IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2013-419-955
[2014] NZHC 2016

UNDER	the Judicature Amendment Act 1972 and Bylaws Act 1910
BETWEEN	THE NEW ZEALAND MOTOR CARAVAN ASSOCIATION INCORPORATED Plaintiff
AND	THAMES-COROMANDEL DISTRICT COUNCIL Defendant

Hearing: 15 and 16 April 2014

Appearances: M Chen and K Van Houtte for Plaintiff
P M S McNamara and R J O'Connor for Defendant

Judgment: 25 August 2014

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
25 August 2014 at 1.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Chen Palmer Public and Employment Law Specialists, Auckland
Simpson Grierson, Auckland

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Introduction

[1] The plaintiff Association has commenced this proceeding to challenge the validity of the Thames-Coromandel District Council's Freedom Camping Bylaw 2011 (the Bylaw). The Freedom Camping Bylaw was purportedly made by the Council in reliance on powers given to local authorities by s 11 of the Freedom Camping Act 2011 (the Act).

[2] The Association also challenges the validity of amendments that the Council made to the Freedom Camping Bylaw 2011 in March and December 2013. It is alleged that the Council acted unlawfully by not using the special consultative procedure set out in s 83 of the Local Government Act 2002 in making the amendments.

[3] Challenges are also mounted in respect of clauses of the Council's Public Places Bylaw 2004 (the Public Places Bylaw) and Parking Control Bylaw 2004 (the Parking Bylaw) which are also said to be illegal and invalid. It is claimed that these bylaws prohibit freedom camping in all public places in the Council's district, with certain exceptions. It is also said that cumulatively, the provisions of all three

bylaws constitute an unlawful restriction on the ability to engage in the activity of "freedom camping", a term now defined by the Freedom Camping Act 2011.

[4] Underpinning these arguments is the claim that the Bylaw represents an unlawful restriction on the right affirmed by s 18 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) which provides that:

> Everyone lawfully in New Zealand has the right of freedom of movement and residence in New Zealand.

[5] According to an affidavit sworn in support of the current application by Mr Bruce Lochore, who is the chief executive of the Association, at the time the proceeding was commenced, the Association had a membership of over 52,600. Those members pay an annual fee and receive benefits of membership such as access to a tailored group insurance scheme, discounts for products and services, invitations to rallies and special events and access to an online travel directory including GPS locations for holiday parks, camping grounds, and other amenities. According to Mr Lochore, members of the Association are typically retired couples who enjoy exploring New Zealand in motor caravans and who are committed to protecting the environment in accordance with a code of conduct. There could be no suggestion that the Association does not have standing to bring the present proceeding, and no issue about that was raised by the Council.

[6] In the judgment that follows I will:

(a) Refer to the relevant provisions in the Freedom Camping Act 2011.

(b) Explain the key features of the Bylaw as originally made.

(c) Explain the steps that were taken to amend the Bylaw in 2013.

(d) Consider and reach conclusions on the lawfulness of the steps taken by the Council to amend the Bylaw in 2013. This step is necessary in order to establish the relevant form of the Bylaw for the purposes of the arguments directed to the Bylaw's substantive invalidity.

(e) Consider other Bylaws that the Council made prior to enactment of the Freedom Camping Act, which have implications for the lawfulness of freedom camping.

[7] I will then proceed to consider whether the Bylaw is a valid exercise of the bylaw-making power conferred by the Act.

The Freedom Camping Act 2011

[8] The Act does not contain a clear statement of purpose of the kind that often appears at the outset of recently enacted legislation. Section 3(1) states that the section provides an outline of the Act and "indicates its purpose and scope", while not limiting or affecting "the application or interpretation of any of the individual provisions of the Act". Subsection (2) of s 3 then states that the Act regulates freedom camping on land controlled or managed by local authorities and on land controlled or managed by the Department of Conservation under statutes including the Conservation Act 1987 and the Reserves Act 1977.

[9] Section 3(3) provides that:

> … the powers of regulation under the Act do not allow for freedom camping to be prohibited on all land controlled or managed by a particular local authority or on all land controlled or managed by the Department.

[10] Section 3(4) states that the Act does not regulate freedom camping on private land. Section 3(6) explains that Part 2 of the Act deals in two subparts with freedom camping on land controlled or managed by, respectively, local authorities, and the Department of Conservation. The subsection also provides:

> Freedom camping is permitted under this Part unless it is restricted or prohibited in accordance with the provisions of each subpart.

[11] Section 5 defines what "freedom camp" means:

> **Meaning of freedom camp**
>
> (1) In this Act, freedom camp means to camp (other than at a camping ground) within 200 m of a motor vehicle accessible area or the mean low-water springs line of any sea or harbour, or on or within 200 m

of a formed road or a Great Walks Track, using 1 or more of the following:

(a) a tent or other temporary structure:

(b) a caravan:

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

(2) In this Act, freedom camping does not include the following activities:

(a) temporary and short-term parking of a motor vehicle:

(b) recreational activities commonly known as day-trip excursions:

(c) resting or sleeping at the roadside in a caravan or motor vehicle to avoid driver fatigue.

[12] This is followed by a definition of "local authority area" in s 6. Section 6(2) is only relevant to the area administered by the Auckland Council. Of relevance in the present case is s 6(1) which enacts:

Meaning of local authority area

(1) In this Act, local authority area—

(a) means an area of land—

(i) that is within the district or region of a local authority; and

(ii) that is controlled or managed by the local authority under any enactment; and

(b) includes any part of an area of land referred to in paragraph (a); but

(c) does not include an area of land referred to in paragraph (a) or (b) that is permanently covered by water.

[13] Part 2 subpart 1, ss 10 to 14 contain the detailed provisions that relate to freedom camping in local authority areas.

[14] Section 10 provides that freedom camping is permitted in any local authority area unless it is restricted or prohibited in an area in accordance with a Bylaw made under s 11 of the Act, or under any other enactment.

[15] Section 11 sets out provisions relating to the Councils' bylaw making powers. The section provides:

> **Freedom camping bylaws**
>
> (1) A local authority may make bylaws—
>
> (a) defining the local authority areas in its district or region where freedom camping is restricted and the restrictions that apply to freedom camping in those areas:
>
> (b) defining the local authority areas in its district or region where freedom camping is prohibited.
>
> (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.
>
> (3) A bylaw made under subsection (1) must define a restricted or prohibited area in either or both of the following ways:
>
> (a) by a map:
>
> (b) by a description of its locality (other than just its legal description).
>
> (4) However, where a bylaw contains both a map and a description and there is an inconsistency between the map and the description, the description prevails.
>
> (5) The local authority must use the special consultative procedure set out in section 83 of the Local Government Act 2002 (as modified by section 86 of that Act) in—
>
> (a) making a bylaw under this section; or
>
> (b) amending a bylaw made under this section; or
>
> (c) revoking a bylaw made under this section.

(6) Despite subsection (5)(b), a local authority may, by resolution publicly notified, make minor changes to, or correct errors in, a bylaw made under this section, but only if the changes or corrections do not affect—

(a) an existing right, interest, title, immunity, or duty of any person to whom the bylaw applies; or

(b) an existing status or capacity of any person to whom the bylaw applies.

(7) In subsection (6), publicly notified means a notice given in accordance with the requirements of the definition of public notice in section 5(1) of the Local Government Act 2002.

[16] Section 12 then provides that a local authority may not make bylaws under s 11 that have the effect of prohibiting freedom camping in "all the local authority areas in its district". Subsection (2) provides that the section has been enacted "for the avoidance of doubt".

[17] Section 13 provides for the review of bylaws at periodic intervals and is not relevant for present purposes.

[18] Finally, I mention s 14 of the Act which provides:

Application of Local Government Act 2002 to bylaws

(1) To the extent that the Local Government Act 2002 applies to bylaws made under other enactments, that Act also applies to a bylaw made under this Act.

(2) Subsection (1) is subject to any provision to the contrary in this Act.

The Freedom Camping Bylaw 2011

[19] At a meeting on 28 September 2011, the Council approved a statement of proposal relating to the Freedom Camping Bylaw for consultation purposes. In making the Bylaw, the Council was obliged by s 11(5) of the Act to follow the special consultative procedure set out in s 83 of the Local Government Act 2002 as modified by s 86 of that Act. That meant that the statement of proposal had to include a draft of the proposed bylaw. The proposal attracted a substantial number of submitters, among them the Association whose submission described the Bylaw as fundamentally flawed. It attached a legal opinion from its solicitors, Chen

Palmer, to the effect that the proposed Bylaw amounted to an unlawful blanket ban on freedom camping throughout the Council's district. It was also claimed that the proposed Bylaw would amount to an unjustified limitation on the freedom of movement guaranteed by s 18 of the Bill of Rights Act.

[20] As a result of hearing and considering the submissions, the Council resolved to make the Bylaw with a number of modifications. In the form in which it was passed, the Bylaw:

(a) Repeated the relevant definitions of "camping ground", "Council area", and "freedom camp" from the Freedom Camping Act.

(b) Added a definition of "urban area", defined as meaning:

> Any location where the permanent speed limit is set at no more than 70 kilometres per hour.[1]

(c) Contained the following substantive provisions:

> **903 RESTRICTIONS ON CAMPING**
>
> **903.1 Prohibited areas**
>
> (a) A person must not freedom camp in any Council area identified in Schedule A.
>
> (b) Subclause (a) does not apply if the person is freedom camping—
>
> (i) at a location identified in Schedule B and complies with all conditions attached to the use of that location; or
>
> (ii) with the prior written consent of the Chief Executive of the Council and the Community Board Chair for the area and complies with all conditions attached to that written consent. Consent must be sought at least twenty days in advance, and any costs incurred by the Council in processing the application for consent must be met by the applicant before any consent is granted.

[1] The Association complained that this definition was uncertain. I am not persuaded that it is, and consider that the reference to areas within a 70 kilometres per hour speed limit is a useful and intelligible way of describing the "urban area" for the purposes of the Bylaw.

> Consent is at the discretion of the Chief Executive and Community Board Chair.
>
> **903.2 Restricted areas**
>
> A person may freedom camp in a self contained vehicle displaying a NZS5465:2001 Self-Containment Certificate at locations identified in Schedule B provided they comply with all conditions attached to the use of that location.
>
> **904 Amendment of Schedules**
>
> The areas set out in the Schedules may be amended from time to time by resolution of the Thames-Coromandel District Council.

[21] As can be seen from cl 903.1(a), there was a prohibition on freedom camping in the areas identified in Schedule A. Schedule A was in three parts, the first of which referred to:

> All Council areas including roads and reserves within the following urban areas:

There was then a list which referred to most of the more substantial towns in the Council's district. Those areas were:

- Coromandel town
- Colville
- Cook's Beach
- Hahei
- Hot Water Beach
- Little Bay
- Matarangi
- Kuaotunu
- Oamaru Bay
- Otama
- Opito
- Pauanui
- Tairua

- Thames
- Tuateawa
- Waiomu
- Whitianga
- Whangapoua
- Whangamata

[22] The second part of Schedule A referred to four roads, including their verges, controlled by the Council. They were Colville Road, Port Charles Road, Port Jackson Road and Wentworth Valley Road. The final part of Schedule A was a list six reserves administered by the Council, which it is not necessary to detail.

[23] Schedule B set out areas where freedom camping was permitted subject to conditions. The Schedule read as follows:

> SCHEDULE B
> Areas where freedom camping is permitted subject [to] complying with conditions of use.
>
> **Thames**
> Two (2) car parks at the northern end of Queen Street car park in front of Danby field.
>
> Conditions of use:
> Only self contained vehicles that can show they comply with NZS 5465:2001 will be permitted;
> A maximum of two nights stay;
> Persons must move at the request of an authorised officer.
>
> **Tairua**
> Locations:
> Two (2) car parks at the eastern end of the car park adjacent to 9 Tui Terrace, Tairua.
> Two (2) car parks at the south end of the car parking area at 25 Paku Drive Tairua.
>
> Conditions of use:
> Only vehicles shall be permitted to use the area;
> A maximum of two nights stay;
> Freedom Camping is not permitted at the locations identified between 20 December and 8 February.
> Persons must move at the request of an authorised officer.

[24] Although freedom camping remained prohibited over a substantial part of the urban areas in the Council's district, the Bylaw as passed contained a substantially reduced number of Schedule A areas. There were 98 Schedule A areas in the Bylaw as originally proposed, consisting of 50 urban areas, 29 roads and 19 reserves. The Bylaw as adopted had only 29 Schedule A areas (19 urban areas, four roads and six reserves). In addition, although the drafting of the Bylaw as proposed had included a reference to Schedule B being places where freedom camping could occur subject to compliance with conditions, no areas had been so specified. In the Bylaw as made, as has been seen, there was provision for freedom camping at specified locations at Thames and Tairua, those being urban areas where there was otherwise a prohibition.

Amendments to the Bylaw

[25] The Council purported to amend the Bylaw by resolutions made on 13 March and 27 November 2013. The Association alleges that the changes so made were unlawful because the Council did not follow the special consultative procedure as required by s 11(5)(b) of the Freedom Camping Act. The Council says that with the exception of one category of change made, it was entitled to make the changes by resolution under s 11(6) of the Act, since the changes were minor and did not affect any of the matters set out in s 11(6)(a) or (b).

[26] Before considering the rival arguments, it is appropriate to set out what the changes were. Nine areas were added to Schedule A. These included Thornton Bay, the Te Puru urban area, the Tapu urban area, Te Mata urban area, Waikawau, Rings Beach, Te Kouma, the Tararu urban area and Ngarimu Bay. In addition, a new road, Blackjack Road and two new reserves, namely the Sailors Grave reserve and Little Waikawau reserve, were also added to Schedule A. These amendments added to the parts of the Council's district where freedom camping was prohibited.

[27] Mr McNamara conceded that s 11(6) would not authorise this amendment of Schedule A of the Bylaw by resolution of the Council, without resort to the special consultative procedure. He submitted, however, that the amendments were "clearly severable" and would not affect the validity of the remaining parts of the Bylaw. I accept that is so. The appropriate course to follow is to sever those parts of the

Bylaw purportedly added to Schedule A by the Council's resolution of 13 March 2013.

[28] In its resolution of 13 March, the Council also resolved to add eight areas to the sites listed in Schedule B. In addition, with respect to the provision made at Paku Drive, Tairua the 13 March resolution would provide for four parks at Paku Drive opposite the Tairua Surf Club, between signs displayed for the purpose. It would impose a condition that only self-contained vehicles that can show they comply with the relevant New Zealand Standard (NZS 5465:2001) are permitted. The wording of the resolution with respect to all the new Schedule B areas was that they be "additions to Schedule B". Consequently, I construe the purport of the amendment as being to add a further four car parks to the provision made at Paku Drive. It is only the new spaces so provided for that would be subject to the condition of use requiring that the vehicles be self-contained.

[29] The requirement that the vehicles be self-contained is also imposed in respect of the other new sites added to Schedule B by the March amendment.

[30] Ms Chen submitted that the changes made to Schedule B were not minor and so could not be made by resolution under s 11(6). She noted also that under s 11(6) an amendment could only be made if it did not affect "an existing right, interest, title, immunity, or duty of any person to whom the Bylaw applies". In this respect she submitted that the Bylaw applies not only to freedom campers, but also to residents and ratepayers in the area who might wish to make submissions on the inclusion of a Schedule B area. Such residents and ratepayers have an "interest" which would be affected by the addition of an area to Schedule B. She referred to this in connection with a number of submissions made in respect of the special consultative process carried out by the Council when the Bylaw was proposed.

[31] However, the fact that a person living on adjacent land might be opposed to the inclusion of an area where freedom camping is permitted subject to conditions would not be sufficient to create an existing right, interest, title, etc. in respect of a person to whom the Bylaw applies. I doubt also that the Bylaw can properly be said to apply to members of the public whose houses adjoin or lie near an area where

freedom camping is permitted. In my view, the persons to whom the Bylaw "applies", within the meaning of s 11(6)(a), are those who must comply with it.

[32] There is also no suggestion here that the proposed additions to Schedule B would affect the existing status or capacity of any person. The question that remains is whether the changes to Schedule B can be characterised as "minor changes". For the purposes of this question, I think there is force in Ms Chen's submission that those living near or adjacent to a site added to Schedule B might expect to be consulted about that possibility. Mr McNamara submitted that the changes made were minor, in the context of a Bylaw which did not regulate freedom camping in the vast majority of the district, and only regulated freedom camping (in the Bylaw as originally made) in 29 Schedule A and two Schedule B areas. He argued that the changes made to Schedule B had little significance, and were "minor" for that reason.

[33] However, the draft Bylaw used by the Council for the purposes of the special consultative procedure provided for no Schedule B areas. When the Bylaw was formally made, there were two Schedule B areas. The 13 March resolution would significantly add to that number. I have concluded that the changes were too significant to be properly described as "minor" and as a consequence, the special consultative procedure should have been followed. Because it was not followed, the additions to Schedule B should also be severed.

[34] By its resolution of 27 November, the Council purported to remove one of the freedom camping areas that it had added at Whangamata, by its 13 March resolution. In view of the decision that I have already made in respect of the March resolution the 27 November resolution does not require any further discussion.

[35] In summary, I consider that the 13 March and 27 November 2013 amendments were not lawfully made, and should be severed. This means that the Bylaw that needs to be assessed for the purposes of the Association's arguments about substantive invalidity is the Bylaw in the form it took when it was made by the Council on 14 December 2011.

The Public Places and Parking Bylaws

[36] The Association's proceeding also challenges two other bylaws that the Council made prior to the Freedom Camping Bylaw. Those bylaws were purportedly made under the Council's Bylaw making powers under the Local Government Act 2002.

The Public Places Bylaw 2004

[37] The Council had made a new Consolidated Bylaw in 2004. That Consolidated Bylaw, purportedly made under the authority of the Local Government Act 2002 contained Part 2, headed "Activities in Public Places" and Part 20, headed "Parking Control". The Consolidated Bylaw was operative from 8 September 2004.

[38] One of the Bylaws in Part 2 was cl 203.4(b), which proscribed camping in an area not set aside for the purpose and provided that "camping" included the use of any vehicle for sleeping, whether or not it was "specially set out for sleeping". The Council carried out a review of its Consolidated Bylaw in 2009. As required by the Local Government Act 2002, it used the special consultative procedure for that purpose. No relevant change was proposed as a result of that review. However, Mr Samuel Napia, the Council's Group Manager of Environmental Services, who gave affidavit evidence in the present proceeding, said that a change was made to the Bylaw in the context of preparation for the 2011 Rugby World Cup. In anticipation of that event, the Council wished to ensure that its Bylaw provisions could be enforced by infringement notices, and the Council had received advice from the Department of Internal Affairs that cl 203.4(b) of the Public Places Bylaw was too broadly expressed to enable that to occur. A new provision was drafted and the Council resolved to commence the special consultative procedure in relation to it on 13 April 2011.

[39] The Council heard submissions and deliberated on the proposed new Public Places Bylaw provision, before resolving on 6 July 2011 to adopt the Public Places Bylaw with some amendments responding to submissions. The new clause in the Public Places Bylaw, which was now numbered 203.5, provided:

(a) A person must not camp in any public place.

(b) Subclause (a) does not apply if the person is camping—

(i) at a licensed camping ground; or

(ii) at a location identified in Schedule B and they are complying with all conditions attached to the use of that location; or

(iii) with the written consent of the Chief Executive and the relevant Community Board Chair and is complying with all conditions attached to that written consent. A minimum of a twenty day lead in time for approval will be required and include any costs that are incurred in the approval process.

[40] It may be noted that although this provision referred to Schedule B locations, none were provided at the time the Public Places Bylaw was made. The Freedom Camping Bill had been introduced into Parliament on 18 May 2011. According to Mr Napia, at the time the Public Places Bylaw amendment was made, the Council knew that in order to take advantage of the new Act it would have to identify specifically the areas where freedom camping was and was not permitted. He said that the intention was that the Council's community boards would identify proposed "Schedule B" sites, which would then be the subject of final decisions by the Council. Those decisions would in turn be guided by the Council's freedom camping policy once it had been finalised and adopted. That process was eventually overtaken by the Freedom Camping Act 2011.

[41] In order to amend the Public Places Bylaw, it was necessary for the Council to comply with the requirements of the Local Government Act 2002. The Association now claims that the Council did not do so and in particular it failed to meet the requirements of s 155 of the Local Government Act. It is said that the Bylaw is inconsistent with the Bill of Rights Act.

[42] Section 155 of the Local Government Act, in the form it stood when the Council resolved to adopt cl 203.5, provided as follows:

Determination whether bylaw made under this Act is appropriate

(1) A local authority must, before commencing the process for making a bylaw, determine whether a bylaw is the most appropriate way of addressing the perceived problem.

> (2) If a local authority has determined that a bylaw is the most appropriate way of addressing the perceived problem, it must, before making the bylaw, determine whether the proposed bylaw—
>
> (a) is the most appropriate form of bylaw; and
>
> (b) gives rise to any implications under the New Zealand Bill of Rights Act 1990.
>
> (3) No bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990, notwithstanding section 4 of that Act.

The Parking Control Bylaw 2004

[43] At its meeting of 24 June 2009 the Council received a report dealing with matters relevant to the review of the Consolidated Bylaw. One of the "significant issues" that was adverted to in that report was described as "enforcement of using a parked vehicle for camping in". It was noted that camping in a parked vehicle was currently prohibited by Part 2 of the Bylaw, but the enforcement options were limited to prosecution or seizure. Incorporating a relevant offence in Part 20 of the Bylaw would enable the Council to issue infringement notices for the offence. The report recommended that the Bylaw be amended to include a provision dealing with that issue in order to enhance the Council's enforcement options.

[44] On 24 June 2009 the Council resolved to proceed with the special consultative procedure in respect of the proposed new Parking Bylaw provision and having considered submissions subsequently received, the Council resolved to include what eventually became clause 2003.5 in the Parking Bylaw. Clause 2003.5 provides:

> Without the prior consent of the Council no person shall stop, stand or park any vehicle on any road or in any public place for the purposes of camping, with the exception of those areas identified as approved camping areas.

[45] However, according to Mr Napia, the Council resolved that it would not issue infringement notices for breaches of the Parking Bylaw until it had adopted a formal policy on freedom camping. That policy was not in fact adopted until the Council had made the Freedom Camping Bylaw. It was Mr Napia's evidence that the Council had never in fact taken enforcement action for breaches of cl 2003.6.

[46] This Bylaw is attacked by the Association on the same grounds of invalidity as are alleged in respect of the Public Places Bylaw. It is said that it is illegal for failure to comply with s 155 of the Local Government Act, and that it is inconsistent with the Bill of Rights Act.

The pleadings

[47] The challenge to the Public Places Bylaw is set out in the Association's second cause of action. The challenge to the Parking Bylaw is the subject of the third cause of action. The fourth cause of action alleges that the cumulative effect of the Freedom Camping Bylaw, the Public Places Bylaw and the Parking Bylaw is a limitation on the right to freedom of movement which is inconsistent with the Bill of Rights and therefore ultra vires the empowering statute because:

(a) Having regard to s 5 of the Bill of Rights Act, the right to freedom of movement can only be subject to such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society;

(b) The limits prescribed by law must be adequately identifiable and accessible to the public, and formulated with sufficient precision and clarity to enable people to regulate their conduct; and

(c) The relationship between, and the cumulative effect of, the three Bylaws is not accessible to the public, or sufficiently clear to enable the public to regulate their conduct.

[48] For reasons that will emerge, I do not think it is necessary to go into the substance of those arguments. I do, however, mention in passing an issue raised by Mr McNamara in relation to the pleadings. A challenge was made to Ms Chen's submission that the cumulative effect of the three Bylaws was to create an impermissibly broad restriction or effective prohibition, on the ability to "freedom camp". He complains that the Association's first cause of action (challenging the lawfulness of the Freedom Camping Bylaw) does not rely on the existence of the Public Places and Parking Bylaws as a reason why the Council's decision to make the Freedom Camping Bylaw was unreasonable or ultra vires. Rather he says the

attack is on each Bylaw in its own terms. Mr McNamara submitted that in terms of the lawfulness of the Council's decision to make the Bylaw, the combined effect of the Bylaws is "irrelevant for the purposes of s 12 of the Freedom Camping Act and its prohibition on a blanket ban".

[49] That argument is correct, so far as it goes. I note also that although the Association's fourth cause of action referred to the cumulative effect of the three Bylaws, it did not directly raise the "effective prohibition argument". However, quite apart from s 11 of the Act, a power given to regulate an activity has always been held not to extend to a prohibition. This fundamental distinction was made by the Privy Council in *Municipal Corporation of the City of Toronto v Virgo*,[2] and has never been doubted. It has been applied in New Zealand on a number of occasions, recently in *Willowford Family Trust v Christchurch City Council*[3] and *Schubert v Wanganui District Council.*[4] Further, I consider that whether or not the Bylaw, when made, breached the prohibition in s 12 of the Freedom Camping Act would have to take into account the other provisions of the Council's Consolidated Bylaw because the Bylaw would necessarily involve controls that were incremental on the existing controls. Consequently, even if the Bylaw did not breach s 12 of the Freedom Camping Act by virtue of its own provisions, there might nevertheless be an issue as to whether it constituted an unlawful prohibition having regard to the overall content of the Council's Bylaws.

[50] I accept Mr McNamara's point that the argument as Ms Chen ultimately presented may not have emerged with clarity from the Association's statement of claim. However, the argument based on cumulative effect was clearly made in the submissions filed, and had it been necessary to do so I would have been inclined to allow the Association to amend its pleading so that the issue could be reached. However, for reasons that I will address, that course is not necessary and both parties accept that the other Bylaw provisions should not remain in force.

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2 *Municipal Corporation of the City of Toronto v Virgo* [1896] AC 88 (PC).
3 *Willowford Family Trust v Christchurch City Council* [2011] NZAR 209 (HC).
4 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC).

Did the Council revoke the other Bylaw provisions?

[51] In fact, Mr McNamara developed an argument to the effect that the other Bylaw provisions had in fact been revoked by the Council, and invited the Court so to find. This argument was based on the proposition that at the time the draft Freedom Camping Bylaw was notified in September 2011, the Council believed that s 10 of the Freedom Camping Act would override the existing Bylaw provisions, based on legal advice. Accordingly, it told the public both through the consultation process and in its adopted policy that the existing provisions were being replaced.

[52] Mr McNamara made specific reference to the report prepared for the Council's meeting of 28 September 2011 in which it was said:

> Council has provisions that deal with freedom camping which are currently contained with Part 2 Public Places and Part 20 Parking Control of the Consolidated Bylaw.
>
> In both cases these clauses extend a blanket ban across the District. This is contrary to the Act and legal advice has been received identifying that the provisions contained in the Consolidated Bylaw are no longer enforceable.

[53] In the statement of proposal that formed part of the public consultation process, the Council said:

> Council has historically controlled freedom camping through a Bylaw made under the Local Government Act. This Bylaw has identified that camping is not permitted in any public place. However, the Freedom Camping Act 2011 (the Act) establishes that camping is permitted in a local authority unless it is prohibited or restricted and that the local authority can not absolutely prohibit freedom camping in all the local authority areas in its district.

[54] Mr McNamara also referred to the Council's draft and adopted freedom camping policy in which it was said that:

> The Freedom Camping Act 2011 (the Act) has established that freedom camping is permitted in any local authority area unless it is restricted or prohibited in an area in accordance with a Bylaw made under that Act or under any other enactment. Council has sought legal advice on this matter and it has been determined that Section 10 of the Act would override the clause which is contained within the existing bylaw.

[55] Subsequently, in early November 2011, the Council received further legal advice which was referred to in a report by Mr Napia dated 9 November 2011 on the submissions received on the draft Freedom Camping Bylaw. Mr Napia wrote:

> Further legal advice has acknowledged that Council will continue to be able to enforce its current Bylaw relating to camping in a public place made under the Local Government Act 2002. The method of enforcement will however be restricted to seizure or prosecution.

[56] Mr McNamara conceded that it was as he put it, "likely" that the Council's initial advice about the effect of the Freedom Camping Act on the existing Bylaw was mistaken. That concession is appropriate because apart from any other considerations, s 42(1) of the Freedom Camping Act provided that the Act did not limit or affect the powers of a local authority under the Local Government Act 2002 or any other enactment that conferred powers on it. Further, s 10 of the Act provided that freedom camping was permitted in any local authority unless it is restricted or prohibited in accordance with a bylaw made under s 11 or "under any other enactment". A restriction in a bylaw validly made under the Local Government Act would, it seems, be a restriction made under another enactment, that is to say under bylaw making powers conferred by the Local Government Act. Nevertheless, for present purposes the issue is not whether the Council was right or wrong in the view it took of the implications of the Freedom Camping Act. The issue is whether steps that the Council took for the purpose of consulting with the public over the terms of the draft Bylaw meant that when the Council resolved to make that Bylaw the effect of what it did was, as a matter of fact, to revoke the other Bylaws.

[57] I am not persuaded that is the case. While Mr McNamara correctly said that no form of words is specified in order for a Council to revoke a Bylaw, it is clear that there must be a resolution which is capable of being interpreted as a revocation. None of the Council documents to which Mr McNamara referred was a resolution, still less a resolution to revoke the other bylaws. I understand that Mr McNamara relies on the fact that the Council resolved to make the new Bylaw in the context, amongst other things, of the statements that it made in publicly notified documents about the unlawfulness of the controls in the other bylaws. But that would not be sufficient. Section 156 of the Local Government Act requires the Council to use the special consultative procedure in revoking any bylaw made under that Act. That

would require amongst other things a publicly notified statement of proposal containing a statement that the "bylaw is to be revoked".[5] The materials on which Mr McNamara relied assume that the Freedom Camping Act itself would make the bylaws inoperative; this was not a statement that the Council, as a matter of policy, intended itself to revoke the other Bylaws.

[58] Consequently, I reject Mr McNamara's argument on this point.

Should the other bylaws be quashed?

[59] Mr McNamara advised the Court that the Council would consent to orders that the other Bylaws be set aside, in accordance with the prayers for relief in the Association's second and third causes of action. He explained that the Council would not consent to orders declaring the other bylaws illegal as the Association had also sought, and that it did not concede that the bylaw clauses were ultra vires the Local Government Act and invalid for the reasons put forward by the Association. The Council would consent to them being "set aside", but only because it regarded them as superseded or redundant, not because they are flawed.

[60] However, Mr McNamara submitted there would remain a jurisdictional issue, because such action by the Court would only be appropriate if it could be concluded that the bylaws were in fact invalid. He referred to an alternative solution by which the Council would consent to an order that the bylaws not be enforced. He submitted this would not give rise to any practical difficulties, since that had been the policy position adopted by the Council since the Bylaw was made.

[61] I have reservations about an order which would prevent the Council enforcing bylaws that it has validly made, if the order were to be permanent in its effect. It seems to me wrong in principle for a bylaw to remain in force, but on the basis that the Council will not enforce compliance with its terms and indeed would have been prevented from doing so by a court order. In my view, a Council should not maintain bylaws that, on the face of it, declare conduct unlawful if there is no intention or ability to enforce them. An analogy can be drawn between the position

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[5] Local Government Act 2002, s 86(2)(a)(ii).

of Councils, and the position of enforcement authorities such as the police. In *R v Commissioner of Police of the Metropolis, Ex parte Blackburn* it was held that the Commissioner had a public duty to enforce the law, which he could be compelled to perform; while there is a discretion not to prosecute in individual cases a policy decision of general application not to enforce a particular law would itself be unlawful.[6]

[62] I accept that the position of the police in relation to enforcing an Act of Parliament cannot be equated with a Council deciding not to enforce a bylaw. If the police fail to act, they are not doing what Parliament must have intended in enacting the statute. In the case of a bylaw, by contrast, the Council itself is the lawmaker. Nevertheless, I consider it is wrong in principle for a Council to both maintain a bylaw and say it will not enforce it. Citizens are entitled to regulate their affairs in accordance with the law, and should not be dependent on enforcement policies able to be changed without the formality and publicity attendant on the actual law making process. This is a fundamental requirement of the rule of law.

[63] In the present case, however, I am satisfied on the evidence that it was the Council's intention, once the Freedom Camping Act was passed, to control freedom camping pursuant to the powers given to it by that Act. The existence and continuing effect of the other bylaws has resulted in more extensive control of that activity than the Council contemplated when making its Freedom Camping Bylaw. In these circumstances, for a limited period at least, I consider it will be appropriate to direct that the Council not enforce the other bylaws. However, while that may be an acceptable interim solution to the current difficulty, I consider the Council should take the necessary steps to revoke those provisions by way of the special consultative procedure in the Local Government Act.

[64] I will return to this issue and the appropriate form of relief later in the judgment. Having reached this point, however, it is not necessary to make a decision about the ongoing lawfulness of the other bylaws having regard to the issues raised by the Association. All relief in applications for review is discretionary; it is not necessary to contemplate quashing a bylaw that will not be enforced. Further, the

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6 *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118 (CA).

discussion of the legality of the Freedom Camping Bylaw can proceed on the basis that it was intended to be and is likely in the foreseeable future to operate as the sole restriction on freedom camping in the Council's District.

Validity of the Freedom Camping Bylaw

[65] The Association's statement of claim alleges that the Bylaw is unlawful because it does not meet the requirements set out in s 11(2) of the Act and it is inconsistent with the Bill of Rights Act.[7]

[66] Section 11 of the Act has already been set out. Amongst its requirements, in paragraph (c), is that the Council must be satisfied that the Bylaw is not inconsistent with the Bill of Rights Act 1990. The Association's claim alleges that the Council could not reasonably have been satisfied that the Freedom Camping Bylaw was not inconsistent with the Bill of Rights Act. It is also alleged, as a separate pleading, that the Bylaw is both ultra vires s 11 and repugnant to the laws of New Zealand because of inconsistency with the Bill of Rights Act. The allegations based on the Bill of Rights Act are thus similar, but not precisely the same.

[67] In order to assess the rival arguments as to invalidity, it is necessary to consider the steps that the Council took to satisfy itself of the matters which it was required to be satisfied about under s 11(2) of the Act.

[68] I have already dealt in broad outline with the steps that the Council took in making the Bylaw. For present purposes, it is necessary to focus on the substance of the matters that were before the Council at the relevant times. Evidence about that was given by Mr Napia.

[69] Mr Napia explained that the draft Bylaw had been written on the basis that the Council had had problems associated with freedom camping in the major settlements in the District, but decided to draft the Schedule A list on the basis that it would cover all of the main settlements. It proceeded on the premise that if freedom

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[7] I have already dealt with the third allegation of invalidity based upon non-compliance with the requirement to follow the special consultative procedure in amending the Bylaw in March and December 2013.

camping was prohibited only in the areas that had reported problems previously, the problem might simply migrate to an available area where camping was not prohibited. Insofar as roads and reserves were concerned, the Schedule A list was prepared again "in light of known and reported issues relating to freedom camping at those locations", an approach based on the Council's record of complaints and observations made by Council officers.

[70] Some 76 submissions were received to the draft Bylaw, including the Association's submission with attached legal advice that has already been mentioned. The Council itself sought legal advice on the points made in the Association's submissions and as a result Council officers undertook what Mr Napia described as a "critical review" of the proposed Bylaw, in particular the proposed Schedule A and B locations.

[71] The Council heard submitters on 30 November 2011. For the purposes of that meeting, a detailed report was prepared from the Council's environmental services manager, Mr Birkett. Near the outset of the report, there was a summary of the wishes of the Council's Community Boards, as to the areas that should be permitted for freedom camping. This was followed by a section headed "Factors to Consider" which advised the Council on:

(a) Community views and preferences. It was stated that the submissions received identified that there were a range of views on the issue with some submitters wishing to see the Council open up the majority of the district to camping in self-contained vehicles, while others wanted no freedom camping at all.

(b) Compliance with legislative requirements. This noted that the Council had followed the special consultative procedure up to that point. The Council was also advised of the content of ss 11(1) and (2) of the Freedom Camping Act and reminded that under s 12(1) it could not make a bylaw that had the effect of prohibiting freedom camping in all the local authority areas in the District.

[72] The Association's submission was addressed in the following paragraphs. Mr Birkett noted:

> 17. As a result of the submission however Council officers have undertaken a further review of the Bylaw and identified the issues (protection of the areas and health and safety) that have been presented at the locations in Schedule A. Council has the option to reduce the number of areas to those where there has been a reported issue, or simply focus only on those areas with the highest profile e.g. Hotwater Beach and Hahei. In addition to protection of the area and the health and safety of visitors Council can also make a bylaw for the purpose of protecting access to the area. The Council may only make such a bylaw if it is satisfied that it is necessary for one or other of those purposes.
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> 18. In order to provide assurance that the Bylaw is the most appropriate and proportionate way of addressing the perceived problem in relation to that area; and that the Bylaw is not inconsistent with the New Zealand Bill of Rights Act 1990 staff have sought further legal advice.
>
> 19. This advice has confirmed that the proposed Bylaw may be at risk if challenged, and that consideration should be given to whether or not the prohibition of freedom camping in the areas identified in Schedule A of the Bylaw is necessary for one or more of the following purposes:
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> - to protect the area;
> - to protect the health and safety of people who may visit the area;
> - to protect access to the area.
>
> 20. Issues associated with freedom camping in certain areas that are listed in Schedule A are identified in Attachment E. Generally, the issues fall into the realm of the need to protect the area and the health and safety of people who may visit the area. As pointed out by the NZMCA submission, the criteria listed above (in Paragraph 19) must form the basis of reasoning to identify restricted or prohibited areas. The issues listed in Attachment E may not be the only reasons for the area being incorporated into Schedule A. However it does identify the principal issues that have been detected at each of these areas.
>
> 21. Another reason for some of these areas to be in Schedule A is that some coastal areas, for example Hotwater Beach and Hahei, have limited parking and therefore it is appropriate for these areas to be included in Schedule A on the basis that it is needed to protect access to the area. Campervans parked overnight in car parks prevent the ability for these areas to be fully utilised by other members of the travelling public.

[73] Mr Birkett also noted:

> 23. Paragraph 61 of the NZMCA submission also raises the question of
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> - Whether the limitation contained in the Bylaw is rationally connected with the objective(s);
>
> - Whether the limitation impairs the right of freedom (sic) no more than is reasonably necessary for sufficient achievement of the objective; and,
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> - Whether the limitation is in due proportion to the importance of the objective.
>
> 24. These are all questions the Council has to consider before deciding whether to make the Bylaw, whether as notified or following any amendments it may make as a result of submissions. The Act gives the Council the authority to designate areas as prohibited or restricted. While it is accepted that there are a large number of areas in the prohibited schedule these areas have been selected in part due to the unique environment of the Coromandel Peninsula. However, the Council must not make a bylaw that has the effect of prohibiting freedom camping in all of the local areas in the district.

[74] After referring to the decision of the High Court in *Schubert v Wanganui District Council*[8] Mr Birkett wrote:

> 26. It is widely acknowledged that the Coromandel is seen as a tourist destination and so therefore struggles with the issues caused by this type of tourism (freedom camping). It is considered that the Bylaw, provided proper consideration is given to the locations included in Schedule A, will not impair the right of freedom of movement any more than is reasonably necessary. In fact the Coromandel welcomes this type of tourism (camping) and the intent of the Bylaw is to offer the protections provided for in the Act.
>
> 27. To the extent that the objective of the bylaw is the protection of public areas, the health and safety of people who may visit those areas, and access to those areas, the bylaw can be considered a justifiable limitation on the freedom of movement. However, as the submitter asserts, not all of the objectives of the bylaw set out in the statement of proposal are within the terms of section 12 of the Freedom Camping Act, and the very large number of areas where camping is prohibited would suggest that unless amended the bylaw would be wider in its application than is reasonably necessary to achieve its legitimate purposes.
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> 28. Council has worked and is working through a process of designating areas however this has become problematic due to implications of the Reserves Act 1977 and the District Plan. A change to the reserve management plans is required in addition to resource consent in

[8] *Schubert*, above n 4.

> order to allow camping on reserves that could be listed in schedule B. It is anticipated this will lead to a number of otherwise prohibited locations being listed in Schedule B.

[75] The report then addressed three options. The first, which Mr Birkett recommended be adopted, was to make the Bylaw subject to any amendments that councillors considered should be made as a result of submissions. The second option was to adopt the draft Bylaw and the third was not to adopt the Bylaw.

[76] The attachments to Mr Birkett's report included, as Appendix D, a listing of the areas placed in Schedule A of the draft Bylaw with statements setting out the reasons for prohibition or restriction of freedom camping in that area. Each area was listed in a spreadsheet containing five columns. These were headed respectively:

(a) Reasoning to protect the area

(b) Reasoning to protect the health and safety of people who may visit the area

(c) Reasoning to protect access to the area

(d) Appropriate

(e) Proportionate

[77] For example, in respect of the settlement of Waiomu which is on the west coast of the Coromandel Peninsula the following observations were made under the respective headings:

(a) Reasoning to protect the area: Issues of persons lighting fires and fowling reserves.

(b) Reasoning to protect the health and safety of people who may visit the area: Open fires on the beach represents a risk to beach-goers and fowling of reserves presents a health and safety risk.

(c) There was nothing said in relation to access protections.

(d) Appropriate: Limit campervans to areas that do not present a fire risk and where toilet facilities are present.

(e) Proportionate: Freedom camping inconsistent with urban residential standards in high population areas; addresses need for reserve user security and health risks. District is permanently in a restricted fire season, this therefore means that there is a risk of the spread of fire in addition to nuisance issues with smoke affecting nearby residents.

[78] For Opito, which is on the east coast of the Peninsula the following information was given in respect of the same headings (which I do not repeat):

(a) Issues identified with campers fowling reserves, depositing waste water, lighting fires, vandalism and litter onto reserves. Allegations of offences against the Fisheries Act committed by campers in motor homes.

(b) Fowling reserves, litter and wastewater onto reserves creates health hazards.

(c) Camping on this reserve has proven environmental concerns and due to the isolation monitoring is difficult and expensive.

(d) It would be appropriate to prohibit freedom camping.

(e) As an isolated area monitoring is difficult and expensive. This area needs protection from issues caused by freedom camping.

[79] In the case of Hotwater Beach, the following information was included in the Schedule under the same headings:

(a) Issues identified of campers fowling reserves, littering and lighting fires.

(b) Fowling reserves creates health hazards, fires create a fire risk and illegal consumption of alcohol may put other users at risk.

(c) The reserves in this area are small and can be congested. Conflicts between unruly campers exists already.

(d) It would be appropriate to prohibit freedom camping.

(e) Due to the high profile of this location and difficulties in addressing issues associated with freedom camping it has been established that this area needs protection from the issues associated with Freedom Camping.

[80] Looking at the schedule as a whole, it is clear that there is common language adopted with respect to describing the issues in respect of each of the areas addressed. However, there are also distinctions between them which I consider indicate that a genuine attempt was made to distinguish between the various areas and problems which, albeit to a limited extent, varied between them. For example, in the case of Hahei, which is near Hotwater Beach, in the first column the reference was to "issues identified with campers fowling reserves, depositing litter, lighting fires, vandalism and intoxication". In the case of Hotwater Beach, a fewer number of issues was identified.

[81] It was Mr Napia's evidence that the analysis in attachment E reflected further work that had been done by Council officers in response to issues raised by submitters and the legal advice received. Mr Napia also noted that the number of proposed Schedule A areas in the table which were addressed in attachment E was significantly reduced when compared to the draft Bylaw originally put out for consultation.

[82] The 30 November meeting was resumed on 14 December, when the Council heard a further submitter and then deliberated on its decision. Once that process was completed it resolved to make the Bylaw, with amendments, as noted above. The result was a substantial reduction in the number of urban areas, roads and reserves that had previously been included in the draft Schedule A. For example, the

following towns or settlements where a prohibition had previously been proposed were no longer included in the Schedule. These areas were listed by Mr Napia in a table in his evidence, which I reproduce:

Kopu	Wharekaho	Otama Beach Road
Tararu	Coroglen	Skippers Road
Ngarimu Bay	Whenuakite	Matapaua Road
Thornton Bay	Ferry Landing	Waitaia Road
Te Puru	Flaxmill Bay	Pumpkin Flat Road
Whakatete Bay	Opoutere	Hotwater Beach Road
Ruamahunga Bay	Hikuai	Hahei Beach Road
Tapu	Onemana	Link Road
Te Mata	Waikawau Bay Road	Purangi Road
Waikawau	Cemetery Road	Boat Harbour Road
Te Kouma	Moewai Road	Sailors Grave Road
Manaia	309 Road	Hikuai Settlement Road
Wyuna Bay	Tapu Road	Opoutere Road
Papa Aroha	Kennedy Bay Road	Onemana Road
Amodeo Bay	Driving Creek Road	Kikowhakarere Reserve
Waitete Bay	Papa Aroha Access Road	Colville Foreshore Reserves
Sandy Bay	Whangapoua Beach Road	Wharf Road Reserve
Te Rerenga	Bluff Road	Otautu Esplanade Reserves
Kennedy Bay	Black Jack Road	Kuaotunu Recreation Reserves
Port Charles	Tangitarori Reserve	Flaxmill Bay Historic Reserve
Rings Beach	Kuranui Bay Reserve	Te Karo Bay Reserve
Grays Beach Matapaua Bay	Rhodes Park	Te Matata North Reserve
Coroglen Stock Paddock	Opoutere Hall Reserve	Waipatukahu Point Reserve

[83] Mr Napia noted that the reduced list of Schedule A areas reflected an intention to include only those areas where there had historically been demonstrated issues associated with freedom camping. Council officers relied in this respect on an extensive database of incidents in its records, reflecting information received from members of the public and observations made and investigations carried out by

Council officers. The database, extending back to March 2006, was attached to an affidavit sworn by Mr Benjamin Day, the Council's deputy chief executive.

[84] It is clear that the Council was advised of the matters about which it needed to be satisfied before it could make the Bylaw under s 11(2) of the Act. The minutes of the 30 November 2011 meeting show that councillors engaged with the report, one of them being recorded as commenting on s 11(2)(a) of the Act and emphasising that there were three parts to the provision. During the hearing of submissions, another councillor is recorded as having reminded submitters that "legislation states that every place is suitable unless Council can prove otherwise".

Section 11(2)(a)

[85] Ms Chen submitted that the Council could not reasonably have been satisfied of the matters set out in s 11(2)(a). She argued that the "problem" addressed by the Council in making the Bylaw ought to be site specific, and should require a close analysis of the correlation between the purposes for which the Bylaw was made and the areas where freedom camping was to be prohibited. She argued that in order to comply with s 11(2)(a), the Council must, in respect of each area in the district where freedom camping was to be prohibited or restricted, have turned its mind to whether the Bylaw was necessary for one or more of the purposes stated in s 11(2)(a). She further submitted that the question of whether the Bylaw was "necessary" required consideration of alternative mechanisms available to address the "perceived problems" caused by freedom camping, and whether a "less intrusive" means would achieve the same objective.

[86] Ms Chen complained that the Council's analysis as reflected in Mr Birkett's report was inadequate. She submitted that only in the case of one area, Otama, was there any "area-specific" concern, namely that the parking area adjoined a significant dune area and Department of Conservation reserve. Further, she claimed that the Council had prohibited freedom camping in 28 entire urban areas when the problems associated with freedom camping were only experienced in reserves or beachfront areas. There had been no analysis of why a restriction was needed at Pauanui. In addition, the Council had prohibited freedom camping in areas where in accordance

with the officers' advice restrictions may have been appropriate. She also submitted that the areas listed in Schedule B could have been far more extensive: Ms Chen referred in this respect to advice given to the councillors referring to six locations that were specified in Mr Birkett's report, as well as other areas that were dealt with in reports prepared for the Council in 2012. She complained in addition that the restriction on requiring that vehicles parked in the identified locations in Thames be self-contained was a further unwarranted restriction.

[87] Ms Chen also submitted that the Bylaw was an effective prohibition on freedom camping in breach of the Act, as well as the Bill of Rights Act. In the result, she submitted that the Council could not reasonably have been satisfied of the matters set out in s 11(2)(a) of the Act.

[88] Ms Chen advanced these arguments relying on the Supreme Court's decision in *Discount Brands Ltd v Westfield (New Zealand) Ltd*[9] in which the Supreme Court addressed the meaning of the word "satisfied" in the context of what was then s 94 of the Resource Management Act 1991. Ms Chen quoted (in part) from [116] of the judgment of Blanchard J to the effect that:[10]

> … the Court will upon a judicial review application carefully scrutinise the material on which the consent authority's non-notification decision was based in order to determine whether the authority could reasonably have been satisfied that in the circumstances the information was adequate in the various respects discussed above.

[89] She also referred to an observation of Elias CJ that the requirement that the Council be "satisfied" of the matters set out in s 94(2)(a), of the Resource Management Act was a "significant obligation" and a "pointer to additional conviction and the need for some caution".[11] Ms Chen also relied on observations of Keith J:[12]

> Significant in the basic requirements stated in ss 93(1) and 94(2) are the double emphases on "satisfied", the strongest decision or verb used in the Act, the etymology of "satisfy" (to do enough), and a standard meaning relevant in this context – to furnish with sufficient proof or information; to

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9 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.
10 At [116].
11 At [23].
12 At [52].

> assure or set free from doubt or uncertainty; and to convince; or to solve a doubt, difficulty.
>
> The word must of course be read in context, in particular the context of the power in question.

[90] Ms Chen also relied on *Moore v Police*,[13] a case in which the Court considered the Wanganui District Council – Prohibition of Gang Insignia) Act 2009. That Act provided in s 5(5) that:

> The Council may make a Bylaw under this section only if it is satisfied that the Bylaw is reasonably necessary in order to prevent or reduce the likelihood of intimidation or harassment from members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs.

[91] Ms Chen relied on statements that it would be necessary to consider the steps taken by the Council to satisfy itself as to the matters specified in the statute, and that a close examination of the Council's decision-making process would be required.[14] She also referred to *Schubert v Wanganui District Council*[15] in which Clifford J said, with reference to the same Act discussed in *Moore v Police*:

> [157] As I have held, in my view the use of the term "reasonably necessary" in s 5(5) necessarily directed the Council's attention to NZBORA issues. Moreover, and as the history of this matter makes clear, NZBORA issues have in many ways been at the heart of the decision-making processes relating to the Wanganui Act and the Bylaw throughout their history. Furthermore, important human rights are involved. I therefore am not persuaded that I should approach the question of the lawfulness of the Council's decision on a *Wednesbury* reasonableness basis. Rather, I think a considerably more intensive standard of review is appropriate.
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> [158] Applying such a standard of review, which I think has equivalent effect to giving the Council a moderate, but not overly large, margin of appreciation, it is difficult to conclude that, in the way it reached its decision that the geographic extent of the Bylaw was reasonably necessary, that the Council acted lawfully. I reach this conclusion by reference to what was, in my view, a lack of a sufficiently close analysis of the correlation between that geographic extent and the offending and other behaviour involving gangs that gave rise to the Council's concerns.

[92] Ms Chen submitted that a similar approach was appropriate in this case, and also relied on a decision of the Full Court in *Brown v Māori Appellate Court*[16]

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13 *Moore v Police* [2010] NZAR 406 (HC).
14 At [23] and [24].
15 *Schubert*, above n 4.
16 *Brown v Māori Appellate Court* [2001] 1 NZLR 87 (HC).

construing s 228(2) of the Te Ture Whenua Māori Act 1993. That section provided that the Māori Land Court should not make a partition order affecting any land unless it was "satisfied that the partition is necessary to facilitate the effective operation, development and utilisation of the land". The Court held that "necessary" was properly to be construed as "reasonably necessary". However, it emphasised that necessity was a "strong concept" and said:[17]

> What may be considered reasonably necessary is closer to that which is essential than that which is simply desirable or expedient …

[93] Again, Ms Chen submitted that a similar approach was appropriate in this case, in the context that "fundamental human rights are involved". Although Ms Chen used the plural "rights" I have understood her submission to be based on an unlawful restriction on the right to freedom of movement contained in s 18(1) of the Bill of Rights Act. The breach of that right is said to arise from the extent to which the Council has purported to control freedom camping by the Bylaw. The question of whether s 18 of the Bill of Rights Act is in fact engaged is one to which I shall return later.

[94] Mr McNamara, for the Council, relied on a different line of authorities which he submitted established that the Court's review should be less intense than sought by the Association. Mr McNamara referred to the Court of Appeal's decision in *Conley v Hamilton City Council*[18] in the context of a challenge to a bylaw made under the Prostitution Reform Act 2003. The Court said:

> 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.

[95] Mr McNamara also relied on observations of Asher J in *Carter Holt Harvey Ltd v North Shore City Council*[19] where Asher J said:

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17 At [51], citing *Environmental Defence Society v Mangonui County Council* [1989] 3 NZLR 257 (CA) at 260 per Cooke P.

18 *Conley v Hamilton City Council* [2007] NZCA 543, [2008] 1 NZLR 789.

19 *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 (HC) at [106].

> … 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…

[96] Those observations were referred to by Stevens J in *Harrison v Auckland City Council*,[20] another case on which Mr McNamara relied.

[97] Stevens J endorsed Asher J's approach and continued:[21]

> 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.

[98] While I do not disagree with the observations made in *Carter Holt Harvey Ltd* and *Harrison,* they are of limited assistance in resolving the present issue. I accept, however, that the points made in the paragraph I have quoted from *Conley* are apposite here. There is considerable policy content in the way the Council exercises its bylaw making powers under s 11 of the Act. The Bill of Rights Act does not contain a right to "freedom camp"; the right relied on by the Association is a right of movement from place to place, and if the Bylaw involves a breach of that right (a subject to be addressed below) it is tangential. This may be contrasted with the bylaw considered in *Schubert*, which was in direct conflict with the right to freedom of expression in s 14 of the Bill of Rights Act. It can also be pointed out that in *Conley* the bylaw restrictions on the location of brothels in Hamilton were not analysed as giving rise to freedom of movement issues under s 18 of the Bill of Rights Act, even though the bylaw clearly restricted the places in which the services provided in brothels could be obtained.

[99] Nor do I accept that the discussion of the word "satisfied" in *Discount Brands Ltd v Westfield (New Zealand) Ltd* is a useful guide to the approach that should be taken the question of whether the Council is "satisfied" for the purposes of s 11(2) of the Act. I do accept that "satisfied" in this Act should be read as if it were "reasonably satisfied", and the Association's pleading that the Council could not

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[20] *Harrison v Auckland City Council* [2008] NZAR 527 (HC).
[21] At [58].

have been "reasonably satisfied" of the matters set out in the subsection takes that approach. However, the question of whether the Council could have reasonably been satisfied of those matters is not to be equated with the kind of decision that a Council is required to make when considering in what circumstances public notification of an application for resource consent was not required, if the consent authority was "satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor". This is an essentially fact-driven judgment required to be made by consent authorities under the Resource Management Act, and one which is of pivotal importance to the rights of third parties to participate in the statutory processes in relation to resource consent applications under the Act. The discussion of the term "satisfied" in the various judgments unsurprisingly reflects that context.

[100] The question of the extent to which the Council will control freedom camping pursuant to a bylaw made under the Freedom Camping Act is of a different nature. Clearly, it has a high policy content and the fact that a bylaw may only be made after the Council has followed the special consultative procedure set out in the Local Government Act means that the relevant decisions will be made only after the Council has consulted the public. The situation is far removed from the close factual inquiry appropriate for decisions about the notification of resource consent applications.

[101] While I accept, as was held in *Brown v Māori Appellate Court* that necessity is a "strong concept", the question of whether a bylaw is necessary in terms of s 11(2) of the Act is one which will involve not only a consideration of the Bylaw's terms, but also problems that might arise if a bylaw is not made, as well as other means available to a Council of dealing with those issues.

[102] Against the background of the foregoing discussion, I turn to the substantive issue of whether the Council could reasonably be satisfied that the Bylaw was necessary for one or more of the purposes set out in s 11(2)(a) of the Act.

[103] I reject Ms Chen's contention that the prohibition in the Bylaw is so extensive as to amount to a total prohibition. That is incorrect as a matter of fact. I have

earlier set out the table presented in evidence by Mr Napia showing the areas previously forming part of the draft Schedule A that were excluded from that Schedule once the Council had completed the process of public consultation. The consequence was that the Bylaw as made contained 29 Schedule A areas compared with 98 as before. The prohibition applied in 19 "urban areas" (as defined) as opposed to the 50 urban areas originally proposed. The number of roads in Schedule A was reduced from 29 to four and the number of reserves from 19 to six.

[104] The Association complains that the prohibition applies to many of the most sought-after destinations for freedom camping in the Council's district. However, that is a matter for the Council's policy decision and it does not serve to establish that there has been a prohibition masquerading as a control.

[105] As to the submission that the "problem" addressed by the Council in making the Bylaw ought to be "site specific", I am satisfied that the Council did take a site specific approach. Ms Chen submitted that only in the case of Otama was there any "area-specific" concern in as much as it was identified in that case that the parking area adjoined a significant dune and Department of Conservation reserve. It seems implicit in this argument that the Council was somehow bound to identify particular problems that were associated only with a specifically identified location. However, I do not consider that is a requirement of s 11(2)(a).

[106] Ms Chen accepted that Schedule E to Mr Birkett's report identified various issues or combinations of issues in respect of the Schedule A sites. These included the fouling of reserves, health hazards, waste water on reserves, the risk of fire, littering, consumption of alcohol, the risk of residents confronting campers and the destruction of native fauna. Other issues plainly identified by the Council included public access, particularly in relation to popular coastal town destinations such as Hotwater Beach and Hahei. I accept that the Schedule E discussion used similar language in respect of similar problems arising at different locations. However, it seems to me that is inherent in the fact that freedom camping is the subject matter being controlled. It is hardly surprising that similar problems had been recorded in the Council's records as having been historically associated with that activity. The

fact that the Council recognised the repetition of the problem at different locations is not indicative of any error in its approach.

[107] It can appropriately be emphasised here that the Council's approach was based on records which it held of complaints made by residents and observations and actions taken by its own enforcement officers.

[108] I accept, as Ms Chen submitted, that the Council appears to have taken the approach that once there had been an identified problem at a particular location in a reserve or at the beachfront, a prohibition should extend to the adjacent urban area. I do not consider that is a policy approach unavailable under s 11(2)(a) of the Act. Particularly in destinations where freedom camping is likely to be popular, a prohibition only in a reserve or at the beachfront might simply result in the problem migrating elsewhere in the vicinity. That might itself give rise to the same problems, or perhaps additional problems where freedom campers moved into residential streets and closer proximity to those occupying private property.

[109] As to Ms Chen's complaint that the Council had prohibited freedom camping in areas where, in accordance with the officers' advice, restrictions only may have been appropriate, I consider once again that is a policy consideration for the Council to address. It is not bound to accept its officers' advice in relation to these matters. It is clear from the record that the Council engaged with the advice it was given; it was not obliged to accept it.

[110] I accept that the number of areas listed in Schedule B could have been far more extensive, as Ms Chen submitted. Apart from anything else, this is shown by the advice given to it by Mr Birkett before it made the Bylaw (he referred to six locations). It is also shown by the further areas that the Council purported to add by amendment to the Bylaw in 2013, in a process that I have found to be unlawful because the special consultative procedure was not adopted. However, once again, I do not consider that this point indicates that the Council could not reasonably have been satisfied about the s 11(2)(a) matters. When the draft Bylaw was publicly notified there were no Schedule B areas. As explained, the Council envisaged that Schedule B areas would be added following the special consultative procedure and

the development of its freedom camping policy. In the end, Schedule B areas were identified at Thames and Tairua. The adequacy of those areas was a matter for the Council's policy decision. It may be that the Council will give further consideration to adding Schedule B areas in accordance with what it purported to do by way of amendment to the Bylaw in 2013. However, that fact, and the invalidity of the actions taken by the Council in 2013, do not indicate that the Bylaw as made was invalid.

[111] Although Ms Chen raised the possibility that the problems identified by the Council could be addressed by "less intrusive" means, the argument was focused on provisions that would enable the Council to take enforcement action in response to particular kinds of behaviour. Thus, she referred to s 20(1) of the Act which creates offences of, amongst other things, interfering with or damaging an area and depositing waste.[22] It is also an offence under the Act to discharge a substance in or on a local authority area in circumstances where the discharge of the substance is liable to be noxious, dangerous, offensive or objectionable to such an extent that it is likely to have a significant adverse effect on the environment or cause significant concern to the community or users of the area.[23]

[112] Ms Chen also referred to other Council bylaws under which enforcement action could be taken. She might also have mentioned similar powers that would be available in respect of some kinds of conduct (discharges of effluent, for example) under the Resource Management Act, and there would also no doubt be occasions when the Litter Act 1979 might be used.

[113] However, while the Council could prosecute under such provisions, they are essentially powers exercisable after the event and prosecuting individuals would be inherently problematic in respect of a class of offender who by definition is peripatetic. Such provisions are of obviously less utility than the controls assumed by the Council under its Bylaw and the Council was not obliged to rely on them.

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22 Freedom Camping Act 2011, ss 20(1)(b) and (d).

23 Section 20(2)(a) and (b).

[114] For these reasons I reject the Association's claim that the Council could not reasonably have been satisfied of the s 11(2)(a) matters.

Section 11(2)(b)

[115] As has been seen, s 11(2)(b) of the Act required the Council to be satisfied that the Bylaw is the most appropriate and proportionate way of addressing the perceived problem. Ms Chen submitted that the Bylaw represented a disproportionate response because of the existence of other mechanisms for dealing with the problems that the Council perceived arose from freedom camping.

[116] This adds nothing to the same point which has already been addressed in the context of her argument under s 11(2)(a). For the reasons already given I reject the argument in this context also.

Section 11(2)(c)

[117] Section 11(2)(c) of the Act requires the Council to be satisfied that the Bylaw is not inconsistent with the Bill of Rights Act. As noted, the Association claims that the Bylaw is inconsistent with s 18(1) of the Bill of Rights Act, in particular the right to freedom of movement referred to in subs (1).

[118] In this part of her argument Ms Chen placed considerable emphasis on advice given to the Attorney-General by the Ministry of Justice as to the consistency of what was then the Freedom Camping Bill with the Bill of Rights Act. In the course of that advice the Ministry's Chief Legal Counsel, Mr Orr referred to s 18(1) of the Bill of Rights Act and said:

> The provisions of the Bill in Part 2 … appear to limit the freedom of movement of people who would otherwise be able to enter and camp in these public areas.

[119] Mr Orr also wrote:

> Where a provision is found to pose a limit on a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justified in terms of s 5 of that Act.

[120] He noted that under what is now s 11, bylaws made under the Act must be geographically confined, and the most appropriate way to address the perceived problem and necessary for a defined purpose. Further, such bylaws must be interpreted consistently with the Bill of Rights Act, and therefore must not unreasonably limit the right to freedom of movement. This and other aspects of the legislation resulted in a conclusion that the Bill was consistent with the Bill of Rights Act.

[121] Ms Chen submitted that a bylaw made under the Act which is inconsistent with the Bill of Rights Act would be ultra vires s 11(2) of the Act. She cited various authorities for that proposition, but in the end the clear words of s 11(2)(c) require that the Council must be satisfied that the Bylaw is not inconsistent with the Bill of Rights Act.[24] At one stage Mr McNamara submitted that the Court should treat with deference the Council's own decision as to whether the Bylaw is consistent with the Bill of Rights Act. I reject that approach: once the matter is before this Court it is for the Court to judge whether or not the Bylaw is consistent or inconsistent with the Bill of Rights Act.

[122] In substance, the reasons advanced by the Association as to why the Bylaw is in breach of the Bill of Rights Act rehearsed the grounds already addressed under ss 11(2)(a) and (b), but in the context of the analytical framework set out in *R v Hansen.*

[123] It was said that, after the Bylaw was demonstrated to be inconsistent with a protected right, it was for the Council to demonstrate that the provisions of the Bylaw limit freedom camping no more than is reasonably necessary for achievement of a sufficiently important purpose to justify curtailment of the right concerned.[25] Ms Chen submitted that there was a balance to be struck between "social advantage and harm to the right".[26] Assessing proportionality would involve a consideration of the harm that the Council sought to prevent compared with the benefits of tourism to

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[24] Reference was made to *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774, *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) and *J B International Ltd v Auckland City Council* [2006] NZRMA 401 (HC).

[25] Citing *R v Hansen*, above n 24, at [64] per Blanchard J and per Tipping J at [104].

[26] At [134] per Tipping J.

the region and consideration of whether the limit impaired the right of freedom of movement no more than is reasonably necessary. The requirement for minimal impairment of the right would involve a consideration of alternative options available to address the same harm and that in turn would require consideration of whether a less intrusive means would achieve the same objective as effectively as the chosen approach.

[124] Ms Chen submitted that the Council did not properly "tailor" the Bylaw to ensure that it achieved a minimal impairment of the right, and there was no evidence that the Council had turned its mind to the alternative, less intrusive enforcement mechanisms available to punish relevant behaviours when defining the prohibited and restricted areas in Schedules A and B of the Bylaw.

[125] Ms Chen once more relied in this context on *Schubert v Wanganui District Council*. As in that case, she contended that the broad geographic scope of the Bylaw meant that it was an unjustified limitation on the right. She again maintained that the Council had extended the prohibition to more locations, and at those locations more widely, than was necessary. She pointed to evidence in Mr Lochore's affidavit that the Bylaw is having a chilling effect on the right to freedom of movement, deterring members of the Association from visiting the Thames-Coromandel region; however, that argument was based on confusion due to the inconsistencies between the Freedom Camping Bylaw, Public Places Bylaw and Parking Control Bylaw, an issue that I have already addressed.

[126] She asserted again, in this context, that the Council had other mechanisms available by which it could address the behaviours it was purporting to regulate through the Freedom Camping Bylaws.

[127] For the Council, Mr McNamara submitted that the right to freedom of movement in s 18(1) was not engaged. He submitted that freedom to move does not involve the freedom to remain overnight; staying in a place was not moving, by definition. Even if the right to freedom of movement includes the right to remain, a limitation on freedom camping was not a limit on that right. He argued that it was no answer to say that freedom of movement was impacted because a prohibition on

camping in a particular area meant campers must move to another site if they wished to camp: on that approach to s 18(1), any law which regulates where an activity may be carried out would affect freedom of movement, because a person wanting to carry out that activity would have to go where it was permitted. He drew an analogy to s 20 of the Dog Control Act 1996 which prohibits dogs from specified public places and therefore prevents dog owners from taking their dogs into the area concerned. He submitted that such an expansive approach would risk the alleged right becoming meaningless as a discreet right.

[128] Mr McNamara argued that even if s 18(1) was engaged by s 11 of the Act, the Bylaw was a justified limitation in terms of s 5 of the Bill of Rights Act. He argued that if there was a restriction on the right of freedom of movement, then that was so in a very "technical" sense only. Consequently, the reasonable limits on that activity that could be justified in a free and democratic society could be more extensive than in the case of a more significant manifestation of the right. Mr McNamara submitted that managing adverse effects that can arise from freedom camping such as littering, damage to public land of high amenity value, and health and safety issues associated with persons staying overnight in areas which may not have toilets or other amenities is a sufficiently important purpose to justify the Bylaw limits on freedom camping. He argued that the Freedom Camping Bylaw is rationally connected with this purpose, reasonably necessary and a proportionate response.

[129] The rights to freedom of movement affirmed in s 18(1) of the Bill of Rights Act is one of the important democratic and civil rights set out in Part 2 of the Act. It sits alongside electoral rights and freedom of thought, conscience, religion, expression, peaceful assembly and association. It is recognised in all of the major international human rights instruments.[27] There are equivalent provisions in Canada, the United States, South Africa, Germany and Ireland.[28]

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[27] Including the European Convention on Human Rights and Fundamental Freedoms, the Universal Declaration of Human Rights, the International Covenant for the Protection of Civil and Political Rights and the United Nations Convention on the Rights of the Child.

[28] A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at 467–478.

[130] So far as is relevant in this case, s 18(1) affirmed the right to move freely within New Zealand. It has been pointed out that freedom of movement has a close connection with other rights and freedoms affirmed in the Bill of Rights Act: freedom of movement together with the right of freedom of expression (s 14) and the rights to freedom of peaceful assembly and freedom of association (ss 16 and 17) together authorise the right to protest and that may also involve exercise of the right to freedom of movement (as in street marches) and on occasion to remain in place.

[131] No authority exists however, for the right to be applied in a circumstance such as the present where none of the other rights in the Bill of Rights Act appears to be engaged, and the right asserted is a right to remain in place for the purpose of staying in a location overnight simpliciter. I doubt whether the right asserted by the Association in this case is in fact a right that falls within s 18 of the Act. However, it is not necessary to decide the point because even if the right is breached, the breach is not a significant one and, on the view I take, the limitations arising from the Bylaw are justified limitations in terms of s 5 of the Bill of Rights Act.

[132] Section 5 enacts:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this 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.

[133] In accordance with the approach mandated in *R v Hansen* there is no doubt that the Bylaw serves a sufficiently important purpose to justify some limitation of the right to freedom of movement. The discussion that has already taken place establishes that there is a rational link between the Bylaw provisions and the objective of controlling the adverse effects of freedom camping. For reasons that have already been given, I am satisfied that the Bylaw controls are no more than is reasonably necessary to achieve the protective purposes set out in s 11(2)(a). I am also satisfied that the Bylaw is a proportionate response to addressing the issues arising from freedom camping in the Council's district.

[134] This is not a case where there was in effect a total prohibition, directly in breach of a guaranteed right, as in *Schubert*. I have already rejected Ms Chen's argument based on alternative approaches that the Council could have taken.

[135] Accordingly, I also reject the Association's assertion that the Council could not reasonably have been satisfied that the Bylaw is not inconsistent with the Bill of Rights Act.

Repugnancy

[136] The Association also sought to argue repugnancy as a means of directly applying the provisions of the Bill of Rights Act 1990 to the Bylaw.

[137] The issues that arise in respect of this claim are no different from those already discussed under s 11(2)(c) of the Act. This argument must also fail.

Result

[138] For the reasons addressed above I make the following orders:

(a) I direct the Council forthwith to take the necessary statutory steps pursuant to s 156 of the Local Government Act 2002 to revoke Clauses 203.5 and 2003.5 of its Consolidated Bylaw.

(b) The Council should diligently proceed with and complete the steps required by paragraph (a).

(c) Pending completion of the steps required by paragraph (a) I direct that the Council is not to enforce Clauses 203.5 and 2003.5 of its Consolidated Bylaw.

(d) I declare that the amendments made to the Freedom Camping Bylaw on 13 March and 27 November 2013 were unlawful. The amendments are severed from the Freedom Camping Bylaw and quashed.

[139] The intent of the foregoing orders is that, for the future, freedom camping in the Council's district shall be governed only by the terms of the Freedom Camping Bylaw as may be validly amended from time to time. This judgment is not intended to hold and does not hold that the Council could lawfully maintain in force the Freedom Camping Bylaw and Clauses 203.5 and 2003.5 of the Consolidated Bylaw.

[140] In the event that the Council for whatever reason does not complete the processes required by [138](a) and (b), I expressly reserve leave to the Association to apply again for orders challenging the validity of Clauses 203.5 and 2003.5 of the Consolidated Bylaw. Such application if made may be dealt with by another High Court Judge.

[141] The Association's claim is otherwise dismissed, subject to the reservation in [139].

[142] I reserve questions of costs although I do note that both parties have had a measure of success. If any issue as to costs arises I will receive memoranda within ten working days.