Hearing Panel – Proposed East Coast Beach Vehicle Bylaw
Marlborough District Council
PO Box 443
Blenheim 7240

2 May 2022

Tēnā koutou

Proposed East Coast Beach Vehicle Bylaw

1. I am writing on behalf of Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura in relation to the Proposed East Coast Beach Vehicle Bylaw (**the Bylaw**).
2. The purpose of this letter is to respond to:
    a. Procedural Minute 7 (Tangata Whenua Issues) issued by the Commissioners dated 14 April 2022 (received 27 April 2022);
    b. A letter from Radich Law to Marlborough District Council (**MDC**) on behalf of Te Rūnanga a Rangitāne o Wairau dated 3 February 2022 (**the Letter**); and
    c. The Second Substantive Submission from made by Te Rūnanga a Rangitāne o Wairau dated 8 February 2022 (**the Second Submission**).
3. Having read the Minute, Letter and the Second Submission, Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura consider that there are two issues to be addressed:
    a. The request by Rangitāne o Wairau to MDC to amend the Bylaw to name a number of iwi as being "tangata whenua" for the purposes of the Bylaw; and
    b. The allegation that Commissioner Clayton has an apparent conflict of interest on account of her Ngāi Tahu membership.

MDC Process and Recognition of Tangata Whenua

4. Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura do not propose to repeat what has already been set out in our previous letters dated 12 October 2021 and 3 December 2021. Rather, this letter should be read alongside these earlier letters.
5. The position of Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura remains unchanged. We are supportive of the process that has been undertaken by MDC to date and the substance of the Bylaw in its current form.
6. In the Second Submission, Rangitāne o Wairau has requested that the following clause be included in the Bylaw:

> **Tangata whenua** for the purposes of this Bylaw means any of the parties recognised as being tangata whenua within Marlborough as set out in Marlborough's Regional Policy Statement, being: Ngāi Tahu, Ngāti Koata, Ngāti Rārua, Rangitāne, Ngāti Apa, Ngāti Kuia, Ngāti Toa and Te Ātiawa.

Te Rūnanga o Ngāi Tahu
15 Show Place, Addington, Christchurch 8024
PO Box 13-046, Christchurch, New Zealand
Phone + 64 3 366 4344, 0800 KAI TAHU
Email: info@ngaitahu.iwi.nz
Website: www.ngaitahu.iwi.nz

7. Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura oppose the inclusion of this clause into the Bylaw.

8. The Ngāi Tahu Takiwā is defined in section 5 of Te Rūnanga o Ngāi Tahu Act 1996 where the boundary is clearly defined. The Ngāi Tahu Claims Settlement Act 1998 explicitly states at section 6 that Ngāi Tahu are recognised as "**the** tangata whenua of, and as holding **rangatiratanga** within, the Takiwā of Ngāi Tahu Whānui" [emphasis added]. Ngāi Tahu Whānui is defined in section 9 of the Ngāi Tahu Claims Settlement Act 1998, and at section 2 of Te Rūnanga o Ngāi Tahu Act 1996, as "the collective of individuals who descend from the primary hapū of Waitaha, Ngāti Mamoe, and Ngāi Tahu, namely Kāti Kurī, Kāti Irakehu, Kāti Huirapa, Ngāi Tūāhuriri, and Kai Te Rauhikihiki".

9. Consistent with that recognition of Ngāi Tahu rangatiratanga and as being the tangata whenua, neither the Crown nor Parliament considered it appropriate to provide any redress to other iwi within the Ngāi Tahu Takiwā, notwithstanding the more expansive "areas of interest" in the settlements with Te Tau Ihu iwi. As we have previously stated, those "areas of interest" are not akin to, nor do they create the same rights as, the recognition of Ngāi Tahu rangatiratanga as the tangata whenua within the Ngāi Tahu Takiwā.

10. Should MDC adopt the clause referred to at paragraph 6 of this letter into the Bylaw, as has been requested by Rangitāne o Wairau, Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura would consider this a serious breach of the Ngāi Tahu Claims Settlement Act 1998 and Te Rūnanga o Ngāi Tahu Act 1996.

Conflict of Interest

11. Procedural Minutes 3 and 7 set out that Commissioner Ma-rea Clayton has whakapapa to Ngāi Tahu, Ngāti Rarua, Rangitāne o Wairau, Ngāti Toa, Te Atiawa.

12. The Letter from Radich Law alleges that Commissioner Clayton's involvement in the decision making process is inappropriate on account of her Ngāi Tahu membership and the fact that she is a Ngāi Tahu appointed commissioner. That, Radich Law alleges, raises issues of apparent bias. This allegation is unfounded and fails to take into account the context in which this Bylaw is being considered.

13. The appointment of a commissioner with relevant whakapapa, or the nomination of a commissioner by an iwi authority, has become more common in recent years, particularly in local government and resource management processes,[1] as a way of ensuring there is an understanding of Te Aō Māori and tikanga, grounded in whakapapa and mātauranga Māori.

14. As mentioned in our previous letter, Commissioner Clayton has no financial interests, role-base interests, personal interests, nor any strongly held beliefs/opinions that affect her independence. As highlighted at paragraph 5.7 of Minute 7, it would lead to poor decision making if Māori Commissioners could not be recommended for appointment or appointed to a Bylaw Panel unless their whakapapa was unconnected to the rohe in question.

15. The Court of Appeal in *Lower Hutt City Council v Bank*[2] acknowledged that the context of decision-making function is relevant when considering bias:

> [94] … no man can be a judge in his own cause. But again, the extent to which this fundamental principle applies must be governed by the relevant circumstances, including, especially, the statutory provisions relating to the function.

[1] For example: COVID-19 Recovery (Fast-track Consenting) Act 2020, Schedule 5, clause 3; Resource Management Act, section 34A (Delegation of powers and functions) and Schedule 1, Part 4, clause 59 (Freshwater Planning Process).
[22] *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA) at [94].

16. The Local Government Act 2002 (**LGA**) (which establishes the special consultative procedure that the Bylaw is being considered under) explicitly sets out in section 81:

81 Contributions to decision-making processes by Māori

(1) A local authority must—

a. establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority; and

b. consider ways in which it may foster the development of Māori capacity to contribute to the decision-making processes of the local authority; and

c. provide relevant information to Māori for the purposes of paragraphs (a) and (b).

17. MDC appointing a Māori commissioner for this Bylaw hearing panel (who has Ngāi Tahu whakapapa) goes some way to executing its responsibilities under section 81.

18. It would be highly inappropriate (and indeed undermine section 81 of the LGA) if the very expertise for which an iwi nominated commissioner is often sought (i.e., an understanding of iwi and hapū of the area and knowledge of tikanga, whakapapa and mātauranga Māori) could then lead to a challenge to his/her involvement on the basis of apparent bias.

19. Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura support the direction in Minute 7 that Commissioner Clayton does not recuse herself from continuing in her role as an independent commissioner.

Conclusion

20. We request the right to address the Panel further on these matters if necessary and if it would be of benefit to the Panel.

21. Both Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura reserve their legal positions relation to the matters referred to in this letter.

Nāhaku noa nā

Rakihia Tau

Group Head Strategic Relationships

Te Rūnanga o Ngāi Tahu