RADICH LAW

BARRISTERS AND SOLICITORS

DATE: 3 February 2022

TO: Marlborough District Council

By email: eastcoast@marlborough.govt.nz

FROM: Miriam Radich on behalf of Te Rūnanga a Rangitāne o Wairau

RE: **TE RŪNANGA A RANGITĀNE O WAIRAU - FURTHER RESPONSE TO EAST COAST BYLAW**

1. Following the hearing of submissions in relation to Marlborough District Council's **(Council)** proposed Bylaw under the Local Government Act 2002 and s22AB of the Land Transport Act 1998 **(Bylaw)**, Te Rūnanga a Rangitāne o Wairau **(RoW)** has been given two further opportunities to provide responses to the Commissioners appointed by Council. The first response is due on 4 February 2022 and is in relation to the letter to the Commissioners from Te Rūnanga o Ngāi Tahu **(NT)** dated 3 December 2021 **(NT Letter)**. The second is a further opportunity to provide information and other materials in relation to RoW's substantive opposition to the Bylaw. The second response is due on 8 February 2022.

2. This Memorandum deals with this first issue, being RoW's response to the NT Letter.

Aspects of NT Letter to which RoW wishes to Respond

3. The NT Letter refers to its "initial letter" to Council dated 12 October 2021. The initial letter is supportive of the approach which Council had then taken in relation to the Bylaw which:

   (a) Described NT as having "mana whenua and mana moana" in the area the subject of the Bylaw and as being "tangata whenua" in that area.

   (b) Considered NT as the "iwi authority" within the area the subject of the Bylaw; and

   (c) Consulted with NT on the basis of the assumptions in (a) and (b) above and on the basis that RoW's rights in the subject area were subsidiary to NT's.

4. NT's position, quite reasonably, is that because Council had, in the promulgation of the Bylaw, made the determinations about the issues in (a) – (c) above, NT did not submit on the Bylaw. NT has asked Council to "retain its position" in relation to matters (a) – (c) above.

5. NT's second letter reiterates the positions it took in the October letter and makes the point, with which RoW agrees, that "MDC as agent of the Crown, cannot neatly opt out of these issues."

6. NT also addresses the concerns raised by RoW that Ms Ma-Rea Clayton, as a NT appointee to the Panel, is in the unenviable position of having to be a judge in a matter in which she has an interest on account of being a member of NT.

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7. RoW wishes to address:

(a) NT's position that Council "cannot neatly opt out" of the issues referred to in (a) – (c) above.

(b) The issue of apparent bias and the principles of public law which apply, given Ms Clayton's status as a NT appointee to the Hearings Panel.

Opting Out

8. RoW agrees with NT that, having made determinations about the matters in (a) - (c) above, Council cannot now, as it is proposing to do, say that these matters are of no significance and will not be subject to determination in the final decision which is made in relation to the Bylaw. That Council is now endeavouring to "opt out" of making decisions in relation to these issues is evident from certain of the opening statements made by the Hearings Panel before and during RoW's submission on 23 November 2021. Those statements included the statement made on 22 November 2021, the evening before RoW was due to submit, that the Council now apparently accepts that RoW has ancestral and contemporary relationships with the area the subject of the Bylaw and that Council will not address the issue of which iwi has a stronger claim to mana whenua, mana moana or tangata whenua status in the subject area.

9. RoW agrees with NT that Council's opportunity to back track from determinations it made in this process has now passed. The determinations made by Council in relation to the relativity of RoW's status to NT's have affected:

(a) The basis on which Council has consulted with RoW and other Te Tauihu Iwi.

(b) RoW's decision to decline Council's offer to appoint a representative to sit on the Hearings Panel; an offer which was conditional on RoW not proceeding with making a submission in opposition to the Bylaw.

(c) Self-evidently, NT's decision not to submit on the substance of the proposed Bylaw.

10. An example of the statements in the materials which have informed the content of the Bylaw, and Council, RoW and NT's engagement in the process to date, is referred to at para. 6 of NT's October letter, which cites a passage from the East Coast Bylaw Technical Report. The relevant excerpt records Council's view that:

> Ngāti Kurī are the tangata whenua who have manawhenua and manamoana in the area covered by the East Coast Beach Vehicle Bylaw. Manawhenua and manamoana are determined by whakapapa and confer customary authority. The manawhena and manamoana status of Ngāti Kurī comes from continuous land use and occupation. Te Rūnanga o Kaikōura is the modern assemblage and representative of the hapū, Ngāti Kurī, one of 18 Papatipu Rūnanga of Ngāi Tahu Act 1996. The takiwā of Te Rūnanga o Kaikōura is described as centering on "... Takahanga and extends from Te Parinui o Whiti/White Buffs to the Hurunui River and inland to the Main Divide...". This takiwā extent is backed up by Kaikoura Whakatau takiwā definition conveyed to W.J.W Hamilton in 1857, and the ousting of northern iwi from the Ngāi Tahu takiwā after their defeat at Kapara te hau/Lake Grassmere in the 1830's.

> Purakau korero/Historical narrative and written account, whakapapa knowledge alongside archaeological evidence indicates Ngāti Kurī enduring relationship, connection and stewardship to the whenua, awa and moana across their territory. Kaitiakitanga/Stewardship extends to ensure the mauri of each entity within the natural world whether it be an animate or inanimate object be, preserved, conserved and managed to enhance the mauri dynamic.

11. These statements cannot be looked away from as if they had not been made (as Council is now endeavouring to do). In this regard, RoW notes the Commissioners' views expressed during RoW's submission that "sitting as Commissioners we don't speak for Council." This is incorrect. The Hearings Panel has been delegated authority by Council and does, in fact, speak for Council.

12. RoW has made the point throughout this process that it reserves its rights in all respects and that it is providing additional information after its first submission, only because it has been asked to and not because it considers that the provision of such information will cure the substantive and procedural defects and failures which have occurred. For this reason, RoW agrees with NT that the Council cannot opt out of making determinations when the determinations it has previously made have informed the process and substance which had led to the form and content of the Bylaw.

The Role of Ms Clayton

13. As RoW understands it, NT was asked to nominate a representative to sit on the Hearings Panel. Ms Clayton is NT's nominated representative.

14. RoW, in no way whatsoever, wishes to impugn Ms Clayton. The issue is not one of actual bias but one of apparent bias. Academic Philip Joseph, an authority on New Zealand's constitutional and administrative law, describes "apparent bias" as occurring when:[1]

> ... the decision-maker has some personal or professional relationship with a party or witness, or a prejudice against or preference towards a particular party or result, or a predisposition leading to a predetermination of the issue(s).

15. Joseph referenced the House of Lords decision of *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* to illustrate and said:[2]

> In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2),* Lord Hoffman was disqualified for his personal interest in General Pinochet's claim for sovereign immunity. Pinochet's lawyers alleged not actual bias but the appearance of bias arising from the Judge's association with an intervener (Amnesty International). The appearance of bias was as damning as actual bias.

16. The law on apparent bias in administrative and public law proceedings (such as the Bylaw process) is quite clear. New Zealand's leading authority is *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* **(Saxmere)**. The Supreme Court in *Saxmere* set out the well settled common law principles that:[3]

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1 Phillip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1144.

2 At 1144.

3 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72 at [3]-[5].

> ... a judge [or decision maker] is disqualified if a fair-minded lay observer might reasonably apprehend that the judge [or decision maker] might not bring an impartial mind to the resolution of the question the judge was required to decide ... the question is one of possibility ("real and not remote"), not probability.
>
> ... Two steps are required:
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> (a) First, the identification of what is said might lead a judge to decide a case other than on its legal and factual merits; and
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> (b) Secondly, there must be 'an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits'.

17. Further, the Supreme Court noted that the principles for apparent bias are wide in scope in order to give significant weight to the need for public confidence in the integrity of judicial and public decision-making.[4] As the Supreme Court noted in *Saxmere:*[5]

> Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it.

18. In circumstances, where NT is now seeking to be heard in relation to the Bylaw and seeking to maintain positions that Council adopted earlier in the process, Ms Clayton is compromised in terms of the principles which deal with apparent bias on account of being a NT member and a NT (not a Council) appointee.

19. The case on which NT relies (*New Zealand Māori Council v Foulkes*), in an endeavour to maintain the position that there is no conflict of interest has no application in administrative and public processes. It is a case involving allegations of conflict in relation to a Trust. This is evident from the High Court's judgment at para. 207, where the plaintiffs endeavoured to rely on the *Saxmere* case referred to above. In rejecting the application of those principles in a private law context, the High Court noted:[6]

> The private and public law tests have much in common. Both require a robust, realistic view to be taken by a notional reasonable person in full possession of the facts. But it would be a mistake to import case law from one stream to resolve issues in the other. One concerns private, fiduciary duties. The other public, ethical duties. Their content is different because different interests and ultimate objectives are involved. ... there is no need to risk confusion by intermingling the two streams of jurisprudence represented by the rule against bias in administrative law and the rule in respect of conflicts of interest in the law of trusts. ...

20. The High Court also noted that:[7]

> A conflict of interest may not become apparent until part way through an evaluative process, when the implications of the decision to be made become clearer.

21. The potential conflict of interest in having a NT appointee and member on the Hearings Panel has been obvious for some time. The conflict has become more acute given that both RoW and NT have made submissions and wish to be heard in relation to matters of substance affecting their respective interests in the subject area. RoW has some sympathy for

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4 At [92].
5 At [3].
6 *New Zealand Māori Council v Foulkes* [2014] NZHC 1777 at [207].
7 At [201].

Council endeavours to tip toe through these issues without upsetting anyone and without attaching any significance to the statements which were made by Council in earlier stages of this process. Such endeavours are, however, legally futile and the reality of the mistakes made needs to be looked at the eye and not avoided.

Conclusion

22. In conclusion therefore RoW's position is that:

(a) The Hearings Panel cannot look away from decisions and determinations Council has made at earlier stages of this process and which were considered relevant by Council in those earlier stages.

(b) Those decisions and determinations related to the relativity of RoW's and NT's interests in the area the subject of the Bylaw and in RoW's submission are wrong, legally and factually.

(c) Those decisions and determinations have affected the process and substance of the Bylaw process to date in ways which are significant and cannot be remedied by the Hearings Panel deciding to "opt out" of dealing with these issues now.

(d) Ms Clayton's position on the Panel and any decision made is affected by the principles of apparent bias.

(e) For all of these reasons, this process and any outcome of it will be fundamentally flawed and will be likely to be set aside on Judicial Review unless there is meaningful engagement with these issues.

Yours sincerely

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