IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WAIHARAKEKE ROHE

CIV-2021-406-015
[2021] NZHC 3157

	BETWEEN	NEW ZEALAND MOTOR CARAVAN ASSOCIATION INCORPORATED Applicant
	AND	MARLBOROUGH DISTRICT COUNCIL Respondent

Hearing: 2-3 November 2021

Appearances: P McNamara and O Rego for the Applicant
A C Besier and G A Rainey for the Respondent

Judgment: 17 December 2021

JUDGMENT OF GRICE J (No. 1)

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Introduction

[1] The Marlborough District is situated in the north-eastern region of the South Island. The local authority for the district is the Marlborough District Council (MDC).

[2] The area is a popular tourist destination for freedom campers and others. This case deals with bylaws promulgated by the MDC for freedom camping (also referred to as "responsible camping") across the district.

The Bylaw

[3] The MDC first made bylaws for freedom camping in 2012, following the enactment of the Freedom Camping Act 2011 (FCA). Those bylaws (as amended in 2016) prohibited or permitted (with restrictions) freedom camping in areas or on sites listed in the schedule to the bylaws. Otherwise, freedom camping was permitted throughout the district on general conditions: one of which was that the camping could only be in vehicles with self-contained waste disposal (the default permission).[1]

[4] In 2019, the MDC commenced a wide-ranging review of freedom camping. As a result of that, it initiated a process to review the bylaws. That review resulted in the adoption of the 2020 bylaws. The bylaw review was handled by a special committee of the Council (the Subcommittee), chaired by Councillor Oddie. It heard submissions and prepared a report which the full Council considered and adopted. No issue is taken with that process. The 2012 bylaws were revoked in December 2020 at the same time as the 2020 bylaws came into force.

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1 Marlborough District Council Freedom Camping Control Bylaw 2012, cl 6.2(b).

[5] The MDC bylaws used the phrase "responsible camping", which has the same definition as that of "freedom camping" under the FCA.[2]

[6] The 2020 MDC Responsible Camping Control Bylaw took a different approach to that taken in the 2012 Bylaw. The new bylaw provided that unless a site or area was named (subject to restrictions), responsible camping was by default, prohibited in council managed or controlled areas (the default prohibition). The change in the default position had been adopted following the public hearings and in the course of the Subcommittee's deliberations.

[7] Only vehicles with self-contained waste disposal may use the specified permitted areas or sites.[3] No other form of freedom camping, such as camping in a car, caravan or vehicle (without self-contained waste disposal) or in a tent, is permitted at all. No issue has been taken with that restriction.

NZMCA

[8] The New Zealand Motor Caravan Association Incorporation (NZMCA) represents the interests of private motor home and caravan owners throughout New Zealand. It is the largest membership-based camping organisation. It has some 108,000 financial members.

[9] One of the objects of the NZMCA is the safe and courteous operation of certified self-contained freedom camping vehicles. It has a keen interest in the provision of sites by local authorities for freedom camping. Ninety-two per cent of its members with registered vehicles camp in a self-contained motor home or caravan that complies with the standard for self-contained waste disposal in motor caravans.

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2 Ms Tito, the manager of the review of the bylaw, said that "responsible camping" is the phrase now used for "freedom camping" by central and local government. I use the terms "freedom camping" and "responsible camping" interchangeably.

3 The 2020 Bylaw used the phrase "Restricted areas" for areas and sites on which responsible camping is permitted subject to conditions. For ease of reference, I refer to the "Restricted areas" as "permitted" sites or areas.

[10] NZMCA encourages all motor home and caravan owners to certify their vehicles under the standard. It takes no issue with the MDC bylaw imposing that restriction on freedom camping.

Marlborough District

[11] The MDC has pointed out the challenges it has faced in regulating responsible camping in the district. This includes the geographical diversity of the land and sounds that it covers as well as the climate factors – most recently, extensive flooding in the region.

[12] The Marlborough district runs north from the boundary with Canterbury to the shores of Cook Strait and west to Tasman Bay. The Marlborough Sounds features a number of inlets, bays and coves. Many are difficult to reach. Virtually all of them, if they are accessible by road, are serviced by narrow windy roads. Picton is at the head of Queen Charlotte Sound and has a port that deals with many visitors arriving and leaving on the interisland ferries between the North and South Island. This includes many vehicles used for freedom camping. A distinct component within the district is the alluvial Wairau Plains. Another is the tussock-covered back country on which large scale sheep farming was established. That part of the district is now one of New Zealand's largest wine producing regions.

[13] The MDC also faces administrative challenges. Before the Local Government Reforms, local government arrangements in the district were split between a number of borough, district and catchment bodies.[4] The present MDC councillors are drawn from across the region.[5] However it has no central database of all the MDC controlled or managed land throughout the district.

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4 The Council was formed in 1981. It replaced Blenheim County Council, Picton County Council and Marlborough County Council, as well as the borough councils.

5 Seven Blenheim Board councillors, three Marlborough Sounds Board councillors, and three Wairau-Awatere Board councillors.

Issues

[14] The NZMCA has sought judicial review of the 2020 bylaw because of the introduction of a blanket default prohibition on freedom camping across the district unless specifically permitted on a site.

[15] NZMCA says there was a failure by the Council to follow the statutory consultation process under the Local Government Act 2002 (LGA) before it introduced the blanket prohibition. It says the bylaws are unlawful under the FCA and/or unreasonable in terms of the Bylaws Act 1910.

[16] The Council says that it did consult properly however, despite that assertion, it says it intends to redo the bylaw consultation process anyway. It has started that process, which it calls the 2022 Bylaw Review.

[17] The 2020 bylaws have now been in force only twelve months. However, the "redoing" of the consultation process has become a larger task than initially anticipated due to extensive floods affecting some of the camping sites and other parts of Marlborough in the past twelve months as well as the continuing impact of Covid-related issues in the district.

[18] NZMCA says that the further consultation will not deal with its concerns and, in any event, it is entitled to a remedy.

[19] NZMCA pleads three causes of action:

(a) *Consultation*: the first cause of action relates to failure to consult. The MDC decided after the public consultation had closed, to adopt a district wide blanket prohibition on responsible camping in all but five restricted areas (cl 5 of the 2020 bylaw). The MDC failed to exercise its discretion as to whether it should reconsult on that. A breach of the principles of consultation in s 82 of the LGA is alleged.

(b) *Freedom Camping Act*: the second cause of action alleges an error of law in failing to take into account the purposes of the FCA, by imposing a blanket prohibition and/or failing to consider the most appropriate and

proportionate way of addressing the perceived freedom camping problem in relevant areas in the district, as required by s 11(2)(b) of the FCA.

(c) *Bylaws Act*: the third cause of action alleges unreasonableness in terms of the Bylaws Act 1910. The 2020 bylaw is unreasonable because it was a disproportionate response to the perceived problems generated by freedom camping in the Marlborough District and effectively prohibited freedom camping in the local authority areas.

[20] NZMCA seeks orders setting aside the 2020 bylaw, in whole or in part, and declarations that the Council's decision adopting the 2020 bylaws was unlawful and invalid.

[21] The applicant formulated the key issues relating to the causes of action as follows:

(a) *Consultation*: did the MDC exercise its discretion not to consult on the proposals for the 2020 bylaws after it removed cl 6.3 (the permissive clause) of the 2012 bylaw and prohibited freedom camping in all but five restricted areas?

(b) *Freedom Camping Act*: did the MDC satisfy itself that cl 5 (the prohibition clause) in the 2020 bylaw was the most appropriate and proportionate way of addressing the perceived problem in relation to the relevant local authority areas by imposing it over the entire district, save for five restricted areas, as required by s 11(2)(b) of the FCA?

(c) *Bylaws Act*: is the 2020 bylaw a disproportionate response to the perceived problems related to freedom camping in the district?

Issues (b) and (c) cross-over to some extent.

Legal framework

[22] As Simon France J said in *Coromandel Watchdog of Hauraki (Inc)*, it remains a valid proposition that judicial review was intended to be a comparatively simple

process of "testing that public powers have been exercised after a fair process, and in a manner, which is both lawful and reasonable".[6]

[23] In this case, the relevant power is the bylaw making power which operates within a statutory framework. First, the FCA provisions relating to the making of the bylaws for freedom camping. Secondly, the LGA imposes statutory requirements as to consultation and decision-making on local authorities making bylaws. Finally, the Bylaws Act 2011, provides for the deeming of the whole or any part of the bylaw invalid if it is ultra vires the legal authority or repugnant to the laws of New Zealand, unreasonable, or for any other cause, invalid.[7]

[24] The FCA defines "freedom camping" as follows:

> **5 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.
>
> (3) In subsection (1),—
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> **camping ground** means—

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6 *Coromandel Watchdog of Hauraki (Inc) v Minister of Finance* [2020] NZHC 1012 at [13]; citing Wild J in *BNZ Investments Ltd v Commissioner of Inland Revenue* HC Te Whanganui-a-Tara | Wellington CIV-2006-485-697, 7 December 2006 at [15], commenting on *Ministry of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353 and *Wellington International Airport Ltd v Commerce Commission* HC Te Whanganui-a-Tara | Wellington CP151/02, 23 July 2002 at [44]–[45].

7 Bylaws Act 1910, s 17.

(a) a camping ground that is the subject of a current certificate of registration under the Camping-Grounds Regulations 1985; and

(b) any site at which a fee is payable for camping at the site

…

[25] The FCA permits freedom camping in a local authority area. This is any area of land within the district or region of the local authority or controlled or managed by the local authority).[8] Freedom camping cannot be prohibited in all local authority areas in the district. The relevant provisions are as follows:

10 Where freedom camping permitted

Freedom camping is permitted in any local authority area unless it is restricted or prohibited in an area—

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

(b) under any other enactment.

…

12 Bylaws must not absolutely prohibit freedom camping

(1) A local authority may not make bylaws under section 11 that have the effect of prohibiting freedom camping in all the local authority areas in its district.

(2) This section is for the avoidance of doubt

[26] The MDC, as a local authority, has the power to make bylaws for freedom camping under ss 11 and 12 of the FCA, as follows:

11 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—

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8 Freedom Camping Act 2011, s 6(1).

(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.

…

[27] The local authority, under s 11(5), must use the special consultative procedure (SCP) set out in s 83 of the LGA for making, amending or revoking a bylaw:

83 Special consultative procedure

(1) Where this Act or any other enactment requires a local authority to use or adopt the special consultative procedure, that local authority must-

(a) prepare and adopt-

(i) a statement of proposal; and

(ii) if the local authority considers on reasonable grounds that it is necessary to enable public understanding of the proposal, a summary of the information contained in the statement of proposal (which summary must comply with section 83AA); and

(b) ensure that the following is publicly available:

(i) the statement of proposal; and

(ii) a description of how the local authority will provide persons interested in the proposal with an opportunity to present their views to the local authority in accordance with section 82(1)(d); and

(iii) a statement of the period within which views on the proposal may be provided to the local authority (the period being not less than 1 month from the date the statement is issued); and

(c) make the summary of the information contained in the statement of proposal prepared in accordance with paragraph (a)(ii) (or the statement of proposal, if a summary is not prepared) as widely available as is reasonably practicable as a basis for consultation; and

(d) provide an opportunity for persons to present their views to the local authority in a manner that enables spoken (or New Zealand sign language) interaction between the person and the local authority, or any representatives to whom an appropriate delegation has been made in accordance with Schedule 7; and

(e) ensure that any person who wishes to present his or her views to the local authority or its representatives as described in paragraph (d)-

(i) is given a reasonable opportunity to do so; and

(ii) is informed about how and when he or she may take up that opportunity.

[28] When making, amending or revoking a bylaw, s 86 applies as follows:

86 Use of special consultative procedure in relation to making, amending, or revoking bylaws

(1) This section applies if, in accordance with section 156(1)(a), the special consultative procedure is required to be used in relation to the making, amending, or revoking of a bylaw.

(2) The statement of proposal referred to in section 83(1)(a) must include,-

(a) as the case may be,-

(i) a draft of the bylaw as proposed to be made or amended; or

(ii) a statement that the bylaw is to be revoked; and

(b) the reasons for the proposal; and

(c) a report on any relevant determinations by the local authority under section 155.

[29] Also relevant to the Council's decision-making are ss 78 and 82, which provide:

78 Community views in relation to decisions

(1) A local authority must, in the course of its decision-making process in relation to a matter, give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter.

(2) [Repealed]

(3) A local authority is not required by this section alone to undertake any consultation process or procedure.

(4) This section is subject to section 79.

…

82 Principles of consultation

(1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:

(a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:

(b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:

(c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:

(d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:

(e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:

(f) that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.

(2) A local authority must ensure that it has in place processes for consulting with Māori in accordance with subsection (1).

(3) The principles set out in subsection (1) are, subject to subsections (4) and (5), to be observed by a local authority in such manner as the local authority considers, in its discretion, to be appropriate in any particular instance.

(4) A local authority must, in exercising its discretion under subsection (3), have regard to—

(a) the requirements of section 78; and

(b) the extent to which the current views and preferences of persons who will or may be affected by, or have an interest in, the decision or matter are known to the local authority; and

(c) the nature and significance of the decision or matter, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision or matter; and

(d) the provisions of Part 1 of the Local Government Official Information and Meetings Act 1987 (which Part, among other things, sets out the circumstances in which there is good reason for withholding local authority information); and

(e) the costs and benefits of any consultation process or procedure.

(5) Where a local authority is authorised or required by this Act or any other enactment to undertake consultation in relation to any decision or matter and the procedure in respect of that consultation is prescribed by this Act or any other enactment, such of the provisions of the principles set out in subsection (1) as are inconsistent with specific requirements of the procedure so prescribed are not to be observed by the local authority in respect of that consultation.

[30] As I indicated above the MDC has adopted the phrase "responsible camping" instead of "freedom camping". I use these phrases interchangeably. In addition, no issue is taken in these proceedings with the restrictions placed on responsible camping on the sites and areas where camping is permitted.[9] For instance under the 2020 bylaw all responsible camping on the listed sites is restricted to camping in vehicles with self-contained waste disposal facilities with the appropriate certification.

[31] I now turn to consider the consultation process undertaken by the Council for the 2020 Bylaw review.

Consultation

[32] In this case, the NZMCA says that the MDC failed to follow the principles of consultation. In particular, it did not provide to persons affected, including the NZMCA, any proposal or information that indicated an intention to change the status quo default position from allowing responsible camping in the district unless the bylaw prohibited or restricted it in the 2012 bylaws, to a blanket default prohibition on camping in the 2020 Bylaw. It said the statement of proposal, the summary of proposal and the draft of the proposed 2020 bylaws sent to submitters, gave NZMCA and others no inkling that the MDC was contemplating a blanket ban on freedom camping in the whole district apart from on sites listed in the bylaws.

[33] The parties agreed that *Wellington City Council v Minotaur Custodians Ltd* (*Minotaur*) is one of the leading authorities on the point at issue here.[10] *Minotaur* looked at the consultation requirements generally under s 82 of the LGA.

[34] Minotaur Custodians Ltd, a landlord whose tenants were affected by the parking restrictions introduced by the Council, had not been consulted as part of a Council consultation process on parking restrictions. The High Court heard that the Council had breached its consultation obligations by failing to consult with Minotaur as a landlord which was affected by the Council's decision restricting parking.

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9 I refer to permitted in the sense responsible camping was permitted albeit with restrictions. There sites were referred to as "Restricted areas" in the 2020 Bylaw.

10 *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464.

[35] The Court of Appeal allowed the appeal. It concluded it was open to the Council in its discretion not to consult with landlords generally. While there was no specific evidence in the decision papers as to the exercise of the Council's discretion on who to consult, the appellate court said that where an inference can be drawn that there was a rational basis for different treatment between affected classes within the community, such an inference should be drawn.[11] The Court noted that Parliament had expressed a "clear and repeated preference for protecting the Council's right to decide how it wishes to consult". While Minotaur, as a landlord, would be financially affected, it was an indirect effect. It was open to the Council to determine *Minotaur* was not a person required to be consulted although it was in a class with others who were consulted.

[36] The NZMCA says the MDC was required to exercise its discretion as to whether it should reconsult, before it adopted a bylaw which significantly changed what it had proposed and consulted on.

[37] Initially the MDC resisted the claim, saying that the change was not significant. It also pleaded, in general terms, that the statement of proposal attached a draft bylaw so it meant everything was open for consultation. However, in her submissions, Ms Besier, for the MDC, conceded that the Council had adopted a proposal which was "materially" different from that upon which it had originally consulted.

[38] This was an appropriate concession for reasons I set out in detail below.

[39] The real question is whether the MDC did exercise its discretion not to reconsult on that change from the original proposal.

The process

[40] The Council had published the initial consultation documents as required under s 83(1) of the LGA. This included a revised Statement of Proposal for Review of Marlborough District Council Freedom Camping Control Bylaw 2012, which stated that only vehicles with self-contained facilities would be permitted to freedom camp

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11 *Wellington City Council v Minotaur Custodians Ltd,* above n 10, [68].

in the district. In addition, the proposal listed named areas and sites on which responsible camping was prohibited and those on which it would be permitted, albeit subject to various restrictions and conditions together with a "reformatting" of the responsible camping site at the Wairau Diversion. The proposal also noted that the Council could close any area for various specified reasons, including potential health and safety issues or for the use of the area for an event, a need to "better protect public access" or for maintenance as required.

[41] Included in the consultation documents was a Summary of Changes entitled Proposed Changes to the Freedom Camping Control Bylaw 2012, as well a draft of the Proposed 2020 Bylaw. The 2020 draft bylaw included the changes described in the proposal. The prohibited areas included urban areas, a list of roads (including Queen Charlotte Drive) and various sites including reserves. The proposed bylaw included a default provision based on the 2012 bylaws that responsible camping in any local authority area was permitted other than at listed sites or areas prohibited or restricted in the bylaws. The default position permitted responsible camping subject to conditions, including as to time of stay, using a self-contained vehicle, not lighting fires, not restricting public areas and appropriately disposing of waste.[12]

[42] The 2020 Bylaw that was ultimately adopted by the MDC at the end of the process contained a new cl 5, headed "Prohibited Areas":

> No person may responsible camp in any local authority area in Marlborough, unless otherwise provided for in this Bylaw.

[43] The bylaw then went on to permit with restrictions responsible camping on listed sites called "Restricted Areas", subject to conditions (the permitted sites).[13] A general provision allowed the Council to close those sites for reasons relating to risk of fire or flood, health and safety issues, the area being used for an event, the need to "better protect public access" or maintenance. Prohibitions of that nature were required to be removed when the circumstances described no longer applied.

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12 Marlborough District Council Draft Freedom Camping Control Bylaw 2020, cl 6.1.1.

13 Although responsible camping on the listed sites was "restricted", I refer to those as the permitted sites for convenience.

[44] Under the heading "Restricted Areas for Camping" was the following provision:

> No person may responsible camp in any local authority area identified in Restricted Areas unless he or she complies with the restrictions imposed on use of that particular site.

[45] The five sites on which responsible camping was permitted with restrictions were then listed as follows:

(a) Wairau Diversion;

(b) Taylor Dam Reserve Upper Level;

(c) Renwick Domain Carpark;

(d) Wynen Street Carpark; and

(e) Lake Elterwater.

[46] The MDC says that it was entitled to exercise its discretion not to reconsult before it determined to change the default position. It says that a decision not to reconsult was within its discretion and was properly made. Nevertheless, it says it has now restarted the consultation process "in the interests of ensuring that all of the Council's obligations have been fully met". An indicative timeframe for the re-consultation was set out in the statement of defence which provided for a revised 2022 Bylaw being presented to the Council in March 2022. While the timeframe has slipped, the proposed bylaws are still scheduled to be approved in May 2022.

[47] The public consultation had not begun at the time of this hearing. The Council was still in the process of completing new site assessments. The Council says it has put more resources into the exercise than could be deployed for the 2020 review.[14] The site assessments now cover some 43 sites whereas only 23 were included in the report for the 2020 bylaw review. The MDC intended publicly notifying the 2021

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[14] The MDC pointed to the fact it had difficulties in even compiling a list of all areas it owned or had control over.

proposals sometime in mid-November 2021, with submissions closing at the end of January 2022. Hearings will take place in March 2022 and the revised bylaw will go to the MDC in April 2022 with adoption scheduled for May 2022.

NZMCA's position

[48] The NZMCA says that the reversal of the permissive default position was not a matter that it could have been expected to foresee would occur. Therefore, it made no submission on that possibility. It says many possible sites and areas were likely taken away by that reversal.

[49] It points to the principles of consultation contained in s 82 of the LGA. These require that persons affected be encouraged to present their views, have reasonable access to "relevant information", and receive clear information concerning "the purpose of the consultation and the scope of the decisions to be taking following the consideration of views presented".[15]

[50] The NZMCA accepts that the MDC had a discretion under s 82(3) and (4) as to how it consulted. In exercising its discretion it was required to take into account the extent to which the views of persons who might be affected were known to the local authority and the nature and significance of the decision on the matter as well as the costs and benefits of any consultation process or procedure.[16] However, NZMCA says that even taking into account the wide discretion that the Council has to determine how it would consult, in this case, despite a significant change in the proposal following the close of consultation, it did not turn its mind to exercising its discretion as to whether another round of consultation should be undertaken.

[51] Ms Besier, for the MDC in her submissions, said that it was impossible to say how many responsible camping sites had been removed from the local authority district by the change in the default position. Due to the amalgamation of the preceding local government bodies in the local government reforms, there was no one

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15 Local Government Act 2002, s 82(1)(c).
16 Section 82(4).

database of land owned or controlled by the MDC to allow it to ascertain the extent of the change.

[52] Ms Besier said the district was very large and there were many roads and pieces of land that would be within the definition of local authority land for the purposes of the FCA. The task of ascertaining that, was beyond the resources of the Council to ascertain. However, she said there was no evidence of lack of availability of responsible camping sites in the district to date.

[53] Ms Besier submitted that the change in the default position was significant but that:

(a) the Council had a discretion whether or not to reconsult following the decision to adopt the blanket default prohibition, subject to site specific exceptions; and

(b) the Council was aware of the NZMCA's views due to ongoing discussions between it and the MDC officials.

[54] Ms Besier could point to no evidence that indicated that NZMCA had been asked for or expressed a view to the Council at any time concerning a districtwide prohibition default. It is fair to say NZMCA's submissions were all directed at expanding the areas in which responsible camping was permitted, particularly in the urban areas. It could be anticipated, as Ms Besier submitted, what its attitude would be to a proposal of a blanket prohibition. She acknowledged, however, that if submitters, such as NZMCA, did know that the permissive default position might be reversed, it may have been able to gather some evidence on the point in that regard.

[55] Ms Besier also confirmed there was nothing specific to be found in the MDC decision papers to evidence that it had actually considered whether or not it should reconsult on the change to the default position.

[56] Councillor Oddie, the chairperson of the Subcommittee, explained the process that the Subcommittee had undertaken. He said the change in default position had

occurred because the councillors, in debating the issues with the benefit of the public submissions, considered it would be more effective to provide a blanket default prohibition and identify sites where responsible camping was allowed, rather than, as it had been attempting to do, identify every possible site and area where submitters had said that responsible camping should be restricted or prohibited, as it had done for the 2012 bylaw.

[57] Councillor Oddie said there had been numerous submissions from the public on the problems associated with responsible camping generally through the district. These provided support for the Council's decision to introduce a default blanket prohibition. He agreed that at the time the consultation documents had been sent out, there had been no intention to provide a default blanket prohibition.

Analysis on consultation

[58] The MDC was required to follow the special consultative procedure under the LGA. This requirement was imposed not only by the LGA, which required the procedure to be followed when making bylaws, but separately under the FCA. The FCA required the special consultative procedure be followed in making, amending or revoking a bylaw restriction or prohibiting freedom camping.

[59] The special consultative procedure that the MDC followed required it to prepare and adopt a statement of proposal, and if it "considered on reasonable grounds" that it was necessary "to enable public understanding of the proposal", a summary of the information contained in the proposal was to be prepared. The proposal was to be made widely available "as is reasonably practicable as a basis for consultation".[17] That summary of information was required under s 83AA(a) to be a fair representation of the major matters in the statement of proposal.[18]

[60] In addition, under the statutory "Principles of consultation" set out in the LGA,[19] persons who will "or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local

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17 Local Government Act 2002, s 83(c).
18 Section 83AA(a).
19 Section 82.

authority".[20] Persons invited or encouraged to present their views must be given "clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of the views presented".[21] Persons who wish to have their views on the decision or matter considered must be provided with a reasonable opportunity to present those views in a manner and format appropriate to the preferences and needs of those persons.[22] These the views should be received by the local authority with an open mind and be given due consideration in decision-making.[23]

[61] The local authority has a discretion as to the manner in which it observes the principles of consultation in any particular instance.[24] In exercising that discretion, the authority must take into account the extent which the current views and preferences of people affected or having an interest in the decision are known to the local authority, the nature and significance of the decision or matter and its likely impact from the perspective of persons who may be affected or have interest in the decision as well as the costs and benefits of any consultation or process.

[62] This case differs from *Minotaur* in that Minotaur was only indirectly affected by the Council's decision. It could be inferred that the Council had turned its mind to who to consult and it was open to it to decide not to consult persons in the position of Minotaur.

[63] This case is more analogous to *Nelson Gambling Taskforce Inc v Nelson City Council.*[25] The gambling policy in the *Nelson Gambling* was under review. The Nelson Council had sent out a detailed proposal of changes to the existing policy. The proposal was to tighten the policy and restrict the number of gaming machines. The Council ultimately decided to loosen the policy by not reducing the cap on machine numbers as much as the proposal had contemplated and prohibiting the siting of machines in certain locations but relaxing the siting of machines near other locations,

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20 Section 82(1)(b).
21 Local Government Act 2002, s 82(1)(b).
22 Section 82(1)(d).
23 Section 82(1)(b).
24 Section 82(3).
25 *Nelson Gambling Taskforce Inc v Nelson City Council*, HC Whakatū | Nelson, CIV-2010-442-368, 7 September 2011.

such as playgrounds and kindergartens. The High Court had no hesitation in concluding the changes did not comply with the special statutory consultation requirements. It noted that the Council was not starting with a clean slate but was making changes, therefore, it could not say everything was up for review.

[64] The 2020 summary of proposed changes to freedom camping controlled bylaw in summary were: sites that were previously available for freedom camping were to be closed (Koromiko Recreation Reserve, Collins Memorial Reserve, Brown River Reserve, Elterwater Reserve and Ohauparuparu Bay); on some further sites responsible camping would be prohibited (Marfells Beach Road and Grovetown Lagoon; and some new sites were to be opened (Ward Domain and two new sites in Picton). In addition, self-contained vehicles were to be required in all responsible camping sites in the district and the local authority was authorised to close sites for listed reasons such as for health and safety or council events. The revised statement of proposal set out in more detail the proposal to close some sites and to open others and to allow only "self-contained" vehicles to be used. Those changes were set out in the draft of the proposed Marlborough District Council Freedom Camping Bylaw 2020 made available to submitters.

[65] A generous approach is normally taken by the Courts to local authority decision-making. If it can be inferred that the authority has followed a decision-making process, then the Court will do so. However, consultation is not just a process. It exists to promote fair decision-making. It allows interested parties to have input into the decision-making. In this case, the Council has specifically acknowledged that the NZMCA has a role to play in the management of responsible camping in the district. This was referred to in the Draft Decision Report which had been prepared by the Subcommittee and was subsequently adopted by the Council.

[66] The MDC submitted that the change to the finalised bylaw was brought about by consultation and it would be a disproportionate requirement for Council to go back and require further consultation when there is a change brought about by public submissions. Ms Besier said this was a policy decision and the Council's decisionmakers are held accountable by the ratepayers at the polls. She relied on the

Court of Appeal comments in *Minotaur;*[26] that a council cannot be required to "meticulously record reasons" for its approaches to procedural details as if it were a Court. Ms Besier said that it would limit the democratic accountability of the decisionmakers.

[67] The local authority is the decision maker who is entrusted with the decision as to the best way to regulate freedom camping. The decision is one of policy and of particular importance to those who live in the district and the MDC. However the special consultative process requires the Council to follow a process before making a decision. It is also noteworthy that it is not just local constituents who are entitled to make submissions.

[68] In this case it is not the failure to reconsult that is the issue here but rather the failure to consider the method of consultation when a significant change to the proposal which had been consulted on was put on the table. The problem is that in circumstances where there were persons known to the Council who would be directly affected by the change which was a significant change to the whole approach to regulating responsible camping. There is no material that would allow me to infer the council had turned its mind to the issue of consultation. As was noted in *Minotaur* the council is not required to meticulously minute every decision in its process, however the level of information in the decision papers should be sufficient to enable the court to satisfy itself that the councillors had, or at best appeared to have, considered the issue of consultation.

[69] The circumstances suggest that the MDC did not turn its mind to consider the likely impact or significance of the change of position. It did not even know what that impact would be, according to Ms Besier. In addition, it appears unlikely the councillors turned their mind to a consideration of the costs and benefits of any further consultation or the options for limited consultation on the changes. These are matters that the Council was required to have regard to when considering the method of consultation.

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[26] *Wellington City Council v Minotaur Custodian Ltd*, above n 10, at [59].

[70] In those circumstances, the change was significant and the procedure required by the legislation would have "little worth if this process was found to be compliant".[27]

[71] I conclude that the MDC did not exercise its discretion as to the appropriate manner in which it should consult before making a decision which was significantly different than contained in the proposal on which it had originally consulted. This is a breach of its consultation obligations under s 82. The first cause of action is made out.

[72] I deal with relief below.

Second cause of action: Freedom Camping Act 2011

[73] The next issue is whether the 2020 bylaw was the most appropriate and proportionate way of addressing the perceived problem with freedom camping in all areas of the district. The applicant says the use of a blanket default prohibition clause was neither.

[74] This is pleaded as an error and a breach of the FCA. The starting point is that bylaws may be made under the Act to prohibit or restrict freedom camping which is otherwise permitted in any local authority area.[28] Those bylaws must comply with s11(1)-(4) of the FCA:

> **11 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:

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27 *Nelson Gambling Taskforce Incorporated v Nelson City Council,* above n 25, at [27].
28 Freedom Camping Act 2011, s 10.

(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.

[75] Also relevant is that the bylaws must not have the effect of prohibiting freedom camping in all the local authority areas in the district.[29]

[76] The MDC could therefore make bylaws "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"[30] as well as "where freedom camping is prohibited".[31] The bylaw may define the restricted or prohibited area either by reference to a map or by a description of its locality (other than by its legal description) or in any other appropriate manner. Where the bylaw uses both a map and a description, the description prevails in the event of an inconsistency.[32] However, the bylaws cannot have "the effect of prohibiting freedom camping in all the local authority areas in its district".[33] The areas however defined must then be subject to the s 11(2) analysis.

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29 Freedom Camping Act 2011, s 12.
30 Section 11(1).
31 Section 11(1)(a) and (b).
32 Section 11(4).
33 Section 12(1) and (2).

[77] In essence s 11(2) requires the local authority to carry out a risk analysis using the three factors set out in s 11(2)(i) to (iii) using the criteria in s 11(2)(b) – that is assessing that the bylaw is the most appropriate and proportionate response to each of the factors in the relevant areas in the district.

[78] Mr McNamara said, on behalf of NZMCA, that there was no contemporaneous evidence that the MDC had considered the requirements of s 11(2)(a) or been satisfied that all areas in the district satisfied those criteria. In addition, there was no evidence that the MDC satisfied itself that cl 5 of the 2020 Bylaws (the default prohibition) was the most appropriate way of addressing the perceived problem in relation to each area, as required by s 11(2)(b) of the FCA.

[79] The MDC says that it complied with the requirements of the FCA in that it was satisfied as to the matters set out in s 11 for all areas in the district. In their submissions, counsel for the MDC summarised the consultation submissions received. It is not possible to say, from that, how the Council defined the relevant areas in the district or whether all areas in the district were the subject of a s 11(2) analysis.

[80] The question is, can it be taken from the information that was in front of the Council that the requirements of s 11(2) were met?

[81] It is therefore necessary to consider the background material and reasons given by the Council for its decision to adopt the proposed 2020 bylaws.

Material before the Council

[82] The original MDC Freedom Camping Control Bylaw 2012 was enacted on 26 November 2012. Following this, two summers of freedom camping in the district were monitored. These years were referred to the MDC as the "trials".[34] Reports on those trials went to the Assets and Services Committee of the MDC, as a result of which amendments were made to the 2012 bylaw and approved on 15 December 2016. These generally introduced further restrictions on responsible camping in the district.

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[34] Only self-contained waste vehicles were permitted to camp on the default permitted sites and areas.

[83] From April 2017 to May 2019, a number of submissions on freedom camping were made in other consultation processes. Such submissions were included in the consultation feedback on the 2017/2018 annual plan, the 2019/2020 annual plan, the 2020/2021 annual plan, and the 2018 – 2028 long term plan.

[84] In October 2019, the Council engaged a consultant, Paul McArthur, to carry out an assessment of freedom camping in the district over the 2019/2020 summer season.

[85] Mr McArthur produced a report commissioned by the MDC, titled the "Responsible Camping Review for Marlborough District Council", dated May 2020.[35] This was accompanied by a specific site analysis of twelve sites under the title, "Marlborough District Council's Responsible Camping Review Site Assessments".

[86] The purpose of the McArthur Report was to identify a "more strategic and long-term sustainable approach" to the management of camping for visitors to the region. It looked at past, present and future possible patterns of budget campers as well as various management responses undertaken by the Council.

[87] The scope of the review was to consider all camping activity within the Marlborough District with a focus on the demand for low cost or free camping. It considered the supply of existing facilities and sites provided by others as well as the Council in assessing future facilities.

[88] For each site Mr McArthur did a detailed analysis. These referred to the s 11(a) FCA criteria: to protect the area; to protect the health and safety of visitors and to protect access to the area. Each criterion was assessed for risk on that site and a recommendation was made as to whether the response was proportionate or not. A sample of the site analysis is attached to the judgment, using the Wynen Street carpark as the example.

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35 Paul McArthur *Responsible Camping Review for Marlborough District Council* (May 2020) ["The McArthur Report"].

[89] Twelve named freedom camping sites were specifically reviewed in that report. The report noted that there had been a significant emphasis by Council staff and contractors on providing good quality information to freedom campers on camping opportunities and the rules and expectations when visiting Marlborough. To manage the risks, the rangers and compliance patrols had been using an educational approach, in the first instance, before using formal enforcement powers in cases of non-complying freedom camping. The report noted a low number of complaints regarding freedom camping had been recorded – seven complaints over three years. With the emphasis on education, infringement notices were not issued in most cases until warnings had been given which meant there was a low number of infringement notices.

[90] The report also noted that verifying the self-contained status of a vehicle had been an ongoing problem. A high number of small vans claimed the certified self-contained status "either through incorrect certification or by accessing fraudulently obtained compliance stickers".

[91] Insofar as demand and supply was concerned, the report noted that Marlborough hosted many domestic and international travellers. There had been an increase of 16 per cent from 2015 to 2019 (in that five-year period increasing from 152,659 to 177,290). It noted the closing of the overseas borders following the arrival of Covid 19 would likely see the plummet of international tourism in the medium to short-term. Therefore, the overall total of visitor numbers to the district would be significantly lower over the next few years as a result of that.

[92] The report noted there were 29 registered camping grounds within the MDC district, of which two were provided by the Department of Conservation. Two were owned by the Council and leased to private operators. At the time of the report, there were 13 sites identified as options for freedom camping sites under the 2012 Bylaw. Six of those permitted non-self-contained vehicles and four allowed tents.

[93] The report stated that significant capacity remained in camping sites but that occupancy was variable. Some coastal camping grounds had short periods when they

were full. Nevertheless, at most times of the year, capacity remained. Other more remote camp sites receive but a few overnight visitors all-year-round.

[94] The analysis was carried out on the combined availability of commercial and other camp sites. The report concluded that while there was likely to be camping pressure on sites, there remained a surplus of sites available, even in the busiest months. It noted this did not mean that campers would utilise available capacity nor that there were no issues in some sites where pressures did exist.

[95] The report also pointed out the environmental cost and the documented examples of the impacts of irresponsible campers, particularly in relation to the disposal of human waste and litter, irrespective of the facilities available on site or within vehicles and that this behaviour could have a significant effect at the relevant location. Financial costs were also incurred by the Council in the management of responsible camping, including the provision and serving of facilities, and compliance costs.

[96] It referred to the social costs, including the annoyance of members of local communities, real or perceived environmental impacts, and concerns relating to physical detraction from local reserve amenities through blocking access, blocking views or devaluing property. The feedback from Mr McArthur's community consultation included concern about damage to the environment and communities from rubbish and sewerage, the driving on sensitive areas, access being blocked, as well as the difficulty of undertaking enforcement over a wide area of so many sites. Concern had been expressed regarding the safety of some sites for camping due to flooding concerns and loss of recreational access. The report noted a general desire to close camping areas where significant natural areas were threatened or there was a risk of fire.

[97] The McArthur Report also referred to the concerns by organisations such as the NZMCA about the number of prohibited areas, the need to be proportionate (not to take into account irrelevant considerations) and about the consultation processes when making the bylaw changes.

[98] The report noted there had been varying approaches taken by other local authorities to the management of freedom campers. Many provided sites for only certified self-contained vehicles. A few councils relied on a default "no camping" rule.

[99] The report also looked at a number of management techniques, short of bylaw controls. However, it said that the potential adverse effects of freedom camping without a bylaw was not a viable option. There were areas within Marlborough that required protection from the adverse impact that freedom camping could have, and the bylaw was effective to manage the issues.

[100] The report approved the MDC's 2012 Bylaw approach, which was to prohibit freedom camping in urban or high visitor use areas, as well as in sensitive or historical problem areas. The report said this was appropriate and consistent with the principles that the FCA. The report recorded: "the reasons are clearly assessed and identified for each prohibited area".[36]

[101] The report noted it was reasonable to generally restrict camping to self-contained vehicles on Council-owned land outside of locations where a prohibition may be necessary. It then went on to note that if specific locations available for freedom camping were not identified the activity would not go away. Instead, freedom campers might disperse and use a range of locations on which freedom camping was not permitted. It would be impossible for compliance staff to be in all places in the district at the same time. Nor could the Council take action if freedom camping took place on land not administered by it.

[102] On 9 July 2020, following the receipt of that report, the Council approved a commencement of the 2020 Bylaw review (of the 2012 Bylaws) and appointed the freedom camping Subcommittee of the Council, chaired by Councillor Oddie, to undertake it, as well as approving the timeline for the bylaw review process.

[103] On 6 August, the Council adopted a revised Statement of Proposal for Review of Marlborough District Freedom Camping Control Bylaw 2012 (the statement of proposal). This included a Summary of Proposed Changes to the Freedom Camping

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[36] The McArthur Report, above n 35, at 32.

Control Bylaw (summary of changes) as well as a draft of the proposed Marlborough District Council Freedom Camping Bylaw 2020 (draft bylaw).

[104] The McArthur Report was referred to in the Statement of Proposal and was available on the MDC website.

[105] Public consultation ran from on 7 August 2020 and closed on 7 September. The Subcommittee heard submissions from 14 to 16 September.

[106] Before the public consultation hearings on 11 September 2020, the Subcommittee members were provided with a staff report (Staff Report) on the submissions received. This report said many submitters had stated that the Council should prohibit freedom camping across the district. It listed the most commonly mentioned reasons, as follows:

- Impact on local accommodation businesses
- We need higher quality tourists who do want to stay and spend money in Marlborough
- There are already existing Department of Conservation and private campgrounds
- Camping should be user pays
- Use of ratepayer money to provide facilities for campers
- Impacts on the environment with rubbish and toileting frequently described as issues
- Campers intimidating locals
- Council should be proactively seeking a change in the statute with central government
- The number of sites to be provided
- Prohibition in urban areas but enable in rural area
- Impacts of Covid-19
- Health and Safety reasons includes hygiene and fire being lit

[107] The Staff Report also noted that the FCA prevented the Council from simply prohibiting camping.

[108] The MDC staff involved in the bylaw review process, in particular Ms Tito and Ms Craighead, filed affidavits referring to the submissions received.

[109] Ms Tito, the Manager of the Parks and Open Spaces section of the Property and Community Facilities Department of the MDC, noted that she had managed the freedom camping portfolio and the bylaw review process. Ms Tito noted there were 350 written submissions on the notified draft 2020 bylaw. There were a number of submissions supporting freedom camping, including some who opposed the use of a certified self-containment standard for freedom camping. There were also numerous submissions which would fall into the category of protecting the area; protecting health and safety of people who may visit the area; and protecting access to the area but were non-specific as to which part of the local authority they applied. There were also many site-specific submissions.

[110] Ms Craighead, a planner in the parks and open spaces section of the Property and Community Facilities Department, assisted in the review of the Freedom Camping Control Bylaw 2012 and prepared the staff report on the submissions to the draft 2020 bylaw. Ms Craighead presented an overview of the evidence and the Subcommittee deliberations. She said that the councillors had been made aware that the evidence was that free camping sites "in proximity to main touring routes" were no longer able to be sustained due to their popularity and the cost to the environment and community". Ms Craighead said that the councillors were aware of this through submissions received on the annual plans and Mr McArthur's report. Ms Craighead noted of the 350 submissions received and many were site-specific but many were also general. She said her impression in preparing the summary was that those seeking a total prohibition on freedom camping cited several reasons relevant to s 11(2) of the FCA considerations. These included impacts on the environment with rubbish and toileting, campers intimidating locals and sites near residential areas.

[111] Ms Craighead's summary of submissions indicated that submissions had been received in general terms in relation to all parts of the district, including in relation to the eastern areas such as Awatere Valley in the eastern part of the district. Along with other parts of the district, the points raised in relation to the Awatere Valley were in common with other parts of the district that there was fire risk and rubbish issues. In

addition, the submitters indicated that there were biosecurity risks with campers' dogs threatening stock in the area. A common issue raised was the fire risk, the problems with rubbish and human waste, traffic safety and access to reserves and coastline by local visitors being blocked.

[112] A number of submitters said that prohibitions on some roads in the Marlborough Sounds should extend to other roads as many others were dangerous. For instances, submissions in relation to Rangitoto ki te Tonga | D'Urville Island noted it had not been included as a prohibited area for freedom camping, while the Island's roads had similar characteristics to the French Pass Road, which had been made prohibited areas. Similar concerns were raised in relation to other roads in the Marlborough Sounds. There were also reported problems of "migrations", for instance when a Department of Conservation campsite in Elaine Bay was full, freedom camping occurred on the roadside. This affected access for parking and use of the boat ramp. The Elaine Bay Community Association sought the addition of Elaine Bay to the French Pass Road's prohibited area to reduce the effects on access to the area and for health and safety reasons.

[113] There were a number of general complaints raised as a result of freedom camping. These included, rubbish being dumped and left behind; and the natural environment being used as a dumping ground for raw sewerage and grey water, impact on water and marine life, visual amenity (washing hanging from trees) and noise from campers arriving late at night, affecting residents. In general terms, Ms Craighead described the health and safety issues by submitters in terms of s 11(2)(a)(ii) of the FCA as including:

> 72. Health and safety issues described by submitters in terms of s.11(2)(a)(ii) of the FCA included:
>
> - hygiene related matters including defecating, urinating, spitting from cleaning teeth and unsanitary bathing (Kevin Wilson, Christine Hall);
> - traffic hazards with vehicles entering and leaving the reserve (Kevin Wilson);
> - aggression from non-com pliant campers to residents (Kevin Wilson, Kathryn Omond);
> - fire risk (Kevin Wilson, Kathryn Omond); and

- camping on the emergency helicopter pad (Kevin Wilson, Kathryn Omond).

[114] Ms Craighead also noted that even before the 2020 bylaw, there were many kilometres of roads within the Marlborough Sounds where freedom camping was prohibited. She noted there were submitters that identified some roads had similar characteristics to other prohibited areas and therefore should be treated similarly or identified other reasons for wanting other roads prohibited for freedom camping. She gave some examples relating to D'Urville Island Ward and Cape Campbell Road, Port Underwood (seeking to include Tumbledown Bay Road), Anakiwa Road and others.

[115] In response to a comment by Mr Lochore in his affidavit, Ms Craighead rejected that there was just one submission that raised the issue of fire risk in the east Marlborough coast and she pointed out a number of submissions raising that issue in written or oral submissions, both in that area and across the district.

[116] In relation to demand for freedom camping sites, Ms Craighead said, even with a reduction in the number of sites to five (which was proposed),[37] the two larger sites being the Wairau Diversion and Wynen Street, had not been at full capacity over the 2020/2021 summer.

[117] The Subcommittee met to deliberate on 18 September, 19 October and 9 November. The change in the proposed default position occurred in that period.

[118] The Council considered the report of the Subcommittee entitled "Proposed Responsible Camping Control Bylaw 2020" at an Extraordinary Meeting and adopted the recommended bylaw.

The deliberations of the Subcommittee/Council

[119] Mr Oddie said his review of the submissions indicated that the topic of freedom camping was of considerable concern to many of his constituents and many had strong views against freedom camping. He noted that the verbal submission process had

[37] From 13 sites in the 2012 Bylaws.

enabled the members to hear in detail how submitters felt the community values were being eroded by allowing freedom camping in their communities.

[120] The councillor noted that during the deliberation process, submitters had requested that freedom camping be prohibited on a number of other sites and locations across the district. Mr Oddie said the Subcommittee's views on changing the default position came about as follows:

> 42. During the deliberation process the Subcommittee considered that there had been a number of other areas requested for prohibition across the district and at specific locations, such as Tumbledown Bay Road, D'Urville Island, Awatere Valley Road and the Ward area. Councillor Croad then suggested, and the Subcommittee agreed, to request from staff a map of the Marlborough District showing current and proposed areas on roads prohibited for freedom camping across the district. He commented that it would be easier for visitors to Marlborough to understand the freedom camping proposal if there was a prohibition of freedom camping across the district unless it was specifically allowed in a range of identified locations.
>
> 43. Councillor Croad's comments in a way changed the Subcommittee's thinking. We were also concerned about responding to written submissions and submitters at the hearing regarding their annoyance about freedom campers in the district. My view is that all the submissions had had an impact on the Subcommittee. So when we started considering our decision, and looked at all the additional areas requested by submitters for prohibition, and importantly the reasons for the requested prohibitions, the Subcommittee questioned whether freedom camping should be more constrained than it had been provided for in the draft 2020 bylaw. In our deliberations we were all very mindful of Council's obligations under the Act. Ultimately, we considered that the right balance could be achieved by restricting freedom camping to 5 sites.

[121] A draft decision report as well as a Post-Hearing Site Assessment were provided to the Subcommittee. On 15 November 2020, these were also sent to the Deputy Mayor and Mayor, who were not on the Subcommittee. There were a number of emails exchanged concerning the reasons, particularly in relation to the proposed change from a default permission for responsible camping except in areas or sites listed to a default prohibition except on listed sites. The reasons on the decision report were fleshed out before it was put before the full council.

[122] The report went to the full Council attached to a paper entitled "Proposed Responsible Camping Control Bylaw", which was an item on the agenda of an Extraordinary Council meeting held on 27 November 2021.

[123] The bylaw came into effect on 1 December 2020. Judicial review proceedings were filed some six months later on 20 May 2021.

The MDC Decision

[124] Councillor Oddie pointed to the information that the members had before them as a result of the public consultation. It indicated the widespread concerns. He noted:

> 46. The Proposed Bylaw Report made the following points:
>
> a. The comprehensive assessment of sites undertaken by Mr Paul McArthur used a review matrix which aligned with section 11 (2)(a) of the Act to ensure that the responsible camping sites in the 2020 Bylaw would satisfy the requirements in that section …;
>
> b. The decisions made by the Subcommittee to meet a level of management of responsible camping which would satisfy the Act, and respond appropriately to the local community's views, included that responsible camping would be permitted at five sites in the Marlborough region …; and
>
> c. Council agreed to reduce the number of responsible camping sites to five on the basis that the Council had a comprehensive site assessment undertaken of all responsible camping sites and there has been sufficient discussion on the sites in the community and consideration by the Subcommittee as part of the Bylaw Review process overall … .

[125] Councillor Oddie summarised the reasons for the Council decision and referred to the Final Decision Report and its attachments, as follows:

> 47 …
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> a. Overall, in considering the submissions received and the evidence presented, the Subcommittee considered there had been an inappropriate level of impacts resulting from freedom camping at locations throughout Marlborough and that over time these impacts are becoming unsustainable. This increase in the number of visitors has seen the nature of some areas where freedom camping has been enabled change considerably. In recent years the frequency of

occupation has increased, including over the winter period, with some sites being occupied many nights throughout the year which has not allowed the sites to recover from sustained use (as they might have previously done over winter)... .

b. The Subcommittee confirmed the five Restricted Areas to be appropriate for freedom camping satisfying the provisions of the Act (as set out in the May 2020 site assessment report and the November 2020 Post Hearings Site Assessment Update report) as well as the Council's high level objectives for freedom camping. …

c. Paragraphs [68] to [74] of the Decision Report set out the reasons for the amendment to the district wide provision for freedom camping. They provide that the Subcommittee's overall approach was to identify those areas where camping is considered appropriate and the effects of camping can be sustainably managed, and identified those locations as the five Restricted Areas, which provided capacity of upwards of 120 spaces for vehicles nightly.

48. I consider that the Decision Report provided a complete and accurate summary of the Subcommittee's decision making. I also emphasise however that the presentations at the Hearing were influential for the final decision as the majority of submitters were opposed to freedom camping and presented strong arguments in opposition.

[126] The Decision Report adopted by to the Council, noted:[38]

6. In making their decisions the Hearings Panel has reviewed the following:

- Responsible Camping Review for Marlborough District Council May 2020;
- Marlborough District Council Responsible Camping Review Site Assessments May 2020;
- Submissions lodged on the proposed bylaw and evidence presented at subsequent hearings;
- Schedule of decisions attached to this Decision Report; and
- Post Hearings Site Assessment Update November 2020.

[38] Hearings Panel of the Marlborough District Council *Decision Report of the Hearings Panel to Marlborough District Council and submitters in respect of Draft Marlborough District Council Responsible Camping Control Bylaw 2020* (27 November 2020) ["Decision Report"].

7. The Hearings Panel records that it considers the provisions of the draft bylaw are the most appropriate and proportionate way of addressing problems in relation to all areas covered by the draft bylaw as required by section 11(2)(b) of the Freedom Camping Act 2011.

[127] Paragraphs [68]-[74] of the Decision Report of 27 November 2020, referred to by Mr Oddie, read as follows:

68. The current and proposed bylaws both include a provision that enables freedom camping across the District where an area is not otherwise restricted or prohibited. Any camping under this provision is subject to a number of general restrictions as follows:

- Spending no more than two consecutive nights at a site in any four week period;
- Camping in a CSC vehicle;
- Lighting no fires;
- Not restricting access to the area; and
- Appropriately disposing of all waste.

69 As indicated earlier in this Decision Report, the Hearings Panel considers there have been impacts from freedom camping on the Marlborough environment that have become unsustainable over time. The issues have arisen because of a significant increase in the number of freedom campers visiting the District, the type of vehicles some campers move around in and the increased frequency of occupation of freedom camping sites. The behaviours of some campers have also been noted by the Hearings Panel as a cause of concern to some communities.

70. The Hearings Panel's overall approach to freedom camping is to identify those areas where camping is considered appropriate and the effects of camping can be sustainably managed. These locations in Marlborough have been identified as the Wairau Diversion, Renwick Domain, Taylor Dam Reserve - upper level, Wynen Street carpark (Blenheim) and Lake Elterwater. These five sites have the capacity for upwards of 120 spaces for vehicles nightly. This is in addition to the many other opportunities for camping available through commercially run campgrounds and Department of Conservation campgrounds and freedom camping areas". The Council's sites also provide a range of options for campers from urban through to rural and coastal locations.

71. The Hearings Panel noted that much of the land that is controlled or managed by the Council is already prohibited for freedom camping under the provisions of the Reserves Act 1977 (RA). Unlike the FCA where freedom camping is permitted everywhere unless otherwise restricted or prohibited, under the provisions of the RA the reverse applies - see paragraphs 108 to 111 for more discussion on this.

> 72. The district wide provision currently applies to many local roads around the District that are narrow and windy. These roads have few areas for vehicles to pull completely off the formed road while staying on the legal road in a safe manner. This is a significant reason behind the prohibition for camping on the Marlborough Sounds roads.
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> 73. The Hearings Panel also became more aware of the concerns of landowners submitting in opposition to freedom camping from the east Marlborough area because of fire risk. This is becoming more evident in eastern areas of New Zealand generally. However. given that many of Marlborough's local roads in rural areas traverse long valleys, there are concerns about adequate escape routes during a fire event for those camping in these locations. Having campers in known locations rather than situated up valley roads means management of people is easier during hazard events. Several submitters also raised concerns about the potential for accidental fires from campers themselves when using camp stoves.
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> 74. When considering all of these factors, which are consistent with the provisions of the FCA in enabling prohibitions to apply, the Hearings Panel reached the decision that the proposed district wide provision enabling freedom camping should be removed from the draft bylaw. The consequence of this is that unless freedom camping occurs in one of the five sites identified above it will be prohibited elsewhere in the District

[128] Councillor Oddie said at the full Council meeting there had been questions about the proposals to enable councillors outside the Subcommittee to understand the reasoning but, eventually, the report was accepted and adopted. The councillors had access to all submissions and documents. The councillors requested the Council work with NZMCA on allowing more freedom district sites if requested but only once the affected communities had been consulted again.

[129] The report went on to reiterate that "for the avoidance of doubt" freedom camping could only take place at the five locations.[39] Everywhere else in the district "will be prohibited for freedom camping". The related mapping in the draft bylaw was to show only those areas where freedom camping could occur.[40]

[130] The report also noted that RMA requirements meant that resource consents were required for four of the sites.[41] It also referred to the requirement of permission under the Reserves Act 1977, that the MDC had ministerial delegation to grant that

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39 See above at [45]. All locations are subject to restrictions, including the overarching requirement that only self-contained vehicles were permitted to camp on any of the sites.

40 Decision Report, above n 38, at [76].

41 At [114].

consent by reserve management plans permitting camping needed to be put in place before such permissions could be granted.[42]

[131] The decision to adopt the 2020 Bylaw was recorded in the Council minutes at the meeting on 27 November 2020, as follows:

> There have been impacts from freedom camping on the Marlborough environment that have become unsustainable over time. Issues have arisen because of an increase in campers, the type of vehicles used, increased frequency of occupation of sites and the behaviours of some campers.
>
> Much of the land that is controlled or managed by the Council is already prohibited for freedom camping in terms of the provisions of the Reserves Act 1977. This is because camping has not been provided for in reserve management plans or otherwise approved by the Council.
>
> There are health and safety issues for camping along many of the local roads which are windy and narrow and there is also an increased fire risk apparent in many rural locations in the east Marlborough coast.
>
> When considering all of these factors the decision reached was that the district wide provision enabling freedom camping should be removed from the draft bylaw. The consequence of this is that unless freedom camping occurs in one of the five sites identified above it will be prohibited elsewhere in the District.
>
> *Decision: The district wide provision for freedom camping be removed from the draft bylaw to protect the area, to protect the health and safety of people who may visit the area and to protect access to the area.*

Submissions

[132] Mr McNamara says that it is obvious from the Decision Report that no proper analysis was undertaken as required by s 11(2) of the FCA. He said that the analysis required by the FCA was of the type undertaken by Mr McArthur. He had looked at each site and determined whether a restriction or prohibition was necessary for one of the purposes set out in s 11(2)(a). Mr McArthur had explicitly considered whether the bylaw was the most appropriate and proportionate way of addressing the perceived problems. A copy of the analysis carried out by Mr McArthur for the Wynen Street Carpark site is attached by way of example. [43]

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42 At [108]–[113].
43 See Attachment below.

[133] Mr McNamara also referred to comments made at the second reading of the Freedom Camping Bill by the Minister of Conservation that:[44]

> Local authorities will be able to make bylaws, prohibiting or restricting freedom camping in a particular area, but only if such bylaws is the most appropriate way of addressing those problems. Prohibitions or restrictions will apply only to areas where problems have been caused by freedom campers. Importantly, any prohibitions or restrictions must be in proportion to the problems identified, which will also alleviate the concern regarding blanket bans. This is a stronger pro-camping stance than currently exists under some local authority bylaws.

[134] The then Minister for the Environment[45] also commented as follows:

> That "the Bill" addresses a growing problem. It is needed in order to protect public health, protect iconic spots, and protect New Zealand's "clean green" brand. It poses no threat to the responsible freedom camper.

[135] Ms Rainey, for the Council, submitted that the councillors had a detailed knowledge of all areas in the Marlborough Council district in addition to the substantial amount of information from the submitters, and reports from residents and other constituents from all over the district. That led councillors to the conclusion that in various areas across the district, risks such as fire protection to the east, the nature of roads in the non-urban areas and the problems with health and safety from inappropriate waste disposal, together with examples of difficulties caused by blocking access, were sufficient to enable the Council to conclude that the whole district needed protection. It concluded that the most appropriate and proportionate way to manage that risk was to put a blanket default ban on freedom camping, then isolate the sites that were appropriate and where the risks presented by responsible camping could be managed.

[136] Ms Rainey argued that there were submitters from across the local authority whose comments could be extrapolated. For instance, in relation to the Awatere Road area (to the east of the district), a submission had been made that freedom camping beside roads or off-road created a biosecurity risk for stock health and farm safety and that dogs travelling with campers were harmful to sheet and cattle and camp cookers were identified as a risk in dry seasons. The submitters said freedom camping should

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44 (11 August 2011) 2056 NZPD at 20566.
45 (11 August 2011) 2056 NZPD at 20570.

be prohibited in an area of the Awatere Valley Road. Submitters also sought prohibitions in other areas of the MDC jurisdiction. These included the Marlborough Sounds and Picton to the north/west, the urban areas in which camping had been prohibited in the 2012 bylaws, the east along the Kaikōura coast and the inland areas toward Nelson.

[137] Counsel for the MDC emphasised that Marlborough presented unique difficulties when it came to managing responsible camping. First, there was no comprehensive database of all land and areas owned or controlled by the local authority, therefore, there was no central repository of that type of information. Secondly, the Council was not resourced to undertake a comprehensive survey of all areas of the district. In addition, due to not only the flooding but other problems given the geography of the district and the remoteness of many of the areas, it faced more pressing problems. Those hazards were issues to be considered when assessing whether and how to appropriately and proportionately respond to freedom camping.

[138] In submissions, counsel for the MDC summarised the position the councillors faced when responding to the responsible camping risks:

(a) In the Marlborough Sounds, the geography resulted in narrow windy roads with difficult access and flood-prone low-lying areas. Many of these roads had a prohibition on freedom camping.

(b) The main road from Picton to Blenheim and down toward Kaikōura was State Highway 1. This was under the authority of the New Zealand Transport Authority (NZTA), not the MDC.

(c) Between Picton and Blenheim lay the Wairau Diversion, which had suffered severe flooding, leading to closure so the remedial works to be carried out. A temporary nearby site had been made available for responsible camping.

(d) The south coast (along which the State Highway 1 runs) was also flood-prone.

(e) The eastern area which included the Awatere Valley had long, windy roads and much of the area was subject to a high risk of fire.

(f) The urban areas – most already did not allow freedom camping outside reserves.

[139] These geographical and environmental features were compounded by:

(a) The fact there was no central register of all local authority land due to the nature of the previous borough and district council.

(b) Very severe floods in 2020 that had compromised some sites and other areas in the district.

(c) There had been a substantial growth in demand for sites for freedom camping.

(d) There had been a rise in reports of problems with freedom campers, including waste. The fact that a vehicle was certified as having self-contained waste facilities did not mean they were necessarily operative. Other problems included blocking access to locals who were visitors to the reserves, and campers using adjacent private property. In one case, a freedom camper had camped on a helipad used for emergency helicopter landings in a remote area.

[140] Ms Rainey referred to an analysis of the submissions attached to counsel's submissions which had been made. She pointed out that submitters came from various parts of the district.

[141] The approach suggested by counsel for the MDC is based on the premise that it was not necessary for the local authority to undertake an analysis of each area or site in its district such as that done by Mr McArthur. Ms Rainey submitted, given the nature and the diverse geography of the district, as well as the problems the MDC was facing, the Council had properly decided that a default bylaw was necessary for all of the s 11(2) purposes: to protect the area, to protect the health and safety of people who

may visit the area; and to protect access to the area. Therefore, the 2020 Bylaw was the most appropriate and proportionate way of addressing that perceived problem.

[142] Counsel also submitted that the threshold for a Court interfering with a decision of a democratically elected local authority is high and councils should be afforded a wide discretion in complying with decision-making requirements, due to the political nature of their role and their accountability to their constituents. This meant their decisions should not readily be interfered with by the Court.

Other cases

[143] Cooper J in the *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* (*TCDC*) reviewed the TCDC Freedom Camping Bylaw.[46]

[144] The NZMCA had challenged the validity of the TCDC Freedom Camping Bylaw 2011. It also challenged the Council's Public Places Bylaw 2004 and Parking Control Bylaw 2004 which predated the FCA. The Council had received erroneous legal advice on the legality of leaving those 2004 Bylaws in place following the coming into force of the FCA. The TCDC said they would not be enforced and would be revoked as soon as possible following the special consultative procedure in the LGA.

[145] In those circumstances, counsel for the TCDC said it would consent to orders that the bylaws be set aside.[47] The TCDC proposed a solution to the litigation by which the Council would consent to an order that the bylaws not be enforced.[48] That was on the basis that such a solution would cause no practical difficulties since that had been the policy decision adopted by the Council since the bylaw was made.[49]

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46 *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZHC 2016, [2014] NZAR 1217 ["*NZMCA v TCDC*"].
47 At [59].
48 At [60].
49 At [60].

[146] The Court had reservations about making an order which would prevent the Council enforcing its bylaws which had been validly made,[50] citing *R v Commissioner of Police of the Metropolis, ex parte Blackburn*.[51] However, His Honour concluded that bylaws were in a different category to criminal laws, particularly as the Council itself was the lawmaker.[52] Cooper J was satisfied on the evidence that it was the Council's intention that once the FCA was passed, the local authority would control freedom camping pursuant to the powers given by the Act. Therefore, he concluded that a direction not to enforce the 2004 bylaws was appropriate as an interim solution and made the order sought.[53] His Honour noted that relief in applications for review was discretionary and it was not necessary for him to quash a bylaw that would not be enforced.[54]

[147] The TCDC had also made amendments to the FCA bylaw without following the special consultative procedure. It suggested parts of the bylaw be severed. That left the balance of the bylaw, apart from the amendments, intact. This was the course adopted.

[148] Cooper J said the reasons justifying the protection of a specific area under s 11(2) need not be unique to that area. In that case, an area and site analysis had been done and presented in a tabular format. The table listed each of the sites and the purpose for which it should be protected. Many of those purposes were in common. However, the Judge felt there had been a genuine attempt to consider each area separately.[55] His Honour accepted that similar problems appeared to arise at different locations which was "inherent in the fact that freedom camping is the subject matter being controlled".[56]

[149] Cooper J also found that a prohibition could extend into an adjacent urban area if the identified problem attracting the prohibition or restriction at a particular location,

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50 At [61].
51 *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118 (CA).
52 *NZMCA v TCDC,* above n 46, at [62].
53 At [63].
54 At [64].
55 At [80].
56 At [160].

such as a reserve or beachfront, might simply result in the problem migrating elsewhere in the vicinity.[57]

[150] In addition, His Honour said the number of freedom camping sites and their locations was a policy consideration for the Council.[58] This included the fact that the prohibition applied to many of the most sought-after destinations for freedom camping in the Council's district.[59]

[151] Cooper J was satisfied that it was appropriate to prohibit camping by a blanket ban in an urban area, and to protect areas of land where there may be "migration" effect from other areas.

[152] In the *TCDC* case, the Court accepted the possibility that many of the problems identified by the Council in relation to sites could be addressed by "less intrusive means" such as enabling the Council to take enforcement action in response to particular types of behaviour.[60] However, the Judge said that the decision as to the method of control was up to the Council, he said:

> [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.

[153] The Court in *TCDC* recognised that a margin of appreciation was to be allowed to a local authority in its decision-making. This has long been the approach taken by the Courts. For instance in *New Zealand Public Services Association Inc v National Distribution Union Inc*,[61] Hammond J was asked to review decisions of the Hamilton City Council in the restructure of the delivery of Council services. In the course of that judgment His Honour noted that the Court needed to ensure it did not interfere

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57 At [108].
58 At [109].
59 *NZMCA v TCDC,* above n 46, at [104].
60 At [111].
61 *New Zealand Public Services Association Inc v National Distribution Union Inc* CP52/96, HC Kirikiriroa | Hamilton, 16 September 1996.

with a council's decision by "assessing the council's homework".[62] He declined to interfere with the council's decisions and analysis of the merits.

[154] In *Minotaur*,[63] the Court of Appeal noted that there was a clear intention in Part 6 of the LGA to give councils "a wide discretion in this field. …",[64] and, further:

> [59] … An assessment of all relevant facts and factors is required with due deference to the breadth of the discretion. A punctilious approach must therefore be avoided. Section 79(1)(b)(iv) of the LGA also reserves to the Council a discretion as to the nature and extent of any written record of the decision under challenge. It may be, as here, that the record does not address the specific issue raised in the proceeding. … There is no indication there that the situation of non-resident landlords was considered when consultation categories were formulated. That is to be expected. The Council cannot be required to meticulously record reasons for its approach to procedural detail as if it were a court. As s 79(1)(b)(iv) implies, that would create too heavy a burden on a busy council with a finite budget.

[155] More recently, in *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council*,[65] Palmer J reiterated that a Court will not interfere with a discretionary judgment of a council, unless it is irrational and made on a wrong principle. But he also noted there must be an evidential basis for the judgment. In that case, the High Court decided there was no evidence that the local authority had made any s 79 judgement at all.

The approach

[156] A local authority may use such method as it determines appropriate to delineate relevant areas within its district for the purposes of the s11(2) analysis. The decisionmaker must then satisfy itself that the bylaw was necessary for the relevant purposes and was the most appropriate and proportionate way of addressing the perceived problem of freedom camping in a relevant area.

[157] This requires that the local authority undertake a risk analysis framed by the criteria set out in s 11(2) of the FCA. A default prohibition or restriction on freedom

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62 At 19.
63 *Wellington City Council v Minotaur Custodians Ltd,* above n 10.
64 At [48].
65 *Hauraki Coromandel Climate Action Inc v Thames Coromandel District Council* [2020] NZHC 3228, [2021] NZRMA 22 at [57](iv).

camping in areas in a district does not of itself offend against the provisions of ss 11 and 12 of the FCA as long as there are sites or areas in which freedom camping is permitted. However, the local authority must satisfy itself on the requirements of s 11(2) in relation to each area.

[158] The FCA contemplates that each area (however selected) must be the subject of consideration. The description of the area may be general. For instance, the description of an urban area in which freedom camping is prohibited by reference to the location of a speed sign for the urban speed limit has been held to be an appropriate manner of defining an area for the purposes of the FCA.[66] A definition of "urban area" by reference to a speed limit of no more than 70 kph was described as a "useful and intelligible way of describing 'urban area' for the purposes of the Bylaw".[67]

[159] The statutory requirement is that the local authority must properly consider and satisfy itself what was the appropriate and proportionate response for the purposes set out in s 11(2)(b) of the FCA, in order to determine that freedom camping should be prohibited or restricted in an area or site. It must consider the most appropriate and proportionate way of addressing a perceived problem in each area.

[160] The risks may be in common with other areas, such as dangerous roads or dry conditions and there may be adjacent areas, which justify restriction or prohibition due to a "migration" effect to nearby areas.

[161] There was a substantial amount of information before the councillors as to the views of residents of the district, about the effect of freedom camping generally. There was also considerable information about the issues encountered in specific areas in the district. The councillors were also entitled to bring their own knowledge and experience to bear on the decisions. There was also some site and area-specific analysis. However it is not apparent that the issues in all areas of the district were considered as required.

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66 *NZMCA v TCDC,* above n 46, at fn 1.
67 At [20].

[162] Councillor Oddie explains how the Subcommittee members were grappling with how to protect the areas that needed protection on a site or area specific basis but, concluded that a general district prohibition was the better approach. I am unable to discern any "genuine attempt" to define areas in the district or to apply the s 11(2) criteria to those areas. This is likely because the decision of the Subcommittee to adopt the different approach came at the end of the process and the justification was written later to support the decision already made. It is not the lack of a written area analysis such as those set out in the McArthur report that is the difficulty. If it were apparent from the decision papers including the submissions relied upon that an analysis had been carried out that would have been sufficient although well short of best practice decision making. However, that material is not apparent in the decision papers and counsel for MDC were unable to point to the required analysis.

[163] This case differs from the *TCDC* case as in that case the local authority had undertaken the s 11(2) analysis using a specific site and area analysis, similar to that used in the McArthur report. The Judge considered the material showed a "genuine attempt" to consider each area. There was also not a default district prohibition in the *TCDC* case.

[164] As I have noted, nothing requires the Council to record its deliberations on those issues in s 11(2) in a particular format. However, on the material I have, it is not apparent, nor can it be inferred, that the Council did turn its mind to how to delineate the areas in the district nor was there a "genuine attempt" at the analysis it was required to carry out.

[165] I accept that the decision of the Council as to the regulation of responsible camping contains a high policy content. Mr McNamara said that was not a "social policy" issue such as occurred in the brothel cases, which I detail below.[68] I disagree. It is a social issue despite it being a different type of issue to that engaged in the brothel bylaw cases. It is entitled to a wide margin in exercising its decision-making discretion on the merits.

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[68] See below at [178]–[181].

[166] The Council was entitled to take into account the unique features of the difficulties and problems associated with areas such as flooding risk and the problems associated with Covid at the time of its consideration. The constraints that it was operating under are also relevant to the extent of its investigation.

[167] However, as is apparent, I am not satisfied that all the analysis of the areas in the MDC district has been carried out as required of s 11(2) of the FCA.

[168] The second cause of action is made out.

Third cause of action

[169] The third cause of action is based on unreasonableness. The applicant says the 2020 Bylaw is unreasonable because they have the effect of prohibiting freedom camping throughout the district. This prohibition offends against s 12 of the FCA.[69]

[170] Section 17 of the Bylaws Act states:

> **17 Part of bylaw only may be deemed invalid**
>
> If any bylaw contains any provisions which are invalid because they are ultra vires of the local authority, or repugnant to the laws of New Zealand, or unreasonable, or for any other cause whatever, the bylaw shall be invalid to the extent of those provisions and any others which cannot be severed therefrom.

Lack of legal sites

[171] Mr McNamara for the NZMCA, submitted that on its own terms the 2020 Bylaw was disproportionate due to an effective prohibition on freedom camping contrary to s 12 of the FCA and unreasonable as a disproportionate response to the perceived problem. I have dealt with that issue in general terms under the second cause of action.

[172] In argument under this head, Mr McNamara focused on an argument that the combination of the statutory requirements of Reserves Act and the need to get Resource Management Act 1991 (RMA) consent for some sites to allow freedom

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[69] Set out above at [25]

camping meant that it was not lawful to camp on any of the sites on which responsible camping had been permitted in the 2020 bylaw. In addition, the Wairau Diversion has been closed due to flooding, although a temporary site (without RMA consent) in that general area has been allocated for use instead.

[173] Counsel for the MDC indicated that the Council had been given delegated authority under the Reserves Act to grant permission for responsible camping to take place on the relevant reserves. It intended to do so in mid-November 2020. Counsel said it was an oversight that this permission was not granted at the same time the MDC approved the bylaws in December 2019.

[174] The MDC agreed that five of the permitted sites require RMA consents to allow responsible camping. It says it could not provide an estimate as to when resource management consenting process would be finished but it has applied for the consents.

[175] The consent applications must be notified and will be heard by independent commissioners. Any consent granted will be subject to possible appeals to the Environment Court. The outcome of the RMA process is uncertain as is the time required. In the meantime, the MDC has indicated, given the applications are in the pipeline, it will not be enforcing RMA compliance at the sites. It will allow responsible campers to camp on those sites, pending completion of the resource consent process.

[176] If the consents are not ultimately granted, it will mean that some of the sites identified for responsible camping will not be available. These are: the Wairau Diversion, the Taylor Dam Reserve, the Renwick Domain Park, Wynen Street Carpark and the Elterwater sites. This means four of the five designated responsible camping sites will not be consented for responsible camping.

[177] Ms Craighead, in her affidavit, said that the reason why resource management consents were required at the camping sites was because the proposed Marlborough Environment Plan (the proposed plan) had changed the earlier legal position. Despite this, council compliance staff were not taking any enforcement action under the RMA, given that preparation of resource consents was well in hand and some had been

lodged. Ms Craighead said that the difficulty had arisen by way of a sidewind when submissions were made on the proposed plan in relation to activities within the road and rail corridors. These submissions were largely relating to discharges to air and land and water, excavation and land disturbance. However, the changes have also captured all district and land uses as well, despite the fact that the submissions on the rule were unrelated to freedom camping. She said that by default freedom camping as an activity in road and rail corridors had become a discretionary activity requiring consent.

[178] Counsel both referred to *Conley v Hamilton City Council*[70] in relation to the application of s 17 of the Bylaws Act. That was a decision concerning the validity of bylaws controlling the locations of brothels in Hamilton. The bylaws were made under the Prostitution Law Reform Act 2003. The High Court had declined to strike down the relevant bylaws. The Court of Appeal upheld that decision.

[179] In that decision Hammond J, for the Court of Appeal, summarised non-exclusive grounds on which a bylaw might be held to be invalid. He said:

> [45] The more explicit grounds are:
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> - First, a bylaw may be invalid on the basis of the simple proposition that the authority purporting to make it may not act outside its powers, which as Sir William Wade put it, "might fitly be called the central principle of administrative law" (*Wade and Forsythe Administrative Law* (9ed 2004) at 35);
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> - Secondly, a bylaw will be regarded as uncertain if the persons required to obey it cannot ascertain what is required of them;
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> - Thirdly, a bylaw will be invalid if, even though it is in a strict sense intra vires in respect of its own particular statute, it contravenes another statute or purports to make something unlawful which the general law says is lawful; and
>
> - Fourthly, a bylaw will be regarded as unreasonable if it leads to manifest arbitrariness, injustice, or partiality. A well-known example of the application of this fourth principle is *Re City of Montreal v Arcade Amusements Inc* [1985] 1 SCR 368 holding invalid a bylaw prohibiting minors from entering amusement halls or using amusement machines. The Supreme Court of Canada said that it was upholding "the rule of administrative law that the power to make by-

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

> laws does not include a power to enact discriminatory provisions" (at 403) and that this is a "principle of fundamental freedom" (at 413).

[180] His Honour went on, after some discussion of "unreasonableness" to conclude that a "proportionality analysis" to establish when a bylaw was unreasonable might be applied. However, even where that was resorted to, there was still a difficult question of "the intensity of the review to be employed".[71]

[181] The Court of Appeal in *Conley* emphasised the evidence as to the effect of the exclusion from zones other than those permitted was poor and quite equivocal. Hammond J contrasted that case with earlier cases on brothel bylaws where the evidence was clear that the ability to carry out the activity would have a severe impact if prohibited in various zones. Finally, His Honour expressed caution about second guessing a decision of the local authority. He said:

> [75] The fourth point is that, even if this were a close run case, in our view whereas 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.
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> [76] Fifthly, nothing said by the Court in this case will necessarily dictate the outcome of other cases. The whole point of the Parliamentary delegation is that the appropriate requirements for particular locales may very well vary.

[182] In this case, Mr McNamara, for NZMCA, argued that in fact what has happened here is that "in effect" there are now no lawful responsible camping sites available. He said this is because of the default blanket prohibition, together with the fact that four of the five sites require resource consent before they can lawfully be used and the remaining site requires Reserve Act permission (as do two other sites which also require resource consent). Without any lawful sites available, he said the bylaw was made in contravention of s 12 of the FCA, which prevented local authorities from making bylaws that had the effect of prohibiting freedom camping in all areas of the district.

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[71] *Conley v Hamilton City Council,* above n 70, at [56].

[183] In *TCDC*, Cooper J was prepared to make an interim order allowing the Council time to revoke its Parking in a Public Place Bylaws. These bylaws had the effect of prohibiting all freedom parking in the Thames Coromandel local authority area. However he pointed out the bylaws could be revoked by the Council therefore bylaws were unlike criminal laws where such a policy of nonenforcement would be unlawful.

[184] In this case, the Council indicated that it intended to issue the Reserves Act permissions in mid-November. It has the delegated authority to grant those.

[185] I can see no difficulty with the MDC indication that it will not enforce compliance pending the granting of the permissions, which it has indicated it will do in the short term.

[186] However the MDC acknowledged that the resource management consents were more problematic. The Council finds itself in a difficult position in that regard because a different local authority planning process has led to the position that, for reasons other than the review of responsible camping, requirements for resource consent on the relevant sites have been inadvertently triggered. The Council cannot guarantee the outcome of the resource consent applications. However, it is able to manage its enforcement processes so that the practical effect is that compliance will not be enforced at the relevant sites, pending the obtaining of consents.

[187] In the circumstances, given the background to the issue with the RMA and the inadvertent non-compliance, I do not consider that the combination of the Reserves Act and the RMA, together with the default prohibition on freedom camping, would have had the effect of prohibiting freedom camping, contrary to s 12 of the FCA. For all practical purposes responsible camping would have been permitted at the sites indicated but for my findings on the second cause of action. It is up to the MDC to determine the location and nature of the sites on which it will permit, prohibit and restrict freedom camping. It has indicated it will ensure access is maintained to the relevant sites. That is sufficient.

[188] Nevertheless the third cause of action succeeds in that the bylaw is invalid under s 17 due to my findings on the second cause of action that the decision to adopt the 2020 bylaw was in contravention of the requirements of s 11 of the FCA.

Findings

[189] I have concluded that the MDC did not exercise its discretion as to whether to reconsult on the proposals for the 2020 Bylaw after it removed the permissive default clause (6.3 of the 2012 Bylaw) and inserted a default blanket prohibition on freedom camping across the district. This was a significant change to the Statement of Proposal that had been consulted on. The local authority has a wide discretion about how and who it consults. However, it did not turn its mind to the issue of whether it should reconsult after the change. It should have done so. The first cause of action succeeds.

[190] In addition, on the evidence available, I am unable to conclude that the MDC satisfied itself that cl 5 of the 2020 Bylaws (the blanket default prohibition clause) was the most appropriate and proportionate way of addressing the perceived freedom camping problem in all relevant local authority areas in the district, as required by s 11(2) of the FCA. However, it did satisfy itself, as it was required to, in relation to the sites and areas (including urban areas and roads) that were referred to in the various reports, including the McArthur Report, the Staff Site Reports and the sites and areas referred to in the 2012 Bylaws. I am not satisfied that the MDC had considered all areas of the district, as it was required to do in terms of s 11(2) of the FCA. Therefore, the second cause of action is made out.

[191] Given my findings on the second cause of action, it follows that the third cause of action succeeds.

Relief

[192] In view of those findings, I now turn to the relief.

[193] The NZMCA took no issue with a requirement that all vehicles used for responsible camping were required to have self-contained waste facilities. Nor did it suggest that it was unlawful that the Council reserve to itself the right to restrict or

prohibit access on a limited-term site by site basis for express reasons such as risks of fire, flooding, health and safety, use for an event approved by the Council, or the need to better protect public access or for maintenance. Although it did question whether the bylaw was sufficiently specific as to the limited-term nature of such restrictions or prohibitions.

[194] In addition, the applicant supported an area or site by site analysis methodology. The NZMCA had made submissions to the MDC that there should be more sites available, particularly in urban areas. However, the location and number of sites, are matters for the Council. The MDC had before it, when it made the site and area decisions, the NZMCA submissions. I am satisfied that the MDC had properly consulted on that aspect of its decision.

[195] Both counsel referred to the provisions of the Bylaws Act 2010 which allow the Court, instead of quashing the whole decision, to sever the offending part of the bylaw or amend it in such a manner as it thinks necessary to render the provisions valid.[72]

[196] As counsel agreed, the 2020 Bylaw has been drafted in such a manner that it did not allow severance of the offending default provision without amendments to the bylaw as a whole. However, even if it were possible to make those amendments, the resultant bylaw would not reflect the intention of the MDC. The Council may have decided that other areas and sites would be the subject of prohibitions or restrictions on responsible camping if it had not decided to use the default blanket prohibition mechanism.

[197] Therefore, I do not consider it is appropriate to use the provisions of the Bylaws Act 1910 to amend the 2020 Bylaw.

[198] Mr McNamara, for the NZMCA, suggested that if the bylaw was quashed or set aside, the Council could use other bylaws, such as the Parking Bylaws, to regulate any difficulties with freedom parking. However, in my view, that is an inappropriate

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[72] Bylaws Act 1910, ss 17 and 12(5).

use of bylaws, which have been promulgated for the purposes other than the regulation of freedom camping.

[199] Ms Besier submitted that if the Court concluded that the 2020 Bylaws were unlawful in the public law sense, consideration should be given to applying s 17 of the Judicial Review Procedure Act, which allows the Court to make a direction in addition to, or instead of granting relief, where the Court is satisfied that an applicant is entitled to relief.[73] That section provides:

> **17 Court may direct reconsideration of matter to which statutory power of decision relate**
>
> (1) This section applies if the court is satisfied that an applicant who has filed an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision is entitled to relief under section 16.
>
> (2) The court may make a direction under subsection (3) in addition to or instead of granting any relief under section 16.
>
> (3) The court may direct any person whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates.
>
> (4) In giving a direction to any person under subsection (3), the court must—
>
> (a) advise the person of the reasons for the direction; and
>
> (b) give the person such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
>
> (5) If the court makes a direction under subsection (3), it may make an interim order under section 15, and that section applies so far as it is applicable and with all necessary modifications.
>
> (6) If a matter is referred back to any person under subsection (3),—
>
> (a) the act or omission that is to be reconsidered continues to have effect (subject to any interim order) unless and until it is revoked or amended by that person:
>
> (b) the person has jurisdiction to reconsider and determine the matter in accordance with the court's directions despite anything in any other enactment:

[73] Judicial Review Procedure Act 2016, ss 17(1) and (2).

(c) the person must have regard to—

(i) the court's reasons for giving the direction; and

(ii) the court's directions.

[200] Those provisions were recently applied in *Waimea Nurseries Ltd v Director-General for Primary Industries.*[74] The respondent (the Director General for Primary Industries) had determined that tree stock had been imported in contravention of biosecurity standards and had directed that the stock and the trees propagated from it since 2012, be destroyed. The Court found that the decision and direction was unlawful in public law terms and could not stand.[75] However, there were other options available to the Ministry to deal with the tree stock and trees propagated in light of the biosecurity contravention. His Honour determined the Ministry should be given the opportunity to consider these options, although their use might lead to the same outcome including the destruction of the trees.[76] In the circumstances, His Honour made interim orders preserving the position while the decision-maker was given the opportunity to reconsider. That reconsideration was likely to result in a further exercise of power by the decision-maker.[77]

[201] His Honour made orders preserving the position for a set period of time observing that the decisionmaker was free to apply to the Court for an extension of time. The provisions of the interim orders had agreed between the parties, but the Court indicated that it would have made orders to the same effect.

[202] Cooke J recognised that strong reasons were required to decline relief or to allow relief as an alternative to setting aside a decision. However, he noted there had been a degree of debate in recent years relating to the scope of discretion in relation to relief and that a more nuanced approach such as that recognised in *Rees v Firth* may be necessary in the generality of cases.[78] He concluded that a nuanced approach was to be preferred in relation to the case before him.[79]

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74 *Waimea Nurseries Ltd v Director-General for Primary Industries* [2018] NZHC 2183, [2019] 2 NZLR 107.
75 At [46] and [57].
76 At [58].
77 *Waimea Nurseries v Director General for Primary Industries,* above n 74 at [86].
78 At [88]; citing *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48].
79 *Waimea Nurseries v Director General for Primary Industries,* above n 74, at [89].

[203] I take the same view in this case. The MDC has commenced, of its own volition, a process of review of the FCA bylaw. That process has recently commenced and I consider it appropriate that orders be made for a period to enable the MDC to complete this review. It has indicated the review timetable should lead to decisions by the Council in April 2022.

[204] In the circumstances, I propose granting relief by setting aside the decision leading to the adoption of the 2020 Bylaws. That has the effect of setting aside the 2020 Bylaws and preventing MDC from taking action under them. However, at the same time I propose making interim orders under s 17(3) to effectively preserve the position as it was under the 2012 Bylaw updated as to sites in terms of those listed in the 2020 bylaw as permitted sites.

[205] I do not propose finalising the form of relief and interim orders before I hear from counsel. A minute will be issued with directions as to further submissions in that regard. To enable the form of the final orders to be finalised this judgment will not have effect until 24 December 2021.[80]

Costs

[206] There appears no reason why the costs should not be awarded on a 2B basis in favour of the applicant. If agreement cannot be reached on costs, any application, together with supporting submissions, should be filed and served five days after the making of the interim orders and any reply, within a further five days.

Grice J

Counsel/Solicitors:
Simpson Grierson, Auckland
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[80] Rule 11.5 of the High Court Rules 2016.

ATTACHMENT

Wynen St Carpark

Description:
Located on Wynen Street off Symons Street to the east and Market Street to the west.

Criteria (Required for bylaw restriction or prohibition)

Criteria	Interpretation	Risk?	Risk Management Required (if any)
To Protect the area	Conservation values	**N**	No risk.
	Natural resource values	**Y**	Minor risk to stormwater systems from waste disposal if used by non-SC campers.
	Historical or cultural values	**N**	No risk.
	Landscape and Amenity values	**N**	Visual impacts are consistent with usual carpark use.
	Recreation assets	**N**	No recreation assets at risk.
To protect the health and safety of visitors	Natural hazards	**N**	No significant risks provided any allocated carparks away from earthquake prone buildings etc.
	Built environment hazards	**N**	No significant risks provided any allocated carparks away from buildings etc that may create a fire hazard to campers.
	Human hazards	**Y**	Hygiene risk from use by non-SC campers without suitable facilities.
To protect access to the area	Physical obstruction of access	**N**	Use unlikely to prevent access unless this occurs during the day when demand for parking is highest.
	High use discouraging access	**N**	Use unlikely to discourage access. Campers parking during the day, pay usual day charges.

Secondary Considerations (Not to be factors used in bylaw restriction or prohibition consideration)

Support of the administering agency or owner?	Council
Can the site be located, designed, and managed to minimise actual or perceived negative effects on nearby residences?	Yes
Are there existing camping grounds or accommodation providers with capacity that provide for the same user group?	Not in the CBD
Can waste be adequately managed at the location? (either in vehicles or on site)	No
If reserve held under the Reserves Act 1977, is camping on a reserve provided for under section 41 or 44?	N/A - LGA held land
Resource management plan restrictions?	No
Relevant Iwi or stakeholder feedback? No specific feedback received expressing a specific concern regarding this site	

Site Restriction Options

Camping Type? (yes or no)

Self-Contained Vehicle Camping?	Non-Self-Contained Vehicle Camping?	Tent Camping?
Yes	No as potential impacts likely to be too great	No suitable areas

Conditions

Number of vehicles per night	Variation from up to 2 nights per 4-weeks?	Hours of use restrictions?	Seasonal restrictions?	Charge for Facilities?
Review whether any issues from current full size of designated area	Prohibit consecutive night use but 2 nights per calendar month	Overnight hours only	No	No – unless possible through CG Regulation exemption.

Recommendation

Site is currently available for overnight parking by SC campervans with few significant issues reported. Given the nature of the site and level of facilities the site is not appropriate for Non-SC vehicles or tents.
Worthwhile to review the size and location of the area allocated and use levels and if any safety or management issues reduce in size or move within the carpark as required. Supported over Railway Station carpark (high profile) and A&P showgrounds (required for other purposes). Waterlea Racecourse also providing good option for NZMCA members.
Proportionate? Y/~~N~~