

IN THE MATTER OF the Proposed East Coast Beach
Vehicle Bylaw

**SECOND SUBSTANTIVE RESPONSE OF
TE RŪNANGA A RANGITĀNE O WAIRAU
TO THE PROPOSED EAST COAST BEACH VEHICLE BYLAW
Dated this 8th day of February 2022**

1. This is the second substantive response of Te Rūnanga a Rangitāne o Wairau (**RoW**) following the hearing of its first submission in opposition to the East Coast Beach Vehicle Bylaw (**Bylaw**) proposed under the Local Government Act 2002 (**LGA**) and s22AB of the Land Transport Act 1998 (**LTA**).
2. At the hearing of the Bylaw on 23 November 2021, RoW made the following points, which had been previously made in its written submission:
 - (a) The procedure adopted by Council in developing, notifying and consulting in relation to the Bylaw had seriously misfired on account of the Council's mistaken belief (which was peppered throughout the documents promulgating the Bylaw) that Ngāti Kuri, a hapū of Ngāi Tahu, was the only iwi which held tangata whenua, mana whenua and mana moana status in the area the subject of the Bylaw (**Subject Area**).
 - (b) The Bylaw was flawed in substance because, as proposed, it will unlawfully remove the ability of tangata whenua, including RoW, to exercise customary rights in the Subject Area.
3. RoW's essential point was and remains that RoW has not been heard in relation to the second argument ((b) above) because of Council's mistaken belief that RoW has no status as tangata whenua and that Ngāti Kuri has the exclusive rights to exercise mana moana and mana whenua in and is the only party with tangata whenua status of the Subject Area.
4. After 7pm on the night before RoW was due to address Council about these concerns, Council issued a Procedural Minute in which it expressed the "preliminary view" that Council would no longer as part of the Bylaw process "address the issue of which iwi or hapū has a stronger claim to mana whenua, mana moana and tangata whenua status or strength of relationship or association."¹
5. At the hearing, the following day, RoW made the point that it was too late for Council to take that position in view of the statements which had been made by Council throughout the process of promulgating the Bylaw and the significance Council itself attached to the issue of which iwi has those rights and statuses in the Subject Area. Ngāi Tahu has described its dissatisfaction with the "preliminary view," submitting that Council, having gone this far, cannot now "opt out" of confirming or varying the positions it has previously taken. RoW supports Ngāi Tahu in this respect, as is evident from RoW's response to Ngāi Tahu dated 4 February 2022.
6. In relation to the "preliminary view" set out at para. 16 of the Minute of 22 November 2021, RoW makes the following points:

¹ Procedural Minute 3 under the Local Government Act 2002 and Section 22AB of the Land Transport Act 1998 in the matter of a proposed Bylaw using a Special Consultative Procedure issued by Commissioners dated 22 November 2021 at para. 16.

- (a) Council has already made determinations, which RoW considers are wrong, about which Iwi or hapū has a stronger claim to mana whenua, mana moana and tangata whenua status.
 - (b) Those determinations are relevant to the substance of the Bylaw. If they were not considered relevant by Council to the substance of the Bylaw, they would not have formed such a significant part of the processes antecedent to the hearing (including the consultation process).
 - (c) As RoW noted in its previous submission on 23 November 2021, as far back as 1995, Council considered all of the Te Taihū Iwi to have tangata whenua status in Marlborough. It is regrettable that in 2021 and 2022 Council's understanding of the concept and identity of Marlborough's tangata whenua appears to have diminished, to the extent that Council considers there is some hierarchy among tangata whenua within a particular area (with Ngāi Tahu having exclusivity in the Subject Area and Council having the right to define who sits where within the hierarchy).
 - (d) One of the purposes of the Bylaw, as set out at 4(c) is to "protect and preserve sites of significance to tangata whenua." Council's Technical Report, which has informed the final version of the Bylaw, has proceeded on the basis that tangata whenua, for purposes of the Bylaw, is limited to Ngāti Kuri. On this basis, RoW has not been considered as having sites of significance which are required to be protected by the Bylaw.
7. The issue of whether RoW has status as mana whenua, mana moana and tangata whenua in the Subject Area is inextricably tied up with the substance of the Bylaw (as is evident by the use of the term tangata whenua in the "Purpose" section of the Bylaw). If RoW has, for example, tangata whenua status in the Subject Area, it follows that RoW and the other Te Taihū Iwi have sites of significance which need to be protected by the Bylaw and have customary rights in the Subject Area. The evidence of Mr Heberd is that the Bylaw will extinguish or curtail the exercise by RoW of customary rights which it has been found by the Waitangi Tribunal to have throughout the Subject Area. This evidence has not been and cannot be the subject of any challenge.
8. It is a breach of the Treaty of Waitangi (Article 2) for legislation (including secondary legislation) to extinguish or curtail Māori customary rights. As we all know, Article 2 provides that:²

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaee ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te rino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

² Te Tiriti o Waitangi 1840, art 2.

Action by the Crown to extinguish or curtail the fundamental rights guaranteed to Māori in Article 2 can only be justified (although compensation must follow) “as a last resort and in the national interest.”³ No-one is suggesting that these circumstances apply here.

9. Bylaws of this kind are secondary legislation by operation of s22AB(7) of the LTA, by operation of s5 of the Legislation Act 2019 and by operation of s161A of the LGA. In making bylaws, Council is a delegate of the Crown and has the responsibilities of the Crown, including the Crown’s obligations to meet its obligations under the Treaty of Waitangi. Legislation, including secondary legislation, which breaches the Crown’s obligations under the Treaty:
 - (a) Gives rise to claims for contemporary breaches of the Treaty against the party promulgating the legislation, including the secondary legislation;
 - (b) Renders secondary legislation presumptively reviewable.⁴
10. As noted above, it has already been determined by higher authorities than Council that RoW has customary rights in the Subject Area.⁵ If it is accepted by Council that RoW has customary rights in the Subject Area, it needs to be accepted by Council that it cannot, through the Bylaw, extinguish or curtail the exercise by RoW of those customary rights. This is a matter of long-established law in New Zealand and is the basis of the historical and modern jurisprudence which has established the Waitangi Tribunal as a check and balance on the meeting by the Crown of its obligations under the Treaty of Waitangi.
11. These propositions are all self-evident and it should not be up to RoW to have to argue for the consideration of its Treaty rights in this process. It has previously endeavoured to raise this issue with Council but was advised by Council staff that *Council’s are not subject to the Treaty because Council is not the Crown*.
12. If this position is maintained by Council in this process any decision which is made and which affects the exercise by RoW of its customary rights in the Subject Area will, inevitably, be set aside on RoW’s application for judicial review. Apart from the issues of process and the failure to consult, Council’s position would be seriously wrong in substance.
13. If this Bylaw process and outcome are to be recovered, RoW submits that:
 - (a) RoW needs to be acknowledged as having tangata whenua, mana moana and mana whenua status in the Subject Area together with Ngāi Tahu and other Te Taihū Iwi.

³ Waitangi Tribunal *The Turangi Township Report* (Wai 84, 1995) at 285.

⁴ Sir Robin Cooke “Empowerment and Accountability: The Quest for Administrative Justice” (1992) 18 Commonwealth Law Bulletin 1326 at 10 citing *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *New Zealand Māori Council v Attorney General* [1992] 2 NZLR 576 (CA).

⁵ See Evidence of Corey Lee Heberd on behalf of Te Rūnanga a Rangitāne o Wairau dated 23 November 2021 at paras. 5 and 10 -14.

- (b) The Bylaw must not apply to the exercise by tangata whenua of their customary rights in the Subject Area.
14. A markup of the current version of by Bylaw with RoW's proposals in specific terms is **attached**. The adoption of these changes would satisfy RoW's concerns with Council's process and substance. The adoption of these changes would not, however, resolve RoW's sense of grievance and hurt about having to make these arguments in the first place, especially to Marlborough District Council who should have had a better understanding of these important issues. RoW would like to propose a separate process in which it, Council and Ngāi Tahu meet and engage to establish some common understandings about the nature and extent of their overlapping interests. The purpose of such meeting and engagement would not be with a view to defining areas of exclusivity but to recognise that customary rights overlap and can co-exist (such recognition being consistent with tikanga Māori and established legal principles).



M J Radich for
Te Rūnanga a Rangitāne o Wairau

5. Draft Bylaw

Marlborough District Council East Coast Beach Vehicle Bylaw [Insert Year]

This Bylaw is made under sections 22AB(1)(d), 22AB(1)(f) and 22AB(1)(g) of the Land Transport Act 1998. The Local Government Act 2002 applies to this Bylaw.

1. Title

This Bylaw is the Marlborough District Council East Coast Beach Vehicle Bylaw [year].

2. Commencement

This Bylaw comes into force on [date].

3. Application

This Bylaw applies within the Marlborough District.

4. Purpose

The purpose of this Bylaw is to—

- (a) protect the environment;
- (b) allow the environment to recover from the effects of the Kaikōura earthquake in 2016;
- (c) protect and preserve sites of significance to tangata whenua and to protect and preserve the customary rights of tangata whenua;
- (d) protect and preserve historic heritage;
- (e) protect, promote and maintain public health and safety; and
- (f) protect the public from nuisance.

By regulating the use of motor vehicles on Beaches in the Marlborough District.

Part 1 Interpretation

5. Definitions

In this Bylaw, unless the context requires otherwise,—

Authorised agency means Marlborough District Council, New Zealand Police, Fire and Emergency New Zealand, any Emergency Ambulance Service, Department of Conservation, any Central Government Department or Ministry, the National Institute of Water and Atmospheric Research and any surf lifesaving club registered with Surf Life Saving NZ:

Beach means the foreshore being any area covered and uncovered by the ebb and flow of the tide, and any adjacent area which can reasonably be considered part of the beach environment including areas of sand, pebbles, shingle, dunes or coastal vegetation or the confluence of any river, but does not include any private property or land administered by the Department of Conservation. The definition of “beach” is not relevant where a Bylaw made under any provision aside from sections 22AB(1)(d) and s22AB(1)(f) Land Transport Act 1998.

Council means the Marlborough District Council or any officer authorised to exercise the authority of Council:

Dune means any natural hill, mound or ridge of sediment, or any series of such, landward of a coastal beach or on the border of a large lake or river valley that is deposited by wind action or storm over wash, and sediment deposited by artificial means and serving the purpose of storm damage prevention or flood control and includes three metres of the beach immediately adjacent to the toe of the dune, but does not include any private property or any land administered by the Department of Conservation:

Motor Vehicle has the same meaning as in section 2(1) of the Land Transport Act 1998.

At the time of commencement of this Bylaw, motor vehicle —

- (a) means a vehicle drawn or propelled by mechanical power; and
- (b) includes a trailer; but
- (c) does not include—

- (i) a vehicle running on rails; or
- (ii) repealed; or
- (iii) a trailer (other than a trailer designed solely for the carriage of goods) that is designed and used exclusively as part of the armament of the New Zealand Defence Force; or
- (iv) a trailer running on 1 wheel and designed exclusively as a speed measuring device or for testing the wear of vehicle tyres; or
- (v) A vehicle designed for amusement purposes and used exclusively within a place of recreation, amusement, or entertainment to which the public does not have access with motor vehicles; or
- (vi) A pedestrian-controlled machine; or
- (vii) A vehicle that the Agency has declared under section 168A is not a motor vehicle; or
- (viii) A mobility device.

Tangata whenua for 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.

Part 2 Access to the east coast

6. Access to the east coast by motor vehicle

1. No person may cause any motor vehicle to enter any beach as defined at Part 1 of this Bylaw at any time. The extent of the beach area is identified with red hatching in Schedule 1 for the purposes of guidance only. This part of the Bylaw is authorised by s22AB(1)(f) LTA.
2. No person may cause any motor vehicle to enter any dune on Council controlled land at any time. This part of the Bylaw is authorised by s22AB(1)(f) LTA.
3. No person may cause any motor vehicle to enter the unformed legal road identified in Schedule 1 at any time. This part of the Bylaw is authorised under s22AB(1)(g) LTA.
4. No person may drive a motor vehicle at a speed of more than 30 kilometres an hour on the Beach as defined in Part 1 of this Bylaw, between the southern edge of the Waima (Ure) River and the southern edge of the Marlborough District Boundary. The extent of the beach area is identified with yellow hatching in Schedule 1 for the purposes of guidance only. This part of the Bylaw is authorised by s22AB(1)(d) LTA.

7. Exemptions

1. Notwithstanding Bylaw 6, any person may cause a motor vehicle to enter an area where motor vehicle access is otherwise prohibited:
 - (a) To launch or retrieve a vessel provided that the person causes the motor vehicle to only:
 - (i) Enter a boat launching area at Marfells Beach or Ward Beach. The extent of the launching area is identified as solid blue areas on Map 6 and 12 in Schedule 1 for the purposes of guidance only; and
 - (ii) take the most direct route between the entry point and the sea; and
 - (b) To access any part of the beach set aside for motor vehicles, such as a driveway, a carpark, or a shared path.
2. Nothing in this Bylaw applies to an employee, contractor or nominee of an authorised agency or Dominion Salt Ltd who is carrying out the lawful functions or activities of that agency.
3. Nothing in this Bylaw applies to any person who is exercising protected customary rights and who has tangata whenua status in the area the subject of the Bylaw, by reason of whakapapa connections to one or more of the eight iwi identified by Marlborough District Council as having tangata whenua status in Marlborough.
4. Nothing in this Bylaw will apply to any person or entity who has an extant claim before the Crown or the High Court under the Marine and Coastal Area (Takutai Moana) Act 2011 in the Subject Area.

8. Further conditions of access

1. Any person operating any vehicle, on any part of the beach must show due consideration for other users of the beach.
2. Any person operating any vehicle on the beach, shall operate that vehicle in a courteous, appropriate, safe and responsible manner, giving due consideration to other vehicle operators and to other users of the

beach at all times.

3. Any person operating any vehicle on the beach shall not operate that vehicle in such a manner as to present a real or implied danger or threat to the wellbeing and safety of any other user of the beach at all times.

9. Application

1. For the avoidance of doubt, nothing in this Bylaw affects—
 - (a) any persons access to the dunes and to the rest of the beach as defined in Part 1 other than by motor vehicle; and
 - (b) any persons access to the east coast for commercial fishing to the extent that that right to access was permitted before the commencement of this Bylaw.

[Note: Walking, cycling, horse riding, and access by vehicles that are not motor vehicles as defined in the LTA, continue to be unrestricted on the whole of the east coast].

Part 3 Enforcement and penalties

10. Breaches of Bylaw

1. Any person who fails to comply with this Bylaw commits an offence under the Land Transport Act 1998, as set out in Schedule 2. The following penalties apply;
 - (a) Breach of Bylaw made under LTA (infringement offence): \$150.
 - (b) Breach of Bylaw made under LTA (ordinary offence): fine not exceeding \$1000.