreation reserves, in the absence of a reserve management plan policy that specifically provides for the activity.

50. Our reading of the proposed amendment to policy 9(b) is that the Council will allow CSC freedom camping in all public reserves if the bylaw also enables the activity, in which case we support (in principle) the proposed amendment. Please advise us prior to the hearing if this is not the Council's intention.

Summary

51. Taking into account the NZMCA's submission points, we strongly recommend the Council defers any decision until it has reviewed and adequately assessed all mapped settlement areas and beach and coastal environments.

52. The NZMCA wishes to speak to this submission and we request the following information in order to prepare for the hearing:

    a) Copies of any proportionality tests relevant to the settlement areas and beach and coastal environments;

    b) What the "certain amenity values" are;

    c) For each of the mapped settlement areas, the specific section 11(2) reasons which apply to each. More particularly, list in relation to each mapped area whether there is a perceived problem in relation to:

        i. Amenity values (and describe the relevant amenity values affected);
        ii. High volumes of traffic and pedestrians (and confirm whether this is true during business hours, daylight hours or at all times);
        iii. Lack of facilities; and
        iv. Limited parking on roadsides for residents and businesses.

    d) Any other relevant information that the Council believes will assist in responding to the various matters and concerns discussed above.

Yours faithfully,
New Zealand Motor Caravan Association Inc.

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Our advice

Prepared for	James Imlach, National Planning and Policy Manager, New Zealand Motor Caravan Association
Prepared by	Kathryn McLean, Senior Associate, and Jonathan Salter, Partner
Date	13 September 2017

PRIVILEGED AND CONFIDENTIAL

Local authorities' enforcement of NZ Standard 5465:2001: modifying the Standard, searching vehicles to determine compliance with the Standard, and incorporating amendments made to the Standard

Background

The *New Zealand Standard 5463:2001 Self containment of motor vehicles and caravans* (**Standard**) sets out requirements for vehicles to meet in order to qualify as 'self-contained', and includes a certification regime for this process. It is common practice for local authorities to reference the Standard in their freedom camping bylaws, typically so as to provide that freedom camping in some areas is restricted to those using self-contained vehicles that meet the Standard.

The Standard was amended in May 2017, to improve the minimum requirements for toilets. Section 16 in the Standard provides a transitional regime for the changes introduced under this amendment.

We understand the New Zealand Motor Caravan Association (**NZMCA**) is concerned about differing interpretations of the new minimum requirements for toilets. In particular, the NZMCA is concerned that some issuing authorities may potentially be certifying vehicles as self-contained under the Standard on the basis of an incorrect interpretation[1] of the minimum requirements for toilets.

The NZMCA is interested in whether local authorities might be able to address such a problem through their freedom camping bylaws. We understand from the NZMCA that some local authorities are also interested in whether they could potentially look behind certification issued under the Standard, to ensure vehicles truly comply with the substantive requirements in the Standard, including the minimum requirements for toilets. Apparently some local authorities are also interested in whether they might enforce the recent amendments to the Standard before they come into force under the transitional provisions in the Standard.

If local authorities are able to look behind the Standard in this way, they want to know if they would have the necessary search powers to back up such an approach (eg ability to search a campervan to see if it complies with the requirements in the Standard).

1 We understand that there are differing interpretations of section 6.1.1 in the Standard, notably about the phrase "even with the bed made up". You have not asked us to advise on the correct interpretation of this section.

Finally, the NZMCA is aware that local authorities reference or cite the Standard in somewhat different ways within their bylaws. The NZMCA is interested in whether the recent amendment made to the Standard will automatically apply to all local authorities' bylaws. The NZMCA has indicated that local authorities are themselves interested in how they might best reference or cite the Standard in bylaws to as to capture any amendments made to the Standard.

Questions

You have asked the following questions:

1. Can a local authority provide that the only self-contained vehicles permitted under its bylaw are those that in fact comply with the substantive requirements in the Standard, even if the vehicle has already received a self-containment certificate?

2. Can a local authority provide that the only self-contained vehicles permitted under its bylaw are those that meet the substantive requirements in the Standard, but without regard to the transitional provisions in the Standard (ie effectively overriding the transitional provisions)?

3. Can a local authority enforcement officer enter a vehicle to check whether it complies with the Standard?

4. How should a local authority cite the Standard in its bylaw to ensure that it captures any amendments made to the Standard?

Answers

Local authority bylaws arguably provide a possible means to address the NZMCA's concerns about issuing authorities certifying vehicles on the basis of an incorrect interpretation of the new toilet requirements. Local authorities can choose to incorporate just some of the Standard, and in a modified form. Bylaws could in theory require vehicles to effectively meet NZMCA's view of the correct minimum toilet requirements. Also, local authorities could modify the Standard so as to override the transitional provisions in the Standard for the new toilet requirements.

There is, however, a serious practical problem with using bylaws in this way. Unfortunately, existing statutory powers of entry are unlikely to prove useful to local authorities wanting to enter and search a self-contained vehicle to determine if it complies with the Standard or any other requirements imposed by a local authority through its bylaws (eg modifications to the Standard). There would be serious risks if a local authority were to purport to give itself such powers in bylaws.

Finally, local authorities will almost certainly need to amend their bylaws to adopt the May 2017 amendment to the Standard. It may not be possible for local authorities to draft bylaws so as to automatically capture any amendments to the Standard.

Our reasons

Summary

Question 1: Can a local authority provide that the only self-contained vehicles permitted under its bylaw are those that in fact comply with the substantive requirements in the Standard, even if the vehicle has already received a self-containment certificate?

Open to local authorities to incorporate Standard into bylaws in a modified form

The Standard itself is not legally binding or enforceable unless, and to the extent, it is incorporated into local authorities' bylaws.[2]

It will be open to a local authority to incorporate the Standard into a bylaw in a modified form. Section 30 of the Standards and Accreditation Act 2015 (**Standards Act**) expressly allows for Standards to be incorporated "in whole or in part" and for any reference or incorporation of a Standard to be done "with or without modification".

Accordingly, where a local authority cites the Standard in its bylaw, it could choose to incorporate just some aspects of the Standard, to modify aspects of the Standard, and it could include requirements additional to the Standard.

Local authorities may be able to use this discretion to require self-contained vehicles to meet certain toilet requirements

A local authority could use the discretion in section 30 of the Standards Act to address the NZMCA's concerns about issuing authorities issuing certification for vehicles that do not meet (the NZMCA's interpretation of) the minimum toilet requirements.

For instance, a local authority could provide in its bylaw that a "self-contained vehicle" will be one that meets the substantive requirements of the Standard and certain additional toilet requirements described by the local authority in the bylaw, with those additional requirements being the NZMCA's detailed view on the necessary standards for a toilet.

As an alternative, a local authority could require compliance with all requirements in the Standard, other than the requirement in section 6.1.1 (which we understand is the problematic section) and instead provide its own minimum requirements for toilets within the definition of a "self-contained vehicle".

2 See sections 29 and 30 of the Standards Act.

Another alternative might be for a local authority to simply provide that a "self-contained vehicle" must in fact meet the substantive requirements of the Standard to the satisfaction of the local authority, regardless of whether a warrant, certificate, or sticker has been issued.

There will no doubt be other options for framing a bylaw so as to address the NZMCA's concerns.

However, regardless of which option is chosen, there are likely to be serious practical problems with enforcing any such approaches, given the lack of powers to enter and search self-contained vehicles to determine if they do in fact comply with the Standard or any modifications included in bylaws – this is discussed under Question 3 below.

Local authorities would need to have some evidence showing how poor certification of minimum toilet requirements risks causing harm

If a local authority were to take such an approach in its bylaw, it would need to ensure that it complied with the requirements in section 11(2) of the Freedom Camping Act 2011:

> *(2) A local authority may make a bylaw under subsection (1) only if it is satisfied that—*
>
> *(a) the bylaw is necessary for 1 or more of the following purposes:*
>
> *(i) to protect the area:*
>
> *(ii) to protect the health and safety of people who may visit the area:*
>
> *(iii) to protect access to the area; and*
>
> *(b) the bylaw is the most appropriate and proportionate way of addressing the perceived problem in relation to that area; and*
>
> *(c) the bylaw is not inconsistent with the New Zealand Bill of Rights Act 1990.*

Notably, section 11(2)(a) requires that a bylaw be "necessary" to protect an area or people's health and safety. On that basis, it would be prudent for a local authority to have some evidence which demonstrates how poor certification of minimum toilet requirements risks causing harm to an area or to people's health and safety. If a local authority could not point to such evidence, its bylaw could be vulnerable to challenge on the basis of non-compliance with section 11(2).

Question 2: Can a local authority provide that the only self-contained vehicles permitted under its bylaw are those that meet the substantive requirements in the Standard, but without regard to the transitional provisions in the Standard (ie effectively overriding the transitional provisions)?

Local authorities will be able to override the transitional

Section 16 of the Standard sets out the transitional regime for implementing the changes introduced under the May 2017 amendment. We understand that these transitional provisions allow lead time into the new requirements, in some cases perhaps as long as 4 years. The

provisions in the Standard through bylaws, provided of course there is justification for this position	NZMCA has suggested that a few local authorities may be keen to introduce the requirements sooner than that. As mentioned in the discussion under Question 1, it is open to local authorities to refer to or incorporate the Standard in whole or in part, or in a modified form.[3] It will, therefore, be open to a local authority to incorporate the Standard, but with the exclusion of section 16. This would effectively allow it to bring the new minimum requirements for toilets into force immediately. As already identified under Question 1, the local authority would need to be satisfied that such an approach was necessary in line with section 11(2) of the Freedom Camping Act. Essentially, the local authority would need to have some basis for considering that immediate introduction of the requirements was necessary to protect an area or people's health and safety.

Question 3: Can a local authority enforcement officer enter a vehicle to check whether it complies with the Standard?

Freedom Camping Act does not provide helpful search powers	The Freedom Camping Act gives enforcement officers (appointed under that Act) powers to require certain information,[4] to require people to leave a local authority area,[5] and to even seize and impound property, including a vehicle.[6] However, none of these powers include the ability to enter and search a vehicle.
Search powers in the LGA 02 unlikely to be of much use given the restrictions on searching dwellinghouses	The only search powers in the Local Government Act 2002 (**LGA 02**) that have the potential to be of use to local authorities wanting to enter and search a self-contained vehicle are those set out in sections 171 and 172: ***171 General power of entry*** *(1) For the purpose of doing anything that the local authority is empowered to do under this Act or any other Act, a local authority may enter any land or building other than a dwellinghouse.* ***172 Power of entry for enforcement purposes*** *(1) A warranted enforcement officer may enter land for the purpose of detecting a breach of a bylaw or the commission of an offence against this Act if the officer has reasonable grounds for suspecting that a breach of the bylaw or the commission of the offence has occurred or is occurring on the land. …* *(3) The power in subsection (1) to enter a dwellinghouse must not be exercised unless—*

3 Under section 30 of the Standards Act.
4 Section 35 of the Freedom Camping Act.
5 Section 36 Freedom Camping Act.
6 Sections 37-38 Freedom Camping Act.

(a) the entry is authorised by a warrant given by an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2012) on application made in the manner provided for an application for a search warrant in subpart 3 of Part 4 of that Act; and

(b) when exercising the power, the enforcement officer is accompanied by a constable.

Whether these search powers are of any use turns largely on whether a self-contained vehicle, such as a campervan, constitutes a "dwellinghouse". If it does, then the search powers are of no real use, given that section 171 will not apply, and the power in section 172 can be exercised only after obtaining a search warrant and in the company of a Police officer.

Unfortunately, we have not been able to identify any case law that considers the meaning of "dwellinghouse" in the context of sections 171 or 172. The case law that does consider whether a caravan or the like is a dwellinghouse is in the context of other legislation and, in any event, is contradictory.[7]

In our opinion, if a court were to consider whether a self-contained vehicle, such as a campervan, were a "dwellinghouse" for the purposes of sections 171 or 172, it is more likely than not that it would consider it to be a "dwellinghouse". It seems to us that the greater protections for dwellinghouses within the search powers are due to people have a greater expectation of privacy in the spaces in which they reside. Despite the fact that a campervan is on wheels and might often be sited in a public place, it is likely that those living in them (albeit on a temporary basis) regard it as their main place of residence at that time. In those circumstances, and bearing in mind the protection against unreasonable search and seizure in the New Zealand Bill of Rights Act 1990 (**Bill of Rights**),[8] it seems more likely that a court would interpret the search powers narrowly, against a local authority.

In our opinion, the search powers in the LGA 02 do not provide a sufficiently safe basis for a local authority to search a self-contained vehicle, such as a campervan.

Serious risks would arise if local authority were to purport to

In the absence of any statutory search powers, a local authority could look to provide itself with additional search powers in its bylaw, if it considered that to be necessary. After all, section 14 of the Bylaws Act 1910 provides that:

7 For instance, in *Auckland Council v Steed* [2013] NZEnvC 10, the Environment Court opined that a "dwellinghouse" did not include a caravan for the purposes of section 315(2)(a) of the Resource Management Act 1991. That section concerned the ability of a person against whom an enforcement order has been made to enter, with the consent of the Court, upon any land or enter any structure, with the proviso that a person entering a structure that is a dwellinghouse must be accompanied by a constable. In comparison, in *Cunningham v NZ Police* (1997) 4 HRNZ 240, the Court considered that a caravan was analogous to a dwellinghouse for the purpose of disallowing evidence obtained by Police after entering a caravan on the occupier's property. Also, in *Hale v Hale* (1985) 3 NZFLR 608, the Court determined that a caravan could be a "household residence" for the purposes of the Domestic Protection Act 1982.

8 Section 21 Bill of Rights.

give itself additional search powers in bylaw

> *No bylaw shall be invalid merely because it deals with a matter already dealt with by the laws of New Zealand, unless it is repugnant to the provisions of those laws.*

There is, however, a serious hurdle to overcome with such an approach. Section 11(2)(c) of the Freedom Camping Act provides that a local authority can make a bylaw "only if satisfied that … the bylaw is not inconsistent with the New Zealand Bill of Rights Act 1990". As mentioned above, section 21 of the Bill of Rights includes a protection against unreasonable search and seizure:

> *Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.*

To successfully demonstrate that a search power inserted into a freedom camping bylaw was not inconsistent with the protection against unreasonable search and seizure, a local authority would have to be able to demonstrate that the power was necessary and a proportionate response to the problem the bylaw was seeking to address.

If our view that "dwellinghouse" in the search powers in the LGA 02 is likely to include self-contained vehicles is correct, this would suggest that giving a local authority the power to enter a self-contained vehicle without a search warrant, or in the company of Police officer, may be excessive, and not in line with the Bill of Rights. In addition, the justification for such a power is weak: entering a vehicle to determine if it complies with the Standard because the local authority is unwilling to rely on certification issued under the Standard does not provide a compelling argument for entering someone's (albeit temporary) home.

Acknowledging that we have limited information about the problems caused by the differing interpretations over the new toilet requirements in the Standard, our opinion is that the introduction of a search power into a freedom camping bylaw to enable enforcement officers to search self-contained vehicles would be found to be inconsistent with the Bill of Rights, and so in breach of section 11(2)(c) of the Freedom Camping Act.

Question 4: How should a local authority cite the Standard in its bylaw to ensure that it captures any amendments made to the Standard?

Bylaws often reference the Standard, and sometimes expressly include any amendments to the Standard

Our understanding is that many local authorities' freedom camping bylaws reference the Standard, usually as part of the definition of "self-contained vehicle" (or equivalent). Most commonly, the definition of "self-contained vehicle" states that a self-contained vehicle is one that complies with the Standard, and the Standard is simply cited by name.[9]

We understand from the NZMCA that some local authorities' bylaws either currently refer to (or local authorities are considering having them refer to)

9 In our experience, this is the common approach in freedom camping bylaws.

the Standard "*and any amendments made to it*". For instance, the definition of a "self-contained vehicle" will provide that a self-contained vehicle is one that complies with "New Zealand Standard 5465:2001, including any amendments".

There is some uncertainty about whether the recent May 2017 amendment to the Standard will automatically apply to these two types of bylaws.

Presumption is that amendments to NZ Standards will apply only if subsequently expressly incorporated

Typically, where a document (eg the Standard) is incorporated by reference into some form of legislation or rule (eg a bylaw), the presumption is that any amendments to the document will have effect only if they are specifically incorporated through some subsequent change to the legislation or rule.[10]

The rationale behind this presumption is that the entity making the legislation or rule should turn its mind to whether particular amendments to a document are desirable and appropriate in the context of the particular legislation or rule before they can be incorporated. If the entity did not specifically undertake such a consideration, then it would effectively allow another agency (being the agency responsible for creating and amending the document incorporated by reference) that is not responsible for making the legislation or rule to dictate the substance of that legislation or rule. This would be an abdication of responsibility by the entity.

Section 29 of the Standards Act deals with this scenario in the context of New Zealand Standards (emphasis added):

> *(1) A New Zealand Standard may be cited in any Act, regulations, or bylaw by the title and number given to it by the NZ Standards Executive.*
>
> *(2) If a New Zealand Standard is cited in an enactment by the title and number given to it by the NZ Standards Executive, that citation must, unless the context otherwise requires, be deemed to include and refer to the latest New Zealand Standard with that citation, together with any modifications to it, promulgated before the enactment in which it is cited was passed or made.*

Section 29(2) makes clear that a reference to a Standard in an enactment can only be to the version of that Standard that applied at the time the enactment was made. So if an entity wants to incorporate an amendment to a Standard into its enactment, it will need to amend the enactment to enable this.

10 See section 53(3) of the Legislation Act 2012, which provides that "Amendments made by the originator of the material have no legal effect as part of the instrument unless they are specifically incorporated by a later instrument made in accordance with this subpart." Section 53(3) does not apply to local authority bylaws (see definition of "instrument" in section 48 of the Legislation Act, which specifically excludes a bylaw that is subject to the Bylaws Act 1910. The Bylaws Act applies to any bylaw made by a local authority – see the definition of "bylaw" in section 2 of the Bylaws Act). In addition to the Legislation Act, various statutory regimes that allow for material to be incorporated by reference into rules generally provide that any amendments to the material incorporated by reference will apply only if the rules are specifically amended to incorporate such a change. For instance, see section 261F in the Local Government Act 2002, and section 406 in the Building Act 2004.

However, section 29(2) does not appear to strictly apply where a Standard is cited in a local authority bylaw. This because a bylaw is not an "enactment".[11]

Interestingly, the reference to "any Act, regulations, or bylaw" in section 29(1) is not repeated in section 29(2) – rather the word "enactment" is used. It is arguable that this indicates Parliament was deliberate in ensuring that the rule in section 29(2) would not apply to bylaws.

Regardless, there may be issues with amendments to a Standard being automatically applied to a bylaw. Such a practice would effectively amount to a potentially significant amendment to the local authority's bylaw, without the local authority carrying out necessary consultation. There would likely be scope to try to challenge such an approach.[12]

Our opinion is that the May 2017 amendment to the Standard will not have effect until a bylaw is amended to incorporate this change

In our opinion, where a freedom camping bylaw simply refers to the Standard (and does not refer to any amendments to that Standard), the recent May 2017 amendments to the Standard will not have effect until such time as the local authority amends its bylaw to expressly reference the amendment.

Where a freedom camping bylaw refers to the Standard, and any amendments to it, we are of the opinion that it is unlikely that the May 2017 amendment to the Standard will have effect until the bylaw is amended. We acknowledge there is less certainty on this point, but a lack of certainty is likely to be problematic for a local authority wishing to enforce its bylaw.

Section 23 of Interpretation Act does not provide a fix

We understand from the NZMCA that some local authorities have taken the view that amendments to the Standard will automatically be incorporated into freedom camping bylaws by virtue of section 23 of the Interpretation Act 1999, which provides: "An amending enactment is part of the enactment that it amends". Presumably, the thinking is that the Standard is an enactment, and any amendment to the Standard is therefore part of the Standard itself.

In our opinion, this interpretation is unsound. The word "enactment" is defined in section 29 of the Interpretation Act as meaning any "Act or regulations". The words "Act" and "regulations" are also defined in section 29, and neither definition includes Standards. So section 23 cannot apply to the Standard.

Also, even if section 23 were to apply, and the amendment to the Standard becomes part of the Standard, this does not mean that the amendments should automatically be incorporated in local authorities' bylaws that cite the Standard. As explained above, this would effectively enable the NZ Standards Executive to dictate some of the substance of local authority bylaws and to alter them at will. In our opinion, section 23 would not be interpreted so as to allow such an outcome.

11 Refer to the definition of an "enactment" in section 29 of the Interpretation Act 1999.
12 For instance, an argument could be made that a provision in the bylaw that purports to automatically adopt amendments to the Standard is repugnant to the consultation requirements that apply to amending freedom camping bylaws under section 11(5) of the Freedom Camping Act.

May not be possible for local authorities to draft bylaws so as to automatically capture any amendments to the Standard

You have asked how local authorities should cite the Standard in their bylaws so as to capture any amendments made to the Standard.

In our opinion, this may not in fact be possible. The proper and prudent approach would be for a freedom camping bylaw to simply cite the current Standard, and to then amend the bylaw so as to expressly incorporate any subsequent amendments to the Standard.

We acknowledge that it is arguable that a local authority could expressly refer to the Standard, and any amendments to it, within its bylaw,[13] and treat that as automatically capturing any subsequent amendments to the Standard. The basis for this argument is the fact that section 29(2) of the Standards Act does not strictly apply to bylaws.

However, in our opinion, such an approach carries considerable risk. A person who was subject to enforcement action, which relied on the amendment to the Standard having been automatically incorporated (eg an infringement notice was issued to someone operating a campervan that did not meet the new toilet requirements in the Standard), could challenge the lawfulness of the bylaw. For instance, they could argue that the bylaw was, in substance, amended by the update to the Standard, and that the local authority failed to consult on this amendment using the special consultative procedure, as is required under section 11(5) of the Freedom Camping Act.

It seems to us that there is a reasonable chance that a court might have some sympathy for such an argument, most particularly if the amendment to the Standard was substantive in nature and directly affected the rights, interests, and liabilities, of those to whom the bylaw applies. Given such a risk, we would not recommend this approach to local authorities.

Please call or email to discuss any aspect of this advice

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13 If they were to do so, we would suggest they be absolutely explicit about their intent, eg "... the Standard and any amendments to that Standard, whether made before or after this bylaw comes into force."